

An analysis on role of judges in interpreting tax legislation

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DECLARATION

I, Mildred Kudzanai Chanhuwa, declare that the work presented in this dissertation is my own original work. It has never been presented to any other University or Institution. Where other people's works have been used, references have been provided.

Signed.....

Date.....

ABSTRACT

This thesis focusses on the role of judges as interpreters of tax legislation. It examines the role of judges by analysing how the perceptions of judges can impact on how they interpret legislation. It also analyses various other factors that play a role when judges interpret legislation, in an effort to answer the question to what extent do philosophical theories and interpretative approaches explain the role of judges as interpreters? Jurisprudential theories such as the natural law theory, positivist theories, and American realist theories are used to analyse how judges interpret and how theorists think judges should play their interpretational role. It is noted that in pre-constitutional South Africa the courts followed a positivist paradigm; as a result, the judges used a strict literal approach to interpretation. The new Constitution brought a change in the jurisprudential paradigm accepted in South Africa and has transformed how judges perceive and carry out their role as interpreters of legislation. Judges have now adopted the purposive value-laden approach as authoritative. As custodians of the Constitution, judges should interpret provisions against the values imposed by it. The purposive value-laden interpretational approach allows judges to take into account more considerations and to weigh a provision against the constitutional values. Other issues discussed pertain to how institutional guidelines such as the doctrine of precedent and separation of powers, to a lesser extent, play a role in how judges interpret the law. It is demonstrated that the doctrine of precedent does not limit the role of judges but rather contributes to maintaining certainty, predictability and coherence in the legal system. It is also noted that judicial discretion is the mechanism by which judges use extra-legal factors such as public policy and moral considerations to assist in interpreting legislation.

Key words: Constitution; interpretation; judicial discretion; judicial precedent; jurisprudential theories; role of judges; separation of powers.

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Table of Contents

DECLARATION	i
ABSTRACT	ii
ACKNOWLEDGEMENTS	iii
CHAPTER ONE	1
INTRODUCTION.....	1
1.1 Context	1
1.2 Research goals	5
1.3 Methods, procedures and techniques	5
1.4 Overview of the thesis	7
CHAPTER TWO	9
JURISPRUDENTIAL THEORIES.....	9
2.1 Introduction.....	9
2.2 Classification of theories.....	9
2.3 Jurisprudential perspectives	11
2.4 Natural law theories	12
2.5 Positivism	13
2.5.1 Background to Dworkin’s work	13
2.5.2 Theory of interpretation	14
2.5.3 Dworkin’s perceptive of hard cases.....	15
2.5.4 Interpretative theories	16
2.5.5 Critics of Dworkin’s theory.....	18
2.6 Background on Hart	19
2.6.1 Main concept of Hart.....	20
2.6.2 Open texture of law	21
2.6.3 Criticism of Hart’s views.....	22
2.7 American Realists	23
2.7.1 Oliver Wendell Holmes.....	23
2.7.2 Karl Llewellyn	24
2.7.3 Jerome Frank	26
2.7.4 Critics of American Realism	26
2.8 Conclusion	26
CHAPTER THREE	28
INTERPRETATIONAL APPROACHES TO LEGISLATION	28

3.1 Introduction.....	28
3.1.2 Approaches of interpretation	28
3.2 Literal approaches to interpretation	29
3.3 Strict literal approach.....	30
3.3.1 Golden rule	31
3.3.2 Mischief rule	31
3.4 Literalism-cum-intentionalism approach.	32
3.4.1 Problems associated with the literal approaches and literalism-cum intentionalism approach	33
3.5 The purposive approach.....	35
3.5.1 Problems with the purposive approach	36
3.6 Teleological/Value coherent interpretation	37
3.6.1 Problems with the teleological approach	37
3.7 Impact of the Constitution on the approaches to interpretation	38
3.7.1 Purposive-value laden approach.....	39
3.7.2 The impact of the Constitution on the role of judges as interpreters.....	40
3.8 Aids to interpretation of legislation	42
3.8.1 Internal aids.....	42
3.8.2 Preamble	42
3.8.3 Long title, short title and definitions	43
3.8.4 External aids.....	44
3.8.5 Presumptions	44
3.8.6 Parliamentary history and debates	44
3.8.7 Contra fiscum rule	45
3.8.8 Exceptions to the <i>contra fiscum</i> rule.....	46
3.9 Conclusion	47
CHAPTER FOUR.....	49
CHANGE IN THE APPROACH TO INTERPRETATION: A CASE LAW APPROACH.....	49
4.1 Introduction.....	49
4.2. Background	49
4.3 Pre-constitutional cases	50
4.3.1 <i>Venter v R</i>	50
4.3.2 <i>CIR v George Forest Timber Company</i>	52
4.3.3 <i>Ochberg v CIR</i>	53
4.3.4. <i>Delfos v CIR</i>	55
4.3.5 <i>CIR v Frankel</i>	57

4.3.6 <i>R Korster & Son (Pty) Ltd v CIR</i>	58
4.3.7 <i>CIR v Kuttel</i>	59
4.4 Other approaches.....	60
4.5 Post-constitutional era.....	60
4.5.1 <i>De Beers Marine (Pty) Ltd v CSARS</i>	60
4.5.2 <i>Estate Welch v CSARS</i>	62
4.5.3 <i>CSARS v Airworld CC</i>	63
4.6 Conclusion.....	65
CHAPTER FIVE	66
NATURE OF THE LEGAL SYSTEM AND INSTITUTIONAL ELEMENTS	66
5.1 Introduction.....	66
5.2 The nature of the South African legal system.....	66
5.3 The doctrine of separation of powers.....	67
5.4 Judicial precedence.....	68
5.5 Intersection between the interpretational role and other functions.....	69
5.6 Factors which influence a judge's choice of the interpretive method.....	70
5.7 Judicial discretion.....	70
5.8 Public policy.....	71
5.9 Morality.....	73
5.10 Conclusion.....	74
CHAPTER SIX	76
CONCLUSION	76
6.1 Goals of the research.....	76
Bibliography.....	79

CHAPTER ONE

INTRODUCTION

1.1 Context

The role of judges in interpreting legislation is to develop and improve the understanding of legislation. The legislature has not defined the meaning of certain words and phrases used in the Income Tax Act, 58 of 1962.¹ Judges therefore play a fundamental role in the interpretation of these words and in giving meaning to them. Decisions on the meaning of terms included in the definition of the “gross income”, the general deduction formula (comprising the preamble to section 11, section 11(a) and section 23(g)) and the general tax avoidance sections have been developed largely through the interpretation of provisions by particular judges dealing with cases involving those provisions. For example, the legislation provides that “receipts” are taxable but does not precisely clarify the receipts that are taxable and this has been left in the hands of the judges to decide.² Each decision that required deliberation on the meaning of the word “receipt” gave a clue as to what could be perceived as a receipt for the purposes of the Act. *Geldenhuis v CIR*³ authoritatively established that having physical control over an object does not mean that a taxpayer has received it for income tax purposes. The case of *CIR v Genn*⁴ established that if a person borrows money, that money is not considered a receipt for the purposes of the gross income definition. In the case of *CIR v Delagoa Bay Cigarette Co Ltd*⁵ Bristowe J pronounced that both legal and illegal receipts constitute income in terms of the gross income definition. *MP Finance Group CC (in liquidation) v CSARS*,⁶ brought another perspective to the interpretation of “receipt”, holding that the intention of the taxpayer can be referred to in order to ascertain whether or not there was receipt for income tax purposes. Thus the meaning of “receipt” is a result of the manner in which the judges have interpreted the words, given a set of facts.

¹ Income Tax Act, 58 of 1962 referred to as the “Act”.

² GK Goldswain “Hanged by a comma, groping in the dark and holy cows – fingerprinting the judicial aids used in the interpretation of fiscal statutes” (2013) 16 *Southern African Business Review* 30 at 32.

³ 1974 (3) SA 256, 14 SATC 419.

⁴ 1955 (3) SA 293, 20 SATC 113.

⁵ 1918 TPD 391.

⁶ 2007 ZASCA 71, 2007 SCA 71.

The importance of interpretation as stated by Diescho is that “[o]ften, the law comes alive in the manner in which a particular judge interprets and, or calls for the law to be enforced.”⁷ Therefore the law is basically what the judge interprets it to be.⁸ How judges interpret legislation is thus central to understanding what the law is and how it can be applied to a given set of facts.⁹

The following is a general discussion on the literature on role of judges as interpreters.

Broadly speaking, the role of judges is to adjudicate on the cases before them.¹⁰ According to Brooks the role of the judge, objectively stated is to apply established existing rules.¹¹ Brook’s definition seems to suggest that judges should merely interpret from the words of a statute.¹² On the other hand, Masui defines the role of the judges in interpreting tax legislation as: “to elaborate on the provisions of the statute in order to ensure that they conform to a coherent model of how the income tax statute should be structured.”¹³ Masui’s definition gives the impression that the exercise of interpreting legislation by tax judges should be seen as fitting a puzzle piece in to build a complete puzzle. Seemingly such a task can be achieved by looking at the purpose of the legislation as a whole when interpreting.

Lyons is of the view that judges should interpret and apply the law without justifying their decision when the law is clear, regardless if it leads to unfair outcomes. An approach that would convey this position is the strict interpretation approach which is consistent with Brook’s viewpoint. However, Lyons¹⁴ adds that it is naive to assume that the role of the judge is merely to apply established rules, for judges have the duty to interpret legislation

⁷ JB Diescho “The paradigm of an independent judiciary: Its history, implications and limitations in Africa.” (2008) www.kas.de/upload/auslandshomepages/Namibia/...Judiciary/diescho.pdf (accessed 18 July 2015) 38.

⁸ Diescho “The paradigm of an independent judiciary” 38.

⁹ *ibid.*

¹⁰ A Barak “A Judge on Judging: The Role of a Supreme Court in a Democracy” (2002) 116 *Harvard Law Review* 8 at 28.

¹¹ N Brooks “The Responsibility of Judges in Interpreting Tax Legislation” in G S. Cooper. *Tax Avoidance and the Rule of Law* (1997) 101.

¹² Brooks “The Responsibility of Judges in Interpreting Tax Legislation” 101.

¹³ Y Masui “The Responsibility of Judges in Interpreting Tax Legislation: Japan’s Experience” (2015) 52 *Osgoode Hall Law Journal* 2 493.

¹⁴ D Lyons “Justification and Judicial Responsibility” (1984) 72 *California Law Review* 1 at 179.

even in cases where legislation does not sufficiently cover the issue before them; this is known as the limited theory.

Lyons further argues that in adjudicating difficult cases the judges are expected to provide legally justified decisions and that this manner of adjudicating is known as the legal justification doctrine. Lyons associates the limited theory with the legal justification doctrine; he suggests that judges should only make legally justified decisions when the law does not address fully the case before them. Lyons concludes, therefore, that by looking at judges with the understanding that their task is merely to apply law, limits the observer's understanding of the breadth of the judicial function.¹⁵ In turn, the observer does not have room for other considerations such as the moral complexity of judicial responsibility associated with the role of the judge.¹⁶ This view is shared by Barak who argues that it is fictitious to assume that the judges merely apply the law, they create it.¹⁷ Barak argues that the role of a judge in a democracy is not merely adjudicating, but it is adjudicating to bridge between the law and society, and adjudicating to protect democracy.¹⁸

Barak¹⁹ is of the opinion that judges do not merely use the written words when interpreting legislation. Barak states that judges take into account many considerations other than the written laws, which is why common law today is not what it was 50 years ago.²⁰ This is contrary to Dworkin's opinion. Dworkin suggests that judges should only give effect to law as it appears in statute.²¹ Barak's opinion is also different from that of Cardozo;²² Barak's theory is based on the conceptual framework in which judges can add to the law through the exercise of judicial discretion, whereas Cardozo argues that judges only create law if

¹⁵ *ibid.*

¹⁶ *ibid.*

¹⁷ A Barak "A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002) 116 *Harvard Law Review* 8 at 28.

¹⁸ *ibid.*

¹⁹ Barak 2002 *Harvard Law Review* 22.

²⁰ Barak 2002 *Harvard Law Review* 23.

²¹ R Dworkin *Taking Rights Seriously* (1977) 81.

²² B Cardozo *The nature of the judicial process* (1928) 14.

there is a gap relating to the matter they are adjudicating.²³ In this regard Cardozo shares a similar view with Herbert Hart.²⁴

Walker suggests that when the law does not accurately provide for the case before judges, the manner in which judges adjudicate should be understood by:

- i) the rules or methods of interpretation that judges apply in reaching decisions in those cases; and
- ii) the theories or philosophies of interpretation to which a judge might adhere, consciously or subconsciously.²⁵

The view is also shared by Barak who states that the role of the judges can be seen in light of the tools used to adjudicate.²⁶ These tools include the manner of interpretation, the moral values, balancing rights and justifiability of rights.

In South Africa, the constitutional values of fairness and equity are taken into account when interpreting legislation.²⁷ Steyn J in *ITC 1384*²⁸ describes how judges should interpret fiscal statutes. He states that fiscal statutes:

... have to be construed subject to the presumption of a fair, just and reasonable lawgiver's intention and in consequence with the 'new approach' to interpretation of fiscal statutes, in terms whereof such measures are neither to be subjected to eviscerating formalism or strictness nor to be treated with fawning respect as 'Holy Cows', ...²⁹

Thus, the values and presumptions that are taken into account by judges during interpretation should also be examined, for they shape the outcome of cases and how judges approach or interpret provisions.

²³ *ibid.*

²⁴ Hart *Concept of Law* 140.

²⁵ JM Walker "Judicial Tendencies in Statutory Construction: Differing views on the role of the Judge." http://www.pegc.us/archive/Journals/walker_statutory_construction.pdf. (accessed 28 August 2015).

²⁶ Barak 2002 *Harvard Law Review* 21.

²⁷ GK Goldswain 2008 *Meditari Accountancy Research* 114.

²⁸ 46 SATC 95.

²⁹ *ITC 1384* 46 SATC 95 at 106.

This research is not aimed at determining whether or not the judges have become legislators or have unconstitutionally intruded into the mandate of any other arm of the government. Rather it assesses the role of judges by considering philosophical theories and interpretative methods. The nature of the South African legal system and institutional elements such as doctrine of separation of powers, judicial precedent and judicial discretion are analysed to demonstrate that there are other factors apart from jurisprudential theories and interpretational approaches that partially explain the roles of judges as interpreters. There is research on how judges have interpreted certain provisions of the Income Tax Act and information on how certain judges have contributed to tax law. It appears, however, that there is not a considerable body of research of the role of the judges as interpreters in tax law or an exploration of what comes into play when judges interpret tax law.

The research question is, therefore, to what extent do philosophical theories and interpretation methods explain the role of judges as interpreters?

1.2 Research goals

The main aim of this research is to analyse the extent to which jurisprudential theories and interpretational approaches explain the role of judges as interpreters of the law and to analyse how these theories and approaches impact on the interpretation process.

Therefore, it is imperative to analyse the different philosophical theories to which the judges may ascribe and the interpretative methods at their disposal when interpreting the law. It is also crucial to examine other considerations that may affect judges when they interpret the law. These include institutional guidelines on how judges should interpret the law, such as the doctrine of separation of powers, the doctrine of judicial precedent and *boni mores* (good morals) of society.

1.3 Methods, procedures and techniques

The research method applied in this research is qualitative in nature and falls within the legal interpretative paradigm. The legal interpretative approach will be used as this research seeks to understand and to describe a legal phenomenon.³⁰ The interpretative research method is also known as the doctrinal research method. This research method is purely

³⁰ E Babbie & J Mouton *The Practice of Social Science Research* (2010).

theoretical. It is concerned with the nature of the law, legal authority, theories behind substantive areas of the law, the nature of rights, justice and political authority.³¹ It also focuses on studying the legal decision-making processes, theories of interpretation and legal reasoning.³²

The present research focuses entirely on the role of judges in interpreting tax legislation. Therefore, it considers philosophical theories, methods of interpretation and factors that influence judges' choice of interpretative method. The sources of information to be employed in the research include:

- the Income Tax Act 58 of 1962;
- relevant case law;
- accredited journal articles; and
- textbooks and any other forms of academic material that aid in shedding light on the research question.

The research is conducted in the form of an extended argument, supported by documentary evidence. The validity and reliability of the research and conclusions will be ensured by:

- adhering to the rules of the statutory interpretation, as established in terms of statute and common law;
- using primary sources, placing greater evidentiary weight of cases which create precedence, and making use of writings of acknowledged experts in the field;
- discussing opposing viewpoints and concluding, based on preponderance of credible evidence; and
- the rigour of the arguments.

This research has no ethical implications or considerations; all the data to be used is in the public domain. Interviews will not be conducted; all opinions will be considered in their written form.

³¹ AA Razak "Understanding Legal Research" (2009) 4 *Integration and Dissemination* 19 at 21.

³² *ibid.*

1.4 Overview of the thesis

Chapter two briefly discusses the jurisprudential theories that offer insights into the role of judges as interpreters. The aim of analysing these theories is to determine whether or not the judges' affiliation to a jurisprudential school impacts on how they interpret legislation. The chapter briefly examines natural law theory, positivist and realist approaches. The work of Ronald Dworkin is extensively elaborated on, particularly his theory of interpretation, theory integrity and his views on exercise of judicial discretion. Herbert Hart's contribution is also considered. Finally, the American realist theorists are discussed and the work of Oliver Wendell Holmes, Karl Llewellyn and Jerome Frank are examined.

Chapter three analyses the interpretational approaches used by judges. The main aim of the chapter is to analyse the impact of the interpretational method on how judges interpret legislation. The main emphasis is on the literal approach to interpretation and the purposive-value laden approach, as these are the two main approaches that have largely been applied. It is indicated that the literal approaches were the main approaches used before the advent of the Constitution. The effect of the Constitution on the interpretational approaches judges may use is discussed. The analysis also extends to how the approaches affect the role of a judge as an interpreter. Towards the end of this chapter an analysis of whether or not the Constitution impacted on the *contra-fiscum* rule is discussed. Aids to interpretation methods are also discussed. Attention is paid to the fact that judges should be permitted to use parliamentary history when adjudicating. The chapter ends with a detailed discussion of how the role of judges as interpreters has changed as a result of adopting the modern approach to interpretation.

