

## Unit 1: Introduction miscellaneous

**Botha:** - body of rule & principles used to construct the correct meaning of legislative provisions to be applied in a practical situation – Not mechanical.

**Du Plessis':**- statutory & constitutional interpretation is constructing enact laws text with reference & reliance on other law text in concert situations.

**Unisa:** - statutory interpretation is studying the rule, principle that is used to construct and justify the meaning of legislative provision when applied in a practical situation.

Interpretation not just reading – not mechanical

### **Can't be put into categories not rule bound:-**

- Circumstances & facts are different in each case
- Interpretation has not clear and predictable pattern
- Language difficult and obscure
- Law is not objective, neutral, value free
- Interpreters all interpret differently depending on pre understanding, history, background and experience.
- Spirit and aim of fundamental rights to be promoted during interpretation of all legislation.

### New Constitutional Order:

- 70 & 80 rule, principles of statute interpretation was criticized

Traditionally: (old) unnecessary, confusing maxims, uncertain principles

- “golden rule” and overriding principles called primary, secondary and tertiary rules of RDL = misconceptions on structure and meaning of language
- Based on sovereignty parliament

New: fundamental right based on supreme constitution

- Devenish – new constitutional democracy – deposed apartheid and new political & legal order the influenced the new constitution
- Bill of rights in line with spirit of the constitution

93: operation 27 April 04 = Constitutional implications, political ramification and changed interpretation of statutes - Parliamentary sovereignty replaced with constitutional supremacy - Court can't ignore value judgments

96: came into operation 4 Feb 97 – principles of 93 constitutions kept

6 provisions: Sec 1 – foundational provision, Sec 2 – Supremacy of the Constitution, Sec 7 – Obligation clause, Sec 8 – Application clause, Sec 36 – limitation clause, Sec 39 – Interpretation clause

### Glossary of Terms:

- **Act** – parliamentary statute or provincial legislature
- **act** – conduct of government official or organ of state
- **Concretisation** – last phase of interpretation process = text, purpose, situation harmonised to get a meaningful conclusion
- **Constitutionalism** – gov gets powers from + bound to the constitution, law is supreme, gov & stat authorised are bound by the rule of law
- **Constitutional State** – state where the constitution is supreme
  - a. Formal – separation of powers and legality
  - b. Material – justice & equality values
- **Context** – situation where something happens
- **Contextualisation** – legislation is read, researched to understand the purpose
- **Entrenched** – provision in constitution that can only be altered/amended or repealed with difficulty (2/3)
- **Intra vires** – when gov acts within scope of powers conferred
- **Judicial law making** - primary is applications, secondary development of common law to modern situations
- **Jurisdiction court competency in particular court to hear the matter depends on:** Geographical area and types of cases – criminal for sentencing and civil for claims

- **Law** – common law, statute law, customary law and case law  
Written statute enacted by legislative bodies who have authority to make rules
  - a. Legislation – enacted legislation – Act, provincial legislation, municipal by laws, proclamations and regulations
  - b. Common law - not originally written but accepted – SA common law is RDL
  - c. Customary Law – traditional law of indigenous black people in SA – unwritten or codifications
  - d. Case Law – judicial precedent, law decided by various courts – stare decisis.
- **Legality** – lawfulness
- **Legislature** – elected body who had legal power to enact laws – called legislation
- **Locus Standi** – allow to be in court – who be heard.
- **Parliamentary Sovereignty** – parliament is supreme, enact any law
- **Proclamation** – subordinate legislation
- **Promulgation** – legislation is made known to the public by promulgation and comes into operation when published in government gazette.
- **Purpose** – point or aim of the legislation
- **Supreme constitution** – constitutions the highest law parliament still highest legislative body | any legislation or act of parliament in conflict is invalid | courts subject to constitution | replaced parliamentary sovereignty on 27 April 1994
- **Testing Legislation** – called judicial review, if legislation is alleged to be in conflict with constitution – tested by court | measuring legislation against the constitution to see if valid or invalid.
- **Textual Approach** – Simple meaning
- **Ultra vires** – act/conduct of gov the goes beyond the powers conferred to it.

**Botha:** - statutory interpretation is both the process and activity of interpreting statutes and the law that regulates the ways statutes are interpreted.

**Unisa:** - statutory interpretation as a subject studies body of rules and principles that are used to conduct and justify the meaning of legislative provisions when they are applied in practical situations

**Soccer/cooking – can u play soccer by studying the official fifa rule book. The game of soccer is not the same as the rules of soccer.**

### Interpretation Steps

1. Read the text
2. Read the text in context of Act as a whole
3. Consider text in light of Bill of Rights
4. Presumptions to be kept in mind
5. Make use of intra textual aids
6. Make use of extra textual aids
7. Use all above to find purpose and aim of legislation
8. Compare purpose with actual text
9. Look at answer in line with the Constitution
10. Apply situation at hand

## Unit 2 – What is legislation

### B4 interpret Legislation:

- Is the legislation in force?
  - When it came into force
  - Has it been amended or repealed
  - Study legislative process from promulgation to repeal.
- 
- written law enacted by a body/person authorised to do so by the constitution
  - 1 of 3 formal sources of law
  - Rules, principles of interpretation apply to legislation
  - Du Plessis' – enacted law text

**Interpretation Act 33 of 1957** – Sec 2 different types of legislation, Acts, ordinances, proclamations, by laws, regulations, rules and any other enactments with force of law -Section 1 and 2

**Constitution** - refers to proclamations, regulation and subordinate legislation –

Sec 101(3) Proclamations, regulations & other subordinate legislation must be accessible to the public.

Sec 140(3) Proclamations, regulations & other subordinate legislation must be accessible to the public.

### Categories of legislation: (chronological, hierarchical and delegated)

Chronological /Historical Categories:

Existing legislation categorise according to their historical origins

Chronological time line:

1. **Legislation before 1806** – Dutch law seen as common law – no formal procedures
2. **Old order legislation** (schedule 6 of 96 Con as legislation enacted before interim constitution)
  - a. Pre union legislation (1806-1910) legislation between British annexation of the Cape in 1806 and the union in 1910. British colonies & Boer Republic – incorporated in Union and Republic or Repealed.
  - b. Legislation between Union and Democratic era (1910 – 1994) = old order legislation. Most existing SA Legislation between 1983 and 1994.
3. **Legislation in new Constitutional era since 1994** – all legislation enacted after the start to the constitutional democracy in 1994, included interim constitution (repealed). 96 Constitution, national legislations, provincial legislation, regulation, proclamations.

Hierarchical Categories:

Deals with status of legislation

**Before 94 Constitution** was not supreme; the classification of legislation was simple and straight forward – original legislation, subordinate legislation (regs & proclamations)

**After 94:** new supreme constitution, older order legislation and new 94 legislation & 3 levels of co operative government (national, provincial and local)

Constitution supreme, all other legislation is subordinate

Du Plessis': different between hierarchy and status of legislation.

#### **a. Constitution**

- Supreme law of republic and any law/conduct inconsistent is invalid
- Obligations must be fulfilled – sec 2
- Courts can test legislation
- Called constitution of Republic of South Africa Act 108 of 1996
- **Van Wyk & Du Plessis** – don't agree with the number of the act, as ordinary Acts of parliament are numbered chronologically but the Constitution is more than just an Act.
- Constitution is not an Act as it wasn't adopted by Parliament, but drafted by a Constitutional Assembly and certified by the Constitutional Court.

## b. Original Legislation (6) **Know diff between this and Delegated**

- forms complete and comprehensive legislative capacity to elect legislative body
- Assigned by another Act of parliament/Constitution

### 1. Acts of Parliament

- All acts since 1910
- 1910 – 1983: Parliament consisted of House of Assembly and senate
- 1983 – 1994: Parliament consisted of House of Assembly, House of Representative, House of delegates, President council
- 1994: Parliament consisted of Nation Assembly + National Council of provinces
- Legislative author of current parliament is the Constitution Section 43(a) and 44
- Parliament highest legislative body in SA subject to the constitution
- Some acts of parliament have a higher status than other legislation (PAIA) and were created to give effect to specific human rights by the constitution sec 9, 32 and 33. PAIA – sec 5 – says it prevails over any other law in that area of law.

### 2. New Provisional Act from 1994 onwards

- Legislation enacted by 9 new provincial legislatures
- Powers to make legislation from constitution or acts of parliament
- Courts had power to review Act into Bill of rights

### 3. Provincial Ordinances (1961 – 1986)

- Provincial Government Act of 32 of 1961 – 4 former provincial councils to enact provincial ordinances on matter within their powers
- Councils abolished in July 1986 by Provincial Government Act 69 of 1986 – ordinances only apply in geographical area

### 4. Legislation of former homelands

- Self governing territories has concurrent legislative power with central government
- Repealed now but were granted complete legislative capacity to specific matter so they could amend, repeal parliamentary legislation
- Power over health, welfare, education and agriculture- not defence, foreign matters.
- No power over defence, foreign matter and self governing

### 5. Legislation of former TBVC States

- Transkei, Botswana, Venda, Ciskei not part of SA legislature
- Valid part of SA law as states are now incorporated into the Republic

### 6. Municipal Legislation

156 Powers and functions of municipalities

(1) A municipality has executive authority and the right to administer-

(a) local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and

(b) any other matter assigned by national or provincial legislation.

(2) make and administer by-laws for administration of the matters which it has the right to administer.

(3) Subject to section 151 (4), a by-law that conflicts with national or provincial legislation is invalid.

- Can enact by laws in light of local government matters for their areas
- Fedel Life Insurance VS Greater JHB metropolitan Council

**c. Deleted Legislation(3) Know diff between this and Original**

- Adds flesh to Acts and other forms of legislation drafted but not completed because legislative bodies not able to deal with changing society – delegate power to other bodies or tribunals
  - Bodies/tribunals than have delegated authority to enable that legislation - called legislative administrative acts or secondary /subordinate legislation
  - Constitution Section 101,140,129 refer to subordinate law
  - Can only be done within the framework delegated – can't amend or repeal
1. Existing Provincial proclamations & regs (1968-1944)
    - Before provincial councils abolished, some ordinance allowed committees to issue regulations and proclamations
    - Provincial Government Act 68 abolished councils & their legislative competency
    - Legislative Authority moved to the administrator o f each province
    - Administer could enact, amend or repeal provincial legislation by proclamation or regs under a new parliament Act or proclamation
    - Resulted in old provincial legislation being original and delegates need to be read tougher.
  2. New Provisional proclamations & regs(1994)
    - Empowered functionaries like Premier, Provincial Cabinet to add flesh to provincial Acts through proclamations or regulations have to met limits of the enabling act
  3. Other proclamations & regulations
    - Constitution, Act of Parliament or province can confer delegates powers to certain bodies – for example:
      - E.g. 1 – sec 8 of Defence Act president authorised subject to 203 constitution to declare state of national defence by proclamation
      - E.g.2 – Minister authorise to promulgate regulations - section 75 National Road Traffic act which allows the minister to issues regulations dealing with the use of a vehicle on a public road.
      - E.g.3 – Higher education Act – minister to issue statue for university dealing with general management

**New constitutional order:**

- Sec 229 interim constitutions – all existing legislation is in force until repealed or amended
- Item 2 of schedule 6 of the Constitution – all law in force when constitution took effect is still in force unless amended or repealed
- Old order legislation still in force
- New province has own provincial legislature
- Apartheid – black local authorities controlled by general affairs legistion, while white Indian and coloured has own affaires legislation.
- Law of general application – Section 36 limitation clause – limits fundamental rights of all legislation – original, delegated, common law and indigenou law.

