

A FURTHER LOOK AT S v ZUMA (1995(4) BCLR 401 SA (CC))

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SUMMARY

The *Zuma* case - important as the first decision of the Constitutional Court - is primarily concerned with the constitutionality of section 217(1)(b)(ii) of the Criminal Procedure Act. In trying to find an answer to this question, the Constitutional Court also addressed other important issues.

In this dissertation the Constitutional Court's decision on the constitutionality of section 217(1)(b)(ii) is examined, as well as important general principles laid down by the Court regarding incompetent referrals by the Supreme Court; constitutional interpretation; reverse onus provisions and the right to a fair trial; as well as the application of the general limitation clause.

A closer look is taken at adherence to these principles in subsequent Constitutional Court decisions, and finally a conclusion is reached on the value of the *Zuma* case.

(Constitutional Court decisions; constitutional jurisdiction; constitutional interpretation; reverse onus provisions; right to a fair trial; general limitation clause)

1 INTRODUCTION

The *Zuma*¹ case was the first case to come before the Constitutional Court and, as such, has attracted considerable attention.²

In this case the Constitutional Court was primarily concerned with the constitutionality of section 217(1)(b)(ii) of the Criminal Procedure Act 51 of 1977, which dealt with the admissibility in evidence of a confession made by an accused before trial. The court found this section to be unconstitutional. Although this is an important issue, the greater significance of the *Zuma* case lies in the fact that it was the Constitutional Court's and therefore sets the tone for subsequent judgments.

The judgment has already made itself felt in the way in which the Constitutional Court and other courts approach interpretation of the Interim Constitution. The effect of the *Zuma* judgment on the wording of the jurisdictional clauses in the final constitution should also not be underestimated.

For the purposes of this discussion, the following principal issues arising from *Zuma* will be considered:

- * referral to the Constitutional Court
- * constitutional interpretation
- * reverse onus and fair trial
- * the limitation clause

¹ *S v Zuma* 1995(4) BCLR 401 SA (CC).

² A few commentaries have already appeared on this case (see eg, Erasmus, G "The first judgment of the Constitutional Court: What does it tell us?" 1995 *SA Public Law* 215; Erasmus, G and Strydom, H "Judgments on the Constitution and fundamental rights" 1995 2 *Stell LR* 264; and Olivier, D "Eerste uitspraak van die Konstitusionele Hof" 1995 *De Rebus* 347), and it has been referred to in a number of subsequent Constitutional Court decisions (eg, *S v Mhlungu* 1995(7) BCLR 793 (CC); *S v Vermaas*; *S v Du Plessis* 1995(7) BCLR 851 (CC); *S v Zantsi* CCT/24/94; *S v Williams* 1995(7) BCLR 861 (CC) and *S v Makwanyane* 1995(6) BCLR 665 (CC)).

2 GENERAL BACKGROUND TO THE ZUMA CASE

In the *Zuma* case, two accused appearing before the Natal Provincial Division of the Supreme Court³ on two counts of murder and one of robbery, had made statements before a magistrate. The admissibility of these statements was contested by the defence, which led to a trial-within-a-trial during which the defence questioned the constitutionality of section 217(1)(b)(ii).⁴

According to the accused they had made the statements after being assaulted by the police. Two women called as witnesses testified that they saw the police assaulting the accused.

After all the evidence had been heard, the court concluded that, although it was not satisfied beyond a reasonable doubt that the statements had been "freely and voluntarily" made, the accused had not managed to discharge the onus on them in terms of subsection (b) on a balance of probabilities. Had it not been for the doubt surrounding the constitutionality of section 217(1)(b)(ii), it would have been a simple case of accepting that having failed to discharge the onus the accuseds' statements would be admissible.

The constitutionality of section 217(1)(b)(ii) was therefore of crucial importance to the outcome of the case. Hugo J refrained from addressing the issue, and referred it to the Constitutional Court. At the same time, the Attorney-General of Natal also referred the

³ *S v Zuma* 1995(1) BCLR 49 (N).

⁴ S 217(1)(b)(ii) reads as follows:

"Provided -

...

(b) that where the confession is made to a magistrate and reduced to writing by him, or is confirmed and reduced to writing in the presence of a magistrate, the confession shall, upon the mere production thereof at the proceedings in question -

...

(ii) be presumed, unless the contrary is proved, to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto if it appears from the document in which the confession is contained that the confession was made freely and voluntarily by such person in his sound and sober senses and without having been unduly influenced thereto."

constitutionality of section 217(1)(b)(ii) to the Constitutional Court, as a matter of public interest. This proved to be the decisive factor in the Court's decision to hear the case.

Zuma is the first in a series of Constitutional Court decisions dealing with incompetent referrals and this is the first matter which will be addressed.

3 REFERRAL TO THE CONSTITUTIONAL COURT

As it the constitutionality of an Act of Parliament was in question, the *Zuma* case dealt with an issue falling within the exclusive jurisdiction of the Constitutional Court. Both parties to the dispute consented, however, to the jurisdiction of the Natal Provincial Division of the Supreme Court under section 101(6), making it possible for the Supreme Court to decide this issue. As already stated,⁵ Hugo J chose rather to refer this matter to the Constitutional Court, despite the fact that the Natal Provincial Division of the Supreme Court had the necessary jurisdiction to hear the case. This resulted in the referral being labelled "incompetent".

