



ZIMBABWE EZEKIEL GUTI UNIVERSITY

FACULTY OF LAW

DEPARTMENT OF PUBLIC LAW

EXAMINATION PAPER

COURSE CODE : LLB 213
COURSE TITLE : Administrative and Local Government Law
SPECIAL REQUIREMENTS : Relevant pieces of legislation
DURATION : 3 Hours
LEVEL : 2.1
DATE : 28 JUN 2022

INSTRUCTIONS TO CANDIDATES:

1. Answer FOUR questions. Question ONE in section A is compulsory. Answer any THREE questions from section B. Each question carries 25 marks.
2. This is an open book examination and students may bring into the exam own handwritten note into the examination room. No student is allowed to share his/her notes with another.
3. Students are NOT allowed to carry and use electronic gadgets such as laptops and cellular phones, among other things
4. Write legibly
5. Number your answers accordingly
6. Good luck...and remember...*all is fair in love and war*

Section A: Compulsory question

Question 1

After an extensive public outreach and committee hearings, Parliament passes and the President signs the Smokeless Tobacco Act in 2022. The Act creates a new commission known as the Free Tobacco Commission (FTC). The Smokeless Tobacco Act was enacted against a background of (1) a growing body of evidence that use of smokeless tobacco products (such as snuff) presents serious health hazards, and (2) recent dramatic increases in the number of young people who use smokeless tobacco in Universities. To respond to these disturbing developments, Parliament enacted a comprehensive scheme “to make the public aware of the adverse health consequences of using smokeless tobacco products.” The Act includes provisions for public education and ingredient reporting. It also requires all smokeless tobacco packages to contain one of three prescribed health warnings (e.g., Warning: This Product May Cause Mouth Cancer, etc.) In addition, the Act provides as follows:

It shall be unlawful for any manufacturer . . . Of smokeless tobacco products to advertise or cause to be advertised (other than through the use of outdoor billboard advertising) within Zimbabwe any smokeless tobacco product unless the advertising bears, in accordance with the requirements of this chapter, one of the [required] warning labels.

FTC’s first action is to publish in the Government Gazette a Statutory Instrument (SI) 67/2022 entitled; “Proposed Rule on FTC regulations on advertisement requirements.” The SI identifies the Smokeless Tobacco Act as FTC’s source of authority, tasking to do the following;

- i. FTC staff, after carefully studying the impact of smokeless products and data about current conditions in the country, its usage, will to make the public aware of the adverse health consequences of using smokeless tobacco products.
- ii. To “develop requirements as to the size, colour and typeface of the required warnings,” and to “determine the best placement of the warnings on packages.”
- iii. After the proposed regulations are published, FTC shall hold a hearing at which affected person, companies, civil society and other interested persons may express their views on the proposed decision.
- iv. After reviewing and considering the hearing testimony, FTC shall make any modifications to its proposed regulations that are necessary in light of the hearing

testimony, and then shall publish its final regulations. Any person aggrieved by this final decision may thereafter seek judicial review in accordance with the Administrative Justice Act.

Almost immediately the FTC published a notice announcing proposed regulations. Under the terms of the proposed regulation, the warning requirement for advertising would not apply to signs on factories, plants and other facilities related to the manufacture or storage of smokeless tobacco, to corporate or financial reports, or to promotional materials that are distributed to smokeless tobacco wholesalers, dealers or merchants, but not to consumers.

