10. THE LIABILITY OF THE STATE FOR ADMINISTRATIVE EDUCATION ACTS

10.1. Introduction

Bear in mind that the following discussion refers to the liability of the state as a result of judicial proceedings instituted against it. Whenever the state is sued by its officials (servants) or the private individual in the civil courts (the public courts), both applicants act in their private capacity: as regards the official, it is the state and not its components, which is vested with legal personality in this case.69

As was said above, the state administration comprises all the administrative bodies/organs which are directly involved with the execution of authoritative powers. During the course of its activities the administration performs duties which may affect the rights of individuals and cause prejudice. In most cases though, the administration has a lawful basis for its conduct in which case the individual has no action. If, on the other hand, the administration acts wrongfully and causes damage or loss to the individual, the law requires that the individual be compensated for the loss or damage.

Section 1 of the State Liability Act 20 of 1957, provides that the state will be liable for "any wrong committed by any servant of the State acting in his capacity and within the scope of his authority as such servant". In terms of this Act as regards the wrongful act (delictual liability), no difference exists between the position of the state and its servants (public law) and that of the master and servant in private law.

If state liability were based on a private-law basis, this could, however, cause problems, as the state is not merely a private employer. The state and its components must, after all, act in the public interest and in this respect a private-law basis would be ill-equipped for this purpose. As yet, no wholly and generally acceptable legal basis for the liability of the state for administrative acts has been established in our law. A more acceptable basis – which includes a form of private-law liability – would be that the state in rendering wide-ranging services to promote the general public

69 Bear in mind, though, that certain autonomous administrative education bodies, like the TFC, are clothed with legal personality. Under certain circumstances such a body may file a suit in its official capacity against, for example, the Minister of Education and Culture (House of Assembly).
interest, must take responsibility for the risk that its employees may commit delicts (wrongful acts) which may cause loss that has to be made good.

Because state liability arises almost exclusively from administrative acts within the individual legal relationship, the emphasis will fall mainly on "purely administrative acts" as a source of such liability.

10.2. Lawful administrative acts

A lawful administrative act by the administration is performed within the sphere of its authority. The interpretation of "authority" – as is also mentioned in the Act supra – raises certain questions. It may be given a narrow interpretation, in which case authority would be statutory authority (statutory powers). In this regard the intra vires act performed by the administration would be a lawful act, irrespective of the fact that it may have caused unreasonable consequences for the individual. Seen from this angle, the administrative act would not comply with the principle of general legality: in other words, according to the discussion on valid acts supra, it would be an invalid administrative act. As general legality constitutes the foundation of sound administration, it must be said that the exercise of a statutorily authorised power in an unreasonable manner, is invalid and also wrongful if the unreasonable exercise thereof infringe rights, powers and privileges.70

It is suggested that "authority" in the above-mentioned Act should be given a wider interpretation in order to mean "acting within his capacity and within the scope of his employment as such a servant".71

In the education administration this approach would mean that the principal cannot act purely in terms of his statutory powers (whether provided expressly, by implication or as ancillary powers) but must also act in a just and equitable manner. Compliance with the requirements for validity

70 As was said supra under reasonableness as a requirement for validity, unreasonable- ness relates to the infringement of rights, powers and privileges of the individual.

71 This interpretation was followed in a decision of the Appellate Division, Mhlongo NO v. Minister of Police 1978 2 SA 551 (A). In casu state liability for the acts of policemen was put beyond doubt by the inclusion of section 5 in the Police Act 7 of 1958. The effect of this amendment is that the state will be liable for the wrongful act of a policeman performed within the scope of his "employment". However, as police acts constitute a particular type of administrative act, one would be cautious not to equate them with acts normally performed by the state administration.
thus signifies not only lawful conduct but also valid conduct according to the general principle of legality.

10.3. Wrongful administrative acts

Flowing from the discussion above, the statement may be made that wrongful administrative acts are invalid acts which infringe the rights of individuals in a culpable manner causing them damage or loss.

In the assessment of wrongful acts by the administration, the following criteria are employed:

10.3.1. A wrongful administrative act is naturally invalid

Wrongful administrative acts are not automatically delicts.\(^\text{72}\) Only those wrongful acts which infringe the rights of the individual and cause damage or loss, raise the possibility of state liability.\(^\text{73}\)

10.3.2. The administrative organ who has acted delictually must have a blameworthy state of mind

The form of fault that is required here, as well as in private law, is either intention (mala fides or dolus) or negligence (culpa). The blameworthy state of mind which is required in mala fides is tested by means of subjective criteria, for instance, did the particular principal act mala fide? Where negligence is concerned, the care of a reasonable man (the bonus paterfamilias) is used as criterion: for instance, would a reasonable principal have acted in this way? This test is an objective test of reasonableness.

10.3.3. The wrongful authoritative act must be performed by a servant of the state

In order to determine who is a servant of the state, the status of the particular person must be considered. The following questions could serve as

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72 Delicts are found in private law and are tested against similar requirements.

73 Many examples exist where the acts of the principal, in terms of his authoritative position, may encroach upon the rights of his members of staff: this infringement is, however, not always wrongful.
guidelines: who pays the person? with whom has he entered a service contract into? who decides on his promotion, transfer or dismissal?

The next question is: when does the servant act in his capacity as a servant of the state? Certain formal and material tests are used here. The formal test is whether the delictual act took place during ordinary working hours. This test is not conclusive, as the principal may also act in his capacity as principal after working hours. Certain material tests must therefore be used with the formal test. For example, the purpose and the nature of the principal’s act must be examined. Another material test that may be applied is to examine the nature of the relationship between the state and the principal. In this regard the courts will ask whether the principal was under the direct control of a higher authoritative body while performing the act. The control test caused many problems in the past as it was accepted that a servant who exercised a discretion, was not under the control of the state. From this point of view, the exercise of a discretion implies that the person is acting in a private capacity and consequently, the principal would be personally liable (in his private capacity) for his discretionory conduct.

The courts do not actually use the original control test any longer but, instead, enquire whether the servant has acted in terms of the authority vested in him. In other words, the courts will still examine the control exercised over the servant, but on a much wider level, namely, whether the act was performed in accordance with the general requirements of the law.

