MEMORANDUM

LCP4809

MAY/JUNE

2016

QUESTION 1

1. 2
2. 1
3. 1
4. 2
5. 3
6. 2
7. 3
8. 1
9. 4
10. 2
11. 2
12. 4
13. 3
14. 3
15. 4
16. 4
17. 3
18. 1
19. 1
20. 4

QUESTION 2

The right to receive education in an official language or in a language of choice (section 29(2) of the Constitution) is becoming an ever increasing debate in South Africa. With reference to <u>two</u> relevant cases, discuss how the courts have interpreted this section of the Constitution thus far. [20]

If a student mentions what section 29(2) makes provision for – marks should be awarded in the following manner:

Section 29(2) of the Constitution of the Republic of South Africa provides the following:

"Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account-

(a) equity;
(b) practicability; and
(c) the need to redress the results of past racially discriminatory laws and practices.

If a student has explained the content or limitations of the section 29(2) right, they should at least be given 5 marks for a correct discussion.

"Section 29(2) guarantees the right of everyone to education in the official language or languages of their choice in public educational institutions where it is reasonably practicable, in other words, whenever it is reasonable to expect the state to provide such education. In the heated atmosphere generated by the ongoing disputes over single-medium institutions, the recognition of this basic right in the South African multilingual situation is being overlooked sometimes. Note that the right goes further than Article 2 of Protocol I of the European Convention on Human Rights and Fundamental Freedoms as it was interpreted and applied in the *Belgian Linguistic Cases*, and that it indeed imposes a duty on the state to provide such education wherever reasonably practicable. The right is not confined to existing facilities either" (Malherbe R "The constitutional framework for pursuing equal educational opportunities in education" (2004) *Perspectives in Education* 20).

"The right applies to all education and is not restricted to basic education. Even institutions of higher education are therefore required to provide instruction in the languages preferred by students. However, the right extends only to the official languages and not to all languages used in South Africa. Although it would accommodate most South Africans, it therefore does not strictly speaking provide for a right to mother-tongue education. Of course the right includes mother-tongue education, which is significant not only for the protection of language rights, but also, as mentioned, because it has been proven over and over that mother-tongue is the preferred medium of education, especially in the early phases, and is therefore a legitimate mechanism for creating equal educational opportunities" (Malherbe *op cit* 21).

"Section 29(2) contains an important specific limitation provision in that the right is subject to the condition that provision of education in the preferred language must be reasonably practicable. The state must fulfil this right, unless it is not reasonably practicable or the state can establish on other grounds that its refusal or inability to provide such education complies with the general limitation provision. In respect of the practicability requirement, learner numbers, costs, availability of facilities and educators, the distance to the nearest similar institution that is able to provide education in the chosen language, and the chosen medium of instruction in the case of universities, can be relevant factors that may determine whether,

in a particular case, it is reasonably practicable to provide such education. It seems as if this specific limitation provision calls for a similar approach as the one followed in the Canadian case of *Mahe v Alberta*. In that case, the reference in section 23(3)(a) of the Canadian Constitution to student numbers was held to establish a sliding scale of steps to be taken by the state to fulfil the right.

Section 29(2) further provides, and this was the actual compromise during the constitution making process, that in order to ensure effective access to and implementation of this right, the state must consider all reasonable alternatives, including single medium institutions, taking into account equity, practicability and the need to redress the results of past discrimination. Although this provision does not provide for a right to single-medium institutions, it imposes a particular duty on the state and on any applicable organ of state. In choosing the appropriate institution in general or in a particular case, the state must consider all reasonable alternatives in a *bona fide* way, taking into account what is educationally appropriate, as well as the listed factors of equity, practicability and the need for redress. The factors carry equal weight and must be balanced. What may be equitable to everybody concerned may not be practicable or educationally reasonable or appropriate, and what may be practicable may not serve to redress historical inequalities. This duty applies in the case of existing institutions as well. It thus means that when an education department or school authority takes decisions regarding the medium of instruction, it must comply with the provisions of section 29(2)" (Malherbe *op cit* 21).

"A few implications of section 29(2) should be emphasised.

