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**Durban**  
6 September 2008  
08h30-12h50  
Unisa Regional Office (check for venue on the notice board)  
Stanger Street  
Durban

### **3 THE MAY/JUNE 2008 EXAMINATION PAPER**

#### **3.1 General remarks**

Of the 1287 students who registered for this module in the first semester, 908 wrote the examination. Of those who wrote the examination, 466 passed and 442 failed (a pass rate of 51.32%). 71 obtained distinctions (75% or more). What can we deduce from these statistics? It is certainly an improvement from the previous semester. We hope students continue on this path. Although Interpretation of Statutes is by no means an easy subject, it is nevertheless not impossibly difficult to pass, provided that you work through the tutorial matter a number of times to grasp the basic concepts and that you understand their application. This is unfortunately the only way to master this course. "Spotting" for the examination is out! Furthermore, it would seem that most students had knuckled down and studied the work, which is the only way to go about mastering the module.

**Problem-type questions** require students to **APPLY** their knowledge of the basic principles of administrative law to concrete factual situations. Many students merely write down the particular principle (provided they have recognised the principle!) and leave it at that. A mere repetition of the relevant principles is inadequate, since it does not demonstrate to the examiner your ability to apply your knowledge to the particular legal problem. On the other hand, if you do not know the answer to the problem, at least show that you do know the theory by writing it down. This will at least earn you some marks. So, do not start off by writing "yes" or "no". **First write down the principle and the rules or requirements governing the principle, and then apply this to the set of facts. Your conclusion is the last part of the answer.** I will demonstrate this during the discussion.

**A last remark: the use of SMS language is completely unacceptable in this examination. Language is your tool as a lawyer. You must prove that you are able to use language correctly.**

#### **3.2 The May/June examination paper**

##### **QUESTION 1**

- (a) *If there is a conflict between the signed version of the Act (English) and the Xhosa version (both versions published in the Government Gazette), how will the rules of statutory interpretation resolve this conflict? In your answer you should also mention the difference between original and subordinate legislation and give one example of each. (10)*

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Original legislation derives from the complete and comprehensive legislative capacity of an elected legislative body, also known as direct or primary legislative capacity, since it is derived directly from the Constitution, or is assigned by another Act of parliament.

#### Examples

Any one the following:

(1) Act of parliament (2) new provincial acts (3) provincial ordinances (4) legislation of the former homelands (5) legislation of the former TBVC states (6) new municipal legislation.

Delegated legislation is legislation by the administration. Delegated legislation is also referred to as secondary or subordinate legislation. However, since all categories of legislation are subordinate to the supreme Constitution, the term delegated legislation is preferred.

#### Examples

Any one of the following:

(1) Proclamations (2) regulations (3) existing provincial proclamations and regulations (1961-1994) (4) new provincial proclamations and regulations after 1994.

See Botha 7.2.1. In the past, before the 1993 interim Constitution, the signed version of the text was decisive if there was conflict between the versions. The Constitution itself determines in section 240 that **in the case of the Constitution**, the English text is decisive. That is also because there is no other official version of the Constitution. It makes no mention of conflict in other legislation.

The signed version of the text does not carry more weight merely by reason of the signing. The most important rule is that when there is no irreconcilable conflict, the two versions should be read together to find the true meaning of the text in the light of the context and purpose of the legislation (*Zulu v Van Rensburg*). If the one version has a wider meaning than the other, the common denominator should be found. (*Jaffer v Parow Village Management Board*). Only when this proves impossible, will the signed version, in this case the English version be decisive. One may even refer to the unsigned version of the text to determine the purpose of the legislation (*CIR v Witwatersrand Association of Racing Clubs*).

In practice all versions of subordinate legislation are signed. In case of conflict the texts are read together to determine the true meaning. In the case of irreconcilable conflict, the court will favour the version which benefits the affected party. Such an approach underscores the presumption that the legislator does not intend futile or nugatory provisions. If the irreconcilable conflict leads to subordinate legislation which is vague and unclear, the court may declare it invalid.

All versions of the text should be read together from the start because they are all part of the structural whole of the same text. The arbitrary way of deciding that the signed text carries more weight, is a statutory confirmation of the literal approach, ignoring the purpose of the legislation completely. It is suggested that in the case of an irreconcilable conflict, the version which promotes the spirit and object of the Bill of Rights best, should have preference.

The Constitution also provides (in ss 82 and 124) that the signed copy of an Act of Parliament/provincial Act is conclusive evidence of the provisions of the Act. **These provisions are concerned with the existence of the Act and has no relevance to its interpretation.**

- (b) *Identify the long title of the Children's Act and explain if and how it can be used to interpret other sections of the Children's Act.* (6)

There is no need to repeat the entire long title. Any sensible indication of where it can be found is acceptable, for instance, "To give effect ... connected therewith".