Chapter four is an extension of chapter three. It also provides a brief background on the development of the South African law. It serves to demonstrate the change in the interpretational approaches prior and post the Constitution, 1996, by way of a case law analysis.

Chapter five deals with institutional elements that impose limitations and provide guidelines for judges when they interpret. This chapter aims to show that apart from the judges' jurisprudential affiliations and interpretational approaches, there are other factors at play that also impact on how judges interpret. The chapter discusses the doctrine of separation of powers and the doctrine of judicial precedents. Both doctrines direct how judges should interpret or rather provide restrictions on how the interpretation process can

be executed. Thereafter judicial discretion is considered by way of analysing factors at play when judges employ it. Public policy and moral consideration are highlighted as some of the factors that play a role and impact on the manner in which judges interpret legislation.

Chapter six concludes this thesis. It reiterates the goals of this research and gives a brief summary of each chapter. The chapter ends by concluding on the extent to which the jurisprudential theories, together with the interpretational methods, explain the role of judges as interpreters.

CHAPTER TWO

JURISPRUDENTIAL THEORIES

2.1 Introduction

One court observer once remarked that “the way in which a judge conceives his judicial role is the single most significant [factor] in the whole judicial process.”³³

Judges have different perceptions of the proper functions of the courts and the norms of judicial decision making. How they perceive their roles generally impacts on how they arrive at their judgements. The aim of this chapter is to analyse the different philosophical theories to which the judges may ascribe in order to get a better understanding of how they interpret statutory provisions. The analysis of jurisprudential theories will also show the extent to which these theories explain the role of judges. The jurisprudential theories dealt with in this chapter are those that attempt to explain how judges perceive their role as interpreters and how other theorists think judges should perceive and execute their interpretational role.

The chapter begins with a general overview of the classification of theories, followed by an analysis of the various jurisprudential perspectives on the roles of judges as interpreters.

2.2 Classification of theories

The theorists discussed in this chapter fall into two categories: the mainstream theorists and the critics.³⁴ The mainstream theorists are commonly known as the formalists. They include the natural law theorists and positivists, whilst the non-formalists or critics include the realists and other post-modernist theorists. Mainstream theorists hold the view that judging is a rule-bound activity.³⁵ On one hand mainstream theorists argue that judging is a methodical and logical activity which primarily involves the deductive application of legal doctrines, principles and rules to the facts of a case.³⁶ This method of adjudicating is known

³³ R Swanson “Judicial Perceptions of Consensual Norms on State Supreme Court (2008) 91 *Judicature* 196 at 196.

³⁴ V Tumonis “Legal Realism & Judicial Decision-Making” (2012) 19 *Jurisprudence* 1361 at 1363.

³⁵ Tumonis 2012 *Jurisprudence* 1363.

³⁶ *ibid.*

as legal reasoning.³⁷ On the other hand other main stream theorists hold the view that legal reasoning is not always followed when judges adjudicate.³⁸ However, the general consensus of mainstream theorists is that rules are important to ensure certainty. Rules are also important as they provide the necessary means for judges to reach a decision.³⁹

Most mainstream theorists argue that there are two types of reasoning: legal and political reasoning. They contend that judges must employ legal reasoning and not political reasoning.⁴⁰ Legal reasoning follows a more constrained approach and does not take into account the moral and political considerations.⁴¹ For that reason, the adjudication is expected to be impartial and objective.⁴² Judges are therefore expected to decide cases according to the law and not depart from precedence even if the judges think that the statute was misconstrued by previous adjudicators.⁴³ Political reasoning is contrary to legal reasoning. Political reasoning is driven by politicians morals, beliefs and political pressures.⁴⁴ Political reasoning seeks to push a political agenda, which will define what society holds as desirable.⁴⁵

Critics of the mainstream theorists believe that the role of judges as interpreters and adjudicators is affected by external or non-legal factors.⁴⁶ The critics have different conceptions of how judges actually adjudicate. However, most of these theorists believe that judges have a preferred outcome of a case before they hand down a decision and that the outcome of the case is influenced by external factors.⁴⁷ These external factors include the judge's conception about justice, his ideologies, public policy preferences and his personality.⁴⁸ Critics of the mainstream theorists suggest that judges are generally open to

³⁷ *ibid.*

³⁸ *ibid.*

³⁹ *ibid.*

⁴⁰ D Meyerson *Understanding Jurisprudence* (2007) 62.

⁴¹ *ibid.*

⁴² *ibid.*

⁴³ *ibid.*

⁴⁴ *ibid.*

⁴⁵ *ibid.*

⁴⁶ D Meyerson *Understanding Jurisprudence* 88.

⁴⁷ *ibid.*

⁴⁸ Tumonis 2012 *Jurisprudence* 1367.

take into account political considerations.⁴⁹ Judges are therefore not expected to follow the doctrine of precedence. They can rely on moral and political considerations only to arrive at a decision.⁵⁰

The next section will deal with jurisprudential perspectives on the role of judges when interpreting legislation.

2.3 Jurisprudential perspectives

The discussion of the jurisprudential theories is not aimed at equipping the reader with a thorough understanding on all areas of law a particular theorist dealt with. Rather, they serve to equip the reader with the essential background on the theoretical perspectives underlying the complexities of interpretation and provide different perspectives on the role of judges in adjudication and interpretation. This discussion does not follow a particular structure. Theories are discussed in light of their genre, beginning with natural law, positivism, and lastly the realists' theories.

Jurisprudence theories discussed in this chapter are applied in their pure form as coined by their original theorists. The development of jurisprudential theories in South Africa has been based on an extension of the original theories but slightly adapted by taking in to account South African history. This development has been done mainly in terms of human rights law and there is scant if any publication on jurisprudential theories that have been further developed and adapted in relation to tax law. This is the reason why the original foreign theories have been used. It is important to note that although the theorists originated from different countries the principles relating to interpretation of law are similar in most aspects.

Natural law theories are not discussed in detail. They have been referred to briefly to provide background. Natural law theories are essential to the understanding of jurisprudence as they are the forerunner of all the other theories discussed in this chapter.

⁴⁹ Meyerson *Jurisprudence* 89.

⁵⁰ *ibid.*

2.4 Natural law theories

The backbone of natural law theories is that law is essentially a moral concept.⁵¹ Natural law theorists hold the view that there is a higher authority from which the laws come.⁵² The higher authority is divine in nature. It is because of that celestial character that natural law is believed to be absolutely binding and overrules any other rules constructed by men.⁵³ Aristotle summarised the superiority of God's laws by stating that "he who asks Law to rule is asking God and Intelligence and no others to rule; while he who asks for the rule of a human being is bringing in a wild beast."⁵⁴

Aristotle's opinion is that the rules of man are not ideal. Therefore, people should use the law that is derived from God. The role of a judge in terms of natural law is to uphold the rule of law.⁵⁵ This means that judges do not make the law; they are expected to strictly interpret the law as it is.⁵⁶

According to Thomas Aquinas it is unlawful for a judge to decide a case based on his subjective knowledge.⁵⁷ A judge should use written law to arrive at a decision and should make reasons for his decision known to ensure that the objective basis of his judgement becomes known.⁵⁸ When a judge who subscribes to the tenets of natural law is faced with ambiguity he is expected to interpret the law so that it is not in conflict with a higher norm.⁵⁹ If a written law is contrary to natural law such law is considered invalid and the judge should not give effect to that law.⁶⁰ That law is considered unjust and it carries no

⁵¹ R Wacks *Understanding Jurisprudence. An Introduction to Legal Theory* (2012) 33.

⁵² N Swarts & J Obonye "The Superiority of Integrity of Natural law of our time" (2012) 1 *International Law Research* 117 at 119.

⁵³ *ibid.*

⁵⁴ Aristotle *The Politics* (1979) 143. The same passage has been quoted by D Forte "Natural Law and the Limits to Judicial Review."

⁵⁵ D Forte 1996 *Catholic Social Sciences Review* 42.

⁵⁶ *ibid.*

⁵⁷ Thomas Aquinas as cited in D Forte "Natural Law and the Limits to Judicial Review" (1996) 1 *Catholic Social Sciences Review* 42-47.

⁵⁸ Forte 1996 *Catholic Social Sciences Review* 44.

⁵⁹ The word "higher norm" is used here to refer to norms that come from a higher authority that is celestial in nature.

⁶⁰ Forte 1996 *Catholic Social Sciences Review* 44.

binding force. If a judge gives effect to such a law the judge is considered to be acting unlawfully.⁶¹

South African law has traces of natural law. The preamble of the Constitution of South Africa, 1996, recognises the existence of a higher authority or a deity in the manner that natural law theorists envisioned. The preamble makes reference to God, asking him to protect the people to whom the Constitution is intended to apply. In the case of *The Citizen 1978 Pty Ltd v McBride* the Chief Justice Mogoeng Mogoeng made use of a biblical injunction when he was adjudicating the case.⁶² Although his remarks were criticised, the case is an indication that natural law still has relevance in South Africa.

2.5 Positivism

Positivism is mainly based on the concept that the law should be kept separate from morals.⁶³ Therefore the question of what the law ought to be is not taken into consideration; emphasis is put on what the law is as it appears in statutes.⁶⁴ The positivists' point of view is that the study of law and its application is supposed to be done in an objective fashion, free from bias and ideology.⁶⁵ Dworkin and Hart ascribe to the same underlying concept that adjudication and interpretation should be value free; however they have other contrasting opinions on how judges should decide a case when the law does not seem to be clear.⁶⁶ The following is a summary of Dworkin's main ideas pertinent to this discussion.

2.5.1 Background to Dworkin's work

Dworkin's work to a larger extent was an effort to define the role of the courts amidst the problems that America was facing at the time.⁶⁷ His theories were mostly formulated during political and social upheavals in the United States of America in the 1960s. During that time there were mass protests against the Vietnam War. These war protests were followed by other mass protests on civil rights. Dworkin sought to explain the role which

⁶¹ *ibid.*

⁶² 2011 (8) BCLR 816 (CC).

⁶³ B Bix *Jurisprudence: Theory and Context* (2003) 34.

⁶⁴ *ibid.*

⁶⁵ *ibid.*

⁶⁶ Wacks *Jurisprudence* 110.

⁶⁷ Dworkin as cited in Johnson D *et al Jurisprudence a South Africa Perspective* (2001)116.

institutions should play in light of the conflict between the left wingers who demanded transformation of institutions and the right wingers, who sought reinforcement of the USA institutions.⁶⁸ Dworkin also wanted to respond to concerns about the judicial role of the USA Supreme Court. For judges were accused of engaging in judicial activism. The courts at the time apparently exercised powers that were not expressly provided for by the American Constitution.⁶⁹ The main aspects of Dworkin's works that are discussed here are the theory of interpretation, the interpretative approach and his position on hard cases.

2.5.2 Theory of interpretation

Dworkin's theory of interpretation is based on the idea that the law should protect the individual.⁷⁰ He believes that if the law protects individuals it ensures that all the members of the society are treated equally and with respect.⁷¹ Dworkin also avers that the legislature's task is to reflect the community's views, whilst the court's responsibility is to protect individual rights.⁷² Dworkin suggests a theory of interpretation that is known as the theory of integrity. Dworkin describes this theory by stating that:

Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a set of coherent principles about justice and fairness and procedural due process, and it asks them to enforce these to fresh cases that come before them, so that each person's situation is fair and just according the same standards.⁷³

The theory of integrity is distinct from conventionalism and pragmatism.⁷⁴ Conventionalism as a theory of interpretation is based on the idea that legal practice is ascertained by a fixed and certain way, such as the interpretation of legal statutes and case law.⁷⁵ Pragmatism as a theory of interpretation allows the judges to adjudicate based on what they perceive as the best for the community.⁷⁶ Dworkin argues that conventionalism as a theory is not satisfactory because it does not allow interpretation to be based on the

⁶⁸ *ibid.*

⁶⁹ *ibid.*

⁷⁰ *ibid.*

⁷¹ *ibid.*

⁷² *ibid.*

⁷³ Dworkin *Law's Empire* (1986) 243.

⁷⁴ Dworkin *Empire* 160.

⁷⁵ *ibid.*

⁷⁶ *ibid.*

current principles and policies. As a result conventionalism should not be used exclusively by the courts for interpretation purposes.⁷⁷ Dworkin however, acknowledges that conventionalism encourages predictability when cases are adjudicated. Dworkin also rejects the use of pragmatism as a theory of interpretation on the basis that it does not ensure that individual's rights are fully taken into account.⁷⁸ It focuses on what is best for society and not individuals. Dworkin therefore suggests a theory of integrity. The theory of integrity is based on consistency of the government's conduct to act in a principled manner to all the citizens and ensure that they get an equal treatment.⁷⁹ Judges are expected to apply the same substantial standards of justice and fairness consistently and ensure that each individual's set of circumstance is taken into account accordingly.⁸⁰

2.5.3 Dworkin's perceptive of hard cases

One of Dworkin's greatest contributions on the role of judges as interpreters is his view of what a judge should do when faced with a hard case. A hard case can be understood as a case in which the law is not clear or a case where it seems there is no law to cover the issue brought before the judges. Dworkin suggested that when judges are faced with hard cases they should decide the law according to legal principles and norms.⁸¹ From his point of view the law does not run out and there is a right answer for every case that comes before the judges.⁸² This is explained by Roederer⁸³ when he states that:

For Dworkin the law does not run out in hard cases because the principles that undergird the law allows us to enforce a new rule in light of their gravitational force. The judge's duty is to remain faithful to the law and render a decision that gives effect to existing rights of the parties [and it] does not cease in a hard case.

Dworkin was convinced that the law is complemented by principles and legal norms.⁸⁴ Where statutory law does not adequately provide for cases before the judges, the judges are

⁷⁷ Dworkin *Empire* 154.

⁷⁸ Dworkin *Empire* 155.

⁷⁹ Dworkin *Empire* 160.

⁸⁰ *ibid.*

⁸¹ R Dworkin *Taking Rights Seriously* (1977) 81.

⁸² Dworkin *Rights* 279-90.

⁸³ C Roederer & D Moellendorf *Jurisprudence* (2004) 98.

⁸⁴ Dworkin *Rights* 81.

expected to resort to legal principles and legal norms.⁸⁵ Rules override legal principles; principles only apply when there is no formal rule applicable.⁸⁶ If there are many principles the judges have to weigh the principles and pick the most applicable.⁸⁷

As a result of the fact that Dworkin supposed that the law does not run out; judges can only exercise what he calls “weak discretion”.⁸⁸ The nature of discretion defined by Dworkin is not free from constraints imposed by the legislature.⁸⁹ It is restricted and places an obligation on the judge to reach a decision based on principles that emanate from the law. The position of a judge in exercising judicial discretion is summarised as follows:

[W]hen judges are making determinations about the content of legal norms; they are always constrained by the law, never free to go outside the law to make a creative legislative choice.⁹⁰

2.5.4 Interpretative theories

The idea that Dworkin puts forward that consistent non-rule standards or principles can be used for interpretation or adjudication is known as constructive interpretation.⁹¹ Dworkin identifies that the problem with constructive interpretation is that judges may have differing claims on what the shared legal principles of the community are.⁹² This problem, according to Dworkin, can be eradicated by judges if judges interpret the law as writers of a chain novel, apply the law in the manner Hercules would and desist from transplanting legal principles to areas where they do not belong.⁹³

Dworkin compares the adjudication that judges do to writers of a chain novel. Although each writer makes a different contribution, the contribution should be consistent with the

⁸⁵ *ibid.*

⁸⁶ *ibid.*

⁸⁷ *ibid.*

⁸⁸ Dworkin *Rights* 31.

⁸⁹ *ibid.*

⁹⁰ K Greenwalt *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges* (1975) 75 *Columbia Law Review* 361.

⁹¹ Dworkin *Empire* 289.

⁹² *ibid.*

⁹³ Dworkin *Empire* 44-68.

previous writer or at least share the same theme.⁹⁴ This illustration of how judges should interpret legal provisions falls within the category of interpretative theories. Dworkin describes this kind of interpretation as follows:

Law as integrity asks a judge deciding on a common law case ... to think of himself as an author in a chain of common law. He knows that other judges have decided cases that, although not exactly like case, deal with related problems; he must think of their decisions as part of a long story he must interpret and then continue, according to his own judgement of how to make the developing story as good as it can be ... the judge's decision must be drawn from interpretations that both fits and justifies what has gone before, so far as that is possible.⁹⁵

Another precaution indicated to by Dworkin is that when using constructive interpretation the judge should use legal principles related or rather applicable to the hard case which is being decided.⁹⁶ This ensures that remote principles of the law are not imported into areas where they are foreign.

Dworkin suggests that in order for judges to overcome the problems that are brought about by the use of constructive interpretation judges should interpret law like Hercules. Hercules is a fictional figure who represents a perfect judge.⁹⁷ Hercules provides a right answer in every case he is asked to adjudicate.⁹⁸ Hercules looks at previous decisions and makes a decision based on the law as a whole.⁹⁹ Using these precautions, Dworkin assumes that parties will get the right decision that best fits the circumstances and that is justified in terms of the existing legal record.

⁹⁴ *ibid.*

⁹⁵ Dworkin *Empire* 289.

⁹⁶ Dworkin *Empire* 45-68.

⁹⁷ Dworkin *Rights* 110-122.

⁹⁸ Dworkin *Rights* 279-90.

⁹⁹ Dworkin *Rights* 110-122.

2.5.5 Critics of Dworkin's theory

Dworkin's idea that there is a right answer for every case has been rejected by various theorists.¹⁰⁰ These theorists suggest that there are cases where there is no one correct solution to a problem, but many solutions that can achieve the required effect.¹⁰¹

Dworkin's idea that judges should resort to settled legal principles known in the community when faced with hard cases has also been rejected. Critics express the opinion that community morals only exist as a result of an individual's sense of morality.¹⁰² This is to suggest that each individual has his/her own different sense of morality. Therefore there are no community morals from which judges can draw to adjudicate. Hence if a judge employs what he supposes are the community's shared morality; he might actually be employing his own subjective moral standards.