**Not Legislation:**

- Written enacted by a body/person with authority
- Legislation must be published in Gazette before it takes effect
- Not everything published is legislation
- Not legislation – legal notices, reports, draft bills
- Policy documents – green and white papers are published for public comment
- Before called legislation – must comply to constitution and other legislation
- Unwritten codified law – common law and indigenou are not legislation but formal sources of SA Law

## Structure of Legislation:

- **Long Title:** Shorty summary of subject matter – part of statute & considered by the legislator during interpretation process to determin purpose.
- **Preamble:** not always in Act – mainly for constitutional/national NB – background, reason for legislation – after long title
- **Enacting Provision:** acknowledges authority of the body enacting it |  
Sec 43 constitutions: national legislative authority is vested in parliament, provincial legislative authority is vest in provincial legislature, and legislature of local authorities is vested in municipal councils.
- **Definitions:** internal dictionary at beginning of Act
- **Purpose & Interpretation:** include post 1994
- **Repeal/amendment legislation:** done by amendments act, new act passes, some other acts may need to be amended/repealed – normally in schedule at end of act
- **Short Tile & Commencement:** last section.  
No commencement date – operation date published in GG  
Give Commencement date – give date in short title  
Unknown Commencement date – operation on date to be fixed by president
- **Schedules:** shorten/simplify legislation - repealed or amendments
- **# Legislation:** Sec 1, subsec (1), paragraph (a), sub para (i), item (AA), sub item (AA) = 1 (1) (a) (i) (AA) (AA)  
Adding on amendments between 66 and 67 – 66A  
Old legislation called bis, ter, quot
- **Amendments:** Published in GG
- Explanatory note [] words in bold are deleted while \_\_\_\_\_ words are inserted in
- **Amended:** [s1amended by section1 of Act 45 of 1961]
- **Definition 1<sup>st</sup> amended then substituted then deleted:** “administrator” [Definition of administer was amended by section2 of Act 45 of 1961, then substituted by section 22 of Act 201of 1986 and then deleted by section 4 of Act 201 of 1993]
- **Paragraph:** added – don’t need new number [Para.(c) added by section2 of Act 201 of 1993]
- **Section amended then repealed in full:** 9...Section 9 substituted by section 3 of Act 45 of 1961 and repealed by section 344 (1) of Act 51 of 1977]
- **New Section inserted between two sections** [S.16A inserted by section 17]

## Legislation & Common Law:

- Sec 2 – in constitution to Constitution invalid
- Sec 39(2) – court to promote sprit, purport & objectives of Bill of Rights when develop common law
- Before 94 – courts used common law rules for interpreting
- After 94 – common law overrules by legislation and Constitution
- Interpreters rely on common law maxims & presumptions as long as they don’t conflict with the constitution
- Preliminary assumptions = common law presumptions on interpretation before the constitution could be referred to as the rebuttable common law bill of rights
- Presumptions fundamentally changed by the new constitution
- Fundamental rights can't be over turned by legislature at will because they are entrenched in the constitution.

### Presumption that legislation only apply to the future

*Presumptions apply if consistent with the Constitution / constitutionally justified*

*Presumption are on future matters – Bill of Rights – Sec 35(3) (i) and 35(3)(n)*

#### a. General

- *Presumed to regulate future matters unless expressly or by necessary implication*
- *Based on preventing unfair results*

**Curtis VS JHB Municipality-** *Presume to apply to future so vested rights are not taken away – presumed to come in after the act is in operation*

b. Express Retrospective application

- Provide expressly it has retrospective (forward-looking) force
- Sec 33(3)(i) no new offence can't be created retrospectively
- Sec 33(3) (n) accused has right to benefit of least severe punishments, if punishments have been changed between time of offence and sentencing.
- Offences can't be created and punishment not increase
- Presumption will apply as in the past except for creating of offences and increase punishment
- Courts to test retrospective legislation against bill of rights

c. Retrospectively by necessary implication

- Presumption can be rebutted if legislature intended the legislation to have retrospective by necessary implications.
- If absurd /unfair results can't be retrospective

Presumption that legislation does not intend to change the existing law more than is necessary

- Legislation should be interpreted in a way that it's in agreement with existing law (legislation, common law, customary law and public international law)
- New legislation that repeals or changes existing common law must do so clearly.

Common Law

- Presumption shows a respect and esteem for our common law heritage
- Legislature is free to change the common law as long as leaves no doubt that the new legislation has replaced the old common law.

**Plain language:**

- JA – Both in Santam Insurance VS Taylor – no 1 can understand
- All legal docs to be written clearly and comprehensively
- Drafted in way all readers know what is expected
- Good/ordinarily language
- Plain language will increase legal certainty
- Rules to be abided by need to be understood
- Shorter sentences, better structured paragraphs.

## Unit 3 – Commencement of Legislation

### Adoption & Promulgation

Adoption - is the process/reading that legislation has to be passes before it was accepted by the legislative body

- Not law
- Parliament passed Bill, Act to be signed by President
- Provincial Legislature passed, Act to be signed by Premier of Provinces
- Once signed by either President or Premier of Provinces = officially law

Promulgation - follows adoption, a means of making legislation known to people. Usually comes into operation on dates it's promulgated meaning published in the GG (date of commencement)

Proclamation - a category of subordinate legislation

### Requirement of Publication

- **Sec 13 of Interpretation Act 33 of 1957** – legislation is in operation once published in GG
- **Sec 81 & 123 Constitution** – Acts of Parliament or Provincial Acts are in effect when published or on date determined in the Act
- **Sec 162 Constitution** – municipal by laws enforced after published in Gazette of that province
- Must be published in GG or Provincial Gazette
- Doesn't comment before publication
- Problem – Remote areas who get gazette late = 16A Interpretation act – have alternative procedures for promulgation

### Commencement of Legislation

- Commencement – day the law comes into operation
- Law – proclamations, ordinance, Act, delegates legislation or enactment having force
- Delegated Legislation – must be published in Gazette and tabled in parliament
- New Legislation – regulations made need to be given to parliament for publication.
- Operation one of three times: - Published in GG, Date specified in Statute or Fixed Date to be proclaimed, signed by President.

### 13 Commencement of laws

(1) 'Commencement' is on the day it gets published in the Gazette, unless legislation provides another date. (another date could be for the whole act or just some sections of the act)

(2) "Commencement day" begins at midnight in operation @ end of the previous day – date specified in statute

(3) "A date fixed by the President or the Premier of a province" means Act will commence at a later dates to be proclaimed – it can be different dates for different provisions of that Act. (signed by the President)

### Presumption that legislation only apply to the future

Presumptions apply if consistent with the Constitution / constitutionally justified

Presumption are on future matters – Bill of Rights – Sec 35(3) (i) and 35(3)(n)

#### General

- Presumed to regulate future matters unless expressly or by necessary implication
- Based on preventing unfair results

**Curtis VS JHB Municipality**- Presume to apply to future so vested rights are not taken away – presumed to come in after the act is in operation

#### Express Retrospective application

- Provide expressly it has retrospective (forward-looking) force
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Retrospectively by necessary implication

- Presumption can be rebutted if legislature intended the legislation to have retrospective by necessary implications.
- If absurd /unfair results can't be retrospective

C1.Enactment deals with procedure

- Presumption retrospective legislation won't apply if it deals with procedure
- New rules 2 procedure apply to future cases
- New act is retrospective because the new procedural rules apply
- Rules of procedure don't effect vested rights

C2. Retrospectively favours the individual

- If benefits the individual its presumed not to apply to avoid an unfair result

C3. Retrospectively doesn't benefit the individual

- Amendment act place individual in a worse position, the presumption will apply

## Unit 4 – Demise and Amendment of legislation

- Legislation to be repealed by a competent body or declared invalid by a court
- B4 94 – parliament sovereign, courts couldn't invalidate legislation that didn't comply with common rules
- After 94 – courts test legislation against the supreme constitution
- Legislation in force when cc took effect, still in force until amended/repealed or declared unconstitutional
- Khulumani Support Group – claimed damages from multinational corporations, crime against humanity during apartheid, used Alien Torts Claims Act, not used for 200 years – dismissed cause link between normal bus activities and suffering caused by apartheid was not established – appeal to still be heard.

### Changes to Legislation (3)

- All legislation in force until amended/repealed/ amended/declared unconstitutional by the CC

#### 1. Amendment of Legislation – either by legislature or Constitutional Court

- Change or amend existing legislation - new Act
- Reformat whole act or adopt a general laws amendment act for many acts
- Amended by a competent legislature or Constitutional Court
- Parliament can amend an Act of parliament
- Provincial legislature can amend provincial ordinances and provincial acts
- Specific legislation will be amended by a specific amending legislation – Births & Deaths = Birth & deaths amendment Act

#### 2. Modificative Interpretation

- Botha – modification of words that have absurd results or don't serve the purpose – courts changed the initial meaning to avoid the absurd results = its legitimate and necessary exercise of judicial power.
- Botha – CC can declare a whole pieces of legislation or a whole act unconstitutional – but to try keep the legislation in force as much as possible by **Reading In or Severance**
- Courts can change legislation or modify meaning
- Doctrine of separation of powers the various legislature create legislation, courts interpret the legislation and dispense justice

### Reading down / Reading In / Severance

- Court declare legislation unconstitutional/ invalidates it – can't be applied any more
- Courts should try modify or adapt the legislation to keep it constitutional
- Sec 35(2) and 232(2) of interim constitution – if legislation on the face of it is unconstitutional – but can have a more reasonable interpretation to make it constitutional = reading down
- Reading in - drastic remedy used by the courts to change legislation to keep it constitutional
- Severance – court can read something in to rescue the provision to keep the rest constitutional

## National Coalition for gay and lesbian Equality VS Minister of Home Affairs 2000

### Facts

- Constitutionality of section 25(5) of Alien Control Act – allows the spouse or child of a person with permanent residence to immigrate to SA to join their spouse or child – gay & lesbians were not allowed to use this section – unfair discrimination – CC struck down the section 25(5) and reading in was used after the word "spouse" this was added "or partner in permanent same sex life partnership"

### Finding of CC considered and followed before reading in is applied:

- Reading in must be consistent with the Constitution
- Results of reading in must have little interference with existing laws as possible
- Court must be able to define how the meaning should be modified to comply with the Constitution
- Court must try keep to the aim & purpose of the act
- Reading in can't be used if will result in unsupportable budgetary intrusion

### Judgement

It was held that the constitutional defect in Section 25(5) can be cured with sufficient precision by reading in after the word 'spouse' the following words: 'or partner, in a permanent same-sex life partnership' and that it should indeed be cured in this manner.

### 3. Modification of legislative meaning during interpretation

- Courts can under exceptional circumstances modify (change/adapt) the initial meaning of the legislative text to ensure it reflects the purpose and objectives of that particular legislation.

### Invalidation of Legislation(2)

#### 1. Unconstitutional Provisions

- Delegated legislation can be declared invalid because it does not comply with the requirements of administrative law
- sec172 – HC, SCA or CC can declare legislation unconstitutional
- Declared with immediate effect or suspended to give legislature time to correct the defect
- If Act of parliament declared unconstitutional by HC, SCA it must be confirmed by the CC
- Local Gov legislation and delegated legislation can be declared unconstitutional by the HC and SCA and does not need to be confirmed the CC
- Enabling Act declared unconstitutional – the delegated legislation will also not exist any more unless court orders otherwise.

#### 2. Invalid delegated legislation

- Delegated legislation can't be repealed but ONLY invalidated by a court

### Repealed and substitution

Sec 11 of Interpretation Act- repeals wholly or partially any former law and substitutes provisions for the law repealed, the repealed law remains in force until the substituted provisions came in effect.

**S VS Koopman 1991** – Accused found guilty in MC for contravention of the Road Traffic Act – received a fine and a suspended driver's licence – on review it was questioned if it was valid, as the Road Traffic Ordinance had been repealed by the Road Traffic Act and the provisions of suspending a licence had not come into effect yet. – Sec 11 held that it was still in force

### Effect of Repeal

12 Effect of repeal of a law (IA)

(1) Where a law repeals and re-enacts with or without modifications, any former law, references to any other law shall, unless the contrary intention appears, be construed as references to the provision so re-enacted.

If provision X is repealed and re-enacted as Y – all references to X must be constructed as references to Y  
Everything done, achieved or began before an Act was repealed remains in place as if the Act was still in force.