The long title contains a short description of the subject of the legislation. It forms part of the legislation which is considered by the legislator during the legislative process. Its value to determine the purpose of the legislation will always depend on the information it contains. The court may look to the long title to establish the object and purpose of the legislation (*Bhyat v Commissioner for Immigration*)

- (c) *In terms of section 29(3) of the Act, the court, hearing an application contemplated in subsection (1), may grant the application unconditionally or on such conditions as it may determine, or the application may be granted only if it is in the best interests of the child. You appear for the applicants for adoption and claim that this section is unconstitutional. List and explain the five methods of Constitutional interpretation that must be applied in this matter.* (10)

**Grammatical interpretation** – It acknowledges the importance of language in the text, but does not imply a return to the literal approach.

**Systematic/contextual interpretation** – This method concentrates on the meaning of a specific provision in the context of the whole text and stresses the need for words and phrases not to be read in isolation.

**Teleological interpretation** – It emphasises the fundamental constitutional values and a value-orientated interpretation. (Please pay attention to the spelling here – it has nothing to do with religion!)

**Historical interpretation** – It refers to the historical context of the legislation, the mischief rule, the history of the legislation, but cannot be the decisive factor in determining the final meaning of the text.

**Comparative interpretation** – It refers to the process (where possible and necessary) during which the court examines international law and foreign law.

- (d) *The literal approach was popular in the legal systems influenced by English law. List four factors that led to the adoption of the textual approach in England as well as the criticism against the text-based literal approach to statutory interpretation.* (9)

- The narrow interpretation of the *trias politica* doctrine and parliamentary sovereignty led to the role of the judiciary being reduced to the mechanical interpretation and application of the will of the legislator as found in the legislative text. The intention of the legislator is to be found in the text alone.
- The doctrine of positivism – that which the state has regulated, is the law. The task of the judiciary is limited to an analysis of the law as is and not to what it should be.

- The *common law* tradition in English law meant that English courts traditionally have a lawmaking function as regards the common law. Legislation was the exception which altered the common law as little as possible.
- English legislation was formulated carefully and in great detail for the sake of legal certainty. This led to the maxim that everything intended by the legislator was contained in the legislative text.

The criticism against the literal approach is the following:

- The normative role of the presumptions is reduced to the 'last resort'.
- Words are regarded as the primary indicator of the legislative intention.
- Interpretative aids are disregarded unless the text is unclear or ambiguous. The context plays no role.
- The 'intention of the legislator' is dependent on the clarity of the legislative language to the court.
- Few texts are so clear that they are not open to more than one interpretation. The discipline of interpretation of statutes is evidence that legislative texts are not always clear and unambiguous.

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## QUESTION 2

- (a) *In terms of the regulations under the Act, the Director-General must respond in writing to any request for an inquiry made to him/her within 21 working days. Peter lodged a request for an inquiry on 2 June 2006. What would be the latest date that the Director-General may respond? Explain in detail the statutory method of the computation of time in days (Section 4 of the Interpretation Act) with reference to case law.* (7)

Section 4 of the Interpretation Act determines that days are computed by excluding the first day and including the last day of the period. The latest day for the response would thus be 23 June 2006.

Section 4 will only be used if the legislator made no other arrangement in the legislation. (*Kleynhans v Yorkshire Insurance Co*). In *Brown v Regional Director, Department of Manpower* it was held that section 4 is meant to determine the end of the period and not its beginning. The period commences when the particular right originates.

- (b) *Can the repealed provisions of legislation still have an influence on the interpretation of legislation? Discuss with reference to case law.* (8)

The repealed provision remains in effect until the new provision comes into operation. In *S v Koopman* the accused was found guilty of an offence and inter alia sentenced with an endorsement on his driving licence. New legislation had come into being but the relevant sections were not yet in operation. The court held that the previous legislation was still in effect and the sentence valid.

In *Solicitor-General v Malgas* the court held that when provisions of an earlier statute (Act) had been incorporated in later legislation, the repeal of the earlier statute did not affect the later statute. (Also in *End Conscription Campaign v Minister of Defence*).

*Morake v Dubedube* concerned legislation which had been partially repealed. The rest of the Act had to be interpreted in its context which included the repealed sections although these sections could not have direct application.

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### QUESTION 3

- (a) *The English text of the Act was signed by the President. Explain the relevance, if any, of this fact for the interpretation of the Act. Refer to the way legislative texts in other official languages may be used in the interpretive process.* (6)

In the past, before the 1993 interim Constitution, the signed version of the text was decisive if there was conflict between the versions. The Constitution itself determines in section 240 that in the case of the Constitution, the English text is decisive. It makes no mention of conflict in other legislation.