Another issue that has caused problems with Dworkin's theory is his use of the fictional figure of Hercules. Hercules seemingly can arrive at the right answer in any given circumstance by looking at the law and precedent to arrive at the right answer. Critics such as Levinson, argue that the idea of Hercules is not practical and no man can use objective moral principles in the manner envisioned by Dworkin.¹⁰³ The existence of Hercules underplays the personal convictions, prejudices and bias that judges as humans possess.¹⁰⁴

Dworkin's idea that judges have weak discretion and that their discretion is confined to principles has also faced criticism. Greenwalt criticises this aspect of Dworkin's work by stating that the denial of the capacity to exercise discretion when judges adjudicate, is mistaken or woefully misleading.¹⁰⁵ He supports his claim by stating that when decisions are made, certain performances are deemed proper by the person deciding, as a result of taking into consideration other factors that might not necessarily be considered the law or

¹⁰⁰ Roederer & Moellendorf *Jurisprudence* 100.

¹⁰¹ *ibid.*

¹⁰² S Fish "Working on the chain gang: Interpreting Law and Literature" (1982) 60 *Texas LR* 551.

¹⁰³ S Levinson "Taking Law Seriously: Reflections on "Thinking Like a Lawyer."" (1978) 30 *STAN. L. RE* 1071.

¹⁰⁴ *ibid.*

¹⁰⁵ Greenwalt 1975 *Columbia Law Review* 368.

the norms of the society.¹⁰⁶ Furthermore, Greenwalt believes that even if judges have no discretion to make law; they actually make law by the way they write their opinions.¹⁰⁷

Richard Posner rejects Dworkin's view of how judges should be viewed as writers of a novel writing different chapters of the same story.¹⁰⁸ Posner argues that, although interpretation is central to law and literature, law and literature have institutional differences and differences of purpose.¹⁰⁹ The manner in which law is formulated and structured is substantially different from the way a novel is written, and so is the interpretation. Novels can be literally interpreted and can result in many interpretations. Posner argues that if such interpretations could be applied to law, such law would be bad law.¹¹⁰ The second problem Posner identified is that ascertaining the intention of the legislator would be problematic if a law is interpreted like a novel; judges will not fully perform their task as agents delivering the intention of the legislature.¹¹¹

It is submitted that although Dworkin's work has faced much criticism, his contribution is still valuable and his jurisprudential paradigm has been well received in certain quarters.¹¹²

The next section discusses Herbert Hart's contribution on the role of judges in interpretation.

2.6 Background on Hart

Hart's theory is a mid-way between that of the sceptics and formalists.¹¹³ Sceptics believe that when judges are faced with hard cases they should turn to their own moral and political preferences to resolve the case, whereas formalists believe that the law provides a clear answer to every solution that arises.¹¹⁴ Hart believes that when the judges are faced with hard cases they can exercise judicial discretion.¹¹⁵ By exercising judicial discretion they

¹⁰⁶ *ibid.*

¹⁰⁷ Greenwalt 1975 *Columbia Law Review* 379.

¹⁰⁸ R A Posner *How Judges Think* (2008) 253.

¹⁰⁹ *ibid.*

¹¹⁰ *ibid.*

¹¹¹ *ibid.*

¹¹² Roederer & Moellendorf *Jurisprudence* 100.

¹¹³ H McCoubrey & N White *Textbook on Jurisprudence* (1996) 34.

¹¹⁴ McCoubrey & White *Jurisprudence* 34.

¹¹⁵ Hart *Concept of Law* 123.

can make the law. The following discussion on Hart's main concepts serves as explanatory information to understand the role of judges as interpreters of legislation.

2.6.1 Main concept of Hart

Hart proposed that people obey the law not mainly because of commands or force as certain laws are not coercive. They simply assist with the existence of certain structures and powers.¹¹⁶ Hart takes the view that non-coercive laws put people under obligation to, or obliges them to conduct themselves in a certain way.¹¹⁷ He describes this distinction by way of examples. According to Hart a person feels obligated to do something if ordered by a gunman because he/she is under threat, but a person feels obliged to act in a certain way because of some valid normative system.¹¹⁸

Hart divides rules into primary rules and secondary rules. Primary rules are more general and are uncertain in application; there are no procedures that exist for their interpretation and determination.¹¹⁹ Secondary rules qualify primary rules. They “specify the ways in which the primary rules maybe conclusively ascertained, introduced, eliminated, varied, and the fact of their variation conclusively determined.”¹²⁰ The secondary rules comprise of the rule of change, rule of recognition and rules of adjudication.¹²¹ The rule of recognition deals with the criteria that can be used to identify the law.¹²² The rule of change focuses on the mechanism in place by which new rules and old rules can be changed.¹²³ The rule of adjudication focuses on what the functions of the court are and on what other adjudicating institutions other than courts do.¹²⁴ It is the rule of adjudication that is essential for the present research for it speaks to the role of judges and the interpretation of legislation. Hart explains the rule of adjudication by theorising how courts should perform their tasks in validating rules. His discussion on the role of judges arises mainly because Hart identifies

¹¹⁶ Hart *Concept of Law* 18-33.

¹¹⁷ Hart *Concept of Law* 84.

¹¹⁸ Hart *Concept of Law* 82-86.

¹¹⁹ *ibid.*

¹²⁰ *ibid.*

¹²¹ Hart *Concept of Law* 93.

¹²² *ibid.*

¹²³ *ibid.*

¹²⁴ *ibid.*

problems that judges face due to the inadequacies of the law, and he suggests how judges can overcome these difficulties.

2.6.2 Open texture of law

Hart explains that language, by its very nature, is uncertain.¹²⁵ He further goes on to say that it is within the inherent nature of language that it does not always articulate exactly what it is intended to articulate.¹²⁶ Therefore, even if the law sufficiently covers all cases, the language might impose limitations when it is interpreted by another. Hart also concedes that sometimes there are borderline cases that do not seem to be covered by statute.¹²⁷ It is these cases that Hart describes as the “open texture” of the law.¹²⁸ The reason for the existence of borderline cases is that the law introduced by the legislature is general, but cases that come before the courts have entirely unique sets of circumstances that may never have been contemplated by the legislature when making law.¹²⁹

An example that Hart gives to elucidate the inadequacies of law is that the legislature can provide a rule that states: “No vehicles in the park”.¹³⁰ This rule, with certainty, asserts that there should be no automobiles that enter the park.¹³¹ However, there is an area of uncertainty where there is a “penumbra of doubt” on whether other objects such as roller skaters may or may not be allowed into the park.¹³² This type of uncertainty is similar to what happens with other provisions that have been enacted by the legislature.

Hart concedes that where there are borderline cases that do not seem to be covered by statute and judges have to exercise judicial discretion.¹³³ Hart’s admission that judges should exercise judicial discretion is also acknowledged by Aristotle. Aristotle describes at

¹²⁵ McCoubrey H & White N (1996) *Textbook on Jurisprudence* 92.

¹²⁶ Hart *Concept of Law* 123.

¹²⁷ *ibid.*

¹²⁸ *ibid.*

¹²⁹ *ibid.*

¹³⁰ *ibid.*

¹³¹ *ibid.*

¹³² *ibid.*

¹³³ Hart *Concept of Law* 140.

what point judges should exercise judicial discretion.¹³⁴ Aristotle states that judges may exercise judicial discretion:

[W]hen the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, when the legislator fails us and has erred by over simplicity, to correct the omission– to say what the legislator himself would have said had he been present, and would have put into his law if he had known.¹³⁵

Hart's position with regard to how judges interpret is that judges should strictly apply the law. Judges can only exercise discretion when there is an "open texture of law."¹³⁶ It is only at that point that judges can be said to legislate. Hart therefore allows judges a wider ambit to interpret and decide cases based on judicial discretion in comparison to Dworkin.

2.6.3 Criticism of Hart's views

Hart has been criticised for focusing on the inadequacies of language to advance his theory.¹³⁷ It is argued that arriving at a judgement does not only involve linguistic exercises, but rather it involves legal reasoning and the impact of precedents.¹³⁸ The law as it appears today is made by a system of rules that complement each other and have adequately provided for cases through written language.¹³⁹ Hart's work on the open texture of law was a reply in part to the American Realists.¹⁴⁰

The American Realists had a totally different conception of the role of judges, in comparison to Hart. They believed that judges did not in fact rely on statutes to decide cases. The discussion below deals with the main concepts of American Realists and their contribution on how judges adjudicate.

¹³⁴ Aristotle *The Complete Works of Aristotle* (1984) 1796.

¹³⁵ Aristotle *Aristotle* 1796.

¹³⁶ Hart *Concept of Law* 123.

¹³⁷ Roederer & Moellendorf *Jurisprudence* 172.

¹³⁸ *ibid.*

¹³⁹ *ibid.*

¹⁴⁰ Bix *Jurisprudence* 38.

2.7 American Realists

The American Realists comprise of a group of theorists who reject the formalistic approach of adjudication.¹⁴¹ These theorists are diverse but share the conception that the interpretation of law is not neutral or objective and that judges are influenced by extra-legal factors to arrive at a judicial decision.¹⁴² The extra-legal factors include the judge's social background, personal preferences, convictions, political beliefs and commitments.¹⁴³

American Realists believe that the role of judges in interpretation is more discretionary and creative.¹⁴⁴ This is summarised by Murphy when he states that:

Since the 'rules' allow the judge considerable free play, he or she can in fact decide the case in a variety of ways, and the way that is in fact adopted will be more of a function of such factors as the judge's psychological temperament, social class, and values than of anything written down and called 'rules'.¹⁴⁵

Realists analysed the role of judges more broadly and from a non-legal perspective.¹⁴⁶ Some of these theorists include Oliver Wendell Holmes, Karl Llewellyn and Jerome Frank. The main ideas of these theorists are discussed below.

2.7.1 Oliver Wendell Holmes

Oliver Wendell Holmes theorised that judges do not merely interpret the law, rather they are lawmakers.¹⁴⁷ This is a result of the fact that the laws are too general and do not respond to the specific problems that arise.¹⁴⁸ Holmes describes his assertion in the following words:

¹⁴¹ *ibid.*

¹⁴² Tumonis 2012 *Jurisprudence* 1367.

¹⁴³ McCoubrey & White *Textbook on Jurisprudence* 203.

¹⁴⁴ Roederer & Moellendorf *Jurisprudence* 158.

¹⁴⁵ JG Murphy & JL Coleman *Philosophy of law- An Introduction to Jurisprudence* (1990) 33.

¹⁴⁶ McCoubrey & White *Jurisprudence* 193.

¹⁴⁷ Johnson *et al Jurisprudence* 162.

¹⁴⁸ *ibid.*

General propositions do not determine concrete cases... I always say in conference that no case can be settled by general propositions, that I will admit any general proposition you like and decide a case either way.¹⁴⁹

Holmes was of the opinion that judges decided on a case and then applied the law to justify the reasons that they come up with.¹⁵⁰ This is explained by Holmes when he states that:

The life of law has not been logic, it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow man, have had a good deal more to do than the syllogism in determining the rules by which men should be governed ...¹⁵¹

Holmes' observations can be contrasted to Dworkin's philosophies on how interpretation and adjudication takes place. Holmes believed that the judiciary plays a legislative role and that the judges arrive at decisions through use of extra-legal factors, whilst Dworkin on the other hand stressed that judges do not legislate. They only decide cases from the written law and where the law does not suffice, legal principles and legal norms are used to inform the decision the judge should take. Holmes' opinions also contrast with those of Hart who supposed that law making was peripheral to what judges should do. Holmes, on the other hand, averred that judges make the law and should continue to do so.¹⁵²

The theories of another legal realist that will be discussed are those of Karl Llewellyn.

2.7.2 Karl Llewellyn

Llewellyn viewed judicial law-making as essential to meet the rapid social change.¹⁵³ He believed that as law is the tool for social development it should be forward looking rather than backwards looking.¹⁵⁴ Thus he made a statement that legal rules do not accord to

¹⁴⁹ O.W Holmes cited in W.E Rumble *American Realism: Skepticism, Reform and Judicial Processes* (1968) 39-40.

¹⁵⁰ Roederer & Moellendorf *Jurisprudence* 167.

¹⁵¹ O.W Holmes citation taken from "The Common Law" (1881) 1. Extracted from Roederer & Moellendorf *Jurisprudence* 165.

¹⁵² Roederer & Moellendorf *Jurisprudence* 165.

¹⁵³ McCoubrey & White *Jurisprudence* 207.

¹⁵⁴ *ibid.*

reality; what exists in books is separate from what actually happens in practice.¹⁵⁵ Hence the only way to understand the law is by looking at how the law plays out when applied to a set of facts.

Llewellyn suggests that the law should be seen from the purpose it is set to serve. Llewellyn argued that for any institution to function, certain law jobs must be carried out.¹⁵⁶ Law jobs can be understood as the function of the law. He broke down the law jobs into six categories namely:

1. Disposal of troubled cases.
2. Preventing or channelling of conduct so as to avoid trouble.
3. Re-channelling of conduct and expectations as needs and conditions and relations change.
4. Allocating authority and making arrangements on procedures which are considered as authoritative.
5. Providing integration, direction and incentive to society as a whole.
6. Giving a juristic method, which embraces maintenance and improvement of structures and tradition and skills of official craftsmen of the law.¹⁵⁷

The contribution made by Karl Llewellyn is important in that he directs judges to arrive at the intention of the legislature by looking at the mischief that the legislature intended to address. Statutory provisions exist to serve certain purposes. If judges interpret the law by first looking for its purpose there is high likelihood that they will not misconstrue any statutory provisions but will apply them in the manner intended by the legislature.¹⁵⁸

Llewellyn also recommends that judges should use the so called grand style over the formal style when interpreting legislation.¹⁵⁹ He describes the grand style as reasoning by which judges give consideration to prior cases to produce rules which make sense and minimise uncertainty.¹⁶⁰ The formal style involves following the strict rules of the law.¹⁶¹

¹⁵⁵ Roederer & Moellendorf *Jurisprudence* 170.

¹⁵⁶ Roederer & Moellendorf *Jurisprudence* 171.

¹⁵⁷ *ibid.*

¹⁵⁸ Roederer & Moellendorf *Jurisprudence* 172.

¹⁵⁹ *ibid.*

¹⁶⁰ *ibid.*

The grand style allows judges to use the doctrine of *stare decisis* and in so doing, encourages certainty when judges interpret.

The last of the American Realist theorists to be discussed is Jerome Frank. The following discussion briefly looks at Frank's perception of the role of judges.

2.7.3 Jerome Frank

Jerome Frank argued that law is not the basis through which judges arrive at a decision.¹⁶² He assumed that the judges' decisions are influenced by emotions, intuitive hunches, prejudices and other irrational factors.¹⁶³ As a result the law cannot be predicted based on written statutes. According to Frank, rules are mere words until they are applied to facts to which they correspond.¹⁶⁴ This is explained by Frank when he states that: "No one knows the law about any case or with respect to any given situation, transaction, or event, until there is a specific decision (judgement, order or decree) with regard thereto."¹⁶⁵

2.7.4 Critics of American Realism

The American Realists have been largely discredited on the basis that they undermine the role of rules.¹⁶⁶ Critics state that the American Realists failed to take into account the large areas of law that are filled with certainty, where judges merely apply the written laws without looking at other extra-legal factors. This mainly applies to Jerome Frank who postulated that the law only comes alive by the way it is applied to specific facts.

2.8 Conclusion

There is no consensus amongst schools of thought on how judges should perceive or perform their roles as interpreters of legislation and as adjudicators. This disagreement is largely a result of differing opinions of whether or not judges should legislate and whether or not filling in gaps when deciding hard cases constitutes legislating. The question of how judges should adjudicate, as a result, has received a broad spectrum of responses. Those who favour the Dworkinian perspective recommended that judges should strictly adhere to

¹⁶¹ *ibid.*

¹⁶² Roederer & Moellendorf *Jurisprudence* 168-169.

¹⁶³ *ibid.*

¹⁶⁴ Frank 1931 *University of Pennsylvania LR* 28.

¹⁶⁵ Frank 1931 *University of Pennsylvania LR* 41.

¹⁶⁶ McCoubrey & White *Jurisprudence* 209.

the words of a statute to arrive at the intended meaning by the legislature.¹⁶⁷ This manner of adjudication is believed to be a mechanism designed to prevent an overlap between the judicial function and the legislative function.¹⁶⁸ Hart also advocates for judges to strictly interpret statutes, but exercise judicial discretion when faced with an open texture of law.¹⁶⁹ Hart and Dworkin's positions were rejected by American Realists. The American Realists hold the view that written law does not determine the outcome of a case but extra-legal factors do.¹⁷⁰ As a result no one can predict how a case will be decided.

These different jurisprudential schools of thought discussed above impact on how judges perceive their role as interpreters and how they execute their role. For a judge who ascribes to the positivist paradigm will have a different interpretational approach to a judge who subscribes to the tenets of the American Realists. Each jurisprudential theory discussed here gives a different perspective to explain how judges interpret. None of these theories encapsulate all of the ways judges interpret, but when they are viewed together they paint a broad picture of the role of judges as interpreters.

The next chapter focusses on the interpretational approaches or methods of interpretation as tools judges use to interpret legislation. The chapter links together how the different jurisprudential theories discussed here may impact on the interpretational approach judges choose to interpret legislation. It also analyses how the interpretational methods chosen by judges may impact their role as interpreters. The impact of the Constitution on the role of judges as interpreters and the methods of interpretation they can use is also discussed.

¹⁶⁷ Dworkin *Rights* 81.

¹⁶⁸ *ibid.*

¹⁶⁹ Hart *Concept of Law* 123.

¹⁷⁰ McCoubrey & White *Jurisprudence* 203.

CHAPTER THREE

INTERPRETATIONAL APPROACHES TO LEGISLATION

3.1 Introduction

The previous chapter explained the manner in which judges perceive their role as interpreters. This was done by way of analysing the different jurisprudential theories that explain how judges interpret legislation and how they should execute their role as interpreters. How judges interpret is not only affected by judges' perceptions of their role as interpreters, it is also affected by the interpretational approaches judges employ to arrive at the meaning of a legislative provision or a statute. The aim of this chapter is to analyse the different methods or approaches to interpretation that judges employ. In doing so an analysis is carried out on the extent to which these theories explain the role of judges as interpreters. The impact of the Constitution on the role of judges as interpreters is also discussed.