10.3.4. The aggrieved person must prove that he has suffered damage

The type of damages which can be claimed from the state in respect of administrative acts, is also determined by private law. Material damage may be claimed via the actio legis Aquilae while damage to the person (for example for dishonour to his reputation, dignity or integrity) may be

74 When the nature of the principal’s act is scrutinised, his position of authority must be considered. The deputy may also perform acts of school management in his capacity as servant of the state although he cannot perform them in terms of an authoritative position. Within the school substructure only the principal is vested with this special status.

75 In another police case, Naidoo en Andere v. Minister van Polisie 1978 4 SA 954 (T), the court rejected this narrow application of the control test with its ridiculous implications.
claimed via the actio iniuriarum (action for defamation). The individual may institute the actio iniuriarum against the state, but the state cannot institute this action against an individual.

10.3.5. The state has the power to alter its liability by way of legislation

The state may regulate its liability at any time before or after the commission of a wrongful act by its servants. It may also exclude liability in certain instances. Certain formal procedural requirements may also be instituted through legislation, for example, compliance with provisions relating to the service of documents; compliance with provisions as to whom to cite as nominal defendant or respondent; compliance with provisions relating to the time within which actions may be instituted.

10.3.6. Strict liability based on risk

As a general rule, our law does not recognise strict liability based on risk. In some instances the state does not compensate individuals who have suffered damage or loss despite the fact that there has been no fault on the part of the servant (author), for example, in the case of dangerous activities by the state in terms of the Electricity Act 40 of 1958.

76 Both actions are called delictual actions but are instituted according to the nature of the damage or loss. The actio legis Aquiliane is used by an aggrieved person in the case of material damage or loss. To illustrate this point: say that the school bus has been damaged as a result of the mala fide conduct of the principal. The law supplies a remedy for the pecuniary loss caused by this act and normally a sum of money will be paid out. In the event of the actio iniuriarum where the aggrieved person’s reputation, dignity or personality is dishonoured, the loss or damage is not of a material (pecuniary) nature but immaterial as it affects personal qualities. An example would be the defamatory conduct of the principal against the teacher or pupil. However, once the actio iniuriarum has been successfully instituted against the offender, the “loss” or “damage” will be calculated by the court in financial terms and paid out to the aggrieved party.

77 The South African Teachers’ Council for Whites Act supra, provided in section 25 that the former SATC and a member or employee of the council would not be liable for damages resulting from an act performed in terms of certain sections of the Act.

78 In terms of the above-mentioned Act the teacher could appeal to the Supreme Court within three months after the SATC had acted against him.

79 In order to succeed with a delictual claim against the state, the plaintiff must not only prove wrongfulness and damage or loss, but also that the official acted intentionally or negligently.
10.3.7. Limitation of state liability by the presumption that the state is not bound by its statutes

The presumption that the state is not bound by its statutes applies, unless the legislature binds the state expressly or by necessary implication.\(^{80}\)

**Résumé**

When the liability of the state for administrative acts is determined, the nature of the relationship between the state and its servant must be analysed. Certain criteria are employed in this regard.

The state is vested with legal personality and therefore the highest authoritative body in the education structure will normally be cited – in its capacity as the representative of the state – in legal proceedings.

“Lawful” administrative acts must be interpreted according to the general principle of legality in order to render the state liable for administrative acts conducted in an unreasonable manner.

Wrongful administrative acts are invalid. Certain aspects must be borne in mind whenever state liability must be established.

This discussion must be supplemented with additional material from the bibliography.

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\(^{80}\) More information will be supplied on this point *infra* under interpretation of statutes.
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PART ONE GUIDELINES FOR THE INTERPRETATION OF STATUTES

This section consists of two parts. Part One deals with the theoretical part of the interpretation of statutes and Part Two covers the practical application of the rules of statutory interpretation.

1. INTRODUCTION

The interpretation of statutes, or more correctly, the juridical interpretation of statutes, is a comprehensive task which covers almost every facet of the law. Because it is so comprehensive, it involves many rules and methods which, unfortunately, cannot be neatly compartmentalised. It is therefore quite understandable that law students regard the interpretation of statutes as one of the most difficult subjects.

According to the title, this section deals with the interpretation of statutes (legislation). Legislation as a source of the law of education has been discussed supra. It was also observed that statutory law (written law) must be seen as the most significant source of the law of education: it creates the public-education structure and regulates its organisation, powers and activities.¹

As the powers and activities of education bodies are embodied primarily in education legislation, teachers should have some knowledge of the interpretation of statutes. The principal will consult the education legislation, whether it be central or subordinate, to establish the nature and scope of

¹ Refer to the discussion on legislation as a source of the law of education and administrative legislative acts supra.
his powers and duties; the teacher must acquaint himself with his powers and duties vis-à-vis the professional council or the education department; the superintendent (inspector) must consult legislation in order to determine his position vis-à-vis the principal or the teacher; directors of education or other bodies of internal control must adhere to particular rules when they act against subordinate education officials. Statutory interpretation is therefore encountered not only in problem cases but throughout the application of legislation, whether consciously or unconsciously.

The civil courts (judiciary) are the chief interpreters of legislation: our case law consists of authoritative decisions that are binding on the lower courts. Through this process the rules and principles of statutory interpretation have developed and become established. Within the internal education sphere legislation is interpreted on an almost daily basis by a wide spectrum of education officials who are all, needless to say, aware of the many problems which arise from the process of interpretation. Ignorance of this field of study may, however, be the main cause of these problems.

In the discussion which follows, an attempt will be made to demarcate the theoretical field of interpretation of statutes and the practical application will be explained. The intention is not to provide a comprehensive discussion but only a basic framework to which may be added the reading matter to be found in the bibliography.

2. THE NATURE AND SCOPE OF INTERPRETATION OF STATUTES

Within the theoretical structure of this field of study, there is a variety of rules of interpretation, which differ in nature and application. Some of these rules may indeed be called legal rules, as their origin or source would be legislation, the common law or case law. Other rules of interpre-

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2 The Interpretation Act 33 of 1957 may be regarded as an important source of rules of interpretation; legal presumptions which have a common-law origin, also form a valuable source; decisions of the Supreme Court relating to interpretation of statutes, also create binding rules of interpretation. For example there is, Dadoo Ltd v. Krugersdorp Municipal Council 1920 AD 530 on the application of the literal rule; S v. Kohler 1979 1 SA 861 (T) on the application of the eiusdem generis rule; Klipriviersoog Properties (Edms) Bpk. v. Gemeenskapsontwikkelingsraad 1984 3 SA 768 (T) where modificative interpretation was applied in order to establish the manifest purpose of legislation.
tation are merely rules of logic, guidelines or tests which are applied under special circumstances. Nevertheless, these rules of interpretation constitute the theoretical norms or working tools which are used by the interpreter – the judge in court or the school principal – to establish the purpose or object of the legislation. Consequently, to establish the juridical meaning of legislation, the interpreter must apply the rules of statutory interpretation.

