THE APPLICATION OF A NEW APPROACH TO INTERPRETING FISCAL STATUTES IN SOUTH AFRICA

by

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ABSTRACT

South African courts have historically been inconsistent in the manner in which they have approached the interpretation of fiscal statutes. Even the introduction of the Constitution in South Africa has not resolved these inconsistencies.

Recently, the Supreme Court of Appeal in the case of Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 3 SA 593 (SCA) took upon itself the task of clarifying how courts should interpret legislation. In this regard, the court concluded that all courts in South Africa should follow a purposive approach when embarking upon the role of statutory interpretation.

The study commences by briefly considering the various theories underlying the different approaches to statutory interpretation including how these approaches have been applied by South African courts in the context of the interpretation of fiscal statutes.

It also considers whether the purposive approach should also be followed by tax courts on the basis that fiscal legislation should not be interpreted any differently to other legislation and whether the *contra fiscum* rule continues to apply.

The study finds a practical approach to interpreting fiscal provisions which satisfies the requirements of current law.

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Chapter 1: Introduction

1 Background to the research problem and rationale for the study

In the case of Bato Star Fishing (Pty) Ltd vs the Minister of Environmental Affairs and Tourism and Others 2004 4 SA 490 (CC) (hereafter *Bato Star Fishing*), the Constitutional Court made references to the interpretative approach followed in Jaga v Dönges, NO and Another; Bhana v Dönges, NO and Another 1950 4 SA 653 (A) (hereafter *Jaga v Dönges*), a case from the 1950s. In particular, the court in following a purposive approach to interpreting the relevant statutes, found support for this approach in various provisions contained in the Constitution, including reference to Schreiner JA's minority judgement in *Jaga v Dönges*. More recently, the Supreme Court of Appeal in Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 4 SA 593 (SCA) (hereafter *Natal Joint Municipal Pension Fund*) endorsed the approach of Schreiner JA.

It is noted that the Constitutional Court has consistently followed the so-called purposive approach. Upon becoming effective, the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution) became the supreme law in South Africa and the Constitutional Court became the highest court in the hierarchy of courts in the Republic.

Consequently, it is surprising that despite the introduction of the Constitution the tax courts have often continued to favour a literal approach to interpretation. This is particularly relevant given that the effect of the various provisions of the income tax legislation, including the Tax Administration Act No. 28 of 2011 (hereafter the Tax Administration Act), impact the rights of South African citizens in a multiple of ways.

Until revisions to their text in 2015, De Koker and Williams (2015: §25.1), authors of the authoritative Silke on South African Income Tax, arguably the leading academic authority on South African tax law, merely identified both the literal and purposive approaches and thereafter simply recorded tax cases which have followed each approach. No attempt was made by these authors to reconcile the different approaches or even provide a view of which approach, in the opinion of the learned authors, should

take precedence. In the revised text issued in 2015, the learned authors refer with reference to the judgement by Wallis JA in *Natal Joint Municipal Pension Fund* that it is settled law that tax courts should now follow a purposive approach (2015: §25.1). However, it is interesting to note that the learned authors do not provide any insight into whether important presumptions such as the *contra fiscum* rule remain intact or whether the purposive approach changes the admissibility of background or surrounding information such as explanatory memoranda as evidence which a court could take into account.

This study considers an overview of the case of *Jaga v Dönges* wherein Schreiner JA in the minority judgement convincingly set out an argument for an approach to the interpretation of statutes which did not follow a strict literal approach. The study notes that up until the introduction of the Constitution (initially the Interim Constitution then followed by the Constitution), South African courts generally sought to follow a literal approach to the interpretation of statutes.

The study also considers the judgement of Ngcobo J in *Bato Star Fishing* wherein the learned judge referred to the minority judgement in *Jaga v Dönges* in detailing with why the Constitution requires courts to follow a purposive approach to the interpretation of statutes. The study includes reference to the Supreme Court of Appeal judgement in *Natal Joint Municipal Pension Fund* where the court strongly advocates in favour of the purposive approach to the interpretation of statutes.

In the context of a literal approach, South African courts have often applied various aids to the interpretation of statutes and certain of these aids, such as the *contra fiscum* maxim, have direct application in the context of the interpretation of fiscal statutes. Where a purposive approach is followed, it becomes debatable whether this rule becomes nothing other than a useful consideration for a court to take into account where the circumstances allow. The study considers the application of the *contra fiscum* rule in the context of a purposive approach to statutory interpretation. In addition, the study considers whether the purposive approach changes the basis for the admissibility of background or surrounding information such as explanatory memoranda which are often issued by the drafters at the time of introducing fiscal legislation.

Given the approach of the Constitutional Court in *Bato Star Fishing* and in certain other cases, the study concludes on whether South Africa tax courts should also be consistent in interpreting tax legislation in accordance with the purposive approach and if so, practically, how such approach should be undertaken.

1.2 Statement of the research problem

South African courts have been inconsistent in relation to how they interpret fiscal provisions. In this regard, the research problem is whether it is still correct for the courts to apply a strict literal approach to interpretation.

1.3 Objectives of the research

The objective of this study is to discuss the inconsistent approaches pursued by the various South African courts when ruling on fiscal matters and to determine whether tax courts should adopt a similar approach as other South African courts when interpreting tax legislation.

More specifically, the study seeks to address the following four questions:

- Should South African courts follow a different approach when interpreting fiscal as opposed to non-fiscal legislation?
- Should South African courts apply a purposive approach, as applied by the Constitutional Court, to the interpretation of fiscal statutes?
- If a purposive approach should be followed, what is the significance of the *contra fiscum* rule in the context of the interpretation of fiscal statutes?
- Has the purposive approach changed the basis of admissibility of explanatory memoranda as evidence in court?

1.4 Research method

The research method consists of an interpretative analysis of the law and the relevant provisions of the Constitution, the Income Tax Act No. 58 of 1962 (hereafter the Income Tax Act) and the common law together with court decisions, published articles and

academic text authorities relating to the scope of the study. Consequently, this inquiry is qualitative as opposed to quantitative in nature and the study applies a doctrinal research methodology.

Pearce, Campbell & Harding (1987: 13) described doctrinal research as:

> *"…research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments*."

Chynoweth (2008: 28) notes that:

> *"Doctrinal research is therefore concerned with the discovery and development of legal doctrines for publication in textbooks or journal articles and its research questions take the form of asking 'what is the law'?"*

This study involves a systematic exposition of case law, the application of the Constitution and other appropriate literature.

1.5 Envisaged contribution of the study to practice

Recently, some South African courts have followed a purposive approach when interpreting tax legislation. However, these courts have not clearly set out the basis on which they have adopted this approach. This study intends to set out the academic background as to why a court considering fiscal statutes should consider a purposive approach and also sets out a proposed practical basis on which courts could interpret legislation. It is hoped that this study may trigger a more focussed interest in these issues, in particular, a consideration of all the aids to and presumptions of interpretation and how each of these could apply in the context of statutory interpretation.

1.6 Ethical standards

The student acknowledges that taking authorship of the writings of others in the form of committing plagiarism is unethical. Consequently, all reference to all other authors will be properly cited. The student will endeavour to ensure that the findings and the

details of the research are disseminated in such a way that promotes accountability, authenticity, and accuracy.

1.7 Limitations of study

Although this study will include reference to constitutional law, it is noted that this is an exhaustive study in its own right. The study does not consider a detailed analysis of the Bill of Rights clauses contained in the Constitution and how these may interrelate with the relevant provisions of the income tax legislation and in particular with the provisions contained in the Tax Administration Act.

Consequently, this study merely summarises the key issues considered in various Constitutional judgements as they may relate to the interpretation of statutes without a critical analysis with reference to an application of constitutional law.

1.8 Chapter outline

The limited-scope dissertation is structured as follows:

1.8.1 Chapter 1: Introduction

Chapter 1 introduces the study by setting out the background to the study. It discusses the research problem, the objectives of the study, the methodology followed in conducting the study, the envisaged contribution of the study to fellow students and the limitations of the study.

1.8.2 Chapter 2: Academic overview of the different approaches to interpretation of legislation

Chapter 2 discusses the various approaches identified by academics which have been followed by South African courts when interpreting legislation. This chapter provides the theoretical foundation on which the remainder of the study is based.

1.8.3 Chapter 3: Should fiscal legislation be interpreted differently to other legislation?

Chapter 3 discusses whether courts should follow a different approach to interpreting legislation when considering constitutional as opposed to statutory matters. This issue is important as the purposive approach to the interpretation of legislation is largely premised on the impact of the Constitution as the supreme law in South Africa.

1.8.4 Chapter 4: Various approaches followed by South African courts when interpreting fiscal legislation

Chapter 4 discusses, with reference to case law, the approaches of South African courts when interpreting fiscal statutes with specific reference to the literal approach, the so-called *"intention of the legislator*" approach and the purposive approach.

1.8.5 Chapter 5: *Jaga v Dönges* and beyond

Chapter 5 discusses the Appellate Division judgement of *Jaga v Dönges* in detail with specific emphasis on Schreiner JA's landmark minority judgement, where the court clearly deviated from the literal approach in following a purposive approach to the interpretation of statutes.

Chapter 5 also discusses the Constitutional Court's views set out in *Bato Star Fishing* which referred to Schreiner JA's minority judgement in *Jaga v Dönges*.

The Chapter also discusses recent case law, including the judgement in *Natal Joint Municipal Pension Fund* where the court also referred both to *Bato Star Fishing* and to the minority judgement in *Jaga v Dönges* in strongly advocating a purposive approach to the interpretation of statutes.

1.8.6 Chapter 6: Implications of a purposive approach for fiscal legislation on the *contra fiscum* rule

Chapter 6 discusses the implications of a purposive approach to the interpretation of fiscal statutes and the effect of this on the relevance of the *contra fiscum* rule.

1.8.7 Chapter 7: Implications of a purposive approach on whether courts may take background information such as explanatory memoranda into account when considering fiscal provisions

Chapter 7 discusses the implications of a purposive approach to the interpretation of fiscal statutes and the effect of this on the admissibility of explanatory memoranda as evidence in court.

1.8.8 Chapter 8: Conclusion

This is the final chapter of the limited-scope dissertation. The chapter summarises the approaches followed by South African courts in interpreting both fiscal and non-fiscal legislation and answers the research questions posed in Chapter 1. In addition, this chapter provides guidance for further research.

Chapter 2: Academic overview of the different approaches to interpretation of legislation

2.1 Introduction

Before commencing with an overview of the different approaches to the interpretation of legislation it is useful to first consider what statutory interpretation is.

In this regard, Du Plessis (2002: 18) describes statutory interpretation as being:

> "…*about construing enacted law-texts with reference to and reliance on other law-texts, concretising the text to be construed so as to cater for the exigencies of an actual or hypothetical concrete situation."*

Various commentators and authors have attempted to categorise the various approaches to be applied in the interpretation of legislation.

Du Plessis (2011: 269) writing in the Law of South Africa journal suggests that a legal theory should constitute an "*explanation*" which provides the principles that justify a course of action. In the context of statutory interpretation, Du Plessis (2011: 271) comments that the so-called common law theories of statutory interpretation are nothing more than "*preferences"* of an interpreter of a particular disposition which then identifies a preferred *modus operandi* for the interpretation of statute law.

Devenish (1992: 25) notes that courts use these various approaches in a capricious manner and invariably arrive at inconsistent conclusions given that there is no articulated approach or method which is anchored in a jurisprudentially sound theory.

Du Plessis (2002: 93) argues that six conventional theories of statutory interpretation exist. He defines these theories as literalism, intentionalism, purposivism, judicial activism, objectivism and a theory which he describes as the linguistic turn or subsumption.

Du Plessis (2002: 100) then considers the application of these theories by South African courts and concludes that South African courts can be accused of being inconsistent in their approach and:

"…vacillating between narrow, formalist literalism and broad, free-thinking purposivism…"

Du Plessis (2002: 100-101) notes that the courts apply the various theories to develop practical approaches which are not in themselves a reflection of the theories but are applied by the courts depending upon the factual peculiarities and the nature, tenor and objectives of each legislative instrument under consideration. Du Plessis (2002: 101) cites an example of the judgement in Public Carriers Association v Toll Road Concessionaries (Pty) Ltd 1990 1 SA 925 (A) where Smalberger JA, while arguing in favour of a purposive approach to a provision, emphasised that the literal interpretation principle is firmly entrenched in South African law and that he would not seek to challenge it. Du Plessis (2002: 101) contends that although this approach may seem untenable, it is noteworthy that the court was quite prepared to change theoretical positions where the circumstances of a particular fact pattern required such a result.

Du Plessis (2002: 101-119) then identifies how the theories have been applied by South African courts in practice and essentially concludes that three main approaches may be distinguished. These are the formalistic approach, a contextual approach and a purposive approach. (Du Plessis (2002: 102) identifies the formalistic approach as being akin to a devotion to literalism on the basis that it requires that the interpreter maintains an approach consistent with the strict linguistic form in which a provision is drafted.)

Botha (2012: 91) notes that in his view, only two main schools of thought exist in relation to the interpretation of statutes. These are the *"orthodox text-based*" approach and the "*text-in-context*" approach. Botha's "*orthodox text-based*" approach would include both the formalistic approach and the intentionalism theory referred to by Du Plessis whilst Botha's "*text-in-context"* approach would essentially include Du Plessis' theory in relation to purposivism.

Devenish (1992: 25-55) also identifies a variety of approaches, these being the literal approach, the subjective approach, the purposive approach, the teleological or value-coherent approach, the judicial or free theory and the objective approach.

Cockram (1983: 36-58) in his now dated work simply refers to the literal rule, the golden rule and the mischief rule.

The theories identified by both Du Plessis and Devenish, as arguably the leading South African academic authors in this field, are applied in this study as the basis for analysing the various theories. It is noteworthy that there is a significant overlap in respect of the different theories which they identify.

2.2 Formalistic or literal approach

The literalism approach maintains that the meaning of an enacted provision has to be deduced from the very words in which the provision is couched, irrespective of its consequences (Du Plessis, 2002: 93). Devenish (1992: 26) notes that in terms of this approach, the true meaning of the text is to be sought almost exclusively in the *ipsissima verba* used by the legislature.

Clear language is therefore placed on the same footing as plain or ordinary language, which infers that it is language which the normal speaker of the language will understand. However, as noted by Du Plessis (2002: 94), ordinary language is not necessarily clear and unambiguous. Consequently, strict adherence to the words of a provision may yield results which are nonsensical.

In order to counter this outcome, the South African courts imported the "*golden rule*" from English courts. The court in Poswa v Member of the Executive Council for Economic Affairs, Environment and Tourism, Eastern Cape 2001 3 SA 582 SCA held that in terms of this rule:

> *"…the grammatical and ordinary of the words must be adhered to, unless that would lead to some absurdity, or some other repugnance or inconsistency with the rest of the provisions, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid the absurdity and inconsistency but no further."*

Devenish (1992: 29) records that the absurdity must be obvious and must be pulled out from the instrument as a whole and exist in the words of the statute rather than in their result of an application to a particular fact pattern. In this regard, Devenish (1992: 28) notes that the literal theory does permit courts, when an ambiguity is present, to apply the "*mischief rule*" in relation to which courts can examine the historical

motivation for the statute from which the purpose of the legislation can be inferred and words are then read in the light of that purpose. (Further detail in relation to the "*mischief rule*" is set out under paragraph 2.4 in this report.)

Du Plessis (2002: 105) in a criticism of this approach identifies the following questions which arise from the application of the so called "*golden rule*":

- what criteria can be relied upon to highlight the unreliability of language in its literal sense?;
- who or what determines what an absurdity is and when is the absurdity sufficiently glaring for the "*golden rule*" to apply?; and
- how can it happen that an intention contrary to the intention of the legislature be gleaned from the very language which is supposed to clearly set out the intention of the legislature?

Devenish (1992: 31) criticizes the literal approach on the basis that it:

- defines the process as a rigid arrangement and does not facilitate a composite and contextual approach, which is not ideal given that in an ideal world, interpretation should be a process of combining all relevant sources in attaining a coherent conclusion. Put differently, when interpreting the legislation, the interpreter, as part of a simultaneous process, should ideally read the legislation against a known background, correct apparent errors and make implications as to its meaning as he reads before giving a meaning to the documents in its entirety;
- results in an exaggeration of an analysis of word meanings and the relations between the words and their meanings in interpretation while devaluing the purpose of the statute and the relevance of the common law;
- does not lead to legal certainty as what may be clear and reasonable to one person may be obscure and absurd to another; and
- does not distinguish between "*meaning*" and "*language*". "*Language"* is the medium through which the *"meaning*" is communicated and the two are not necessarily the same.

Du Plessis (2002: 94) concludes that crude literalism "*has probably reached its apogee and is on the wane*". However, Du Plessis continues to state further that it is still "*alive and kicking*" in an adapted form.