It would seem that the Constitutional Court feels very strongly about the fact that the local and provincial divisions of the Supreme Court should exercise the jurisdiction conferred on them in terms of section 101(3) and 101(6) of the Interim Constitution.⁶ This emerges

⁵ See par 2.

⁶ S 101(3) provides that the Supreme Court has jurisdiction over certain constitutional matters within its area of jurisdiction, and in listing these matters, it effectively narrows the Constitutional Court's field of exclusive jurisdiction down to an inquiry into the constitutionality of an Act of Parliament; a dispute over the constitutionality of any Bill of Parliament; any dispute of a constitutional nature between organs of state, where at least one of the parties is an organ of state at the central government level; and the determination of questions whether any matter falls within its jurisdiction.

S 101(6) goes even further in limiting areas over which the Constitutional Court has exclusive jurisdiction, by allowing the Supreme Court to hear matters falling within the exclusive jurisdiction of the Constitutional Court, where both parties to a dispute agree thereto. Appeals arising from matters referred to in section 101(3) and which relate to issues of constitutionality, will, however, still lie to the Constitutional Court.

S 102(12) of the Interim Constitution reads that:

clearly from certain statements made by Kentridge AJ, for example the emphasis he placed on the fact that the jurisdiction conferred on the local and provincial divisions of the Supreme Court in terms of the Interim Constitution is not an "optional jurisdiction", but one conferred "in order to be exercised".⁷ He also firmly stated that "even if a rapid resort to this Court were convenient, that would not relieve the Judge from making his own decision on a constitutional issue within his jurisdiction."⁸ The only reason why the Constitutional Court consented to hear the matter, was because Mr TP McNally's⁹ application for direct access to the Court in terms of section 100(2)¹⁰ of the Interim Constitution, read with Rule 17(1) and 17(2) of the Constitutional Court Rules,¹¹ was granted. Even in a such a case, Kentridge AJ warned, direct access is "contemplated in only the most exceptional cases, and it is

"Appeals arising from matters referred to in section 101(3) and which relate to issues of constitutionality shall lie to the Constitutional Court." (own italics)

No mention, however, is made of matters referred to in section 101(6). Can this possibly mean that the Supreme Court is the court of final instance in a constitutional matter over which the Constitutional Court, strictly speaking, has exclusive jurisdiction, but for the fact that the parties to the dispute agreed to the jurisdiction of the Supreme Court? This is clearly undesirable, and would seem to be one of the problems which should be addressed in the final constitution.

The Working Draft of the Constitution already seems to go a long way towards solving this problem, through the provision contained in section 78(3)(b), which reads as follows:

"Any finding by a court that an Act of Parliament, [a Provincial Act] or any conduct of the President, is unconstitutional has no force or effect unless confirmed by the Constitutional Court; but, a court may grant a temporary interdict or other temporary relief." (my italics)

⁷ At 409 B-C.

⁸ At 409 B.

⁹ The Attorney-General for Natal.

¹⁰ S 100(2) provides that:

"The rules of the Constitutional Court may make provision for direct access to the Court where it is in the interest of justice to do so in respect of any matter over which it has jurisdiction."

¹¹ In terms of subrule (1) direct access will only be allowed in exceptional circumstances, under which is understood "a matter of such urgency, or otherwise of such public importance, that the delay necessitated by the use of the ordinary procedures would prejudice the public interest or prejudice the ends of justice and good government." Subrule (2) further provides that the above special procedure "may be sanctioned by the Court on application made to it in terms of these rules", as was the case in *Zuma*.

certainly not intended to *legitimate an incompetent reference*".¹²

The matter of incompetent referrals has come before the Constitutional Court in a number of subsequent cases.¹³

In *Mhlungu*,¹⁴ with regard to referrals to the Constitutional Court under section 102(1),¹⁵ Kentridge AJ pointed out that an issue which falls within the exclusive jurisdiction of the Constitutional Court and arises in a provincial or local division of the Supreme Court does not necessitate an immediate referral to the Constitutional Court. He went further and held that even if the issue appears to be a substantial one, the Court hearing the case is required to refer it only:

- (1) if the issue is one which may be *decisive*¹⁶ for the case; and
- (2) if it considers it to be in the interest of justice to do so.¹⁷

As far as decisiveness is concerned, Kentridge AJ laid down a general principle that "where it is possible to decide any case, civil or criminal, *without reaching a constitutional issue*,¹⁸

¹² At 409 H (my italics).

¹³ See *S v Mhlungu* 1995(7) BCLR 793 (CC); *S v Vermaas*; *S v Du Plessis* 1995(7) BCLR 851 (CC); and *S v Zantsi* CCT/24/94.

¹⁴ See footnote 13 above.

¹⁵ S 102(1) reads as follows:

"If, in any matter before a provincial or local division of the Supreme Court, there is an issue which may be decisive for the case, and which falls within the exclusive jurisdiction of the Constitutional Court in terms of section 98(2) and (3), the provincial or local division concerned shall, if it considers it to be in the interest of justice to do so, refer such matter to the Constitutional Court for its decision: Provided that, if it is necessary for evidence to be heard for the purposes of deciding such issue, the provincial or local division concerned shall hear such evidence and make a finding thereon, before referring the matter to the Constitutional Court."