- The phrase "in order to provide effective access to and implementation of the right" requires the state to take the right seriously and to be able to demonstrate that it in fact provides the right to education in one's preferred language effectively. The indiscriminate targeting of Afrikaans-medium schools and educational institutions to become dual or parallel medium institutions presently undertaken by the state, as well as the neglect of indigenous languages in education, deny the multilingual reality of South Africa and violate the language rights guaranteed by the Constitution. This is an example of the values of human dignity and freedom being sacrificed for the sake of a view which equals equality to uniformity, instead of the three values being applied in harmony to enhance the equal worth of people.
- The right to education in one's preferred language is primarily subject to the practicability test, and not to the factors mentioned later in subsection 29(2) relating to the best alternative to provide the right effectively. The latter factors apply only to the determination of the best alternative to give effect to the right, and should not be used to deny the right as such.
- The fact that subsection 29(2) expressly refers to single-medium institutions means that within a range of possibilities that may also include dual and parallel medium instruction, at least this alternative must always be considered. Whenever they are found to provide the most effective way to fulfil the right to education in one's preferred language, single-medium institutions should be the first option.
- Any perception that single-medium institutions obstruct the redress of past discrimination is unfounded. As suggested above, mother-tongue education is, as a matter of fact, a powerful tool to extend educational opportunities to all South Africans. Research has established the correlation between mother-tongue instruction and optimal educational progress. Furthermore equal access to educational facilities is in any case guaranteed by the equality principle and any abuse of single-medium institutions to deny anyone equal access to education would be inconsistent with section 9.
- Although, in principle, dual and parallel medium institutions or instruction may under suitable circumstances be the appropriate option to fulfil the right to education in one's preferred language, it has the shortcoming that diminishing numbers of a

particular language group put tremendous pressure on that language and may in practice lead to an institution eventually becoming single-medium. Should that happen, the right of those learners to education in their preferred language is threatened" (Malherbe *op cit* 22).

"Summarising this issue, it should be emphasised that the right to education in one's preferred language is guaranteed unequivocally in the South African Bill of Rights. Single medium educational institutions are not a guaranteed right, but must be considered whenever the best alternative to provide the right to education in one's preferred language must be chosen. Even when a single-medium institution proves not to be the best alternative, the duty remains on the state to provide education in one's preferred language effectively. This seems to be the most feasible and just way in which this delicate matter could have been handled in the Constitution, but the present concern is that instead of fulfilling the right, the state is actually advancing policies that undermine the right and that may yet prove to be an unconstitutional violation of the right to education in one's preferred language" (Malherbe *op cit* 22-23).

A student must explain any two of the following cases. Please note that if a student merely mentions any two of the relevant cases, then their answer must still be assessed out of 20 marks i.e. 10 marks for each case that is discussed in detail. Also note that a mark should be given for the name of the case.

(i) ***The Western Cape Minister of Education v The Governing Body of Mikro Primary School* 2005 (10) BCLR 973 (SCA).**

Facts

Mikro Primary School was an Afrikaans-medium public school whose governing body refused to accede to a request by the Western Cape Education Department to change the language policy of the school so as to convert it into a parallel-medium school. A subsequent directive by the MEC for Education, Western Cape Education Department, to the principal of the school to admit certain learners and to have them taught in English, the dismissal of an appeal against the directive to the Western Cape Minister of Education, and the resultant admission of 21 pupils for instruction in English, had given rise to an urgent application by the respondents to the Cape Provincial Division (the Court a quo) for an order setting aside the directive and the decision on appeal, as well as for ancillary relief. The application succeeded and the Court a quo held that the MEC had acted unlawfully by overriding the language and admission policy of Mikro Primary School and its governing body when it directed the latter to admit the pupils and to instruct them in English, as had the Minister of Education in dismissing the school's appeal against said directive, and the Western Cape Department of Education in enforcing that directive. The Minister of Education and the Western Cape Department of Education in appealed against the whole of the judgment.

Judgment

The court held, that the right of everyone to receive education in the official language or languages of their choice in public educational institutions where that education was reasonably practicable, as provided in s 29(2) of the Constitution, was a right against the State. In order to ensure the effective access to and implementation of this right, the State was required, in terms of the provision, to consider all reasonable educational alternatives, including single-medium institutions. This was a clear indication that, in terms of s 29(2), everyone had a right to be educated in an official language of his or her choice at a public educational institution to be provided by the State if reasonably practicable, but not the right to be so instructed at each and every public educational institution subject only to its being

reasonably practicable to do so. Neither the Act nor the Norms and Standards regarding Language Policy, published in terms of s 6(1) of the Act, purported to provide that, in the event of it being practicable to provide education in a particular language at a particular school, children who wished to be educated in that language were automatically eligible for admission to that school in that language. It followed that, in the present matter, the pupils in question had a constitutional right to receive education in English at a public educational institution provided by the State if reasonably practicable but, even if it was reasonably practicable to provide such education at the second respondent, they did not have a constitutional right to receive such education there in English.