(2) Where a law repeals any other law, unless the contrary intention appears, the repeal shall not-  
Transitional provision – all cases pending when 96 Constitution took effect must be finished into the repealed Interim Constitution

- (a) Restore anything not in force or existing at the time at which the repeal takes effect; or
- (b) affect the previous sections of any law; anything done before the legislation is repealed remains valid and in force after the repeal (except for proclamations, regulations and bylaws)
- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; Rights of legislation and not common law. **Balrows VS metal Allied Workers** – right of appeal in terms of the repealed legislation was a material right and not a procedural matter
- (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; **R VS Sutherland** – accused convicted of a contravention of the regulation under the state of emergency act even though the regulations were repealed before the trial (c) & (d) – accused in court on 2 June 1982 for contravening the Internal Security Act 44 of 1950 – was refused bail on 29 July 1982 cause the security act 44 of 1950 was repealed on 2 July 1982 and replaced by the Internal Security Act 72 of 1982 – defence said he could not refuse as the accused has not committed the offence into the new act and that the accused should still be tried under the old act (d) but in (c) the refusal of bail under the old act was still effective.
- (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.

**S VS Erasmus** – enquiry under the act must continue even if a particular act is repealed before the enquiry can be completed.

**Nourse VS Van Heerden 1999 – example of demise of legislation Sec 12(2)**

1992 a gynaecologist from Durban was charged under the Abortion and Sterilization Act 2 of 1975 for performing illegal abortions. Trial started on 27<sup>th</sup> Nov 1992, and was not finalised in 1997.

1 July 1997 his attorney brought an application to have the charges against his client dropped, since at that stage abortions were no longer illegal and therefore no crime was committed – used the following:

- The Abortion and Sterilisation Act on illegal abortions not be applied since the mid 90's and therefore those provisions have been abrogated by disuse
- The Abortion and Sterilisation Act was repealed by the Choice on Termination of Pregnancy Act 92 of 1996 relating to abortion.
- Bill of rights – one has the right to make decisions regarding their own body and reproductive health.

**Legal issue:** The application of the demise of legislation, Section 12(2) of the Interpretations Act, as well as retrospectively.

**Finding:** Court found it could not be abrogated by disuse and must be repealed by competent legislature. The existing legislation remains in force until repealed or declared unconstitutional.

The trial started before the repeal of the Abortion Act and under sec 12 of the Interpretation Act the trial must be completed as if the Abortion Act was never repealed. The 1996 Constitution was in force on 4 Feb 1997 and the abortion act was never declared unconstitutional.

**Presumption that legislation does not intend to change the existing law more than is necessary**

- Legislation should be interpreted in a way that it's in agreement with existing law (legislation, common law, customary law and public international law)
- New legislation that repeals or changes existing common law must do so clearly.

**Common Law**

- Presumption shows a respect and esteem for our common law heritage
- Legislature is free to change the common law as long as leaves no doubt that the new legislation has replaced the old common law.

**Legislation**

- Existing legislation is usually expressly repealed.
- New acts have a schedule with all sections that have been repealed are listed.
- If Act does not expressly repeal or amend existing legislation – presumption is the new Act has not changed the existing legislations.
- Presumption it's assumed that legislation didn't intend to repeal or modify an earlier Act.
- Try to read the old and new act and reconcile – if impossible it is presumed by implication that the newer act prevails

## Unit 5 – How Legislation is Interpreted

### 5.1. Two theories of Interpretation:

<b>Textual Approach/Orthodox/Literal</b>	<b>Purposive/Contextual Approach</b>
ordinary /plain meaning clear, that meaning to be applied	Applied time to time before 94
Golden Rule – only if ambiguous, can court deviate from the meaning	Resulted in NB minority judgement
court can use 2 <sup>nd</sup> aids(internal & external)	Meaning and context
If language unclear & 2 <sup>nd</sup> aids can't solve then use common law presumptions (3 <sup>rd</sup> aids)	Purpose/object is most NB
Adopted by English law, RDL was replaced by literal approach	Social factors, political policies are also taken into account when deterring the purpose of legislation
Based on predominance of the word or called the intention of legislature	Mischief rule is the forerunner of purposive approach of interpretation, acknowledges the application of external aids and common law
Plain meaning given literal meaning	Used from the beginning as it's a balance btwn grammatical and context of the meaning
Court regard literal meaning that the legislature intended	Object and scope of legislation must also be taken into acc
No room for judicial law making, courts seen as mechanical interpreters of the law	
Impression that once law spoken, courts have no function	
Ridged adherence to the separation of powers	
<b>Criticism:</b>	<b>Schriener in Jaga provided guidelines:</b>
1. Common law presumption last resort if text is ambiguous	1. Contextual approach to be used @ beginning - wider view
2. Internal textual aids are ignored	2. Even if text is clear/ambiguous the context must be used
3. Intention of legislature ultimately depends on how clear the words are	3. Wider content can be more NB than legislative text
4. Implied that legislation is seldom clear and unambiguous	4. Once text & context meaning, clear it must be applied irrespective of interpreter's opinion.

#### Criticism:

- Only be applied if text is vague /ambiguous.
- Leaves little room for judicial law making(courts just mechanical interpreters of law)
- Impression that once Legislation has spoken, courts has little law making function
- Ridged adherence to the separation of powers as courts can only interpret and not make the law
- Casus Omissus rule – courts to interpret law and not to make it
- Aim & Purpose of legislation are not taken into account

**Contextual/Purposive/text in context approach** Purpose/object of legislation is NB for interpretation

- Social factors/political policy NB to determine purpose
- Mischief Rule - acknowledges external aids and common law before legislation
- Recognises contextual framework of legislation
- Balance between framework and contextual meaning

**Jugo vs. Donges** – minority decision – Schiner identified guidelines for interpretation of statutes:

- Interpreter can take aim and purpose into consideration
- Even if clear/unclear the practical effects and background can be taken into account
- Wider context more NB than legislation text
- Once meaning determined it must be applied

**Mjuqu vs. Jhb City Council** – regarded as model of contextual approach

**University of CT vs. Cap Bar Council** – court to examine all contextual factors when looking for the intention, even if words are clear or ambiguous

- Courts can adopt/modify initial meaning to harmonise it with the purpose of legislation
- Courts role is more flexible and not limited to meaning of words
- Judiciary has law making discretion during interpretation

### **Influence of the Supreme Constitution: (3)**

#### 1. Supremacy Clause (Supreme Constitution)

- 1(c) refers to the supremacy of the Constitution and rule of law
- Constitutional Supremacy – supreme law of land, any law/conduct inconsistent is invalid as obligations must be fulfilled
- Sec 2 & 7 obligation clause – Bill of rights is cornerstone of SA democracy and must be respected, protected and promote the bill of rights
- Sec 8(1) Bill of rights – applied to all laws and binds legislature, judiciary & organs of state
- Sec 8(1) Bill of rights – applied to natural and justice persons
- Sec 237 – All CC obligation to be performed without delay
- Sec 7(4) Sec1 only amended if 75% of member of NA agree + 6 of 9 provinces agree
- Sec 1 – most NB provision of the supreme constitution

#### 1 **Republic of South Africa**

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, equality and advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and the rule of law.
- (d) Universal adult suffrage, national common voter's roll, regular elections + multi-party system of democratic government, to ensure accountability, responsiveness and openness.

#### 2. Interpretation of Provisions NNBB

- Sec 39(2) interpreting any legislation and developing common/customary law every court/tribunal/forum must promote the spirit/purport and objectives of the Bill of rights.
- Promotes contextual approach to interpretation – using external aids from the beginning.
- Peremptory/binding provision – all courts/tribunals/forums must view aim and purpose of legislation in light of the bill of rights = unclear text is not enough

**Bota Star Fishing vs. Mat Environmental Affairs & Tourism** – before interprets any legislation, look at CC to promote the spirit/purport and objectives of the bill of rights even if words are unclear.

**Investing Directorate; Serious Economic Offences vs. Hyandi Motors** – In re Hyundai Distributors – sec 39(2) all statutes to be interpreted in light of the bill of rights

- Sec 233 – when interpreting legislation every court must use reasonable interpretation of legislation that is consistent to international laws.
- Peremptory provision – interpretation that doesn't conflict with international laws
- Any interpretation of sec 233 is subject to sec 1(c) and sec 2
- Legislation must as best as possible be interpreted constitutionally

### **Prinsloo vs. Van De Linder** – 93 CC reading down to be kept alive

- Sec 233 – has sec 231 & 232 – stating that application of international law is subject to the CC
- Strengthens sec 39(2) – promotes the spirit/purpose and object of the bill of rights

### 3. Values underpinning the Constitution

- 93 preamble – SA Constitutional State – Regstat
- 96 preamble – SA not refer to as a Constitutional State
- Section imply so – 1,7,39(2)
- Preamble – Society based on democratic values, social justice, human rights = freedom, equality and human dignity - 36(1) + 39(1) = 3 core values of the constitution.
- 96 Constitution has constitutional provisions of the 93 interim constitution

#### Courts:

- the guardian & enforces of the values underlying the constitution
- uphold & protect CC and human rights
- make value judgements during interpretation and applications and rights
- interpretation to balance conflicting values and rights

### **Practical / Inclusive methods of Interpretation (Du Plessis')**

- Grammatical Interpretation - NB role of language - Focus on linguistic & grammatical meaning of words, phrases and sentences
- Systematic /Contextual Interpretation - Clarify meanings of a section in relation to the legislation as a whole, its an Holistic approach / wholeness of words/ phases can't be read in isolation
- Teleological Interpretation - Fundamental constitution values - Aim & purpose ascertained against fundamental constitution values
- Historical Interpretation - Historical Context -Factors that play a part in adoption of legislation
- Comparative Interpretation - Process where court examine interpretation of similar legislation by foreign courts and international laws

### **Different aspects/techniques for interpretation:**

All identified in Minister vs. Land Affairs - Court requires:

- Ascertain meaning of provision by analysing its purpose
- Having regard to all historical context
- Regard the statute as a whole & values it underpins
- Regard exact provision to other interrelated provisions
- Regard to precise wording

## Unit 6 – Basic Principles

### **The Constitutional demands:**

- NB rule is to establish the purpose of the legislation to give effect to
- *Matiso v Commanding Officer, PE Prison 1994*: the rule of ascertaining the intention of the legislation does not apply in a state of constitutional supremacy: The Constitution is supreme & not the legislature.
- Now the most important rule is to establish the purpose of legislation in the light of and assessed in terms of the Constitution. The Constitution prescribes a “contextual approach”

### **Why not “the intention of the legislature” or “textual approach in post apartheid:**

- Originated from parliamentary sovereignty.
- Steyn: The will of the legislature is ascertained from the words used (textual).
- Intention = individual subjective state of mind which can't be achieved when it comes to all the members of a legislative body because: -
  - Large number of persons involved in legislative process.
  - Some members oppose legislation = reflects intention of majority.
  - Members may support due to party pressure even if opposed to it.
  - Not all expected to understand highly technical terms.
  - Bill drafted by drafters acting on advice from bureaucrats.
  - Members may be absent when voting takes place.

### ***Intention used in narrow sense (literal approach)***

- *R v Krk 1914*: We can only arrive at the intention of the legislature by construing the actual words used. We cannot insert words or assume intention.

### ***Intention used in broad sense (purposive approach)***

- *Stellenbosch Farmers Wineries v Distillers Corp* to arrive at the intention one must find the goal of the legislature, the reason for the statute.
- The most important rule of statutory interpretation is that the interpretation must reflect the purpose.
- Legislation that dates from the years of Apartheid can't be restricted by what the parliament originally intended, but must take into account our constitutional democracy and human rights culture

The Marriage Act 25 of 1961: Can it still be used to conclude marriages between gay couples? How should courts deal with this interpretive question, a problem in transitional societies like post-apartheid South Africa? Does it matter whether the courts understand their interpretive task in a textualist or a contextualist manner?

- Yes, it matters a great deal whether post-apartheid courts adopt a textualist approach, from this perspective the **original** intention of the legislature must be established – it was not the intention of the legislature to allow gay marriages. Therefore the Act cannot be used to conclude a gay marriage.
- The contextualist approach is to establish the **present** purpose & further that purpose. *Fourie v Minister of Home Affairs 2005*: The purpose of the Act is to allow people who are eligible to marry to get married. Gay couples have a constitutional right to marry. The text or wording must be updated. A contextual approach is required by the transitional nature of our society.

