1 Discussion of the May/June 2003 examination

QUESTION 1

*(a) Name five (5) examples of **original** legislation.* (5)

Interpretation of statutes has to do with legislation. It is therefore important that you know the different types of legislation. In this question students were required to **name** the different types of original legislation. These are Acts of Parliament, provincial ordinances, provincial Acts, legislation of the former TBVC states, legislation of the former independent homelands and municipal by-laws after 1994.

*(b) Define the **casus omissus** rule and explain whether it still applies today.* (5)

The *casus omissus* rule means that the courts may not supply an omission in legislation because by doing so it would be usurping the function of the legislature. This rule is derived from the principle that the function of the courts is to interpret and not to make the law (*Ex Parte Walker Securities*). This rule does no longer apply under the new constitutional dispensation. The courts can modify the meaning of legislation in order to give effect to the legislative purpose. In addition, the principle of parliamentary sovereignty has been replaced by that of constitutional supremacy. The aim and purpose of legislation within the framework of the Constitution is the paramount rule of interpretation. This essentially means that the courts can supply an omission in order to give effect to the purpose of legislation.

Let us use an example to illustrate how this rule is invoked in practice. Suppose **section 2(1)** of the **Defence Act of 2003** provides:

'all men above the age of 18 must undergo compulsory military training'.

The Minister of Defence issues a proclamation requiring women who are 18 to report to different military bases to participate in military training under the Act. Women's groups are opposed to this and they approach the court. They contend that the Act does not apply to women.

On the one hand, legal counsel for the women groups could invoke the rule and argue that the courts cannot not supply an omission in legislation by reading in the word 'women' into the provision as this is the function of the legislature (*casus omissus*). The counsel for the respondent (the Minister of Defence), on the other hand, could argue that section 39 of the Constitution requires the courts, when interpreting legislation, to promote the spirit of the Bill of Rights. He could further contend that section 39(1) provides that when interpreting the Bill of Rights the court must promote the values that underlie an open and democratic society and that these values include that of equality. Further, he could also argue that the legislation is discriminatory and the court should read the word 'women' into that section which essentially means that the *casus omissus* rule does no longer apply.

(c) Discuss fully the presumption that government bodies are not bound by their own legislation. (15)

In this question students were required to discuss a specific presumption, not the role of presumptions during statutory interpretation. Therefore, it was not necessary to discuss the two broad viewpoints regarding presumptions which obtained before the advent of the new

constitutional dispensation namely that (i) the common law presumptions are mere tertiary rules to be used as a last resort if the other aids are unable to determine the intention of the legislature; or (ii) that statutory interpretation should begin and end with presumptions.

This is what we expected from students: the general rule is that the state is not bound by its own legislation unless the legislation in question provides otherwise expressly or by necessary implication. The intention that the state is bound depends not only on express wording of the legislation but also on surrounding circumstances (*Union Government v Tonkin*). However, this presumption does not endow the state with unfettered powers. As Du Plessis points out, it is rather a principle of effectiveness to ensure that the state is not hampered in the execution of its functions. Wiechers added that if the state is bound by its own legislation only in exceptional circumstances, there would be no question of state liability and the principle of legality on which the conduct of the state administration are based would fall away. He therefore suggested that the state should always be bound by its own legislation except in those instances where it would be hindered in the performance of its government functions.

In *Evans v Schoeman* the court held that the state would not be bound by its own legislation in the following instances (a) if the state would be rendered subject to the authority of or interference by its own officials, and (b) if the state would be affected by penal provisions.

However, in other cases it was held that (i) government bodies and state controlled agencies are bound by town planning schemes;(ii) a security official who contravenes a statutory provision when acting outside the scope of his duties cannot rely on the presumption against the state being bound;(iii) the driver of a fire engine may disregard the red traffic light while fire-fighting; and (iv) an agricultural official who combats stock disease and at times has to cull stock is not bound by the statutory requirement relating to hunting permits.

An interesting example of the application of this presumption is *S v De Bruin*. In this case De Bruin was caught exceeding the speed limit. He was charged with contravening the fuel-saving regulations and convicted in the magistrate's court. On appeal he argued that he was a public servant, who on the day in question had been running late for an on-site inspection on behalf of the state. If he had arrived late it would have been detrimental to the state. The court held that being bound by the provision could have obstructed essential state services and that De Bruin's decision was reasonable and set aside the conviction.

It is submitted that this presumption does no longer apply under the new constitutional dispensation. First, the Constitution provides in section 8(1) that organs of state at all levels of government are bound by the Bill of Rights. It would be illogical if the state was bound by the Constitution, but were at the same time presumed not bound by its own legislation which, in any event, is subordinate to the Constitution. Secondly, the Constitution abounds with references to principles such as accountability, openness, the supremacy of the Constitution, values underlying an open and democratic society and so on. All these strengthen the argument that this presumption can no longer be invoked.

QUESTION 2

(a) Write notes on the commencement of legislation. (10)

It is important that you read the questions carefully before you write your answer. Some students included a discussion of common law methods of computation of time. This was not necessary and strictly speaking amounted to a waste of time.