The signed version of the text does not carry more weight merely by reason of the signing. The most important rule is that when there is no irreconcilable conflict, the two versions should be read together to find the true meaning of the text in the light of the context and purpose of the legislation (*Zulu v Van Rensburg*). If the one version has a wider meaning than the other, the common denominator should be found. (*Jaffer v Parow Village Management Board*). Only when this proves impossible, will the signed version, in this case the English version be decisive. One may even refer to the unsigned version of the text to determine the purpose of the legislation (*CIR v Witwatersrand Association of Racing Clubs*).

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All versions of the text should be read together from the start because they are all part of the structural whole of the same text. The arbitrary way of deciding that the signed text carries more weight, is a statutory confirmation of the literal approach, ignoring the purpose of the legislation completely. It is suggested that in the case of an irreconcilable conflict, the version which promotes the spirit and object of the Bill of Rights best, should have preference.

- (b) *Legislation may come into operation in three ways. Name them.* (3)

By proclamation in the *Government Gazette*, by a date in the legislation, by a date to be determined by the President in a Proclamation.

- (c) *Distinguish between adoption and promulgation of legislation* (6)



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Adoption is the final stage of the passage of legislation through the legislative chamber. It is when the legislator passes the final version of the legislation. Promulgation is the publication of the legislation in the *Government Gazette* or the *Official Gazette*. It is the announcement of the legislation to the public.

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#### QUESTION 4

(a) Discuss why the judgment in each of the following cases is important for the theory and practice of statutory interpretation:

(i) *Public Carriers Association v Toll Road Concessionaries (Pty) Ltd* 1990 1 SA 925 (A).  
(10)

The interpretation concerned the meaning of 'an alternative road' in the legislation. The court followed the literal/textual approach by giving the words their ordinary grammatical meaning. If this would lead to an absurdity so glaring that the legislature could not have contemplated it, secondary and tertiary aids could be employed. The words in this case, the court found, could have many meanings, including the two argued for by the parties.

Both were linguistically feasible. None of the secondary or tertiary aids could resolve the ambiguity. Only then did the court turn towards the purpose of the legislation and held that although the literal interpretation was firmly entrenched in our law, one may investigate the purpose of the legislation if this would reveal which of more than one meaning was intended by the legislature. The court held that the purpose of the provision was to enable road users to reach their destination without having to pay toll fees and this could be done without a completely separate roadway.

The importance of the case for interpretation is that although finding the purpose of the legislation to determine the intention of the legislature was very unusual it is still an example of the literal/textual approach, since the purpose is only sought after all else had failed.

(ii) *Jaga v Dönges* 1950 4 SA 653 (A). (10)

See Botha 5.2.3 and the corresponding sections in the Study Guide. The facts and the two judgments and the principles laid down in each are summarised there. The case remains important because, although it was decided under apartheid at a time when the textual approach to interpretation dominated the scene, it contains a minority judgment by Schreiner JA in which the contextual approach was followed. This minority judgment remains the *locus classicus* of the contextual approach in our law. In *Bato Star* the Constitutional Court referred to this minority judgment in order to clarify the contextual approach that is now prescribed under section 39(2) of the Constitution. Although it does not state the fact explicitly, section 39(2) constitutionally entrenches the contextual approach (or also the purposive approach) to statutory interpretation in our law. It is a peremptory provision that compels every court, tribunal and forum to "promote to object, spirit and purport of the Bill of Rights" whenever legislation is interpreted. This means that the values underlying the Bill of Rights and the Constitutional order (see the preamble and the founding provisions) should be promoted when the legislative text is interpreted. The question can no longer be "what is the ordinary meaning of the text" but "how can the text be interpreted (within the reasonable bounds of its language) so as to promote the spirit of the Bill of Rights".

(b) *Peter and Jane got married in 2007. They are not South African citizens. They intend to apply for adoption of a South African child. In terms of section 25 of the Children's Act,*

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*when application is made in terms of section 24 by a non-South African citizen for guardianship of a child, the application must be regarded as an inter-country adoption for the purpose of the Hague Convention on Inter-country Adoption and Chapter 16 of this Act. Explain to Peter and Jane how peremptory provisions differ from directory provisions and whether the application will be successful (refer to at least two examples from the case law).* (15)

Peremptory provisions require exact compliance and failure to comply with a peremptory provision will leave the ensuing act null and void, while directory provisions require substantial compliance. Non-compliance with a directory provision will not result in ensuing acts being null and void. The court will usually decide whether there has been sufficient compliance with the provision. There are a number of semantic and jurisprudential guidelines that assist to determine what degree of compliance would be sufficient in each case. However, none of these guidelines are decisive. The overriding question is what would be just, equitable (fair) and practical in the light of the aim and purpose of the legislative provision.

