

CONSTITUTIONAL INTERPRETATION OF STATUTES IN
THE REPUBLIC OF SOUTH AFRICA

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SUMMARY

The interpretation of statutes or to be more precise, the judicial understanding of the legal rules, deals with those rules and principles which are employed to construct the correct meaning of the legislative text to be applied in legal disputes.

In laymen terms, interpretation is about making sense of the total relevant legislative scheme applicable to the situation at hand. Thus, this report will focus on the how the law should be interpreted under our new constitutional dispensation post-Apartheid.

KEY WORDS

Constitutional Interpretation,

Constitutional Transformation,

Constitutionalism,

Just Administrative Action,

Organ of State,

State Authority,

Just Administrative Action.

ACRONYMS

BCLR	Butterworth Constitutional Law Reports
CC	Constitutional Court
CJ	Chief justice
J	Judge
JA	Judge of the Supreme Court of Appeal
MEC	Member of the Provincial Council
MLRA	the Marine Living Resources Act 18 of 1998
P	President of the Supreme Court of Appeal
PAJA	Promotion of Administrative Justice Act No. 3 of 2000
S	Section
SCA	the Supreme Court of Appeal

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INTRODUCTION

1.1 Background Information

In terms of its preamble the Constitution of the Republic of South Africa¹ is the driving force that serves to create a society based on democratic values, social justice and fundamental human rights, as well as to improve the quality of life for all citizens and free the potential of every person. Thus, the Constitution recognises that decades of systemic racial discrimination entrenched by the Apartheid legal order cannot be eliminated without positive action being taken to achieve such transformation.²

Herein lies a new challenge for constitutional interpretation – to activate and animate the fundamental values in general, and to concretise social justice in particular. A fundamental rights dispensation is not only about the entrenchment of certain rights, but it also involves the maintenance and strengthening of the necessary prerequisites for the proper exercise of those rights.³

The achievement of transformation may come at a price for those who were previously advantaged under the Apartheid system.⁴ Moreover it must be acknowledged that ‘transformation’⁵ in the legal field will not occur overnight.

1.2 Problem statement

Suppose a law is promulgated that states that it is a criminal offence to sleep in any railway station. On the face of, it such a law it may be construed to say that it has been enacted to prevent homeless people from using the railway stations as shelters.

¹ The Constitution of the Republic of South Africa Act 108 of 1996 (hereafter ‘the Constitution’, unless indicated otherwise).

² *Bato Star Fishing (Pty) Ltd v The Minister of Environmental Affairs* 2004 (4) SA 490 (CC) [74].

³ Botha *Interpretation* 204.

⁴ *Minister of Finance v Van Heerden* 2004 (4) SA 490 (CC) [44].

⁵ The term “transformation” under this context refers broadly to redressing the historical imbalances caused by past unfair discrimination.

Now consider two men appear in court on the charge of contravening the law in question. One of the man is a regular commuter who sat upright, but dose off while waiting for the train, and the other man brought a blanket to the station and settled down for the night on one of the benches, was arrested while fully awake.

Interpretation of legal rules is not so easy now is it, meaning, how should the court interpret and apply the law? Surely in the case above the court cannot read and interpret the law in a literal sense. If not, why not? After the all the words are clear and unambiguous – or are they? What about the intention of the legislature, the historical background and other surrounding factors? How much of these may the court take into consideration?⁶ Moreover, why is constitutional interpretation an issue?

1.3 Hypothesis

Constitutional interpretation is a dynamic process which can never be exhausted, since circumstances, perceptions and values change from time to time. There can never be one final interpretation of statutes.

The modern constitutional state cannot only take, but has to give as well – the state has to protect the individual and provide for society in general.

In other words, the judiciary, executive and legislature not only has a duty to protect the traditional liberal rights of the individual against encroachment by the state or individuals, but also has to ensure that the state meet its positive obligations with regard to the social advancement of the community.

Therefore the judiciary, executive and legislature must act as the agent empowered to ensure that society do not remain helpless and disempowered.

By preventing people from opportunities and benefits may be a more serious infringement of fundamental rights than governmental abuse of power. The Bill of Rights is not only a shield against government intervention, but also a positive guide to opportunities, services, resources and empowerment.

⁶ Botha *Interpretation* 5.

1.4 Methodology

In attempt to answers the questions above, with the aid of various legislative provisions, judicial precedents and handbooks this report will attempt to give an analysis of constitutional interpretation of statutes and transformation in the Republic of South Africa, and will also determine the influence it has on our Constitutional dispensation.

1.5 Review of Related Literature

*Bato Star Fishing*⁷ is the case that will be at the centre of this report, in order to determine the influence of the Constitution on the interpretation of legal rules and principles in the Republic of South Africa after 1994.