**Public Carriers Assoc v Toll Road**: a distinction between the purpose and intention of legislature.

- Cowen took following into account:
  - NB 2 distinguish between the purpose and reason of legislation
  - Aim/purpose 2 be distinguished from the 'intention of the legislature' is subject to speculation;
  - Purpose determined by objective meaning not guesswork.



### **The meaning of the text:**

- The “literal rule” no longer applies.
- Text read for the meaning but as a whole
- The purpose of the legislation viewed against the Constitution will qualify the meaning of the text.

### **The initial (phase 1) meaning of the text:**

- Process begins with the reading of text.
- The ordinary meaning must be attached 2 words as a starting point
- In technical legislation (specific trade) that applies to a specific trade, these meanings will be different to the ordinary meaning.

*The interim Constitution - all proceedings pending dealt with as though the Constitution had not been passed.*

- *The criminal trial of Mhlungu was pending on 27 April 1994.*
- *Mhlungu argued he was entitled to the constitutional right to a fair trial (certain evidence was no longer admissible). The state rejected this according the interim constitutional provision.*
- *The CC was divided:*
  - *Majority - interpretation was that old apartheid courts to close cases. The CC had to be applied and the evidence excluded.*
  - *Minority held the courts had to conclude pending cases under the old law as if CC had’nt been passed and the evidence therefore allowed.*
- *Majority rejected this as it violated the principle that every word and clause must be given meaning.*
- *The purpose was that the provision deals with jurisdictional issues and not with substantive law. The interpretation of the minority only focused on one section and not on the interpretation as a whole.*

### **Every word is important:**

- Meaning to be assigned to every word according to their ordinary meaning
- Unless essential for the court to regard it as unwritten.
- Repetition sometimes occurs cause of overly cautious drafters
- Should be read as a whole.
- Related to the presumption that legislation does not contain useless provisions.

### **The continuing timeframe of legislation:**

**Question:** Should words be interpreted according to their present-day meaning or retain the meaning they had when the legislation was passed?

- Cowen: unnecessary for words to retain their original meaning.
- Initially courts held that legislation must be given the meaning at the time it was passed.
- Recently held that the purpose of an Act – the definitions should be flexible in order to keep up with, and not update legislation.

### **No addition or subtraction:**

- Basic rule if purpose of the legislation is clear, court ensure that the legislative process reaches a just and meaningful conclusion

### **Balance between the text and the context:**

- Initially where provision is clear – literal meaning.
- In *Jaga v Donges – NB of contextual framework – judge Schreina* rejected the narrow view and argued even if there is a clear meaning the context must be taken into account.
- The purposive approach does not separate the text from the context but strikes a balance between them.

## **6.2 OTHER BASIC PRINCIPLES:**

### **Legislation must be read as a whole:**

- Interpreter's to read legislation as a whole.
- Common law - **ex visceribus actus**: All parts of legislation must be studied / birds flock together/from inside of Act
- Du Plessis: refers to the legislation be studied as a whole as the structural wholeness of the enactment.

### **The presumption that legislation does not contain useless provisions:**

- NB presumption - court must determine the purpose of legislation and give effect to it.
- Presumption is that legislation has a functional purpose.
- If the intention is clear, it should not be defeat because of vague language
- If a provision is capable of two meanings, the meaning which is consistent with the legislative purpose must be accepted.
- Applies to delegated legislation
- Maxim *ut res magis valeat quam pereat* – interpreter won't leave delegated legislation invalid but rather valid
- Presumption can't be used to rescue a administrative Act that is defective or invalid.

### ***R v Forlee***

- **Facts:** Forlee was found guilty of contravening an Act by selling opium. Argued on appeal -that he didn't commit an offence as the Act prescribed no punishment.
- Legal issue: The presumption that legislation doesn't contain futile or nugatory provisions
- **Finding:** The court relied on the presumption against futility, finding that the absence of a penal clause didn't render the Act ineffective, since the court has the discretion to impose punishment.
- wide-spread criticism as the ***nullum crimen sine lege*** (no penalty, no crime) was not adhered to
- Although both presumptions applied, the ***nullum crimen sine lege*** rule is the basis of the criminal justice system and should have outranked the presumption against futile results.
- The presumption applies to delegated legislation. The maxim *ut res magis valeat quam pereat* applies: an interpretation that will leave the delegated legislation *intra vires* (valid) and not *ultra vires* (invalid) should be applied
- Legislation should be interpreted in such a way that a *casus omissus* (omission) is avoided.

## Unit 7 – Research: Ascertaining the legislative scheme

### 7.1. General introduction

- Fundamental principle in statutory interpretation is to determine the purpose of the legislation in light of the spirit purpose and objects of the Bill of rights in the constitution.
- Internal & external aids: researched to obtain the purpose.
- Purpose is established through research: this is known as the contextualisation of the text.
- Interpreter to establish plain meaning that reflects the purpose
- Different approach as to **when** the aids will be used – Textualist and Contextualist  
Diff in opinion between textualist and Contextualist is settled by section 39(2) = Contextualist approach to be used.
  - **Textualists:**
    - Wording and intention – 1<sup>st</sup> internal then external then tertiary
    - Only if ambiguous only used in exceptional circumstances
    - Internal & external aids are “secondary aids”
  - **Contextualists:**
    - internal and external aids to be used from the start 2 have a balance between text & purpose.
- CC supports a purposive approach; courts decide usage and extent of external & internal aids.

### 7.2. Internal Aids (7) (inside text)

- The legislative text in official language 2 clarify uncertainties
- B4 94 the courts were not consistent in their approach to the use of internal aids.
- This has been settled by s 39(2) of the Constitution.

### **1. Original Legislation**

- Legislative texts are signed in different languages in which they were drafted and the signed text enrolled for record at the Appellate Division
- Sec 240 of the 96 CC provides if any inconsistency, the English text will prevail.
- 61, 83 and 93 CC – if irreconcilable conflict between various legislative texts exist, the signed text prevailed.
- CC says all national & provincial legislation signed by the President or premier kept at CCourt
- The signed text will be conclusive evidence of the provisions of that legislation.
- The constitution doesn't refer to irreconcilable conflicts between texts of other legislation.
- The signed version does not carry more weight simply because it is signed:
  1. Signed version conclusive only where irreconcilable conflict between versions.
  2. Signed version only used as a last resort.
  3. Where one version is wider, the 'common-denominator' rule is followed.
  4. If no conflict, must read together, reconcile with reference to purpose & context.
  5. Unsigned version may be used to determine the purpose.
  6. Amendment Act signed becomes part of the original statute. Original Act prevails if irreconcilable conflict between the texts of amendment Acts.

### **2. Delegated Legislation**

- All versions of delegated legislation will be signed.
- Signed version can't be used on to solve conflicts between texts but read together
- Irreconcilable conflict courts give preference to the one which grants benefits to the party concerned.
- Presumption - legislature doesn't intend legislation that is pointless
- If conflict results in legislation being vague / unclear: court may declare invalid.
- Textual approach – signed version applies – purpose gets ignored.

### 3. Criticism

- All versions to be read together from beginning cause all part of the same structure of 'enacted law-text'.
- SA benefits with the comparisons between same legislation in different languages.
- Considering signed versions = aim and purpose of the legislation is ignored.
- Botha: irreconcilable conflict btwn versions of the same legislative text, the text which best reflects the spirit and purport of the Bill of Rights must prevail.
- Signed version may be incorrect & unsigned might reflect the true purpose of the provision.

### 4. Preamble

- Usually contains a programme of action / declaration of intent. (Provide a starting point).
- Read as a whole with the rest of the text

*Green v Minister of the Interior* held that the preamble considered only if unclear, which approach is a narrow and textual.

*Jaga v Dönges*, the preamble was considered to be part of the context of the statute

*National Director of Public Prosecutions v Seevnarayan*, the approach held in *Green* was considered and outdated approach to interpretation.

### 5. Long Title

- Short description of the subject matter.
- Court entitled to refer to the long title to obtain the purpose of legislation.

### 6. Definition Clause

- certain words or phrases used in the legislation are defined
- Definition in this section are conclusive, unless context indicates another meaning, then the ordinary meaning will be adopted.

*Kanhym Bpk v Oudtshoorn Municipality* it was held that a deviation from the meaning in the definition clause will only be justified if the meaning is not the correct interpretation within the context of the particular provision.

### 7. Express legislative purpose and interpretation guidelines

- more detailed description of the legislative than the long title, not decisive
- The interpreter must analyse the text as a whole with external aids.

### 8. Headings to chapters and sections – introductions to headings/sections

- In past heading was used if text unclear.
- Contextual approach: heading should be used to obtain the purpose
- Value attached to headings depends on each individual case.
- They can be used to establish purpose of the legislation.

### 9. Paragraphing and punctuation

- Grammatical fact that punctuation can affect the meaning of the text.
- If the legislature considers punctuation therefore the interpreter must also do so.

### 10. Schedules

- Shorten & simplify the content matter of section
- Value depends on the nature and relationship with the rest of the text.
- General rule:
  - Schedules that explain sections should have the same force of law
  - If conflict between schedule and section, the section prevails. (A schedule may state it is not part of the Act, and does not have the force of law: it may be considered as part of the context. E.g. Labour Relations Act: schedule with flow diagrams explaining the procedures for dispute resolution.

### .3 External Aid/ Extra Textuals: (6)(outside text)

#### 1) The Constitution: 39(2)

- NB aid to interpretation - supreme
- No argument about plain meaning / unclear provisions could prevent the Constitution from being referred to.

#### 2) Preceding discussions:

- Debate on specif bill before parliaments, debates and reports of commissions of inquiry
  - Courts reluctant to accepts debates as an aid of interpretation
- a. **Debates during the legislative process:**
  - Not accepted by the courts in earlier cases.
  - CC used parliamentary debates, a speech by the Minister of justice, report by the SALaw Commission during interpretation in recent cases. *S v Tilly, S v Tshilo* 2000.
- b. **Commission reports:**
  - Courts reluctanct to accepts and will onlky accep if the provision is ambiguous.
  - Court can refuse a report of 1 committe member cause its subjective opinion.

#### 3) Surrounding circumstances:

- Those conditions before and during the adoptions of legislation which led to its creation.
- Refers to the **context** of the legislation.

##### a. **The mischief rule:**

- Historical context used to place provision in perspective.
- Object of rule: To examine circumstances leading to the measure in question.
- laid down by Lord Coke in *Heydon's Case 1584* (the cornerstone of the contextual approach).
- Rule: Four questions to be answered to establish the meaning of legislation:
  - What was the legal position before the legislation was adopted?
  - What was the mischief (or defect) not provided for by existing legislation/Common Law?
  - What remedy (solution) was provided by the legislature to solve this problem?
  - What was the true reason for the remedy?
- Purpose of rule - to examine circumstances leading to the measure in question.

##### b. *Travaux preparatoires:*

- deliberations of the drafters of a constitution 39(2) every court to use constitutional interpretation
- If deliberations of the drafters (original intents) became the deciding factor during the interpretation of the constitution, there will be no development / adaptability.
- consulted as a secondary source but cannot be the deciding factor.

##### c. *Contemporanea expositio:*

- Exposition (description) of the legislation the time / after its adoption.
- Marginal notes, punctuation, division into paragraphs, 1st application.
- Exposition probably given by those involved in the adoption / 1<sup>st</sup> application.

##### d. *Subsecuta observatio:*

- established use/custom which may originate at any time after adoption of legislation
- Long term use of a provision may be a deciding factor for interpretation.

##### e. *Ubuntu:*

- humanist disposition towards the world - Compassion, tolerance, fairness.
- *S v Makwanyane*: CC ubuntu translates as humanness. Collective unity.
- May be argued ubuntu lives on the references to human dignity in the Constitution.
- Forms a bridge between individual western approach and unity approach of ubuntu.

#### 4) **Dictionaries and linguistic evidence:**

- Don't understand – external aids

**De Beers v Ishizuka:** held that the interpretation of a word can't be finally determined by dictionary meaning but used as a guideline and the context should serve the decisive factor. Court has held the testimony of language experts is not admissible as an aid.