In this regard, Du Plessis (2002: 105) notes that in relation to the literal approach, clear and unambiguous language is still regarded as a statute's first and primary source of reasoning but notes that courts have agreed to depart from the literal meaning where:

- the context and other considerations as a court is justified to take into account (Venter v R 1907 TS 910). (Context has also been interpreted to also include the apparent purpose of a provision and object of a statute as a whole); or
- the likelihood of an interpretative result be unjust, unreasonable, inconsistent, unconstitutional or at variance with the spirit, purport and objects of the Bill of Rights.

Although the literal approach has been the subject of criticism in the constitutional era, it is interesting to note that Kentridge JA contended in the early constitutional case of S v Zuma and Others 1995 2 SA 642 (CC), where the court was cognisant of a broader approach to interpretation, that *"the Constitution does not mean whatever we might wish it to mean*" and that as a legal instrument its words should be respected. The language used by the legislator should therefore not be ignored in favour of a general resort to values.

However, it is equally apparent that statutory interpretation should also be alive to developments in theories of understanding, particularly given the advent of constitutionalism and the enactment of legislation in a broad constitution such as language (Du Plessis, 2002: 109).

Du Plessis (2011: 272) notes that despite the criticism levied against the literal approach it remains the major point of reference for how the common law theories are classified given that the literal approach is based on the assumption that the point of departure for any statutory interpretation lies with the actual words. Du Plessis (2011: 272) concludes that other approaches are regarded as deviations from literalism as opposed to constituting statutory positions in their own right.

2.3 Intentionalism

Du Plessis (2011: 272) describes intentionalism (or the subjective theory) as an approach which concludes that the paramount rule of statutory interpretation is to determine and give effect to the real intention of the legislature.

In this regard, Du Plessis (2011: 272) notes that "*intention of the legislature*" has a strongly subjective connotation on the basis that it is a metaphor which attributes human-like attributes (mind and will) to either a non-human or a number of individually minded human beings who participate in creating legislation in identifying the mind, will and thoughts underlying the legislation as it exists.

According to Devenish (1992: 33), this approach is based on the distinction between language on the one hand and ideas and thought on the other.

In this regard and as an example of this approach, the court in Farrar's Estate v CIR 1926 TPD 501 stated that:

> *"The governing rule of interpretation - overriding the so-called 'golden rule' – is to endeavour to ascertain the intention of the law-maker from a study of the provisions of the enactment in question."*

Devenish (1992: 33) notes that reference to the intention of the legislature is merely a fiction and that this approach is focussed on abstracting or distilling an aim or purpose by a process of inference from internal and externals aids.

Du Plessis (2002: 106) criticises this as a stand-alone approach on the basis that it is simply too general and unspecific to be a rule. Instead of concluding on the basis that a provision means X or Y, courts may argue that the legislature intended X or Y as justification for reaching the same conclusion. In addition, legislation passes through a sequence of various processes and those that draft the legislation do not pass it. There is often disagreement and the final version of what appears in legislation is often the manifestation of a compromise.

Du Plessis (2002: 106) raises the issue of whose thinking then constitutes the so-called "*intention of the legislature*"?

Devenish (1992: 33) criticises this approach on the basis that it is problematic since most commentators have inordinate difficulty in analysing precisely what is meant by the phrase and some even use it without any real attempt to provide an explanation.

Du Plessis (2002: 107), in his analysis of the practical approaches followed by South African courts when interpreting legislation, identifies what he refers to as the "*literalism-cum-intentionalism*" approach which in essence combines features of both the literal and the subjective approaches. Du Plessis (2002: 107) believes that this is the most dominant practical basis on which statutes have historically been interpreted in South Africa.

The basis for this approach is that the real object of interpretation is to determine the intention of the legislature. However, Du Plessis (2002: 107) suggests that this approach does not stop here. The legislature intended to express its intention in the language in which it was packaged. Consequently, the intention of the legislature is ascertainable from the language used.

As a result, when the words used are clear and unambiguous, their literal, grammatical meaning must prevail and ordinary effect given thereto. On this basis, the true intention of the legislator is understood and the *"correct*" meaning is therefore ascribed to the legislation. Du Plessis (2002: 107) states that this approach is premised upon two assumptions. Firstly, that there is a grammatical structure which allows for a fixed and stable "*ordinary meaning*" of language. Secondly, it assumes the "*correct"* application of language, i.e., respecting the ordinary meaning of its words, grammatical structure and its rules will ensure that the intention inherent in the particular provisions will be equally understood by all users of the language. When the language is unclear or ambiguous, it is then necessary to apply the various aids of interpretation in order to determine the intention of the legislature.

Du Plessis (2002: 108) finds support for this view in certain cases. In this regard, the court in Mendelson and Frost (Pty) Ltd v Pretoria City Council 1977 3 SA 693 (T) held that the intention of the legislature may be determined by affording the words their "*plain, ordinary literal or grammatical meaning*". In Du Plessis v Joubert 1968 1 SA 585 the court concluded that it is inadmissible for a court to construe an enactment contrary to the intention of the legislature as appears from the clear wording of the instrument. In Ensor v Rensco Motors (Pty) Ltd 1981 1 SA 815 (A) the court held that if the

legislature did have a specific intention it would have expressed it by using clear and unambiguous language and that a change in wording in a statutory provision may signify a change in intention.

Du Plessis (2002: 108) contends that this practical approach rescues intentionalism from the criticism of "*arbitrariness*" and "*indeterminacy"* (because the interpreter has recourse to the language in determining the intention of the legislator).

It is submitted that despite the application of this approach in practice, the same criticism as raised in the debate concerning the application of the literalism approach hold true in relation to this hybrid approach, given that a stable grammatical structure may not exist to derive the "*ordinary meaning"* of language.

2.4 Purposivism

Popkin (2000: 222) describes the purposive approach to interpretation as an:

> *"interpretative theory which requires the judge to engage in an imagined dialogue with the departed legislature to reconstruct how legislative purpose should be applied to the facts of the case."*

Popkin (2000: 222) continues to note that this approach allows judges some discretion to be creative in elaborating legislative purpose while claiming that they are merely deferring to what the legislature probably wanted to accomplish in any event.

Du Plessis (2011: 274) describes purposivism as attributing meaning to a provision in light of the purpose that it seeks to achieve in the context of the instrument of which it forms part. To the extent that purpose and clear language conflict, purpose should prevail.

Devenish (1992: 36) notes that this approach requires that interpretation should not exclusively depend on the literal meaning of words according to their semantic and grammatical analysis. In applying this approach, an interpreter should apply an unqualified contextual approach which permits an examination of all internal and external sources.

In his analysis of how South African courts have practically applied this approach, Du Plessis (2002: 96) distinguishes between a contextual approach and a purposive approach. In this regard, the purposive approach could overlap with the contextual approach on the basis that the contextual approach requires that the apparent purpose of the legislation is also considered (but is not paramount). Du Plessis (2002: 113) cites Schreiner JA's minority judgement in *Jaga v Dönges* as the classic example of a contextual application of statutory interpretation. Du Plessis (2005: 607) notes that the purposive approach to interpretation cannot commence as an exercise by simply giving effect to the purpose and objects of a provision on the basis that such purpose and object cannot be known prior to interpretation. Rather, the purpose and objects must be determined through interpretation, failing which the interpretive process could be based on conjecture and surmise.

Botha (2005: 50) does not draw a distinction between a contextual and a purposive approach, preferring to refer to both as falling within what he describes as a purposive or "*text-in-context*" approach. (However, Du Plessis (2002: 97) does concede that contextualism is often advanced as the "*interpretative twin*" of purposivism on the basis that the purpose of a provision can only be ascertained by looking at it in context. It is submitted that particularly in the light of recent South African case law referred to in this report, any distinction that may be validly drawn by Du Plessis between a contextual and a purposive approach is no longer practically relevant.)

In this regard, Botha (2005: 51) notes that Schreiner JA in *Jaga v Dönges* argues that the following guidelines should be identified when interpreting legislation in a purposive or "*text-in-context*" approach:

- from the beginning, the interpreter should consider the wider context of the legislation with reference to the legislative text in question;
- irrespective of how clear or unambiguous the grammatical meaning of the text may be, the relevant contextual factors must be taken into account;
- depending on the circumstances, the broader context may even be more important than the legislative text; and
- once the meaning of the text and context is determined, it must be applied, irrespective of whether the interpreter is of the opinion that the legislature intended something else. On this basis, the context does not only include the

language of the remainder of the statute, but also its matter, its apparent purpose and scope and within limits its background.

Du Plessis (2002: 96) refers to the so-called "*mischief rule"* in the ancient English case of Heydon 1584 3 Co Rep 7a 7b (known as *Heydon's Case*), referred to in Hleka v Johannesburg City Council 1949 1 SA 842 (A) as the classic version of purposivism recognised in South African law. This court held that the purpose of legislation is to suppress *"mischief*". In this regard, a court is constrained to ask four questions:

- what was the common law before the enactment of the provision?;
- what was the mischief and what was the defect for which the common law did not provide?;
- what remedy did parliament resolve to deal with the mischief; and
- what was the true reason for the remedy?

Du Plessis (2011: 275) notes that if the "*mischief rule*" represents purposivism it is clear that purposivism considers the historical context to a provision as being of paramount importance whereas a contextual approach would consider many other contextual factors.

Du Plessis (2002: 97) comments with reference to *Heydon's Case* that the purpose of legislation and the intention of the legislature cannot be different. It is apparent that purposivism allows for the deviation from the literal and unambiguous language of a statute, thereby creating the perception that it emerged as an approach only after literalism took hold. However, Du Plessis (2002: 97) notes that *Heydon's Case* pre-dates the advent of the first acknowledged adoption of the literalism approach by almost two centuries. This was because the purposive approach was a necessity given that parliament met irregularly and the processes surrounding the formulation and adoption of new legislation were not as sophisticated as they later became under the Westminster system. Consequently, the purposive approach permitted the rectification of legislation by judges and provided for the augmentation of law where required.

Devenish (1992: 35) records that the perceived benefit of this approach is that it is more objective than the approaches discussed above which refer to legislative intent, as it refers to legislative goals that transcend a particular application. However, Devenish (1992: 36) submits that an authentic purposive approach endeavours to

interpret a provision of a statute in accordance with the purpose under all circumstances regardless of whether there is an ambiguity or not. Devenish (1992: 36) also refers to the "*mischief rule*", which in his view is applied as part of the literal methodology to be a manifestation of a qualified purposive approach since it can only be applied when there is an ambiguity. This would be consistent with the fact that South African case law has applied this approach only when the words are unclear and ambiguous.

Devenish (1992: 36) also contrasts the purposive approach to the intentional approach in noting that the purposive approach does not refer to a fiction such as the intention of the legislature. Rather, the purpose of a statute is very real.

Clearly, a criticism of the purposive approach is that it potentially lends itself to an arbitrary basis of application. Du Plessis (2002: 116) cautions that the purposive approach cannot be uncontested and result in an *"open sesame*" in relation to the interpretation of all enacted legal texts. In this regard, the purpose of a provision can simply not be known prior to interpretation – rather, it has to be established through interpretation instead since the interpretation of law is by its very nature purpose-seeking. If this is not the case, this approach would simply lend itself to interpretation of an arbitrary basis.

2.5 Judicial activism or free theories

This theory is based on the approach that courts have a creative role to play in the interpretation and application of legislation (Du Plessis, 2002: 97). Devenish (1992: 49) describes this as an approach in terms of which a judge can choose one rule of interpretation over another and apply the selected rule to justify the court's conclusion. In this regard, Du Plessis (2002: 98) suggests that judges may essentially reach their decision and then apply this approach to justify the pre-determined outcome.

In addition to the creativity afforded to the judges, this theory also emphasises the element of subjectivity which may be employed by the judges and is therefore not a basis of interpretation which follows a perceived methodology (Devenish, 1992: 49). This theory has been described as an extreme reaction to the rigid literal theory and

lends itself to criticism that it may result in inconsistent judgements handed down by the courts (Devenish, 1992: 49).

It is noteworthy that Du Plessis (2011: 275) includes references to English case law as an example of how this theory may apply but has no reference to South African cases.

2.6 Objective or delegation theory

Objectivism is intended to be the opposite to the subjective aspects of intentionalism in terms of which courts attempt to prescribe a meaning to the fictional "*intention of the legislature*". The basis for this approach is that when the law has been enacted, the legislation assumes an existence of its own (Du Plessis, 2002: 98).

In this regard, objectivism requires that statutes are interpreted with reference to the policies existing at the time when the legislation was promulgated also continuing within the time frame through which they function and the court is for all and intents and purposes the agent of the legislature (Du Plessis, 2002: 98). The focus is not on the past intention of the legislature but on a "*present realisation*" of the legislation (Du Plessis, 2002: 98).

This approach, therefore, permits the court discretion to interpret the legislation as it deems fit in order to give effect to the dynamic nature of the social needs of society. In other words, a court is entitled to consider how "*best*" to apply interpret and apply the provisions of a statute to a particular factual circumstance (Devenish, 1992: 50).

Du Plessis (2011: 275) notes that this approach has not been followed by South African courts.

2.7 Teleological or value inherent approach

Devenish (1992: 39) identifies the so-called "*teleological*" approach to legislation as something different to the purposive approach and claims that this approach has its foundation in English courts during the 16th and 17th centuries. Devenish (1992: 39)

cites Canadian academic literature in describing this approach as distinguishing between:

> *"…the sense or spirit of a statute and its words and justified the judges in extending or restricting the operation of the letter*."

Thus, this approach is not merely purposive but includes an equitable element (Devenish, 1992: 39). Devenish (1992: 47) notes that the literal approach restricts the sources of interpretation to the text and only in the cases of absurdity can internal or external sources be consulted whereas the purposive approach immediately permits the courts to consider both internal and external sources. The teleological approach permits the court to take into account certain moral issues in determining the intention of the legislature.

Devenish (1992: 40) refers to the following comments by Goff LJ in the English case of Elliott v C 1983 2 All ER 1005 as summarising the basis of the teleological approach:

> "*In my opinion, although of course the courts of this country are bound by the doctrine of precedent, sensibly interpreted, nevertheless it would be irresponsible for judges to act as automatons, rigidly applying authorities without regard to consequences. Where therefore it appears at first sight that authority compels a judge to reach a conclusion which he senses is unjust or inappropriate, he is, I consider, under a positive duty to examine the relevant authorities with scrupulous care to ascertain where he can, within the limits imposed by the doctrine of precedent (always sensibly interpreted), legitimately interpret or qualify the principle expressed in the authorities to achieve the result which he perceives to be just or appropriate in the particular case."*

and further:

> *"..law is a branch of morals and that the judge 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 their sense of right and wrong that prevails in the community … Equity is therefore necessary to interpret the meaning of the law-giver …"*

Devenish (1992: 44) cites the well-known case of Dadoo Ltd & others v Krugersdorp Municipal Council 1920 AD 530 as authority for the application of the teleological approach to statutory interpretation in South African law. *In casu*, the law at the time precluded Indian people from owning land in certain geographical areas. However, the law was not prescriptive in relation to juristic persons and the issue was whether the fact that the shareholders of a company were Indian would on the basis of in fraudem legis or simulation preclude a company from owning land in the particular area.

In this regard, Innes CJ stated that:

> *"It is a wholesome rule of our law which requires a strict construction to be placed on statutory provisions which interfere with elementary rights. And it should be applied not only in interpreting a doubtful phrase, but in ascertaining the law as a whole."*

It is apparent from Innes CJ's judgement that apart from ambiguity, considerations of equity should always be considered by the courts when interpreting legislation.

In more recent times, Le Roux (2006: 383-400) argues that the constitutional judgement of the African Christian Democratic Party v Electoral Commission 2006 3 SA 305 (CC) also constitutes an example of a teleological approach. In this case, the African Christian Democratic Party did not comply with the strict requirements to make a deposit prior to competing in local government elections to a particular recipient and the issue was whether failure to comply with the strict requirements of the relevant electoral legislation meant that the party could not contest the forthcoming elections. The majority disregarded the text contained in the legislation and simply considering the purpose of the legislation in arguing that the purpose was that each political party was obliged to make a deposit but that it not matter where the amounts were paid. The majority concluded that these specific provisions should not be read "*unduly narrowly"* but rather in a manner which is "*far more consistent with our constitutional values*". The court concluded that the underlying purpose of the requirements was not undermined and the political party could contest the elections.

2.8 Subsumption

Du Plessis (2002: 99) refers to an approach in terms of which generally applicable legal rules/norms and principles are generally recognised following which a particular issue is brought within an accepted framework and interpreted accordingly. Du Plessis (2002: 99) notes that this approach has not been followed in South Africa.

2.9 Conclusion

Various theories of interpretation clearly exist. However, it will become apparent from the detail set out in Chapter 4 of this report that, in the context of the interpretation of fiscal issues, South African courts have only applied theories of literalism, intentionalism and purposivism to the extent that this includes contextualism. It is apparent that there appears to be a strong overlap between the purposive approach and what is also referred to as the teleological approach. It is submitted that Botha's approach of simplifying applied South African approaches of interpretation into the textual approach and the text-in-context approach, holds significant practical merit.