Résumé

Interpretation of statutes relates to the juridical meaning of legislation. As legislation constitutes an important source of this field of study, the different categories of legislation must be examined.

In order to establish the juridical meaning of a statute the interpreter has to apply theoretical rules and methods to solve or explain a practical problem situation. Certain techniques must be mastered for the correct application of these theoretical aids to a given concrete situation.

The purpose or object of the legislation constitutes the decisive criterion in the interpretation process: all rules of interpretation and other aids must be applied towards achieving this goal.

3. THE THEORETICAL STRUCTURE OF INTERPRETATION OF STATUTES

The theoretical basis of interpretation of statutes consists of the different rules of interpretation and other internal and external aids which are used in the interpretation process. The ratio for applying these rules is to establish the manifest purpose of the legislation. It is averred, quite rightly, that legislation is adopted with a specific aim or purpose in mind and therefore the interpretation process should involve a purposive activity.4

3 In Sutter v. Scheepers 1932 AD 173 the court held that the tests which have been developed for the determination of peremptory and directory statutory provisions, must be regarded merely as guidelines in the search for the intention of the legislature.

4 In Jaga v. Donges 1950 4 SA 653 (A) the court held that the text of the legislation in question, must be construed in the light of its general policy and purpose thereof; in R v. Westenraad 1941 OPD 103 the different provisions of an ordinance were interpreted and reconciled with the express or clear purpose of the legislation.
As is mentioned above, different procedures or methods may be used in the interpretation process. The theoretical norms, rules and methods constitute the working tools which are used in a specific manner: this follows that the techniques of interpretation must be understood and mastered. In order to understand these techniques, the theories underlying the basic rules and methods, have to be examined.

3.1. The narrow or purely textual approach

In general terms one may explain the textual approach as the meaning of the words used in the text. This statement signifies the predominance of the meaning of the written word. Furthermore, it is said that words should bear an ordinary or plain meaning as they function primarily within ordinary daily situations. After all, the layman should be able to understand legislation. Because the interpreter cannot surmise a meaning or “add” meaning to a word, an approach has been developed whereby the plain or ordinary meaning, in fact, becomes the literal (grammatical) meaning.

The notion existed at one time that the intention of the legislature should be established from the words that are used in the text: the interpreter could not go beyond the text and, consequently, the intention of the legislature was equated with literal meaning. If the ordinary meaning does not make sense, is confusing or ambiguous, the courts (interpreters) should refer the legislation back to the legislature for emendations.

Over the years much criticism has been raised against this narrow form of interpretation. The following points may be mentioned:

- The written word is a medium to convey meaning but does not bear meaning in itself. Words are interpreted within a specific context or structure of language and cannot be construed in isolation;

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5 This approach is, of course, in line with the doctrine of separation of powers: the legislature, as the sovereign legislative power, is responsible for the drafting of legislation while the interpreter is in charge of interpretation only. The interpreter is therefore, bound by the text of the enactment and cannot add or omit a word or sentence.

6 It is said that words, sentences and even the whole text, do not bear any inherent meaning irrespective of how meticulously the legislator has phrased them. The text must therefore be construed within its context.
the intention of the legislature is of paramount importance but cannot be equated with the literal rule. According to this narrow approach intention is degraded to a mere rule of interpretation although it should in actual fact be the frame of reference within which the purpose of legislation is established;

the intention (state of mind) of the legislature is a fiction as one can hardly establish the subjective state of mind — something which requires subjective criteria — of a composite body. When legislation is launched through Parliament, unanimity is seldom reached and the protracted legislative process makes it difficult to determine at which stage, and whose intention should be used as the criterion. The concept “intention of the legislature” must therefore be regarded as an imaginary construction to explain the legislature’s conduct and to place it within the frame of reference of the purpose of legislation;

the intention of the legislature cannot be the main or decisive aim of the interpretation of statutes. The intention theory creates the impression that once the legislature has spoken, the courts lose any creative functions which they might have had. This approach (a strongly positive approach which emphasises the written law) rejects any creative influence in the law and refuses to recognise legal values and criteria of fairness which could prevent unjust and unreasonable effects.

According to the narrow approach, the meaning of the text must be found in the “intention” (or the idea) of the legislature which is hidden behind the words or language. Words, or the language in itself, are, however, not always the true symbols of intentions or thoughts as incorrect or inappropriate words are often used to convey ideas.

There are many instances where the narrow “intention” of the legislature, as a result of deficiencies in the written word, has not conveyed the true intention (meaning the purpose of the legislation): in S v. Kukarie 1972 2 SA 907 (O) the court acknowledged that it could not understand the legislation because of the confusing, ambiguous words that were used in the text. It was therefore, almost impossible to determine the true intention of the legislature. If the court could have elevated the intention of the legislature to the purpose or object of the legislation, the true intention would have ruled supreme: Dadoo Ltd. v. Krugersdorp Municipal Council 1920 530 (AD). In casu the intention of the legislature was found in the literal meaning of the words and as the court could not “create the law”, the legislation was referred back to the legislature for the necessary amendments. The “new” intention in the amendment Act then coincided with the true intention as it was originally construed in a contextual manner, but not applied.

The opposition party and its members will oppose certain legislation and it also frequently happens that some parliamentarians are not present when a bill is launched through the legislative process. Furthermore, it must be remembered that it is not the legislature itself which drafts legislation but a specialist drafting body.

Such a strong viewpoint would then, inter alia, disregard the application of common-law rules in the interpretation process. The significant role played by legal presumptions (common-law rules) in the interpretation of statutes, will be discussed infra.
3.2. The wide, contextual approach (teleological or functional approach)

This approach to interpretation is conducive to the purpose oriented nature of legislation and other purposive approaches. The intention of the legislature still fills an important place but within the wide contextual meaning of "intention": in other words, the intention is determined within the ambit of the underlying purpose of the legislation. To put it crisply, the purpose of legislation is the decisive factor in determining the legislature's intention.