Provisions dealing with the commencement of legislation are found in the Interpretation Act of 1957. First, section 13 (1) of this Act defines "commencement" as the day on which that law comes or came into effect. Secondly, it provides that that day shall, unless the legislation in question provides otherwise, be the day when the law was first published in the *Gazette* as law. Further, subsection (2) provides that the "day" begins immediately at the end of the previous day. Although the word "law" as used here includes subordinate legislation, section 16 provides *ex abundanti cautela* (as result of excessive caution) that subordinate legislation has to be published in the *Gazette*. The reason why legislation has to be published before it is formally put into operation is that it should be made known to whom it applies. However, the fact that the *Gazette* appears only days after publication in most remote areas creates problems. Does legislation commence on publication or at the time when it becomes known to everybody including people in remote areas? This issue was pertinently raised in *Queen v Jizwa*. The court held that legislation commences on the date of publication irrespective of whether it has come to the knowledge of everybody. Steyn and Du Plessis criticised this decision and suggested that there should be a period of at least eight days between the actual publication and the promulgation of the legislation.

If for some reasons the government printer is unable to print the *Gazette*, section 16A empowers the President to prescribe alternative procedure for the promulgation of legislation.

The rule that legislation has to be published before it commences is also endorsed by the Constitution. Sections 81, 123 and 162 of the Constitution provide that Acts of Parliament, Provincial Acts and Municipal by-laws must be published before they come into operation.

(b) You are asked to interpret a piece of legislation. Name the steps (in the correct order) that you would follow in doing this. (10)

It is important that you read all your tutorial letters. The steps which the students were required to name in this question were set out in **Tutorial Letter 103** 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.

(c) Name the sources where you would find the constitutional values. (5)

The sources are the Constitution itself, our common law heritage, the African concept of *ubuntu*, international human rights law and foreign decisions dealing with similar constitutions.

QUESTION 3

The long title of the **Immigration Act of 1996** provides:

To provide for the admission of persons, their residence in and their departure from the Republic; and for matters connected therewith.

Section 1 of the Immigration Act reads:

"Immigration Permit

1(1) The Minister of Home Affairs may upon application by the spouse of a person permanently resident in South Africa, issue an immigration permit".

Furthermore, "spouse" is defined as "husband or wife".

Mr Desperado, who is involved in a same sex relationship with a South African, want to apply for a permit under this Act. Advise him fully, with reference to the rules and principles of statutory interpretation, whether he qualifies for an immigration permit.

In your answer **(relating it to the facts):**

(a) *Discuss the approach you would use to establish the purpose of this piece of legislation, (Including a discussion of section 39 of the Constitution). Give reasons for your answer.* (10)

Here students had to discuss the approach they would use to interpret the **Immigration Act** . As you should know by now prior to the commencement of the 1993 Constitution two approaches to statutory interpretation existed namely the literal approach and the contextual approach. The literal approach endorsed the principle that the interpreter should concentrate on the literal meaning of the provision to be interpreted. According to the literalists if the literal meaning of the words is clear, it has to be put into effect. The secondary aids eg, the long title, headings to chapters and sections and tertiary aids such as presumptions could be invoked only if the plain meaning of the words was ambiguous or if strict adherence to the literal meaning would result in absurd result.

Contextualists, on the other hand, argued that establishing the purpose of legislation is the prevailing factor in interpretation and that the context of legislation and the social and political policy directions must be taken into account during the process of interpretation.

The commencement of the Constitution settled the debate as to which of the two approaches should be followed. First, section 39(2) dealing with the interpretation of legislation in general provides that the courts when interpreting legislation must promote the spirit of the Bill of Rights. This provision is peremptory which means that the courts must review and determine the purpose of the legislation in the light of the Bill of Rights. This provision does not provide that the Bill of Rights may be considered only if the provision concerned is vague or ambiguous. Essentially this provision forces the interpreter to consult factors outside the legislative text right from the outset during the process of interpretation. This is contrary to the literal approach. As explained above, literalists argued that factors outside the text of legislation should be considered only if one cannot establish the purpose of legislation from the literal meaning of words.

The next step is to determine the spirit of the Bill of Rights. This also brings factors outside the legislative text into play. Section 39 (1) provides that when interpreting the Bill of Rights, a court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom, must consider international law and may consider foreign law. The provisions of this subsection relating to the values underlying an open and democratic society and the use of international law are also peremptory. The international law referred to is international human rights law (rules and norms dealing with the protection of fundamental human rights and these are found in international documents such as the Charter of the United Nations, the Universal Declaration of Human Rights, the African Charter and so on) .

Therefore, when interpreting the Immigration Act, one should use contextual approach which, in the light of the constitutional provisions discussed above, is clearly required by the Constitution.

(b) *Discuss whether it is permissible in our law to consult the long title to establish the purpose of legislation.* (5)

The long title provides a short description of the subject-matter of legislation. The role played by the long title in ascertaining the purpose of legislation depends on the information it contains. Generally, the courts are entitled to refer to the long title to ascertain the purpose of legislation (*Bhyat v Commissioner for Immigration*). However, in other cases the courts were of the view that resort could only be had to the long title if the wording of a particular provision is vague or ambiguous (*S v Nel*).This decision reinforces textual approach to interpretation. The long title and all other intra and extra-textual aids must be used right from the outset to determine the purpose of legislation.

(c) *Assume that the purpose of this Act is to regulate admission of persons to the Republic regardless of their sexual orientation. Explain to Mr Desperado whether the initial meaning of section 1(1) accords with this purpose. If it does not, discuss whether modification is required. (In your answer you must explain when the courts may modify the meaning of the text.)* (10)

Here we are told that the purpose of the Immigration Act is to regulate the admission of persons to the Republic regardless of their sexual orientation. Therefore, the requirement that the spouse should either be a wife or a husband clearly does not correspond fully with the purpose of this legislation. Further, the initial meaning of this legislation is in conflict with the Constitution as it discriminates against same sex partners. Clearly, this legislation requires modification. However, it must be pointed out that it is not the language of legislation that is modified but the initial meaning that is adapted or reconstructed to give effect to the legislative purpose.