In *Weenen v Van Dyk* the court had to decide whether the failure of a municipality to publish three separate notices in a newspaper meant that the rates and taxes in question were not due and payable. The municipality published only one notice. The Court held that the failure to comply with the procedure was fatal and that the taxes were accordingly not due. The Act used imperative language "shall publish" and the object or purpose of the three notices was to establish a democratic system of checks and balances and accountability. That object could not be met if only one notice was published. The provision was peremptory and had to be strictly complied with.

In *Commercial Union v Clarke* the court had to decide whether the failure of a road user to send his claim by registered post meant that the road user could not claim. The road user sent the claim by ordinary post. The court held that the failure to comply with the procedure was not fatal and that the claim could still be instituted. The court took the imperative nature of the Act ("shall be sent") into consideration but held that it must still decide what is just, fair and practical given the object of the provision. The purpose of the provision was to protect the insured driver by providing definite proof of the date on which the claim was lodged. The road user took the risk upon himself when he sent the claim by ordinary mail but this did not prejudice the insurance company in any way. It would thus be just, fair and practical to allow the claim to proceed.

In spite of the imperative language one must look at the purpose of the provision and determine what is just, fair and practical in any given situation. Students can present an argument to the contrary as well provided they apply the correct test.

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#### **4 CONCLUSION**

Please do not hesitate to contact us if you experience any problems with the study material and need help. Good luck with your studies. A little bit of study every day is worth far more than cramming a week before the exam!

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### QUESTION 1

The first question is generally straightforward to lead you into the paper gently. It required a common sense understanding of the course and for you to show off what you had learnt.

(a) *List the different types of original legislation.* (5)

Any five of the following would have gained the required marks:

Acts of parliament, new provincial Acts, existing (old) provincial ordinances, legislation of the former homelands, legislation of the former TBVC states, new municipal legislation.

It is, however, important that the terminology is correct. Municipalities do not enact ordinances, and presently neither do provinces, etcetera.

(b) *Explain the different meanings of the maxim 'iudicis est ius dicere sed non dare'.* (10)

Very few of you answered this question correctly. Many had long discussions on the lawmaking function of the judge, or how this function operated in terms of the different interpretation approaches, but that was not what the question asked.

In a narrow sense, the maxim means that it is the function of the courts to interpret, and not to make the law (including legislation). The court is bound by the clear letter of the law and *iudicis est ius dicere sed non dare* means that only the legislature may supplement or alter deficiencies in legislation (*Harris v Law Society*). This approach is derived from a misunderstanding of the doctrine of separation of powers and relied on by the followers of the textual approach. In the light of section 39 of the Constitution, this approach must be incorrect, since it completely negates all lawmaking on the part of the courts, such as every time a judgment is delivered (because of the *stare decisis* doctrine). Courts are enjoined by the Constitution to promote the spirit of the Bill of Rights when interpreting legislation and in developing the common law and customary law.

On the other hand, one could argue that the maxim means that it is not the function of the courts to make laws (as in legislation). Such a view is reconcilable with our new constitutional dispensation, since the doctrine of separation of powers is implicit in our Constitution. In terms of this doctrine the three functions of government should be performed by different branches of government. It is the responsibility of the legislature as the representative of the people to make legislation. However, this does not mean that the courts may not practise modificatory interpretation to ensure that the purpose and the text of legislation are in harmony. This translation would then also fall comfortably within the contextual approach.

(c) *Write notes on the common law methods of computation of time for days.* (10)

Here again, if you had studied the work, you would have found the question easy. You either knew it or you didn't. It is virtually impossible to try and work it out as you go. Again, though, you must read the question carefully. You were asked for the **common law methods**.

Ordinary civil method (computation civilis): The first day of the prescribed period is included and the last day excluded. The last day is regarded as ending at the moment it begins, as it were, midnight the previous day. (*Minister van Polisie v De Beer* and not *Minister van Polisie v Ewels*, as most students wrote.)

Natural method (*computatio naturalis*): The prescribed time is calculated from the hour or even the minute of an occurrence to the corresponding hour or minute of the last day in question (*de momento in momentum*).

Extraordinary civil method (*computatio extraordinaria*): Both the first and the last day of the period are included.

By the way, if you insist on using the Latin terminology, make sure you get it right!

## QUESTION 2

(a) Briefly discuss the mischief rule. (10)

The mischief rule refers to conditions prevailing before and during the adoption of the legislation being examined. It was first laid down by Lord Coke in *Heydon's case*, and forms the cornerstone of the contextual approach. It investigates the surrounding circumstances of the legislation and poses four questions to be answered in order to establish the purpose of the legislation.

- 1 What was the legal position before the legislation was adopted?
- 2 What was the mischief or defect not provided for by existing legislation or the common law?
- 3 What remedy was provided by the legislature to solve this problem?
- 4 What was the true reason for the remedy?

