

# Tutorial Letter 201/2/2014

## Interpretation of Statutes

## IOS2601

### Semester 2

#### DEPARTMENT OF PUBLIC, CONSTITUTIONAL AND INTERNATIONAL LAW

**IMPORTANT INFORMATION**

This tutorial letter contains important information about  
your module.

BAR CODE

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## 1 INTRODUCTION

Dear Student

At registration you received Tutorial Letter 101/3/2014. This is the last tutorial letter for this module. In it we include feedback on Assignments 01 and 02, important information on the format of the October/November 2014 examination paper and some additional self-evaluation questions. We suggest you study this tutorial letter very carefully.

## 2 FEEDBACK ON ASSIGNMENT 01

### 2.1 Assignment topic

Write an essay of between four (4) and five (5) pages in which you discuss whether the judgment in *Jaga v Dönges* 1950 (4) SA 653 (A) may still be used for the interpretation of statutes after the democratic transformation.

#### Special instructions:

- (a) Make use of headings and include at least the following:
- (1) Introduction (**1 mark**);
  - (2) The facts of the *Jaga* case (**5 marks**);
  - (3) The dominant interpretive approach before 1994 as followed by the majority in *Jaga* (**13 marks**);
  - (4) The alternative interpretive approach followed by the minority in *Jaga* (**13 marks**);
  - (5) Section 39(2) of the Constitution and the new interpretive approach followed in the *Bato Star* case (**14 marks**);
  - (6) Critical evaluation and conclusion (**4 marks**).

### 2.2 Feedback and suggested answer

#### 2.2.1 Introduction

In its *Bato Star* judgment, the Constitutional Court referred to the interpretive approach followed in *Jaga v Dönges*, a notorious case from the 1950s. In this essay, I argue that the recent comments by the Constitutional Court about the case clearly show that the *Jaga* judgment is *no longer* relevant to the interpretation of statutes after the democratic transformation.

#### 2.2.2 The facts of the *Jaga* case

In the early 1950s, Jaga was caught selling unwrought gold. He was sentenced to “three months imprisonment suspended for three years”. Section 22 of Act 22 of 1913 reads as follows: “Any person who has been sentenced to imprisonment for any offence committed by the sale of unwrought precious metal and who is deemed by the Minister to be an undesirable inhabitant of the Union, may be removed from the Union under a warrant”. The Minister declared Jaga an undesirable inhabitant of the Union and a warrant for his deportation to India was issued. Jaga challenged his deportation on the basis that he had not been sentenced to imprisonment. The Minister argued that a suspended sentence of imprisonment is still a sentence of “imprisonment” within the ordinary meaning of section 22. Jaga argued that “imprisonment” meant actual (as opposed to merely potential) imprisonment. “Sentenced to imprisonment” thus meant to be sentenced i.e to be actually and physically held in prison, which he was not (his sentence was merely suspended and he was allowed to go home). See paragraph 5.2.2 in the study guide.

### 2.2.3 The dominant interpretive approach before 1994 as followed by the majority in *Jaga*

This section of the essay involved two components. Firstly, you had to briefly set out the dominant interpretive approach before 1994, namely the orthodox text-based (literal) approach (see paragraph 5.3.1 in the textbook and paragraph 5.2.1 in the study guide). Secondly, you had to indicate how the majority of the court in *Jaga* applied the approach in their judgment (see paragraph 5.2.2 in the study guide).

### 2.2.4 The alternative interpretive approach followed by the minority in *Jaga*

This section of the essay also involved two components. Firstly, you had to briefly set out the alternative interpretive approach, namely the purposive (text-in-context) approach (see paragraph 5.3.2 in the textbook and paragraph 5.2.2 in the study guide). Secondly, you had to indicate how the minority of the court in *Jaga* applied the approach in its judgment (see paragraph 5.3.2 in the textbook and paragraph 5.2.2 in the study guide).