The courts may modify the initial meaning of the text if it appears that the initial ordinary meaning of the text will not give effect to the purpose of legislation. This means that the purpose of legislation must be determined in each case even if the initial meaning seems to be clear. Ambiguity, vagueness and absurdity are indicators that the initial meaning should be modified. Only if there can be no doubt about the purpose of legislation and if the text, context and the Constitution are compatible with the modified meaning will the courts deviate from the textual meaning.

QUESTION 4

(a) *Distinguish between peremptory and directory provisions.* (10)

Peremptory provisions require exact compliance. Non-compliance with a peremptory provision would leave the ensuing act null and void. Directory provisions, on the other hand, require substantial compliance. Non-compliance with a directory provision will not result in the nullity of the ensuing act, which may be condoned by the court.

The Motor Vehicle Insurance Act requires a claim for compensation to be sent by registered mail or delivered by hand. In *Commercial Union Assurance Co v Clarke* the claim was sent by ordinary post. The court held that there was substantial compliance with the provision. According to the court it was not necessary to follow the requirements to the finest detail.

The courts generally follow contextual approach to the interpretation of peremptory and directory provisions. The language of legislation is read in its context which includes all intra-textual and extra-textual factors.

Wiechers points out that all legislative provisions are peremptory. He is of the view that if this was not the case, they would be non-obligatory suggestion for desirable conduct.

(b) Name five different methods of constitutional interpretation and briefly discuss what each entails. (15)

(i) Grammatical interpretation.
This method focuses on the linguistic and grammatical meaning of the words, phrases and sentences and other structural components of the text, including the principles of syntax.

(ii) Systematic interpretation.
This method requires that all other constitutional provisions be taken into account when interpreting some or other provision of the Constitution. Further it requires the consideration of extra-textual factors such as the social and political environment in which the Constitution operates during the process of constitutional interpretation.

(iii) Teleological interpretation. (NOTE THE SPELLING)
This method is used to ascertain what the particular constitutional provision must accomplish in the legal order.

(iv) Historical interpretation.
This method refers to the historical context of the Constitution which includes factors such as circumstances which gave rise to the adoption of the Constitution, preceding discussions and so on.

(v) Comparative interpretation.
This method refers to the process during which the court examines international human rights law and the constitutional decisions of foreign courts.

5 DISCUSSION OF THE OCTOBER/NOVEMBER 2003 EXAMINATION

Question 1

(a) Briefly distinguish between concretisation and contextualisation. (5)

We do not encourage students to answer questions in a parrot-fashion. However, there are concepts that are not only used constantly in the prescribed textbook but are also defined. These we expect students to learn off by heart. Two examples of such concepts is **concretisation** and **contextualisation**. The distinction between these phases is explained as follows: **concretisation** is the final phase in the interpretation process during which the legislative text, the purpose and the situation are harmonised to bring the process to a meaningful conclusion and **contextualisation** is the process during which the legislative text is read and researched within its total context in an attempt to ascertain the purpose of legislation.

(b) Distinguish between original and subordinate legislation (in your answer explain whether this distinction is still important). (10)

A common mistake made by most students is that they only gave examples of original and subordinate legislation, instead of discussing the difference between the two broad categories of legislation.

The difference between original and subordinate legislation is that the former is made by a plenary, elected and deliberative legislature. In the pre-constitutional era the original legislatures derived their power to make the law from the Constitution or any other Act of Parliament and legislation made by these bodies could not be struck down on account of deficiencies in its substance. It is no longer possible, as was the case under the erstwhile constitutional system, for an Act of Parliament to call into existence an original legislature as the Constitution itself determines who has the primary or original legislative competence.

Whereas subordinate legislation, on the other hand is made by functionaries and institutions who/which derive the authority to enact legislation from original legislation. In other words, subordinate legislation is delegated in the sense that it owes both its existence and authority to an enabling Act. In contrast to original legislation, subordinate legislation has always been subject to review by the courts.

With the advent of the supreme Constitution the distinction between original and subordinate legislation is no longer watertight. All legislation has become subordinate to the Constitution and as a consequences thereof, the courts may test legislation against the Bill of Rights in the Constitution. However, this does not mean that the distinction is no longer relevant. As stated, subordinate legislation owes its existence to an empowering original legislation.

(c) Discuss the common law methods of computation of time. (10)

Most students prefaced their answers with a brief discussion of the statutory method. Strictly speaking that was not necessary. All that was required was a brief discussion of each of the three common law methods of calculating time namely *computatio civilis*, *computatio naturalis* and *computatio extraordinaria*.

Where *computatio civilis* is used the time is calculated *de die in diem*. This means that the first day of the prescribed period is included and the last day excluded. An example of a case where this method was used is *Minister van Polisie v De Beer*. The Police Act provided that a civil suit brought against the police must be instituted within six months. In this case the collision involving a police vehicle took place on 5 August 1967 and the summons were served on 5 February 1968. The court held the ordinary civil method should be used to calculate the time. The last day was therefore excluded and the serving of the summons was therefore one day too late and the action was refused.

When using *computatio naturalis*, the prescribed period is calculated from the hour or even minute of an occurrence, to the corresponding hour or minute on the last day of the period in question.

As far as *computatio extraordinaria* is concerned both the first and the last day of the period concerned are included.

Question 2

(a) Discuss the common law presumption that the jurisdiction of the courts is not ousted by legislation. (10)

It is presumed, unless the legislation provides otherwise expressly or by necessary implication, that the legislature does not wish to exclude the jurisdiction of the courts. In *Tefu v Minister of Justice* it was held that the legislature should clearly indicate that the jurisdiction of the courts is to be excluded.

