CHAPTER 6
BASIC PRINCIPLES

The following basic principles come into play during this phase:

* The supreme Constitution in general and the Bill of Rights in particular, is the cornerstone of the legal order.
  - S 7(1) of the CON states that the B/R is the cornerstone of the SA democracy.

* Most important principle of interpretation: determine and apply the purpose of legislation in the B/R.

* Determine the initial meaning of the text:
  - keep presumptions in mind
  - strike balance between the text and the context of the legislation.

6.1 The purpose of the legislation

6.1.1 The constitutional demands

* The most important rule: to establish the purpose of the legislation and to give effect to it.
  - Case law and most of the older sources, however, refer to the intention of the legislature.
  - However, whether it is referred to as the purpose or the legislative scheme, the intention of the legislature or the object of the legislation, Froneman J in Matiso v Commanding Officer of Prisons, Port Elizabeth points out:
The interpretive notion of ascertaining the ‘intention of the Legislature’ does not apply in a system of judicial review based on the supremacy of the CON, for the simple reason that the CON is sovereign and not the legislature. This means that both the purpose and method of statutory interpretation should be different from what it was before the commencement of the CON on 27 April 1994.

* Now the most important principle of statutory interpretation is to ascertain and apply the purpose of the legislation in the light of the B/R.
  - Everything that has been said about aim, purpose, scope and intention must now be assessed and qualified in the light of the supreme Constitution.

6.1.2 Why not the ‘intention of the legislature’?

* The ‘intention’ of the legislature originated in the principle of sovereignty of parliament. Parliament was the supreme legislature in the Republic and as a result of its supremacy, legislation had to reflect its underlying legislative intention.

- Steyn was the leading proponent of the intention theory and his work *Die Uitleg van Wette* was for many years the only authoritative textbook on statutory interpretation in SA.

  - He defines statutory interpretation as the process by which the will or thoughts of the legislature are ascertained from the words used by the legislature to convey their will or thoughts.

* Intention denotes a subjective state of mind; an individual formation of will directed toward a specific result. Such a
subjective state of mind is inconceivable, when it comes to all the members of a legislative body:

- Legislature is composed of a large number of persons all of whom take part in the legislative process.

- Some of the members of this body usually oppose the legislation for various reasons, with the result that the legislation ultimately reflects the ‘intention’ of the majority of the legislature only.

- Some members will support legislation for the sake of party unity, though they may be personally opposed to a bill.

- Not all parliamentarians can be expected to understand complex and highly specialised technical legislation.

- The bill before parliament is not drafted by the parliamentarians themselves, but by draftsmen acting on the advice of bureaucrats from state departments.

- Some members of the legislative body may be absent when voting on a bill takes place.

To put it in another way: ‘intention of the legislature’ refers to the fictional collective intent of the majority of the legislative body present at the time when the vote took place, expressing their will within the constraints of the voting guidelines laid down by the caucus of the ruling party in the legislature, and voting for draft legislation (formulated by legal drafters on the advice of bureaucrats)
from a government department) which has been approved earlier by the state law advisers!

* **Public Carriers Association v Toll Road Concessionaries**: The Court tried to make an artificial distinction between the ‘intention of the legislature’ and the purpose of the legislation.

* **Cowen** points out the following:

(i) One must distinguish between *the purpose or objectives of the legislation, and *the reasons why the members of the legislative body voted for the measures.

(ii) The **aim or purpose** of the legislation should be distinguished from the ‘intention of the legislature’. The former is an aim that is

~ either explicitly stated or

~ can at least be determined logically.

~ The latter is a matter of speculation.

(iii) The **purpose** of the legislation **cannot** be found by mere guesswork and made to suit a particular interpretation: the purpose must be determined by objective means.

* The ‘intention of the legislature’ is an ambiguous concept in SA law, both in meaning and application. It is used either in a narrow sense (as a disguise for the literal approach), or in a broad sense (to imply a more purposive approach).
The classic example of the narrow (orthodox) intention of the legislature is a dictum of judge Kotze in R v Kirk:

‘We can only arrive at the intention of the legislature by construing the actual words used. We cannot import words into the section not to be found therein. The court must interpret and give effect to what the legislature has actually said, and not to what it may have intended to have said’.