Chapter 3: Should fiscal legislation be interpreted differently to other legislation?

3.1 Introduction

Chapter 2 highlights the theoretical approaches to the interpretation of statutes. Two key issues need to be considered before reviewing the approaches to fiscal interpretation followed by South African courts. The first is whether fiscal statutes should be interpreted differently to other statutes. The second is the extent to which the body of case law which has developed within the context of constitutional interpretation should apply to other statutory interpretation, including fiscal statutes.

3.2 Is there any difference between fiscal and other statutory legislation?

South African courts have been confronted with the issue of whether fiscal legislation should be interpreted differently to other statutory legislation.

In this regard, Goldswain (2008: 109) notes that as far as tax cases are concerned, the courts in some of the early court decisions such as CIR v Frankel 16 SATC 251 adopted a strict literal approach to interpreting legislation which may have been regarded as unique to fiscal legislation. It is useful to consider this case as an example.

In CIR v Frankel 16 SATC 251, the taxpayer who was married to his wife out of community of property and with the marital power excluded, was employed by a firm in which his wife was one of the partners. From this firm, the taxpayer's wife received a salary and a share of the profits, while he received a salary and commission.

Under the provisions of section 9(2) of the Income Tax Act as it then existed, the income of a wife, who was not separated from her husband by judicial order or written agreement of separation, was deemed to be income accrued to her husband.

In the determination of the taxpayer's liability for excess profits duty for the year ended 30th June, 1945, the Commissioner for Inland Revenue included in his basic profit for that year, his own salary and commission as well as his wife's share of profits and salary. (Excess profits duty was a tax on the total increase in the profits of a trader

derived from trade during a period which covered the World War 2 years. It was imposed by separate legislation although cross-referred to the Income Tax Act.)

For these purposes, "*basic profit*" was defined as that portion of the taxable income of any person which has been derived from trade but excluded from the definition of trade was "*the holding, by persons other than companies, of any office or employment*", subject to the proviso that any form of remuneration received by any person from a trade carried on by that person whether singly or in partnership, was deemed not to have been derived from the holding of any office or employment. The question which then arose was whether the provisions could deem the wife's business to constitute that of the husband's for all purposes, so as to bring within his basic profit, derived from the trade carried on by his wife, the salary and commission received by him from employment in that business despite the fact that he did not carry on a "*trade*" himself for these purposes.

In this regard, the court concluded that based on the wording, the words could not deem the wife's activities to result in the husband to be "*trading"* for these purposes.

The court quoted with approval the remarks of Rowlatt, J., English case of in Cape Brandy Syndicate v Inland Revenue Commissioners, 1921 1 K.B. 64 (hereafter *Cape Brandy Syndicate*) at page 71:

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

Goldswain (2008: 109) records that decisions based on the literal approach, generally tended to favour the fiscus as equity and fairness were not regarded as important when interpreting the legislation. In addition, the courts have in many cases alluded to the principle, arguably a strict form of interpretation, that a taxpayer is then also entitled to arrange his affairs in a manner whereby he would pay the least amount of tax.

In this regard, South African courts have often referred the UK judgement of Lord Tomlin in Duke of Westminster v IRC 1935 All ER 259 at 520 wherein the court noted that:

"Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow-taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax."

Goldswain (2008: 110) submits that these decisions created the impression that fiscal legislation should be interpreted differently to other legislation, *i.e*., strictly as opposed to attempting to establish the true intention or purpose of the legislature.

However, this issue was addressed by Botha JA in Glen Anil Development Corporation Ltd v Secretary for Inland Revenue 37 SATC 319 (hereafter *Glen Anil*) where the Secretary for Inland Revenue sought to disallow a taxpayer's ability to utilise an assessed loss where the company began a property developing business in an entity with a pre-existing assessed loss. In this regard, Botha JA noted that:

"Apart from the rule that in 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 the favour of the subject, there seems to be little reason why the interpretation of fiscal legislation should be subjected to special treatment which is not applicable in the interpretation of other legislation."

The principle enunciated by Botha JA was reconfirmed by the court in Secretary for Inland Revenue v Kirsch 40 SATC 95 (hereafter *Kirsch*). In this case, an issue under dispute was whether section 8A of the Income Tax Act could apply to a scheme where a party acquired shares in a company via outright purchase without acquiring these shares in terms of a share option scheme. Section 8A referred to:

"…the exercise…of any right to acquire any marketable security…"

The taxpayer argued that section 8A could not apply as a "*right"* in *"tax law"* always only referred to an enforceable one. In this instance, the shares were acquired in terms of an arrangement whereby an offer was not kept open and therefore not via a *"right to acquire".*

In response to this contention, Coetzee J in *Kirsch* stated the following:

"This argument is in my view misconceived. There is no particular mystique about 'tax law'. Ordinary legal concepts and terms are involved and the ordinary principles of interpretation of statutes fall to be applied."

Consequently, based on the judgements set out above, fiscal legislation should not be subject to any approach to statutory interpretation which differs from an approach to non-fiscal matters.

3.3 Are there differences between statutory and constitutional interpretation?

Kellaway (2005: 83) notes that it has become commonplace to point out the differences between statutory and constitutional interpretation. A Constitution is drafted with an eye to the future and cannot easily be amended and consequently needs to evolve as circumstances change.

In Nortjé and Another v Attorney-General, Cape and Another 1995 2 SA 460 (C), the court per Marais J held:

"there is general agreement that, because of these fundamental distinctions between ordinary legislation and this kind of legislation, many (but certainly not all) of the traditional rules of interpretation will be inappropriate when interpreting legislation of this kind."

Kellaway (2005: 83) writes that although there are important differences between a supreme constitution and ordinary statutes, the differences between statutory and constitutional interpretation should not be stretched too far.

However, Botha (2012: 99) states that since the Constitution (being the highest law in South Africa) includes an express and mandatory interpretation provision in the form of section 39(2), it is imperative that the process of statutory interpretation always occurs with reference to the values set out in the Constitution.

Du Plessis (2002: 133) follows the approach enunciated by Botha in recording that the Constitution impacts decidedly on the various aspects of statute law and therefore prescribes the basis and limitations for how statutes should be interpreted. When

testing statute law against the Constitution, it is the Constitution which determines the parameters of the statute law and not the other way round (Du Plessis, 2002: 134).

Goldswain (2008: 113) eloquently identifies the difference between the former Westminster system of government as previously practiced in South Africa and the more recently introduced constitutional dispensation. In terms of the previous Westminster system, it was clear that it was parliament which was supreme. Consequently, neither the courts nor any other body had the competence to potentially strike down oppressive or *ultra vires* legislation approved by parliament. Provided that parliament had enacted the law, it was irrelevant whether a person's rights were violated or infringed by such legislation. However, this position completely changed following the introduction of the Constitution which has now become the supreme law of South Africa.

The provisions of the South African Constitution which are relevant to the interpretation of fiscal statutes are set out below.

Section 1 of the Constitution is the foundational clause which states:

> *"The Republic of South Africa is one, sovereign, democratic state founded on the following values:*
>
> *(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.*
>
> *(c) Supremacy of the constitution and the rule of law…"*

Section 2 is the constitutional supremacy clause which clearly affirms what is set out under section 1(c) of the Constitution.

Section 2 states that:

> *"The Constitution is the supreme law of the Republic: law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."*

Section 7 confirms the importance of the Bill of Rights and states:

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

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill."

Section 8 confirms that the Bill of Rights applies to all and requires:

"(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court-

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person."

Section 39(1) of the Constitution deals with the interpretation of the Bill of Rights and section 39(2) deals with the interpretation of any other legislation. In this regard, section 39(2) states:

"When 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."

Section 39(3) of the Constitution states:

> *"The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."*

In the light of these provisions, Goldswain (2012b: 58) concludes that section 2 of the Constitution has introduced a new kind of supremacy on the basis that it essentially incorporates a set of values and any law or conduct inconsistent with the Constitution is invalid. Consequently, in the modern era, although Parliament legislates, all legislation must be subject to the purport and spirit of the Constitution. Furthermore, section 39(1) of the Constitution describes how the Bill of Rights should be interpreted and section 39(2) confirms that all legislation, including fiscal legislation, should be interpreted to promote the spirit, purport and objectives of the Bill of Rights. Section 39(3) of the Constitution states that, *inter alia*, no common law may be recognised to the extent that it is inconsistent with the provisions of the Bill of Rights.

Botha (2012: 100) concludes that if all these provisions are read together, it is beyond doubt that the Constitution is supreme with the consequence that everything and everybody are subject to it. This means that the Constitution cannot be interpreted in the context of the Roman-Dutch common law, including any other traditional customary law. Botha (2012: 100) persuasively states that:

> *"Everything and everybody, all law and conduct, all cultural traditions and legal dogmas and religious perceptions, all rules and procedures and all theories, canons and maxims of interpretation are influenced and ultimately qualified by the Constitution."*

In Holomisa v Argus Newspapers 1996 2 SA 588 (W), Cameron J summarised this issue as follows:

> *"the Constitution has changed the 'context' of all legal thought and decision-making in South Africa."*

It is noticeable that section 39(2) does not expressly require interpreters to follow a purposive approach to the interpretation of legislation. However, it is clearly a provision which requires pre-emptory consideration on the basis that all courts, tribunals or

forums must review the aim and purpose of the legislation in the context of the Bill of Rights. Botha (2005: 101) continues to state that even prior to reading a particular legislative text, section 39(2) makes it obligatory for the interpreter to promote the values and objects of the Bill of Rights. Botha (2005: 102) concludes that these core values may be summarised as being freedom, equality and human dignity. The consideration of so-called *"core values"* manifests itself by ensuring that the spirit, purport and objects of the Bill of Rights are promoted during the process of statutory interpretation. This outcome can only be achieved if courts make certain value judgements during the interpretation and application of all legislation. Botha (2005: 103) notes that since the values underlying the Constitution are not absolute, the interpretation of legislation must also constitute a process of seeking a balance between conflicting values and rights.

Support for this contention is also found in the Matiso v the Commanding Officer, Port Elizabeth Prison 1995 4 SA 631 (CC) (hereafter *Matiso*) where Froneman J, in considering the constitutionality of the imprisonment of judgement debtors permitted in terms of the Magistrates Courts Act No. 32 of 1944, stated:

> *"The 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 statutory interpretation in our law should be different from what it was before the commencement of the Constitution on 27 April 1994. The purpose now is to test legislation and administrative action against the values and principles imposed by the Constitution. This purpose necessarily has an impact on the manner in which both the Constitution itself and a particular piece of legislation said to be in conflict with it should be interpreted."*

Consequently, Botha (2012: 103) concludes that the interpretation of statutes can no longer be a "*mechanical reiteration*" of what was apparently contemplated by Parliament, but what is rather permitted by the Constitution. In this regard, Burger (2001: 26) notes that it does not even matter whether the legislation actually has a clear meaning – the spirit, purport and objects of the Bill of Rights must be promoted.

Implicit in this approach is that the Bill of Rights has to be considered before attempting to interpret the meaning of a provision.

Goldswain (2012b: 4) refers to a number of the rights protected under the Bill of Rights which should enjoy consideration in the context of a taxpayer. These are the following:

- equality;
- human dignity;
- privacy;
- freedom of trade, occupation and profession;
- property;
- access to information;
- just administrative action;
- access to courts; and
- arrested, detained and accused persons.

Goldswain (2012a: 54) concludes that the effect of a consideration of these rights is that unfairness, inequality and unreasonableness of legislation or the conduct of officials should not be tolerated. In line with this approach, Goldswain (2012a: 54) submits that an approach to interpretation which includes the principle of equity (embodied in natural law) should be the preferred approach to the interpretation of legislation. (Natural law may be described as the unwritten body of universal moral principles that underlie the ethical and legal norms by which human conduct may sometimes be evaluated and governed and refers to the "*inalienable rights*" which people may be described as holding irrespective of their individuality or talents (Desmond, 1953: 236). Natural law is often contrasted with positive law, which consists of the written rules and regulations enacted by government.)

On this basis, a literal or an approach based on intentionalism becomes unworkable and courts should consider a purposive approach to the interpretation of legislation as being the only viable theoretical alternative.

3.4 Conclusion

It is submitted that as the Constitution is clearly the supreme law in South Africa and that all statutes are subject to the Constitution, all statutes should be interpreted in the context and in the light of the Constitution. In this regard, the comments by Froneman J in *Matiso* are instructive in concluding that the introduction of the Constitution in South Africa clearly requires a different approach to the interpretation of statutes.

It is submitted that the relatively more recent approaches followed by the courts in the cases of *Glen Anil* and *Kirsch* support the view that fiscal statutes should not be interpreted any differently to other statutes as it means that the approaches of courts to the interpretation of statutes are relevant. Consequently, the basis of Wallis JA's judgement in the case of *Natal Joint Municipal Pension Fund* should have a profound impact on how fiscal statutes are interpreted in South Africa.

Chapter 4: Various approaches followed by South African tax courts when interpreting fiscal legislation

4.1 Introduction

South African courts have followed a literal approach, an approach which is seemingly based on intentionalism (in circumstances where a literal approach yields ambiguities) and a purposive approach to interpreting fiscal statutes. This chapter refers to specific case law where courts have considered each of these approaches in describing how these approaches have been followed by the courts.

It is apparent that in relation to matters relating specifically to the interpretation of fiscal statutes, South African courts have been inconsistent in their approach to interpreting legislation. (In the recent case of C: SARS v Bosch 75 SATC 1, the court referred to a purposive approach recently followed by the court in *Natal Joint Municipal Pension Fund*. However, it is noted that although this case dealt with certain income tax matters, the matter under consideration was simulation, which is essentially a doctrine enshrined in common law and not in a fiscal statute.)

4.2 Literal approach

The point of departure in relation to the literal approach is that if the meaning of the words is perfectly clear or not ambiguous, interpretation becomes superfluous (Meyerowitz, 1957: 28). In terms of the literal approach, a statute should be construed in such a way that, if it can be prevented, no clause, sentence or word will be superfluous, void or insignificant, although this rule is not absolute.

In following a literal approach, South African courts have frequently referred to the ancient UK judgement of Parkington v The Attorney General 1869 LR 4 E&I App HL in which Lord Cairns referred to the strict and literal rule of interpretation as follows:

> *"if the person sought 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 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 may 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."

The courts in cases such as CIR v Simpson 16 SATC 268 and CIR v Frankel 16 SATC 251 referred to remarks made in the English case of *Cape Brandy Syndicate* where the court in that case stated that:

"it simply means that in a taxing Act one has to look at what it clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is said to be read in, nothing is to be implied. One can only look at the language used."

Consequently, the general principle of this approach is that the literal meaning is decisive and that there is little room for considerations of equity. Swanepoel (2014: 23-24) notes that it is contended by De Koker and Williams in the Memorial Edition of Silke on South African Income Tax that the South African courts may have taken the comments set out by the court in *Cape Brandy Syndicate* out of context. Preceding the statement set out above, the court noted the arguments of the counsel of the taxpayer and considered that:

"it is urged by Sir William Finlay that in a taxing Act clear words are necessary to tax the subject. Too wide and fanciful a construction is often sought to be given to that maxim, which does not mean that words are to be unduly restricted against the Crown, or that there is to be any discrimination against the Crown in those Acts."

Swanepoel (2014: 23-24) refers to the commentary in the Memorial Edition of Silke on South African Income Tax, where De Koker and Williams (2012: 10) suggest that the court may in fact have actually been concerned about the adoption of too literal an approach to the interpretation of fiscal statutes. Despite this notion, South African courts have seemingly ignored these comments in quoting the dictum of *Cape Brandy Syndicate* as favouring a literal approach to the interpretation of fiscal statutes.

In Savage v CIR 18 SATC 1 the court was required to consider whether a person was "*married*" for purposes of determining his tax liability. Schreiner JA noted the inherent difficulty with the underlying premise of the literal approach:

> *"…So, too, what 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."*

An example of strict interpretation which favoured the taxpayer is the case of CIR v Lunnon 1 SATC 7. *In casu,* the court was required to consider whether an amount, which a former director received as a gratuitous payment for the loss of his seat as a director and in recognition for the valuable services he has rendered in past years, constituted "*gross income*" for income tax purposes. In the Appellate Division, the court applied a strict approach and concluded that as the amount constituted a donation, it was capital in nature in the hands of the former director and was therefore not taxable. Goldswain (2008: 109) criticises this example of a strict form of interpretation on the basis that in these circumstances, the court's approach was so narrow that it failed to consider the link between the payment made and the services rendered.

Goldswain (2008: 109) cites Ochberg v CIR 5 SATC 93 as an example of a strict interpretation which was arguably unfair to the taxpayer. *In casu*, in exchange for rendering services to the company, the sole shareholder received additional shares in the company. De Villiers CJ represented the majority of the court in concluding that the value of the shares needed to be determined on an objective basis as if the shares had been issued to a third party. Consequently, despite the fact that the sole shareholder's value in its shareholding had not increased, he should still be subject to tax on an objective value of the shares he received.