### 2.2.5 Section 39(2) of the Constitution and the new interpretive approach followed in the *Bato Star* case

Having discussed the different approaches to statutory interpretation, and their respective applications in *Jaga*, you now had to turn to the positive law to see whether your argument is supported by any constitutional or legislative provisions or by the *Bato Star* case. In this paragraph you had to convince the reader that section 39(2) of the Constitution, 1996, prescribes a new approach to statutory interpretation, namely the purposive approach. You should have quoted the section and then discussed why it can be argued that the section prescribes a purposive approach, even though it does not say so explicitly. See paragraph 5.3.3 in the textbook and paragraph 5.2.3 in the study guide. Remember that section 39(2) is a peremptory provision. This means that every interpreter of legislation **MUST** use the interpretive process as a means of promoting the aim, spirit and purport of the Bill of Rights. The interpreter can no longer be satisfied by plain meanings or so-called clear, unambiguous texts (without regard to the underlying purposes of those texts).

The final step in the argument was to argue that the court in *Bato Star* also adopted a purposive approach, like the minority in *Jaga*. The Constitutional Court, in its *Bato Star* judgment, referred to the interpretive approach followed in *Jaga v Dönges*. The focus of your explanation of the *Bato Star* case should have been on the approach adopted by the court and not on the facts of the case as such. The facts of the case should have been mentioned in brief. See paragraph 5.3.3 in the textbook and paragraph 5.2.3 in the study guide.

### 2.2.6 Critical evaluation and conclusion

Next you had to draw the essay to a close and restate the conclusion of the argument as a whole. A short statement like the following would be sufficient: The minority judgment in *Jaga* was one of the first concrete efforts in South African case law to use the wider context to move beyond the plain grammatical meaning to ascertain the legislative purpose (see 2.2.4 above). Although the *Jaga* judgment may continue to be used as a source of reference in future cases or decisions, the fact that the Constitution now prescribes a contextual approach (see 2.2.5 above), with the Constitutional Court already following the contextual approach (see 2.2.5 above), demonstrates that there can only be one conclusion, namely that the contextual approach should indeed be, and has been, adopted in post-apartheid South Africa, and therefore the *Jaga* judgment *is no longer* relevant to the interpretation of statutes after the democratic transformation.

## 3 FEEDBACK ON ASSIGNMENT 02

### Question 1

#### South African common law is known as ...

- (1) English-Dutch law.
- (2) Latin law.

- (3) Roman-Dutch law.
- (4) Roman law.

Only statement (3) is correct. See Botha (2012) page 3, paragraph 1.1.

## Question 2

**According to the Constitution, the legislative menu consists of several items, such as municipal by-laws. Which of the following is NOT an item on the legislative menu?**

- (1) Green Paper and White Paper policy legislation.
- (2) Provincial and national legislation.
- (3) Assigned legislation.
- (4) Instruments of subordinate legislation, proclamations and regulations.

Only statement (1) is incorrect. See Botha (2012) pages 15-17, paragraph 2.1 and Botha (2012) pages 33-34, paragraph 2.3.

## Question 3

**Subordinate legislation is sometimes also referred to as ...**

- (1) original or supreme legislation.
- (2) direct or indirect legislation.
- (3) secondary or delegated legislation.
- (4) primary legislation.

Only statement (3) is correct. See Botha (2012) pages 25-29, paragraph 2.2.2(c).

## Question 4

**Section 13 of the Interpretation Act 33 of 1957 states that legislation may commence ...**

- (1) when it is published in the *Government Gazette* or on a date specified in the legislation or on an unspecified date still to be proclaimed by the President or the Premier of a province.
- (2) when it is published in the *Government Gazette* or on a date specified in the legislation or when it is published in a national newspaper.
- (3) when it is published in the *Government Gazette* or on an unspecified date still to be proclaimed by the Minister of Justice and Constitutional Development.
- (4) when it is published in the *Government Gazette* or on a date specified in the legislation or at the time when it becomes known throughout the country through mass information campaigns/sessions.

Only statement (1) is correct. See Botha (2012) pages 49-50, paragraph 3.3.2(a) – (c).

## Question 5

**A directory statutory provision requires ...**

- (1) exact compliance.
- (2) direct compliance.
- (3) strict adherence.
- (4) substantial compliance.

Only statement (4) is correct. See Botha (2012) pages 175-177, paragraph 8.1.

## Question 6

In *Bezuidenhout v AA Mutual Insurance Association Ltd 1987 (1) SA 703 (A)* the court held the following:

- (1) A word or words with an imperative or affirmative character indicate a peremptory provision.
- (2) Words in a negative form indicate a peremptory connotation.
- (3) The word “shall” is a strong indication that the provision is peremptory.
- (4) If the provision is formulated in flexible or vague terms, it is an indication that it is directory.