3.1.2 Approaches of interpretation

There are many approaches to interpretation of statutes that judges may employ. These include the literal, purposive, intentional, historical and comparative approaches.¹⁷¹ These approaches are distinct but overlap in many ways. The modern development of these methods of interpretation is that a combination of two approaches may be employed when interpreting. Examples of combined approaches to interpretation include the literal-cum-intentionalism and the purposive-value laden based approach. In South Africa, courts have mainly employed the strict literal approach, the literal-cum-intentionalism approach and the purposive-value laden approach.¹⁷² Mainly these approaches will be discussed for the purposes of this thesis. Each of these interpretational approaches is discussed in its original form and then discussed in conjunction with another method, in the manner they are employed by our courts.

This chapter begins with a description of the two literal approaches, the strict literal approach and the literalism-cum-intentionalism approach. The strict literal approach is followed by the golden rule and the mischief rule. Thereafter the literalism-cum-

¹⁷¹ C Botha *Statutory Interpretation. An Introduction for students* 5 ed (2012) 86.

¹⁷² Goldswain 2008 *Meditari Accountancy Research* 32.

intentionalism is discussed followed by a highlight of the problems that emanate from the literal approaches. Other interpretational theories, namely the purposive approach and the teleological approach are discussed. These are followed by an analysis on the impact of the constitution on interpretation and how it led to the development of purposive-value laden approach in respect of tax law.

3.2 Literal approaches to interpretation

The literal approaches to interpretation can be divided into two forms: the strict literal interpretation approach and the literalism-cum-intentionalism approach.¹⁷³ The strict-literalism approach and the literalism-cum-intentionalism approaches are based on the tenets of positivists' theories.¹⁷⁴ Positivists claim that the role of judges is to give effect to the meaning of a provision by using the words used by the legislature.¹⁷⁵ Judges have no room to evaluate on equity, fairness and reasonableness.¹⁷⁶ For positivists, the law is a decree or command that cannot be changed on the basis of policy issues or on grounds of morality.¹⁷⁷ Thus, a judge's hands are tied by what is stipulated in the statute, even if it leads to absurd results.¹⁷⁸

3.2.1 Why the literal approach was dominant in South Africa

The literal approach to interpretation dominated during the pre-constitutional era.¹⁷⁹ However, the advent of the new Constitution brought change to the interpretational approaches that can be used by judges.¹⁸⁰ Goldswain suggests that the main reason why a strict literal approach to interpretation was used in South African tax law is that "the strict and literal interpretation was incorrectly perceived as a mechanism to protect a taxpayer from poorly drafted, unclear, uncertain arbitrary provisions."¹⁸¹ Dugard, on the other hand,

¹⁷³ L du Plessis *Re-Interpretation Statutes* (2002) 93.

¹⁷⁴ *ibid*

¹⁷⁵ Roederer & Moellendorf *Jurisprudence* 86.

¹⁷⁶ R Wacks "Judges and Injustice" (1984) 101 *SALJ* 266- 285.

¹⁷⁷ *ibid*.

¹⁷⁸ *ibid*.

¹⁷⁹ *ibid*.

¹⁸⁰ C Albertyn & D Davis "Legal realism, Transformation and the Legacy of Dugard" (2010) 26 *SAJHR* 189 at 193.

¹⁸¹ Goldswain 2008 *Meditari Accountancy Research* 110.

suggests that the main reason why the courts adopted the plain or strict literal approach is that when South African law was “formed” natural law was in abeyance in Europe.¹⁸² Thereafter, South Africa adopted English law as part of its law.¹⁸³

Apart from the fallacy that strict literal interpretation ensures that the judiciary branch and legislative branch do not overlap, the rationale behind using the strict literal approach was that it encourages legal certainty.¹⁸⁴

3.3 Strict literal approach

The strict literal approach is based on the premise that judges should give effect to the words of a statute when interpreting.¹⁸⁵ Judges have to unconditionally rely on the language used in a provision and disregard any absurd consequences that may come with that interpretation.¹⁸⁶ The strict literal approach has no regard to the intention of the legislature.¹⁸⁷ Words of the statute are expected to suffice in giving meaning to a statute.

Cases that possibly demonstrated the application of this theory are the cases of *CIR v Simpson*¹⁸⁸ and *CIR v Frankel*¹⁸⁹ which approved the dictum of Rowlatt J when he stated that:

In a taxing Act one has merely look at what is clearly said. There is no room for any intendment. There is no presumption as to a tax. Nothing can be read in, nothing is to be implied. One can only look at the language fairly used.¹⁹⁰

The strict literal approach is based on the assumption that the words of a provision clearly express what the legislature intends to say. However, where the words are not clear, the court can resort to other secondary aids of interpretation.¹⁹¹ Where use of the strict-literal

¹⁸² J Durgard “The Judicial Process, Positivism and Civil Liberties” (1971) 88 *SALJ* 181 at 194.

¹⁸³ J Durgard (1971) *SALJ* 195. Also see C Botha in *Statutory interpretation an introduction to students* (2012) at 92.

¹⁸⁴ G Goldswain 2008 *Meditari Accountancy Research* 111.

¹⁸⁵ du Plessis *Statutes* 93.

¹⁸⁶ *ibid.*

¹⁸⁷ *ibid.*

¹⁸⁸ 1949 (4) SA 678 (A) at 695, 16 SATC 268.

¹⁸⁹ 1949 (3) SA 733 (A) at 738.

¹⁹⁰ *Cape Brandy Syndicate v IRC* 1921 (1) KB 64 at 71.

¹⁹¹ du Plessis *Statutes* 93.

approach results in a glaring absurdity that would not have been contemplated by the legislature the golden rule and the mischief rule may be used to extend its ambit.

3.3.1 Golden rule

The golden rule allows judges in exceptional circumstances to take into account the consequences which the literal approach may give.¹⁹² The exceptional circumstances are when the law is clear but the application of the literal interpretation results in an absurdity that is so glaring that it would never have been intended by the legislator, and when the meaning of the statute is clear but there is ambiguity in the provision.¹⁹³ The effect of the golden rule is that the literal meaning of the statute is abandoned and the judges infer the intention of the legislator.¹⁹⁴

The effect of the golden rule is described in the case of *Venter v R* where it was stated that:

... when to give the plain words of the statute their ordinary meaning would lead to absurdity so glaring that it could never have been contemplated by the legislature or where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the court is justified in taking into account, the court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect to the true intention of the legislation.¹⁹⁵

Like the golden rule, the mischief rule is also applied in exceptional circumstances when the strict-literal interpretation results in a glaring absurdity that would not have been intended by the legislature.¹⁹⁶

3.3.2 Mischief rule

The mischief rule was developed in the English case of *Heydon*.¹⁹⁷ It allows the judges to consider factors that are normally not considered when interpreting legislation using the

¹⁹² Madhuku *An Introduction* 150.

¹⁹³ *ibid.*

¹⁹⁴ *ibid.*

¹⁹⁵ 1907 TS 910 at 915.

¹⁹⁶ Madhuku *An Introduction* 154.

literal approach. It directs that the interpreter should answer the following questions to ascertain a proper meaning of a provision:

- 1) What was the common law before the making of the Act?
- 2) What was the mischief or defect that the law did not provide for?
- 3) What remedy did the parliament provide to cure the defect?
- 4) The true reason for the remedy should be given effect to.

Although the mischief rule is an extension of the literal approach, its manner of application appears in the form of a purposive approach. The difference is that when the mischief rule is used as an extension of literal approach, it is used as a last resort, but when the purposive approach is employed considerations under the mischief rule are the first point of call.

3.4 Literalism-cum-intentionalism approach.

The literalism-cum-intentionalism approach is an extension of the literal approach. The approach is a combination of the literal approach and the intentionalism approach. The intentionalism approach assumes that there is a single unified intent behind a provision. It is that intent that an interpreter should seek.¹⁹⁸ What distinguishes the literalism-cum-intentionalism approach from strict-literalism approach is that the words of a statute are read to give effect to the intention of the legislature, whilst the strict literal approach does not allow an interpreter to look beyond the words used to find the intention of the legislator.

In the case of *Bhayat v Commissioner of Immigration*,¹⁹⁹ Stratford JA explained this interpretational approach when he stated that:

The cardinal rule of construction of a statute is to endeavour to arrive at the intention of the law giver from the language employed in the enactment ... in construing a provision of an Act of Parliament the plain meaning of its language must be adopted unless it leads to some absurdity, inconsistency, hardship or an anomaly which from a consideration of the enactment as a whole a court of law is satisfied the Legislature could not have intended.

¹⁹⁷ 1584 76 ER 637.

¹⁹⁸ *ibid.*

¹⁹⁹ 1932 AD 125 at 129.

In the case of *SIR v Kirsch*, Coetzee J also explains the literalism-cum-intentionalism approach. He stated that:

There is no mystique about the ‘tax’ law. Ordinary legal concepts and terms are involved and the ordinary principles of interpretation of statutes shall be applied. One must look fairly at the language used to determine the intention of the legislature.²⁰⁰

Again in the Supreme Court of Appeal case of *CSARS v Executor Firth’s Estate*²⁰¹ the literalism-cum-intentionalism was explained when it was stated that:

The primary rule in construction of a statute is (as well established) to ascertain the intention of the legislator ... by giving the words under consideration their ordinary grammatical meaning, unless to do so would lead to some absurdity of glaring that the Legislature would not have contemplated it.²⁰²

It is submitted that despite judicial recognition of the strict-literal approach and literalism-cum-intentionalism approaches, the two approaches are far from perfect and have caused problems. The following is a discussion of some of the problems caused as a result of employing them.

3.4.1 Problems associated with the literal approaches and literalism-cum-intentionalism approach

The strict literal approach is based on the assumption that the interpreter can arrive at the meaning of statutes from the words of the provision. However, the problem with this position is that what one individual perceives as a clear meaning may not be clear to another. Schreiner JA in the case of *Savage v Commissioner of Inland Revenue* explains this line of thought by stating that:

[W]hat seems a clear meaning to one man may not seem clear to another. This consideration must also, I think, be borne in mind where one refers to the literal, ordinary, natural or primary meaning of words or expressions. The ‘literal’ meaning is not something revealed to judges by a sort of authentic dictionary; it is only what individual judges think is the literal meaning, if they employ that term.²⁰³

²⁰⁰ *SIR v Kirsch* 1973 (3) SA (T), 40 SATC 95.

²⁰¹ 2001 (2) SA 261 SCA.

²⁰² 2001 (2) SA 261 SCA 273.

²⁰³ 1951 (4) SA 400 (A), 18 SATC 1 at 11.

De Ville supports this argument by stating that language is inherently ambiguous and that there is no single correct meaning that can be acquired from interpreting a provision.²⁰⁴

The other major problem with the application of the strict literal approach is that it is not flexible. It does not allow for any other considerations to be taken into account when interpreting. As a result, employing the strict-literal approach may lead to absurd or even unfair results.

In the case of *Ochberg v CIR*,²⁰⁵ the taxpayer rendered services and in return received additional shares in a company of which he was the sole shareholder. The issue before the court was whether or not the amount received in the form of shares constituted income. De Villiers CJ logically applied the facts of the case to the law and found that the taxpayer had received a taxable benefit even though it did not have economic value to him. De Villiers CJ applied the strict literal interpretation. He believed it was the requirement of the law that it should be interpreted as it is and not to be altered because of the unfair consequences it could yield. De Villiers CJ encapsulated his position when he stated that:

[T]he argument is that when the transaction is analysed it will be seen that the appellant has derived no benefit or so little benefit from the transaction that on the principle *de minimis non curat lex* it may be said that there was in fact no benefit and therefore no income. In my opinion in determining whether the amount is income or capital this circumstance does not affect either the nature of the transaction or the nature of the value received. It is therefore entirely irrelevant and should not be taken into consideration. The reasoning ignores the very clear provision of the law that any receipt constitutes income with the single exception of a receipt or accrual of a capital nature. Only in the one case where the receipt is one of a capital nature, only in that case does it not fall within income. In all the other cases the law says it is to be regarded as income. Whether and to what extent the person may have benefited by the receipt of the income is irrelevant, for that cannot alter the nature of the receipt, converting what is income into capital. The amount of benefit may or may not be a good reason for the Legislature to step in and alter the law, but it cannot affect our decision. As long as *the law is what it is*, the receipt is income and as such liable to income tax.” (emphasis added)²⁰⁶

²⁰⁴ J de Ville “Meaning and statutory Interpretation” (1999) 62 *THRHR* 373 at 378.

²⁰⁵ 1931 AD 215, 5 SATC 93 at 97.

²⁰⁶ *Ochberg v CIR* 97.

According to Goldswain, from a business point of view, the taxpayer did not receive any financial benefit and should not have been taxed if the court had taken reasonableness and fairness into account.²⁰⁷ Goldswain suggests that application of the strict-literal approach in this case demonstrates “an interesting exercise in judicial logic, leading, it is submitted, to an illogical and unfair result.”²⁰⁸ If a different approach to interpretation was applied that allows considerations of fairness and equity to be taken into account, the court would have reached a different result.

A concern that has been raised in connection with the literal-cum-intentionalism approach is the reliance on intention to direct the meaning of a provision. According to Eskridge, when interpreting the legislative provisions judges are expected to ascertain the intention the legislature had when the legislation was drafted.²⁰⁹ The intention that judges seek would have remained static since the formulation of the legislation. When judges find it and apply it, the effect will not be the same as what the legislature intended when the law was drafted.²¹⁰ Societal expectations and norms could have changed from the time the law was formulated.

3.5 The purposive approach

The purposive approach is an approach that involves looking at the purpose of the statute to give meaning to the words of a particular provision.²¹¹ This approach does not require judges to enquire into the intention of the legislature but to search for the mischief that the legislature intended to control.²¹² The judges also have leeway to take other factors into consideration to arrive at the meaning of the statute. This is explained by Botha²¹³ when he states:

. . . the purpose or object of the legislation (the legislative scheme) is the prevailing factor in interpretation. The context of the legislation, including social factors and

²⁰⁷ Goldswain 2008 *Meditari Accountancy Research* 110.

²⁰⁸ *ibid.*

²⁰⁹ W Eskridge Jnr “Dynamic Statutory Interpretation” (1987) *Pennsylvania Law Review* 1479 at 1480.

²¹⁰ Eskridge Jnr 1987 *Pennsylvania Law Review* 1480

²¹¹ GE Devenish *Interpretation of Statutes* (1992) 35.

²¹² Devenish *Interpretation* 35.

²¹³ *ibid.*

political policy directions, are also taken into account to establish the purpose of the legislation.

When the purposive approach is used, it does not mean that the judges do not take the language of the provision into account. Rather judges use this approach to go beyond establishing the literal meaning and ascertaining the intention of the legislature in an effort to look at the purposes of the law. Schreiner JA in a minority judgement in the case of *Jaga v Donges*²¹⁴ stated that the "... legitimate field of interpretation should not be restricted as a result of excessive peerage at the language to be interpreted without sufficient attention to the contextual scene."

In *University of Cape Town v Cape Town Bar Council*²¹⁵ Rabie J held that courts have an obligation to examine all contextual factors in order to ascertain the intention of the legislature. Courts are positioned to adopt the literal meaning of statute and harmonise it with the purpose of the legislation. The role of a judge using the purposive approach is more flexible in comparison to when the literal approach is used. The purposive interpretational approach goes against the positivists' ideologies.²¹⁶ It reflects a move to more liberal jurisprudential approaches.

3.5.1 Problems with the purposive approach

The purposive approach has been criticised, mainly on the ground that it does not take into account the moral values.²¹⁷ Furthermore, the purposive approach can perpetuate human rights infringements. Mureinik articulated this concern when he stated that "if a policy of a statute is iniquitous, a purposive interpretation may well foster iniquity."²¹⁸ The purposive approach can, however, be complemented with the teleological approach to infuse moral considerations it does not take into account when applied alone.²¹⁹

²¹⁴ 1950 NO 1950 (4) SA 653 (A) at 662 G - 663.

²¹⁵ 1986 (2) ALL SA 619 (A) para 16-19.

²¹⁶ Devenish *Interpretation* 35.

²¹⁷ *ibid.*

²¹⁸ E Mureinik "Administrative Law in South Africa" (1986) 103 *SAJL* 615 at 624.

²¹⁹ M van Staden "The case of the Speluncean Explorers in the South African Constitutional Court" (2015) *Obiter* 1 at 6.

3.6 Teleological/Value coherent interpretation

The teleological method of interpretation is commonly described as a value based theory of interpretation.²²⁰ This approach is mainly informed by the natural law theory. Its basis is that values, morals and principles co-exist with law. Morals are therefore a fundamental consideration in the interpretation of statutes.²²¹ The rationale of the value based approach is that public values and policies inform the contents of the law.²²² Therefore interpretation of law should favour giving effect to such values above other considerations. Devenish states that the value based approach ensures that justice, morality and equity are taken into account.²²³ Devenish suggests that when judges weigh up values whilst interpreting legislation, they are likely to arrive at judgements that are more just than when no such considerations are taken.²²⁴

Devenish quotes with approval Voet's passage which states that:

[L]aw is a branch of morals and the judges in interpreting the law must always bear in mind the fact that the ultimate end and object of all law is to regulate relations of individuals according to that sense of right and wrong that prevails in the community.... Equity then is necessary to interpret to meaning of the law-giver and to apply law to the vast variety of cases that present themselves.²²⁵

3.6.1 Problems with the teleological approach

The teleological approach, when applied alone, generally provides room for judges to exercise their different notions of justice and their personal values and moral considerations. This impacts negatively on what law is expected to be.²²⁶

Before the last interpretational approach is discussed, it is essential to consider the impact of the Constitution, for it paved the way to a new form of interpretation known as the modern approach or the purposive/value based approach.

²²⁰ Devenish *Interpretation* 32.

²²¹ Wacks *Jurisprudence* 33.

²²² *ibid.*

²²³ Devenish *Interpretation* 44.

²²⁴ *ibid.*

²²⁵ Voet as cited in Devenish *Interpretation* 42.

²²⁶ Devenish *Interpretation* 47.

3.7 Impact of the Constitution on the approaches to interpretation

The Constitution of South Africa 1996, transformed the manner in which judges interpret legislation and the interpretational approaches judges use to interpret legislation.²²⁷ The literal approach was mainly used to interpret fiscal legislation. However, the Constitution brought new perceptions of how statutes should be interpreted. The Constitution provided an entry into the introduction of critical realism methods of interpretation.²²⁸ The change was achieved by transformative provisos which dictate that certain values should be embedded in the statutory provisions when statutes are interpreted.²²⁹ Section 39(2) instructs judges to interpret legislation in a manner that promotes the spirit of the Constitution.