#### **S v Makhubela**

**Facts:** The accused was charged with being behind the wheel of a vehicle that was being pushed by a group of people on a public road, without a driver's licence. He was found guilty of driving a vehicle on a public road without a valid driver's licence.

**Legal issue:** The use of a dictionary

**Finding:** On review, the court decided that the definition of the word 'drive', as found in the Road Traffic act, was inadequate. The court held that the word 'drive' shouldn't be construed only according to its dictionary meaning, but should be understood within the context of the Act as a whole. The legislature had meant that a person driving a vehicle propelled by its own mechanical power should be in possession of a driver's licence. The conviction and sentence were set aside.

#### 5) **The source of a provision:**

- English statute incorporated in SA law should be interpreted in light of the SA common law
- English court's interpretation only acts as a guideline

#### 6) **Explanatory memoranda, examples & footnotes:**

- Bill published by drafters that determines the purpose of the Act
- Courts used explanatory memoranda to interpret Labour Relations Act in *Shoprite Checker's v Ramdaw*.
- Footnote & examples used to facilitate confusing text – used as part of the context.

### **7.4 The Interpretation Act 33 of 1957 (4 original and subordinate legislation)**

- **Part I** General provisions regarding the interpretation of statutes that apply in the Republic
- **Parts II – V** Particular provisions applying in the different provinces
- **Part VI** Provides that the Act binds the state

#### 1) **The time factor:**

##### a. **The meaning of 'month': sec 2**

- Calendar month not lunar.
  - 1 to 31 Jan (Service contracts).
  - 9 Jan to 9 Feb (Prison terms).

##### b. **The computation of time:**

- NB statutory + contractual provisions prescribe a time period in or after actions are to begin or are to be executed, abandoned or completed.
- The Interpretation Act should be read with the common-law method:

The statutory method: (s 4 of the Interpretation Act – 1<sup>st</sup> day excluded, last day included unless falls on a Sunday or public holiday)

- Will be applied where other legislation doesn't mention time.
- S 4 is not applicable the ordinary-civil method applies.
- only to days, not months or years
- applied if no arrangement in legislature

**Brown vs. Manpower** – if clear sec 4 to be used – determine end and not beginning of period

Common-laws methods:

##### i) **Computatio civilis: (Ordinary / civil method):**

- 1<sup>st</sup> day included & last day excluded – opposite to statutory methods

**Police VS De Beer** – accident and had 6 months to institute a crime – summons arrived 1 day late – action refused

ii) ***Computatio naturalis***: (Natural method):

- Prescribed period from the hour/min of the occurrence to the corresponding hour /min on the last day of the period in question

iii) ***Computatio extraordinaria***: (Extraordinary civil method):

- The 1<sup>st</sup> & last days are included.

## **7.5 Other Common Law Presumptions (applies to external aids)**

### **1) Government bodies are not bound by their own legislation: (read)**

- Botha – no longer applies -Argued this presumption should no longer apply under new CC order:
- Sec8(1): Government organs are bound. The Constitution is supreme and all law & government must be tested against it. Constitution refers to accountability & openness, the values underlying it, open & democratic society, the state is bound by the Constitution etc.

#### Examples:

- Government bodies are bound by town planning schemes.
- A security official when acting outside the scope of his duties cannot rely on the presumption.
- The driver of a fire engine may disregard a red traffic light.

### **2) Legislation does not oust the jurisdiction of the courts: (NB)**

- Unless expressly stated / necessarily implied, presumed that legislature doesn't wish to restrict the courts' jurisdiction.
- Presumption entrenched in our Constitution as a fundamental right =
  - sec 34 right to access a court,
  - sec 33 right to just administrative action
  - sec 35(3) - every accused person has the right to a fair trial
  - Legislature can no longer, as in the past, oust the jurisdiction of the courts at will.
- *De Wet v Deetlefs* 1928: Court held: the intention of the legislature should clearly indicate where a court's jurisdiction is to be excluded. Presumption applied in *Mathope v Soweto Council*
- A statutory provision which denies / restricts the right of an individual to appeal to a court has been interpreted strictly. *Du Toit v Ackermann* 1962

## Unit 8 – Concretisation: Correlation of text and purpose in the light of the Constitution(NNNB)

### 8.1. What is concretisation?

- All data collected during the interpretation phase
- bearing in mind the constitutional guidelines
- Du Plessis - It's the final stages in the interpretation process where the legislative text, purpose and facts are brought together to reach a conclusion

### 8.2. The law-making function of the courts

- Courts don't make new laws but give effect to current laws
- Botha – favours the contextual approach

#### a. The orthodox/liberalism viewpoint

- assumption that the meaning of legislation is fixed and fully developed when promulgated
- assumption is that meaning is not created through interpretation

*Engels v Allied Chemical Manufacturers (Pty) Ltd* it was explained that by remedying the defect, the court would be usurping the function of the legislature and making law, not interpreting it.

#### b. The purposive viewpoint

- Not enough to find the plain meaning
- court does have a creative law-making function but completes the legislation process
- Doesn't amount to usurpation of legislature's function – makes for a meaningful end
- Legislature to use general language when drafting legislations
- Legislation is drafted into general rules that apply to many different cases
- Problem with general rule – either too inclusive or under inclusive – court to neutralise problems
- “Law making” – to make sure the purpose of law is not obstructed by the general language

#### c. The myth that courts merely interpret the law

The literalist viewpoint - courts usurp the powers of the legislative body if + when legislation is interpreted creatively is based on a number of 3 false assumptions, namely:

- (i) They confuse the modification of legislation with the literal modification of the text or language of the legislation; (casus omissus – modify meaning as a whole)
- (ii) willing to accept a literal interpretation of a statute which goes beyond the purpose of the legislation;
- (iii) They rely on the doctrine of parliamentary supremacy which has been replaced by the Constitution.

#### d. Factors which support and limit judicial law-making

- The aim and purpose of legislation within the framework of the Constitution must support the modification.

##### (i) Restrictions on the law-making powers of the courts

- Principle of democracy - S1 of constitution – fundamental constitutional values.
- Courts guardians of the constitutional values not allowed to usurp the constitutional role of legislature.
- Principle of separation of powers (S43 of constitution deals with legislative authority)
- Common law presumption – the legislature does not intend to alter existing law more than necessary.
- The rule of law principles e.g. principles of legality.
- Judicial officers accountable for their actions -Personal responsibility/Formal responsibility: constitutional and legislative / Substantial accountability: decision opens to public debate and academic criticism.
- Punishing provisions or restrictive provisions in legislation.

##### (ii) Factors which support modificative interpretation/ Law making discretion of court

- Reading down principle – legislation on the face of it is unconstitutional could have more restrictive interpretation that will still render it valid
- S39 (2) of constitution – courts reconcile aim & purpose of legislation with provisions of bill of rights.
- Bill of rights applies to all law and binds judiciary as well.
- Constitutional supremacy – demise of sovereignty of parliament vests courts with rightful authority.



- Common law presumptions that legislature does not intend futile laws.
- Independence of judiciary assured by constitution S165(2)

### 8.3. Possibilities during concretisation

- Concretisation phase of interpretation may also be influenced by the Constitution.
- final 'result' /outcome of the interpretation process - can't be in conflict with the CC + fundamental rights
- Modificative interpretation (restrictive +extensive ) can be applied only if it's permitted by the purpose of the legislation

#### No problems with correlation

- no difficulties applying the provisions to the facts within the purpose + constitutional guidelines

#### Modification of the meaning is necessary

- Modificative interpretation occurs when the initial meaning of the text doesn't correspond fully to the purpose of the legislation and modification of the initial meaning of the legislation will only take place where:
  - the purpose of the legislation is clear; and
  - the initial meaning of the legislation goes beyond the purpose of the legislation or the initial meaning falls short of the purpose of the legislation

#### Types of Modifications: (2)

- Court may modify the initial meaning of text on the grounds of ambiguity, absurdity or vagueness.

#### (i) Restrictive interpretation (language is over-inclusive)

- Initial meaning of text is reduced

##### *Cessante ratione legis, cessat et ipsa lex*

- Means - if the reason for the law falls away, the law itself also falls away
- Not applied in SA - legislation can't be abolished but remains in force until repealed

##### Eiusdem generis

- Means – of the same kind
- Meaning of words is qualified by their relationship to other words
- Requirements before the initial meaning of the text can be modified:
  - The specific words must refer to a definite genus or category. *Skotness vs. SA library*
  - Specific words must not have exhausted the genus. *Carlis vs. oldfield*
  - Rule can be applied even if the specific words precede the general words. *JHB municipality*
  - The order of words is unimportant. *Burglars Post vs. Inland Revenue*
  - Intention of legislature to such restrictive interpretation must be evident.
  - Case law – *S v Kohler*

#### S v Kohler

**Facts:** The court heard an appeal against a conviction by a magistrate's court, which convicted Kohler of having contravened a municipal poultry regulation by keeping a peacock within the municipal boundaries without a licence. The regulation defined 'poultry' as any fowl, duck, goose, turkey, guinea fowl, partridge, pheasant, pigeon or the chickens thereof, or any other bird. The defence alleged that peacocks are not poultry.

**Legal issue:** The *eiusdem generis* rule

**Finding:** After consulting dictionaries, the court found a peacock to be "a chicken-like decorative bird". Since there already is a definite genus (i.e. poultry), the general words "any other bird" are restricted to that genus. A peacock is a species of that genus and the appeal was dismissed.

#### (ii) Extensive interpretation (language is under-inclusive)

- Initial meaning of text is extended - opposite of restrictive interpretation.
- purpose is broader than the initial textual meaning - widened to give effect to purpose.
- initial meaning of the text is modified (expanded) to include what on the face of it, fall outside the scope of the legislation but are actually implied by the legislative provision.

**Interpretation by implication:**

- Extending textual meaning on the ground of reasonable and essential implication which is evident from the legislation.

Three Main Grounds:

1. Ex contrariis means opposites
  2. Ex consequentibus
  3. Ex accessorio eius
- If certain action is sanctioned by legislation then all that is necessary to bring about the action is authorized by implication.
  - If principal is forbidden or permitted by legislation, it is assumed the accessory thing is also forbidden or permitted as the case may be.
  - Implied inherent relation e.g. Authority to issue regulation implies there is also authority to withdraw the regulation.
  - If a particular result is prohibited then also means of achieving such results is also prohibited by implication.

**No modification of the meaning is possible**

- The discretion of the judiciary to modify the initial meaning of the text is limited.
- If modification of the meaning is not possible, the court will have to apply the legislation as it reads.
- If legislation isn't clear or doesn't support a modification of the initial meaning, the legislature has to rectify it.

## Unit 9 – Non Compliance with legislations

- Legislation has consequences for acts/omission = OK= Problem if no consequences for an Act/omission
- If Legislation doesn't state consequences – Courts to determine if the provision was peremptory or directory?
  - **peremptory** – a statutory provision that requires **exact compliance** and failure to comply with a it will leave the ensuing act null and void;
  - **directory** – a statutory provision that requires **substantial compliance** only and failure to comply with it will not result in the ensuing act being null and void.
- Courts generally follow a contextual approach when interpreting peremptory and directory provisions.
- Language is considered in context, all internal & external aids used to determine the purpose of legislation.
- Factors in making interpretation =principles of justice, fair play, convenience, logic, effectiveness & morality.
- The point is whether the statutory provisions require strict compliance or if substantial compliance is adequate otherwise all the legislative rules are all considered to be peremptory in order to be binding.

### Commercial Union Assurance v Clarke

**Facts:** insurance company denied liability to pay compensation to an injured road user due to failure to follow the correct procedure when submitting claim. Insurance company said claim to be sent by registered post or by hand to the registered company within 60 days. Claim was done in time but send via ordinary mail. Insurance company wanted to escape liability – say the requirement was peremptory.

**Finding:** Court rejected argument and held that the provision was directory as the requirement substantially complied with the provision.

### Weenen Municipality

**Facts:** Political party can contest a local election if gave notice of intention to contest and pay deposit before deadline. Notice was given but deposit not paid. Electoral commission refused to register cause deposit was not paid cause they said it was an peremptory provision, while the municipality said it was a directory provision.