Only statement (3) is correct. See Botha (2012) pages 177-178, paragraph 8.2.1.

## Question 7

**Grammatical interpretation focuses on:**

- (1) The clarification of the meaning of a particular constitutional provision in conjunction with the Constitution as a whole.
- (2) A construction that is congruent with the aim and purpose of the provision and with fundamental constitutional values must be determined.
- (3) The term refers to the process by means of which the court examines international law and the constitutional decisions of foreign courts.
- (4) The linguistic and grammatical meaning of the words, phrases, sentences and other structural components of the text.

Only statement (4) is correct. See Botha (2012) pages 192-193, paragraph 9.3.2(a).

## Question 8

**Comparative interpretation entails:**

- (1) That the *travaux preparatoires* of the Constitution may be consulted as an external aid, but they cannot be the deciding factor.
- (2) A process during which the court examines international law and the constitutional decisions of foreign courts.
- (3) An acknowledgement of the importance of the role of the language of the constitutional text.
- (4) That the values and moral standards underpinning the Constitution must be taken into account throughout.

Only statement (2) is correct. See Botha (2012) pages 194-195, paragraph 9.3.2(e).

## Question 9

**Fill in the missing words. According to your prescribed textbook, the various dimensions of the “practical inclusive method of interpretation” include the language or grammatical aspect, the systematic aspect, the ... aspect, the historical aspect and the ... aspect.**

- (1) value-based or teleological; comparative
- (2) contextual; textual
- (3) peremptory; directory
- (4) internal; external

Only statement (1) is correct. See Botha (2012) pages 105-110, paragraph 5.3.4.

**Question 10**

**In the case of ... the court acknowledged the unqualified application of the preamble to the Constitution.**

- (1) *Public Carriers Association v Toll Road Concessionaries (Pty) Ltd* 1990 (1) SA 925 (A)
- (2) *Qozeleni v Minister of Law and Order* 1994 (3) SA 625 (E)
- (3) *Brown v Cape Divisional Council* 1979 (1) SA 589 (A)
- (4) *Chotabhai v Union Government* 1911 AD 24

Only statement (2) is correct. See Botha (2012) pages 118, paragraph 6.1.2(b).

**Question 11**

**What does the term “repeal” refer to in the context of statutory interpretation?**

- (1) The process whereby legislation is declared unconstitutional.
- (2) The process whereby legislation is invalidated.
- (3) The process whereby legislation is removed from the statute book.
- (4) The process whereby courts declare a statute legally unacceptable.

Only statement (3) is correct. See Botha (2012) pages 71-76, paragraph 4.3.2(b).

**Question 12**

**The presumption that legislation does not intend to change the existing law more than is necessary may be rebutted in the following circumstances. Which of the following is correct?**

- (1) If the legislation clearly provides that the common law is being altered.
- (2) If the legislation contradicts the common law in a minor way.
- (3) If the legislation can be interpreted in a way that is in accordance with existing law.
- (4) Where the legislation is plainly not intended to alter the course of the common law.

Only statement (1) is correct. See Botha (2012) page 78, paragraph 4.5.1.

**Question 13**

**Botha identifies three false assumptions that textualists make about the law-making function of the courts. Which of the following is NOT one of the assumptions?**

- (1) They confuse the modification of the meaning of legislation with the literal modification of the text or language of the legislation.
- (2) They are willing to accept a literal interpretation of a statute which goes beyond the purpose of the legislation.
- (3) They rely on the doctrine of parliamentary supremacy, which has been replaced by the Constitution.
- (4) They rely on the common-law presumption that the legislature does not intend futile, meaningless and nugatory legislation.

Only statement (4) is incorrect. See Botha (2012) pages 161-163, paragraph 7.2.3.

**Question 14**

**The *eiusdem generis* rule can be applied where ...**

- (1) the specific words have not already exhausted the genus.
- (2) there is no common quality or common denominator.

- (3) the legislature's intention does not support restrictive interpretation.
- (4) the order in which the words appear is of high importance.