In the case of *Matiso v The Commanding Officer, Port Elizabeth Prison*²³⁰ Froneman J stated that:

[T]he interpretative notion of ascertaining the intention of the legislature does not apply in a system of judicial review based on the supremacy of the Constitution, for the simple reason that the Constitution is sovereign and not the legislature. This means that both the purpose and method of interpretation should be different from what it was before the commencement of the Constitution on 27 April 1994.

This view was however, challenged in *Du Plessis and Others v De Klerk and Another*²³¹ where it was stated that “constitutional interpretation is concerned with the recognition and application of constitutional issues and not with the literal meaning of legislation.” This statement suggests that the literal approach may be used to interpret legislation unless a constitutional issue arises. However, this viewpoint was not been well supported. The Supreme Court of Appeal judgements endorsed the purposive/value laden method of interpretation as the approach to use when interpreting any statute.²³²

Other obligations imposed by the Constitution include that:

²²⁷ Albertyn & Davis 2010 *SAJHR* 199.

²²⁸ *ibid.*

²²⁹ Sections 7(1), 39(1) and 39(2).

²³⁰ 1994 (3) SA 592 (SE) 597B– 597H.

²³¹ 1996 (5) BCLR 658 (CC) at 722.

²³² *CSARS v Airworld CC* [2008] 2 All SA 593 (SCA), *Metropolitan Life Ltd v CSARS* [2008] 70 SATC 162 judges reiterated that the modern approach to interpretation should be used.

[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.²³³

The above provision does not make it optional for values of the Constitution to be taken into account when interpreting. It stipulates that the interpretation process should be embedded with constitutional value considerations.²³⁴ Accordingly, judges are obligated to adopt a more equitable approach which embraces the values enshrined in the Constitution when interpreting.

The Constitution further directs that judges should favour an interpretation that is consistent with the international law.²³⁵ This provision does not direct judges to employ international law at all times, but when the chance presents itself judges should interpret in a manner which is consistent with international law.

As a result of the values enshrined in the Constitution, judges are required to infuse constitutional values into the interpretation of legislation. This suggests that a value laden approach should be used to complement the purposive approach. Other interpretational theories do not allow considerations of reasonableness, fairness and equity in the manner the purposive-value laden approach does.

3.7.1 Purposive-value laden approach

The purposive-value laden approach, or the modern approach, is now the authoritative approach in South Africa. This approach is a combination of the purposive and the teleological approaches. This approach been authoritatively used in the Constitutional Court. In *African Christian Democratic Party v Electoral Commission*²³⁶ the court stated that:

²³³ Section 39(2) of the Constitution.

²³⁴ F Venter “Politics, Socio-Economic Issues and Culture in Constitutional Adjudication” (2003) 6 *Potchefstroom Electronic Law Journal* 2 at 27.

²³⁵ Section 233 of the Constitution.

²³⁶ 2006 (3) SA 305 (CC).

[C]ourts ... must understand ... provisions in the light of their legislative purpose within the overall ... framework. That framework must be understood in the light of the important constitutional rights and values that are relevant.²³⁷

The Constitution did not just impact on the methods of interpretation judges are expected to follow, it also impacted the role of judges as interpreters. The following is an analysis of how judges' perceptions on their role as interpreters shifted as a result of the Constitution.

3.7.2 The impact of the Constitution on the role of judges as interpreters

The opinion of most judges in pre-constitutional South Africa was that their task was not that of a *censor morum* (critic of morals).²³⁸ Their task as judges was to interpret law as it appears on paper. In the case of *S v Adams*²³⁹ Judge Mervyn King expressed such sentiments on his role as a judge when he stated that:

An Act of Parliament creates law but not necessarily equity. As a Judge in a Court of law I am obliged to give effect to the provisions of an Act of Parliament. Speaking for myself and if I were sitting as a court of equity, I would have come to assistance of the appellant. Unfortunately, and on an intellectually honest approach, I am compelled to conclude that the appeal must fail.

Pickard CJ also took a similar position in the case of *Bongopi v Chairman of the Council of the State, Ciskei* when he stated that:

This Court has always openly stated that it is not the maker of laws. It will enforce the law as it finds it. To attempt to promote policies that are not to be found in the law itself or to prescribe what it believes to be the current public attitudes or standards in regard to these policies is not its function.²⁴⁰

The perception and views of the court at the time aligned perfectly with positivists' paradigm. The judges and interpreters distanced themselves from delivering justice or ensuring that equity and fairness is achieved when they adjudicated. The role of judges as interpreters was seen as mechanical and did not allow them to make use of any

²³⁷ *African Christian Democratic Party v Electoral Commission* 2006 (3) SA 305 (CC) at 46.

²³⁸ *Preston v Biden's Trustee* (1883) 1Buch 322 at 333.

²³⁹ 1979 SA 793 (T) at 801.

²⁴⁰ 1992 (3) SA 250 (CkG) 265 G-I.

considerations other than the law.²⁴¹ They applied the law regardless of the ruthless consequences it would have on any of the parties.²⁴²

The Constitution demanded a change in how judges performed their roles as interpreters. It imposed the responsibility on judges to be custodians of the Constitution. Henceforth, when judges interpret legislative provisions, they are expected to infuse constitutional values and ethos. Mokgoro, J in the case of *S v Makwanyane*²⁴³ describes how the Constitution impacted on interpretation.

[T]he interpretative task frequently involves making constitutional choices by balancing competing fundamental rights and freedoms. This can often only be done by reference to a system of values extraneous to the constitutional text itself, where these principles constitute the historical context in which the text was adopted and which helps to explain the meaning of the text. The constitution makes it particularly imperative for courts to develop the entrenched fundamental rights in terms of a cohesive set of values, ideal to an open and democratic society.

However, when interpreting the provisions, judges should refrain from going beyond what the words actually mean and unnecessarily overstretch its ambit.²⁴⁴ This was explained by Chief Justice Mogoeng Mogoeng:

Judges must not seek to contort the meaning of the Constitution or the law for the attainment of an objective that is difficult to reconcile with the overall constitutional project or vision or the legislative purpose set out in the particular law. For it is when, language ... is unduly strained that things do not add up in that the logic is difficult to follow or the reasoning and outcomes are at odds with the thrust of the provision being interpreted, that public and international confidence in the particular Judiciary is in jeopardy.²⁴⁵

²⁴¹ J Dugard “Judging the Judges: Towards an Appropriate Role for the Judiciary in South Africa's Transformation” (2007) 20 *Leiden Journal of International Law* 965 at 969.

²⁴² J Dugard 2007 *Leiden Journal of International Law* 969.

²⁴³ *S v Makwanyane* 1995 (6) BCLR 665 (CC) para 302.

²⁴⁴ M Mogoeng “Judicial role in interpreting Constitution and laws: Impact on Public and International Conference and Implications for developing Judicial Capabilities”.[www.apjrf.com/Judicial Role in Interpreting Constitutions and Laws...](http://www.apjrf.com/Judicial_Role_in_Interpreting_Constitutions_and_Laws...) · PDF file. (Accessed 20 December 2015).

²⁴⁵ Mogoeng “Judicial role”.

Chief Justice Mogoeng Mogoeng suggests that statutes should be read in context and interpretations should change as society changes.²⁴⁶ This means that judges, as interpreters, now have room to read constitutional values into provisions and ensure that provisions are reasonable and fair. Judges now have room to consult other aids to interpretation that were normally used only to complement the literal approaches to interpretation.²⁴⁷ Some of these aids are discussed hereafter.

3.8 Aids to interpretation of legislation

Most aids to interpretation are normally based on linguistic or institutional considerations and include general presumptions, maxims, and intrinsic and extrinsic materials that may assist in interpretation.²⁴⁸

3.8.1 Internal aids

Internal aids constitute “any material which is published with an Act, but is not a substantive provision of the Act.”²⁴⁹ Internal aids are inclusive of the preamble, long titles, short titles and heading of particular provisions and definitions contained in the statute. Each of these may be used by judges for the purposes of interpretation.

3.8.2 Preamble

The preamble of a statute gives purpose to what the statute serves.²⁵⁰ Devenish describes a preamble as “a recitation, usually couched in polished and eloquent phraseology, of the circumstances and reasons which have induced the legislature to enact the statute.”²⁵¹ In South Africa judges may make use of the preamble when trying to ascertain the meaning of a provision. In the case of *Law Union and Rock Insurance Co Ltd v Carmichael’s Executor*²⁵² the court made use of the preamble. It was highlighted that “where the Court is satisfied that the Legislature must have intended to limit in some way the wide language

²⁴⁶ *ibid.*

²⁴⁷ Goldswain 2012 *Southern African Business Review* 16 (3) at 38.

²⁴⁸ S A Donlan & Kennedy R “A flood of light? Comments on the Interpretation Act 2005” (2006) *Judicial Studies Institute Journals* 92 at 97.

²⁴⁹ Donlan & Kennedy 2006 *Judicial Studies Institute Journals* 98.

²⁵⁰ Devenish *Re-interpretation* 38.

²⁵¹ Madhuku: *An Introduction* 170.

²⁵² 1917 AD 593 at 597.

used, then it is proper to have recourse to the preamble.” Judge Sachs also emphasises the importance and use of the preamble in interpretation by stating that:

The Preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretive value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicates its fundamental purpose. This is not a case of making the Constitution to mean what we like, but of making it to mean what the framers wanted it to mean; we gather their intention not from our subjective wishes but from looking at the document as a whole.²⁵³

3.8.3 Long title, short title and definitions

The long title generally describes the purposes of the Act.²⁵⁴ It gives an overview of what the Act seeks to achieve. The short title may also be used to complement the long title when interpreting.²⁵⁵ Other internal aids such as definitions are crucial. They can define and direct to whom a particular provision applies. For example, the Seventh Schedule of the Act applies to employees only. If a taxpayer does not fall within the definition in the Act, the provision will not apply to him or her. Marginal notes, on the other hand, cannot be used for interpretation purposes as they are considered not to have been passed by the legislature.²⁵⁶

Internal aids are critical in how judges play their roles as interpreters because they clarify the meaning of statutory provisions. According to Goldswain, when using a purposive approach to interpretation, the judiciary should always seek guidance from the preamble and the long and the short titles to a statute.²⁵⁷ The main reason why this is needed is that the purposive/teleological approaches only make sense of individual legislative provisions through understanding them in relation to one another and their purpose as whole.²⁵⁸

²⁵³ The discussion gives Judge Sachs opinion on the intended meaning of the Preamble to the Constitution of the Republic of South Africa, 1996 and *S v Mhlungu* 1995 (7) BCLR 973(CC).

²⁵⁴ Madhuku *An Introduction* 158.

²⁵⁵ Goldswain 2012 *Southern African Business Review* 40. See also *R v Sisulu* 1953 (3) SA 276 (A) p 287.

²⁵⁶ De Koker and R Williams *Silke on South African Income Tax* 25.8.

²⁵⁷ Goldswain 2012 *Southern African Business Review* 41.

²⁵⁸ *ibid.*

3.8.4 External aids

External aids refer to materials from other sources that may be used to ascertain the meaning of a provision.²⁵⁹ External aids allow judges to use the historical settings of a statute to aid in clarifying the meaning of a statute.²⁶⁰ This means that common law presumptions and materials such as parliamentary reports and debates may be taken into account to assist a judge in interpreting a provision in an Act. A general discussion on presumptions and other considerations an interpreter should have in mind when arriving at a decision follows.

3.8.5 Presumptions

Presumptions comprise of assumptions that the courts can take into account when interpreting statutory provisions.²⁶¹ Presumptions are therefore not rules but assumptions that carry obligatory weight for judges to apply to interpret in a certain way.²⁶² There are general presumptions that judges should bear in mind when they interpret statutes. These generally ensure that equity, fairness and reasonableness are achieved.²⁶³

3.8.6 Parliamentary history and debates

The English law before 1933 did not allow parliamentary history to be used as an aid to interpretation, but with the development of law this position changed.²⁶⁴ The change however, has not been fully embraced in the English courts in practice.²⁶⁵ In South Africa, the courts have remained firm on excluding such material when interpreting statutes.²⁶⁶ The importance of parliamentary history as a source of interpretation is demonstrated in the

²⁵⁹ *ibid.*

²⁶⁰ Madhuku *An Introduction* 174.

²⁶¹ *ibid.*

²⁶² Madhuku *An Introduction* 160.

²⁶³ *ibid.*

²⁶⁴ *Pepper (Inspector of Taxes) v Hart* (1993) AC 593 para 43-44. See Richard Kelly Common briefing papers SN00392 <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN00392#fullreport> Accessed 15 September 2016.

²⁶⁵ *ibid.*

²⁶⁶ *ibid.*

case of *Fothergill v Monach Airlines*.²⁶⁷ Diplock J explained that when courts of justice interpret legislation, they are described as ascertaining the intention of the legislature.²⁶⁸ In that context the judges act as mediators between the legislature and the citizens. Thus, if judges are forbidden from accessing parliamentary debates for the purposes of interpretation, the citizens' rights to ascertainable rules is denied.²⁶⁹ Therefore judges should be allowed to consult parliamentary debates when interpreting. Forbidding the use of such material is similar to making judges grope in the dark in search of meaning that could have been easily ascertained from debates engaged in during the construction of the provisions.

Apart from the different aids to interpretation referred to above, judges also use of maxims of interpretation to give meaning to provisions. Maxims are also known as rules of language as they direct an interpreter on how people speak in certain contexts.²⁷⁰ Examples of such maxims include *ejusdem generis*,²⁷¹ *noscitur a sociis*²⁷² and *expressio unius est exclusio alterius*.²⁷³ *Ejusdem generis* means "of the same kind". It suggests that words should be limited to words which fall within the same class. *Noscitur a sociis* 'a thing is known by its associates' meaning that words should derive meaning from its surrounding context. *Expressio unius est exclusio alterius* suggests that when a list of things is given, it means those not mentioned are excluded from application of the law.

The last aid to interpretation to be discussed is a general rule known as the *contra fiscum* rule.

3.8.7 Contra fiscum rule

The rule *in dubio contra fiscum* (when in doubt, do not tax the taxpayer) dates back to Roman times. Then it was applied to determine whether fines or confiscated property should be assigned to the private treasurer of Caesar or to the state treasury, known as the

²⁶⁷ 1981 AC 251 at 279-80.

²⁶⁸ *ibid.*

²⁶⁹ *ibid.*

²⁷⁰ Madhuku *An Introduction* 153.

²⁷¹ Madhuku *An Introduction* 54.

²⁷² Madhuku *An Introduction* 156.

²⁷³ Madhuku *An Introduction* 157.

aerarium.²⁷⁴ However, the *fiscus* and the *aerarium* were merged and the meaning of the rule changed. The accepted meaning adopted by Roman-Dutch authors was that the rule should be applied in favour of a subject who is being taxed where the legislative provision is not clear.²⁷⁵ This means that when judges are faced with a statutory text that is ambiguous and is capable of giving effect to two meanings, the judge has an obligation to give effect to the construction that imposes a lesser burden on the taxpayer.²⁷⁶

Botha JA²⁷⁷ recognised the existence of this rule when he stated that:

[I]n the case of an ambiguity a fiscal provision should be construed *contra fiscum* which is but a specific application of the general rule that all legislation imposing a burden upon the subject should, in the case of an ambiguity, be construed in favour of the subject.

In *Shell's Ammandale Farm Pty Ltd v CIR*²⁷⁸ the court confirmed that the application of the *contra fiscum* rule is not limited to ambiguity in the meaning of the words of a given statute, rather it also applies when there is ambiguity in the intention of the legislature.

3.8.8 Exceptions to the *contra fiscum* rule

In the case of *Ernst v CIR*²⁷⁹ it was stated that the *contra fiscum* rule does not apply to all provisions. It was stated that, where interpretation of a statute is concerned with granting privileges to a taxpayer or where exemptions are being granted, the *contra fiscum* rule should be applied against extension of the special privileges or exemption that are being granted.²⁸⁰

In *ITC 1116*,²⁸¹ Wunsh J stated that it should be recognised that the “ordinary principles of interpretation of statutes” embrace the *contra fiscum* rule. When it comes to anti-avoidance the rule is construed in favour of suppressing the mischief against which the law is

²⁷⁴ van Wyk T “Tax Law Interpretation of fiscal legislation” (1976) *De Rebus Procuratoriis* 455 at 455.

²⁷⁵ van Wyk 1976 *De Rebus Procuratoriis* at 455.

²⁷⁶ *ibid.*

²⁷⁷ *Glen Anil Development Corporation Ltd. v SIR* 37 SATC 319.

²⁷⁸ 2000 JOL 5948 at 17.

²⁷⁹ 1954 (1) SA 318 (A), 19 SATC 1. See also *Badenhorst v CIR* 1955 (2) SA 207 (N), 20 SATC 39.

²⁸⁰ *Ernst v CIR* 1954 (1) SA 318 (A), 19 SATC 1.

²⁸¹ 59 SATC 126 AT 136-7.

directed.²⁸² The advent of the Constitution did not impact negatively on the *contra fiscum* rule. For the rule seeks to avoid prejudice to the taxpayer and encourages equity in interpreting tax legislation.²⁸³ It also encourages equity when interpreting statutes. However, if courts follow a purposive/teleological approach, the doctrine may eventually fall into disuse. In the case of *CSARS vs Airworld CC*²⁸⁴ the court used the purposive approach to interpretation to take into account fairness and equity instead of applying the *contra fiscum* rule.

3.9 Conclusion

This chapter focussed on the devices available to judges as interpreters and the impact they have on their roles as interpreters of legislation. These devices include the interpretational approaches, the Constitution and other aids to interpretation. The literal approaches were the most commonly used before the 1996 Constitution.²⁸⁵ These approaches were used mainly because it was believed that they served to conserve parliamentary sovereignty and ensured certainty and predictability of the law.²⁸⁶

However, the Constitution brought a new awareness of the interpretational approach that courts should use. Although the Constitution does not recommend any particular approach, it places judges on the position of custodians to uphold the constitutional values and ethos embedded in the Constitution.²⁸⁷ For that reason a wider approach to interpretation has been embraced by the courts. The approach is known as the purposive/value laden approach and is now recognised as the authoritative interpretational approach in South Africa.