The appeal was dismissed, save for the addition of a provision that the placing of the children at another suitable school was to be done taking into account their best interests.

(ii) ***Seodin Primary School v MEC of Education of Northern Cape* 2006 (1) All SA 154 (NC)**

Facts

The governing bodies of Seodin Primary School, Kalahari High School and Northern Cape Agricultural High School, sought the setting aside of the MEC's decision to convert a number of Afrikaans-medium schools to double-medium Afrikaans-and-English schools in the Kuruman district.

Judgment

Relying heavily on the judgment in the Mikro Primary School case, the court held that in accordance with the Norms and Standards section that deals with the rights and duties of the provincial department of education, read with section 29(2) of the Constitution, the postulate is that it has to be reasonably practicable to provide education in a particular language of learning and teaching if 40 learners in Grades 1 to 6 or 35 learners in Grades 7 to 12 in a particular grade request to be taught in a specified official language in a particular school.

To paraphrase the words of the Supreme Court of Appeal in the *Mikro Primary* case (*supra*) in correlation with the case under discussion, it follows that (on the version of the applicants) the 109 learners (Seodin), the 60 (Kalahari) and the 73 (NC Agricultural High) or many more, on the respondents' version, had a constitutional right to receive education in English in a public educational institution provided by the State if reasonably practicable. Although these learners did not initially have a constitutional right to receive their Education in English at Seodin Primary School or Kalahari High School or Northern Cape Agricultural High School, as the case may be, it has become immaterial as they now have a legitimate expectation to remain at these schools. See *Mikro Primary School* (*supra*) paragraphs 30 to 31 thereof.

In accordance with the ratio in the aforesaid *Mikro Primary School* case (*supra* at paragraph 33) the MEC or the functionaries of the Department cannot determine the language policy of a school. In other words the applicant-schools (Seodin, Kalahari and NC Agricultural High School) are still without a language policy notwithstanding the fact that the affected children are currently receiving tuition in English in a dual-medium (English-Afrikaans) setting or environment.

In the court's view the affected children acquired a vested right to be at the various schools whereat they were learners and could not be removed there from without an order of the Court. It would be a sad day in the South African historical annals that hundreds of children remained illiterate or dropped out of school because they were excluded from under-utilized

schools purportedly to protect and preserve the status of certain schools as single-medium Afrikaans schools. The court dismissed the application.

(iii) ***Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another*** **2010 (2) SA 415 (CC)**

Facts

The Hoërskool Ermelo (the school), an Afrikaans-medium public school, refused several requests by the Department of Education of Mpumalanga to admit scholars who sought to be taught in English. In response, the Head of the Department (the HoD), acting under ss 22(1) and (3) and 25(1) of the Schools Act (the Act), purported to revoke the power of the school's governing body to set the school's language policy, and appointed a committee to attend to this function. The committee purportedly altered the language policy to parallel English and Afrikaans media. The governing body and the school then applied urgently to the High Court for inter alia the setting-aside of the withdrawal of the function, and of the appointment of the committee. The High Court, apparently following *Minister of Education, Western Cape, and Others v Governing Body, Mikro Primary School, and Another* 2006 (1) SA 1 (SCA), dismissed the application. Mikro had held that, under s 22(1) of the Act, an HoD is entitled to revoke any function of a school governing body, and that once a function had been withdrawn, s 25 applied. The school and governing body thereon sought and were granted leave to appeal to the Supreme Court of Appeal, which found for them. The court found that the power to withdraw functions under ss 22(1) and (3) could only be exercised in relation to the functions allocated to a governing body under s 21. Those functions did not include the determination of the language policy, a power given to a governing body by s 6(2). The HoD and the Minister for Education then sought leave to appeal to the Constitutional Court.