In *Hleka* it was held that the object of the rule is to examine the circumstances that led to the legislation in question. In *Santam Insurance v Taylor* the rule was used to construe the Compulsory Motor Vehicle Insurance Act because of the incomprehensible language of the Act. In *Qozeleni* the court compared the suggested approach to the interpretation of the Constitution to the mischief rule and in *Diepsloot Residents* (not residence!) the background developments of the dismantling of apartheid were used to interpret the purpose of legislation.

(b) Explain why it may be said that section 39 of the 1996 Constitution requires a contextual approach to interpretation. (15)

Section 39(2) requires the interpreter to promote the spirit, object and purport of the Bill of Rights when interpreting any legislation or developing the common law or customary law. This is peremptory which means that the aim and purpose of legislation must be reviewed in the light of the Bill of Rights. The interpreter is forced to consult extra-textual factors when interpreting legislation. The textual approach limits the interpreter to the text of the legislation unless the text is unclear or ambiguous. Section 39 has no such limitation. The Bill of Rights must be promoted in all circumstances irrespective of the clarity of the text. Factors and circumstances outside the legislative text are immediately involved in the interpretation process. (Please note: the textbook states, "before the text is **considered**". This is different from saying, before it is **read**.) This is contrary to the textual approach and therefore points to a contextual approach.

In order to promote the Bill of Rights it has to be interpreted and section 39(1) states how this should be done. This provision is also peremptory. The court must promote the values which underlie an open and democratic society based on human dignity, equality, and freedom as well as consider international law. This would usually be international human rights law which consists of a number of international documents and rules of customary international law. The court may also refer to foreign law, which (in the form of foreign case law) is, according to NJ Botha, one

of the sources of international human rights law. It is clear that here, too, the interpreter must consider matters which are not confined to the text to be interpreted. Since this is in direct conflict with the textual approach, it points strongly to a contextual approach to interpretation.

Reference to or discussion of section 39(3) was not really relevant to the question.

**QUESTION 3**

- (a) *Write a long title for the new Electoral Act in terms of which the 2004 general election will be conducted.* (5)

The purpose of this question is clearly to establish whether you know what a long title is. It is a short description or very brief summary of the subject matter of the legislation. Depending on its content, it may be a good indicator of the purpose of the legislation but it must be clearly distinguished from a section setting out the clear legislative purpose of the Act. It will usually start with words such as: "To provide for", "To give effect to", or "To regulate" and end with "and matters connected therewith". You could, therefore have written something like this:

To provide for the holding of a general election in the country, for the registration of political parties, for the nomination of candidates, for the appointment of an Election Commission, for the determination of voting stations and electoral officers, for the counting of votes and for matters incidental thereto.

If you look carefully, it gives you a synopsis of the Act from which you can deduce the purpose but it does not state the purpose expressly.

- (b) *List five words or phrases you would include in the definition section of the new Electoral Act, with a definition of each.* (10)

Words used in a definitions clause are words that will be used in the legislation concerned, but that also have a particular meaning in that legislation. You do not therefore include words that have their ordinary or usual meaning. The words must also obviously relate to the legislation in question. Words/phrases such as "South Africa", "President", "provinces" are only included if you give them a meaning which is different from the usual meaning, but it must be at least realistic in the circumstances. That is why for instance "Minister = Minister of Home Affairs" is usually a good one, because it determines which Minister is relevant and obviates the necessity of writing out the whole phrase each time it is used in the legislation. You had a wide choice here and marks were allocated fairly leniently.

- (c) *You are approached by Mr I M Alofa, who has been dismissed by his employer for being absent from work for two months. Section 10 of the Labour Relations Act dealing with dismissals on the ground of truancy, provides that an employer **must** first afford such an employee the opportunity to be heard. According to Mr Alofa he was not given this opportunity. Is the dismissal valid? Advise Mr Alofa with reference to the rules and principles of interpretation. Would your advice be different had the section read "the employer **may** afford employees an opportunity to make representations"?* (10)

Please always keep in mind which subject you are dealing with. Some students wrote long discussions on fundamental rights, labour law and all sorts of subjects in answer to this question. Try and confine yourself to the interpretation principles in a problem question. Clearly, section 39

instructs an interpreter to promote the Bill of Rights which brings you to questions of administrative law and so forth in the set of facts, but a mention of that principle is enough. You are not expected to have a detailed knowledge of the Bill of Rights, aspects of fundamental rights or labour legislation in this module.

While on this point, a hearing in this sense is not a court case and the fundamental rights pertaining to court procedure and section 34 of the Constitution have no place here. Equally, Mr Alofa is not an accused, and the fundamental rights pertaining to accused persons do not figure in the problem.

