

The Applied Writing Assignment aims to achieve several of the substantive and generic learning outcomes posited for Constitutional Law 312. Some of the relevant substantive learning outcomes include:

- The ability to read, analyse and critically evaluate South African constitutional jurisprudence and legislation relevant to particular human rights.
- The ability to identify the relevant human rights principles and jurisprudence applicable to a given set of facts or problem.
- The ability to apply the relevant rules, principles and jurisprudence to a given set of facts in order to formulate appropriate constitutional arguments.

Furthermore, relevant generic outcomes include:

- The acquisition of sound legal research and writing skills in the context of human rights law.
- The ability to identify and apply relevant research materials to solve specific human rights problems.
- Sound organisation and analysis of material.
- The ability to develop and communicate clear, logical arguments using the accepted methods of constitutional reasoning.
- The ability to apply writing style and referencing guidelines accurately

It should be borne in mind that no independent research was required for the Heads of Argument. The identification and application of “research materials” thus refer to relevant prescribed and recommended sources, especially jurisprudence.

### **Content of assignment (60)**

In order to make convincing legal arguments for purposes of Application A, you should have focused primarily on the Promotion of Equality and Prevention of Unfair

Discrimination Act 4 of 2000 ('PEPUDA') interpreted in the light of relevant constitutional values and case law (such as *Walker*, *Pillay* and *Jordan*). This is the implication of the doctrine of subsidiarity. The most common substantive error was a failure to systematically apply the logical steps of a PEPUDA analysis to the case study. As explained in class and in the seminars, the 'Harksen test' is only indirectly relevant in relation to the interpretation of relevant sections of PEPUDA and is not applied directly anymore in a case of unfair discrimination.

Similarly, the general limitations clause (s 36) is only directly relevant when there is a constitutional challenge to the provisions of PEPUDA (which was not applicable in Application A). It may be indirectly relevant to the interpretation of the 'fairness' factors in s 14 of PEPUDA, particularly s 14(3)(f) – (h).

A number of you made reference to ss 7 and 8 of PEPUDA. Whilst these sections help you to back up your arguments regarding unfair discrimination, you still need to apply the burden of proof provisions in s 13, and the fairness inquiry in s 14.

Please distinguish clearly between the role of human dignity as an independent right in s 10 of the Constitution and the role of human dignity as a value in various steps of the unfair discrimination inquiry in terms of PEPUDA. Given that you were expressly told that this is an unfair discrimination application in terms of PEPUDA, human dignity is relevant as a value in interpreting, for example, the unlisted grounds of discrimination in the definition of 'prohibited grounds' in s 1 of PEPUDA and the fairness factors in s 14.

Similarly, you were expressly instructed to argue a case of unfair discrimination in terms of PEPUDA. Accordingly, extensive arguments pertaining to socio-economic rights were not directly relevant in the context of Application A (as opposed to Application B).

The burden of proof provision in s 13 of PEPUDA is precisely that – it determines who bears the burden of proof in determining whether the discrimination is fair or unfair with reference to s 14. It does not mean that because the burden rests on the City that the discrimination is "automatically unfair" as some of you argue. Rather, it means

that the City bears the burden of proving that the discrimination was fair with reference to the factors in s 14. You must still set out your client's arguments and counter-arguments in respect of the unfairness of the discrimination in terms of s 14.

Another common mistake made was the failure to apply the tests for 'discrimination' and for 'prohibited grounds' defined in s 1 of PEPUDA. Please also note the relevance of the directive principle on socio-economic status in s 34 read together with the definition in s 1. This was discussed in class during the lectures on PEPUDA.

Repetition of facts, quoting big chunks from the *Harksen* judgment, and extensive quotation of legislation and regulations detract from the space you have available to make convincing legal arguments!