External and internal aids can be consulted when the judges employ the purposive/value laden approach. The *contra fiscum* rule may also still be used by the judges when interpreting provisions. However, it was explained that gradually the *contra fiscum* rule might fall into disuse. This is a result of the fact that purposive/value-laden approach that is now being used allows a judge to take into account equity, fairness and reasonableness in

²⁸² *ibid.*

²⁸³ Goldswain 2008 *Meditari Accountancy Research* 116.

²⁸⁴ 2008 (2) All SA 593 (SCA).

²⁸⁵ Botha *Statutes* 92.

²⁸⁶ *ibid.*

²⁸⁷ Constitution of the Republic of South Africa.

the same manner as the *contra fiscum* rule does. However, there is concern that judges in South Africa are still not permitted to use parliamentary debates or history to assist in them in the interpretation of legislative provisions. It was submitted that there is need for this to change.

The analysis in this chapter demonstrates that interpretational methods do shed light on how judges perform their role as interpreters. The interpretational method may determine whether or not the judges will give effect to the words used by the statute or whether to the judges will employ other extra-legal considerations such as reasonableness and fairness. The methods of interpretation coupled with the jurisprudential theories seem to a large extent to explain how judges perform their task as interpreters. However, there are considerations at play other than the perspectives discussed in this chapter and the previous chapter. These are discussed in chapter five.

The next chapter is an extension of this chapter. The purpose of the chapter is to illustrate through case law how the interpretation theories used by judges have changed from pre to post constitutional South Africa.

CHAPTER FOUR

CHANGE IN THE APPROACH TO INTERPRETATION: A CASE LAW APPROACH

4.1 Introduction

The aim of this chapter is to illustrate, through case law, the change in the approach to interpretation of tax law prior to and post the Constitutional era in South Africa. This chapter gives depth to the previous chapter by providing specific Appellate Division and Supreme Court of Appeal cases which demonstrate the prevailing approach during the different eras. To start with, a brief background on how the literal approach became a part of South African law will be discussed. The background provided does not give a comprehensive or an accurate description of the development of South African law; it merely serves to introduce the reader to the character and nature of South African law and to illustrate the origin of the interpretive approach adopted in South Africa.

4.2. Background

South African law was predominantly Roman-Dutch law as from 1652; however the law was substantially influenced by the English law from 1806.²⁸⁸ The influence of English law increased as result of the fact that the judges in South Africa were trained in England. Despite attempts by the purists to discourage judges from unnecessarily relying on English law, English law continued to be used.²⁸⁹ In 1961, when South Africa became a formal Republic, the Westminster style of parliamentary sovereignty was adopted. The parliament was considered supreme and the task of judges was merely to enforce the intention of the legislature.²⁹⁰ Intention was ascertained from the words used in a statutory provision. The literal approach to interpretation was therefore the acceptable approach. In the present research an attempt has been made to discuss the cases according to their chronological order.

²⁸⁸ J W Pitts "Judges in an unjust society: The case of South Africa" 15 *Denv. J. Int'l L. & Pol'y* 9 1986-1987 at 51.

²⁸⁹ Pitts *Denv. J. Int'l L. & Pol'y* 51.

²⁹⁰ Pitts *Denv. J. Int'l L. & Pol'y* 52.

4.3 Pre-constitutional cases

4.3.1 *Venter v R*

One of the early cases that illustrate the interpretative approach that was followed by the courts is the case of *Venter v R*.²⁹¹ The case of *Venter v R*²⁹² examined section 3 and 5 of Ordinance 20 of 1905. Section 3 stated that:

[A]ny person entering into this colony after the passing of the Ordinance shall be guilty of an offence, if he has been convicted elsewhere than in this colony of certain offences, or if he has in any country other than this colony lived on or knowingly received any part of the earnings of prostitution, or procured women for immoral purposes. He may under such circumstances be sentenced to imprisonment without hard labour for a period not exceeding two months, pending removal by the Governor.²⁹³

The effect of section 3 of the Ordinance, read with section 5, was that it empowered the Governor at his discretion, without judgment from the court of law to banish a person from the Transvaal.

In this case, the appellant was born in the Cape Colony but he resided in the Transvaal from 1896 until 1901. In 1901 the appellant left the Transvaal and went to Natal and thereafter to the Orange River Colony. He stayed in the Orange River Colony for a period of six years but he had no intention of living there permanently. During his residence in the Orange River Colony, the appellant was convicted of theft and served a one year sentence. Months after his release, he travelled back to the Transvaal where he was convicted and sentenced under section 3 of the Ordinance. The appellant thereafter appealed against the magistrate's decision.

In the Appeal Court, Innes J emphasised the importance of language. He stated that:

... in construing the statute the object is, of course, to ascertain the intention which the legislature meant to express from the language which it employed. By far the most important rule to guide courts in arriving at that intention is to take the language of the instrument, or of the relevant portion of the instrument, as a whole; and, when the words

²⁹¹ 1907 TS 910.

²⁹² 1907 TS 910 at 912.

²⁹³ *Venter v R* 915.

are clear and unambiguous, to place upon them their grammatical construction and give them their ordinary effect.²⁹⁴

Innes J relied on English case law and therefore followed a literal approach. He stated that where the language leads to absurdity or two meanings, the court should follow the approach that gives effect to true intention of the legislature. Giving effect to the intention of the legislature could mean departing from the ordinary effect of the words to the extent necessary to remove the absurdity of the words. Innes J observed the plain or literal meaning in this case had the implications that if a person, perhaps a student naturally resident in Transvaal, had left for another area such as Natal or the Cape Colony to study and stole something and was then charged and prosecuted for theft, if he returned home he would be committing a criminal offence. The literal interpretation thus resulted in a situation whereby people could be banished from their place of residence or their place of birth.

Innes J therefore applied the golden rule. He stated that the word “any person” is very wide and applies to both residents and non-residents of the Transvaal. The word “entry” in the provisions was also unqualified and meant every coming in through the border. Innes J held that the court should limit these ordinary words by excluding persons resident in the Transvaal, or persons having homes in the Transvaal. Innes J further explained that the provision was aimed at preventing the influx of criminals from abroad and to provide a mechanism to deport the criminals if they enter the Transvaal boarder. Innes J reiterates that in the absence of a treaty between countries it would not possible to merely deport criminal residents of Transvaal to other countries. He found that section 3 of the Ordinance did not apply to residents or people domiciled in the Transvaal who had committed crimes in other territories.

*Venter v R*²⁹⁵ demonstrates the strong reliance of judges on English decisions. It is trite to note that, although Innes J applied the literal approach, the outcome of the case would have been the same if the purposive approach had been adopted. The golden rule and the mischief rule that complement the literal approach have a similar enquiry into the intention of the legislature that underlies the purposive approach. The main difference is that the literal approach uses the two rules only in exceptional circumstances and as a last resort.

²⁹⁴ *Venter v R* 913.

²⁹⁵ *Venter v R* 914.

4.3.2 *CIR v George Forest Timber Company*

More than two decades after the case of *Venter v R*, the case of *CIR v George Forest Timber Company*²⁹⁶ was heard and followed the same interpretative approach that had been used in the early cases. The case of *George Forest Timber Company v CIR*²⁹⁷ concerned the issue of whether or not the respondent company could deduct in calculating its taxable income a sum of £1 000 which represented the cost of the forest relative to the timber felled in that year. The respondent company carried on its business as timber merchants and sawyers and had purchased 600 morgen of natural forest for the purposes of business. It is the cost of the trees that had been felled and sold as stock-in-trade that the respondent wanted to deduct and the Commissioner refused to allow this deduction.

De Villiers JA began by demonstrating the meaning of the gross income by way of an example. He cited the case of *Stephan v Commissioner for Inland Revenue* (1919, W.L.D. 17) where a shoopkeeper sold an article that cost him 5 shillings for 15 shillings. The 15 shillings received from the transaction was considered to be income for the purposes of the gross income. The cost price of 5 shillings was not considered as a return of capital. As such, the respondent could not claim the deduction of £1 000, on the basis that the amount was capital in nature.

De Villiers JA relied heavily on English law in deciding on the approach to use. De Villiers JA quoted with approval the Privy Council decision in *Kauri Timber Co. v Commissioner of Taxes* (1913, A.C. 771) where it was stated that: “I apprehended that the rule of construction of taxing statutes was as stated by LORD CAIRNS in *Partington v The Attorney-General* (21 L.T. 370 at p. 375)...”²⁹⁸ He repeats Lord’s Cairn’s literal interpretative approach:

I am bound to say that I myself have arrived without hesitation at the conclusion that the judgment ought to be affirmed. I do so both upon form and also upon substance. I am not at all sure that in a case of this kind – a fiscal case – form is not amply sufficient, because as I understand the principle of all fiscal legislation, it is this: If a person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking

²⁹⁶ *Venter v R* (1907 TS 910), *George Forest Timber Company v CIR* (1924 AD 516, 1 SATC 20).

²⁹⁷ 1924, 1 SATC 20.

²⁹⁸ *George Forest Timber Company v CIR* 29.

to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the law the case might otherwise appear to be. In other words, if there be an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.²⁹⁹

A literal approach was adopted and the court held that the deduction claimed by the respondents was not deductible.

4.3.3 *Ochberg v CIR*

The case of *Ochberg v CIR*³⁰⁰ was brought before the Appellate Division following dissatisfaction with the judgment ordered by the Tax Special Court. One of the main issues that was addressed by the court on appeal was whether the shares that had been received by the appellant constituted income as defined in terms of the then Income Tax Act. Whether or not Ochberg had received income depended on the interpretation of the gross income definition. The gross income definition was “the total amount whether in cash or otherwise received by or accrued to or in favour of any person, other than receipts or accruals of a capital nature.”³⁰¹

Ochberg, who was the appellant in the case, had rendered services and given premises to the Airton Timber Company and in exchange Ochberg received shares from the same company. The Commissioner taxed him on the shares but Ochberg rejected the assessment on the basis that he had not received the shares as contemplated in the gross income definition.

In the Appellate Division, De Villiers CJ reiterated that the court relies on the words used by the legislature to decide whether a receipt is taxable or not. In circumstances where the benefit is too minimal as argued by the appellant, the court will consider it taxable unless such receipt is exempted by the legislature. The nature of the receipt and its value to the taxpayer were considered not to be important in determining the taxability of the shares.

²⁹⁹ *ibid.*

³⁰⁰ 1931 AD 215, 5 SATC 93.

³⁰¹ Section 7(1) of the Income Tax Act of 1925, see also *Ochberg v CIR* at 97.

Roos JA supported De Villiers CJ's position. He stated that it may have been that the taxpayer entered into a foolish agreement which resulted in a receipt that halved the value of his old shares. Even so, the taxpayer was still liable to pay tax.

Roos JA's position was that the literal meaning of the gross income was not whether the taxpayer had substantially benefited from the transaction but, whether the taxpayer had received shares in terms of the gross income definition. According to Roos JA the assessment made against Ochberg fell within his gross income. The special relation that existed between him and the company was not the enquiry. For if a third party had received the shares received by Ochberg, the shares would have been taxable.

Despite the literal approach being the main approach at the time, Wessels JA and Stratford JA used different approaches and they both gave the minority judgement. Wessels JA held that the shares issued to the taxpayer should not be taxed in terms of the gross income definition. Wessels JA stated that the shares received by Ochberg *prima facie* appeared to fall within the gross income definition in that year of assessment. Wessels JA, however, departed from the literal interpretive approach and adopted a purposive approach. He took into account whether or not the shares received added value to the taxpayers' estate. His enquiry was different from that of De Villiers JA and Roos JA, who responded to the question of whether or not receipt had been received by the taxpayer by holding that however small or large it was it had been so received. Wessels JA justified his approach by stating that legislature did not intend to tax taxpayers on fictitious amounts received. Wessels JA's line of reasoning was that if the receipt did not add a penny to the taxpayer's estate then the receipt was not taxable. Wessels JA summarised his position as follows:

Now it was never the intention of the legislature to take away from a person a portion of his estate because he is fictitiously supposed to have received a sum of money which upon analysis it is clear he did not in fact receive. Fictitious income is not gross income. If the Court is satisfied, upon scrutinising a transaction which on the face of it has the appearance of having added money to a man's estate that in fact the transaction has not added a penny to his estate, then it will not consider such fictitious accrual as gross income..... I cannot conceive that the legislature ever intended that the State should take away a portion of a man's capital when in appearance he seems to have received an amount of money, but when in fact he has received no money and no money's value: when the sum total of his assets after the so-called receipt is exactly the same as it was

before. By increasing the capital of the private company, of which the appellant held all the shares, the appellant has in his individual capacity added nothing to his estate.³⁰²

Stratford JA shared the same reasoning with Wessels JA that the taxpayer had not received anything taxable for the purposes of the gross income definition. Stratford JA emphasised fairness, a concept that was not taken into consideration for the purposes of interpretation by the courts at that time. Stratford JA's position was that:

To assess the appellant in respect of this issue which clearly brought no added wealth to him, would be to work a manifest injustice upon him, and unless forced to do so by express words of the Legislature we should avoid doing so. I can find nothing in the Income Tax Act which compels us to designate as income something which every principle of reason and common sense tells us is nothing of the kind.³⁰³

The existence of these dissenting judgments indicated the possibility of a shift from the literal interpretative method dominant at the time.

4.3.4. *Delfos v CIR*

In this case the taxpayer was a managing director of a company. He was entitled to receive a fixed salary of £3 000 per annum and £200 as fees, but for years he received a salary far less than this amount. He informed the Commissioner, who accordingly allowed a reduction of his taxable income. In 1930, the appellant received the sum of £9 900 for the various years the taxpayer had not been paid in full. The Commissioner sought to tax that receipt. The main issue that was considered was whether the £9 900 should be regarded as part of respondent's income for the year 1930 or whether the various amounts left unpaid in the various years should be referred back to the past years and assessments raised on the amounts that ought to have been paid.

In the Transvaal Provincial Division, the court held that the money that had been deducted as bad debts accrued in the year the debts were incurred. It also held that the £9 900 received did not become a portion of the taxpayer's income in that year of assessment. It is against this decision that the Commissioner appealed.

On appeal, Wessels CJ took into consideration the sections that allowed the deduction of bad debts and the gross income definition. He stated that the wording of the provisions

³⁰² *Ochberg v CIR* 111-112.

³⁰³ *Ochberg v CIR* 118.

should determine whether or not the £9 900 received ought to be taxed in the year it was received or accrued. He further added that the court ought not to give a liberal meaning of “received by or accrued to”, for it could in certain circumstances possibly lead to double taxation. In his own words Wessels CJ stated that:

I do not think we are justified in rejecting the plain meaning of the words “received by or accrued to” merely on that account. We have no right whatever to strain the language of the statute in favour of the taxpayer merely because in hypothetical cases double taxation may occur.³⁰⁴

In emphasising the literal approach, Wessels CJ further cited the principle of interpretation laid down by Lord Cairns in *Partington v Attorney-General*³⁰⁵, which was accepted by the same court earlier in *Commissioner for Inland Revenue v George Forest Timber Co Ltd.*³⁰⁶ The principle states that tax law can only tax a taxpayer who is within the letter of the law, if he is not, then he cannot be taxed.³⁰⁷ Wessels CJ stated that:

[F]or in all cases of interpretation we must take the whole statute into consideration and so arrive at the true intention of the Legislature. When, however, we are dealing with a definition which is the very basis of the Act, it can only be in very exceptional circumstances that we can modify the plainly-expressed meaning of the words. In cases other than the ‘basic’ definition of gross income the difficulty is not so great, but to modify the plain words of the Legislature in a crucial definition such as the one we are dealing with is to strike at the very heart of the statute.³⁰⁸

Wessels CJ followed a literal approach but he acknowledged the possibility of deviating from the plain meaning of the words through use of the golden rule and the mischief rule.

Stratford JA gave a dissenting judgment and he departed from the literal interpretation of the words “received by and accrued to”. Stratford JA stated that the literal interpretation of Income Tax Act draws a distinction between accruals and receipts. In that regard the legislature has two nets one to catch receipts and another for accruals. The literal interpretation results in a double taxation in certain circumstance when accruals happen and

³⁰⁴ *Delfos v CIR* 1933 AD 242, 6 SATC 92 at 101.

³⁰⁵ 21 L.T. 370 at 375.

³⁰⁶ 1 SATC 20, 1924 AD 516 at 531.

³⁰⁷ *CIR v George Forest Timber Co Ltd.*

³⁰⁸ *Delfos v CIR* 102.

again when the accruals are received by the taxpayer. Stratford JA's view was that the definition of receipts should be established by reading the Act as a whole and taking into account the object of the legislature. Stratford stated that using the literal approach of interpretation resulted in a departure from the fundamental idea of the Income Tax Act. Thus he used the purposive approach to interpretation.

The English case of *Cape Brandy Syndicate v IRC* came after *CIR v Delfos*³⁰⁹ and it emphasised the use of the literal interpretation. The two main cases that are often referred to for authoritatively applying the *Cape Brandy Syndicate*³¹⁰ are the cases of *CIR v Franke*³¹¹ and the case of *CIR v Simpson*.³¹²

In *CIR v Simpson*, Centlivres JA quoted with approval *Cape Brandy Syndicate v IRC* on the statement that

In a taxing Act one has to look merely at what is clearly said. There is no equity about tax. There is no presumption as to a tax. Nothing is to be read in, nothing to be implied. One can only look fairly at the language used.³¹³

It is submitted that this statement endorsed the literal interpretation that seemed to be well accepted at the time.

4.3.5 *CIR v Franke*

The case of *CIR v Franke*³¹⁴ dealt with whether or not the taxpayer's receipts were taxable in terms of the Income Tax Act, 25 of 1940. The Tax Act provided that the basic profit derived from trade was taxable income. The definition of trade excluded income received from employment or holding an office. In his taxable income the respondent declared the amount received by his wife and her share of profits and excluded the income received by him as salary and his commission. The Commissioner rejected the assessment; he stated that the income received by the husband was not separated from that of the wife and therefore the amount received by the husband should be considered to have been received

³⁰⁹ *Cape Brandy Syndicate v IRC* [1921] 1 KB 64, *Delfos*, *CIR v 6 SATC* 92.