BODY

2.1 The Constitution

Unless provided for otherwise, all section[s] referred to under this heading, refer to section[s] in the Constitution of the Republic of South Africa Act 108 of 1996

2.1.1 *The Supremacy and the Rule of Law*

At the dawn of our freedom, the preamble of the *interim* Constitution recognised the need for a “sovereign and democratic state” section 1 of the 1996 Constitution states that the Republic of South Africa is a democratic state founded on, *inter alia*, human dignity, the achievement of equality and the advancement of human rights and freedoms, and the supremacy of the Constitution and the rule of law.⁸

⁷ *Bato Star fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 7 BCLR 687 (CC) (hereafter *Bato Star Fihing*).

⁸ Section 1 of the Constitution.

The Constitution not only contains a whole number of formal requirements for the validity of governmental action, but is also a supreme constitution which contains a Bill of Rights and which gives expression to values which the South African political community has committed itself. These values must guide the judiciary the legislature and the executive when applying the provision of the Constitution.

Section 2⁹ read with sections 167¹⁰ and 172¹¹ of the Constitution makes it clear that it is the supreme law of the country and any law or conduct that is inconsistent with the Constitution will be deemed to be invalid. Thus, the Constitutional Court and High Courts are granted powers to declare any law or conduct invalid and unconstitutional when it is in violation of the Constitution. Furthermore, section 8(1) states, that the Bill of Rights applies to all law binds the legislature, the executive, the judiciary and all organs of state in the Republic of Southern Africa.

2.1.2 The Bill of Rights

In terms of section 7,¹² the state must respect, protect, promote and fulfil the rights and obligations contained in the Bill of Rights.¹³ Section 7 gives a clear instruction to the state not to use the powers contained and provided for by the Constitution in a manner that would violate the Constitution. Therefore failure to comply with section 7 would be invalid and unconstitutional.

⁹ Section 2 – states; this Constitution is the supreme law of the republic, any law or conduct that is inconsistent with it is invalid and the obligations imposed by it must be fulfilled.

¹⁰ Section 167(2)(a) and (b) – states that the Constitutional Court is the highest court of the Republic and may decide constitutional matters.

¹¹ Section 172(2)(a) – states, that the Supreme Court of Appeal, the High Court of South Africa or a court of similar status make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the president, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.

¹² Section 7(1) of the Constitution –

- this Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

¹³ Section 7(2) of the Constitution.

2.1.3 Interpretation of the Constitution and Bill of Rights

Section 39 of the Constitution prescribes the filtering of legislation through the fundamental rights during the ordinary interpretation process. As such Interpretation of the Constitution must be directed at ascertaining the foundational values in the Constitution, whilst the interpretation of a particular legislation will be directed at ascertaining whether that legislation is capable of an interpretation which conforms to the fundamental values and principles of the Constitution.¹⁴

S 39(1)(a) – (b) are examples of peremptory provisions which implies that where a statute prohibits the doing of something unless something else is done as a precedent to doing the thing prescribed, it is a general rule of interpretation that the provision of the Act is obligatory and not directory.¹⁵

However section 39(1)(c) contains permissive words such as “may” which indicate that the provision is to be interpreted as being directory, unless the purpose of the provision indicates otherwise.¹⁶

Throughout the years the courts have developed legal principles or guidelines to determine whether provisions are peremptory or directory. These principles are more influential than semantic guidelines and involve an examination of the consequences, one way or another, of the interpretation of the provisions: If the wording of the provision is in positive terms, with no penal sanction for non-compliance, the provision may be regarded as directory.

If strict compliance could lead to fraud or injustice, it is presumed to be directory,¹⁷ moreover, In some cases, the historical context of legislation will be able provide a reliable indication as to whether the provision is peremptory or merely directory, furthermore by adding a penalty, a prescription or prohibition to a legislative provision is a strong indication that the provision is peremptory.¹⁸

¹⁴ *Investigating Directorate: Serious Economic offences v Hyundai Motors Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit.*

¹⁵ *S v Takaendesa* 1972 (4) SA 72 (RAD).

¹⁶ *Amalgated Packaging Industries v Hutt* 1975 (4) 943 (A).

¹⁷ *Johannesburg City Council v Arumugan* 1961 (3) SA 748 (W).

¹⁸ *Rooiberg Minerals and Development Co Ltd v Du Doit* 1953 (20 SA 505 (T)).

However the Constitution must be given a generous and purposive interpretation¹⁹ this is necessary, since it enables the court to take into account more than just legal rules. All judicial officers are obliged to interpret and apply law so as to give effect to the fundamental values and rights contained in the Constitution.