¹⁶ My italics.

¹⁷ At 821 A-B.

¹⁸ My italics.

that is the course which should be followed".¹⁹ This principle is quoted with approval by Chaskalson P in the *Zantsi* case.²⁰

Didcott J, in the *Vermaas; Du Plessis* case,²¹ came to the conclusion that the effect of section 102(1) and 102(2) is that no division which has jurisdiction over a matter, may refer such a matter properly to the Constitutional Court while the litigation raising it remains in progress there. The judge hearing the case *must decide the issue for him or herself*, and it may only be presented to the Constitutional Court on appeal, once the litigation has ended in the court below.

The Constitutional Court would seem to urge the judges of the local and provincial divisions of the Supreme Court to refrain from referring cases to the Constitutional Court as far as possible. This can be done in two ways:

- (1) by judging the issues before them on a non-constitutional basis, as far as possible;
- (2) by making their own decisions regarding constitutional issues falling within their jurisdiction.

The Working Draft of the Constitution seems to have taken these pointers laid down by the Constitutional Court into consideration. Although it does not specifically contain a clause along these lines, no provision is made for referrals to the Constitutional Court by the Supreme Court, as per section 102(1) of the Interim Constitution. It does contain provisions to the effect that findings of the Supreme Court on the constitutionality of matters over which the Constitutional Court has the final jurisdiction, will be of no force or effect unless confirmed by the Constitutional Court.²² The implicit condition that the specific division of the Supreme Court must first reach its own decision, which will then only be confirmed by the Constitutional Court can be deduced from these provisions.

¹⁹ At 821 F.

²⁰ See footnote 13 above.

²¹ See footnote 13 above.

²² S 77(2)(b) and s 78(3)(b) of the Working Draft.

4 CONSTITUTIONAL INTERPRETATION

4.1 Principles regarding constitutional interpretation laid down in the *Zuma* case

In his interpretation of section 25 of Chapter 3 of the Interim Constitution, Kentridge AJ, after having examined numerous cases, locally and abroad²³ in which applicable principles were formulated and applied, laid down at least nine general principles regarding constitutional interpretation:

- (1) A constitution calls for "a *generous interpretation*"²⁴...suitable to give to individuals the full measure of the fundamental rights and freedoms referred to..."²⁵
- (2) The interpretation of a constitution differs from the interpretation of a statute; a constitution calls for "principles of interpretation of its own".²⁶
- (3) In the interpretation of a constitution, regard must be had to the *legal history, traditions and usages of the country concerned*, if the *purposes*²⁷ of its constitution are to be fully understood.²⁸

²³ Eg, *Nyamakazi v President of Bophuthatswana* 1994(1) BCLR 92 (B); *Khala v The Minister of Safety and Security* 1994(2) BCLR 89 (W); *Minister of Home Affairs (Bermuda) v Fisher* (1980) AC 319 (PC); *S v Marwane* 1982(3) SA 717 (A); *Minister of Defence, Namibia v Mwandighi* 1992(2) SA 355 (NmSC); *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th); *Attorney-General v Moagi* 1982(2) Botswana LR 124; and *Qozoleni v Minister of Law and Order* 1994(1) BCLR 75 (E).

The reference to foreign case law is in accordance with the provisions of the Interim Constitution, and specifically s 35(1), which provides that:

"In interpreting the provisions of this Chapter a court of law...may have regard to comparable foreign case law."

²⁴ My italics.

²⁵ From the well-known judgment of Lord Wilberforce in the Privy Council in *Minister of Home Affairs (Bermuda) v Fisher* (see footnote 23 above) at 328-9.

²⁶ See footnote 25 above.

²⁷ My italics.

²⁸ At 411 E.

- (4) A constitution must be interpreted, so as "to give clear expression to the *values*²⁹ it seeks to nurture for a future South Africa".³⁰
- (5) The Constitution, *as the supreme law*³¹ against which all law is to be tested,³² must be examined "with a view to extracting from it *those principles or values*³³ against which such law...can be measured".³⁴
- (6) The above principles do not entail that the principles which were applicable in our courts of law up to now, are to be ignored, as they can still be of considerable value.
- (7) Nor do the above principles mean that *the language*³⁵ of the Constitution should be neglected. When interpreting a constitution, one should always be aware of the values underlying the constitution, while keeping in mind that it is *a written instrument*³⁶ that is being interpreted. As Kentridge AJ put it very strongly: "...the Constitution does not mean whatever we might wish it to mean",³⁷ and "a constitution embodying fundamental rights should as far as its language permits be given a broad construction".³⁸

²⁹ My italics.

³⁰ From *Qozoleni v Minister of Law and Order* (see footnote 24 above) at 80.

³¹ My italics.

³² The supremacy of the Constitution is confirmed, in accordance with s 4(1) of the Interim Constitution, which specifically states that:

"This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency."

³³ My italics.

³⁴ See footnote 30 above.

³⁵ My italics.

³⁶ My italics.

³⁷ At 412 G.

³⁸ From *Attorney-General v Moagi* (see footnote 23 above) at 184.