It is of cardinal importance that your arguments are legal in nature. This requires that every argument is supported by appropriate legal authority, namely relevant legislation (in this case, PEPUDA) and relevant case law. You should thus demonstrate that you have read PEPUDA and the case law and understood it. This should be apparent from in-depth legislative and case analyses (accompanied by references to relevant sections in PEPUDA and relevant paragraphs in the case law). Proper legal analysis will substantiate your arguments and render them (legally) convincing.

### **Structure of the assignment (10)**

If you submitted an essay, your structure is wholly insufficient and you failed to comply with the core requirement of this assignment.

The structure of your argument will influence whether your legal argument is ultimately convincing or not. It is suggested that you use headings that reflect the logical progression of your argument. Your headings should thus address the main legal principles as discussed above, for example:

#### **1 Introduction**

#### **2 Legal Framework**

Here I expect you to refer to section 9 and the enactment of PEPUDA, and discuss the implications of the doctrine of subsidiarity, as set out in the *Pillay* judgment, for the approach to be adopted in your heads of argument.

### **3 Argument**

Here I expect you to follow the logical steps of applying the provisions of PEPUDA to the facts, supporting your arguments with case law where relevant:

*3.1 The prohibition in s 6*

*3.2 Definition of discrimination (s 1)*

*3.3. Prohibited grounds (s 1 read with s 34)*

*3.4. Direct and indirect discrimination (Walker and Jordan minority judgment)*

*3.5 Burden of proof (s 13) (Pillay)*

*3.6 Fairness inquiry (s 14) (Walker and Pillay)*

### **4 Remedies**

Here I expect you to refer to s 21 of PEPUDA, particularly s 21 (b), (f) and (m).

### **5 Conclusion**

### **Style, tone and language (10)**

You should use terminology as it is used in the Constitution and case law, for example “unfair discrimination” rather than ‘unreasonable discrimination’. Be precise when referring to the language of the Constitution and ensure that any quotations correspond exactly to the original.

Heads of Argument require formal language. An appropriate register should thus be maintained: For example, do not contract words like “don’t” for “do not”. Also try to avoid emotive language or expressions.

Do not repeat facts or arguments, and do not quote all relevant provisions in full in the main text of your Heads of Argument. If you do quote, follow proper quotation protocol and do not have a sentence consisting only of quoted words.

Always use South African English, and use South African English spellcheck (or Afrikaans spellcheck, depending on which language you write in): For example, it is “realisation” and not “realization”; “judgment” and not “judgement”

For those writing in English, distinguish between the use of “is” for singular (for example, “one of the criteria is”) and “are” for plural (for example, “the criteria are”) and between the possessive apostrophe (“the state’s policy”) and plural (“many states have adopted policies”)

When referring to a statute, it is ‘Act’ not ‘act’.

You should refer to ‘the Constitution’, but in lower case when referring, for example, to ‘constitutional rights’.

Case names should be italicised throughout (including abbreviated case names e.g. *Walker*).

Create abbreviations properly as per the Law Faculty Writing Guide, including for statutes such as PEPUDA and abbreviated case names such as *Walker*, *Pillay* and *Jordan*.

## **Referencing (15)**

For Heads of Argument, it is crucial to refer to relevant legislation and case law in order to convince a judge of the legal merits and authority of your argument. You can refer to secondary sources like academic commentary in addition. Heads of Argument that refer only to secondary sources will likely not be convincing on legal grounds/grounds supported by legal authority. When referring to legislation or case law, it is essential to refer to specific sections of the Act or paragraphs of the case. This shows the judge where exactly the authority for your argument can be found. It also shows the lecturer that you actually read the legislation or judgment.

## **Technical presentation (5)**

Leaving “track changes” or comments from the writing consultants in your submitted assignment creates a very bad first impression

Remember to justify your margins.

Inappropriate use of capital letters also makes a bad impression. For example, it is “human dignity” and not “Human Dignity”. Uneven line spacing, odd gaps in your text, and between text and punctuation marks looks unprofessional.

Always carefully proofread your assignment (or Heads of Argument in practice) several times before submitting it!