Legislation often confers the power to make decisions on certain persons or bodies. Whether the court was competent to review such decisions depended on the legislation concerned. The High Court's jurisdiction to review administrative decisions was often ousted by security legislation during the 1980's. However, the court's power of review was not completely excluded because the High Court had an inherent common-law jurisdiction to review such decision on grounds of *mala fides*.

This presumption was applied in *Mathope v Soweto City Council*. This case concerned section 12 of the Community Councils Act which provided that a civil action between a black person and a community council should be heard by the erstwhile commissioners court. The court held that this section does not exclude the jurisdiction of the magistrates court or the supreme court. The court further referred to a person's fundamental right to approach the courts and found that the provision concerned contains nothing that rebuts this presumption.

The principle underlying this presumption is now also entrenched in the Constitution. Section 34 of the Constitution provides that everyone has the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court or another independent and impartial tribunal or forum. This means that the legislature can no longer oust the jurisdiction of the courts. Any such limitation will have to comply with section 36 (the general limitation clause).

(b) Write a note on the mischief rule. (15)

Prior to 1994 the courts in general swung like a pendulum between the narrow literal approach and the wider contextual approach to interpretation. However, even then, there were courts that considered the broader context when construing legislation. Amongst other rules invoked by the courts was the mischief rule.

The mischief rule relates to the conditions prevailing before or during the adoption of legislation which led to its creation. This rule was laid down by Lord Coke in the *Heydon's* case and forms the cornerstone of the contextual approach. It poses four questions that must be answered to ascertain the purpose of legislation namely:

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

This rule was applied in *Hleka v Johannesburg City Council*, *Santam Insurance Ltd v Taylor* where the court resorted to the historical background of the Act in order to ascertain its purpose of legislation, *Qozeleni v Minister of Law and Order* and *Diepsloot v Administrator, Transvaal* where the court used the background of developments about the dismantling of the apartheid system to interpret legislation.

Question 3

(a) Discuss the rule that if the reason for the law ceases, the law itself falls away. (10)

This rules finds expression in the maxim *cessante ratione legis*, *cessa et ipsa lex* which literally means that 'if the reason for the law ceases to exist the law itself falls away'. Since legislation cannot be abrogated by custom or altered circumstances this rule is not applied in its original form in South African law. In most cases where the rule has been applied (in its adapted form) the provisions were merely suspended as the purpose of legislation had already been achieved in another manner.

For example section 10 of the Stock Theft Act of 1923 provides for the levying of compensatory fine. The question that has been raised in a number of decisions concerning stock theft is whether the compensatory fine should be paid even when the stock stolen has been recovered. In *R v Maleka* the court held that the object of the Act had been complied with and therefore the compensatory fine was unnecessary. This approach was followed in *R v Nteto*. However, in *Mbamali* a different approach was adopted and the compensatory fine was levied by the court.

Another interesting example of the application of this rule is *S v Mujee*. In this case the accused had paid a monthly maintenance fee for his child in an institution, in terms of a maintenance order under the maintenance Act. The child was discharged and the accused stopped paying and he was charged with violation of the order. The court held that the *cessante ratione legis* rule applied and that the reason for the application of the Act had fallen away. The accused was therefore acquitted.

(b) Section 10 of the Financial Assistance 20 of 2003 provides that

"any college, university, technikon or any other educational institution may apply for subsidy in terms of this Act".

Gauteng Institute wants to apply for subsidy in terms of this Act. Advise the headmaster fully with reference to rules and principles of statutory interpretation whether Gauteng College qualifies. **(15)**

This question deals with restrictive interpretation. Despite the fact that there was a slip of a pen (the last sentence should have read 'Gauteng Institute' not 'Gauteng College), most students were able to identify the rule that applies here namely the *eiusdem generis* rule. The term literally means 'of the same kind' and is based on the *noscitur a socii* principle which means that words are known by those with which they are associated. This means that the meaning of general words is qualified by their relationship to other more specific words. However, four requirements have to be met before the rule is applied:

- ☐ In *Alli v Pretoria Municipal Council* the court held that *eiusdem generis* rule cannot be applied unless the specific words refer to a definite genus.
- ☐ In *Carlis v Oldfield* the court held that the specific words must not have already exhausted the genus.
- ☐ In *Van Wermeskern v Johannesburg Municipality* the court held that the rule can be applied even when a single specific word precedes the general words.
- ☐ The court emphasised in *Buglars Post Pty Ltd* that the order in which the specific words occur is not important.
- ☐ In *PMB Armature Winders* the Appellate Division held that the rule can only be applied if the legislature's intention unreservedly points to such restrictive interpretation.

In *S v Kohler* the accused was convicted of contravening a municipal poultry regulation by keeping a peacock within the municipal boundaries without a license. The regulation defined 'poultry' as any foul, duck, goose, turkey, partridge, pheasant, pigeon or the chickens thereof, or any other bird. The accused argued that peacocks were not poultry. The court found peacock to be a chicken like bird. Since there already was a genus (poultry) the general words 'any other bird' were restricted to that genus. A peacock is a species of that genus and the appeal was therefore dismissed.

Therefore, Gauteng Institute does not qualify because the provision has to be interpreted restrictively. All the educational institutions mentioned in the provision offer tertiary education. Gauteng Institute offers matric and therefore falls outside the genus.