Judgment

In the case of language policy, which affects the functioning of all aspects of a school, the procedural safeguards, and due time for their implementation, will be the more essential. It goes without saying that excellent institutional functioning requires proper opportunity for planning and implementation. The court held, that this conclusion is premised on the nuanced character of the constitutional imperative found in s 29(2), which whilst recognising the right to receive education in an official language or a language of one's choice, imposes a duty on the State to ensure effective access to the right to be taught in the language of one's choice. This and other positive duties found in section 29 of the Constitution and in the Act were inconsistent with an understanding of s 6(2) of the Act which located the right to determine language policy exclusively in the hands of the school governing body. Such an insular construction would in certain instances frustrate the right to be taught in the language of one's choice and therefore thwart the transformative designs of s 29(2) of the Constitution. Put otherwise, the statute devolves power and decision-making on the school's medium of instruction to a school governing body. It would, however, be wrong to construe the devolution of power as absolute and impervious to executive intervention when the governing body exercises that power unreasonably and at odds with the constitutional warranties to receive basic education and to be taught in a language of choice. 67 The Constitution itself enjoins the State to ensure effective access to the right to receive education in a medium of instruction of choice. The measures the State is required to take must evaluate what is reasonably achievable and must keep in mind the obvious need for historical redress (Paragraphs [75] - [78]).

OR

Some students might also discuss *Matukane v Laerskool Potgietersrus* 1996 (3) SA 223 (T). This case is actually not relevant as it does not deal with section 29(2) of the Constitution. The case is only relevant because it deals with the language of instruction or language policy at a school. Students should not be awarded more than 5 marks if they discuss this case.

Facts

The Constitution of the Republic of South Africa Act 200 of 1993 in s 8(2) prohibits unfair discrimination. The Constitution does not outlaw discrimination as such. This is echoed in s 8(2) of the Northern Province School Education Act 9 of 1995 (NP) and also recognised in s 62 of that Act dealing with discrimination at private schools. However, s 32(c) of the Constitution is couched in more absolute terms. The word 'unfair' should probably be read into s 32(c).

The first, second and third applicants, who were black persons, had at the beginning of 1996 applied to have their children enrolled at the primary school (a state-aided public school as defined in the Northern Province School Education Act 9 of 1995), but their applications had been refused. The second and third applicants had made similar unsuccessful attempts at the beginning of 1995. The reason given for the refusal to admit the applicants' children was that the school was full. The school was an Afrikaans and English parallel-medium school, although the greater majority of pupils were Afrikaans-speaking. Contending that the applicants' children had been refused admission on racial grounds in violation of s 8(2) of the Northern Province School Education Act and ss 8(2), 10, 24(a) and 32(a) of the Constitution of the Republic of South Africa Act 200 of 1993, the applicants (the Member of the Executive Council of the Northern Province for Education, Arts, Culture and Sport being the fourth applicant) applied for an order declaring that the respondent might not, on grounds related to race, ethnic or social origin, culture, colour or language, refuse to admit any child; interdicting the respondent from refusing to admit any child on such grounds; and directing the respondent to admit the black children of the parents listed in an annexure to the notice of motion. The Court analysed the averments in the applicants' and the respondent's affidavits and found that the facts prima facie proved discrimination.

Judgment

The court held that the school could only escape the consequences of that finding if it established that discrimination did not exist or that such discrimination as did exist was not unfair (s 8(4) of the Constitution): it did not matter which of the forms of discrimination mentioned in s 8(2) of the Constitution was proved - should it be found that the applicants had failed to prove discrimination on purely racial grounds, the established facts undoubtedly proved discrimination on the grounds of ethnic or social origin, culture and language.

The school contended, firstly, relying on ss 17, 31 and 32(c) of the Constitution read in the light of international law in regard to minority groups in a country, that discrimination on the grounds of ethnic or social origin, culture or language was not per se unfair. It was contended that the Afrikaner people constituted a minority and, by virtue of the United Nations Charter on Human and Peoples' Rights, had an inalienable right to self-determination, which included the right freely to determine their political status and to pursue their economic, social and cultural development. The respondent contended further that, in terms of other international documents and studies placed before the Court, it was entitled to protect and maintain the school's character and ethos as an Afrikaans medium school providing education of a Christian national character. It was contended, secondly, relying on s 31(1) of the Educational Affairs Act (House of Assembly) 70 of 1988 and the regulations promulgated there-under that the admission of children to the school was a matter in the

control of the governing body and that the school's criteria for admission could only be amended in consultation with the school's parent community.

The court argued, that, assuming that in terms of international law the Government had a duty to protect the rights of a minority people and that such rights included the right to a national school for such a minority as the respondent thought it was, the contention overlooked the unambiguous provisions of s 32(c) of the Constitution: there was nothing in the literature referred to by the respondent which supported the respondent's contention.