This is similar to the warning issued by Van Dijkhorst in *De Klerk v Du Plessis* 1994(6) BCLR 124(T) at 128 E-F, namely:

"...a free floating interpretation unanchored in the aims of the Constitution...might lead to interpretation based on personal predilections and preferences. In interpreting the Constitution

- (8) In interpreting the Constitution, the courts must have regard to, amongst other things, foreign case law, as per section 35(2) of the Interim Constitution.
- (9) Where the Constitution itself, however, provides criteria which ought to be applied in the interpretation of a specific clause, these should be used. The South African Constitution should therefore not be forced into, for example, the Canadian mould, as far as the interpretation of certain provisions is concerned.³⁹

The rules of constitutional interpretation laid down by Kentridge AJ in *Zuma*, confirm certain pre-1994 decisions.⁴⁰ The question now arising is how they accord with the views of authors in the field, the interpretation provisions of the Constitution itself, and subsequent decisions of the Court?

4.2 Interpreting statutes and constitutions

In recent years South African legal literature has seen a spate of new publications on statutory interpretation,⁴¹ advocating a number of fresh approaches. In the most recent work, Devenish⁴² collects the different approaches under headings such as: the literal theory; the subjective theory; the purposive theory; the teleological or value-coherent theory; the judicial

one should guard against using it like a ventriloquist's dummy, making it utter what you want to hear. That danger lurks in applying as a yardstick in interpretation such phrases as 'generous approach' which might tempt one to read into the text of the Constitution one's own social preferences and subjective sympathies."

³⁹ At 419 J Kentridge AJ makes a statement in this regard with specific reference to the general limitation clause, which itself sets out the criteria which should be applied in the interpretation thereof. In the words of Kentridge AJ: "...I see no reason, in this case at least, to attempt to fit our analysis into the Canadian pattern."

⁴⁰ Eg, *S v Marwane* 1982(3) SA 717 (A); *Minister of Defence, Namibia v Mwandighi* 1992(2) SA 355 (NmSC); *Attorney-General v Moagi* 1982(2) Botswana LR 124; and *Nyamakazi v President of Bophuthatswana* 1994(1) BCLR 92 (B).

⁴¹ Botha, CJ *Statutory Interpretation: An introduction for students* (1991); Devenish, GE *Interpretation of Statutes* (1992); Du Plessis, LM *The Interpretation of Statutes* (1986).

⁴² See footnote 41 above at 25-55.

or free theory; the objective or delegation theory; and normative transposition.

Despite the differences in terminology a broad distinction can be drawn between a literal (or textual) and a contextual approach.⁴³

The *literal approach* holds that the true meaning of the text can be found virtually exclusively in the words used by the legislature, which are then equated with the meaning of the legislature. The interpreter of the text may deviate from the ordinary grammatical meaning of these words in exceptional circumstances only, namely in order to avoid absurdity and to resolve ambiguity. This approach leaves no room for interpreters of statutes to question the morality of statutes; they are only required to find the literal meaning of the specific Act, and to apply it as such. As the literal approach is derived from the theory of sovereignty of Parliament, it is doubtful whether it will be of much value in the new South Africa, where the sovereignty of Parliament has been replaced by a supreme constitution. This does not mean however, that the ghost of literalism (in what ever guise) might not from time to time haunt the constitutional interpreter - as would appear to be the case from Kentridge AJ's minority decision in *Mhlungu*.⁴⁴

The *contextual approach* distinguishes, broadly speaking, between a purposive and a teleological theory.

The *purposive theory*, according to Devenish,⁴⁵ adopts the objective concept of 'purpose' and does away with the idea of the 'intention of the legislature', as legislative purpose is regarded to be far more objective. The application of this theory requires that "interpretation should not depend exclusively on the literal meaning of words ", but that the interpreter should make use of "an *unqualified contextual approach*,⁴⁶ which allows an unconditional examination of

⁴³ As Botha did (see footnote 41 above) at 10.

⁴⁴ *S v Mhlungu* 1995(7) BCLR 793 (CC). See discussion in par 4.3.

⁴⁵ See footnote 41 above at 35.

⁴⁶ My italics.

all internal and external sources."⁴⁷ Unfortunately Devenish does not explain what is to be understood under the concepts "unqualified contextual approach" or "all internal and external sources."

At first glance, the *teleological or value-coherent theory*, does not seem to be that different from the purposive theory. Closer scrutiny reveals, however, that it contains another element, namely that of 'equity'. In this way equity is used as another aid to establish the purpose of legislation. Devenish's concurrence with Eskridge's criticism against "purposivism",⁴⁸ namely that it cannot be accepted as a general theory "because it neglects other critically *important values*,"⁴⁹ clearly shows that the major distinction between these two theories lies in the fact that the purposive theory, in establishing the purpose of legislation, is concerned with context in a narrower sense. The teleological theory on the other hand, takes a much broader view through its involvement with vaguer concepts such as the prevailing *values and norms* in a specific society, as well as equity - all of which should be kept in mind when trying to ascertain what the purpose of legislation is. The teleological theory is therefore wider than the purposive theory, as it takes into account the vaguer, more general purposes of law, such as justice and security. As its name indicates, this theory is based on a value system.