**Finding:** CC held that the ACDP had (substantially) complied with the provisions and ordered the Commission to register the party for the Cape Town elections.

### Weenen Transitional Local Council v Van Dyk

**Facts:** Municipality meant to publish three notices but only published one about the levying of taxes.

Municipality sued Van Dyk for payment of his outstanding rates and taxes for the year.

Van Dyk denied that the taxes were due, cause they only published one notice and not three and therefore did not follow the correct procedure

**Finding:** The judgment of the court was in favour of Van Dyk that the taxes weren't due. Court said that the procedure was peremptory and that the Municipality had to comply with the three notices.

### Ex parte Dow

**Facts:** 1984, marriage solemnised by marriage officer at a privately owned residential in front garden and not in pvt dwelling house as per Marriage Act. Husband wanted marriage declared null and void as the requirements was not complied with.

**Finding:** Court held that the marriage was legal and that he would have to follow the normal divorce proceedings - The fact that the statutory requirement was ignored and that the marriage took place in a garden didn't in any way affect the validity of the marriage.

## **Guidelines to determine whether provision is to be considered peremptory or directory NNNB**

**Semantic Guidelines (Devenish)** - based on the grammatical meaning of the language used in the provision:

- Word/s with an vital/affirmative character indicate a peremptory provision (e.g. the words 'shall' or 'must');
- lax words such as **may** indicate discretion, interpreted as directory unless the purpose of provision indicates otherwise.
- Words in negative form indicate a peremptory connotation.
- Positive language suggests provision to be merely directory.
- If provision is formulated in vague terms, it is an indication that it is directory

## **Jurisprudential Guidelines (Devenish)**

- These are based on legal principles formulated and developed by courts and are more influential than semantic guidelines based on examination of consequence
- If provision is couched in positive language with no penal sanction it is considered directory.
- If strict compliance to provision would lead to injustice or fraud it is presumed to be directory.
- Historical context of the legislation (mischief rule) will in some instances provide indication of whether provision is peremptory or directory.
- Adding Penalty to prohibition is strong indication that it is peremptory.
- If validity of the Act would defeat purpose of the legislation then it is an indication that conduct should be null and void.
- In spite of all these guidelines, the purpose of the legislation is the overriding factor in determining whether strict compliance or substantial compliance would suffice.

## **Presumptions about Specific Circumstances**

- Where legislation protects public revenue e.g. taxes, a presumption against nullity exists
- When legislation confers right , privilege or immunity, the requirements are peremptory and compliance is required before conferment of such rights, privileges or immunities
- If other provisions in the particular legislation would be rendered meaningless, the requirements are merely directory.
- If freedom of individual is at stake the court has to emphasize peremptory nature of requirement.
- If a time limit prescribed and a court has no power over such time then it is peremptory.

## **Some peremptory provisions in the constitution**

1. S2 Supremacy of constitution
2. S7(2) Application of bill of rights
3. S39(2) Interpretation clause

## Unit 10 – Constitutional Interpretation

### 10.1. Introduction

- 35(3) of 93 and 39 of 96 Constitution diff btwn interpretation of 'ordinary' legislation & con interpretation
- All courts, tribunal and forums have to interpret in light of the constitution.

#### Constitutional interpretation and 'ordinary' statutory interpretation

- Sec 39(2) of CC the 'filtering' of legislation via fundamental rights during the 'ordinary' interpretation process.
- Con interpretation is authoritative interpretation of the supreme Constitution by the judiciary during judicial review of the constitutionality of legislation and government action.
- **Du Plessis** and **Corder the** diff btwn constitutional + 'ordinary' interpretation mustn't be over-emphasised, because they are interrelated.
- 39(2) ensure that 'ordinary' interpretation should be based on a contextual and purposive method similar to that used in constitutional interpretation.

**Matiso v Commanding Officer, Port Elizabeth Prison:** "Constitutional interpretation is aimed at ascertaining the fundamental values inherent in the Constitution and legislation interpretation is directed at ascertaining the purpose of legislation and whether it is capable of interpretation which conforms with the values of the Constitution".

#### A supreme constitution and ordinary legislation

A supreme Constitution's status in the legal order is the main reason for the difference between constitutional interpretation and 'ordinary' interpretation; the old system of parliamentary sovereignty is no more. The Constitution is now the frame of reference within which everything must function and against which all actions must be tested and is the *lex fundamentalis* (fundamental law) of the South African legal order. As such, it embodies the values of society, as well as the aspirations, dreams and fears of the nation and should be the most important national symbol. It does more than describe the institutional framework of government.

### 10.2. Why is a supreme Constitution different?

- A constitutional state is underpinned by 2 foundations:
  - **formal** - the separation of powers, checks and balances on the government and the principle of legality) and a
  - **material or substantive** - state bound by a system of fundamental values such as justice and equality

The reasons why the text of the Constitution is different from the text of ordinary legislation are:

#### A constitution as a formal power map

- Constitution is a formal 'power map' dealing with institutional/organisational structures/ state procedures
- different branches and tiers of government (separation of powers) and checks and balances

#### Substantive constitutionalism

- Constitution - system of fundamental state authority is bound by a set of higher, substantive legal norms.

#### Constitutional symbolism

- A bridge in a divided society, of culture of authority and justification.
- Reflects the nation's ideas and aspirations
- Shield for ID against abuse by the state and (+) transformation into the fundamental values

**Nortje v Attorney-General of the Cape** it was held that a supreme Constitution: "Is not a finely tuned statute designed ad hoc to deal with one particular subject, or to amend or repeal another specifically named statute, or a specifically identified rule of the common law. It is sui generis. It provides, in the main, a set of societal values to which other statutes and rules of the common law must conform, and with which government and its agencies must comply, in carrying out their functions- It is short on specifics and long on generalisation."

### 10.3. How to interpret the Constitution (NB)

In the *Nortje* case the categorisation of theories and canons of constitutional interpretation was questioned and it was held that the adopted approaches were a valuable aid to understanding what is entailed in those processes, but it was unwise to settle too strictly on one approach at this stage.

#### 10.3.1 Constitutional guidelines

##### Section 39(1) of the Constitution – Interpretation of Bill of Rights

When interpreting the Bill of Rights, a court, tribunal or forum -

- (a) promote the values that underpin an open, democratic society based on human dignity, equality+ freedom;
- (b) must consider international law; and
- (c) may consider foreign law.

(a) **Peremptory:** When interpreting the Bill of Right, value judgments must be made, universal set of rules and norms dealing with the protection of fundamental human rights.

(c) **Directory:** Only those legal principles not in conflict with our legal order.

***Shabalala v The Attorney-General of Transvaal:*** A supreme Constitution must be given a generous and purposive interpretation.

***Nyamakazi v President of Bophuthatswana:*** A purposive interpretation of the Constitution is necessary, since it enables the court to take into account more than legal rules. The Constitution must be liberally interpreted, referring to 'flexibility' and 'generosity'.

***S v Acheson:*** During the interpretation of the Constitution, its spirit and tenor must be adhered to.

***S v Makwanyane:*** A provision in the Constitution cannot be interpreted in isolation, but must be read in the context as a whole.

***Shabalala v The Attorney-General of Transvaal:*** Respect must be paid to the language in the Constitution, the context is anchored to the particular constitutional text.

***S v A Juvenile:*** The Constitution has bestowed on the court the sacred trust of protecting human rights.

***Khala v Minister of Safety and Security:*** The Constitution was drafted with a view to the future, providing a continuing framework for the legitimate exercise of government power and the protection of individual rights and freedoms

***Qozoleni v Minister of Law and Order:*** The Constitution must be interpreted in the context and setting existing at the time when the case is heard, and not when it was passed, otherwise the growth of society will not be taken into account. Constitutional interpretation is an exercise in the balancing of various societal interests and values.

***Nortje v Attorney-General of the Cape:*** These methods and principles of constitutional interpretation don't constitute a firm set of rules and constitutional interpretation is an inherently flexible process.

***S v Zuma:*** The principles of international human rights and foreign law must be applied with due regard for the South African context

***S v Makwanyane:*** Constitutional interpretation must start and end with the Constitution.

***Prince v Cape Law Society:*** All judges and judicial officers are obliged to continuously interpret and apply legislation to give effect to fundamental values and rights in the Constitution.

#### ***Prince v Cape Law Society***

**Facts:** previous conviction of possession, use of dagga denied admission to the Law Society as he also intended to use dagga in future in legal ceremonies. Prince believed that this infringed his constitutional rights.

**Legal issue:** Setting out the correct way of interpreting the Constitution.

**Finding:** Limitations analysis under our Constitution is based not on formal or categorical reasoning but on processes of balancing and proportionality as required by Section 36. This Court has accordingly rejected the view of the majority in the United States Supreme Court that it is an inevitable outcome of democracy that in a multi-faith society minority religions may find themselves without remedy against burdens imposed upon them by formally neutral laws. Equally, on the other hand, it would not accept as an inevitable outcome of constitutionalism that each and every statutory restriction on religious practice must be invalidated. On the contrary, limitations analysis under Section 36 is adverse to extreme positions which end up setting the irresistible force of democracy and general law enforcement, against immovable object of constitutionalism and protection of fundamental rights. What it requires is the maximum harmonisation of all the competing considerations, on a principled yet nuanced and flexible case-by-case basis, located in South African reality yet

guided by, international experience, articulated with appropriate frankness and accomplished without losing sight of the ultimate values highlighted by our Constitution. In achieving this balance, this Court may frequently find itself faced with complex problems as to what properly belongs to the discretionary sphere which the Constitution allocates to the Legislature and the Executive, and what falls squarely to be determined by the Judiciary.

#### A comprehensive methodology

**Du Plessis** and **Corder** discuss 5 techniques of interpretation and these complementary techniques apply to constitutional interpretation as well.

- Grammatical Interpretation - NB role of language - Focus on linguistic & grammatical meaning of words, phrases and sentences
- Systematic /Contextual Interpretation - Clarify meanings of a section in relation to the legislation as a whole, its an Holistic approach / wholeness of words/ phases can't be read in isolation
- Teleological Interpretation - Fundamental constitution values - Aim & purpose ascertained against fundamental constitution values
- Historical Interpretation - Historical Context -Factors that play a part in adoption of legislation
- Comparative Interpretation - Process where court examine interpretation of similar legislation by foreign courts and international laws

**S v Makwanyane** "When dealing with comparative law we must bear in mind that we are required to construe the South African Constitution and not an international instrument and this has to be done with due regard to our legal system, our history and circumstance and the structure and language of our Constitution. We can derive assistance from international law and foreign case law but we are not bound to follow it".

**Question 1:**

- Essay for 50 March similar to the essay in the assignment
- Must use the introduction given
- Only facts of the case asked
- Explain the majority and minority impressions of the case
- Section 39(2) – Bato State
- Evaluate and give Conclusion whether you agree or disagree
- Put case name in italic and use all heading given to you – no longer than 4-5 pages

**Question 2:**

- 2.1 Short essay question – “what is meant....”
- 2.2 Short essay question – “name & discuss” and “distinguish between”
- 2.3 Short essay question – “distinguish between”
- 2.4 3 Short questions – “Briefly explain” (case law – all ask about 1 or more cases)

**Example of Questions & Answers:**

**Sec 39(2) of CC had statutory interpretation head on statutory interpretation in South Africa (10)**

**Interpretation of Provisions (Chapter 5)**

Sec 39(2) interpreting any legislation and developing common/customary law every court/tribunal/forum must promote the spirit/purport and objectives of the Bill of rights.

- Promotes contextual approach to interpretation – using external aids from the beginning.
- Peremptory/binding provision – all courts/tribunals/forums must view aim and purpose of legislation in light of the bill of rights = unclear text is not enough – use external aids

**Bota Star Fishing vs. Mat Environmental Affairs & Tourism** – before interprets any legislation, look at CC to promote the spirit/purport and objectives of the bill of rights even if words are unclear.