According to the contextual approach, the purpose of legislation is preferred to the intention of the legislature in its narrow sense. This indicates a change from the subjective intention of the legislature to a more objective purpose of legislation. The latter objective aim or purpose thus forms a sound theoretical foundation for the interpretation of statutes. In order to approach legislation in relation to its broad context, a wide contextual framework must be acknowledged from the outset of the interpretation process. According to the textual approach the interpreter may deviate from the literal meaning in particular instances only, for example, where the words of the text do not reflect the intention of the legislature, or, where absurd results would take effect which could, in any event, not have been the intention of the legislature.

The purpose-orientated approach provides a balance between the grammatical (literal) and wide contextual meaning. It can also accommodate the continuous time-frame in which legislation operates and acknowledges

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11 To build the theoretical structure of interpretation of statutes on a subjective-intention criterion, may cause many problems, for instance, it would cause the development of improved interpretation techniques to stagnate.

12 This broad approach thus indicates an opposite method of interpretation: the first step in the textual approach is to establish the literal meaning of the words as it is found within the narrow meaning of "intention". This is done without regard to surrounding circumstances or other related matters. The contextual approach, on the other hand, starts with the legislation in its wide context, which means that all relevant intra-textual and extra-textual circumstances and matters will be considered from the outset.

13 To illustrate this point, the court held in Du Plessis v. Joubert 1968 1 SA 585 (A) that words convey their ordinary meaning unless this would conflict with the intention of the legislature. The intention of the legislature must then be established by examining the enactment as a whole, and surrounding circumstances. Once this is established, the court may deviate from the plain, ordinary meaning, provided the text is capable of bearing another meaning. In the Jaga case supra, the minority judgment (with persuasive power only) acknowledged the interpretation process within a contextual framework.
the flexibility and peculiarities of language, historical aspects and preliminary discussions as valuable aids to interpretation.

Bear in mind, though, that the courts are not yet unanimous about the interpretation of the intention of the legislature. In some cases intention still bears the restricted meaning while in other cases it has been construed in relation to context.14

Résumé

The interpretation of statutes is a purpose-orientated activity in which certain methods and techniques are to be mastered by the interpreter.

The theoretical structure of interpretation is based on different theories of which the narrow textual approach is one. According to this approach the literal meaning of the word is seen as the intention of the legislature: the intention of the legislature is found within the literal meaning. Criticism of this approach is directed at the deficiencies of words as separate units of meaning and the lowering of the status of “intention of the legislature”.

The wide contextual or teleological approach prefers a wide frame of reference which includes extra-textual aspects. The “intention” is elevated to the frame of reference in which the “purpose of the legislation” is to be determined. In this way the shortcomings of “intention” as a subjective criterion are made good by linking the concept of intention with an objective purpose-orientated test.

In some cases it will be difficult to determine which approach has been followed by the courts; in other cases the interpretation process will have elements of both approaches. The wide, contextual method is recommended as it provides a broad frame of reference which offers adequate opportunity for proper attention to be denoted to each stage of the interpretation process. After all, fair and equitable conduct should also be the hallmark of this field of study.

14 In some cases it is quite difficult to establish how the courts have interpreted “intention”: sometimes reference is made to the intention of the legislation, which could indicate a combination of the two elements (subjective and objective). In recent court decisions dealing with the national emergency measures and the interpretation of subordinate legislation (proclamations by the State President), there are many examples of the way in which the courts interpret legislation in relation to its context: see in this regard, State President and Others v. Tsenoli and Kerchhoff v. Minister of Law and Order 1986 4 SA 1150 (A).
4. FUNDAMENTAL RULES OF INTERPRETATION OF STATUTES

Whether the interpreter follows the purely textual or wide contextual approach, there are certain basic or fundamental rules applicable to the interpretation process. It may happen that in some cases where the purely textual approach has been followed, certain basic rules have been used incorrectly, or not at all. The discussion which follows will deal briefly with the fundamental rules of statutory interpretation and additional literature may be found in the bibliography.

4.1. The common-law presumptions

As is mentioned in the discussion above, the common law is regarded as a source of the rules of interpretation. This means that common-law rules, for example legal presumptions, exist alongside statutory rules and case law as a source of interpretation of statutes. Although there is still no complete unanimity about the nature of presumptions, one may conclude that for the purpose of statutory interpretation, legal presumptions apply unless excluded by legislation either expressly or by necessary implication. Briefly, one may presume that a particular legal presumption will find application unless it is rebutted by legislation. In the case of rebuttal, the presumption will not apply.

The interpreter must be conscious of legal presumptions from the outset as they form the basic guidelines to be followed throughout the interpretation process. Adherence to presumptions ensures legality in the interpretation process: it guards against unjust results and the retroactive operation of statutes – unless such operation proves to be in the individual's interest.

The most important presumptions will be discussed briefly.

15 Supporters of the contextual approach refer to presumptions as the ABC and XYZ of the interpretation process and regard them as intra-textual elements of legislation (within the structure of legislation). Following this statement, presumptions operate as the material grundnorm (the original form) of legislation.

16 Refer to the discussion of legality supra, and the emphasis on just and equitable conduct.
4.1.1. The presumption that the state is not bound

The general rule is that the state is not bound by its own legislation, except by express provision or necessary implication to the contrary.

If the state (which naturally includes the state administration) is not bound by its own legislation, the question of state liability strictly speaking, cannot arise. A distinction must, however, be made between the higher acts of state, where the state acts as the sovereign, and the state in its administrative capacity, as discussed previously. In the latter instance, which is of particular importance in the public-education sphere, the state will indeed incur liability through the conduct of its organs. The criterion for liability is, of course, the conduct of the servant “within the scope of his employment”.

Finally, it must be remembered that, in determining whether the state is bound, each case must be considered individually and the relevant legislation analysed in context. The aim is to establish the objective purpose of the legislation involved.

4.1.2. The presumption against provisions which are futile or nugatory (purposeless legislation)

Unless the contrary applies, it is presumed that the legislature does not intend legislation which is futile or without any purpose. This presumption therefore supports the contextual approach which emphasises the purpose-orientated characteristic in the formulation of legislation.

The presumption is also applicable to subordinate legislation, where the maxim ut res magis valeat quam pereat applies: in other words, valid

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17 In terms of the legislation mentioned above, Act 116 of 1976 (now repealed), the official of the SATC (in effect, the state) did not incur liability when performing its functions and duties in the prescribed manner: section 25, read with section 18(a) or (b), 19 or 23. In other words, the officials must act within the scope of their employment. With reference to these binding provisions, one may deduce that the state may also be bound by one section or several sections of a statute. See also the discussion on state liability supra.