It is clear that the literal or textual approach will be of little or no value in interpreting the new Constitution, which reigns supreme. Time and time again, since April 1994, the word "purposive" has been used by the courts in the context of the Constitution.⁵⁰

This term is not found in the Constitution itself. The most direct guide to the interpretation of the Constitution and Chapter 3 in particular is section 35 with its reference to the values

⁴⁷ See footnote 41 above at 36.

⁴⁸ See footnote 41 above at 38.

⁴⁹ My italics.

⁵⁰ *S V Gqozo* 1994(1) BCLR 10 (Ck); *Ntenti v Chairman, Ciskei Council of State* 1994(1) BCLR 168 (Ck); *Khala v Minister of Safety and Security* 1994(2) BCLR 125 (W); *Rattigan v Chief Immigration Officer* 1995(1) BCLR 1(Ck); and *Baloro v University of Bophuthatswana* 1995(8) BCLR 1018 (B).

which underlie an open and democratic society based on freedom and equality.⁵¹ It would appear that for the courts "purposive interpretation" includes "value interpretation".

Du Plessis and De Ville⁵² are of the opinion that section 35(1) "opens the door to the evolution of a teleological hermeneutic" and welcome this approach as it allows for the interpretive adaptation of the human rights norms enshrined in the chapter to constantly changing circumstances." They distinguish between intra- and extra-textual contextualisation, and define intra-contextualisation as interpreting the Constitution in relation to the broader text, for example the preamble; schedules; and the long title of the Constitution. Extra-contextualisation, on the other hand, takes note of external factors, for example the prevailing values in a society.

Kruger⁵³ calls intra- and extra-contextualisation the written and the unwritten text of the Constitution. The unwritten text contains the implied values inherent to and underlying the written Constitution, and forms and inextricable part of the Constitution.

What is clear from the above is that when trying to establish the purpose behind certain provisions, everybody agrees that constitutional interpretation demands that account be had of values and norms. In the combined terminology of court and writers a purposive approach is followed, refined to a teleological approach by the acknowledgement of values. In this regard one is tempted to agree with Kroon and Froneman, JJ in *Qozoleni v Minister of Law*

⁵¹ The 1993 Interim Constitution contains a specific interpretation clause, namely s 35. S 35(1) deals with the interpretation of Chapter 3 of the Interim Constitution specifically and reads as follows:

"(1) In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law."

⁵² Du Plessis, LM and De Ville, JR "Bill of Rights interpretation in the South African context (3): Comparative perspectives and future prospects" 1993 3 *Stell LR* 357 at 389.

⁵³ Kruger, J "Regpositivisme en die 'ongeskrewe teks' van die (nuwe) grondwet" 1991 *SA Public Law* 231.

and Order,⁵⁴ where they state that:

"In my view it serves little purpose to characterise the proper approach to constitutional interpretation as liberal, generous, purposive or the like. These labels do not in themselves assist in the interpretation process and carry the danger of introducing concepts or notions associated with them which may not find expression in the Constitution itself. Far more useful is to recognise that because the Constitution is the supreme law of the land against which all law or conduct is to be tested, it must be examined with a view to extracting from it those principles or values⁵⁵ against which such law or conduct can be measured. "

In what follows the term "purposive" will be used to describe the process that has just been described. However, one should caution with Du Plessis and Corder,⁵⁶ that current terminology is not very helpful. They doubt, for example, whether the reference to "purposive" is feasible in practical terms, as the purpose of any written instrument can only be determined after it has indeed been interpreted. A better term, according to them, would be "purpose-seeking", which would, *besides teleological interpretation*,⁵⁷ ⁵⁸ also include grammatical, systematic, historical, and comparative interpretation. For them, teleological interpretation is nothing more than an aid when applying a purposive or purpose-seeking approach.

Besides a purposive interpretation, Kentridge AJ also endorsed a "generous approach" in *Zuma*. The next question concerns the relationship between "purposive" and "generous" interpretation.

⁵⁴ 1994(1) BCLR 75 (E) at 80 D.

⁵⁵ My italics.

⁵⁶ Du Plessis and Corder *Understanding South Africa's Transitional Bill of Rights* (1994).

⁵⁷ My italics.

⁵⁸ Du Plessis and Corder define teleological interpretation as follows:

"...the determination of the ratio legis or the 'intention of a hypothetically permanent constitution-maker', as it is sometimes also referred to, thereby acknowledging the directive influence of '*present circumstances*' on an understanding of the constitutional text - it is, in other words, a purposive, or rather purpose-seeking method of interpretation. "

In *Phato; Commissioner of South African Police Services v Attorney-General, Eastern Cape*⁵⁹ Jones J held that a purposive approach is not necessarily the same as a generous approach. In his discussion of this decision, Jagwanth⁶⁰ summarized the reasoning of Jones J as follows:

- (1) A purposive approach to interpretation need not be a liberal or generous approach, but could also be restrictive, depending on the purpose of the right in question.
- (2) In support of this statement, he quoted the Canadian author, Peter Hogg,⁶¹ who states that a generous interpretation might overlook the purpose of a right and include behaviour that is unworthy of constitutional protection.
- (3) A generous approach to interpretation is not reconcilable with the stringent standard of justification required by the limitation clause.
- (4) A narrow interpretation should be given to rights while maintaining the stringent standard of justification called for by the limitation clause, rather than a wide interpretation with a more relaxed standard of justification.