In Stellenbosch Farmer’s Wineries v Distillers Corporation (SA) Ltd the judge used the ‘intention of the legislature’ in a purposive sense:

“Om agter die betekenis van die woorde te kom, moet vasgestel word wat die doel was wat die wetgewer voor oë gehad het, en wat die rede vir die aanname van die artikel was”.

Ultimately the most important rule of statutory interpretation is that the interpretation must reflect the purpose of the legislation. - Cowen emphasis that the interpretation must be reconcilable with the purpose of the legislation, even when the words of the particular measure may seem to have only one unambiguous meaning.

6.1.3 The meaning of the text

The so-called ‘literal rule’ approach no longer has any place in statutory interpretation. - The statute as a whole and its context play an important role in the interpretation process.
- Important: the **purpose** of the legislation will qualify the meaning of the text.
- The rules with regard to the meaning of the text may therefore be regarded as, at the most, initial and merely tentative rules. In the final instance, it is the purpose of the legislation,
- viewed against the fundamental rights in the CON, which will qualify the meaning of the text.

(i) **The initial meaning of the text**

* The interpretation process begins with **the reading of the legislation** concerned.

  - *Union Government v Mack*: The ordinary meaning must be attached to the words.
    “What was a normal principle of language was elevated to the ‘**literal rule**’ of literal interpretation.”

  - *Volschenk v Volschenk*: The court decided that the most important rule of interpretation was to give words their ordinary literal meaning.

  - *Sigcau v Sigcau*: Court decided that the term ‘ordinary meaning’ could be held to include the **ordinary grammatical meaning**.

  - *Association of Amusement and Novelty Machine Operators v Minister of Justice*: the court held that ‘ordinary meaning’ means colloquial speech.

* It cannot be emphasised enough that the principle that the ordinary meaning should be attached to the words of the
legislation is only the **starting point** of the interpretation process.

* The context of the legislation, including all the factors both **inside** and **outside** the text should be taken into account right from the outset.

* *Kommissaris van Doeane en Aksyns v Mincer Motors*: In the case of technical legislation (which applies to a specific trade or profession), words which have a specific meaning in that field, which is different from the ordinary, colloquial meaning, must be taken to denote the **specialised, technical meaning**.

**(ii) Every word is important**

* The principle that a meaning must be assigned to every word derives from the rule that words are to be understood according to their ordinary meaning.
  - Strictly speaking this is a rule which applies when any text is read.
  - Legislation should be interpreted in such a way that no word or sentence is regarded as redundant.

* *Keyter v Minister of Agriculture*: The court pointed out that the court’s function was to give effect to every word unless it is absolutely essential to regard it as unwritten.
  - Sometimes, however, it is impossible to assign a meaning to every word in a statute, as tautological (unnecessary repetitive) provisions are often added as a result of excessive caution (*ex abundante cautela*).
- Overlapping and repetition often occur, because the drafters of legislation are overly cautious in guarding against anything important being omitted.

- *R v Herman:* The resulting redundandancy may be ignored in the interpretation of a clause.

  *Steyn* points out that if superfluous words serve to define the meaning of other words more clearly, *they are not redundant*; the provision should be read as a whole in order to obtain the full meaning.
  *However, in *Secretary for Inland Revenue v Somers Vine* the court stated that the principle that a meaning should be assigned to every word is not absolute.
  - This view is correct; the **purpose** of the legislation should be the deciding factor in determining whether a word is superfluous or not.

(iii) **The continuing time-frame of legislation**

*In view of the principle that words should bear their ordinary meaning, the question arises whether, in the case of *old legislation*,
- words should be interpreted to accord with their present day meaning, or
- whether they should retain the meaning they had when the legislation was passed?*

*Cowen* feels that the so-called ‘rule’ that words should retain their original meaning is unnecessary.
* The courts, however, hold a different view.

- *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein*: The AD decided that unless later legislation explicitly provides otherwise, words in legislation must be construed according to their meaning on the day on which the bill is passed.

- Following this judgment, the court in *Minister of Water Affairs and Forestry and others v Swissborough Diamond Mines (Pty) Ltd* held that the intention of the legislature must be determined in accordance with the meaning of the provisions at the time when it was enacted.

* However, it would seem that the courts may be less rigid in the future.

- In *Golden China TV Game Centre v Nintendo Co Ltd* it was held that the general scheme (purpose) of an Act suggested that the definition in that Act were to be interpreted flexibly in order to deal with new technologies on a continuous basis, rather than to interpret provisions narrowly, forcing the legislature periodically to update the Act.