Question 4

(a) List five criticisms of the textual approach and explain each of them briefly. **(10)**

- ☐ The common law presumptions are only resorted to if the so called primary rule and the secondary aids are unable to reveal the intention of the legislature. This leads to an absurd situation that presumptions only become important if the text is ambiguous.
- ☐ Words are regarded as primary index to legislative intention. This means that all the internal and external aids that can be used to establish the contextual meaning are ignored.
- ☐ The literal approach is inherently subjective. The use of the intra and extra textual aids depends on how clear the text may seem to the particular interpreter.
- ☐ Few texts are so clear that only one interpretation is possible. The fact that a discipline like interpretation of statutes exists is proof that texts are seldom clear and unambiguous.
- ☐ Literal approach leaves little room for judicial law making. The literalists argue that the function of the courts is to interpret and not to make the law as this is the function of the

"Law" *means* "any law, proclamation, ordinance, Act of Parliament, or any other enactment having the force of the law". More easy marks!

Question 2

(a) Discuss the use of preceding discussion as an extra-textual aid to statutory interpretation. (10)

First you need to establish what constitutes preceding discussions? Debates about a specific bill before Parliament; explanatory memoranda; the debates and reports of various committees; and the reports of commissions of inquiry, all constitutes preceding discussions.

Then you need to indicate that the courts, under the influence of the textualist approach, are very reluctant to accept the debates during the legislative process as an aid to interpretation. In fact in cases such as *Bok v Allen*, *Mathiba v Moschke* and *More v Minister of Co-operation and Development* the courts rejected the use of the debates. However, in *Mpangele* a ministerial speech was used by the court as an aid to interpretation. As regards commissions reports the courts seem amenable tp accept them as aids to interpretation. Although these have been considered only if the provision is not clear. In another case, the court refused to accept the a report of a single member of the committee on the basis that it represented his subjective opinion.

As a contextualist, Botha is in favour of the more extensive use of preceding discussions as an aid to the establishmet of the purpose of legislation.

(b) Discuss whether the courts may exercise a law making function when they interpret legislation. In your answer you must refer to the position prior to the advent of the new constitutional order and thereafter. (10)

The answer will differ depending on which theory of statutory interpretation is adopted. Prior to 1994, the literalists or textualists argued on the basis of the maxims *iudicis est ius dicere sed non dare* and *casus omissus* that the function of the courts was to interpret, and not to make, the law and that it was not the function of the courts to supply omissions in legislation as this was the role of the legislature. Contextualists on the other hand, argued that the courts could modify the initial meaning of the text to harmonise it with the purpose. However, this discretion was qualified by the requirement that modification would only be permissible if the purpose of legislation is clear. Labuschagne and Du Plessis have tried to show that the law making function of the courts does not mean that they take over the legislative function; that the courts and the legislature are partners in the law making function; that the legislation only becomes a complete and functional statutes when it is applied by the courts.

After 1994 this debate took a new turn. The starting point of interpretation is now to ascertain the purpose of legislation in the light of the Bill of Rights and to give effect to it. This means that the courts must establish the purpose of legislation. If the literal meaning of the text does not give effect to the purpose, for example, where the text has stipulated either more or less than the purpose or where it is in conflict with the Constitution, the courts may modify the legislation concerned. Such modification can either be restrictive or extensive.

(c) Discuss the presumption that the legislature does not intend to change existing legislation more than is necessary. In your discussion you must also address the influence of the new constitutional order on this presumption. (15)

This common law presumption gives expression to the value of legal certainty. First, this presumption means that legislation must be interpreted in such a way that it is consistent with existing law (in its widest sense). In respect of legislation, the presumption means that when interpreting subsequent legislation, it is assumed that the legislature does not intend to repeal or modify earlier legislation. Any repeal or amendment must be effected expressly or by necessary implication. In *Shozi v Minister of Justice* it was held that old and new legislation dealing with the same issue should be read together and reconciled. This will frequently happen where a more general later provision supplements a more spesicic earlier provision. Where reconcilation is not possible, it has to be accepted that the old legislation has been repealed or amended by necessary implication. Such a problem presented itself in *Gov of the RSA v Gov of KwaZulu* (you must shortly discuss the facts). The value of legal certainty also forms part of the new constitutional dispensation. Sections 35(2) and 232(3) of the interim Constitution held in effect that the new Constitution sought to change the existing law as little as possible. Legislation had to be interpreted narrowly rather than be declared unconstitutional. These sections do not form part of the final Constitution. However, the technique of narrowly interpreting legislation (so-called reading-down) is frequently used by the Constitutional Court in order to save legislation that violates the final Constitution.

Question 3

(a) Section 29 of the Marriage Act 25 of 1961 reads as follows: "A marriage officer shall solemnise any marriage in a church or other building used for religious purposes, or in a public office or a private dwelling-house, with open doors". Jasmine recently concluded a wedding ceremony with Joseph in the front garden of her mother's riverside home. A friend later told here that she is, for this reason, not legally married. She wants to know from you whether her friend is correct. In your answer explain

(i) what the difference is between peremptory and directory statutory provisions; (1)
(ii) what the effect of non-compliance with each type of provision; (1)
(iii) which semantic and jurisprudential guidelines are usually used to distinguish between the two types of statutory provisions (8)

(i) Peremptory provisions require exact compliance, whereas directory provisions require substantial compliance.

(ii) The effect of non-compliance with a peremptory provision renders the ensuing act (not Act or statutory provision) 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.

(iii) The question is whether the letter or the spirit of the legislation should be obeyed. Also in this regard there is a shift from the textual to the contextual approach (i.e a tendency to require substantial compliance only). However a number of semantic and jurisprudential guidelines exist. You must list and discuss these in detail.