On the other hand, the minority (per Stratford JA) held that the value of the shares in the hands of the sole shareholder needed to be considered on a subjective basis, *i.e*., the value of the shares should be determined with reference to their value in the hands of the sole shareholder. On the basis that the additional shares brought no increased

value to the sole shareholder, no amount was thus received or accrued for income tax purposes.

In ITC 830 21 SATC 305 (which referred to CIR v Simpson 16 SATC 268) and quoted with approval in subsequent cases, the court with reference to a judgement in Storm v Durban Corporation 1925 AD 49 followed a "*true"* literal approach in concluding that:

> *"…the primary rule of construction is that, where the language of an enactment is clear so as to admit of only one meaning, the court is bound to follow the literal sense, unless there is something in the Act itself indicating a contrary intention. Rules, like maxims, are however not all-embracing. As pointed out by my brother Solomon in Venter v R., 1907 T.S. at 919, the primary rule of construction does not always apply, for it may in a given instance be subject to qualification and restriction…"*

It is apparent from this judgement that the court was of the view that where a statute is expressed in clear, precise and unambiguous words, the court is not entitled to do anything else other than to interpret the words in their ordinary and natural sense. Thus, unless words and phrases are specifically defined in the legislation, they must be interpreted according to their ordinary meaning.

De Koker and Williams (2013: §25(1A)) point out that Nicholas JA in the Appellate Division case of R Koster & Son (Pty) Ltd and Another v CIR 47 SATC 23 considered the literal approach to be *"well established*". This court affirmed the principles of the literal approach set out in the preceding cases and held:

> *"That in construing a provision of the Act of Parliament the plain meaning of the language must be adopted unless its leads to some absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as a whole the court of law is satisfied the Legislature could not have intended."*

In the recent case of Defy Ltd v C: SARS 72 SATC 99, the court was requested to consider whether a particular provision granting an exemption from Secondary Tax on Companies in the case of a dividend declared by a company from proceeds arising from a capital profit derived by it, could similarly be applied in relation to the onward distribution of this dividend in the form of another dividend now declared and paid by the recipient shareholder. The basis for this view would be that the recipient

shareholder had incurred a cost in relation to its underlying investment, received a dividend on its underlying investment in the shares of the subsidiary and in so doing had earned a "*capital profit"* on its underlying investment. The effect of this approach would be that the profits giving rise to the original dividend could flow up two levels without attracting Secondary Tax on Companies (hereafter STC).

Nugent JA stated that the meaning of the word *"profit"* was instructive but noted that it was clear that the word *"profit"* was capable of being used in various ways to describe a gain, or advantage, or benefit of some kind.

In this regard, Nugent JA noted that:

> *"But like all language that is used in a statute, it must be construed in a particular context…"*

In this specific context, the court held that it was clear that "*profit"* meant the conversion of assets into cash via the disposal of assets in preparation for the dissolution of the company.

Nugent JA referred to the court *a quo* which had considered the *"contextual and purposive"* approach in reaching its conclusion in noting that:

> *"I have some difficulty with the idea that a construction of the parts of a statute can produce one result but a construction of the sum of its parts can produce another. It needs to be born in mind that a statute is not a statement of policy by the legislature that leaves the detail to be filled in by a court. It is policy that has been translated into law. If it has not been adequately translated I do not think that it is for courts to rewrite the statute. That would seem to me to strike at the heart of the rule of law."*

The literal approach is premised on the basis that the courts are largely seen to be the mere *"mechanical"* interpreters of the statutes (Botha, 2012: 95). On this basis, the courts do not carry out a law-making function as it can be safely assumed that the legislature has enacted all that it wanted to and it is also well aware of the existing law (Botha, 2012: 95). Consequently, it is the legislature's obligation to correct omissions and poor drafting in legislation. In this regard, the *casus omissus* rule forms the basis

of the general principle that no addition to or subtraction from the legislation is possible as it is the court's responsibility to interpret, and not make, legislation.

In C: SARS v BP Southern Africa (Pty) Ltd 68 SATC 229, Friedman JP stated:

> *"If it is possible to place a reasonable construction on the Schedules which does not lead to a casus omissus, while another construction does lead to that result, the construction which avoids such a result is to be preferred. The question then is whether it is possible to place a reasonable construction on the Schedule which avoids the casus omissus."*

With reference to the English case of Cowper Essex v Acton Local Board 1889 14 AC 153, the court in R Koster & Son (Pty) Ltd and Another v CIR 47 SATC 23 concluded that:

> *"The words of a statute should never in interpretation be added to or subtracted from, without almost a necessity."*

It is apparent that many of the tax courts have taken the view that the literal approach should be the preferred approach to interpretation. As part of this approach, the courts have also concluded that it is possible to depart from a literal interpretation where the ordinary grammatical language results in a material absurdity. In these circumstances, a court is entitled to depart from the ordinary meaning of the words to the extent necessary in order to eliminate an absurdity in giving effect to the true intention of the legislature.

The court in ITC 830 21 SATC 305 noted that:

> *" . . the principle we should adopt may be expressed somewhat in this way -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, 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 Legislature."*

It is seemingly clear that the literal approach was introduced in South Africa through the application of English common law and enjoyed support by South African courts

throughout the twentieth century. Meyerowitz, Emslie and Davis (2008a: 161) note that the literal approach held sway in South African until the late 20th century.

However, in line with the comments of Du Plessis (2002: 94) who concluded that crude literalism "*has probably reached its apogee and is on the wane*", it appears that since 2000 South African tax courts have generally sought not to invoke the literal approach.

4.3 Intention of the Legislature

The intention of the legislature is determined with reference to the language expressed in the legislation (Meyerowitz, 1957: 30). The issue which then arises is the extent to which courts may overcome a discrepancy between the language appearing in the legislation and the intention of the legislature.

In his editorial column published in 1957 in The Taxpayer, Meyerowitz (1957: 30-33) considers only three categories to be relevant in determining whether the intention of the legislature could overcome the words contained in the legislation. There are implications which arise by necessity, common anomalies and glaring or absurd anomalies.

With reference to an implication by necessity, Meyerowitz (1957: 30) cites the judgements of Centlivres CJ in CIR v Simpson 16 SATC 268 and Dibowitz v CIR 18 SATC 11 as authority for the view that a court could qualify the principle of literal interpretation on the basis that even in a fiscal statute, something might have to be implied by necessity. Meyerowitz (1957: 30) cites the case of Ernst v CIR 19 SATC 1 as being one such example.

In this case, the taxpayer sought to claim an allowance on expenditure incurred on a dwelling which was occupied by an employee and the issue was whether the disallowance of "*domestic expenditure*" referred to the taxpayer himself or to anyone. The taxpayer argued that the court should read the word *"his"* into the words before "*domestic expenditure*" to make it clear that it was *"domestic expenditure*" relating to the taxpayer which was excluded from application of the allowance. The taxpayer contended that a literal interpretation of the opening words of paragraph 17(1) of the Third Schedule to Income Tax Act as it then read, suggested that a farmer could claim

a deduction on expenditure incurred on a dipping tank built for someone else's use other than his own. Centlivres CJ agreed with this approach in relation to this specific issue and noted that it was implicit from the opening words when read with the general body of the Income Tax Act, that the farmer could only claim such deduction to the extent that it was incurred for his own farming operations. In this regard, Centlivres JA remarked:

> *"If the opening words of paragraph 17(1) are read, as I think they should be read, in this sense, there was no need for the Legislature to insert the word 'his' before farming operations in sub-paragraph (f)."*

However, the court noted that in construing legislation there is no justification for implying a word unless such implication is necessary to give effect to the intention of the Legislature – it must be plain beyond doubt that that the Legislature had such an intention. In relation to the reference to "*domestic expenditure*", there was nothing in paragraph 17 or the Income Tax Act itself to justify the implication of the word "*his*". It may have been possible that the Legislature intended to imply the word but mere possibility was insufficient. Consequently, expenditure incurred by the taxpayer on the dwelling occupied by an employee constituted "*domestic expenditure*" and the allowance could not be claimed.

Meyerowitz (1957: 30) refers to the decisions of the courts in Brownstein v CIR 10 SATC 199 (hereafter *Brownstein)* and Bell's Trust v CIR 15 SATC 255 (hereafter ***Bell's Trust***) as examples of circumstances where anomalies arise irrespective of the interpretation followed. In both instances, the courts acknowledged the existence of the anomalies which would arise and concluded that on this basis, it would not depart from a literal interpretation.

Bell's Trust related to the application of the so-called *"super tax*" on undistributed profits. A trust held shares in a company. The trust had five beneficiaries, all of whom were children of Mr Bell, two of whom were minors. In terms of the trust deed, the children who were majors enjoyed a vested right to any income accrued by the trust on the shares. The question to be decided was whether the majors were "*shareholders"* as envisaged in terms of the definition of shareholder in the Income Tax Act as it was then, in which case 3/5^{ths} of the profits of the company should not be subject to super tax in the hands of the trust as contended by the Commissioner, but

rather in the hands of these beneficiaries which would have yielded a beneficial outcome for these individuals. The court identified certain anomalies such as a scenario where a large dividend is declared and paid to a shareholder who thereafter sells his shares to another shareholder who then holds these shares at the end of the year of assessment of the company. The last mentioned person would then be liable for the super tax despite the fact that the selling party received a dividend free of tax. The court noted that anomalies will sometimes arise and the one in question would probably be taken into account in terms of how parties price a particular transaction. The court held in favour of the Commissioner in concluding that the major shareholders were only entitled to distributed profits whilst the trust would be required to be taxed on undistributed profits.

In the case of *Brownstein,* the court considered whether exemptions from an Ordinance that provided for both a personal income tax and a provincial income tax (with provincial tax being determined with reference to the taxpayer's income for the twelve months ending 30 June each year while an amount of income tax payable is based on an assessment for the preceding twelve months) only applied to personal tax. The list of exemptions was prefaced with the words *"any tax*". The Commissioner argued that if the court followed a literal approach all kinds of anomalies would arise such as that a minor who was assessed for income tax in a preceding year would still be required to pay provincial tax even though the minor had no income during the provincial year end. On the basis of the principle enunciated in Venter v R (1907), it was contended by the Commissioner that these anomalies were so "*glaring"* that a court should depart from the literal interpretation. Upon an analysis of all the facts, the court concluded that although anomalies existed, this was still not a case where a court could be justified in ignoring the literal interpretation on the basis that it does not lead to a result "*contrary to the intention of the Legislature as shown by context or by other considerations as the Court is justified in taking into account."*

Meyerowitz (1957: 30) concludes with reference to the principle enunciated in Venter v R 1907 TS 910 and recognised in the tax case of CIR v The Galena Oil Co., Ltd 5 SATC 26 that in the case of glaring anomalies, a court would be entitled to depart from the ordinary effect of the words to the extent necessary to remove the absurdity and be afforded a discretion to give a true effect to the intention of the Legislature.

In the case of CIR v the Galena Oil Co., Ltd 5 SATC 26 the issue related to whether the Cape Province could impose tax on the importation of goods where the defendant (taxpayer) imported goods into the Cape Province where the taxpayer had its head office in the Transvaal province. In order to successfully impose the tax, the goods had to be "*for sale within the Province".* It was contended that a literal interpretation of these words would lead to absurd results on the basis that if the importer sold to a Johannesburg customer whilst on business in Johannesburg no liability would arguably arise whilst if the same importer sold to a Johannesburg customer in Cape Town the tax would arise. The court concluded that these absurdities were insufficient to justify a departure from the clear language of the law. The court further noted that a tax of this kind was peculiar and in dealing with it the language to be used to circumscribe its precise limits require careful consideration. Despite the fact that difficulties in interpretation arise, this does not mean that a court can simply depart from the literal interpretation.

It is apparent that these now relatively dated judgements, that courts have interpreted reference to a glaring absurdity to mean an exceptional circumstance.

De Koker and Williams (2013: §25(1B)) confirm the approach described by The Taxpayer and note that in circumstances where courts have found wording in the legislation to be uncertain, ambiguous or absurd, they have tended to depart from the strict literal approach and have attempted to establish the intention of the legislature. The purpose of this approach has been to understand the policy in enacting the provision and interpreting it in a manner which is consistent with the reason why it was introduced (De Koker & Williams, 2013: §25(1B)).

De Koker and Williams (2013: §25(1B)) refer to the judgement in *Glen Anil* as the clearest example of this approach where the court held that:

> *"if the language of the statute is not clear and would be nugatory if taken literally, but the object and the intention are clear, the statute must not be reduced to a nullity merely because the language used is somewhat obscure."*

The court then continued to rely on a reference to an English legal principle which had been previously supported by Centlivres CJ in Minister of Labour v Port Elizabeth Municipality 1952 2 SA 522 (A) which is that:

> *"It may in certain circumstances be permissible to supply omitted words or expressions and it is clear from what the learned Chief Justice said… that it would be necessary to do in order to give effect to the clear intention of the legislature."*

De Koker and Williams (2013: §25(1B)) indicate that this could mean that, depending upon the circumstances, a court could give either an expansive or restrictive meaning to a word or phrase. De Koker and Williams (2013: §25(1B)) cite the decision in CIR v Kuttel 54 SATC 298 as an example of the court applying a restrictive meaning to the words "*ordinary resident"* on the basis that an expansive meaning would have defeated the policy of introducing the concept of an *"ordinary resident".* In this regard, the legislature's policy in extending concessions to those not ordinarily resident in South Africa is to encourage them to invest their money in South Africa.

Conversely, the court found in favour of an expansive interpretation in the case of SIR v Safranmark 43 SATC 235 which related to the phrase "*in the process of manufacture"* in the context of whether machinery used by the taxpayer (who held a Kentucky Fried Chicken franchise) to cook and prepare the final product was used "*in the process of manufacture*".

It was important to note that the final product differed from its various components in nature, utility and value and that all activities were carried out for the purpose of the taxpayer's trade.

The majority of the court held that:

> *"the detailed process evolved, prescribed and insisted upon by Safranmark was calculated to result in a new and distinctive product recognizable as such and the evidence shows that that has been achieved. The circumstance that what is fundamentally involved in the production is the cooking or frying of raw chicken is not a bar to acceptance of the process as one of manufacture."*

De Koker and Williams (2013: §25(1B)) refer to the cases of CIR v Kuttel 54 SATC 298 and SIR v Safranmark 43 SATC 235 as examples of a subtle shift over a lengthy period of time by the judiciary from the strict literal approach applied in earlier cases such as CIR v Lunnon 1 SATC 7 and Ochberg v CIR 5 SATC 93.

Furthermore, Goldswain (2008: 113) argues that decisions such as Welch's Estate v C: SARS 66 SATC 303 is an example of where a court's resort to determining the intention of the Legislature becomes very close to an actual purposive approach to the interpretation of statutes, thereby resulting in an overlap between the different approaches.

The facts in Welch's Estate v C: SARS 66 SATC 303 dealt with an attempt by the South African Revenue Service (hereafter SARS) to impose donations tax on a court sanctioned payment made by a spouse to a trust for the maintenance of an ex-spouse in terms of a divorce order. The Appellate Division considered the meaning of a donation and narrowed the meaning to something which includes the elements of *"pure liberality"* or "*disinterested benevolence"* as required in terms of South African common law. Consequently, the payment was not held to be a donation for income tax purposes.

4.4 Application of the *contra fiscum* rule

The cases which have pursued a literal approach to interpretation clearly indicate the ordinary meaning of the words should be followed unless an ambiguity arises. Should a taxing statute reveal an ambiguity, the *contra fiscum* principle must be applied in finding in favour of the taxpayer. This position is only reached when a provision of the Income Tax Act is reasonably capable of two constructions, the court will place the construction upon it that imposes the lesser burden on the taxpayer. (However, as set out above, and before reaching this point, a court will be motivated to find a reasonable interpretation to the words.) The *contra fiscum* rule is discussed in more detail in Chapter 6 of this report.

4.5 Purposive approach

De Koker and Williams (2013: §25(1C)) conclude that Steyn J in ITC 1384 46 SATC 95 is generally regarded as having been first to clearly apply a purposive approach to the interpretation of tax legislation. This case dealt with the application of the Estate

Duty Act and whether it was possible that a testatrix could claim a "*double"* deduction for the same amount albeit in terms of two difference provisions of the legislation.

De Koker and Williams (2013: §25(1C)) record that Steyn J emphasised, with reference to the work of Steyn, Die Uitleg van Wette published in 1974, that the court's main objective is to ascertain the intention of the legislator which is primarily sought in the language he chose to use. Once this has been determined, and unless the contrary is evident from the terms of the measure itself, the legislator is presumed not to have intended an unfair, unjust or unreasonable result. Consequently, the court should interpret a statute as unoppressively as possible.