Following the comment period, in which extensive comments were received from industry, FTC promulgated a final regulation which continued all of the proposed exceptions and now added an additional provision-that the "warning requirement does not apply to utilitarian objects for personal use, such as pens, pencils, clothing or sporting goods, which are designed with a brand name." The FTC explained this addition as follows:

Although the Commission understands that certain types of promotional activities, like the distribution of utilitarian objects, are intended to increase brand awareness, warnings on utilitarian objects have never been required in the cigarette context, and there is no reason to treat smokeless tobacco products less favourably. Moreover, there are practical problems in putting health warnings on many of the utilitarian objects distributed by the smokeless tobacco industry, such as golf balls. In addition, the Commission is sensitive to the need to avoid diminishing the seriousness of the required warnings by mandating their display in absorb situations in any print advertisement, the antecedent to "this product" (in the phrase "this product may cause mouth cancer".) is unambiguous the product advertised. When a personal utilitarian item, such as a pencil or cap or T-shirt or golf ball, is used to promote a smokeless tobacco product, the utilitarian item itself becomes highly susceptible to ridicule or trivialization when the warning is placed on a separate functional item. Indeed, were the Commission to insist on such a warning, it is likely that such utilitarian items will become cult objects sought after to demonstrate the silliness of well-intended regulation carried to excess.

The FTC further revealed that it had conducted an extensive study of consumer-response to the proposed regulation and to cigarette warnings, and that its decision to exempt utilitarian objects from the warning requirement was based in large part on the results of that study

The Zimbabwe Heart Association, the Zimbabwe Lung Association and the Zimbabwe Public Health Association are not happy about this added portion of the regulations. According to their original complaint, the organizations have a combined membership of 3 million and are broadly engaged in health advocacy in addition, the organizations alleged that “some of its members and their members’ families have used or may use smokeless tobacco products because they are not fully aware of the serious health risks that are associated with the use of smokeless tobacco products.” (Names, characters, places and incidents used here are fictitious. Any resemblance to actual events or locales or persons, living or dead, is entirely coincidental.)

You are the judge assigned to several lawsuits, filed at different times, all of which arise out of FTC’s actions. How would you rule on the following questions?

- a) Ingazvakanaka 1945 Smokeless Tobacco a manufacturer of Bute Rematare wants to challenge in court the promulgating the regulation, or the substance of the final regulation? (15 marks)
- b) After FTC published a notice announcing proposed regulations, The Zimbabwe Heart Association, the Zimbabwe Lung Association and the Zimbabwe Public Health Association want to challenge this decision. (10 marks)

[25 marks]

Section B answer ANY three questions.

Question 2

The test to be applied in determining whether a decision is reviewable or should be set aside vary depending on the nature of the decision and the law applicable thereto. Discuss. [25 marks]

Question 3

Discuss the Constitutional Court’s interpretation of the right to reasonable administrative action as decided in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC), in your answer be mindful to refer to Zimbabwean decided cases for illustrative purposes. [25 marks]

Question 4

Section 68 of the Constitution of Zimbabwe Amendment No. 20 Act of 2013 provides for procedural fairness. Discuss the mandatory and the discretionary requirements for procedural fairness as set out in section 68 of the 2013 Constitution of Zimbabwe with reference to decided case law and scholarly views? [25 marks]

Question 5

- a) Administrative law is an aspect of constitutional law and there exist no distinction between Administrative Law and Constitutional Law. Discuss. (15 marks)
- b) Outline and discuss the key 'Constitutional Principles' underlying Administrative Law? (10 marks)

[25 marks]

Question 6

The development of effective protection of substantive legitimate expectations may be seen as just one facet of the shift away from a blinkered preoccupation with form, towards recognition that fairness of outcome matters. Discuss this shift from form to substance, from procedure to substantive. [25 marks]

Question 7

"...repealing an Act is the prerogative of Parliament which is according to section 134 (a) of the Constitution may not be delegated ..." as per Zhou J in case of *Mfundo Mlilo v Minister of Finance and Economic Development* HH605-19. Discuss the reasoning behind the decision and how it creates doubt about the validity of similar enabling provisions in the other Acts – and any statutory instruments made in reliance on those enabling provisions. In the course of your answer also discuss the various Acts of Parliament that contain provisions permitting the President or a Minister to make statutory instruments – regulations, orders and so on – which amend the Acts themselves. [25 marks]

******End of Examination******