Only statement (1) is correct. See Botha (2012) pages 170-172, paragraph 7.3.2(a).

### Question 15

**In which case was it stated that a supreme constitution must be given a generous and purposive interpretation?**

- (1) *Nyamakazi v President of Bophuthatswana* (1994) 1 BCLR 92 (B)
- (2) *Nortje v Attorney General of the Cape* 1995 (2) SA 460 (C)
- (3) *Shabalala v The Attorney-General of Transvaal* 1996 (1) SA 125 (CC)
- (4) *S v A Juvenile* 1990 (4) SA 151 (ZSC)

Only statement (3) is correct. See Botha (2012) pages 189-192, paragraph 9.3.1.

## 4 FORMAT OF THE OCTOBER/NOVEMBER 2014 EXAMINATION PAPER

The Department of Examinations will inform you shortly of the date, time and venue of the examination. The examination paper counts 100 marks and you will have two hours in which to complete the paper. You must answer all the questions. Below you will find a guideline on the format of the paper for the October/November 2014 examination. We hope that you will find it useful in preparing for the examinations.

### Question 1

Question 1 consists of 20 multiple - choice questions and carries a total of **20 marks** (1 mark for each question).

**Question 2** comprises one question only. Your answer for this question must be in the form of an essay and the question carries a total of **50 marks**. For an example of how the question will be structured, please refer to Assignment 01 for this semester. Question 2 will be structured in a similar manner.

**Question 3** comprises four sub-questions and carries a combined total of **30 marks**.

- (a) an essay-type question (Explain...) **(10 marks)**
- (b) a short question (List...) **(5 marks)**
- (c) a short question (Distinguish...) **(5 marks)**
- (d) a combination of two short questions (Briefly explain ...) **(10 marks)**

The examination questions will cover the whole textbook and the study guide. No area of the work can be singled out as more important than another. Case law may be included under the shorter questions, the longer questions and the multiple-choice questions. You will frequently be asked to give or discuss examples from case law. For this reason, you should study all the cases in the study guide. You should also study the cases in the grey areas in the textbook, as well as those cases from which Botha quotes extensively. Please refer to section 5 of this tutorial letter for the topics or themes that will be covered in questions 2 and 3 of the examination paper.

## 5 ADDITIONAL SELF-EVALUATION QUESTIONS

During the assessment of the assignments and examination papers for this module, it became apparent to us that students do not know how to answer questions. We have therefore decided to include a set of additional self-evaluation questions in this tutorial letter. We have also decided to provide you with a guideline on how to answer these questions. Please work through the questions carefully.



**YOU SHOULD CONSIDER THESE QUESTIONS VERY CAREFULLY AS THEY DEAL WITH THE TOPICS OR THEMES THAT WILL BE COVERED IN QUESTIONS 2 AND 3 OF THE FORTHCOMING EXAMINATION.**

### QUESTION 1

- (a) With reference to *Commercial Union Assurance Co v Clark* 1972 (3) SA 508 (A) distinguish between directory and peremptory provisions. (15)

**Answer:**

The answer to this question involves two components. You first need to distinguish between directory and peremptory provisions. Peremptory provisions require exact compliance whereas directory provisions require substantial compliance. Non-compliance with a peremptory provision renders the ensuing act null and void, whereas failure to comply with a directory provision may be condoned by the court. In other words, non-compliance does not result in the nullity of the act. Secondly you need to state the facts of the *Commercial Union Assurance* case and explain the judgment of the court in detail. Please refer to pages 78-79 of the study guide in this regard.

- (b) Compare the orthodox text-based (literal) and purposive (text-in-context) approaches to statutory interpretation (20)

**Answer:**

You may approach the answer to this question in one of two ways: You could either compare the text-based and purposive approaches alongside each other in a table by highlighting their differences and similarities **OR** you could merely explain what each of the individual approaches entails. Examples of relevant case law must be quoted throughout. Please refer to paragraph 5.2.1, which appears on pages 32–37 of the study guide and paragraph 5.3.1, which appears on pages 91–97 of the prescribed textbook for an explanation of the orthodox text-based (literal) approach to statutory interpretation. Also refer to paragraph 5.2.2, which appears on pages 37–40 of the study guide and paragraph 5.3.2, which appears on pages 97–99 of the prescribed textbook for an explanation of the purposive (text-in-context) approach to statutory interpretation. [35]

### QUESTION 2

- (a) What effect has section 39(2) of the Constitution had on statutory interpretation in South Africa? (15)

**Answer:**

When answering a question on section 39(2) of the Constitution, you should always start by quoting the section. Section 39(2) provides that: “When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”.