The key to the relationship between "purposive" and "generous" would seem to lie in the fact that a constitution should not be regarded as ordinary legislation. It is a document which requires "principles of interpretation of its own"⁶² - a phrase quoted with approval by Kentridge AJ and a viewpoint which the majority of commentators seem to share.⁶³

A viable solution would be to follow a generous interpretation, but only to the extent that it

⁵⁹ 1994(2) SACR 734 (E).

⁶⁰ Jagwanth, S "Constitutional Application" *SACJ* (1995) 8 69 at 72.

⁶¹ Hogg, P *Constitutional Law of Canada* (1992) at 814-5.

⁶² See footnote 25 above.

⁶³ Eg, Kruger (Kruger, J "Regpositivisme en die 'ongeskrewe teks' van die (nuwe) grondwet" 1991 *SA Public Law* 229 at 233), who also referred to and approved of the well-known quotation from the *Fisher* case; Du Plessis and De Ville (Du Plessis, LM and De Ville, JR "Bill of rights interpretation in the South African context (1): Diagnostic observations" 1993 1 *Stell LR* 63), who agreed with the much-quoted passage from *Hunter et al v Southam Inc* ([1984] 11 DLR (4th) 641 (SCC) at 649), where it was stated that: "The task of expounding a constitution is crucially different from that of construing a statute."; Van Rensburg (Van Rensburg, JM "Interpretation and limitation of fundamental rights" 1995 (vol 30 no 2) *The Magistrate* 63 at 64), who expressly stated that the interpretation of a constitution differs from the interpretation of a statute; and Marcus (Marcus, G "Interpreting the chapter on fundamental rights" 1994 *SAJHR* 92 at 93), who is also of the opinion that a constitution is a document which enjoys a status differing from that of ordinary statutes.

would not defeat the purpose of the relevant provision, and as far as it is in accordance with the language of the Constitution.

In this regard "generous interpretation" can be seen purely as a warning that the courts should steer clear of a too literal or textual approach, especially if one has to reconcile it with the fact that great emphasis is placed on the fact that a constitution remains a *written instrument* which is interpreted.

The approach advocated in *Zuma* would seem to fall somewhere between a strictly purposive and a purely generous approach - which is acceptable in light of the fact that the Constitution is held to be a *sui generis* document to which the ordinary principles of statutory interpretation need not be applied.

4.3 Adherence to the principles regarding constitutional interpretation formulated in *Zuma*, in subsequent Constitutional Court decisions

Whether the principles formulated by Kentridge AJ in *Zuma* are of lasting value can only be established in light of subsequent decisions of the Constitutional Court.

In the second judgment of the Constitutional Court, *S v Mhlungu*,⁶⁴ the main judgment expounding the majority view followed the principles laid down in *Zuma*. They⁶⁵ held that an interpretation was to be preferred which gave force and effect to the *fundamental objectives and aspirations of the Constitution*, and which was less arbitrary in consequence. This is clearly a value-orientated judgment, and one in which it is mentioned that this interpretation is possible because *the language* of the relevant provision, namely section 241(8), permits such an interpretation.

It is interesting to note, however, that Kentridge AJ who formulated and applied these

⁶⁴ 1995(7) BCLR 793 (CC).

⁶⁵ Mahomed J delivered this judgment, in which Madala, Mokgoro, O'Regan and Langa JJ concurred.

principles in *Zuma*, ignored them in the minority judgment in the *Mhlungu* case. In this case he leaned towards a literal approach, holding that the language of the section was clear and therefore had to be given effect, and even referring to what the framers of the Constitution *intended* with this section. This is not at all in keeping with what was said by him in *Zuma*. Fortunately this was only a minority judgment.

In *S v Williams*⁶⁶ the Court also confirmed that "in interpreting the rights enshrined in Chapter 3 of the Constitution, a purposive approach should be adopted. "

The judgment on the unconstitutionality of the death sentence, *S v Makwanyane*,⁶⁷ is interspersed with references to concepts such as the values prevailing in a society, the historical background against which this judgment is delivered, and the idea of *ubuntu* which appears in the post-amble to the Constitution and refers to ideas such as humaneness, social justice and fairness. It would therefore appear that the Constitutional Court definitely proposes a value-orientated approach towards the interpretation of the Constitution.

Whether this approach will develop in something so liberal as to not have any bearing on the language of the Constitution, but be based on purely subjective 'values', remains to be seen. It is hoped not, and in light of Didcott J noting this danger clearly, and assuring that "...courts of law...whose training and experience warns them against the trap of undue subjectivity",⁶⁸ our hopes need not be groundless.

5 REVERSE ONUS PROVISIONS AND THE RIGHT TO A FAIR TRIAL

The constitutionality of section 217(1) (b) (ii) was attacked on the ground that it was

⁶⁶ 1995(7) BCLR 861 (CC) at 878 F.

⁶⁷ 1995(6) BCLR 665 (CC).