* All legislation must be interpreted to promote the spirit and scope of the B/R.

- *Nyamakazi v President Bophuthatswana*: the court stated that a supreme constitution must be interpreted in the context and setting existing at the time when the case is heard and not when the legislation was passed otherwise the growth of society will not be taken into account.
* **Baloro v University of Bophuthatswana:** Judge Friedman explained this constitutional dynamic.

  ‘The Constitution has a dynamic tension because it aims and purport are to metamorphose SA society in accordance with the aims and objects of the Constitution. In this regard it cannot be viewed as an inert and stagnant document. It has its own dynamism, and the courts are charged with effecting and generating changes.’

(iv) **No addition or subtraction**

* **Basic rule:** no additions to or subtractions from the words used in the legislation.
- only basic principle, in the final analysis, the purpose of the legislation is the qualifier of the meaning of the text.
- Court have elevated this principle to a so-called ‘primary rule’.

* **Greenshield v Willenberg:** A court should be careful not to extend the meaning of the legislation beyond that of the words used.

* **R v Kirk:** The court should give effect to what the legislature has said, and not try to cover eventualities that the legislature, for what reason, has not covered.

* For all practical purposes, it is sufficient to know that the courts may not supply omissions in legislation at will.
  - If, however, the purpose of the legislation is clear, the court, as the last link in the legislative process should (according to Labuschagne) ensure that the legislative process reaches a just and meaningful conclusion.
6.1.4 Balance between text and context

* The courts had long held the view that if the text of the legislation was clear and unambiguous, effect should be given to it.

* The broader context of the legislation was taken into account only if the language of the legislation was ambiguous.
  - In *Jaga v Dönges* this **narrow view was rejected** and it was stated that the interpreter could examine the broader context even when the text was quite clear.

* **Kruger** points out that legislation cannot be construed properly if text and context are separated. From the outset:
  - the purpose of the legislation,
  - the statute as a whole,
  - and the surrounding circumstances should be taken into account, together with the **words of the provision**.

* **Stellenbosch Farmer's Wineries v Distillers Corporation (SA) Ltd:** Judge Wessels described this **balancing process** very well:

  ‘In my opinion it is the duty of the Court to read the section of the Act which requires interpretation sensibly, i.e. with due regard, on the one hand, to the meaning(s) which grammatical usage assigns to the words used in the section in question and, on the other hand, to the contextual scene which involves:
  - consideration of the language of the rest of the statute, as well as:
    - the matter of the statute,'
its apparent scope and purpose and
within limits, its background’.
In the ultimate result the court strikes a proper balance
between these various considerations and thereby ascertains
the will of the legislature and states its legal effect with
reference to the facts of the particular case which is before it.

* In Diepsloot Resident’s and Landowners Association v
Administrator, Transvaal the court recognised the
importance of legislative context.
- It held that it is permissible to view and interpret the
provisions of legislation against the background of
developments with regard to the dismantling of the
apartheid system. These developments are sufficiently
well-known for the court to take judicial notice of them.

* Supporters of the orthodox test-based approach to
interpretation frequently accuse contextualists of indulging
in ‘free-floating’ methods of interpretation, which ignore the
text of the legislation. The fact that there must be a balance
between the text and the context, does not mean that the
legislative text may be ignored. The context has to be
anchored to the particular text in question.

* S v Zuma:
- ‘While we must always be conscious of the values
underlying the Constitution, it is nonetheless our task to
interpret a written instrument.
- It is not easy to avoid the influence of one’s personal
intellectual and moral perceptions.
- But it cannot be too strongly stressed that the Constitution does not mean *whatever we might wish it too mean*.
- We must heed Lord Wilberforces reminder that even a constitution is a legal instrument, the language of which must be respected.

* The purposive (text-in-context) approach does not propagate a method of statutory interpretation based only on the legislative context. On the contrary, it merely wants to move away from the rigid and legallistic text-based approach to statutory interpretation and restore the balance between text and context.

### 6.2 Other basic principles

#### 6.2.1 Legislation must be read as a whole

* The interpreter must study the legislation as a whole.
- In *Nasionale Vervoerkommissie van Suid-Afrika v Salz Gossow Transport (Edma) Bpk* the court stated clearly that, when interpreting certain provisions, a statute must be studied in its entirety.
- *Nyamakazi v President of Bophuthatswana* and
- *Qozeleni v Minister of Law and Order*: This principle also applies to the CON.