(b) David killed Moses during a fit of road rage on 31 January 2003. He was convicted of murder on 31 March 2004. The case was then postponed to 31 May 2004 for sentencing. On 1 February 2004 a new Road Traffic Act was adopted by Parliament.

legislature. Therefore the court may not modify legislation.

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

Prior to 1994 the literal and contextual approach to interpretation existed side by side. The literalists argued that the interpreter should concentrate on the literal meaning of the provision to be interpreted. If the meaning of the words was clear it had to be put into effect and equated with the intention of the legislature. If the words were unclear or ambiguous resort could be had to the secondary aids in the form of long title, headings to section and so on. If the secondary aids proved insufficient then the courts could use tertiary aids, for example, presumptions to determine the intention of the legislature.

The contextualists, on the other hand, argued that the context of legislation as well as the social and policy directions should be taken into account to establish the purpose of legislation. Essentially, their argument was that all intra and extra textual aids should be taken into account right at the outset when interpreting legislation.

Then came the Constitution. Section 39 (2) provides that when interpreting legislation the interpreter must promote the spirit of the Bill of Rights. This is a peremptory provision which means that the courts must interpret legislation in the light of the Bill of Rights. This provision does not say that the courts must refer to the Bill of Rights only if the provisions are unclear, ambiguous or if strict adherence to the literal meaning will result in absurd result. Therefore this provision forces the interpreter to consult extra textual factors during interpretation. Factors outside the legislative text (the Bill of Rights in this instance) come into play. This is contrary to the views expressed by the literalists.

How do we go about determining the spirit of the Bill of Rights? This brings another set of facts outside the legislative text that we are dealing with into play. Section 39(2) states that when interpreting the Bill of Rights the interpreter (a) must promote the values that underlie an open and democratic society based an human dignity, equality and freedom, (b) must consider international law and (c) may consider foreign law. The first two provisions are peremptory.

It is clear from the preceding discussion that the Constitution prescribes contextual approach to interpretation. A number of factors outside the legislative text come into play when determining the purpose of that legislation. These should be consulted regardless of the clarity of the provision. This is consistent with the views and the approach that was followed by contextualists even before the advent of our new constitutional democracy. This approach now finds support in the supreme law of the land namely the Constitution.

6. CONCLUSION

We hope that this tutorial letter will have cleared clear up all or most of your questions and concerns dealing with the forthcoming examination. If you have any other questions or problems of an academic nature please contact us immediately.

We wish you every success in the examination!

MR FANYANA MDUMBE
PROF WESSEL LE ROUX **PRETORIA**

(a) **What are the three phases of interpretive process in the model that is suggested by Botha in the textbook? Explain each phase briefly. (6)**

The three phases used by Botha (please note that these are not rules or principles of interpretation) are discussed in the last part of Chapter 1 and they are the initial phase, the research phase and the concretisation phase. In the first phase the initial meaning of the lkegislative text is established (subject to the understanding that the Constitution, the common law presumptions and the purpose of the legislature will all be taken into account with the initial grammatical meaning of the text). In the research phase, intra-textual and extra-textual aids are studied to ascertain the purpose of legislation. During the concretisation phase, the legislative text, the purpose, the facts of the case and the constitutional values are weighed against each other in order to reach a conclusion.

(b) **List the main grounds (at least five) on which the intentionalist approach to interpretation may be criticised. (5)**

Note that in your prescribed textbook the concepts **"literalist, intentionalist and textualists"** approach are used interchangeably. This approach (i) reduces common law presumptions to a mere tertiary aids to interpretation, (ii) is inherently subjective, (iii) regards words as primary index into legislative intention, (iv) leaves little room for judicial law making. In addition, the view that legislative text are clear and unambiguous must be questioned in view of the existence of disciplines such as the interpretation of statutes..

Most students thought that they were required the criticise the use of the phrase "intention of the legislature" namely, that it is denotes a subjective state of mind, the legislature is composed of a large number of persons and so on. Perhaps students were misled by the use of the term "intentionalist". As stated, this concept is similar to the concept "literalist or textualist" approach.

(c) **Define what "interpretation by implication" means, and then briefly the three main grounds of extension by implication. (5)**

Interpretation by implication involves extending the textual meaning on the ground of a reasonable and essential implication, which is evident from the legislation. Students were also required to set out the three main grounds: *ex contrariis*, *ex consequentibus* and *ex accessorio eius*.

(d) **Briefly set out what the approach of the courts should be to the interpretation of a statute that has been taken verbatim from, say an English statute? (4)**

Many students confused this question with the use of the legislative text of another official language as an intra-textual aid. Initially the courts subscribed to the view that if the language of the statute is identical to that of the foreign source (say, an English or British statute), the legislation concerned should be interpreted in accordance with the interpretation of the English courts. If not, the court has unfettered discretion. The prevailing view now is that the approach of the foreign courts will be used only as a guideline. The courts will always interpret South African legislation in the light of South African common law.

(e) Name five generally accepted methods of constitutional interpretation. (5)

These are the grammatical, systematic, historical, teleological, and comparative methods of interpretation. Easy marks!

(f) Define what "law" means as it is used in the Interpretation Act 33 of 1957. (5)

If you look at section 10, it has specific words (taxi, bus, rickshaw) and general words (any other vehicle). This means that the *eiusdem generis rule* applies. This terms means "of the same kind". It means that the meaning of words is qualified by their relationship to other words. The rule stipulates that the meaning of general words is determined when they are used together with specific words. The requirements for the application of this rule are that:

- the specific words must refer to a definite genus or category
- the specific words must not have exhausted the genus
- the order in which the words appear is not important
- the rule applies even when specific words precede the general words
- the rule applies only if it is clear that the intention of the legislation points to such a restrictive interpretation

The rule was applied by the court in *Kohler* case. In this case the accused was convicted of keeping a peacock in contravention of the municipal regulations. The regulations defined "poultry" as "any fowl, duck , goose, partridge, pigeon, or chickens thereof or any other bird". The court found that since a peacock was a species of that genus the appeal was dismissed.