18 Because the narrow meaning of “intention of the legislature” was followed in the Dadoo case, supra, the court preferred to hold that the provisions in question were futile and nugatory rather than to apply modificative interpretation. The legislature had to pass an amendment Act. If the presumption had been applied, the court would have been able to project the true intention of the legislature onto the purpose of the legislation and to have given a positive decision. Thus the provisions of the original enactment would, according to the purpose of the legislation, have been valid and operative.
rather than invalid subordinate legislation. Subordinate legislation which is *ultra vires* is, of course, invalid. This maxim will apply only where two interpretations of the provision are possible. Clearly invalid provisions cannot be cured or validated by the application of this maxim.

The courts are indeed prepared, in the light of this presumption against futile and nugatory provisions, to apply modificatory interpretation but will not, for other reasons, apply modification at will.\(^{19}\) Only when the ordinary meaning of the words does not reflect the clear purpose of the legislation, and when the words are capable of such a construction, will modificative interpretation be applied.

4.1.3. The presumption that the legislature intends to promote the public interest

Strictly speaking, this presumption must be regarded as an *irrebuttable* presumption as it is accepted that legislation is *always* passed in the public interest. Although legislation regulates *public* (general) provisions, it is also applicable to the *individual* as a citizen or inhabitant of the state. A proper balance must, therefore, exist between the public interest, which applies to all individuals, and individual interests and rights.\(^{20}\) After all, the law must, *inter alia* by means of legislation, create and maintain equilibrium within the community. The object of this presumption is mainly to guard against unfair or unequal treatment.

Public interest and general interest must, however, not be regarded as synonymous. The general interest is aimed at the interest of a *particular group*, for instance, teachers, farmers or business executives. Even in cases where the interests of a substantial group of individuals are at stake, it cannot be regarded as the *public* interest. Public interest therefore includes the general interests of specialised groups of individuals:

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\(^{19}\) One of the reasons is, of course, the demarcation of powers in terms of the doctrine of *separation of powers*. See the discussion on modificative interpretation and its application, *infra*.

\(^{20}\) It is, however, not always easy to maintain this balance: in many cases the public interest will carry more weight. In *R v. Magana* 1961 2 SA 654 (T), section 14 of the Interpretation Act was in question. The court held that the statute was promulgated for the public good and, consequently, the powers of public officials (civil servants) must be interpreted in an extensive manner and not restrictively.
general interest is specified by public interest. Following this argument, one cannot say that a matter of general interest will necessarily clash with public interest. It also becomes clear why this strong presumption is generally regarded as irrebuttable.

4.1.4. The presumption against the exclusion or limitation of the courts’ jurisdiction

Unless it is expressly provided in the legislation concerned or must be inferred by necessary implication, it is presumed that the legislature does not intend to exclude or limit the jurisdiction of the courts. Education legislation, as mentioned above, empowers superior education bodies or organs to make decisions. Whether the courts are competent to review such decisions depends on the purpose of the authorising legislation. Even where the courts’ jurisdiction is excluded expressly, this does not indicate a general exclusion: the Supreme Court still retains its inherent common-law power of review.

4.1.5. The presumption that the legislature does not intend altering the existing law more than is necessary

In terms of this presumption, legislation must be interpreted in such a way that it agrees with existing law, or deviates from it as little as possible.

Where the common law is concerned, this presumption will not apply where the legislature provides expressly for the alteration of the common law. Such an alteration must be implemented.

With regard to statutory laws, the presumption means that in interpretation of a subsequent Act, it is assumed that the legislature did not intend repealing or modifying the earlier Act. Any repeal or amendment has to be affected expressly or by necessary implication. In principle, the interpreter

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21 Primarily, a matter of public interest is not regarded as a private matter. There must, however, be reconciliation and correlation between public and private interests. In certain cases the courts have allowed a private action to be instituted in the public interest: Bamford v. Minister of Community Development and State Auxiliary Services 1981 3 SA 1054 (C) and S v. Innes 1979 1 SA 783 (C).

22 Referring to the education legislation mentioned supra, a “conclusive” or “final” decision by the organ does not mean that the courts’ jurisdiction is excluded in toto. The Supreme Court may still review the matter, for example in the case of mala fides.
must read the earlier and later enactments together in an attempt to reconcile them. If such a reconciliation is impossible, it has to be presumed by necessary implication that the subsequent legislation amends or repeals the earlier legislation.  

4.1.6. The presumption that the legislation does not intend that which is unreasonable, harsh or unjust

This presumption has already been mentioned in the discussion of the requirement of reasonableness supra. The presumption arises only if doubt exists about the meaning of a provision, and if more than one interpretation is therefore possible. If the aim of the legislation is clear, the courts must implement it, regardless of how unfair or unreasonable the effect might be. The courts are thus not empowered to pass a verdict on the merits and demerits of the results such legislation might have.

With regard to onerous provisions, they should be interpreted in such a fashion that they burden or restrict those to whom they apply as little as possible. Onerous provisions are therefore strictly interpreted. In the case of beneficial provisions, where two interpretations are possible and doubt exists, the interpretation most beneficial to the individual should be adopted.

Unless a contrary intention is clear, the presumption exists that the legislature intends equal treatment of all who are affected by the legislation in question. Therefore, if there is a clear indication that the legislation should be harsh or discriminatory, this presumption will not apply. Parliamentary laws which are based on racial discrimination and clearly indicate such a purpose, must be interpreted by the courts irrespective of its unreasonable or discriminatory effects. In the case of subordinate legislation, unequal treatment is allowed only where express or implied provision to this effect is made in the empowering (authorising) enactment.

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23 In such a case the legislation (or certain of its provisions) to be compared, must have the same purpose.

24 Onerous provisions include provisions that encroach upon rights; provisions imposing monetary obligations; penal provisions.

25 According to the common law all persons are equal before the law. Legislation which causes inequality and discrimination, has been adopted in South Africa by means of legislation and forms part of government policy.

26 The subordinate legislative body must therefore act within the scope of its legislative powers as provided for in the main (empowering) enactment. See also the discussion supra under the requirement of reasonableness.
4.1.7. The presumption against retrospectivity

Unless a contrary intention appears either expressly or by necessary implication, it is presumed that the legislature makes laws for the future only. This rule is based on the prevention of unfair results, as rights which exist and are vested in the individual, are not taken away. In a number of exceptional cases, the presumption will fall away and the legislation concerned will have retroactive force, for example:

- if it appears clearly from the Act that a retrospective effect is intended;
- if the Act deals with procedure; and
- if the provisions of an amendment Act favours the individual.27

Résumé

For the purposes of this discussion, the most significant legal presumptions are seen as common-law rules. These rules apply unless the contrary appears either expressly or by necessary implication.