The first obvious conclusion is that there is a peremptory provision in the initial set of facts. A peremptory provision requires exact compliance and failure to comply exactly will leave the ensuing act null and void – as if there had been no dismissal in this case. This conclusion is indicated by the word “must” in terms of the semantic guidelines which have been developed by the courts. This is not an example of literal interpretation because the purpose of the legislation remains a decisive factor. In the alternative facts the word “may”, also in terms of the semantic guidelines, indicates a discretion and will be interpreted as directory. A directory provision will not result in the nullification of the action and substantial compliance may result in condonation by the court of the action. In this set of facts, though, it seems that there is a total discretion on the employer and Mr Alofa would have to abide by the dismissal, if one left fundamental rights and administrative law out of the equation. Remember that Wiechers points out that all legislative provisions are in effect peremptory. If this were not the case, they would not be binding rules but non-obligatory suggestions for desirable conduct. The courts have generally followed the contextual approach to the interpretation of peremptory and directory provisions. The language of the provision is read in its context and the purpose of the provision is the decisive factor.

#### QUESTION 4

(a) *When may the courts modify the initial meaning of the legislative text?* (10)

The courts may modify the meaning if it appears that the initial ordinary meaning of the text will not give effect to the aim and purpose of legislation. In each case the purpose of the legislation has to be determined and the initial meaning of the text must be compared to the purpose of the legislation to ensure that effect will be given to the purpose.

Ambiguity, vagueness and absurdity are **indicators** that the initial meaning of the text should be modified. Too many students wrote that the text **will** be modified if it is vague or ambiguous. The initial meaning may only be modified if the purpose can be clearly determined and the purpose, text and context and the Constitution are all compatible with the modified meaning.

Modification was applied by the courts in *Durban City Council and Du Plessis*. It must be emphasised again that it is the meaning that is modified and not the words of the text as it was enacted.

(b) *Discuss the approach of the courts to the use of commission reports in interpreting legislation.* (10)

The reports of commissions of enquiry that give rise to the adoption of legislation, constitute preceding discussions. Commissions of enquiry are sometimes appointed by the President or the Premier to investigate a troublesome or troubling issue. Very often such a commission is chaired

by a retired judge or other legal practitioner, but certainly by someone considered to have expertise in the field. The findings of the commission may then lead to legislation being introduced to deal with the issue. A commission is definitely not part of the legislative set-up and not every piece of legislation is preceded by a commission of enquiry. (These are all statements made in the examination.) The courts seem more prepared to consult the reports of commissions of enquiry preceding particular legislation than parliamentary debates, for instance. Often, however, this will only happen if the provisions are not clear. The use of commission reports was considered by the courts in the following cases:

In *Hopkins* the court decided that prevailing law prevented the use of commission reports. In *De Jager* we see a change in judicial attitude. The court decided that the report of a one-man commission which was largely responsible for the Prescription Act, was an admissible aid in construing the Act. This report was used to establish the purpose of the legislation. In *Nel* the court held that the report may be used only if the provisions of the legislation are ambiguous. This approach was followed in *Vyninde*. In *Dilokong Chrome Mines* it was held that a commission report must be distinguished from the report of a member of a standing committee in the legislature since the latter represents the subjective opinion of the person concerned.

(c) Explain the terms **concretisation** and **contextualisation**. (5)

**Contextualisation** is the process during which the legislative text is read and researched within its total context, using all intra- and extra-textual aids, in an effort to ascertain the purpose of the legislation.

**Concretisation** is the final phase in the interpretation process during which the legislative text, the purpose (which has been determined), the Constitution and the facts of a particular case are harmonised to bring the process to a meaningful conclusion.

## October /November 2002 examination

### QUESTION 1

- (a) Define **original and subordinate** legislation. (10)

Interpretation of Statutes has to do with the rules and principles that apply to the interpretation of legislation. As a student of IOS101-3 you should be able to distinguish between two broad types of legislation, namely **original** and **subordinate** legislation. Original legislation emanates from an elected representative body in any of the spheres of government. Legislation made by these bodies is sometimes called primary legislation because it is derived directly from the Constitution or an Act of parliament. Legislation rarely authorises the enactment of original legislation. In fact, the only "Act of parliament" that authorised the enactment of original legislation was the erstwhile Provincial Government Act of 1961 which empowered the provincial councils to enact ordinances concerning their respective provinces. The law enacted by these bodies was considered original because they were elected bodies.

Subordinate legislation, on the other hand, is delegated legislation. It is subordinate because it derives both its authority and existence from empowering original legislation. Proclamations and regulations are two examples of subordinate legislation. Because of the supremacy of the Constitution, the distinction that only the subordinate legislation could be tested by the courts has been removed. Both original and subordinate legislation can now be tested for constitutionality. The only distinction which remains important is that subordinate legislation is dependent on original legislation for its existence.