Applied to the facts before us, the Act does not apply to the lift club because, unlike the other specified categories, Mr X does not intend to make profit out of this.

Statute

Title

Seashore Act 21 of 1935 (as amended: final amendment by the Constitution of the Republic of South Africa Act 200 of 1993)

Long Title or Preamble

To declare the President to be the owner of the seashore and the sea within the territorial waters of the Republic; and to provide for the grant of rights in respect of the seashore and the sea, and for the alienation of portions of the seashore and the sea and for matters incidental thereto.

Definitions

1 In this Act, unless the context indicates otherwise

"high-water mark" means the highest line reached by the water of the sea during ordinary storms;

"low-water mark" means the lowest line to which the water of the sea recedes during periods of ordinary spring tides;

"Minister" means the Minister of Transport;

"Seashore" means the water and the land between the low-water mark and the high-water mark.

President is owner of the seashore and the sea

2 (1) Subject to the provisions of this Act, the President shall be the owner of the seashore and the sea.

(2) . . .

(3) The seashore and the sea shall be capable of being alienated as provided by this Act, and shall not be capable of being acquired by prescription.

Letting of seashores and the sea

3 (1) The Minister may let any portion of the seashore and the sea for any of the following purposes:

(a) the erection of beach shelters;

(b) the erection of beach huts;

(c) the erection of tea rooms and refreshment places;

Provided that in the opinion of the Minister such letting either is in the interests of the general

To prohibit the consumption and possession of blue cake; and to regulate research into the effects of the consumption of blue cake, and to deal with related matters

Definitions

1 In this Act, unless the context indicates otherwise –
"blue cake" means any confectionary composed mainly of flour and containing any substance which gives the cake a blue colour (between green and violet in the spectrum);
"Department" means the Department of Health;
"Minister" means the Minister of Health;
"research" means a scientific investigation conducted by appropriately qualified persons at a university, other tertiary institution or other institution registered as a research institution.

Permit for research purposes

2 (1) Any person or institution wishing to conduct scientific research into the effects of eating blue cake, the causes of the disease known as "blue cake disease" and the means of preventing the above disease, must apply to the Minister for a permit to possess blue cake and to conduct the intended research.
(2) The permit referred to in subsection (1) will be issued only to universities, other tertiary institutions and other institutions registered as research institutions in terms of Act 4000 of 1999.
(3) Application for the permit concerned must be made on the prescribed form to the Department of Health.
(4) The Minister may delegate any of his or her powers under this Act to an official in the Department, but is not divested of such powers by the delegation and may modify or rescind any decision made by any other official under this subsection.
(5) Persons or institutions to whom a permit referred to in subsection (2) has been issued, may possess an unlimited quantity of blue cake for research purposes.
(6) The research referred to in this section may be conducted only in a laboratory and no humans may be used in the research.

Offences and penalties

3 (1) It is an offence for any person to eat blue cake or to persuade another person to do so.
(2) Unless a permit has been obtained in terms of section 2, it is an offence for any person or institution to be in possession of any blue cake.
(3) Any person found to be in possession of blue cake is liable on conviction to a fine or to six months' imprisonment or both.
(4) An institution found to possess blue cake unlawfully is liable on conviction to a fine of not more than RI0 000.

This Act will be known as the Prohibition on the Consumption and Possession of Blue Cake Act 100 of 2001

Question 2

The missing words have been inserted in bold print.

Section 39 of the Republic of South Africa Constitution of 1996 prescribes, by implication, an unqualified **contextual (purposive)** approach to statutory interpretation. This means that the meaning of a provision will be determined by analysing the purpose of the provision.

Section 39(2) contains a **peremptory** provision that the spirit, purport and objects of Chapter 2 (the Bill of Rights) of the Constitution, which contains the fundamental rights, should be **promoted** when determining the purpose of a provision.

How does one determine the spirit, purport and objects of the **fundamental** rights? Section 39(1) provides how this should be done, namely that (i) the **values** which underlie an open and democratic society based on freedom, equality and human dignity *MUST* be promoted, and (ii) **international law** (applicable to the protection of the entrenched fundamental rights) law *MUST* be considered, and **foreign** law *MAY* be consulted.

These guidelines are unfortunately also capable of more than one interpretation, and other factors surrounding the text of the legislation, such as the provisions of the rest of the constitution and the particular legislation, preceding discussions and the values of the community should be taken into account. All these are examples of factors surrounding the text to be taken into account when interpreting statutes. There are no conditions attached to the use of these as was the case with the outdated **textual** approach where extra-textual aids could be used ONLY when the words were unclear or ambiguous.

In the approach as prescribed by the Constitution, the courts will first have to read the text of the legislation but will also have to consider all the factors surrounding the legislation from the outset in order to find the purpose of the legislation, irrespective of the **plain meaning** of the words. The use of factors (i) and (ii) is in the form of a peremptory provision while the use of factor (iii) is merely in the form of a directory provision. The courts therefore do not have any **discretion** (choice) whether or not to consider factors surrounding the text.