Section 39(2) of the Constitution prescribes the contextual or purposive (text-in-context) approach to statutory interpretation. You must discuss why it can be argued that the section prescribes a purposive approach, even though it does not say so explicitly. See paragraph 5.2.3 in the study guide and paragraph 5.3.3 in the prescribed textbook. Remember that section 39(2) is a peremptory provision. This means that every interpreter of legislation **MUST** use the interpretive process as a means of promoting the aim, spirit and purport of the Bill of Rights. The interpreter can no longer be satisfied by plain meanings or so-called clear, unambiguous texts (without regard to the underlying purposes of those texts).

In your answer, you should also discuss the judgments in the cases of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) and *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 (1) SA 545 (CC) to substantiate your arguments further. See paragraph 5.2.3 in the study guide and paragraph 5.3.3 in the prescribed textbook.

- (b) **With the aid of relevant case law, explain what you understand by the terms “reading-in”, severance, and “reading-up”.** (10)

**Answer:**

**“Reading in”:** Reading-in is a more drastic remedy used by the courts to change legislation in order to keep it constitutional. In exceptional circumstances the court will ‘read’ something into a provision in order to rescue a provision, or a part of it.

**Severance:** In practical terms severance is the opposite of reading in. The court will try to rescue a provision from unconstitutionality by cutting out the offending part of the provision to keep the remainder constitutional and valid. Before severance can be applied, the two requirements must be met: First, it must be possible to separate (sever or cut out) the unconstitutional (bad) part of the provision from the rest (good). Secondly, what remains of the provision must still be able to give effect to the purpose of the legislation

**“Reading-up”:** Reading-up takes place when there is more than one possible reading of the legislative text, and a more extensive reading is adopted in order to keep the legislation in question constitutional.

The relevant case law here is: *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC), *Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison* 1995 (4) SA 631 (CC) and *Daniels v Campbell* 2004 (5) SA 331 (CC). Here you need only discuss the judgments of the courts.

- (c) **List the documents that, although they are published in the Government Gazette, do not constitute legislation.** (5)

**Answer:**

Please refer to paragraph 2.3 which appears on pages 33-34 of the prescribed textbook.

[30]

### QUESTION 3

- (a) **With reference to *R v Sillas* 1959 (4) SA 305 (A) and *R v Mazibuko* 1958 (4) SA 353 (A) explain the presumption that legislation only applies to the future.** (10)

**Answer:**

For the answer to this question you need to discuss the facts of each case and the judgments of the relevant courts. Please refer to paragraph 3.4 which appears on pages 55-62 of the prescribed textbook.

- (b) **With reference to one relevant case, state whether the adoption of the purposive approach in our law has had any effect on all previous attempts to determine whether a statutory provision is directory or peremptory?** (10)

**Answer:**

In *African Christian Democratic Party v Electoral Commission* 2006 (3) SA 305 (CC) the Constitutional Court confirmed that the adoption of the purposive approach in our law has rendered obsolete all the

previous attempts to determine whether a statutory provision is directory or peremptory on the basis of the wording and subject of the text of the provision. In order to complete your answer for this question, you need to explain the facts of the *African Christian Democratic Party* case and discuss the judgment of the court in detail. Please refer to pages 79-80 of the study guide in this regard.

- (c) With reference to *Director of Public Prosecutions, Western Cape v Prins 2012 (2) SACR 183 (SCA)* and *R v Forlee 1917 TPD 52*, explain the presumption that legislation does not contain futile or nugatory provisions. (15)

**Answer:**

For the answer to this question you need to discuss the facts of each case and the judgment of the relevant courts. Please refer to paragraph 6.2.4 which appears on pages 133-138 of the prescribed textbook.

[35]  
{100}

## 6 CONCLUSION

Please contact us if you experience any problems with the module. A little bit of study every day is worth far more than cramming a week before the exam!

Good luck with your studies.

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