These presumptions constitute the basic guidelines in the interpretation process and are often referred to as the “basic norms” in the interpretation of statutes. They apply in particular at the outset and in the final stage of the interpretation programme.

Legal presumptions may be regarded as the inherent norm “grundnorm” of legislation and their application in the interpretation process ensures legality. Viewed from this angle, legal presumptions form part of the basic rules of justice and fairness.

4.2. Other fundamental (basic) rules in the interpretation of statutes

4.2.1. The ordinary meaning of the word

Legal presumptions are seen as important basic rules of interpretation of statutes. Another basic rule is the application of the ordinary meaning of the text. This rule has several ramifications.

27 An offender who is convicted in terms of a certain Act but has not yet been sentenced, will receive the benefit of the lighter sentence if the amendment Act has reduced the original penalty. The amendment Act is therefore assumed to have retroactive force. Where the punishment is, however, increased under similar circumstances, the person involved will still not be unduly burdened and receive the benefit of the doubt: the original lighter sentence will be passed and the amendment Act will not have retroactive force.
The concept of **ordinary meaning** of the text has undergone a change in emphasis: according to the **purely textual** approach, it had a literal meaning; in the **wide contextual** approach the plain, ordinary meaning is still examined **but** within the **context** and **purpose** of the legislation. In the latter case it does not necessarily mean that the words will bear a literal meaning.

*The ordinary, grammatical meaning of words*

Under **ordinary meaning**, one may include the **grammatical** meaning of words. According to the purely textual approach, this rule was watered down to the literal meaning of separate words, sentences or paragraphs of the text. Legal writers referred quite rightly to this approach as the “slavishly literal squabbling about words”. Fortunately, the wide contextual approach brought about a change in emphasis and words now bear the **ordinary, grammatical** meaning within the context of the enactment. This means that the legislation must be studied **in toto** (as a whole) from the outset, and the meaning of words construed in terms of the **wider context** and **purpose** of the legislation.

*Technical terms*

Legislation of a technical nature, which applies to a specific trade or profession, has a particular meaning which deviates from the ordinary, colloquial meaning. Under these **circumstances** though, the technical meaning may also be regarded as the ordinary meaning and the words should be construed according to their “ordinary” specialised, technical connotation.

*The interpretation clause*

A large number of statutes contain an interpretation clause which is usually embodied in section 1 of the enactment. It is an explanatory list of terms in which specific definitions are given to certain words or phrases used in the legislation. The definitions are not absolute and the interpretation clause is usually introduced with the words, “Unless inconsistent with the context, in this Act ...” The meaning of a word in the interpretation clause must be in accordance with the purpose of the legislation in the contextual sense: under these **circumstances** the interpretation clause will then have an **ordinary** meaning.
A meaning assigned to every word

According to the ordinary meaning of words, no word or sentence may be regarded as superfluous or redundant. This rule does not apply absolutely as repetition and overlapping may occur in some cases. The court will, however, be reluctant to decide that words are superfluous or that certain words have been omitted from the text. Under these circumstances modificative interpretation may be necessary.\textsuperscript{28}

4.2.2. No addition or subtraction

It is a basic rule of interpretation that no additions may be made to, or subtractions be made from, the words used in legislation. The courts will also be careful not to extend the meaning of the legislation beyond the words that are used. Adherence to the literal meaning is still evident here, for the following reasons:

- according to the maxim \textit{iudicis est ius dicere sed non dare} the function of the court (the presiding official), is to interpret and not to make law. This approach is derived mainly from the doctrine of separation of powers or \textit{trias politica} (the idea that there are three authoritative organs of the state) which concerns the division of powers of these organs;

- the \textit{casus omissus} rule is alas derived from the principle of separation of powers and means that the interpreter may not supply an omission in a law, as this is the function of the legislature. As is mentioned above, this approach will not always supply a satisfactory solution. At the moment there is some confusion about the application of this rule but in general, one may say that the courts will not supply omissions in legislation \textit{at will} though they may, under special circumstances, supply an omission in order to achieve the manifest purpose of the legislation.\textsuperscript{29}

Against the background of the wide contextual approach and with due consideration of the legal presumption that the legislature does not

\textsuperscript{28} Modificative interpretation is discussed \textit{infra}.

\textsuperscript{29} In the Dadoo case \textit{supra}, the court refused to supply an omission although the purpose of the legislation indicated clearly that such an addition was necessary. In the Klipriviersoog case \textit{supra}, the court was prepared to supply an omission in order to fulfil the clear purpose of the legislation.
intend futile or nugatory provisions, one may conclude that whenever the purpose of the legislation is clear the court, as the last link in the legislative process, should ensure this process is brought to a just and meaningful conclusion.

4.2.3. The balance between text and context

As is mentioned above, the courts' view used to be that if the text of the law was clear and unambiguous, it should be put into effect without even considering the law in its contextual relationship. The wider context of the law was taken into account only if the language concerned seemed unclear or ambiguous. According to the contextual approach in interpretation, the interpreter may examine the wider context of legislation from the outset of the process, even when the text is quite clear or unambiguous. The meaning of words is thus explained in terms of the wide context (the enactment as a whole) and other surrounding circumstances in order to reflect the manifest purpose of the legislation. Therefore all these matters as well as the words of the text must be taken into account from the first step of the interpretation process.

Résumé

Besides legal presumptions, there are other basic rules which exist in the interpretation process. Although, at first glance, some of these rules appear to encroach upon the wide contextual approach, only a slight change in their application has occurred.

The individual fundamental rules must be applied within the broad contextual (teleological) frame of reference in order to explain the meaning of words, sentences or paragraphs according to the purpose of the legislation.

5. AIDS TO ESTABLISHING THE PURPOSE OF THE LEGISLATION

The structural aspects of this section will be dealt with in the ensuing discussion. Consult the bibliography for additional literature.