Question 3

(a) **Mahomed J** (later Mahomed CJ, the Chief Justice of South Africa) used a value-based approach to the interpretation of the Constitution and all other statutes. He states that a

constitution is not just any law which mechanically defines structures and relationships, but a "mirror reflecting the national soul"; it contains ideals, aspirations and values. For that reason, the values and spirit of the Constitution must be taken into account whenever statutes are interpreted. Thus the purpose, context and end result (*telos*) of a statutory provision must be considered by the interpreter.

(b) **Friedman J** used a literal/textual approach. He made no mention of context, values or the fact that a supreme Constitution takes preference over an ordinary statute. He talked about "clear language" and "plain language" and did not appear to recognise the inherent flexibility and ambiguity of all language. He apparently thought that any deviation from this would have to be based on the judge's own personal view or philosophical outlook (and not on values and norms contained in the Constitution itself).

(c) Section 39 endorses the approach of Mahomed J (see the references to the "values that underlie an open and democratic society based on human dignity, equality and freedom" in s 39(1)) and requires courts to promote the spirit, purport and objects of the Bill of Rights (s 39(2)).

(d) The difference between the two approaches has already been explained above.

- The one is a **flexible approach,** taking into account purpose, context and constitutional values **as well as the text.** (Do not make the mistake of thinking that a contextual and value-based approach means that the text and the actual words used can be thrown overboard. **You always begin with the text**, but interpret it in the light of and with reference to, context, purpose, values, etc.)

- The other approach is **rigid, literal and textual**. The judge not only started with the text, but also ended there. He took no account of possible ambiguity, context, purpose or values and assumed that doing so would involve him in a subjective exercise in which his own views would be foisted onto the text. He also assumed that the judge's choice lies between stressing the rights of the individual against the state (or *vice versa)* and did not consider that the rights of the individual should be **balanced** against the interests of the state (or the broader community) to achieve a just result (teleological approach).

SECTION C

1 Practical exercise in interpretation of statutes

1 The purpose of the legislation is explained in the long title: it is to regulate the ownership of the seashore and that portion of the sea which falls within the territorial waters of the Republic, the granting of certain rights to the sea and shore by the Minister, and the alienation of portions of the sea and seashore.

2 One may be tempted to think that there is no question of any "mischief" here; after all, it doesn't seem as if there is any undesirable practice that needs to be stopped. However, if one interprets "mischief" simply in terms of the reason why legislation was necessary, then the "mischief" was the fact that there may have been uncertainty about the way in which the sea and seashore should be regulated and administered.

3 The term is defined differently in the old and the new statute which were quoted. You

Question 2 -

Certain words have been omitted from the following paragraph. **Rewrite the paragraph** and insert the missing words. To be able to do this you must **study** chapter 3 of the prescribed textbook.

Section 39 of the Republic of South Africa Constitution Act 108 of 1996 prescribes, by implication, an unqualified ..... approach to statutory interpretation. This means that the meaning of a provision will be determined by analysing the purpose of the provision.

Section 39(2) contains a ..... provision that the spirit, purport and objects of Chapter 2 (the Bill of Rights) of the Constitution, which contains the fundamental rights, should be ..... when determining the purpose of a provision.

How does one determine the spirit, purport and objects of the ..... rights? Section 39(1) provides how this should be done, namely that (i) the ..... which underlie an open and democratic society based on freedom, equality and human dignity *MUST* be promoted, and (ii) ..... (applicable to the protection of the entrenched fundamental rights) law MUST be considered, and (iii) ..... law *MAY* be consulted.

These guidelines are unfortunately also capable of more than one interpretation and other factors surrounding the text of the legislation, such as the provisions of the rest of the constitution and the particular legislation, preceding discussions and the values of the community should be taken into account. All these are examples of factors surrounding the text to be taken into account when interpreting statutes. There are no conditions attached to the use of these as was the case with the outdated ..... approach where extra-textual aids could ONLY be used when the words were unclear or ambiguous.

In the approach as prescribed by the Constitution, the courts will first have to read the text of the legislation but also consider all the factors surrounding the legislation from the outset, to find the purpose of the legislation, irrespective of the ..... of the words. The use of factors (i) and (ii) is in the form of a peremptory provision while the use of factor (iii) is merely in the form of a directory provision. The courts therefore do not have any ..... (choice) whether or not to consider factors surrounding the text.

Question 3

Study the following two quotations and answer the questions:

In the Namibian case of *S v Acheson* 1991 2 SA 805 (NmHC) 813B Mahomed J (currently the South African Chief Justice) made the following well-known statement:

> **The constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a 'mirror reflecting the national soul', the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion.**

In *Monnakale v Republic of Bophuthatswana* 1991 1 SA 598 (B) 621D-E Friedman J said the following:

> **[T]he role of the judiciary is to interpret the enactments of Parliament, and where the language of the statute is plain and unambiguous, effect must be given thereto, however unpalatable the result may be. It is not for the Court to indulge in an exercise of semantic elasticity in the face of clear language, nor can it disregard the well-established and proven canons of construction and interpretation at the slightest seductive beckoning of what the law ought or should be. There is almost an inevitable temptation to stress the rights of the individual against the interests of the State, particularly where a Bill of Rights calls for interpretation. If the language is clear and plain, and encroaches on a Bill of Rights, effect must be given thereto, irrespective of the personal views or the philosophical outlook of the Judge concerned.**

(a) Which approach to interpretation did Mahomed J use in *S v Acheson*? Explain your answer. (10)

(b) Which approach to interpretation did Friedman J use in the *Monnakale* case? Explain your answer. (10)

(c) Which of the above approaches to interpretation is similar to that required by section 39 of the 1996 Constitution? Explain your answer. (10)

(d) Write a paragraph (maximum 50 words) in which you explain the most important difference, in your opinion, between the two quotations. (10)