2.1.4 Limitation Clause

In terms of section 36(1) –

The rights in the Bill of rights may be limited only in terms of general application. To the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

This means that not all infringements on fundamental rights are unconstitutional. But it does not mean that the rights in the Bill of Rights can be limited for any reason, the reason(s) for the limitation must be exceptionally strong, in other words the limitation must serve a purpose that most people would regard as compellingly important.²⁰ Accordingly the law should apply generally and should not target specific individuals.²¹

Moreover, according to Mokgoro J in *Hugo*²² the 'law of general application' requirement is merely a precondition to the applicability of the law. If a limitation is in substance ill-advised, that will be caught by the rigours of the limitation test itself. To conclude, the Presidential Act is an exercise of constitutional power in the form of general, publicly accessible rules which affect the rights of individuals. Thus, is sufficient to fall within 'law of general application for the purpose of section 33(1).²³

¹⁹ *Shabalala v the Attorney-General of Transvaal* 1996 (1) SA 725 (CC) 740 para [26].

²⁰ *D Meyerson Rights Limited* (1997) 36 – 43.

²¹ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) [103.].

²² *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) [104.].

²³ *Currie and De Waal Handbook* 159.

2.1.5 Application of the Bill of Rights

Section 8 of the Constitution provides that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary, and all organs of state,²⁴ a provision of the Bill of Rights binds a natural or juristic person, if and to the extent that is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.²⁵

Furthermore, when applying a provision in the Bill of rights to a natural or juristic person in terms of subsection 8(2) a court – in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that it gives effect to that right,²⁶ a court may develop rules of common law to the right, provided that the limitation is in accordance with section 36 of the Constitution,²⁷ a juristic person is entitled to the rights in the bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

2.1.6 The Right to Equality

In terms of section 9 of the Constitution everyone is equal before the law and has the right to equal protection and benefit of the law. The concept of equality is very controversial and will not be discussed in full length. What is important to grasp at this point is the fact that section 9 guarantees every individual person living in the Republic the right to equality, which comprises a guarantee that the law will protect and benefit people equally and a prohibition on unfair discrimination. Special measures may be taken to ensure the protection or advancement of people who have been disadvantaged by discrimination in the past.²⁸

The constitutional right to equality must be construed contextually, that is to understand the type of society 'that the Republic of South Africa once were, as a country that was governed by a parliament that was supreme, and was

²⁴ Section 8(1) of the Constitution.

²⁵ Section 8(2) of the Constitution.

²⁶ Section 8(3)(a) of the Constitution.

²⁷ Section 8(3)(b) of the Constitution.

²⁸ Carrie and De Waal *Handbook* 211.

characterised by racial segregation under the apartheid political and legal system that were squarely based on inequality and unfair discrimination.

The apartheid system specifically discriminated against black people in all aspects of social life.

“Black people were prevented from becoming owners of property or even residing in areas classified as ‘white’, which constituted nearly 90 per cent of the land mass of South Africa, senior jobs and access to establish schools and universities were denied to them, civic amenities, including the transport systems, public parks, libraries and many shops were also closed to black people, Instead, separate and inferior facilities were provided, the deep scars of the appalling programme are still visible in our society.”²⁹

The ‘deep scars’ of decades of systematic racial discrimination can be seen in all the key measures of inequality in South Africa. White South African’s are significantly wealthier and better nourished than their fellow black citizens; they enjoy relatively high standards of literacy and education. Infant mortality rates and life expectancy among black South Africans are equivalent to those of the poorest nations of the world. Wealth and poverty are notoriously unequally distributed.

The idea of *restitutionary* equality has also been associated with a political concept that has gained considerable currency, which is the concept of “transformation”. The commitment to transformation requires understanding that the measures that bring about transformation will inevitably affect some members of society adversely, particularly those coming from the previous advantaged communities.

What is required, though it is that the process of transformation must be carried out in accordance with the Constitution.³⁰ It is a requirement in terms of the *rule of law* that the exercise of public power by the executive and other functionaries should not be arbitrary, decisions must be rationally related to the purpose for

²⁹ *Brink v Kitshoff* NO 1996 (4) 197 (CC) [40].

³⁰ *Bato Star Fishing* para [74].

which the power was given; otherwise they are arbitrary and inconsistent with the rule of law.

2.1.7 *The Right to Just Administration*

Judicial review of administrative action was largely governed by common law prior to the commencement of the Constitution and PAJA, the right to just administrative action in the Constitution now plays an indirect rather than a direct role in judicial review, the right contained under section 33 entrenches fundamental principles of administrative law that were developed by the courts in exercise of their common law review powers.³¹

The common-law principles that previously provided the grounds for judicial review of public powers have been subsumed under the Constitution and, insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution. Therefore, the main purpose of PAJA is to give effect to section 33 of the Constitution.