³¹⁰ *Cape Brandy Syndicate v IRC* [1921] 1 KB 64.

³¹¹ 1949 (3) SA 733 (A), 16 SATC 251.

³¹² 1949 (4) SA 678 (A), 16 SATC 268.

³¹³ *CIR v Simpson* 469.

³¹⁴ 1949 (3) SA 733 (A), 16 SATC 251.

from a trade. At that time section 9(2) of the Income Tax Act, 31 of 1941, stipulated that the income of a wife who is not separated from her husband by judicial order or written agreement of separation is deemed to be income accrued to her husband. Thus, in each year of assessment the husband was deemed to have received the wife's salary and the share of profits and salary and commission earned by him.

Centlivres JA, who gave the judgment, stated that the literal meaning of the provisos should be given effect to. The literal meaning of the provisions deemed taxable the amounts derived from trade; as such amounts received as a result of employment could not be taxed. The Commissioner's argument was based on the premise that a husband was deemed to have received his wife's income. The husband therefore would be liable to pay tax on it. Centlivres JA stated that such a formulation was not permissible from the language used by the legislature. The deeming provisions were held to apply factually rather than fictitiously. The appeal was dismissed on that basis. In *Simpson v CIR*³¹⁵ the Court also relied on the literal interpretation and quoted with approval the remarks of Rowlatt J in *Cape Brand Syndicate v IRC*.³¹⁶

After 1961 judges continued to follow the literal interpretative approach despite the fact that the Privy Council's decisions were no longer binding on South African law. The previously decided cases, however, had established precedence regarding the interpretative approach that should be used.

4.3.6 *R Korster & Son (Pty) Ltd v CIR*

The case of *R Korster & Son (Pty) Ltd v CIR*³¹⁷ also illustrates the continued dominance of the literal approach after 1961. In this case a group of farmers who were horse breeders bought a stallion with the intention of using it for breeding purposes. Seven years later the farmers received an exceptional offer to sell the stallion at US \$3 500 000 having bought it for US \$550 000. The farmers sold the stallion and divided the income from the proceeds accordingly. The Commissioner sought to tax the proceeds on the basis of paragraphs 2 and 3(1) of the First Schedule, which required every farmer to include all livestock or produce held and not disposed by him at the beginning and end of each year of assessment.

³¹⁵ 1949 (4) SA 678 (A), 16 SATC 268.

³¹⁶ [1921] 1 KB 64.

³¹⁷ 1985 (2) SA 832 (A), 47 SATC 23.

The words that required interpretation was the phrase “all livestock”. The farmers averred that this term did not include livestock that was held as a capital asset, but that which was held as floating capital or as stock-in-trade. Nicholas JA cited with approval Stratford JA in *Bhayat v Commissioner for Immigration* 1932 AD 125 at 129) when he quoted Lord Bramwell, who stated:

that in construing a provision of an Act of Parliament the plain meaning of its language must be adopted unless it leads to some absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as a whole a court of law is satisfied the Legislature could not have intended. “The words of a statute never should in interpretation be added to or subtracted from, without almost a necessity”: *per* LORD BRAMWELL in *Cowper Essex v Acton Local Board* (14, AC 153, 169).³¹⁸

Nicholas JA held that the words used by the legislature were specific and did not make a distinction between the kinds of livestock that should be included or excluded. The argument raised by the appellant could therefore not be sustained since the literal approach was used.

4.3.7 *CIR v Kuttel*

The issue that the court dealt with was whether the respondent was entitled to exemption in terms of the then section 10(1)(h)(i) and section 10(1)(k)(ii) of the Income Tax Act. The former exempted interest received by or accrued to or in favour of “any person (other than a company) not ordinarily resident nor carrying on business in the Republic”. In turn section 10(1)(k)(ii) exempted from tax dividends received by or accrued to or in favour of “any person (other than a company) not ordinarily resident nor carrying on business in the Republic”.

The Appellate Division was faced with the question of the interpretation of the term “ordinarily resident”. The taxpayer had been resident in South Africa but had sold some of his businesses and moved to United States. However, he continuously visited South Africa for business reasons and maintained property in South Africa. He used the properties for accommodation when he visited South Africa and did not let the properties. Goldstone JA consulted both South African and English cases and took into account the natural and ordinary meaning of the words ordinarily resident. He stated that:

³¹⁸ *R Korster & Son v CIR* 32.

I can find no reason for not applying their natural and ordinary meaning to the provisions now under consideration. The policy of the Legislature in providing these exemptions from taxation in s 10 of the Act is to encourage investors from outside the Republic to invest their money in the Republic.... Having regard to that policy there is certainly no warrant for giving an extended meaning to the words. I would respectfully adopt the formulation of Schreiner JA and hold that a person is “ordinarily resident” where he has his usual or principle residence, ie what may be described as his real home. If one applies that meaning to the words, there can be no doubt that at the relevant times the respondent was not ordinarily resident in the Republic.³¹⁹

Goldstone JA further added that holding properties in South Africa was not inconsistent in any way with the term ordinarily resident. The taxpayer therefore was not ordinarily resident in the Republic.

4.4 Other approaches

The purposive approach therefore was not entirely a foreign concept that only applied after the Constitution in 1996. Emphasising the dominance of the literal approach during the pre-constitutional era does not suggest that there are no instances where the court resorted to other interpretative approaches. One of such examples is *Public Carriers Association v Toll Road Concessions*³²⁰, an Appellate Division case prior to the constitutional era. However, this case is not discussed here in detail for the reason that it is not a tax case.

4.5 Post-constitutional era

Two years after the case of *CIR v Kuttel*³²¹ the interim Constitution was introduced and thereafter the Constitution of 1996. The Constitution of 1996 led to a gradual change in the authoritative approach.

4.5.1 *De Beers Marine (Pty) Ltd v CSARS*

The facts of the case of *De Beers Marine (Pty) Ltd v CSARS*³²² were that the appellant owned six mining vessels which were used for the purposes of exploration, evaluation and management of underwater diamond deposits. The vessels collected diamond bearing gravels from the seabed beyond the South Africa waters in the Namibian marine

³¹⁹ *CIR v Kuttel* 1992 (2) All SA 151 (A) at 156, 54 SATC 298.

³²⁰ 1990 (1) SA 925 (A).

³²¹ 1992 (2) All SA 151 (A), 54 SATC 298.

³²² 2002 (3) SA 181 (A).

concession areas. The vessels always crossed over the border to receive bunker drops (fuel) in South African waters. Before the bunker drops were delivered at a meeting place they were stored at a site licensed as a customs warehouse in terms of the Customs Act, 92 of 1964. The warehouse was used to store goods for export purposes. The Commissioner raised excise duties and levies on the bunker drops (fuel) that had been delivered to the mining vessels in terms of section 20(4) of the Customs Act on the basis that they were not “exports” as provided by the section.

The issue addressed by the court was whether the bunker drops were “exports” within the meaning of the word as used in section 20(4)(d) of the Customs Act. If the deliveries were considered to be exports no excise duty or levies could be charged on the appellant. However, if they fell outside the meaning of “exports” as defined, then they were liable to tax. The appellant and the respondents brought forward different linguistic definitions of exports favourable to their position. Counsel for the appellant stated that the word “export” should be interpreted to mean “to take out of the Republic of South Africa”, whereas the Commissioner averred that “export” meant to “to take out of the Republic for import in another country.”

Nienaber JA who delivered the majority judgment moved to modern approach of interpretation. He stated that:

[I] am hesitant to regard a meaning extracted from a miscellany of dictionary definitions as conclusive to the entire issue (cf *Fundstrust (Pty) Ltd (in liquidation) v Van Deventer* 1997 (1) SA 710(A)). The better approach, so it seems to me, is to bear that meaning in mind when examining the provisions of the Act itself in order to determine whether there is anything in the context in which the word is used that adds to or detracts from its ordinary commercial meaning.³²³

Nienaber JA reasoned that the word “export” as used in the Act, like a chameleon, takes on the colour surrounding the facts of the case.³²⁴ He added that storing the bunker drops in licensed warehouse storage did not mean that the goods stored were exports. The word exports applied to goods that were carried to be used in another country, where the goods are likely to be charged import tax. Charging excise duty and levies on such goods could

³²³ *De Beers Marine (Pty) Ltd v CSARS* 2002 (3) SA 181 (A) paragraph 5.

³²⁴ *De Beers Marine v CSARS* 188 par 7.

discourage exports. The legislative purpose of section 20(d) was to prevent the taxation of goods that are being exported to another country.

The judge arrived at his conclusion by basing his arguments on the context and the surrounding facts of the cases to determine the true meaning of “export”. It is submitted, however, that use of the literal approach in this case could have led to the same result, possibly if the golden rule and or the mischief rule were applied.

4.5.2 *Estate Welch v CSARS*

The facts of *Estate Welch v CSARS*³²⁵ were that Mr Welch and his wife became divorced. In pursuit of their divorce they entered into an agreement which governed property rights and maintenance of the wife and the child born of their marriage. To discharge his obligations, Mr Welch created a trust. The trust deed, however, provided that the excess money was payable to Mr Welch’s children and other beneficiaries who were not persons to whom maintenance obligations were owed in terms of the consent paper. Mr Welch died before the transfer of assets had taken place. The issue in contention was whether, given the circumstances, the disposal of assets amounted to a donation upon which donations tax was payable.

The Commissioner levied donations tax on Mr Welch’s estates on the entire settlement paid to the trust. The Commissioner defined the word “donation” to mean “any gratuitous disposal of property, including any gratuitous waiver or renunciation of a right”.³²⁶ The respondent, on the other hand, averred that “donation” in terms of the common law definition required “pure liberality” and “disinterested” benevolence. The transaction on behalf of Mr Welch had none of these elements.

Marais JA stated that the definition of “donation” provided in the Act had not eliminated the essential common law elements required of a donation. Marais JA approached the case with an open mind and abandoned the strict literal approach. He did not prioritise the words used by the legislature, rather he accepted a broader meaning that had been recognised and accepted in terms of common law. He stated that if the legislature had intended to exclude common law elements, it would have done so in a more appropriate language

³²⁵ 2004 (2) All SA 586 (SCA).

³²⁶ Section 55 (1) Income Tax Act.

Marais JA therefore took into consideration the intention of the legislature when it levied donations tax. He also considered the purpose of the disposal. He stated that:

It is so that logic, fairness and consistency are not essential attributes of taxing legislation and that that has to be borne in mind when interpreting such legislation. But that does not mean that in interpreting taxing provisions one should assume *a priori* that an interpretation which is illogical, unfair and inconsistent is probably what was intended. Nor does the fact that it is a taxing provision which is under consideration mean that where the language employed is reasonably capable of two possible interpretations, one of which will yield absurd results, and another which will not, the former should be preferred.³²⁷

Marais JA therefore stated that the definition of the word donation should be evaluated in light of the common law elements. Mr Welch's estate was obliged to pay maintenance and therefore donations tax was not payable. Zuluman J concurred with Marais JA that the purpose of the disposition was supposed to be taken into account to determine the meaning of donations.

Conradie JA, on the other hand, disagreed with the approach taken by Marais JA and Zuluman J; he adopted a literal approach to the word "donation" as provided by the Act. He reasoned that the trust received R3.2 million from Mr Welch's estate. The receipt was not given as a loan and the trust did not promise to do anything in turn. The disposal was therefore a gratuitous disposal in terms of the Act and the Commissioner had rightly levied donations tax. It is submitted that had Conradie JA applied the modern approach to interpretation, he would have appreciated that the assets transferred were not gratuitous but the discharge of a legal obligation by the father.

4.5.3 CSARS v Airworld CC

In the case of *CSARS v Airworld CC*³²⁸ the court was faced with interpretation of the word "beneficiary" as it appears in section 64C of the Income Tax Act. The Commissioner raised an assessment for the payment of Secondary Tax on Companies for the years 1999 and 2000 on the respondents. The basis for the assessment was that the respondents had disposed of a dividend by way of loan to the trust.

³²⁷ *CSARS v Estate Welch* 2004 (2) All SA 586 (SCA) para 43.

³²⁸ *Commissioner of South African Revenue Services v Airworld CC* 2007 SCA 147.

Whether or not the Commissioner had made a correct assessment depended on the whether the respondents who were potential beneficiaries fell within the definition of beneficiaries for the purpose of section 64C. The counsels representing the parties were in agreement that the word beneficiary was capable of three different meanings. They also agreed that the wording of the provision should be used to ascertain the meaning of the legislature and that the scope and purpose of legislation and the context in which the words were used were important.

Hurt AJA gave the majority judgment; he stated that:

In recent years courts have placed emphasis on the purpose with which the Legislature has enacted the relevant provision. The interpreter must endeavour to arrive at an interpretation which gives effect to such purpose. The purpose (which is usually clear or easily discernible) is used, in conjunction with the appropriate meaning of the language of the provision, as a guide in order to ascertain the legislator's intention.³²⁹

Hurt AJA stated that the aim of the legislature was to make all parties, including close corporations, liable to pay Secondary Tax on Companies. As such the legislature realised that companies could make dispositions to their shareholders or other entities as a method to escape tax. Therefore an amendment was introduced in terms of which such incidence could be minimised. Hurt AJA therefore defined the word “beneficiary” in relation to connected persons. However, the term “connected person” was not helpful. Hurt AJA’s enquiry eventually turned on whether the company had made a distribution and to whom and for what purposes the company had made the distribution. Resultantly, Hurt AJA held that taxpayer was liable to Secondary Tax Companies.

Combrinck JJA gave the minority judgment; he accepted the modern approach but he went on to apply the literal approach. It is submitted that Combrinck JJA did not take into account the purposes of the provisions as a whole and the argument presented by the Commissioner. He simply stated that his opinion was that the legislature did not purposely include potential beneficiaries in the definition of “beneficiaries” and therefore the respondents were not liable to tax.

³²⁹ *CSARS v Airworld CC* para 25.

4.6 Conclusion

It has been shown using case law that the literal approach was the dominant approach in South Africa prior the Constitution. Dominance of this approach was mainly because judges were trained in England and because the Privy Council decisions were binding in South African law. The shift in the interpretative approach was triggered by the dictates of the Constitution. This does not suggest that before that Constitution the courts had not of necessity applied the purposive approach to arrive at a decision. The purposive approach was employed in several cases, albeit as dissenting judgments in Appellate Division cases. On occasion, such as in the cases of *Public Carriers Association v Toll Road Concessions*³³⁰, the purposive approach was used in pre-Constitutional South Africa.

The next chapter focusses on the institutional impositions that impact on the role of judges as interpreters. These include the doctrine of separation of powers, the overlap of the roles of the judges with other roles, the doctrine of precedence and the exercise of judicial discretion by judges.

³³⁰ 1990 (1) SA 944.

CHAPTER FIVE

NATURE OF THE LEGAL SYSTEM AND INSTITUTIONAL ELEMENTS

5.1 Introduction

Apart from the perceptions that judges have regarding their role as interpreters and the variety of approaches to interpretation that are available to judges, as dealt with in the previous chapters, there are other factors that impact on interpretation. These include the nature of the legal system and other institutional elements. The South African legal system is designed in a manner that guides the judiciary and imposes restrictions on how judges should interpret the law. This chapter will focus on some of these considerations. The impact of the doctrine of separation of powers, the overlap between the role of judges as interpreters and their other functions, the doctrine of precedence and the role of judicial discretion in interpretation will be discussed.

5.2 The nature of the South African legal system

Although every legal system is unique, democratic states share similarities in the structure of the law and the purpose of the law.³³¹ The main functions of the law, according to Lord Denning, are to preserve order and to bring about justice.³³² Justice encapsulates many fundamental principles which the law is expected to endorse. These are reasonableness, generality, equality, certainty, and fair process.³³³

Barak³³⁴ puts forward similar fundamental principles that underpin the legal system of a democratic country. These include:

[T]he principles of equality, justice, and morality. They extend to the social goals of the separation of powers, the rule of law, freedom of speech, freedom of movement, worship, occupation, and human dignity, the integrity of judging, public safety and

³³¹ Barak 2002 *Harvard Law Review* 83.

³³² L Fuller *The Anatomy of Law* (1986) 25.

³³³ Fuller *Anatomy of Law* 25.

³³⁴ Barak 2002 *Harvard Law Review* 83.

security, the democratic values of the State and its very existence. These principles include good faith, natural justice, fairness, and reasonableness.³³⁵

Likewise, judges in South Africa are expected to interpret legislative provision in a manner consistent with the spirit and values incorporated in the Constitution. The Constitution imposes these interpretational directions to ensure equity in the treatment of similar cases.

Another guide to interpretation arising from the nature of the legal system is the doctrine of separation of powers.

5.3 The doctrine of separation of powers

The doctrine of separation of powers confers upon different arms of the government specific tasks to perform duties within their own jurisdictions and areas of competences.³³⁶ The power of the legislature is to make, amend, and repeal laws, while the task of the judiciary is to determine what the law is and to apply it when there is a dispute.³³⁷ The legislature and the judiciary should therefore complement each other. The judiciary cannot make laws, but it can check the excesses of the legislature by declaring certain provisions invalid if they are inconsistent with the Constitution.³³⁸ Therefore judges should not advance the intention of an undemocratic legislature when it imposes unconstitutional values.³³⁹

The powers of the judiciary against the legislature are described by Justice McLachlin³⁴⁰ when he states:

The elected legislators are subject to the Constitution and must stay within its bounds, as must the courts. The courts have the duty to rule on whether the elected legislators

³³⁵ *ibid.*

³³⁶ P M Mojapelo “The doctrine of separation of powers: A South African Perspective” (2013) *Advocate* 26 (1) 36 at 37.

³³⁷ Mojapelo 2013 *Advocate* 37.

³³⁸ Constitution of RSA s173. It states that “The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.”

³³⁹ Barak 2002 *Harvard Law Review* 34.

³⁴⁰ Barak 2002 *Harvard Law Review* 52 quoted from Beverley McLachlin, Charter Myths, 33 U.B.C. L. REV. 23, 31 (1999) (emphasis omitted).

have done so. Democracy is more than mere populism; it is the lawful exercise of powers conferred by the Constitution.... When the courts hold a law to be invalid, they are not limiting parliamentary supremacy. They are merely expounding the limits that the Constitution imposes on Parliament.