⁶⁸ See footnote 67 above at 734 A.

unconstitutional, being in conflict with section 25 of the Constitution.⁶⁹

Although the presumption of innocence, the right of silence and proscription of compelled confessions are not strange or new concepts to the South African law, it was necessary to confirm them in the Constitution, by the inclusion of section 25, as they have all "to a greater or lesser degree been eroded by statute and in some cases by judicial decision."⁷⁰

Kentridge AJ pointed out that section 217(1)(b)(ii) creates a legal presumption, with the legal burden of rebuttal on the accused - the so-called "reverse onus". The legitimacy of these kinds of provision has been examined by many courts abroad, all of democratic societies, and the conclusion reached was that these types of provision are neither uncommon nor necessarily unconstitutional.

In his interpretation of section 25 of the Interim Constitution, Kentridge AJ also came to the conclusion that the right to a fair trial embraces more than that set out in section 25(3)(a)-(j), and referred to a concept of substantive fairness, in contrast to formalistic fairness which was acceptable in criminal courts before the adoption of the Interim Constitution.

He also indicated that although the provisions of section 25 are more specific than any of the

⁶⁹ The particular provisions of section 25 which were relied on, are the following:

- "25 (2) Every person arrested for the alleged commission of an offence shall...have the right -
- (a) promptly to be informed, in a language which he or she understands, that he or she has the right to remain silent and to be warned of the consequences of making any statement;
 - ...
 - (c) not to be compelled to make a confession or admission which could be used in evidence against him or her; and
 - ...
- (3) Every accused person shall have the right to a fair trial, which shall include the right -
- ...
 - (c) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial;
 - (d) to adduce and challenge evidence, and not to be a compellable witness against himself or herself ."

⁷⁰ At 410 D.

other provisions of Chapter 3, they still lead to some problems of interpretation.

He proceeded to solve these problems by first examining the general principles applicable to constitutional interpretation,⁷¹ and then by researching the application of similar provisions in other countries, for example the United States of America and Canada.

In both of these countries, the courts struggled to reconcile the presumption of innocence with the reversal of the onus. They provided different solutions to this problem, for example in the United States the Supreme Court formulated a test for the validity of such a presumption⁷² in *Tot v The United States*,⁷³ namely that there must be a:

"rational connection between the facts proved and the fact presumed... But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of the courts."

Twenty five years later, in *Leary v United States*⁷⁴ the court formulated a stricter test, in saying that:

"a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."

Kentridge AJ feels that rational connection is a "useful" screening test, but not a "conclusive" one. He substantiates this viewpoint with a quote by Stevens J from *County Court of Ulster County, New York et al v Allen et al*,⁷⁵ where he said that:

⁷¹ See discussion in par 4.1 above.

⁷² As in s 217(1)(b)(ii) of the Criminal Procedure Act.

⁷³ 319 US 463 (1943).

⁷⁴ 395 US 6 (1969).

⁷⁵ 442 US 140 (1979).

"since the prosecution bears the burden of establishing guilt, it may not rest its case entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond reasonable doubt. "

He then turns to Canadian jurisprudence, where the rational connection test has also arisen, but in a way which is considered more useful for the South African situation, as section 1 of the Canadian Charter has a limitation clause analogous to section 33 of the South African Constitution.

Section 1 of the Canadian Charter calls for a "two-stage" approach, namely an enquiry into whether a fundamental right has been infringed upon, and if so, whether this infringement is justified under or "saved" by the limitation clause.

Kentridge AJ examines the application of the two-stage approach to the particular question of reverse onus provisions in three Canadian cases,⁷⁶ all of which held that such a presumption is a violation of the right to the presumption of innocence.

He then applies the first three of seven principles formulated by the Canadian Supreme Court in *R v Downey*,^{77 78} and eventually comes to the conclusion that section 217(1)(b)(ii) is in conflict with section 25 of the Constitution, as:

⁷⁶ *R v Oakes* (1986) 26 DLR (4th) 200; *R v Whyte* (1988) 51 DLR (4th) 481; and *R v Downey* 90 DLR (4th) 449.

⁷⁷ See footnote 76 above.

⁷⁸ These three principles are:

- (1) The presumption of innocence is infringed whenever the accused is liable to be convicted despite the existence of a reasonable doubt.
- (2) If by the provisions of a statutory presumption an accused is required to establish, that is to say to prove or disprove, on a balance of probabilities either an element of an offence or an excuse, then it contravenes section 11(d). Such a provision would permit a conviction in spite of a reasonable doubt.
- (3) Even if a rational connection exists between the established fact and the fact to be presumed, this would be insufficient to make valid a presumption requiring the accused to disprove an element of the offence.

- (1) The common law rule on the burden of proving that a confession was made voluntarily, is an essential part of some of the rights contained in section 25 of the Interim Constitution, namely the right to remain silent after arrest, the right not to be compelled to make a confession, and the right against self-incrimination.
- (2) These rights are furthermore a necessary reinforcement of the so-called "golden thread", namely that the prosecution has to prove the guilt of the accused beyond a reasonable doubt.
- (3) If the burden of proof is reversed, as is the case with reverse onus provisions, all these rights are undermined. The reverse onus provision contained in section 217(1)(b)(ii) further lays a much more difficult burden of proof on the accused, namely they have to discharge the onus on a balance of probabilities.
- (4) The common law rule regarding the burden of proof is inherent to the rights listed in section 25 and forms part of the right to a fair trial.