* This is known as interpretation *ex visceribus actus*, in other words, all parts of the particular legislation must be studied.
- Du Plessis refers to this principle as the ‘structural wholeness of the enactment’, and
- Devenish describes it as follows:
Interpretation should be *ex visceribus actus*, ie from the bowels of the Act or, to paraphrase, ‘within the four corners of the Act.’

6.2.2 The presumption that legislation does not contain futile or nugatory provisions

* Unless the contrary is clear, it is presumed that the legislator does not intend legislation which is futile or nugatory. *Hahlo & Kahn* refer to the principle of ‘*effectual and purposeful legislation*’.

* This presumption forms the basis of the most important principle of interpretation: the court has to determine the purpose of the legislation and give effect to it.

* Since statutory interpretation is a purpose-seeking activity, this presumption constitutes its very essence. The foundation of this presumption is an acknowledgement that legislation has a functional purpose and object.

* In *Ex parte the Minister of Justice: In re R v Jacobson and Levy* the court found that if the intention of the legislature is clear, the **purpose** of the legislation should not be defeated merely because of vague and obscure language.
  - The court must, as far as possible, attach a meaning to the words which will promote the aim of the provision.

* In *SA Medical Council v Maytham* the court held that futile (useless) legislation must be avoided, and that an attempt should be made to promote the ‘business efficacy’ of a provision.
* In *Prokureur-Generaal v Van Zyl* the court favoured a practical, purposive interpretation.

* In *Esselman v Administrateur SWA* the court emphasised an ‘effective and purposive’ interpretation over one which would defeat the provision, leaving it useless:

As the interpreter of a legal provision the court must suppose that the legislature would like to make an effective and purposive provision. The court would like to avoid a futile and nugatory provision.

* The AD held in *SA Transport Services v Olgar* that if a provision is capable of two meanings, the meaning which is more consistent with the purpose of the legislation should be accepted.

A notorious example of the application of this presumption occurs in *R v Forlee*:

- Forlee was found guilty of contravening Act 4 of 1909 by selling opium.
- On appeal his lawyer argued that Forlee had not committed an offence since the Act in question prescribed no punishment.
- The court relied on the presumption against futility, finding that a specific offence had been created by the legislature.
- The absence of a prescribed penal clause did not render the Act ineffective since the court has a discretion to impose a suitable form of punishment, as it deems fit. A discretion of this nature could be excluded by the rest of the Act.
- This decision gave rise to widespread criticism because
the rule *nullum crimen sine lege* (if there is no penalty, there is no crime) was not adhered to.

- **Devenish** is of the opinion that this was a case where the court should have applied the *casus omissus* rule.

- Although both these presumptions applied in this case, the *nullum crimen* rule forms the basis of the criminal justice system and should have outranked the presumption against futile results.

- Devenish is of the opinion that this was a case where the court should have applied the *casus omissus* rule.

* This presumption also applies to delegated legislation. Here the maxim ‘*ut res magis valeat quam pereat*’ applies. This means that preference is given to an interpretation that will leave the subordinate legislation valid.

  - *R v Vayi*

This rule **applies only where more than one interpretation of a provision is possible.** The presumption cannot be used to rescue an administrative act (conduct) which is defective and invalid from the outset.

  - *Mamogalie v Minister van Naturellesake.*

* In *Dadoo Ltd. v Krugersdorp Municipality* it was said that the court should strive to interpret legislation in such a manner that evasion of its provisions is prevented.

* In *Dhanabakium v Subramanian* the court found that legislation should be interpreted in such a way that a *casus omissus* (omission) is avoided.

  - The courts may indeed modify (adapt) the initial meaning of the legislative text in the light of the presumption against futile provisions and within the framework of the purpose of the legislation.
* The presumption does not only comply with constitutional requirements, but is actually supported by it.
  - The best example of a meaningless provision is legislation which is declared unconstitutional because it is in conflict with the Constitution.

* The so called ‘reading down’ principle Sections 35(2) and 232(2) of the 1993 Constitution provides that, if legislation was unconstitutional on face value, and the legislation was reasonably capable of a more restricted interpretation which would be constitutional and valid, such restricted interpretation should be followed.

* The principle that courts should as far as possible try to keep legislation constitutional (and therefore valid) is a well-known principle of constitutional interpretation.
  - Legislation should as far as possible be ‘kept alive’.