The court also noted that the school seemed to have ignored the fact that it was not an exclusive Afrikaans school but a parallel-medium school that already accommodated two different cultures and languages: no answer was offered to the question why the Afrikaans section should have stronger or better rights than the English section - if it was based solely on numbers, the argument was illogical and unacceptable.

The court also argued that the kind of power to which the respondent's governing body laid claim could not be found in any of the statutory provisions relied upon: the governing body could never exercise powers in conflict with the Constitution.

The court held, further, that, apart from clause 5 of the school's admission requirements that a proposed pupil should be white (which the school had conceded was contrary to ss 8 and 32 of the Constitution and therefore invalid), there was nothing in the other requirements for admission which absolutely disqualified black children from being admitted.

Held, further, that the school had failed to establish that there was no unfair discrimination against black children: even if their applications for admission had been rejected because they had elected to receive their schooling through the medium of English, it would still constitute unfair discrimination.

QUESTION 3

(a) In terms of sections 8(1) to (5) of the South African Schools Act 84 of 1996, what are the legal requirements for a code of conduct? (10)

Section 8 of the South African Schools Act 84 of 1996 provides that:

"(1) Subject to any applicable provincial law, a governing body of a public school must adopt a code of conduct for the learners after consultation with the learners, parents and educators of the school.

(2) A code of conduct referred to in subsection (1) must be aimed at establishing a disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process.

(3) The Minister may, after consultation with the Council of Education Ministers, determine guidelines for the consideration of governing bodies in adopting a code of conduct for learners.

(4) Nothing contained in this Act exempts a learner from the obligation to comply with the code of conduct of the school attended by such learner.

(5) A code of conduct must contain provisions of due process safeguarding the interests of the learner and any other party involved in disciplinary proceedings".

(b) With the aid of one relevant case, critically discuss how a learner's right to freedom of religion, belief and opinion (section 15 of the Constitution) can be affected in a public school. (10)

Students may discuss any one of the following cases:

***Antonie v Governing Body, Settler's High School and Others* 2002 (4) SA 738 (C)**

Facts (4 marks must be awarded for a discussion of the facts of the case)

The applicant, a grade 10 learner at the school, became interested in various religions at an early age. During December 1999 she decided to embrace the principles of the Rastafarian religion. One of these principles is that Rastafarians are required to grow their hair into so-called dreadlocks. Another is that Rastafarian women should cover their heads.

During the first school term of 2000 the learner, supported by her mother, approached the principal of the school, on several occasions for permission to wear dreadlocks and a cap, as an expression of her religion, while attending school. When no permission ensued, her religious convictions prompted her, during April 2000, to attend school with a black cap covering her dreadlocks. The cap was crocheted by herself and matched the prescribed school colours.

The principal argued that the learner was acting in conflict with the school's code of conduct and was in defiance of an arrangement, negotiated with the applicant's mother, that she would not wear headgear with her school uniform. He regarded her defiance of school rules and authority as a disciplinary matter requiring referral to the first respondent as governing body of the school. She was thereupon summoned to attend a disciplinary hearing before the school governing body.

At the hearing the learner was charged with serious misconduct in that she had acted in an unbecoming manner, in defiance of school regulations, by wearing headgear and growing dreadlocks according to Rastafarian custom. The principal testified that she had caused

'disruption and uncertainty' by her conduct. More particularly disruptive was her breach of school rules and defiance of authority. This created a situation which could escalate.

The applicant and her mother argued that the learner had not caused any disruption and that her appearance was at all times neat and tidy. Both emphasised her need to express her religious convictions and to develop her individuality. After consideration of the evidence and all arguments tendered by the legal representatives, the governing body held that the applicant was 'guilty of serious misconduct' and was suspended for a period of five days.

Judgment (6 marks must be awarded for a discussion of the judgment in this case)

The student should have discussed the following things:

The court found that the school's code of conduct made no mention, under the heading of 'hair' to dreadlocks or anything similar. There was likewise no reference, in the discussion of clothing, to headgear. In the court's opinion, the school governing body did not apply their minds to the aforesaid provisions of the code of conduct. If they had, they would, and indeed should, have realised that the growing of dreadlocks and the wearing of headgear was not prohibited thereby.