**Investing Directorate; Serious Economic Offences vs. Hyandi Motors** – In re Hyundai Distributors – sec 39(2) all statutes to be interpreted in light of the bill of rights

**Section 13(1) Interpretation Act – what is understood by “adoption & Commencement” of Legislation (5)**

Adoption - is the process/reading that legislation has to be passed before it was accepted by the legislative body

- Not law
- Parliament passed Bill, Act to be signed by President
- Provincial Legislature passed, Act to be signed by Premier of Provinces
- Once signed by either President or Premier of Provinces = officially law

**Commencement of Legislation**

- Commencement – day the law comes into operation
- Law – proclamations, ordinance, Act, delegates legislation or enactment having force
- Delegated Legislation – must be published in Gazette and tabled in parliament
- New Legislation – regulations made need to be given to parliament for publication.
- Operation one of three times: - Published in GG, Date specified in Statute or Fixed Date to be proclaimed, signed by President.

13 Commencement of laws

(1) ‘Commencement’ is on the day it gets published in the Gazette, unless legislation provides another date. (another date could be for the whole act or just some sections of the act)

(2) “Commencement day” begins at midnight in operation @ end of the previous day – date specified in statute

(3) “A date fixed by the President or the Premier of a province” means Act will commence at a later date to be proclaimed – it can be different dates for different provisions of that Act.(signed by the President)

E.G: Road Traffic Act – Proclamation R 54 Sep 97 – 7 years after promulgation of the rest of the Act



**Restrictive Interpretation is applied when the words of a particular legislation embraces more than its purpose with reference to relevant case law, explain the *Eiusdem Generis Rule (10)***

(ii) Restrictive interpretation (language is over-inclusive)

- Initial meaning of text is reduced

***Cessante ratione legis, cessat et ipsa lex***

- Means - if the reason for the law falls away, the law itself also falls away
- Not applied in SA - legislation can't be abolished but remains in force until repealed

**Eiusdem generis**

- Means – of the same kind
- Meaning of words is qualified by their relationship to other words
- Requirements before the initial meaning of the text can be modified:
- The specific words must refer to a definite genus or category. *Skotness vs. SA library*
- Specific words must not have exhausted the genus. *Carlis vs. oldfield*
- Rule can be applied even if the specific words precede the general words. *JHB municipality*
- The order of words is unimportant. *Burglars Post vs. Inland Revenue*
- Intention of legislature to such restrictive interpretation must be evident.
- Case law – *S v Kohler*

**S v Kohler**

**Facts:** The court heard an appeal against a conviction by a magistrate's court, which convicted Kohler of having contravened a municipal poultry regulation by keeping a peacock within the municipal boundaries without a licence. The regulation defined 'poultry' as any fowl, duck, goose, turkey, guinea fowl, partridge, pheasant, pigeon or the chickens thereof, or any other bird. The defence alleged that peacocks are not poultry.

**Legal issue:** The *eiusdem generis* rule

**Finding:** After consulting dictionaries, the court found a peacock to be "a chicken-like decorative bird". Since there already is a definite genus (i.e. poultry), the general words "any other bird" are restricted to that genus. A peacock is a species of that genus and the appeal was dismissed.

**Relevant case law, explain the purposive approach to statutory interpretation (15)**

**Contextual /Purposive/text in context approach** Purpose/object of legislation is NB for interpretation

- Social factors/political policy NB to determine purpose
- Mischief Rule - acknowledges external aids and common law before legislation
- Recognises contextual framework of legislation
- Balance between framework and contextual meaning
- Courts can adopt/modify initial meaning to harmonise it with the purpose of legislation
- Courts role is more flexible and not limited to meaning of words
- Judiciary has law making discretion during interpretation

**Jugo vs. Donges** – minority decision – Schirmer identified guidelines for interpretation of statutes:

- Interpreter can take aim and purpose into consideration
- Even if clear/unclear the practical effects and background can be taken into account
- Wider context more NB than legislation text
- Once meaning determined it must be applied

**Mjuqu vs. Jhb City Council** – regarded as model of contextual approach

**University of CT vs. Cap Bar Council** – court to examine all contextual factors when looking for the intention, even if words are clear or ambiguous

***Public Carriers Association v Toll Road Concessionaries***

**Facts:** A section of the N3 between Jhb and Durban was declared a toll road in terms of Sec9 (1) of the National Roads Act. Section 9(3) no toll road unless "an alternative road to the intended toll road, along which the same destination or destinations may be reached" is available to road users. The alternative road overlapped the toll road for a distance of 79km, but bypassed the entire toll gate. Association of public road carriers said that a proper "alternative road" was not available as per Section 9(3) and that the "an alternative road" means an alternative roadway and not an alternative route – meaning two physically separate roadways. The toll road

operators argued that alternative road” means “an alternative route”. In this sense two roads (or routes) are alternative roads, even though parts of them are common to both.

**Legal issue:** How should the phrase “an alternative road” is interpreted?

**Finding:** Last textual approach before the introduction of the new constitutional order. The purpose of the legislation could solve interpretation problems, when the textual approach could not. Court partially recognised purposive or text-in-context approach, but restricted it to cases where the textual approach had failed. The case provides a bridge between the old textual approach and the new contextual approach.

Court held in favour of the Toll Road Operators – it applied the rules of textual approach to see the intention of legislature – taking into consideration their ordinary grammatical meaning, unless this would lead to an absurdity legislature could not have contemplated. Court used dictionary to get a clear meaning for the terms “road” and “alternative” only to find that the words are not limited to a single ordinary grammatical meaning as it could mean a “a different roadway” (association) or “a different route”(toll operators )

Court used secondary aids of textual interpretation – which did not help then turned to Common Law presumptions but this did not give clear guidelines of when the intention of the legislature was.

Court then had to look at the purpose of the provision – adapted the interpretation which best serves the purpose. – The purpose of sec9(3) was to ensure that road users who wish to reach the same destination could do so without paying the toll fees – Court held that “an alternative road” meant “an alternative route” and not “an alternative roadway” . It was found unnecessary to have a separate road to achieve the objective of the Act, but rather to have another way to pass the tolls without paying. Court held the relevant portion of the N3 as a toll road was valid.

### **Explain the Comprehensive and inclusive methods of Constitutional interpretation as described by Du Plessis and Carder in Botha’s Statutory Interpretation (10)**

- Grammatical Interpretation - NB role of language - Focus on linguistic & grammatical meaning of words, phrases and sentences
- Systematic /Contextual Interpretation - Clarify meanings of a section in relation to the legislation as a whole, its an Holistic approach / wholeness of words/ phases can’t be read in isolation
- Teleological Interpretation - Fundamental constitution values - Aim & purpose ascertained against fundamental constitution values
- Historical Interpretation - Historical Context -Factors that play a part in adoption of legislation
- Comparative Interpretation - Process where court examine interpretation of similar legislation by foreign courts and international laws

### **References to case of Commercial Union Assurance Co VS. Clark and Weenam Transition Council VS. Van Wyk distinguish between directory and peremptory Provision (10)**

- Legislation has consequences for acts/omission = OK= Problem if no consequences for an Act/omission
- If Legislation doesn’t state consequences – Courts to determine if the provision was peremptory or directory?
  - **peremptory** – a statutory provision that requires **exact compliance** and failure to comply with a it will leave the ensuing act null and void;
  - **directory** – a statutory provision that requires **substantial compliance** only and failure to comply with it will not result in the ensuing act being null and void.
- Courts generally follow a contextual approach when interpreting peremptory and directory provisions.
- Language is considered in context, all internal & external aids used to determine the purpose of legislation.
- Factors in making interpretation =principles of justice, fair play, convenience, logic, effectiveness & morality.
- The point is whether the statutory provisions require strict compliance or if substantial compliance is adequate otherwise all the legislative rules are all considered to be peremptory in order to be binding.

### Commercial Union Assurance v Clarke

**Facts:** insurance company denied liability to pay compensation to an injured road user due to failure to follow the correct procedure when submitting claim. Insurance company said claim to be sent by registered post or by hand to the registered company within 60 days. Claim was done in time but sent via ordinary mail. Insurance company wanted to escape liability – say the requirement was peremptory.

**Finding:** Court rejected argument and held that the provision was directory as the requirement substantially complied with the provision.

### Weenen Transitional Local Council v Van Dyk

**Facts:** Municipality meant to publish three notices but only published one about the levying of taxes. Municipality sued Van Dyk for payment of his outstanding rates and taxes for the year.

Van Dyk denied that the taxes were due, cause they only published one notice and not three and therefore did not follow the correct procedure

**Finding:** The judgment of the court was in favour of Van Dyk that the taxes weren't due. Court said that the procedure was peremptory and that the Municipality had to comply with the three notices.

### **Distinguish between statutory and common methods of Computation of day**

#### **The computation of time:**

- NB statutory + contractual provisions prescribe a time or period in or after actions are to begin or are to be executed, abandoned or completed.
- The Interpretation Act should be read with the common-law method:

The statutory method: (s 4 of the Interpretation Act – 1<sup>st</sup> day excluded, last day included unless falls on a Sunday or public holiday)

- Will be applied where other legislation does not mention time.
- S 4 is not applicable the ordinary-civil method applies.
- only to days, not months or years
- applied if no arrangement in legislature

**Brown vs. Manpower** – if clear sec 4 to be used – determine end and not beginning of period

Common-laws methods:

#### **i) *Computatio civilis:* (Ordinary / civil method):**

1<sup>st</sup> day included & last day excluded – opposite to statutory methods

**Police VS De Beer** – accident and had 6 months to institute a claim – summons arrived 1 day late – action refused

#### **ii) *Computatio naturalis:* (Natural method):**

Prescribed period from the hour/min of the occurrence to the corresponding hour /min on the last day of the period in question

#### **iii) *Computatio extraordinaria:* (Extraordinary civil method):**

The 1<sup>st</sup> & last days are included.

### **With reference to case law explain the textual approach to statutory interpretation (10)**

#### **The mischief rule:** For runner approach to statutory interpretation

- Historical context used to place provision in perspective.
- Object of rule: To examine circumstances leading to the measure in question.
- laid down by **Lord Coke in *Heydon's Case 1584* (the cornerstone of the contextual approach)**.
- Rule: Four questions to be answered to establish the meaning of legislation:
  - What was the legal position before the legislation was adopted?
  - What was the mischief (or defect) not provided for by existing legislation/Common Law?
  - What remedy (solution) was provided by the legislature to solve this problem?
  - What was the true reason for the remedy?
- Purpose of rule - to examine circumstances leading to the measure in question.

**Santam Insurance Ltd v Tarylor:** Court was obliged on account of ambiguous language used in the Act to examine historical background of the Act.

**Qozeleni v Minister of Law and Order:** Judge suggested the approach to interpret the Constitution is not foreign to the mischief rule.

### **Jaga v Dönges**

**Facts:** During 1950's Jaga caught selling unwrought gold.

- Sentenced to three months imprisonment suspended for three years.
- Act prescribed any person who is sentenced to imprisonment for selling unwrought metal may be deported.
- Minister, under a warrant, declared for his deportation.
- Jaga challenged on the basis he had not been sentenced (physically).
- Minister argued a suspended sentence is still a sentence of imprisonment.

**Legal issue:** How should the phrase "sentenced to imprisonment" be interpreted?

### **Finding:**

- Majority adopted a textual approach. "sentenced to imprisonment" was given its plain meaning and meant the sentence imposed, contained a period of imprisonment (suspended or not).
- The warrant was thus issued.
- Minority judgment: Schreiner JA: Adopted a contextual approach opposite.

**This is NB judgment:** The context is not limited to the language of the rest of the statute, of more importance are its scope and purpose and its background. Schreiner insisted very few words have one meaning; the meaning is dependent on their context also the mischief rule that the legislation was designed to remedy.

- Schreiner insisted the purpose of "suspended sentence" means keeping offender in the society while aiding his rehabilitation. To include suspended sentence into the meaning of sentenced to imprisonment would not serve the aim of the legislation.
- Schreiner also argued the textual approach should have led to the same conclusion as above. Using the common-law presumption that legislative provision must be interpreted in favour of individual freedom: therefore deportation only where unconditionally sentenced.