Steyn J drew a distinction between the strict, literal approach followed by the court in CIR v Simpson 16 SATC 268 and a so-called "*new approach"* which focussed primarily on the intention of the Legislature in reaching a more equitable outcome for the taxpayer. In particular, Steyn J noted the developments in England where until the 1960s, courts interpreted fiscal legislation narrowly and unless the position of the taxpayer was clearly covered within the rules, tax was otherwise not payable. However, by the mid 1960s, English courts sought the meaning of tax provisions with reference to the whole purpose of the section or Act, rather than the actual words used.

Steyn J described this "*new approach*" as follows:

> *"But even if the legislature was mindful of the common law rule and therefore satisfied that a competence to issue additional assessments on the same return was by necessary implication conferred in the Act, the statute would nevertheless 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, and not as emanating from some revenue-hungry Dracon, but as coming from a reasonable lawgiver intent even in matters fiscal, upon ordering its community fairly and justly."*

Steyn J continued:

> *"Taxing acts have by their very nature great social import and may therefore cause great damage to the aforementioned vital social requirement if unwisely*

framed and improperly administered . . . Fiscal statutes are, as stated above, not a specially privileged category of legislation and must be approached and dealt with in the same manner as other statutes. Nor is there any special virtue in revenue-raising measures, and the oft-repeated remark that there is no 'equity' in tax laws merely underlines that fact and certainty does not mean that fairness must make way for administrative expediency or fiscal advantage."

It is submitted that although Steyn J clearly identifies an approach which is neither strict nor literal, such approach would not necessarily satisfy the theoretical requirements of a purposive approach. It would appear that Steyn J's continued reference to "*equity*" in the judgement was possibly a motivation to soften the potential harshness of a strict literal approach to the interpretation of fiscal statutes.

In the case of Richards Bay Iron & Titanium Ltd and Another v CIR 58 SATC 55, the court needed to consider the meaning of "*trading stock"* and whether certain the stockpiles of material in the course of its operations carried on for extracting and exploiting minerals from sand dunes constituted "*trading stock"* which would otherwise be required to be added back to its taxable income. In this regard, Marais JA considered whether on a purposive basis, the court should restrict the ambit of the definition of trading stock given the generality of the language employed and the need to restrict the meaning to what was envisaged by the Legislature. The court concluded that given that the Legislature had deliberately chosen to extend the concept of trading stock beyond its colloquial ambit there was no restricted purpose of the legislation which was so apparent that it needed to be given effect to.

It would seem that the court did consider the purposive approach, but ultimately chose to follow the perceived intention of the Legislature which seemed to promote a very broad definition.

The so-called purposive approach to interpretation of fiscal statutes remained largely unsupported in Supreme Court of Appeal until the case of C: SARS v Airworld CC 70 SATC 48 (hereafter *Airworld)*.

In the terms of the facts relating to this case, a company had advanced interest-free loans to a discretionary trust in which the shareholder of the company was a beneficiary. The issue confronting the court was whether this was a deemed dividend

for STC purposes. A deemed dividend would arise to the extent that the trust was a "*recipient"* for purposes of section 64C(1) of the Income Tax Act as it read then, it being noted that section 64C(1) was a specific anti-avoidance provision. The trust would be a recipient to the extent that a shareholder was a beneficiary in relation to the trust. The question before the court was whether a "*beneficiary"* included a contingent beneficiary.

The court sought to first identify the "*mischief"* giving rise to the introduction of the legislation. In this regard, Hurt AJA stated at 23, that:

> *"…the legislator in this imperfect world must ever be alert to thwart the relentless ingenuity of accountants, tax consultants, lawyers and even the lay person, by anticipating possible ways and means by which the prescripts of tax legislation might be avoided. And that was the obvious purpose behind the inclusion of section 64C."*

Hurt AJA stated that, as a starting point, in the case of interpretation of statutes, including fiscal legislation, the court needed to interpret the legislation by ascertaining what the legislature intended and that the first part of the process of interpretation must be to consider whether the meaning of the words is clear.

Hurt AJA continued and noted:

> *"…the question is whether the word, properly considered in its context, is … ambiguous. Most of the rules of interpretation have been devised for the purpose of resolving apparent ambiguity and arriving at an interpretation which accords as well as possible both with the language which the Legislature has used and with the apparent intention of with which the Legislature has used it. 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."*

The court then referred to the decision in Standard General Insurance Co Ltd v Commissioner for Customs and Excise 2004 2 SA 376 (SCA) where this court had in

turn referred to the court in De Beers Marine (Pty) Ltd v C: SARS 65 SATC 14 where that court concluded that a word must "*take its colour, like a chameleon, from its setting and surrounds in the Act".*

Hurt AJA ultimately concluded that the purpose behind the provision was clear – in these circumstances, the legislator did not intend to give the word a restricted meaning. Consequently, Hurt AJA in the majority judgement found against the taxpayer.

Meyerowitz, *et al*. (2008b: 225) is critical of Hurt AJA's comment that the "*usually clear or easily discernible"* purpose of legislation can be ascertained and used "*in conjunction with the appropriate meaning of the language of the provision*". Meyerowitz, *et al.* (2008b: 225) note that in many difficult cases this may not be easily achieved. The question posed by the Taxpayer (2008b: 225) is how does one establish the purpose of the legislation if not with reference to the language of the statute as a whole and the language of the specific provision being interpreted? Meyerowitz, *et al.* (2008b: 225) suggest that other than consulting background information such as the explanatory memorandum, the only way of ascertaining the purpose of legislation is with reference to the language as a whole. Consequently the legislative purpose and the meaning of the language are not necessarily independent enquiries, but rather part of one and the same quest in deriving the intention of the Legislature. Meyerowitz, *et al.* (2008b: 225) remark that if the purpose of the legislation is clear and easily discernible, it is unlikely that material issues would arise in the context of interpreting fiscal statutes as it stands to reason that any particular provision should be construed in the light of the purpose and any apparent ambiguity resolved on this basis.

Meyerowitz, *et al.* (2008b: 225) continue to note certain problem areas in the context of purposive interpretation and records that it may be possible in the context of fiscal legislation that the purpose of the legislation cannot be identified. A general purpose may be identified but in the context of a specific provision, this may not be useful. Alternatively, it may be possible for words to give effect to general constructions which in turn also give effect to the general purpose of the legislation. Even where the purpose is clearly identified, the question remains how far a court should proceed in permitting the legislative purpose to override other rules of statutory interpretation such as an interpretation which results in an absurdity.

Meyerowitz, *et al.* (2008b: 225) notes that it is does not suggest that the purposive construction followed by the majority of the court in *Airworld* is wrong, but merely points out that this approach is not without its own limitations. Meyerowitz, *et al.* (2008b: 228) points to the reference by Hurt AJA that the purpose of the provision was to disguise what was "*in truth a dividend distribution"* as some other form of transaction and questions whether an interest-free loan could ever be regarded to be the payment of a dividend.

The issue implicitly raised by Meyerowitz, *et al.* (2008b: 224-228) in The Taxpayer is that the court needs to carefully consider whether it wholly comprehends the purpose of the legislation which it should determine from the words and the context within which they appear. Meyerowitz, *et al.* (2008b: 228) concludes that:

> *"Legislative purpose is to be found in the meaning of the words of a statute, not the meaning of the words of a statute in the legislative purpose, save to the extent that such purpose is itself embodied in the words of statute as a whole."*

In Metropolitan Life Ltd v C: SARS 70 SATC 162 (hereafter *Metropolitan Life*), the Cape High Court was called upon to consider whether section 11(2)(k) of the Value-Added Tax Act, No. 89 of 1991 (hereafter the VAT Act) or section 14(5)(b) applied in the context of certain imported services by foreign service providers which were rendered to Metropolitan, the South African taxpayer. (Metropolitan Life was a life insurance company and its main business involved the provision of life insurance to both local and international clients. Pursuant to its business, Metropolitan Life made use of various overseas consultants, business advisors and computer services.)

Unlike the position in the case of *Airworld*, the court was not called to interpret a specific anti-avoidance provision.

If section 11(2)(k) prevailed, the international supplies sought to be zero-rated whereas in terms of section 14(5)(b) they did not qualify for zero rating treatment but rather for Value-Added Tax (hereafter VAT) at the standard rate. In this regard, the taxpayer argued that section 11(2)(k) referred to zero-rating where the services are simply rendered elsewhere other than in South Africa.

However, section 14(5)(b) stated that no tax on imported services would be chargeable in respect of a supply which, if made in South Africa, would be zero rated. It was clear

that the services supplied to Metropolitan, if made in South Africa, would not have been zero rated.

Davis J noted that tautologous legislation is not unknown. However, it is preferable to seek to construe a statute so as to make sense of it in its entirety. The court then considered the amendment set out in the Explanatory Memorandum in 1997 which was marked as *"textual".* On this basis it appeared unlikely that the Legislature intended making this amendment to change the very nature of the relationship between section 14(5)(b) and section 11(2).

The court continued and noted that when faced with competing meanings to both section 11(2) and section 14(5), a court should follow the approach of Hurt AJA in *Airworld* and the interpreter should endeavour to arrive at an interpretation which gives effect to such purpose.

Davis JA concluded that:

> *"This dictum supports the approach that the Act ... should be interpreted purposively and holistically and that provisions should be given a clear meaning whenever plausible. This in both ss 11(2)(k) and 14(5)(b) can be made to do work within the scheme of the Act, that must constitute the preferred interpretative approach."*

Subsequent to the judgement in *Metropolitan Life*, a tax court had an opportunity to consider the application of the purposive approach to interpretation.

In ITC 1858 74 SATC 173 the court needed to consider how specific lump sum retirement benefits paid to a member should be taxed given how the legislation applied at that time. With reference to various explanatory memoranda, the taxpayer attempted to argue that contributions made before certain changes to legislation effected in 1998 should have been taken into account by SARS.

Fabricius J noted that even taking the constitution into account, legislation should still have its language respected. In this regard:

> *"Legislation does not mean whatever we may wish it to mean… One cannot subvert the words chosen by Parliament either in favour of the spirit of the law, or by referring to background policy considerations which were not reflected in*

the language of the particular statute itself. The legislative authority of the Government is vested in Parliament. Parliament exercises its authority mainly by enacting Acts. Acts are expressed in words. Interpretation concerns the meaning of words used by the legislature and it is therefore useful to approach the task by referring to words used, and to leave extraneous considerations for later."

With reference to Public Carriers Association and Others v Toll Road Concessionaries (Pty) Ltd and Another 1990 1 SA 925, the court then noted that:

"it is abundantly clear that although it has been said that our law is an enthusiastic supporter of 'purposive construction', the purpose of a statutory provision can provide a reliable pointer to the intention of the legislature but only where there is an ambiguity."

On the basis that the provisions were plain and unambiguous, the court gave effect to the ordinary and grammatical meaning of the words.

Fabricius J referred to the words of Corbett JA in AG, Eastern Cape v Blom and Others 1988 4 SA 645 wherein Corbett JA stated:

"In my opinion our courts too are entitled, when construing the words of a statute which are not clear and unambiguous, to refer to the report of a judicial commission of enquiry whose investigations shortly preceded the passing of statute in order to ascertain the mischief aimed at provided that there is a clear connection, between on the one hand, the subject-matter of the enquiry and recommendations of the report, and, on the other hand, the statutory provisions in question."

Fabricius J concludes that it is only where legislation is unclear and ambiguous that courts should have regard to background material such as explanatory memoranda. Where legislation was clear and unambiguous, there was no grounds for "*reading in"* other wording to achieve another meaning.

In his conclusion dealing with the application of the purposive approach, Goldswain (2012b: 38) argues that other than background material such as explanatory memoranda, the purposive approach also requires a consideration of the history of the

provision, its broad objects, and its interrelationship with other provisions of the statute while not violating the precise wording of the provision.

4.6 Conclusion

It is clear from the above references that the literal approach still enjoys much support from the courts. However, as set out in the earlier discussion of the literalism approach, its shortcoming have been shown up to an increasing extent in constitutional interpretation and, as noted by Du Plessis (2002:103), this is bound to impact (and has already done so) this basis for statutory interpretation.

With reference to South African case law relating to the period prior to the introduction of the Constitution in 1994, De Koker and Williams (2013: §25(1A)) remark that where courts have followed an approach which downplays the importance of "*equity",* it needs to be remembered that taxpayers would enjoy the overarching protection of the Bill of Rights contained in the Constitution should a court pursue this approach in the constitutional era.

It is also clear from the above analysis that South African courts have followed a purposive approach to the interpretation of fiscal statutes. However, it is also readily apparent that the courts have been inconsistent in how they chose to follow a particular approach. In this regard, it may also be pragmatic to place both the literal and intentional (intention of the legislature) approach in one category given that the courts have sought to understand the literal meaning of the words and when seeking the intention of the legislature have generally attributed the literal interpretation to be the intention of the legislature. However, it is clear that when pronouncing on a purposive approach, support for this approach has been drawn from previous case law which also referred to determining the intention of the Legislature.

It is doubtful whether De Koker and Williams (2013, §251D) is technically correct to describe Steyn J's approach as being an application of the purposive approach. Steyn was arguably applying the "*mischief rule"* but only after it became apparent that the literal meaning of the words resulted in an ambiguity. It is submitted that Steyn J's approach in ITC 1384 46 SATC 95 was possibly more of an attempt to offer an alternative to a strict literal approach as opposed to the adoption of a purposive

approach. The cases noted in the chapter certainly reflect a trend over time away from a strict literal approach to one which is either contextual or purposive in nature.

It is noteworthy that neither of the two lauded tax cases favouring an apparent purposive approach, namely *Airworld* and *Metropolitan Life*, refer to the Constitution as providing any legal basis for following a purposive approach. Instead, these cases refer to previous fiscal case law where the courts broadly referred to determining the intention of the Legislature and giving effect thereto. On this basis, both courts concluded that they would follow the so-called purposive approach in reaching their conclusions, yet neither of these cases set out in any detail how far a court may actually proceed in assessing the purpose of legislation with little insight into the theoretical basis for this approach other than the purpose of the legislation was important in guiding the court on its interpretative journey. Fabricius J makes a point where he states in ITC 1858 74 SATC 173 that it appears that previous courts had incorrectly applied the so-called purposive approach. In fact, it was not clear to him what the purposive approach encompassed.

A common thread between all cases considered in this chapter is that the courts all appear to favour the approach that if the words contained in a provision are clear and unambiguous and presumably no absurdity arises, effect should be given to these words. The risk with this approach was identified in Savage v CIR 18 SATC 1 where the court noted that what is clear to one party may not necessarily be clear to another party. Only in the event of ambiguity, should the court consider an approach of how it should interpret the legislation.

The following chapter refers to Schreiner JA's minority judgement in *Jaga v Dönges* and also recent constitutional case law and other judgements handed down in the Supreme Court of Appeal where the courts have expressly set out the principles of statutory interpretation. It is seems apparent that courts considering fiscal issues will be obliged to consider these issues going forward, with the resultant effect that fiscal statutes should be interpreted in a consistent manner.

Chapter 5: *Jaga v Dönges* and beyond

5.1 Introduction

Chapter 4 referred to various South African tax cases where the court followed a purposive approach in interpreting legislation. It is noticeable that these cases do not provide any detailed analysis supporting why the purposive approach should be the preferred alternative to consider in the context of interpreting statutes. This Chapter attempts to source the origins of the purposive approach to the current position in South African common law.

Schreiner JA's minority judgement in *Jaga v Dönges* has often been hailed as the first real attempt by South African courts to consider a purposive approach to the interpretation of statutes. This judgement has been cited with approval in various cases but most notably, in the context of statutory interpretation, in the cases of *Bato Star Fishing* and *Natal Joint Municipal Pension Fund*. Given the importance of these cases and the implications for the basis of statutory interpretation in future years, the facts of these cases and the majority and minority (where relevant) judgements are briefly set out below.

5.2 Facts of *Jaga v Dönges*

In terms of the facts of this case, a government Minister had declared a person, who had been convicted of an offence and who had received a suspended sentence of imprisonment, an *"undesirable inhabitant*" of the Union of South Africa. This decision was based on the fact that this person had received a suspended sentence for certain actions. The legislation which granted the Minister the capacity to make such a declaration only entitled the Minister to make these decisions where the person had been "*sentenced to imprisonment*". The question before the court was whether a "*suspended sentence"* constituted "*sentenced to imprisonment*" within the context of the legislation.

5.3 Dominant interpretative approach before 1994 as followed by the majority in *Jaga v Dönges*

In interpreting the legislation, the majority held that a strict literal approach should be followed with a focus on the immediate text arising in the legislation. The court considered the words and held that "*sentenced to imprisonment*" was sufficiently broad to include circumstances where an accused received a suspended sentence.