The court referred to a Schedule which was issued by the Ministry of Education during April 1998 as Notice 776 of 1998. In terms of s 8(3) of the South African Schools Act 84 of 1996, it lays down guidelines for consideration by governing bodies in adopting a code of conduct for learners. The focus in the schedule is on positive discipline (s 1.4 and 1.6) and the need to achieve 'a culture of reconciliation, teaching, learning and mutual respect and the establishment of a culture of tolerance and peace in all schools' (s 2.3). This must be done in the context of the democratic values of human dignity, equality and freedom, as enshrined in the Bill of Rights contained in the Constitution of the Republic of South Africa Act 108 of 1996 (s 4.1). Every learner is accorded 'inherent dignity' and 'the right to have his/her human dignity respected', in the sense of 'mutual respect including respect for one another's convictions and cultural traditions' (s 4.3). In this regard educators and learners are encouraged (in s 4.4.1) 'to learn the importance of mediation and co-operation, to seek and negotiate non-violent solutions to conflict and differences and to make use of due process of law'.

Freedom of expression is also accorded special mention in s 4.5.1 of the schedule. It reads: Freedom of expression is more than freedom of speech. The freedom of expression includes the right to seek, hear, read and wear. The freedom of expression is extended to forms of outward expression as seen in clothing selection and hairstyles. However, learner's rights to enjoy freedom of expression are not absolute. Vulgar words, insubordination and insults are not protected speech. When the expression leads to a material and substantial disruption in school operations, activities or the rights of others, this right can be limited, as the disruption of schools is unacceptable.

The court also had to determine whether the learner's conduct could constitute 'serious misconduct' in terms of s 2(1) of the regulations relating to serious misconduct of learners and published as Provincial Notice (PN) 372 of 1997 on 31 October 1997 The said section reads as follows:

"Subject to the provisions of the Act, a learner at a school who –

(a) has been convicted by a court of a criminal offence and sentenced to imprisonment without the option of a fine; or
(b) used or had in his or her possession intoxicating liquor or other drugs on the school grounds or during a school activity; or

(c) is guilty of assault, theft or immoral conduct; or
(d) has been repeatedly absent without leave from school and/or classes; or
(e) conducts himself or herself, in the opinion of the governing body, in a disgraceful, improper or unbecoming manner
shall be guilty of serious misconduct."

The nature of the conduct set forth in ss (a) - (d) must of necessity assist in determining what constitutes 'disgraceful, improper or unbecoming' behaviour for purposes of ss (e). Quite clearly it must be of a particularly serious or aggravating nature before it can be classified as such. The kind of conduct envisaged by ss (e) is something akin to immoral, promiscuous or shockingly inappropriate behaviour. An offence against the code of conduct could not remotely be classified as such behaviour. It is hence a blatant absurdity to categorise the growing of dreadlocks or wearing of a cap, even if it should be in conflict with the code of conduct, as serious misconduct. Even more so would this be the case if the real problem were not so much the dreadlocks and cap, but the applicant's so-called defiance of authority. Even if the principal's suggestion, that this behaviour had caused disruption or uncertainty, were borne out by the evidence, it would still be a far cry from 'serious misconduct'.

As a result thereof, the decision of the governing body finding the applicant guilty of serious misconduct and the suspension of the applicant by the governing body was both set aside.

MEC for Education: KwaZulu-Natal and Others v Pillay **(CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC)**

Facts (4 marks must be awarded for a discussion of the facts of the case)

The respondent approached the governing body of the school at which her daughter, S, was a learner for an exemption from its code of conduct to allow S to wear a gold nose-stud to school, in keeping with her South Indian family traditions and culture. The governing body refused the respondent's application for exemption and took a decision 'prohibiting the wearing of a nose-stud in school by Hindu/Indian learners'. The respondent approached the equality court for relief and was met with a finding that, although the school's conduct was prima facie discriminatory, the discrimination was not unfair. On appeal to the High Court it was found that the school's conduct was both discriminatory and unfair under the Act. The court set aside the order of the equality court and replaced it with an order declaring null and void the school's decision prohibiting the wearing of a nose-stud in school, by Hindu/Indian learners. The school then applied for leave to appeal directly to the Constitutional Court (CC) against the decision of the High Court. Before the CC, the respondent's primary case was based on equality. On the question of the unfairness of the discrimination against S, the respondent argued that S's case should be decided on the 'reasonable accommodation' principle. The primary argument by the school against allowing S to wear a nose-stud or allowing others like her similar exemptions from the school's code of conduct was that it would impact negatively on discipline at the school and, as a result, on the quality of the education it provided.