Judges, however are not merely the mouth pieces of the legislator as envisioned by Montesquieu.³⁴¹ They can create common law; that way they influence future decisions through the doctrine of precedence.

5.4 Judicial precedence

The doctrine of judicial precedence obliges judges to follow decisions made earlier in higher courts.³⁴² This doctrine, inherited from English law, is entrenched through common law. Its implementation takes place through a rule known as *stare decisis*. The phrase “*stare decisis et non quieta*” means to stand by a decision and not disturb established points.³⁴³ This principle works by imposing a duty on judges to follow decisions of higher courts until or unless legislation is promulgated to change the position or until that decision has been overruled by a higher court.³⁴⁴ In *True Motives 84 (Pty) Ltd v Mahidi*³⁴⁵ this doctrine is described:

The doctrine of precedent, which requires courts to follow the decisions of coordinate and higher courts in the judicial hierarchy, is an intrinsic feature of the rule of law, which is in turn foundational to our Constitution. Without precedent there would be no certainty, no predictability and no coherence. The courts would operate in a tangle of unknowable considerations, which all too soon would become vulnerable to whim and fancy. Law would not rule. The operation of precedent and its proper implementation are therefore vital constitutional questions.³⁴⁶

The purpose of this principle is to ensure certainty, avoid confusion, protect vested rights, and uphold the dignity of the court.³⁴⁷ This is also demonstrated in *Daniels v Campbell*³⁴⁸

³⁴¹ Mojapelo 2013 *Advocate* 37.

³⁴² K O'Regan “*Change v Certainty, Precedent under the Constitution*” (2001) *Advocate* 14(1) 31.

³⁴³ K Govinden “Discarding the doctrine of precedent.” (2014) *Without Prejudice* 26.

³⁴⁴ A Henderson “Defeating the justification of iniquitous opinion. The role of *stare decisis* in the adjudication of constitutional disputes” (1996) *De Rebus* 471.

³⁴⁵ 2009 (4) SA 153 (SCA).

³⁴⁶ *ibid.*

³⁴⁷ Henderson 1996 *De Rebus* 471.

where it is stated that the doctrine serves to “enshrine a fundamental principle of justice: that like cases should be determined alike.” The other reason the doctrine is used is that it provides uniformity between decisions of the higher courts and those of the lower courts and that there is equality before the law.³⁴⁹

In South Africa judges follow judicial precedence unless they believe that the earlier judgement is manifestly wrong.³⁵⁰ Accordingly, the doctrine does not prevent courts from interpreting statutes. However, strict adherence to the principle of *stare decisis* can impede judicial amendments on non-constitutional issues.³⁵¹

5.5 Intersection between the interpretational role and other functions

The role of judges in interpretation complements other roles judges are obligated to perform. The role of a judge in interpreting legislation coincides with being the guardian of the Constitution and maintaining objectivity and impartiality. The intersection of these roles may in some cases impact on the role of judges as interpreters and impose obligations on how judges should adjudicate.

Judges are expected to understand the purpose of law and to ensure that when they interpret legislation they help to achieve it.³⁵² Barak suggests that in the broadest sense the role of judges is to protect democracy and to bridge the gap between law and society.³⁵³ Thus judges are agents in effecting change to ensure that the purpose of the law is met.³⁵⁴ Equally, judges should not be drawn to interpret in favour of the public for the sake of public approval.³⁵⁵ Judges should reflect societal values prevailing at the time but should guard against those values when they conflict with the fundamental values of the legal system.³⁵⁶ In situations in which judges exercise judicial discretion, they are faced with the

³⁴⁸ 2004 (5) SA 331 (CC) 94.

³⁴⁹ O'Regan 2001 *Advocate* 31.

³⁵⁰ Henderson 1996 *De Rebus* 471.

³⁵¹ *ibid.*

³⁵² Barak 2002 *Harvard Law Review* 28.

³⁵³ *ibid.*

³⁵⁴ Barak 2002 *Harvard Law Review* 55.

³⁵⁵ *ibid.*

³⁵⁶ Barak 2002 *Harvard Law Review* 28.

even higher challenge of guarding against imposing their own values against those of the legal system.

5.6 Factors which influence a judge's choice of the interpretive method

Judges are entitled to choose an appropriate method of interpretation to use. According to Volokh, judges always choose an interpretive method that produces their favoured outcome.³⁵⁷ At the same time, judges may choose a method that allows them to justify what they believe to be a plausible interpretation.³⁵⁸ In South Africa, judges are not required to follow a prescribed interpretational approach but may not choose methods to protect their own interests, which would be unethical. They have to choose approaches that lead to fairness, equality and justice.³⁵⁹

5.7 Judicial discretion

Judicial discretion can be defined as the:

... liberty or privilege allowed to a judge, within the confines of right and justice, but independent of narrow unbending rules of positive law, to decide and act in accordance with what is fair, equitable, wholesome, as determined upon the peculiar circumstances of the case, as discerned by his personal wisdom and experience guided by the spirit, principles, and analogies of the law.³⁶⁰

Judicial discretion is given effect when judges are faced with laws that are capable of more than one interpretation.³⁶¹ Although considerations taken into account when exercising judicial discretion are broad, they are restricted to the extent that they should achieve fairness and equity.³⁶² When exercising judicial discretion, judges resort to public policy, *boni mores* (good morals), and moral values to interpret legislative provision.³⁶³ Judges should not, however, resort to their personal, individual values that contradict the values of

³⁵⁷ A Volokh "Choosing interpretive methods; A positive theory for judges and everyone else" (2008) *New York University Law Review* 769 at 772.

³⁵⁸ Volokh 2008 *New York University Law Review* 774.

³⁵⁹ *ibid.*

³⁶⁰ *Osborn v United States 9 Wheat* 866, 6 L. ed. 204.

³⁶¹ Barak 2002 *Harvard Law Review* 81.

³⁶² Barak 2002 *Harvard Law Review* 82.

³⁶³ *ITC 1490 53 SATC* 108.

the whole legal system when exercising judicial discretion.³⁶⁴ This is summarised by Barak when he states that:

It is not his own subjective values that the judge imposes on the society in which he operates. He must balance among various interests, according to what appear to him to be the needs of the society in which he lives. He must exercise his discretion according to what seems to him, to the best of his objective understanding, to reflect the needs of society. The question is not what the judge wants but what society needs.³⁶⁵

5.8 Public policy

Public policy considerations play a role in the interpretation of statutes even if a provision is couched in clear terms.³⁶⁶ Public policy according to Kruger cannot be accurately defined for it constitutes a “basket of policy considerations that are not static and change with societal values and norms.”³⁶⁷ Public policy is normally associated with value-laden subjective considerations that should impose fairness, justice and equity.³⁶⁸

Tax law is not exempt from such considerations: judges have in many cases implicitly or explicitly interpreted legislation in ways that seemingly favour public policy considerations. This has especially been the case in the taxation of illegal receipts, general deductions, and tax avoidance cases. Taxation of illegal receipts brings with it questions of morality. The main question is should the state tax ill-gotten gains when such receipts are a product of unacceptable dealings? Although this question is not directly answered by the courts, the impression given is that people engaging in illegal gains cannot avoid taxation at the expense of honest citizens.³⁶⁹

³⁶⁴ Barak 2002 *Harvard Law Review* 58

³⁶⁵ Barak 2002 *Harvard Law Review* 55. Extracted from the case of 243/83, *Municipality of Jerusalem v. Gordon*, 39(I) PD. 113, 131 internal quotation marks omitted.

³⁶⁶ *ITC 1490* 53 SATC 108.

³⁶⁷ M Kruger “The Role of public policy in the law of contract, revisited” (2011) *South African Law Journal* 128 (4) at 712.

³⁶⁸ Kruger 2011 *South African Law Journal* 716.

³⁶⁹ Williams, R.C, assisted by Louw, C (3rd Edition). *Income Tax and Capital Gains Tax in South Africa: Law and Practice* 137. “On the other hand, is it not equally distasteful from a public policy view point to accord criminals’ exemption from tax?”

In *ITC 1490*,³⁷⁰ Melamet J made his ruling mainly based on reasoning about the dictates of public policy. The issue before the court was whether or not the Commissioner had lawfully denied the appellant's claim for a deduction on expenses for fines paid and fines incurred in the production of income.

The appellant was a carriage truck company; it had incurred fines for overloading and other traffic related charges. It sought to deduct such expenses as having been incurred in the production of income from carrying on business. Melamet J's understanding was that fines should not be deductible because they are a punishment for contravening the law. Melamet J quoted with approval the reasoning of an Australian case, *CIR v Alexander von Glehn & Co Ltd*³⁷¹ which states that:

The penalty is imposed as a punishment of the offender considered as a responsible person owing obedience to the law. Its nature severs it from the expenses of trading. It is inflicted on the offender as a personal deterrent, and it is not incurred by him in his character of trader.

Melamet J thereafter took into account a South African case which employed public policy and pronounced that:

I am in agreement with the conclusion and reasoning of Margo J in *ITC 1199*, supra, but I would prefer to base my conclusion on the basis that to allow fines imposed for an infraction of the law to be deducted as an expense in terms of s 11(a) and 23(g) of the Income Tax Act, would be contrary to public policy in that it would frustrate the legislative intent and allow a punishment imposed to be diminished or lightened.

On the facts of the present case, I am of the opinion that the fines do not play any actual part in the earning of the income as the income had already been earned by charging a higher fee for the increase in the load to provide for the risk of a possible fine. It was conceded by the witness that it would be possible, although in his view impractical, to conduct a transport business without contravening the provisions of the statutes as to overloading. It would, therefore, appear that incurring such fines is not an inevitable concomitant of the business of a cartage contractor.³⁷²

³⁷⁰ 53 SATC 108.

³⁷¹ 12 TC 232 (CA).

³⁷² *ITC 1490* 114.

Although Melamet J arrived at his final decision on the basis that the fines were not an inevitable concomitant of the business, public policy was central to his determination of whether or not the fines were a deductible expense. Approval of Melamet J's judgement by the legislature resulted in a legislative change, which confirmed that deductions of expenses incurred on the form of fines are not permissible.

5.9 Morality

There is debate on whether or not morality should be a concern for judges when interpreting the law.³⁷³ In the philosophy of law various arguments have been put forward. Natural law theorists believe that in interpreting law, morals inevitably play a role.³⁷⁴ Support for this contention is given by Simmonds who states:

“Law” is an intrinsically moral idea, and the inquiry into the nature of law is ultimately a form a moral enquiry ... and ...specific debates about law's content can never be wholly separated from the philosophical inquiry into the nature of laws as such.³⁷⁵

Sceptics, on the other hand, claim that morality is simply a matter of preference and personal taste.³⁷⁶ Feinberg disagrees, arguing that when judges are sworn in they are given the responsibility of administering justice according to the law, and that their oath becomes the judges' source of moral responsibility and moral dilemma in their just administration of the law.³⁷⁷

There is indication of morality as a possible consideration in tax law. In the case of *Port Elizabeth Electric Tramways v CIR*³⁷⁸ moral concern emerges over whether expense incurred as result of an unlawful act would be deductible. Watermeyer stated:

If the act done is unlawful or negligent and the attendant expense is occasioned by the unlawfulness or possibly the negligence of the act, then probably it would not be deductible.

³⁷³ N Simmonds *Law as a Moral Idea* (2007) 6.

³⁷⁴ Simmonds *Law* 6.

³⁷⁵ Simmonds *Law* 6.

³⁷⁶ *ibid.*

³⁷⁷ J Feinberg *Problems at the Roots of Law; Essays in Legal and Political Theory* Oxford (2003) 32.

³⁷⁸ *Port Elizabeth Electric Tramways v CIR* 8 SATC 13.

Although this was stated *obiter* it is an indication that judges take into account moral concerns when interpreting legislation. In the case of *COT v Ferera*,³⁷⁹ MacDonald JP also shared moral concerns on the issue of tax avoidance:

I endorse the opinion expressed that the avoidance of tax is an evil. Not only does it mean that a taxpayer escapes the obligation of making his proper contribution to the *fiscus*, but the effect must necessarily be to cast an additional burden on taxpayers who, imbued with a greater sense of civic responsibility, make no attempt to escape, or lacking the financial means to obtain the advice and set up the necessary tax-avoidance machinery, fail to do so. Moreover, the nefarious practice of tax avoidance arms opponents of our capitalistic society with potent arguments that it is only the rich, the astute and the ingenious who prosper in it and that ‘good citizens’ will always fare badly. While undoubtedly the short term effects of the practice are serious, the long term effects could be even more so.

Again in the case of *CIR v Nemojim (Pty) Ltd*³⁸⁰ it was stated that:

It has been said that ‘there is no equity about a tax’. While this may in many instances be a relevant guiding principle in the interpretation of fiscal legislation, there is nevertheless a measure of satisfaction to be gained from a result which seems equitable, both from the point of view of the taxpayer and the point of view of the *fiscus*.

These passages are evidence of the notion that morality does impact on or influence the role of judges as interpreters

5.10 Conclusion

This chapter illustrated that the structure of the South African legal system and institutional elements partially explain how judges interpret. The elements discussed, such as doctrine of separation of powers, judicial precedent and intersection of the judges’ roles, direct how judges interpret. Judicial precedence demands that judges interpret in the same way as cases decided earlier. The doctrine of separation of powers on the other hand limits judges in that judges cannot make the law. They interpret law based on the statutes and the Constitutional values. Furthermore, when the judges exercise judicial discretion, they are bound to decide in light of public policy, morals and *boni mores* of the society.

³⁷⁹ 1976 (2) SA 653 (RAD), 38 SATC 66.

³⁸⁰ 1983 (4) SA 932 (A), 45 SATC 241 at 267.

The next concluding chapter summarises the findings of this research in addressing the stated goals of the research.

CHAPTER SIX

CONCLUSION

6.1 Goals of the research

The aim of this thesis was to analyse how judges interpret tax legislation by examining the factors that play a role during interpretation. The research mainly focussed on the extent to which philosophical theories and interpretational approaches explain the role of the judges as interpreters. The first chapter gave the theoretical framework of the research and discussed how the research would be conducted.

Chapter two examined the different philosophical theories to which judges may ascribe. It was noted that the perception or affiliation of judges to a jurisprudential school may influence how they interpret legislation. Different jurisprudential theories, such as the natural law theories, positivist theories, and American realist theories were discussed to demonstrate their effect. A judge who believes that the foundations of law rest on natural law is likely to interpret the law accordingly.³⁸¹ The judge is likely to apply a literal approach to interpretation to arrive at his or her decision, but when faced with conflicting provisions he or she is expected to interpret legislation in favour of the meaning that reflects the fundamental values of a higher power or the existence of a God.³⁸² When a judge is faced with a law that is contrary to natural law he or she should not give effect to the law; for such laws are considered unjust. Judges who give effect to such laws are considered to be acting unlawfully.³⁸³

Judges who affiliate with the positivist theories on the other hand accept as true that judges should give effect to the linguistic meaning of a provision or the intention of the legislature.³⁸⁴ The role of judges, according to this theory, is limited to mere interpretation and there is no room for other considerations.³⁸⁵

³⁸¹ Swarts & Obonye 2012 *International Law Research* 119.

³⁸² *ibid.*

³⁸³ *ibid.*

³⁸⁴ Roederer & Moellendorf *Jurisprudence* 98.

³⁸⁵ *ibid.*

Those judges who see the law from the perspective of American realism will not necessarily interpret the law as it appears but might use other external factors to arrive at a decision without taking the law into account.³⁸⁶ Hence there is no particular interpretational approach that judges are expected to follow if they affiliate with this school of thought. Judges can use any interpretational approach and can even adjudicate a case based on their personal and convictions and experiences.³⁸⁷

Chapter three was aimed at analysing the interpretative methods available to judges when they interpret. It also discussed the impact of the Constitution on interpretation. It was stated that the literal approach to interpretation was the main approach used during the pre-constitutional era. It was mainly used because judges operated from a positivist paradigm. The shift from the positivists' theoretical approach was mostly a result of the introduction of the Constitution. Judges now have to interpret the law taking into account the values imposed by the Constitution. Interpretation is no longer merely performing a mechanical task; it now requires applied reasoning.

Chapter four traced through case law the change in the interpretive approach prior to and post the Constitution, 1996. It was demonstrated that, despite the dominance of the literal approach, the purposive approach was not a totally new concept in South Africa. Judges had in a few cases prior to the Constitution resorted to it. However, a combination of the purposive and the value laden approach (modern approach) became rooted as the authoritative interpretation approach post the Constitution, 1996.

Chapter five analysed the institutional limitations that play a role in interpretation. It examined the impact of separation of powers, judicial precedence and judicial discretion on interpretation. It was noted that judges cannot make laws that would infringe on the role of the legislature.³⁸⁸ Judges are therefore limited to apply the laws that are available. They, however, have authority to declare invalid laws that are inconsistent with the Constitution.³⁸⁹ It can be submitted, however, that separation of powers does not serve merely to restrict the manner in which judges interpret provisions, it also aims to provide legal certainty, coherence, and equity in all cases.

³⁸⁶ Rumble *American Realism* 35.

³⁸⁷ *ibid.*

³⁸⁸ Mojapelo 2013 *Advocate* 37.

³⁸⁹ Constitution of RSA section 173.

To a large extent the jurisprudential theories, together with the interpretational methods, explain the role of judges as interpreters. It is submitted however, that, there is no one jurisprudential school that can accurately describe how judges perform their role as interpreters. Seemingly there is a measure of truth in each jurisprudential school discussed in this thesis, but the legal reality of interpretation is too complex to be encapsulated into one theory. The conclusions that can be drawn from the research is that the perceptions of judges and their affiliation to a jurisprudential school are likely to impact on how they interpret legislation.

Secondly, the jurisprudential paradigm from which a judge operates affects the method of interpretation he or she will use. A positivist judge will prefer a strict-literal approach, whereas a realist can use any method of interpretation or not use one at all.

Lastly, the method of interpretation judges use affects how they interpret. If the judge uses a strict literal approach, he or she cannot take into account equity fairness and reasonability, and this may substantially affect the judgement. If the judge uses the purposive-value laden approach in the same case, he may reach a different conclusion.

To a lesser extent, the role of judges as interpreters can be explained by institutional elements that guide interpretation. These guidelines come from the doctrine of separation of powers and the doctrine of precedents.

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