The manifest purpose of legislation is regarded as the fundamental or ultimate aim of statutory interpretation. In many cases it is not easy to
establish this purpose as it is not spelt out in legislation. A wide range of aids, which differ in nature and scope, are at the disposal of the interpreter. In certain cases these aids will have to be researched in order to determine the purpose of the legislation in question. The aids fall into two categories:

- **internal** (or *intra-textual*) aids comprise the legislation and its component parts, in other words, the internal **structure** of the enactment;

- **external** (or *extra-textual*) aids are those factors that are external to the text of the legislation.

In the wide contextual approach both categories of aids are examined from the outset. The Interpretation Act 33 of 1957 also constitutes an important aid and will be discussed separately.

### 5.1. Internal aids

#### 5.1.1. The text in the other official language

All legislation in South Africa is drafted in both official languages. The text in the other language can therefore be used to clarify obscurities.

In the case of **parliamentary legislation**, one of the copies of the law must be signed by the State President. The Afrikaans and English copies are signed alternately. As a general starting point one may say that both copies have equal authoritative weight and that the signed text does not carry more weight merely because it was signed. The signed text will be decisive only when an interpretation problem arises and an irreconcilable discrepancy or a conflict between the two texts occurs.\(^{30}\)

The principles applying to parliamentary legislation, apply to **provincial ordinances** as well.\(^{31}\)

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30 The meaning of "conflict" and "irreconcilable discrepancy" has been examined on several occasions: Handel v. R 1933 SWA 37. A conflict or irreconcilable discrepancy does not exist when the two texts are read together to determine the true meaning. Nor does it exist when the meaning of the one text is wider than that of the other and a "common denominator" meaning is established.

31 Refer to the discussion *supra* of provincial ordinances under legislation as a source of the law of education. Although no more provincial ordinances will be promulgated under the new system of provincial government, this rule of interpretation still applies to the many provincial ordinances that remain in operation under the new system.
With regard to *subordinate legislation* (regulations, proclamations and by-laws) as well as *internal legislation* (departmental manuals, circulars and rules on school policy), the State President obviously does not always have to sign a copy of the text. If one text has been signed, it will not carry more weight than the unsigned text. Even when a conflict or irreconcilable discrepancy arises, the signed text will not be decisive. Thus both texts of subordinate legislation enjoy equal status at all times: in the case of a conflict or irreconcilable discrepancy, both texts are read together to establish the true meaning and purpose of the legislation. If a conflict or irreconcilable discrepancy occurs, the court will give preference to the version that benefits the individual concerned.

### 5.1.2. The preamble or *considerans*

Although statutes beginning with a preamble are rare nowadays, the preamble may be used in context to determine the purpose of the legislation but only in exceptional cases.

### 5.1.3. The long title

The long title contains a short description of the subject-matter of the legislation. It may be used to establish the purpose of the legislation.

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32 For example the State President must sign proclamations issued by him. It would, however, be impossible and quite impractical for the State President to sign the entire body of administrative legislation.

33 One may come to the conclusion that the courts will use these methods to avoid a *casus omissus* in the enactment: where two interpretations are possible, the court will apply the presumption against harsh and unjust results and the individual will be given the benefit of the doubt rather than admitting that a shortcoming exists in the text.

34 A good example of a preamble may be found in the 1983 Constitution.

35 The long title of Act 103 of 1986 reads as follows: “To amend the National Education Policy Act, 1967, ... administration of the said Act and certain ordinances to the Minister of Education and Culture; to allow greater participation by the organized teaching profession and the organized parent community in the education in schools and the training of teachers; to establish an education council for each provincial education department; to make provision for the recognition by the said Minister of a body for the organized teaching profession,...”.
5.1.4. Headings of chapters or sections

These headings may be regarded as preambles to those chapters or sections and may be used in particular instances to determine the purpose of the legislation concerned.36

5.1.5. Marginal notes

Marginal notes are not considered to be part of the legislation as they are not inserted by the legislator, but by the draftsmen. Their value in interpretation is therefore questionable although the courts may use them in exceptional cases.

5.1.6. Paragraphing and punctuation

Punctuation is not considered to be part of the legislation, in principle, although it may well be used to establish the purpose of the legislation.

5.1.7. Schedules

Schedules differ in nature and format but are mostly used as abridgements of sections in the Act. In such a case the schedule will have the same force of law as the content of a section of the legislation. In the case of a conflict between the section of the legislation and the schedule, the section prevails.

5.2. External aids

5.2.1. The source of particular sections in a statute

As a result of English influence in our law, a considerable part of our legislation has its origin in English legislation.37 The earlier approach was that if a problem of interpretation arose regarding a South African Act

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36 The 1983 Constitution offers some examples: the different chapters of the Act are divided into the State President, Legislature, Executive, Judiciary, President's Council, etc.

37 For example, the Companies Act 61 of 1973; the Patent Act 57 of 1978; the Mental Health Act 18 of 1973.
which was taken over verbatim from English legislation, the courts would follow the interpretation given by the English courts. However, this approach negated the operation of our legislation in the South African context. Recent developments indicate that our courts will now construe such legislation in terms of the South African legal situation although English case law may be used as a guideline to establish the true purpose of the legislation in question.

5.2.2. Preceding discussions

Preceding discussions may include debates on a specific bill, explanatory memoranda and reports of commissions of enquiry. The courts are not unanimous about the use of these aids: for example, in some cases commission reports have been admitted and in other cases, rejected. A speech by a cabinet minister in Parliament has also been seen as an aid to interpretation.38

It would appear that the courts are now more prepared than they were previously to use preceding discussions. After all, these matters may help towards a better understanding of the legislation.

5.2.3. Surrounding circumstances

These are the conditions prevailing before and during the adoption of the legislation, which led to its creation. The history of the legislation is thus used to place the provisions in question in their proper perspective.

The use of surrounding circumstances was also referred to as the mischief rule. Briefly, the content of this rule was aimed at eradicating the so-called "mischief" that surrounded the legislation. This was done by examining and analysing the problems, defects and remedies surrounding the legislation. To put it crisply, in applying this aid the interpreter is able to examine the history and other surrounding circumstances of legislation.

5.2.4. Dictionaries and linguistic evidence

Because of the increasing technical and specialised nature of legislation, dictionaries are being used more frequently by our courts. The dictionary

38 For more examples see: Harris v. Minister of the Interior 1952 2 SA 428 (A); Hopkinson v. Bloemfontein District Creamery 1966 1 SA 159 (O); Mpanele v. Botha (I) 1982 2 SA 633 (C).
meaning may, however, be used only as a guideline, as the context in which the word is used should be the decisive factor in construing its meaning.