Judgment (6 marks must be awarded for a discussion of the judgment in this case)

- S was part of the South Indian, Tamil and Hindu groups, which was an identifiable 'culture'.

- The evidence showed that the nose-stud was not a mandatory tenet of S's religion or culture but was a voluntary expression of South Indian/Tamil/Hindu culture, a culture that was intimately intertwined with Hindu religion, and that S regarded it as such. On

the facts of the present matter the practice of wearing a nose-stud was therefore a voluntary religious and cultural practice.

- Whether a religious or cultural practice was voluntary or mandatory was irrelevant to whether it qualified for protection under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

- That the school's code of conduct, coupled with the decision to refuse S an exemption from the code, was discriminatory on the ground of both religion and culture in terms of s 6 of the Act.

- As regards the unfairness of the discrimination, that under the Act failure to take steps to reasonably accommodate the needs of people on the basis of race, gender or disability amounted to unfair discrimination.

- The principle of reasonable accommodation was in a sense an exercise in proportionality that depended intimately on the facts. 'Reasonable accommodation' was an important factor in the determination of the fairness of the discrimination. Reasonable accommodation was most appropriate where, as in the present case, discrimination arose from a rule or practice that was neutral on the face of it and was designed to serve a valuable purpose but which nevertheless had a marginalising effect on certain portions of society. The principle was particularly appropriate in specific localised contexts, such as an individual workplace or school, where a reasonable balance between conflicting interests could more easily be struck. The present case bore both of those characteristics, and therefore fairness required a reasonable accommodation.

- As regards the centrality of the practice, that the enquiry was subjective and the evidence showed that the wearing of a nose-stud was important to S as an expression of her religion and culture.

- As to the effect on the school, there was no evidence and no reason to believe that a learner who was granted an exemption from the provisions of the school's code of conduct would be any less disciplined, or that she would negatively affect the discipline of others. Refusing S an exemption therefore did not achieve the intended purpose.

- It would be perfectly correct for a school, through its code of conduct, to set strict procedural requirements for exemptions from rules therein. It would also be appropriate for the parents and, depending on their age, the learners/scholars to be required to explain in writing beforehand why they require an exemption. That would ensure that these difficult matters were resolved responsibly, fairly and amicably. It is a serious obstacle to a search for reasonable accommodation in such instances that an appropriate procedure is not in place.

- The discrimination had had a serious impact on S and the evidence did not show that the intended purpose of upholding discipline and a high standard of education was significantly furthered by refusing S her exemption. Allowing the stud would not have imposed an undue burden on the school. A reasonable accommodation would have been achieved by allowing S to wear the nose-stud. The High Court's finding of unfair discrimination therefore had to be confirmed.

- That (1) the application for leave to appeal had to be granted; (2) the appeal had to be dismissed; and (3) the order of the High Court had to be set aside and replaced with orders (a) declaring that the decision of the school's governing body to refuse S

an exemption from its code of conduct to allow her to wear a nose-stud discriminated unfairly against her; and (b) ordering the school's governing body, in consultation with the learners, parents and educators of the school and within a reasonable time, to effect amendments to the school's code of conduct to provide for the reasonable accommodation of deviations from the code on religious or cultural grounds and a procedure according to which such exemptions from the code could be sought and granted.

(c) Define the term "co-operative governance". (2)

Co-operative governance envisages co-operation, co-ordination and support among the spheres of government (i.e. national, provincial and local) to promote and maintain effective government. It binds together the spheres of government and forces them to work together in interrelated and interdependent relationships, showing mutual respect for each other's distinctive character.

(d) List eight (8) minimum uniform norms and standards for school infrastructure that the Minister must provide for in terms of section 5A(2) of the South African Schools Act 84 of 1996. (8)

A student may list any 8 of the following:

The norms and standards contemplated in subsection (1) must provide for, but not be limited to, the following:

a) In respect of school infrastructure, the availability of—

i) classrooms;
ii) electricity;
iii) water;
iv) sanitation;
v) a library;
vi) laboratories for science, technology, mathematics and life sciences;
vii) sport and recreational facilities;
viii) electronic connectivity at a school; and
ix) perimeter security.

[30]

QUESTION 4

Study the hypothetical scenario below and answer the questions that follow.