The approach followed by the majority in this case was no different to the so-called *"orthodox text-based approach"* or literal approach described in earlier chapters and first considered by the courts in Venter v R 1907 TS 910 where the court held that the "*plain meaning"* of the words should be sought. To the extent that the "*plain meaning"* of the words was ambiguous, vague or misleading, or where the literal meaning of the words would result in an absurdity, the court could deviate from the literal meaning in order to avoid the absurdity.

5.4 The alternative interpretative approach followed by the minority in *Jaga v Dönges*

Schreiner JA in the minority decision followed what Botha (2012: 98) refers to as the "*text-in context*" or purposive approach.

In his judgement, Schreiner JA points out that context:

> "*…is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background."*

In his judgement, Schreiner JA postulated two approaches to interpretation. The first is to determine whether the language to be interpreted has only one clear ordinary meaning and to then confine a consideration to the context only to cases where the language appears to admit of more than one meaning. Alternatively, the interpreter may from the beginning consider the context and language to be interpreted together in reaching an interpretative determination. Schreiner JA concluded that the outcome should be the same in both cases.

Schreiner JA continued to state that ultimately, when the meaning of the language in the context is ascertained, it must be applied regardless of the consequences. Specifically, interpretation should not be restricted to "*excessive peering*" at the language to be interpreted without sufficient attention to the contextual scene or background.

Schreiner JA took the view that it was reasonable to suppose that Parliament, when it required that the person in question should have been sentenced to imprisonment, had in mind that this would provide some objective guarantee that this kind of person was undesirable. However, the judge pointed out that it was important to note that the legislation did provide for suspended sentences which were subject to certain conditions. This scenario differed markedly from an unconditional sentence on the basis that a court had consciously decided not to send the person to prison. When interpreting the provision, the context needed to be taken into account. On these facts, "*sentenced to imprisonment"* should rather mean unconditionally sentenced to imprisonment. In the case of a suspended sentence, only when the requisite conditions are fulfilled, is the person unconditionally sentenced to imprisonment. On this basis, "*sentenced to imprisonment"* did not include a suspended sentence.

It is submitted that Schreiner JA's conclusion that, where one clear meaning is ascertainable, no further effort is required to interpret the legislation and that this approach would always yield the same outcome as one where an interpreter considers the context and language together from the outset of the interpretative process, is arguably incorrect. Du Plessis (2002: 114) comments that this is unlikely to be correct assuming that Schreiner JA endorsed an approach whereby, once the literal meaning based on the words was understood, the interpretative process came to an end.

However, it is readily apparent that Schreiner JA followed an approach far broader than a strict, literal basis to interpretation and that this arguably formed the basis for courts to follow a similar approach in later years.

5.5 The *Bato Star Fishing* judgement: the application of section 39(2) of the Constitution

The constitutional case of *Bato Star Fishing* related to a constitutional issue with an attempt by the applicant to access a greater share of the quotas provided by government to the various operators within the South African fishing industry. Legislation which referred to the basis of the quota allocation was introduced in the Marine Living Resources Act, 18 of 1998 (the Marine Act). In this regard, section 2 of the Marine Act set out certain objectives of the legislation. Specifically, subsection 2(j) mentions the:

> *"need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry."*

The Marine Act also requires that the Minister and any organ of state shall in exercising any power under this Act, *"have regard to"* the various objectives and principles set out in the legislation.

The applicant argued that the Chief Director, when exercising his discretion to allocate the fishing quotas, did not properly consider subsection 2(j) of the Marine Act thereby resulting in the application receiving a lesser quota than he should have.

The High Court held in favour of the applicant whilst the SCA held that "*have regard to"* meant *"to guide and not to fetter"* and that the Chief Director had properly taken section 2(j) into account.

5.6 Constitutional Court's analysis

After a detailed discussion of the evidence and how the various provisions of the Promotion of the Administration of Justice Act would apply, O' Regan J in the main judgement concluded that the Chief Director had considered the various principles and objectives of section 2 of the Marine Act and that the applicant should not be successful.

However, Ngcobo J issued a dictum supporting the main judgement while also explaining how reference to subsection 2(j) should be interpreted. More specifically,

Ngcobo J noted that the critical issue was to decide how the phrase "*have regard to"* should be understood in the context of the Constitution and the Marine Act and that this exercise was essentially one of statutory interpretation.

Ngcobo J noted that the Constitution is the supreme law of the country and must therefore be the starting point when interpreting any legislation with the command of section 39(2) of the Constitution being that every court "*must promote the spirit, purport and objects of the Bill of Rights*" when interpreting any legislation.

Ngcobo J noted two propositions inherent within this approach. Firstly, that the interpretation placed upon a statute must, where possible, be one that would advance at least an identifiable value enshrined in the Bill of Rights. Secondly, the statute must be reasonably capable of such an interpretation.

When considering whether the Marine Act imposes an obligation to comply with section 2(j), Ngcobo J noted that the SCA had first determined the ordinary meaning of "*have regard to"* in commencing its analysis. In this regard, the SCA had interpreted this phrase to mean *"bear in mind*" or "*not overlook them".*

Ngcobo J stated that in the new order, post the introduction of the Constitution, the phrase should rather be interpreted by the context in which it occurs. In this case, the context is the statutory commitment to redressing the imbalances of the past. Consequently, the phrase as it relates to in section 2(j) should be interpreted purposively to "*promote the spirit, purport and objects of the Bill of Rights."*

In supporting this view, Ngcobo J then proceeded to quote an excerpt from Schreiner JA's dissenting minority judgement in *Jaga v Dönges*. The judge noted that the technique of paying attention to the context of legislation is now specifically required by the Constitution.

Ngcobo J also referred to the judgement by the Constitution Court in the case of In Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2001 (1) SA 545 (CC) where the court concluded that the meaning and the interpretive role of section 39(2) is:

"…that all statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole."

Ngcobo J therefore concluded in favour of a contextual approach to interpretation of statutes. This approach enunciated by Ngcobo J was, *inter alia*, specifically referred to in the case of *Natal Joint Municipal Pension Fund* wherein the court attempted to describe how legislation should be interpreted in the context of the Constitution.

5.7 Facts of *Natal Joint Municipal Pension Fund*

By way of background to this case, two pension funds and one provident fund (hereafter the Fund) were established by legislation for employees of local authorities in KwaZulu-Natal, all of which were regulated in accordance with a single set of regulations. In addition, each fund had its own set of governing regulations dealing with the operation of that fund and these regulations in particular, dealt with the contributions payable to that fund by members and employers and the benefits due to members of that fund. The Endumeni Municipality, the respondent in the appeal, was a participant in the Fund and its employees were entitled to select which of the three funds they joined. The dispute arose as a consequence of an attempt by the Fund to recover an adjusted contribution imposed on the municipality under the regulations governing the Fund.

An individual had essentially manipulated rules by changing membership within the three funds and upon re-joining a new fund, increased his pensionable emoluments substantially. The individual resigned from his employment a year later and became entitled, in terms of the rules of the fund, to be credited with several years of service

not actually performed, thereby increasing his lump sum withdrawal benefit. The issue for the Fund was that as it had not received the benefit of contributions for the additional years allocated to the individual and was consequently out of pocket and hence sought to claim the additional amount from the employer.

A key issue related to how the regulations should be interpreted. This regulation provided that the local authority concerned was obliged to pay to the Fund, within a specified time period, certain amounts which obligation would arise "*should … the pensionable emoluments of a member … increase"*. The Fund argued that when the individual rejoined the Fund and adjusted his pensionable emoluments upwards, there was an increase in the individual's pensionable emoluments in excess of that assumed by the actuary in making his most recent valuation of the Fund and that this increase required that Endumeni pay an adjusted contribution to the Fund. Endumeni argued that the regulation could not be interpreted on this basis. Rather, it referred to a scenario where an employee's pensionable emoluments increased on the usual, annual basis in line with an increase in remuneration. Any deemed increase of pensionable emolument when a participant joined the Fund should not be taken into account.

The court then under a sub-heading entitled "*proper approach to interpretation*" sought to interpret the regulations.

In the court *a quo*, the trial judge had held that the general rule applied when interpreting statutes is that the words used are to be afforded their ordinary grammatical meaning unless they lead to absurdity. With reference to context, the trial judge concluded that:

> *"A court must interpret the words in issue according to their ordinary meaning in the context of the Regulations as a whole, as well as background material, which reveals the purpose of the Regulation, in order to arrive at the true intention of the draftsman of the Rules."*

The court on page 14 of the SCA judgement noted that the approach followed by the court *a quo* suffered from an *"internal tension*" because it does not indicate what is meant by the "*ordinary meaning*" of words, whether or not it is influenced by context, or why, once ascertained, this would coincide with the *"true"* intention of the draftsman.

The court then concluded on its view of the present state of law as it applied to the interpretation of statutes.

In this regard, Wallis JA noted on page 14, paragraph 18 that:

> *"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document."*

Despite formulating this approach, Wallis JA continued on page 15, paragraph 18 that:

> "*Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation… The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."*

With reference to Schreiner JA's minority judgement, Wallis JA confirmed on page 16 paragraph 19 that in his view the approach he describes:

> *"…is consistent with the 'emerging trend in statutory construction'. It clearly adopts as the proper approach to the interpretation of documents the second of the two possible approaches mentioned by Schreiner JA in Jaga v Dönges NO and another, namely that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow, without the need to cite*

authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate. The path that Schreiner JA pointed to is now received as wisdom elsewhere."

Wallis JA on page 17, paragraph 20 was severely critical of the reference in the court *a quo* to the intention of the legislature. The learned judge noted that many judges and academics have pointed out that there is no basis for understanding what meaning members of Parliament or other legislative body intended to attribute to a particular legislative provision. This issue is even more acute where these parties had no real understanding of the issues at hand. In this regard, to mention an intention of parliament is "*entirely artificial".*

Wallis JA on page 19, paragraph 21 continued to state that there is:

"…no such thing as the intention of the legislature in relation to the meaning of specific provisions in a statute, particularly as they may fall to be interpreted in circumstances that were not present to the minds of those involved in their preparation. Accordingly to characterise the task of interpretation as a search for such an ephemeral and possibly chimerical meaning is unrealistic and misleading."

Wallis JA on page 20, paragraph 22 points out that in his view the problem with reference to the intention of the legislature is that at one extreme it leads to strict literalism and prevents a consideration of matters beyond the "*ordinary grammatical meaning"* of the words. At the other end of the spectrum, it entitles judges to apply it in order to justify first determining the divine "*intention*" of the legislature and thereafter adapting the language of the provision to justify the pre-determined conclusion. Clearly, in such instance such an approach involves a disregard for the proper limits of the judicial role. Rather, the proper approach is to read the words used in the context of the document as a whole and in the light of all relevant circumstances from the outset. This, according to Wallis JA, is how people use and understand language and it is sensible, more transparent and conduces to greater clarity about the task of interpretation for courts to do the same.

Wallis JA on page 22, paragraph 25 records that there is no set formula which will determine which interpretational factors will predominate in any given situation. In most cases, the court will be confronted with two or more possible meanings that are to a greater or lesser degree available on the language used. The literalists may conclude that the language is ambiguous but Wallis JA notes that the only ambiguity lies in selecting the proper meaning (on which views may legitimately differ).

In casu, the court concluded that the purpose of the proviso was to address the problem of excessive increases in pensionable emoluments which could result in a funding deficit. Consequently, the expression "*should … the pensionable emoluments of a member … increase"* should be understood to include both actual increases and increases from the imputed level of pensionable emoluments at the time a member transfers into the Fund.

5.8 Impact of *Natal Joint Municipal Pension Fund* on subsequent tax cases

Although none of the cases referred to in this chapter dealt with tax issues, it is submitted that these cases will be instructive in how tax courts consider the basis of statutory interpretation in relation to fiscal issues going forward. This is already borne out by the fact that in the ABC (Pty) Ltd v C: SARS Case No. 13512, the court affirmed the principles set out in Wallis JA's judgement in *Natal Joint Municipal Pension Fund.*

In the case of ABC (Pty) Ltd v C: SARS Case No. 13512, SARS assessed the taxpayer for STC in terms of section 64B(2) of the Income Tax Act on the basis that certain loans made by the taxpayer were loans as contemplated in section 64C(2)(g). In terms of section 64C(2)(g) of the Income Tax Act, loans made to shareholders or connected persons in relation to such shareholders, were deemed to be dividends and therefore subject to STC.

The taxpayer was a wholly-owned subsidiary of a trust. The taxpayer was part of what the court referred to as *"loosely"* a group in terms of which the trust was the central entity. The taxpayer was a property-owning company as well as a treasury company. Interest-free loans were made to the taxpayer by various entities, and the taxpayer in turn advanced interest-free loans to certain borrowers. It was clear from the evidence that the taxpayer never employed its own income or profits to fund outgoing loans and

incoming loans on balance exceeded outgoing loans. The court found based on evidence that it was a tacit term of the loans received by the taxpayer that these proceeds would be advanced interest free to certain borrowers. The loans made by the taxpayer were the subject of the dispute.

The taxpayer did not dispute that the loans were made to its shareholders or connected persons in relation to its shareholders, but relied on an exemption contained in section 64C(4)(bA) of the Income Tax Act.

Section 64C(4)(bA) provided that there will be no deemed dividend:

> *"…to the extent of any consideration received by that company in exchange for –*
>
> *(i).. the cash or asset distributed, transferred or otherwise disposed of; or*
>
> *(ii). any other benefit granted as contemplated in subsection (2)…"*

The taxpayer argued that, in advancing the loans, none of its profits were distributed on the basis that it merely acted as a conduit in relation to the loans which it received.

SARS contended that, for the loans to qualify for exemption, the loans had to comply with section 64C(4)(d) of the Income Tax Act, which provided that a loan would be exempt from being deemed a dividend where, "*a rate of interest not less than the official rate of interest …is payable by the shareholder or any connected person in relation to the shareholder…"*

SARS' contention was based on the argument that section 64C(4)(d) of the Income Tax Act dealt specifically with loans, and only loans of this kind qualified for exemption. The other exemption provisions, such as that contained in section 64C(4)(bA) of the Income Tax Act, could not apply because of the application of the maxim *expressio unius est exclusio alterius*: the mention of one matter excludes the other.

In describing its approach to interpretation, the court referred to the Wallis JA's judgement in *Natal Joint Municipal Pension Fund* and in particular paragraph 18 of that case.

The court also noted that following the judgement in S v Makawanyane 1995 3 SA 391 (CC), it could consider aids such as the explanatory memorandum accompanying the amended sections including the SARS Comprehensive Guide to Secondary Tax on

Companies in providing guidelines and explanations. However, the court concluded that it did not need to go that far in these circumstances.

Following an analysis of the rationale for the introduction of STC, the court noted that STC was a tax imposed on the dividends distributed by a company, and that a dividend is essentially a distribution by a company of its profits. Consequently, STC was in essence a tax on the profits of the company and the court clearly considered this backdrop in its analysis of the issues.

The court ruled that the maxim which the Commissioner contended should be applied in finding in its favour, could not be relied on in this situation and that the maxim should only be used with great caution. The court held that without clear words to that effect, it could not have been the intention of the legislature that only loans contemplated in section 64C(4)(d) could be exempt.

SARS also argued that section 64C(4)(dA), on which the taxpayer relied, was not applicable because the loans were interest free and thus no consideration was received by the taxpayer.

However, the court held that due to the nature of the arrangement between the parties, the taxpayer received quid pro quo for granting the interest-free loans, being the interest-free incoming loans which it received. Consequently, no deemed dividend arose and the Commissioner was not entitled to levy STC on the taxpayer.

In the case of C: SARS v Miles Plant Hire 76 SATC 1 the North Gauteng Division of the High Court was required to consider as a question of law how section 177(3) of the Tax Administration Act should be interpreted.

Section 177 of the Tax Administration Act grants SARS the power to institute sequestration, liquidation or winding-up proceedings in order to recover a tax debt. Specifically, section 177 states the following:

> *"(1) SARS may institute proceedings for the sequestration, liquidation or winding-up of a person for an outstanding tax debt.*
>
> *(2) SARS may institute the proceedings whether or not the person -*
>
> - *is present in the Republic; or*

- *has assets in the Republic.*

(3) If the tax debt is subject to an objection or appeal under Chapter 9 or a further appeal against a decision by the tax court under section 129, the proceedings may only be instituted with leave of the court before which the proceedings are brought."

Both parties agreed that section 177(3) of the Tax Administration Act conferred a discretion on the court where there is a pending tax dispute, to require that a tax debt due be recovered in sequestration, liquidation or winding-up proceedings. However, the issue under dispute related to the timing of when SARS could actually exercise that discretion to institute proceedings.

The taxpayer contended that section 177(3) required that SARS should first apply to the court to obtain permission to institute sequestration, liquidation and winding-up proceedings (ENS, 2014: 1). In the event that the court granted leave to institute the proceedings, SARS is then required to prepare a further application to actually institute sequestration, liquidation and winding-up proceedings which will practically be brought as an application before another judge.