6 APPLICATION OF THE GENERAL LIMITATION CLAUSE

The Interim Constitution contains a general limitation clause in section 33(1). According to this provision, the limitation of fundamental rights will be constitutional if the requirements set out therein are met.

In *Zuma* the state submitted, in the alternative, that if it is decided that section 217(1)(b)(ii) is unconstitutional, it is saved by section 33(1) of the Interim Constitution.⁷⁹

⁷⁹ General limitation clauses have already been the subject of numerous decisions, eg *S v Makwanyane* 1995(6) BCLR (CC); *Matinkinca v Council of State, Ciskei* 1994(1) BCLR 17 (Ck); *S v Majavu* 1994(2) BCLR 56 (CkGD); *Khala v Minister of Safety and Security* 1994(2) BCLR 89 (W); and *Kauesa v Minister of Home Affairs* 1994(3) BCLR 1 (NmH), and of numerous comments, eg De Ville, J "Interpretation of the general limitation clause in the chapter on fundamental rights" 1994 *SA Public Law* 287; Devenish, G "An examination and critique of the limitation provision of the bill of rights contained in the Interim Constitution" 1995 *SA Public Law* 131; Van Rensburg, JM "Interpretation and limitation of fundamental rights" 1995 *The Magistrate* 63; and Woolman, S "Riding the push-me pull-you: constructing a test that reconciles the conflicting interests which animate the limitation clause" 1994 *SAJHR* 60.

With regard to the application of limitations, we can draw the following conclusions from what Kentridge AJ decided:

- (1) *Zuma* confirms that the two-stage approach, as set out in the Canadian case of *R v Oakes*,⁸⁰ will be followed. This approach is applied by posing two questions, namely:
 - (i) Has a fundamental right entrenched in the Constitution been infringed?
 - (ii) If the answer is 'yes', does this infringement comply with all the requirements of the limitation clause, and is therefore 'saved' by it?
- (2) Once again the Court referred to the Canadian model, but decided that section 33(1) itself sets out the criteria which ought to be applied, and that a mechanical application of Canadian jurisprudence is not always required.
- (3) The tests of reasonableness, justifiability and necessity are not identical and in applying each of them individually, one might not always arrive at the same result. In certain instances, they may, however, be assessed together, as was the case in *Zuma*.
- (4) The fact that the limitation of a right is merely 'convenient' would not be sufficient to justify the infringement under section 33(1).

It was held by the Court that section 217(1)(b)(ii) does not meet the requirements listed in section 33(1).

7 CONCLUSION - THE VALUE OF THE ZUMA CASE

The *Zuma* case, as the first judgment of the Constitutional Court, is of considerable value with regard to certain basic principles which should be followed when approaching the Constitution, and more specifically, Chapter 3 dealing with fundamental human rights.

These can be summarized as follows:

- (1) Provincial and local divisions of the Supreme Court should make an effort to alleviate

⁸⁰ 1986 26 DLR (4th) 200.

the work-load of the Constitutional Court, by refraining from making incompetent referrals to the Constitutional Court.

- (2) In the interpretation of the Constitution, and more specifically Chapter 3, a value-orientated approach should be followed. Care should be taken, however, that this approach does not degenerate into purely subjective value judgments.
- (3) Although the Constitution clearly requires a purposive approach in its interpretation, it should never be forgotten that this is in fact a written instrument, of which the language cannot be disregarded.
- (4) It was held that the "fair trial" encompassed in section 25 of the Interim Constitution, goes further than the traditional view of procedural or formal fairness, and embraces a concept of substantive or material fairness.
- (5) The presumption in section 217(1)(b)(ii) of the Criminal Procedure Act was held to be unconstitutional. Kentridge AJ took pains, however, to point out that this decision does not mean that all legal presumptions can now be regarded as unconstitutional. This finding, albeit formally correct, offers cold comfort to many government institutions operating with statutes containing presumably invalid presumptions. It leaves them with the option of approaching Parliament with a general law amendment Act to remove such presumptions, or waiting for an appropriate case to serve before the Constitutional Court. A solution may be a provision in the final constitution analogous to section 87(c), read with section 79(2), of the Namibian Constitution. This section gives the Attorney-General the power to approach the court for the ruling on the constitutionality of any matter.⁸¹ In the South African context this power could be given to the Minister of Justice.
- (6) In accordance with section 35(1) of the Interim Constitution, the Court liberally referred to comparable foreign case law. It was stated, however, that where the South African Constitution sets out criteria which ought to be applied, the specific case should not be forced to fit the pattern of foreign case law. This approach was consistently followed in subsequent decisions of the Constitutional Court.

⁸¹ The best-known example of the exercise of this power is *Ex parte Attorney-General: In re corporal punishment by organs of state* 1991(3) SA 76 (NmSC). This power is not totally unknown in South African law. In terms of s 385 of the Criminal Procedure Act 56 of 1955, the Minister of Justice had the power to approach the court for an "abstract" ruling on a legal question.

- (7) The application of the two-stage approach regarding the limitation of fundamental rights, was confirmed.

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