3.1 Judicial Precedent

Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another [2003] 2 All SA 616 (SCA) - (hereafter *Bato Star Fishing*)

The CC had an opportunity to pronounce the meaning and content of section 2(j) and 18(5) of the Marine Living Resources Act ³²(the Act) in the land mark case of *Bato Star Fishing*. This decision dealt with the allocation of fishing quotas by the Chief Director in the Department of Environmental Affairs and Tourism. The appellate challenged the Chief Director's allocation of his fishing quota in terms of the provisions of the Act 19 of 1998.

³¹Carrie and De Waal *Handbook* 647.

³² The Marine Living Resources Act 19 of 1998.

On 27 July 2001, the Department published in the Government Gazette an invitation to submit applications for a broad range of fishing rights, including the deep-sea hake sector.³³ And the allocations were made in accordance with sections 2(j) and 18(5) of the Act.³⁴

The policy guidelines stipulated that applications would be evaluated in terms of the objectives and principles set out in S -2 of the Act and no order of preference will be provided for. While acknowledging the fact that transformation of the fishing industry could not take place overnight, the guidelines nevertheless affirmed the objectives of building a fishing industry where 'ownership and management, broadly reflects the demographics of South Africa.³⁵

All applicants were initially screened by an advisory committee appointed by the Department. The screening process applied a criterion drawn up by the department based on the objective set by s 2(j) of the Act.

Section 2(j) reads as follows: –

- (2) The Minister and any organ of state shall in exercising any power under this Act, *have regard* to the following principle and objective;
 - (a) The need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry.
 - (b)

Read with section 18(1) of the Act which states that:

That the Minister shall –

” in order to achieve the objectives set by section 2(j) have regard to the need to permit new entrants, particularly those from historically disadvantaged sectors of society.”

The answer as to whether the Act imposes and obligation on the Minister to give effect to section 2(j) of the Act depends on the place of transformation and how

³³ Government Gazette 22517, GN 1771 27 July 2001.

³⁴ Para [8] of *Bato Star Fishing*.

³⁵ Para [9] of *Bato Star Fishing*.

the phrases “*have regard to*” are to be interpreted and understood under our new constitutional dispensation and the Act.³⁶

Place of transformation

The Constitution recognises that decades of systematic racial discrimination entrenched by the apartheid system cannot be eliminated without positive action being taken to achieve that result.³⁷ Moreover, in order to give effect to the right to equality, legislative and other measure designed to protect or advance persons disadvantaged by unfair discrimination must be taken.³⁸

The main objective of this Act is to transform the fishing industry which has been and continues to be dominated by pioneer companies that were privileged under the apartheid government. As the supreme law of the Republic³⁹ the Constitution requires the law to be interpreted in a manner that would promote the values of constitutional democracy. These values include human dignity, the achievement of equality and the advancement of human rights and freedoms.

“To have particular regard to”

The meaning of the phrase “*have regard to*” must be determined by the context in which it occurs. Contextually s 2(j) is the statutory commitment to redress the imbalances of the past and to give effect to the right to equality. In other words section 2(j) must be construed purposefully to promote the spirit, purport and objects of the Bill of Rights.

The court adopted a contextual approach rather than an orthodox approach because the latter approach tends to isolate s 2(j) from the purpose of the Act which is to achieve equality within the industry. The court held that the process of interpreting the Act must recognise that its policy is founded on the need both to preserve marine resources and to transform the fishing industry, and the Constitutional goal of creating a society based on equality in which all people have equal access to economic opportunities.⁴⁰

³⁶ Para [71] of *Bato Star Fishing*.

³⁷ Para [73] and [74] of *Bato Star Fishing*.

³⁸ Section 9(2) of the Constitution.

³⁹ Section 2 of the Constitution.

⁴⁰ Para [92] of *Bato Star Fishing*.

In conclusion the court held that the phrase “*have regard to*” in the constitutional and statutory context require the decision maker to do more than give lip service to s 2(j) the decision must address the need for transformation in a meaningful manner when decisions are taken, and be able to demonstrate that this has been done. Failure to comply with section 2(j) read with section 18(5) is unlawful and unconstitutional.

CONCLUSION

In order to understand and apply legal rules and principles, lawyers need to be proficient in the technical ‘black letter’ aspects of legislation. These aspects include the various types of categories of legislation, the structural parts or components of legislation, as well as the challenging interrelationship between old legislations and post-1994 laws.

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