Postmasburg High School is a public school and is located in the Northern Cape province. Johan has been a learner at Postmasburg High School since 2009 and is only now in Grade 12. During his years of schooling at Postmasburg High, Johan has been under the watchful eye of the school principal, Mr Pretorius, because of his habitual gangsterism. Johan has already been expelled twice and is recently suspected of being in possession of a gun on school premises.

(a) Discuss how Mr Pretorius or his or her delegate would go about conducting a random search at Postmasburg High School and explain the procedures that must be followed if dangerous items are seized by Mr Pretorius or his delegate. (25)

According to section 8A of the South African Schools Act 84 of 1996:

8A. Random search and seizure and drug testing at schools.—(1) Unless authorised by the *principal* for legitimate educational purposes, no person may bring a *dangerous object* or *illegal drug* onto *school* premises or have such object or drug in his or her possession on *school* premises or during any *school activity*.

(2) Subject to subsection (3), the *principal* or his or her delegate may, at random, search any group of *learners*, or the property of a group of *learners*, for any *dangerous object* or *illegal drug*, if a fair and reasonable suspicion has been established—

(a) that a *dangerous object* or an *illegal drug* may be found on *school* premises or during a *school activity*; or
(b) that one or more *learners* on *school* premises or during a *school activity* are in possession of *dangerous objects* or *illegal drugs*.

(3) (*a*) A search contemplated in subsection (2) may only be conducted after taking into account all relevant factors, including—

(i) the best interest of the *learners* in question or of any other *learner* at the *school*;
(ii) the safety and health of the *learners* in question or of any other *learner* at the *school*;
(iii) reasonable evidence of illegal activity; and
(iv) all relevant evidence received.

(*b*) When conducting a search contemplated in subsection (2), the *principal* or his or her delegate must do so in a manner that is reasonable and proportional to the suspected illegal activity.

(4) Where a search contemplated in subsection (2) entails a body search of the learners in question, such search may only—

(*a*) be conducted by—

(i) the *principal*, if he or she is of the same gender as the *learner*; or
(ii) by the *principal's* delegate, who must be of the same gender as the *learner*;

(*b*) be done in a private area, and not in view of another *learner*;
(*c*) be done if one adult witness, of the same gender as the learner, is present; and
(*d*) be done if it does not extend to a search of a body cavity of the learner.

(5) Any *dangerous object* or *illegal drug* that has been seized must be—

(a) clearly and correctly labelled with full particulars, including—

(i) the name of *learner* in whose possession it was found;
(ii) the time and date of search and seizure;
(iii) an incident reference number;
(iv) the name of person who searched the *learner*;
(iv) the name of the witness; and
(v) any other details that may be necessary to identify the item and incident;

(*b*) recorded in the school record book; and
(*c*) handed over to the police immediately to dispose of it in terms of section 31 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

(6) If the police cannot collect the *dangerous object* or *illegal drug* from the *school* immediately, the *principal* or his or her delegate must—

(a) take the *dangerous object* or *illegal drug* to the nearest police station; and
(b) hand the *dangerous object* or *illegal drug* over to the police to dispose of it in terms of section 31 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

(7) The police officer who receives the *dangerous object* or *illegal drug* must issue an official receipt for it to the *principal* or to his or her delegate.

(10) The *principal* or his or her delegate must—

(a) within one working day, if practicable, inform the *parent* that a random test or search and seizure was done in respect of his or her child; and
(b) inform the *learner* and his or her *parent* of the result of the test immediately after it becomes available.

(b) Who is responsible for the expulsion of a learner at a public school, and do the parents of the learner have any recourse if their child has been expelled? (5)

According to section 9(2) of the South African Schools Act 84 of 1996, a learner at a public school may be expelled only-

(a) by the Head of Department; and
(b) if found guilty of serious misconduct after disciplinary proceedings contemplated in section 8 were conducted.

According to section 9(4) of SASA, a learner or the parent of a learner who has been expelled from a public school may appeal against the decision of the Head of Department to the Member of the Executive Council within 14 days of receiving the notice of expulsion.

If a learner who is subject to compulsory attendance in terms of section 3(1) is expelled from a public school, the Head of Department must make alternative arrangement for his or her placement at a public school (section 9(5)).

A learner who has appealed in the manner contemplated in subsection (4), must, pending the outcome of the appeal, be given access to education in the manner determined by the Head of Department (section 9(6)).

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