- (b) Explain the difference between **proclamation** and **promulgation**. (5)

This question was the easiest. Generally, most students did well on this one. A proclamation is a specific category of subordinate legislation. Promulgation on the other hand is a means of making legislation known to the people. It usually comes into operation on the date it is promulgated, that is, when it is published in the *Government Gazette* or *Provincial Gazette*, unless another date is specified.

- (c) Discuss the role of the common law presumptions in the interpretation of statutes. (10)

Presumptions are the underlying values and principles on which civilised societies are based. According to Du Plessis, presumptions are basic principles of South African law – effective and valid legal norms which determine the application of more specific legal norms. As to the role of presumptions in statutory interpretation, there were two viewpoints in South Africa: On the one hand, the textualists viewed presumption as “mere tertiary rules” to be applied as a last resort when everything else has failed to establish the intention of the legislature.

The second view is that strongly advocated by Du Plessis and Cowen that statutory interpretation must begin and end with presumptions, operating as guidelines throughout the process. Wiechers felt that presumptions operated alongside legislation to ensure adherence to the principle of legality.

The advent of the new constitutional dispensation brought about significant changes in relation to presumptions. When one looks at the Bill of Rights, it appears that many of the values underpinning common law presumptions are to a large extent reflected in the Bill of Rights. This has the effect that these rights may not be overturned by the legislature or ignored by the courts. Therefore, the presumptions are in a much stronger position than before.

## QUESTION 2

- (a) *Discuss the influence of section 39 on the interpretation of statutes. Include a discussion of the approaches before the interim Constitution and a discussion of section 39. (25)*

Prior to 1994 two approaches to statutory interpretation existed. The literal approach, on the one hand, limited the interpreter to the literal meaning of words. According to literalists, if the literal meaning of words was clear, it had to be put into effect and equated with the intention of the legislature. The context of legislation could only be consulted if the wording was unclear or ambiguous.

Contextualists, on the other hand, argued that the interpreter should be able to use all possible aids to establish the purpose/ aim or object of legislation. (Please remember that we do not refer to secondary and tertiary aids in the contextual approach, they are all important depending on the circumstances.)

Section 39 of the Constitution has settled the debate about which of the two approaches mentioned above should be followed. As you all know, section 39 is the interpretation clause. The Constitution is the supreme law in the country (s 2) and cannot, therefore, be ignored. Section 39 deals with two related but separate issues. First, section 39(2) deals with the interpretation of legislation. Secondly, section 39(1) deals with the interpretation of the Bill of Rights. **(Remember to make this distinction when discussing the provisions s 39).**

Section 39(2) states that in interpreting any legislation, the interpreter must promote the spirit, purport and objects of the Bill of Rights. This provision is peremptory. It requires all courts, tribunals or forums to review all legislation in the light of the Bill of Rights.

In order to promote the Bill of Rights, it must be interpreted. Section 39(1) provides that in interpreting the Bill of Rights the values of an open and democratic society based on human dignity, equality and freedom must be promoted. To this end, international law must be considered, and foreign law may also be considered.

Section 39 implies a contextual approach to interpretation. It provides that the spirit of the Bill of Rights must be promoted. This is a peremptory provision which must be adhered to by the courts, tribunals of forums. The Bill of Rights is not part of the legislation you want to interpret – it is always outside the legislation. Therefore it is clear that you are consulting an extra-textual factor, something outside the text and since this is directly in conflict with the literal approach to legislative interpretation, this approach may no longer be used.

**Remember, the literal approach limits you to the text you are interpreting. Deviation from the literal meaning is only permissible if the meaning is unclear or ambiguous. Section 39(2) requires the interpreter to promote the Bill of Rights whenever any legislation is being interpreted, not just when the words used are unclear. Therefore, one cannot use the textual approach anymore.**

Section 39(3) is not really relevant here, so we will not discuss it here.

**QUESTION 3**

(a) *You are asked to interpret a piece of legislation. Name the steps (in the correct order) you would take in doing this. (Do not name the three phases of interpretation.)* (10)

Students are urged to read all the study material when preparing for the examination, including the tutorial letters. Some students ignored this piece of advice and did so at their peril. This question was taken directly from a tutorial letter. In that tutorial letter the steps are listed as follows:

- 1 Read the text.
- 2 Read the text in the context of the Act as a whole.
- 3 Consider it in the light of the Bill of Rights.
- 4 Keep the presumptions in mind.
- 5 Consult intra-textual aids.
- 6 Consult extra-textual aids.
- 7 Use all the above to find the purpose of legislation.
- 8 Compare the purpose with the text.
- 9 Consider final answer in the light of the Constitution and presumptions.
- 10 Apply to the situation at hand.