In commencing its analysis, the court adhered expressly to the principles of interpretation to be applied which were set out by Wallis JA in *Natal Joint Municipal Pension Fund*. In this regard, the court noted that this judgement confirms the principle that a court does not need to determine the intention of the legislature, only with reference to the plain meaning of words defined in dictionaries.

In terms of its approach to interpretation, the court first considered the language of the subsection. The court considered the ordinary meaning of the words to "*institute"* a proceeding and what this means in context. The court also noted that the term "*proceedings*" referred to in section 177(3) can only mean the sequestration, liquidation or winding-up proceedings referred to in section 177(1) of the Tax Administration Act. In addition, the court held that the tense used by the subsection indicates that it is the court before which the proceedings serve that is enjoined to grant or refuse leave, not a court before which at some future date the proceedings are to be brought.

The court then considered the context of the provision, its purpose and the potential consequences which might flow from each of the possible interpretations. As part of

this analysis, the court identified that section 177(3) of the Tax Administration Act is located in Chapter 11 of this legislation below the heading *"Recovery of tax*". In addition, Part C of Chapter 11 provides SARS with authority to institute sequestration, liquidation or winding-up proceedings in order to recover a tax debt. In this regard, the court noted that section 164 of the Tax Administration Act sets out the so-called "*pay now argue later*" rule and that in terms of these rules, a taxpayer's obligation to pay tax including the ability for SARS to receive and recover tax is not suspended by an objection or appeal.

The court held that if section 177(3) of the Tax Administration Act was interpreted as contended by the taxpayer as requiring two applications, this would give rise to an absurd result, on the basis that the discretion exercised in the first application potentially fetters the court before which the next application (which will be substantive) is served. The court noted that "*a discretion is best exercised once, with full knowledge of all the relevant facts and circumstances".*

The court concluded that, in its view, the expression "*the proceedings may only be instituted with the leave of the Court before which the proceedings are brought"* means that the tax debt under dispute is not recoverable under the "*pay now, argue later*" rule during winding-up proceedings, unless the court before which those proceedings serve, agrees to this. In this regard, the court noted that this interpretation validates the court's inherent discretion in winding-up proceedings, and enables the court to evaluate all of the appropriate facts and circumstances, including the merits of any objection and pending appeal. Following a consideration of these issues, the court is empowered to make an appropriate order.

It is noteworthy that this judgement was an attempt by a tax court in applying the dictum of Wallis JA in *Natal Joint Municipal Pension Fund* to set out an approach to interpreting a fiscal provision.

5.9 Conclusion

It is noteworthy that Schreiner JA's judgement in *Jaga v Dönges*, although in the minority in that particular case, became a precedent for cases heard over 50 years later. Ngcobo J specifically referred to Schreiner JA's judgement in his judgement of

Bato Star Fishing wherein he specifically addressed the impact of the Constitution on the process of statutory interpretation. In turn, Wallis JA referred to both Schreiner JA's minority judgement in *Jaga v Dönges* and Ngcobo J's judgement in *Bato Star Fishing* as supporting his explanation of how courts should approach statutory interpretation. In this regard, Wallis JA's judgement in *Natal Joint Municipal Pension Fund* is undoubtedly a landmark judgement which has already been followed by the tax courts when interpreting fiscal provisions.

Following the approach set out by Wallis JA, the problem of interpretation should be resolved by applying the apparent purpose of the provision and the context in which it occurs as important guides during the interpretative process. It is clear that an interpretation should not be given which results in impractical, non-businesslike or oppressive consequences or that will stultify the broader application of the legislation under consideration.

6. Implications of a purposive approach for fiscal legislation on the *contra fiscum* rule

6.1 Introduction

Meyerowitz (2006: 36) describes the *contra fiscum* rule (or more formally, interpretation *contra fiscum adhibenda*) as simply one which applies where there is doubt in relation to the interpretation of a provision, following which a court is bound to give the taxpayer the benefit of the doubt as to his liability for tax. Meyerowitz (2006: 36) concludes that there is ample evidence of the *contra fiscum* rule being applied by the courts and therefore forming part of South African law but notes that this rule operates alongside the literal approach to interpretation (2008: 80).

The court in SIR v Raubenheimer 31 SATC 209 described this rule as follows:

> *"Dit wil my bygevolg voorkom dat, hoewel die voorskrif in par. (e) vatbaar is vir 'n engere betekenis, 'n wyere nie uitgesluit kan word nie. Dit is gemene saak dat by meer as een moontlike betekenis, die uitleg teen die fiscus moet gaan."*

Goldswain (2012b: 74) describes the *contra fiscum* rule as forming part of the South African common law on the basis that it originates in Roman Law. The presumption was first recognised in South Africa in Elliot v Rex 1911 EDL 514 at 517 where Kotze JA referred to the Roman maxim "*in dubiis quaestionibus contra fiscum reponditur"* and is a rule which is equity-based.

Clegg and Stretch (2015: §2-8(2)) note that the application of the *contra fiscum* rule is not a departure from existing common law but is rather an existing application of rule "*semper in dubiis benigniora praeferenda sunt*", which means that where there is doubt, the more lenient interpretation should always be preferred. (Clegg and Stretch (2015: §2-8(2)) support this view with reference to the judgement of Milne J in Badenhorst & Others v CIR 20 SATC 39, where the court held that in the context of an ambiguity, the court will interpret a taxing statute "*as it does others*" favourably to the subject.) However, it is also acknowledged that a court will not construe a taxing statute in order not to impose a burden on a taxpayer on grounds of equity where no ambiguity arises (Meyerowitz, 1957: 34).

6.2 Do presumptions and aids of interpretation such as the *contra fiscum* rule have a role in South African law following the introduction of the Constitution?

Devenish (1992: 156) describes presumptions of statutory interpretation as being rebuttable "*a priori guidelines and principles employed to assist the courts in the process of construing the law…".*

Botha (2012: 43) notes that common law is not sacrosanct or protected from constitutional considerations. In terms of section 2 of the Constitution, common law which is inconsistent with the Constitution is invalid and in terms of section 39(2) of the Constitution, courts must promote the spirit, purport and objects of the Bill of Rights when they develop the common law. Botha (2012: 43) refers to Chaskalson J's comments in Pharmaceutical Manufacturers Association of South Africa; In re: Ex parte Application of the President of the Republic of South Africa 2000 2 SA 674 (CC) where the judge held:

> *"I cannot accept this contention, which treats the common law as a body of law separate and distinct from the Constitution. There are two systems of law, each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest Court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control."*

Botha (2012: 43) notes that this judgement reinforces the approach that the Constitution does not repeal all common law. Rather, common law is merely trumped by the Constitution where it is inconsistent with the Constitution. Botha (2012: 44) notes that presumptions of interpretation will still apply in the modern era to the extent that they do not conflict with the values of the Constitution.

In this regard, Botha's commentary implies that the following three categories of presumptions exist:

- those which are codified in the Constitution;
- those which conflict with the Constitution; and

- those which are not impacted by the Constitution.

Botha (2012: 44) describes these presumptions as "*preliminary assumptions as to the meaning of legislation*" which may have also previously been described as a rebuttable "*common law bill of rights*". Botha (2012: 44) records that many of the presumptions have been incorporated into the Bill of Rights with the result that in future, these presumptions will play an increasingly lesser role in the interpretation of statutes. Burns (1998: 85) notes that prior to the introduction of the Constitution, the presumptions of interpretation played a big part in supporting the rights and freedoms of individuals. Burns (1998: 85) concludes that presumptions in conflict with the Constitution will no longer apply, thereby implying that those not in conflict or incorporated into the Bill of Rights will continue to apply.

Du Plessis (2005: 591) notes that in his view there is no overtly and explicitly recognised system for the classification of canons and aids to statutory interpretation. However, it does appear that South African interpreters have generally arranged the canons and aids to interpretation in a hierarchical order of primacy which hierarchy tends to determine the manner and sequence in which canons and aids are applied. In this regard, Du Plessis (2005: 592) records the approach of determining the clear and ordinary meaning of the words in deriving the intention of the legislature appears to rank highest in the order of primacy. Other canons or aids become helpful only where the language of a provision still leads to ambiguity.

Du Plessis (2005: 593) suggests that canons of statutory interpretation include rules, presumptions, and constitutional and statutory provisions that require observance of predefined meanings, values and procedures when statutes are interpreted. Du Plessis (2005: 593) is uncertain whether these canons constitute legal rules but concedes that this is practically irrelevant as all the canons carry interpretative weight, the extent of which is determined by the ranking in the order of primacy. One way or the other, the canons of interpretation form part of the common law or legislation which must be subject to interpretation which develops the "*spirit, purpose and objects of the Bill of Rights*". Du Plessis (2005: 594) concludes that this provides an opportunity to infuse the canons of construction with the values, norms and principles of the Constitution which may mean that in certain circumstances these values, norms and principles may trump the canons of interpretation.

Du Plessis (2005: 595) distinguishes between canons of interpretation and aids to interpretation on the following basis:

- canons of interpretation set out a prescriptive approach from the commencement of the interpretation process;
- aids to interpretation relate to texts or text components that inform the construction of statutory provisions to which they relate on the strength of the prescriptive force which they derive from the canons of construction.

Du Plessis (2005: 595) concludes that there is no practical significance between canons of and aids to interpretation. De Ville (2000: 166) notes that presumptions are invariably subject to another state of affairs and by definition can't constitute rules which simply apply in all circumstances. Du Plessis (2002: 151-153) concludes that presumptions have nevertheless acquired a special status but can still be valuable as interpretive guides in, *inter alia,* supplementing, facilitating and mediating a resort to constitutional values during the interpretative process.

Van Staden (2015: 550) records that it may be erroneously contended that presumptions of interpretation, which were applied in the pre-Constitutional period as a means of protecting individual rights and freedoms and often in the context of a literal approach to interpretation, are no longer relevant given that South Africa now has a Constitution and that a purposive approach to interpretation has finally taken hold. In arguing in favour of the continued application of the presumptions to the extent that they are not inconsistent with the Constitution or have been incorporated into the Constitution, Van Staden (2015: 551) states that presumptions are essentially manifestations of "*moral"* principles which invariably carry weight, albeit not conclusive, in the minds of judges when interpreting law. These presumptions are based on values such as equity, reasonableness, equality, legality, legal certainty and public interest and unless inconsistent or subsumed by the Constitution, should continue to be relevant in the modern order. Van Staden (2015: 2015) concludes that the presumptions remain important and they are even more important than merely supplementing, facilitating and mediating resort to constitutional values, on the basis that they actually represent public and constitutional values.

Du Plessis (2002: 152) disputes this approach – the courts never considered these presumptions as a common law "*Bill of Rights*". In this regard, Du Plessis refers to the Kentridge AJ's judgement in S v Mhlungu & Others 1995 3 SA 867 (CC):

> *"I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."*

Du Plessis (2002: 151) records that the Constitution is not a catalogue of all possible values which may have an impact on statutory interpretation. (Du Plessis (2002: 154) notes that these values include notions of justice, equity and reasonableness.) Consequently, it is possible that the presumptions may "*stand in*" for the Constitution where the Constitution does not specifically provide for certain values (and where the Constitution does not obviously usurp or contradict the presumption). On this basis, it may be possible that a presumption continues to serve its traditional purpose albeit in a different context (Du Plessis, 2002: 153). In this regard, Du Plessis (2002: 159) concludes that the *contra fiscum* rule is not specifically covered, contradicted or usurped by any provision in the Constitution and should therefore continue to apply.

Goldswain (2012b: 45) concludes that the purposive approach to interpretation, which should remove some of the iniquitous results of adherence to a strict literal approach to interpretation, supports the concepts of fairness, justice and equity which are important principles underpinning the Constitution.

Goldswain (2012b: 45) argues that prior to the introduction of the Constitution, the judiciary always had access to various internal and external aids and presumptions relating to interpretation in the context of deriving the intention of the legislature.

Section 8(3) of the Constitution specifically includes a presumption that common law rights are not reduced. With brief reference to the application of section 8(3) of the Constitution, Goldswain (2012b: 67) concludes that as part of South African common law, the *contra fiscum* rule should remain a valid part of the interpretation process.

Goldswain (2012a: 35) considers whether there are any differences between the intention of Parliament and the purpose of legislation. In this regard, Goldswain (2012b: 68) notes that Parliament was considered *"supreme"* and whatever it decreed could never be challenged. The Constitution on the other hand introduced a different

kind of supremacy on the basis that it essentially incorporates a set of values and in terms of section 2 of the Constitution, any law or conduct inconsistent with the Constitution is invalid. Consequently, in the modern era, although Parliament is responsible for the preparation and introduction of legislation, all legislation must be subject to the purport and spirit of the Constitution. Further, section 39(1) of the Constitution describes how the Bill of Rights should be interpreted and section 39(2) confirms that all legislation, including fiscal legislation, should be interpreted to promote the spirit purport and objectives of the Bill of Rights. Section 39(3) of the Constitution requires, *inter alia*, that no common law may be recognised to the extent that it is inconsistent with the provisions of the Bill of Rights.

As explained before, the court in *Matiso* stated that:

> *"The 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 statutory interpretation should be different from what it was before the commencement of the Constitution…"*

A fundamental difference, therefore, between the intention of Parliament and the purposive approach is that the purposive approach would require that the relevant common law rule is tested with regard to its constitutional values and whether these are consistent with the Bill of Rights. Goldswain (2012b: 54) concludes that when interpreting legislation, the judiciary is obliged to promote the principles of liberty of a person, his or her property and the enforcement of the principles of equality, fairness, and transparency by public officials. Goldswain (2012b: 69) also notes that in terms of the Constitution, the judiciary may *"read in*", *"read down*" and apply the presumption that a statute is always living to ensure its constitutionality. In doing this, the judiciary is essentially making law which fits within the purport of the purposive approach but which was not encouraged by the proponents of the literal approach.

Goldswain (2012b: 69) concludes that all the aids, including presumptions, are still valid tools to consider when interpreting legislation.

6.3 Application of the *contra fiscum* rule in the courts and in the future

Meyerowitz (1995: 87) analysed various cases and notes that in many cases the judges did not rely on *contra fiscum* to find in favour of the taxpayer – rather, they relied on background information to support their position. Meyerowitz (1995: 88) concludes that this indicates the *contra fiscum* rule is generally the last resort applied by a taxpayer in supporting his position and that generally the courts have invoked this rule to bolster a construction in favour of the taxpayer which was reached without the aid of this rule.

Dison (1976: 159) also reviewed a number of South African court cases in evaluating the application of the *contra fiscum* rule by South African courts until that time. He concluded that it was noticeable that the courts favoured taxpayers in several judgements on the apparent application of the *contra fiscum* rule yet never expressly mentioned the application of the rule.

Meyerowitz, Emslie and Davis (2008a: 162) question whether the purposive approach will consign the *contra fiscum* rule to the scrap heap on the basis that this rule was often applied as a foil to the literal approach given that clearly the underlying purpose of revenue legislation is for taxpayers to pay taxation.

Meyerowitz, *et al.* (2008a:162) also point out that fiscal legislation is completely different to other legislation as it seeks to deprive a taxpayer of a portion of his funds. On this basis a court should take care not to resort to the purpose of the Act to arrive at simply imposing a liability on the taxpayer. In this regard, a court should remain cognisant of the application of the anti-avoidance rules and what these rules deem to be acceptable or not.

Meyerowitz's concern regarding the application of the *contra fiscum* rule is possibly illustrated by Botha JA's judgement in *Glen Anil* and the learned judge's rather "*broad brush"* approach to the *contra fiscum* rule when considering the application of anti-avoidance issues.

In this case, the court was required to consider the ability of the Commissioner to successfully invoke the provisions of section 103(2) of the Income Tax Act and thereby disallowing the taxpayer from setting off its taxable income against an assessed loss brought forward from an earlier year. The taxpayer had acquired shares in a holding

company which ultimately held shares in a company which had the assessed loss. The purchase price mechanism provided for the purchase price for the shares to be increased to the extent that it was evidenced that the particular subsidiary, which previously carried on business as a distributor, enjoyed an assessed loss. None of the companies acquired by the taxpayer held any assets. The purchaser transferred his township development business into the subsidiary which had a loss. The taxpayer contended that the Secretary was not entitled to invoke the application of section 103(2) of the Income Tax Act on the basis that the court should follow a literal approach where an interpretation suggested that the provision, in these circumstances, could not apply on the basis that the change in shareholding occurred at a different level in relation to the company which ultimately received the income (which was offset against this company's assessed loss). The taxpayer referred to the judgement of CIR v Simpson 16 SATC 268, which court had referred to the decision in the *Cape Brandy Syndicate* case, as compelling grounds of support for this approach.