**Schriner – minority judgement** - identified guidelines for interpretation of statutes:

- Interpreter can take aim and purpose into consideration
- Even if clear/unclear the practical effects and background can be taken into account
- Wider context more NB than legislation text
- Once meaning determined it must be applied

## CASES THAT ARE IMPORTANT

### ***Public Carriers Association v Toll Road Concessionaries***

**Facts:** A section of the N3 between Jhb and Durban was declared a toll road in terms of Sec9 (1) of the National Roads Act. Section 9(3) no toll road unless “an alternative road to the intended toll road, along which the same destination or destinations may be reached” is available to road users. The alternative road overlapped the toll road for a distance of 79km, but bypassed the entire toll gate. Association of public road carriers said that a proper “alternative road” was not available as per Section 9(3) and that the “an alternative road” means an alternative roadway and not an alternative route – meaning two physically separate roadways. The toll road operators argued that alternative road” means “an alternative route”. In this sense two roads (or routes) are alternative roads, even though parts of them are common to both.

Public Carriers Association VS Toll Road Concessionaries – held that even though the intention of legislature is the primary rule of interpretation, it must be accepted that the literal interpretation principle is firmly entrenched in our law.

Purpose was to ensure that road users who wanted to use a road without the toll fees be provided with an alternative road/route and not an alternative road way.

**Legal issue:** How should the phrase “an alternative road” is interpreted?

**Finding:** Last textual approach before the introduction of the new constitutional order. The purpose of the legislation could solve interpretation problems, when the textual approach could not. Court partially recognised purposive or text-in-context approach, but restricted it to cases where the textual approach had failed. The case provides a bridge between the old textual approach and the new contextual approach.

Court held in favour of the Toll Road Operators – it applied the rules of textual approach to see the intention of legislature – taking into consideration their ordinary grammatical meaning, unless this would lead to an absurdity legislature could not have contemplated. Court used dictionary to get a clear meaning for the terms “road” and “alternative” only to find that the words are not limited to a single ordinary grammatical meaning as it could mean a “a different roadway” (association) or “a different route”(toll operators )  
Court used secondary aids of textual interpretation – which did not help then turned to Common Law presumptions but this did not give clear guidelines of when the intention of the legislature was.  
Court then had to look at the purpose of the provision – adapted the interpretation which best serves the purpose. – The purpose of sec9(3) was to ensure that road users who wish to reach the same destination could do so without paying the toll fees – Court held that “an alternative road” meant “an alternative route” and not “an alternative roadway” . It was found unnecessary to have a separate road to achieve the objective of the Act, but rather to have another way to pass the tolls without paying. Court held the the relevant portion of the N3 as a toll road was valid.

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### ***Jaga v Dönges***

**Facts:** During 1950’s Jaga caught selling unwrought gold.

- Sentenced to three months imprisonment suspended for three years.
- Act prescribed any person who is sentenced to imprisonment for selling unwrought metal may be deported.
- Minister, under a warrant, declared for his deportation.
- Jaga challenged on the basis he had not been sentenced (physically).
- Minister argued a suspended sentence is still a sentence of imprisonment.

**Legal issue:** How should the phrase “sentenced to imprisonment” be interpreted?

**Finding:**

- Majority adopted a textual approach. “Sentenced to imprisonment” was given its plain meaning and meant the sentence imposed, contained a period of imprisonment (suspended or not).
- The warrant was thus issued.

- Minority judgment: Schreiner JA: Adopted a contextual approach opposite.

**This is NB judgment:** The context is not limited to the language of the rest of the statute, of more importance is its scope and purpose and its background. Schreiner insisted very few words have one meaning, the meaning is dependent on their context also the mischief rule that the legislation was designed to remedy.

- Schreiner insisted the purpose of “suspended sentence” means keeping offender in the society while aiding his rehabilitation. To include suspended sentence into the meaning of sentenced to imprisonment would not serve the aim of the legislation.
- Schreiner also argued the textual approach should have led to the same conclusion as above. Using the common-law presumption that legislative provision must be interpreted in favour of individual freedom: therefore deportation only where unconditionally sentenced.

**Schriner – minority judgement** - identified guidelines for interpretation of statutes:

- Interpreter can take aim and purpose into consideration
- Even if clear/unclear the practical effects and background can be taken into account
- Wider context more NB than legislation text
- Once meaning determined it must be applied

In *Jaga v Donges* – NB of contextual framework – judge Schreina rejected the narrow view and argued even if there is a clear meaning the context must be taken into account.

### ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism***

**Facts:** Amount of fish caught is limited by quota system – determined by the Minister of Enviro Affairs & Tourism

- Section 2 - Marine Living Resources Act: objective: sustainable development, further bio-diversity to have sustainable development and to restructure the fishing industry to get equality
- Minister to make quotas that confirm the objectives of section 2 of the Act.
- Bato argued their quota too small – wanted the quotation set aside
- Case turned on question whether the Minister did have regard to the objectives to bring equality in the fishing industry. (The phrase “has regard to” to be interpreted).

**Legal issue:** How should the phrase “have regard to” be interpreted?

**Finding: SCA:**

- Textualist approach to determine meaning of “have regarded to”. Looked at how the courts have applied this over the years: result: meant – to take into consideration.
- Meaning the Minister had to take the principle of equality mention in section 2 into consideration – but not a special concern.
- Minister did not have to change the fishing industry when allocating quotas – quotas therefore valid
- Bato appealed to CC: claiming that the Supreme Court of Appeal had interpreted the phrase “have regard to” incorrectly. Argued that the phrase “have regard to” equity not only meant that equity should be “taken into account” (as the ordinary meaning of the words suggests), but that equity should be “promoted as the overriding concern”. This alternative meaning is suggested by the context in which the phrase operates. The Constitutional Court agreed.
- Judge Ngcobo: No longer the textual meaning that must be applied but the values of the Constitution. In this case, the context is that the legislation is committed to redressing the imbalances of the past.
- Confirms the primary & golden rules of textual interpretation do not apply in our law any more.
- S39(2): Implies even where legislation is clear, interpreter must still try to ascribe the meaning that would best promote the values in the Bill of Rights.

***Investigating Directorate: Serious Economic Offences v Hyundai Distributors (Pty)Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit***

**Finding:** The constitutional foundation of the interpretation methodology was explained by referring to Section 39(2) of the Constitution. It was held to mean that all legislation must be interpreted to promote the spirit, purport and objects of Bill of Rights. Therefore, when interpreting the Constitution, the context in which we find ourselves and the Constitution's goal of society based on democratic values, social justice and fundamental human rights must be recognised. The constitutional venture is, as a whole, characterised by the spirit of transition and transformation.

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***Holomisa v Argus Newspapers Ltd***

**Finding:** The interpretation clause of the Constitution was held to be *"...not merely an interpretive directive, but a force that informs all legal institutions and decisions with the new power of constitutional values"*.

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**Nourse VS Van Heerden 1999 – example of demise of legislation Sec 12(2)**

**Facts:** 1992 a gynaecologist from Durban was charged under the Abortion and Sterilization Act 2 of 1975 for performing illegal abortions. The trial started on 27<sup>th</sup> Nov 1992, and was not finalised in 1997. On 1 July 1997 his attorney brought an application to have the charges against his client dropped, since at that stage abortions were no longer illegal and therefore no crime was committed – used the following:

- The Abortion and Sterilisation Act on illegal abortions not be applied since the mid 90's and therefore those provisions have been abrogated by disuse
- The Abortion and Sterilisation Act was repealed by the Choice on Termination of Pregnancy Act 92 of 1996 relating to abortion.
- Bill of rights – one has the right to make decisions regarding their own body and reproductive health.

**Legal issue:** The application of the demise of legislation, Section 12(2) of the Interpretations Act, as well as retrospectively.

**Finding:** Court found it could not be abrogated by disuse and must be repealed by competent legislature. The existing legislation remains in force until repealed or declared unconstitutional.

The trial started before the repeal of the Abortion Act and under sec 12 of the Interpretation Act the trial must be completed as if the Abortion Act was never repealed. The 1996 Constitution was in force on 4 Feb 1997 and the abortion act was never declared unconstitutional.

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**National Coalition for gay and lesbian Equality VS Minister of Home Affairs 2000**

**Facts:** Constitutionality of section 25(5) of Alien Control Act – allows the spouse or child of a person with permanent residence to immigrate to SA to join their spouse or child – gay & lesbians were not allowed to use this section – unfair discrimination – CC struck down the section 25(5) and reading in was used after the word "spouse" this was added "or partner in permanent same sex life partnership"

**Finding of CC:**

- Reading in must be consistent with the Constitution
- Results of reading in must have little interference with existing laws as possible
- Court must be able to define how the meaning should be modified to comply with the Constitution
- Court must try to keep to the aim & purpose of the act
- Reading in can't be used if it will result in unsupportable budgetary intrusion

**Judgement:** It was held that the constitutional defect in Section 25(5) can be cured with sufficient precision by reading in after the word 'spouse' the following words: 'or partner, in a permanent same-sex life partnership' and that it should indeed be cured in this manner.

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**S v Kohler**

**Facts:** The court heard an appeal against a conviction by a magistrate's court, which convicted Kohler of having contravened a municipal poultry regulation by keeping a peacock within the municipal boundaries without a

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licence. The regulation defined 'poultry' as any fowl, duck, goose, turkey, guinea fowl, partridge, pheasant, pigeon or the chickens thereof, or any other bird. The defence alleged that peacocks are not poultry.

**Legal issue:** The *eiusdem generis* rule

**Finding:** After consulting dictionaries, the court found a peacock to be "a chicken-like decorative bird". Since there already is a definite genus (i.e. poultry), the general words "any other bird" are restricted to that genus. A peacock is a species of that genus and the appeal was dismissed.

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### **Commercial Union Assurance v Clarke**

**Facts:** insurance company denied liability to pay compensation to an injured road user due to failure to follow the correct procedure when submitting claim. Insurance company said claim to be sent by registered post or by hand to the registered company within 60 days. Claim was done in time but sent via ordinary mail. Insurance company wanted to escape liability – say the requirement was peremptory.

**Finding:** Court rejected argument and held that the provision was directory as the requirement substantially complied with the provision.

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### **Weenen Municipality**

**Facts:** Political party can contest a local election if gave notice of intention to contest and pay deposit before deadline. Notice was given but deposit not paid. Electoral commission refused to register cause deposit was not paid cause they said it was an peremptory provision, while the municipality said it was a directory provision.

**Finding:** CC held that the ACDP had (substantially) complied with the provisions and ordered the Commission to register the party for the Cape Town elections.

### **Weenen Transitional Local Council v Van Dyk**

**Facts:** Municipality meant to publish three notices but only published one about the levying of taxes.

Municipality sued Van Dyk for payment of his outstanding rates and taxes for the year.

Van Dyk denied that the taxes were due, cause they only published one notice and not three and therefore did not follow the correct procedure

**Finding:** The judgment of the court was in favour of Van Dyk that the taxes weren't due. Court said that the procedure was peremptory and directory (substantial) provision and that the Municipality had to comply with the three notices.

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### **Ex parte Dow**

**Facts:** 1984, marriage solemnised by marriage officer at a privately owned residential in front garden and not in pvt dwelling house as per Marriage Act. Husband wanted marriage declared null and void as the requirements was not complied with.

**Finding:** Court held that the marriage was legal and that he would have to follow the normal divorce proceedings - The fact that the statutory requirement was ignored and that the marriage took place in a garden didn't in any way affect the validity of the marriage.

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### **R v Forlee**

**Facts:** Forlee was found guilty of contravening an Act by selling opium. Argued on appeal -that he didn't commit an offence as the Act prescribed no punishment. Legal issue: The presumption that legislation doesn't contain futile or nugatory provisions

**Finding:** The court relied on the presumption against futility, finding that the absence of a penal clause didn't render the Act ineffective, since the court has the discretion to impose punishment. Wide spread criticism as the *nullum crimen sine lege* (no penalty, no crime) was not adhered to. Although both presumptions applied, the *nullum crimen sine lege* rule is the basis of the criminal justice system and should have outranked the presumption against futile results. The presumption applies to delegated legislation. The maxim *ut res magis valeat quam pereat* applies: an interpretation that will leave the delegated legislation *intra vires* (valid) and not *ultra vires* (invalid) should be applied. Legislation should be interpreted in such a way that a *casus omissus* (omission) is avoided.

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