(b) *Write a **section** to be included in a new **Sub-Economic Housing Act** in which you set out the express legislative purpose of the Act. Your heading should be: **Purpose of this Act.** (NB Do not confuse it with the long title of an Act.)* (5)

This is a question on which you could have saved time and earned marks. In chapter 5 of the textbook different parts of legislation are explained and discussed, namely, the preamble, the long title, express legislative purpose and so on. One aspect of legislation dealt with in this chapter is the express legislative purpose. It provides a more detailed description of the legislative purpose. This is how you could have answered the question:

The purpose of this Act is to provide sub-economic housing as defined in the Act for those people in desperate need for housing. The main objects of the Act are:

- to give effect to the objectives of section 26 of the Constitution
- to give effect to the obligations of the state in terms of section 26 of the Constitution

Statement of Principle



- to provide a framework for the allocation of housing for all
- to promote the participation of people in erecting their own housing

**Please remember that in these practical questions there is never only one correct answer – in fact there could be as many different correct answers as there are students.**

(c) *Jay Walker was arrested in the centre of Johannesburg for not crossing a busy street at a pedestrian crossing provided. At his trial he argued that the municipal bye-law prescribed that the street had to be crossed at the pedestrian crossing, but did not expressly prohibit crossing anywhere else. As the magistrate, what particular rule or principle of interpretation would you use to counter Jay's argument. Discuss.* (5)

Very few students were able to identify the rule involved in this matter. The applicable rule is one of extensive interpretation, that is, interpretation by implication extending the textual meaning of legislation on the ground of reasonable and essential implication that is evident from the legislation. If legislation provides for a specific situation, it is assumed *ex contrariis* that the opposite arrangement will apply to the opposite situation. In the case under discussion, the bye-law provides that pedestrians must cross at the pedestrian crossing. It is assumed *ex contrariis* that they may not cross the street anywhere else.

(d) *Give three examples of the most important international human rights sources.* (5)

This was another easy question. Any of the three sources would have sufficed.

- 1 Charter of the United Nations
- 2 Universal Declaration of Human Rights
- 3 European Convention for the Protection of Human Rights and Fundamental Freedoms
- 4 African Charter on Human and Peoples' Rights
- 5 Customary international law

**QUESTION 4**

(a) *Discuss the demise/ repeal of legislation, ie when does it cease to exist?* (15)

This was another easy question straight out of the last tutorial letter.

- 1 Legislation cannot be abrogated by disuse: it must be repealed by a competent body (*R v Detody*); legislation in force when the Constitution took effect, remains in force until amended or repealed or declared unconstitutional (item 2(1) Schedule 6 of the Constitution).
- 2 If enabling legislation is repealed, all subordinate legislation issued in terms of such enabling legislation also ceases to exist (*Hatch v Koopamal*) unless the new legislation expressly provides otherwise.
- 3 When later legislation repeals (wholly or partially) any earlier legislation and substitutes the repealed provisions, the repealed provisions will remain in force until the new provisions come into operation (s11 of the Interpretation Act)
- 4 If the provisions of earlier legislation are incorporated into any subsequent legislation, the incorporated provisions are not affected if the earlier legislation is repealed: these provisions were actually adopted twice (*Solicitor-General v Malgas*).

- 5 If legislation is partially repealed, the remaining provisions must be interpreted in the context that could include the repealed provisions (*Morake v Dubedube*).
- 6 If X is repealed and re-enacted as Y, all references to X in other legislation must be construed as reference to Y (s 12(1) of the Interpretation Act).
- 7 Section 12(2) of the Interpretation Act is a typical transition provision. All actions, transactions, processes, prosecutions etcetera, which were instituted, but not yet completed, in terms of legislation that has in the meanwhile been repealed, must be completed as if the legislation had not been repealed. It forms a bridge between pending actions and the repealed legislation: the current position is preserved until the pending matter is completed (*Transnet v Ngcezulu*).
- 8 If legislation that changed the common law is repealed, the common law rule is revived (*Rand Bank v De Jager*).
- 9 All court proceedings which were pending when the 1996 Constitution took effect must be completed in terms of the 1993 Constitution unless the interests of justice require otherwise.
- 10 Any unfinished matters before parliament, which were started in terms of the repealed 1993 Constitution, must be completed in terms of the 1996 Constitution.

(b) Briefly discuss the difference between peremptory and directory provisions. (5)

This is another question that could have earned you easy marks.

Peremptory provisions require exact compliance. Failure results in the nullity of the ensuing action. Substantial compliance of a directory provision may suffice and be condoned by the court, but will not result in the nullity of the ensuing action.

(c) Discuss the meaning of "month" in the interpretation of statutes. (5)

Section 2 of the Interpretation Act of 1957 defines "month" as a calender month and not a lunar month of 28 days. This is ambiguous because a calender month may be construed as either from the first to the last day of the month (as in service contracts) or as it is measured in prison terms, from a certain day of the month to the corresponding day of the next month. It would be more appropriate to use "calender month" for the first alternative and "month" for the second.