In concluding on this issue at 726-8, Botha JA noted in *Glen Anil* with reference to the *contra fiscum* rule that:

> *"…I do not understand the rule to be that every provision of a fiscal statute, whether it relates to the tax imposed or not, should be construed with due regard to any rules relating to the interpretation of fiscal statutes. Section 103 of the Act is clearly directed at defeating tax avoidance schemes. It does not impose a tax, not does it relate to the tax imposed by the Act or to the liability therefore or to the incidence thereof, but rather to the schemes designed for the avoidance of liability therefore. It should, in my view, therefore, not be construed as a taxing measure but rather in such a way that it will advance the remedy provided for the section and suppress the mischief against which the section is directed (Hleka v Johannesburg City Council 1949(1) SA 842 (A))… The discretionary powers conferred upon the Secretary should, therefore, not be restricted unnecessarily by interpretation."*

Both Goldswain (2012b: 75) and Dison (1976: 180) criticise the court's approach in *Glen Anil* on the basis that in CIR v King 1947 14 SATC 184 (hereafter *King*), the court also applied the *contra fiscum* rule in the context of an anti-avoidance rule (section 90)

but the court in *Glen Anil* made no effort to distinguish why the principles set out in the *King* case should not be applied.

On the basis that courts will follow a purposive approach going forward, it is submitted that courts will not distinguish between charging provision and non-charging provisions but rather to the purpose of the legislation. Consequently, Goldswain's criticism of the court in *Glen Anil* is probably academic.

In the current era, courts may very well have concluded on the same basis as Botha JA in relation to the basis for interpreting anti-avoidance provisions in the Income Tax Act, but the difference between the *"mischief rule*" and the purposive approach is that the "*mischief rule"* is limited to seeking the defect in the previous law. As has been explained with reference to the purposive approach, this approach is far more all encompassing in considering the background and surrounding facts which inform the purpose of a provision.

In the most recent case involving the *contra fiscum* principle, the court in Shell's Annandale Farm (Pty) Ltd v C: SARS 62 SATC 97 found in favour of the taxpayer where SARS sought to argue that compensation received by a taxpayer in respect of land which was expropriated constituted a *"supply*" on which output VAT was payable. At that point in time, the VAT Act did not describe a supply or deemed supply with reference to expropriation. This case was heard by the courts at a time following the introduction of the Constitution in South Africa and the considerations of a new approach to the interpretation of statutes, yet the court never considered whether the *contra fiscum* remained a valid presumption in statutory interpretation in South Africa. Rather, the court considered both arguments of taxpayer and the Commissioner to be plausible and ultimately held that the *contra fiscum* rule should ultimately weigh considerations in favour of the taxpayer. (Of interest is that the Fiscal Appeal Court of Zimbabwe in ITC 77 SATC 1874 considered the judgement in Shell's Annandale and concluded that it was incorrect on the basis that "*supply*" was capable of interpretation which covered passive actions such as an expropriation.)

In an analysis of the judgement handed down in the *Airworld* case, Meyerowitz, *et al.* records in The Taxpayer (2008b: 226) that there are many situations where a purposive approach to the interpretation of statutes may not result in a purpose being identified which is distinct from the provision which is being interpreted, alternatively two or more

constructions could be subject to the same purpose and the purposive approach is not of any benefit. In these scenarios, it needs to be considered the extent to which the purposive approach operates at the expense of the rules of statutory interpretation.

In this regard, Meyerowitz, *et al.* (2008b: 228) possibly answers this issue raised previously by Meyerowitz in 2006 in questioning the continued existence of the *contra fiscum* rule by remarking that the purposive construction is a valuable and essential tool in the task of statutory interpretation but that it must be applied with reference to the language itself and that a court should guard against making unjustified assumptions as to the purpose of a statute. Instead, the purpose should be found in the meaning of the words of the statute, not the meaning of the words of a statute in the legislative purpose.

6.4 Conclusion

It is submitted that the *contra fiscum* rule still applies in South African law and that it would be incorrect to conclude that the *contra fiscum* rule has no application in the context of an interpretation of a fiscal provision, anti-avoidance or otherwise. The rule is clearly consistent with the values underlying the Constitution. It is conceded that in the modern era of a purposive approach to interpretation, this rule may have a reduced application when compared to the previous era which favoured a strict literal approach to interpretation which more easily appeared to lead to ambiguity. However, to the extent that following analysis, a purposive approach ultimately yields two constructions which are both equally plausible, it is submitted that the *contra fiscum* rule should apply and a court should ultimately conclude in favour of the taxpayer.

7. Implications of a purposive approach on whether courts may take into account background information such as explanatory memoranda when interpreting fiscal provisions

7.1 Introduction

When seeking to interpret fiscal statutes, explanatory memoranda accompanying the introduction of new legislation often serve as useful guides in understanding the background as to why the legislation was introduced. Clearly, in the context of a purposive approach to interpreting statutes, the admissibility of such information would be a valuable aid to interpretation.

Botha (2005:150) records that South African courts were historically reluctant to admit documents such as explanatory memoranda as evidence when interpreting statutes. However, in more recent times, South African courts have been prepared to consider parliamentary materials such as explanatory memoranda.

Typically, a similar approach has been followed in many other jurisdictions but Meyerowitz (1995: 86) refers to the UK case of Pepper (Inspector of Taxes) v Hart 1993 1 ER 42 (HL) (hereafter *Pepper v Hart*) as an example in foreign law where courts are prepared to consider background material. Goldswain (2012a: 49) reports that the case of *Pepper v Hart* essentially brought the curtain down on the strict and literal approach previously followed by UK courts.

7.2 The application of case law

This case of *Pepper v Hart* related to teachers who paid reduced school fees in relation to their own children and the question was how the taxable benefit or "*cash equivalent"* should be determined. The court concluded that a reference to parliamentary materials was permissible as an aid to statutory construction provided that:

- the legislation was ambiguous or obscure or the literal meaning led to an absurdity;

- the material relied upon consisted of statements by the relevant Minister supporting the Bill and parliamentary material as was necessary to understand such statements and the effect;
- the parliamentary materials relied upon were clear.

This UK judgement was raised by the court in S v Makwanyane and Another 1995 (3) SA 391 (CC) which considered the constitutionality of the death penalty. Chaskalson on behalf of the majority noted:

> *"Debates in Parliament, including statements made by Ministers responsible for legislation, and explanatory memoranda providing reasons for new bills have not been admitted as background material. It is, however, permissible to take notice of the report of a judicial commission of enquiry for the limited purpose of ascertaining 'the mischief aimed at [by] the statutory enactment in question.' These principles were derived in part from English law. In England, the courts have recently relaxed this exclusionary rule and have held, in Pepper (Inspector of Taxes) v Hart that, subject to the privileges of the House of Commons:*
>
> > *'...reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words.'*
>
> *As the judgement in Pepper's case shows, a similar relaxation of the exclusionary rule has apparently taken place in Australia and New Zealand."*

Chaskalson CJ then went further in Minister of Health v New Clicks SA (Pty) Ltd & Others 2006 (2) SA 311 (CC), wherein he stated:

> *"In S v Makwanyane and Another I had occasion to consider whether background material is admissible for the purpose of interpreting the Constituion. I concluded that*

'where the background material is clear, is not in dispute, and is relevant to showing why particular provisions were or were not included in the Constitution, it can be taken into account by a Court in interpreting the Constitution.'

Although it is not entirely clear whether the majority of the Court concurred in this finding, none dissented from it. I have no reason to depart from that finding and in my view it is applicable to ascertaining 'the mischief' that a statute is aimed at where that would be relevant to its interpretation."

Botha (2012: 152) notes that in the cases of National Union of Mineworkers of SA v Driveline Technologies 2002 (4) SA 645 (LAC) and Shoprite Checkers (Pty) Ltd v Ramdaw 2001 (3) SA 68 (LC), the courts applied the explanatory memorandum to interpret the Labour Relations Act.

As set out above, the court in ABC (Pty) Ltd v C: SARS Case No. 13512 applied Chaskalson's judgement in Minister of Health v New Clicks SA (Pty) Ltd & Others 2006 (2) SA 311 (CC) as authority for it being entitled to consider explanatory memoranda and even guides issued by SARS in ascertaining the meaning of provisions. (It is noted that section 5 of the Tax Administration Act provides that material which forms "*practice generally prevailing*" becomes binding on SARS. However, "*practice generally prevailing*" is defined with reference to "*official publications"* which would typically exclude guides issued by SARS.)

Apart from the use of background material, Meyerowitz, *et al.* (2008b: 225) suggest in The Taxpayer that the only way of determining the purpose of the legislation is with reference to the legislation as a whole and that the legislative purpose and the meaning of the language of a provision are not separate enquiries.

Finally, in the most recent case of *Natal Joint Municipal Pension Fund*, Wallis JA makes it clear that an interpreter should access material known to those responsible for its production.

7.3 Conclusion

Based on the authority set out above, it now seems apparent that a court may now consider the explanatory memoranda accompanying the introduction of legislation and

even SARS' Guides which explain the background to, and the purported objects of the relevant provisions. However, in order to do, it is submitted that the background material must be clear, must not be in dispute, and must be relevant to showing why particular provisions were or were not included in the particular piece of legislation.

Chapter 8: Conclusion

The objective of this study is to discuss the inconsistent approaches pursued by the various South African courts when ruling on fiscal matters and to determine whether tax courts should adopt a similar approach as other South African courts when interpreting tax legislation.

More specifically, the study seeks to address the following four questions:

- Should South African courts follow a different approach when interpreting fiscal as opposed to non-fiscal legislation?
- Should South African courts apply a purposive approach, as applied by the Constitutional Court, to the interpretation of fiscal statutes?
- If a purposive approach should be followed, what is the significance of the *contra fiscum* rule in the context of the interpretation of fiscal statutes?
- Has the purposive approach changed the basis of admissibility of explanatory memoranda as evidence in court?

Chapter 2 sets out an academic overview of the different approaches to the interpretation of legislation and sets out a theoretical basis for the study.

Botha (2005:86) notes that the theories relating to textualism, purposivism and intentionalism all, to some degree, overlap. In this regard, Botha assumes a pragmatic view in dividing the theories into two, namely the "*orthodox text-based*" approach and the "*text-in-context approach*".

Botha (2012: 86) describes the orthodox text-based approach largely in line with the literal approach set out above whereby if the meaning of the words is clear and unambiguous that meaning should be applied and equated to the intention of the legislature.

Applying this view to the manner in which South African tax courts have interpreted legislation, it may also be pragmatic to place both the literal and intentional (intention of the legislature) approach in one category given that the courts have sought to understand the literal meaning of the words and when seeking the intention of the legislature, have generally attributed the literal interpretation to be the intention of the legislature.

Botha (2012: 97) describes the "*text-in-context*" approach as the approach which places an emphasis on the purpose or object of the legislation when interpreting legislation. In Botha's view (2012: 97), social and political policy directions should also be taken into account in establishing the purpose of the legislation. Botha (2012: 98) refers to Schreiner JA's minority judgement in *Jaga v Dönges* as the first concrete effort in South African law to utilise the wider context in moving beyond the plain grammatical meaning in determining the legislative purpose.

Chapter 3 considers whether fiscal legislation should be interpreted differently to other legislation. Chapter 3 refers to case law which expressly concludes that the approach to the interpretation of fiscal statutes is no different to the approach which would be followed when interpreting non-fiscal statutes. Chapter 4 identifies the various approaches followed by South African courts when interpreting fiscal legislation. An analysis of South African case law reveals that South African courts have followed the literal approach, the intentional or subjective approach and have attempted to follow the so-called purposive approach. It is clear that South African courts have traditionally tended to favour a literal approach to interpretation. It is doubtful whether Silke (De Koker & Williams, 2013: §25.1) is technically correct to describe Steyn J's approach as being an application of the purposive approach. Steyn was arguably applying the "*mischief rule*" but only when his initial attempt at understanding the literal meaning of the words led to ambiguity.

However, tax courts have in recent times (and prior to Wallis JA's decision in the *Natal Joint Municipal Pension Fund*) applied a purposive approach albeit that these courts have not clearly articulated a basis for applying this approach. In particular, the courts in *Airworld* and in *Metropolitan Life* referred to the purposive approach as the basis for their decisions but provided little insight into the theoretical basis for this approach other than the purpose of the legislation was important in guiding the court on its interpretative journey.

Frabricius J stated in ITC 1858 74 SATC 173 that it appears that previous courts had incorrectly applied the so-called purposive approach. In fact, it was not clear to him what the purposive approach encompassed.

On the basis of the conclusion reached in Chapter 3, that fiscal legislation should be interpreted on the same basis as any other legislation, Chapter 5 considers

Constitutional Court judgements and certain Supreme Court of Appeal (in particular, the recent case of *Natal Joint Municipal Pension Fund*) in concluding that the purposive approach is currently the only approach which South African courts should apply when seeking to interpret legislation. It is readily apparent that the introduction of the Constitution has fundamentally amended the manner in which courts should consider statutory interpretation. Certain tax courts have since specifically referred to this judgement as authority for applying this approach to statutory interpretation.

Chapter 6 considers the implications of the purposive approach on the *contra fiscum* rule and whether this rule still has any relevance on the basis that it has traditionally been a counter to the literal approach. It is concluded that the *contra fiscum* rule is arguably a common law rule which is not inconsistent with the provisions of the Constitution and represents a rule which courts are still required to apply in appropriate circumstances notwithstanding the purposive approach to interpretation.

However, it is submitted that this rule will probably only impact the outcome of events when a court has exhausted all other avenues in determining the purpose to a provision, leaving two or more equally plausible interpretations.

Finally, Chapter 7 considers the implications of the purposive approach on whether courts may take background information such as explanatory memoranda into account when interpreting fiscal provisions. This chapter concludes that it is fundamental to the application of the purposive approach that a court consider all background materials, including explanatory memoranda where these material are relevant.

It is clear that the introduction of the Constitution was more than the introduction of a piece of new legislation. The Constitution by definition became the supreme law of the land. Ngcobo J's essentially states that Schreiner JA's minority judgement in *Jaga v Dönges* becomes "*codified*" by virtue of the introduction of the Constitution.

This student therefore submits that Schreiner JA's minority judgement is relevant in providing the guidance away from the pure, literal approach. Schreiner JA notes in his judgement that two approaches could be followed both of which should yield the same outcome. The first is to find out whether the language to be interpreted has only one clear ordinary meaning and to then confine a consideration to the context only to cases where the language appears to admit of more than one meaning. Alternatively, the

interpreter may from the beginning consider the context and language to be interpreted together. Du Plessis (2002: 102) comments that this is unlikely to be correct assuming that Schreiner JA endorsed an approach whereby, once the literal meaning based on the words was understood, the interpretative process came to an end.

It is submitted that the second approach postulated by Schreiner JA in terms of which the context and the language should be interpreted together, is the preferable approach.

With reference to Schreiner JA's approach, Wallis JA in *Natal Joint Municipal Pension Fund* identified the following key issues to be considered when interpreting statutes:

- language is important, in particular the syntax and grammar used, and this is the point of departure when commencing the interpretive process;
- one needs to interpret the provisions in the context in which they appear and with regard to the apparent purpose to which it is directed. In performing this analysis one should access material known to those responsible for its production;
- where more than one meaning is possible each possibility must be weighed in the light of all these factors and ultimately sensible or businesslike results that do not undermine the apparent purpose of the legislation should be followed.

In conclusion, Wallis JA confirmed the Schreiner's minority judgement that from the outset of statutory interpretation, one should consider the context and the language together, with neither predominating over the other.

With this in mind, it is submitted the following practical approach to interpreting fiscal provisions should satisfy the requirements of current law:

(1) read the actual words and derive preliminary interpretations of what the words may mean;
(2) determine the meaning of the provision with regards to its purpose and historical origin giving rise to its introduction which would include access to background information where necessary;
(3) consider the various interpretations in the context of both the fiscal statute in its entirety and in relation to its immediate context in which the provision appears or is interrelated;

(4) consider whether all interpretations are constitutionally valid; and

(5) where relevant and if necessary, consider valid common law aids of and presumptions to interpretation of statutes.

Thereafter, the preliminary interpretation/s identified in (1) should be reconciled with the criteria set out in (2) - (5) above. It is submitted that, practically, the process will complete itself when a grammatical interpretation is clear and unambiguous and in line with the purpose of the provision read in context with the broader legislation.

In more difficult cases, the interpreter will be required to select the interpretation which leads to the most sensible and businesslike approach in determining the "*final"* or most appropriate interpretation.

It is submitted that this approach would be correct particularly as sight should not be lost of the actual words and phrases contained in the legislation and that this would address the possible concerns raised by the court in S v Zuma wherein Kentridge JA commented that if the language used is ignored in favour of *"values*", the result is not interpretation but some sort of "*divination"*.

This should dispense with the criticism of the purposive approach that it potentially permits courts excessive latitude to create, as opposed to interpret, law.

As explained above, various aids of presumptions to interpretation potentially apply in the context of interpreting fiscal statutes. Some of these have been incorporated into the Bill of Rights, some may potentially be inconsistent with the Constitution and others continue to be valid rules which a court may consider. A detailed analysis of many of these rules could yield a useful guide to clearly identifying those rules which still apply and those rules of interpretation which should no longer apply.

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