5.2.5. The influence of custom or usage

Custom or usage (application over a long duration of time) may be used in the interpretation process regardless of whether it had evolved prior to the commencement of a particular enactment or was received subsequently. Custom can, however, never abrogate legislation. Custom or usage may influence interpretation in the following instances:

Contemporanea expositio and subsecuta observatio

The principle of contemporanea expositio – literally, simultaneous interpretation – relates to the exposition (custom or usage) of the legislation at the time of or shortly after its adoption. The implication is that this exposition was probably given by persons who were involved in the adoption of the legislation, or in its first application shortly afterwards. These expositions are regarded as authoritative for interpretation purposes because it is assumed that the functionaries of the state who were closest to the origin of the enactment knew best what it was intended to mean. Marginal notes, paragraph divisions and punctuation marks may serve as examples of contemporanea expositio.

Subsecuta observatio – literally, the exposition after adoption – deals with established use or custom which may have originated at any time after the adoption of the legislation and which may also be in conflict with contemporanea expositio.

In principle subsecuta observatio bears more weight in the interpretation process than contemporanea expositio although the courts have failed to maintain the distinction.

5.2.6. Earlier and subsequent Acts

Previous statutes may be used as a guide in construing subsequent statutes provided the statutes are in pari materia: in other words, they must deal with the same subject-matter and must be almost identical.

Where subsequent statutes are concerned, the same principle applies as discussed above. The subsequent legislation may be used as a guide in the interpretation of earlier legislation.
Résumé

Internal and external aids are used in the interpretation process to establish the purpose of legislation.

Internal aids refer to the internal elements of a statute while external aids include external factors.

Consult the bibliography for more information.

5.3. **The Interpretation Act 33 of 1957 as an aid to interpretation**

The Interpretation Act 33 of 1957 may in the strict sense, also be regarded as an aid to interpretation of statutes. The Act consists of six parts: Part I contains general provisions on the interpretation of statutes; Part II-V contain particular provisions applicable to the different provinces; Part VI provides explicitly that the statute is binding upon the state. Only certain aspects of Part I will be dealt with.

5.3.1. **Application of the Act**

**Section I** provides that the provisions of this Act are applicable to the interpretation of every law in force in the Republic, and to the interpretations of by-laws, rules, regulations or orders made under the authority of any such law, unless the contrary intention appears. The Act is therefore applicable to laws and not to administrative orders or directives. However, the concept “law” for the purpose of this Act, means, “any law, proclamation, ordinance, Act of Parliament or any other enactment that has the force of law”.\(^{39}\)

5.3.2. **The time factor**

In terms of **section 2**, specific methods are used in construing “month”: a calendar month is, for example, the different months as they appear on the calendar – March or October. The term month, on the other hand, may stretch over two calendar months, for example, from 15 May 1987 to midnight on 14 June 1987.

\(^{39}\) It is clear that the Act is not applicable to common-law provisions unless these provisions have been embodied in laws: in these cases they form part of statutory law.
The computation of time plays a significant role, especially in the case of contractual provisions, where certain periods of time are prescribed. There are different methods of computing time: according to the statutory method (section 4) time is calculated by means of days. Common law also recognises different methods of time computation and the common factor here is that the first day/hour of the prescribed period is excluded.

5.3.3. The repeal of legislation

Section 11 deals with the repeal and substitution of legislation. When a subsequent law wholly or partially repeals any former law and substitutes provisions for the law so repealed, the repealed law (the former law) remains in force until the substituted provisions of the subsequent law come into operation. If a law which has been partially repealed by another law is to be interpreted, the remaining or substituting sections cannot be dealt with separately as both laws have to be interpreted as a whole: the amendment in Act 103 of 1986 amends the original National Education Policy Act 39 of 1967 and, consequently, these two enactments must be read together.

Section 12 deals with the effect of repeal. If a law repeals and re-enacts, with or without any modifications, any provision of a former law, references in any other law to the provisions so repealed, will usually be construed as references to the provisions so re-enacted. This matter may, however, also be regulated in terms of other specific provisions although the purpose of the legislation will remain predominant.

Section 12(2) provides that where a law repeals any other law then, unless the contrary appears, the repeal will not

40 The National Education Policy Amendment Act (House of Assembly) 103 of 1986 makes provision for the institution of the TFC which replaces the SATC in terms of Act 116 of 1976 (now repealed). During the launching of the new Act in the House of Assembly and up to its date of publication and commencement (determined at a later date by proclamation), the former Act and, of course, the SATC remained operative. However, at the commencement of the subsequent Act, the TFC became the official professional body. Bear in mind, though, that specific provisions may be included to regulate repeal or substitution in a different way: the purpose of the legislation remains the decisive factor.

41 The provisions regarding the SATC in Act 116 of 1976 were replaced by the provisions on the TFC in Act 103 of 1986. Other existing education laws also contained provision which referred to the SATC. As Act 103 of 1986 is now in operation, references to the SATC in those other education laws, are in terms of Act 103 of 1986 construed as references to the TFC.

42 Bear in mind that section 12(1) deals with the particular repealed provisions of a law which have been replaced by another law. Section 12(2) relates to cases where one law has been repealed in toto by another law. The illustrations used infra will therefore cover the provisions of Act 116 of 1976 which have been repealed in toto by Act 103 of 1986.
- revive anything not in force or existing at the time at which the repeal takes effect;\textsuperscript{43} or

- affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed;\textsuperscript{44} or

- affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any law so repealed;\textsuperscript{45} or

- affect any penalty, forfeiture, or punishment incurred in respect of any offence committed against any law so repealed;\textsuperscript{46} nor will it affect any legal investigation, legal proceedings, or remedy in respect of any such right, privilege, obligation, liability, forfeiture, or punishment; such an

\textsuperscript{43} In terms of section 20 of Act 116 of 1976. White teachers who did not comply with the prescribed conditions for registration were not entitled to teach. To teach under these circumstances constituted an offence. Although Act 103 of 1986 repealed the former Act \textit{in toto}, this does not mean that the conduct of such a teacher now became \textit{legal} as a result of the repeal of the former Act. To put it crisply, whatever was illegal before the repeal does not, as a result of the repeal, become legal with \textit{retrospective force}. Furthermore, it means that Act 116 of 1976 will not revive, if Act 103 of 1986 is repealed at a later stage.

\textsuperscript{44} If an act was performed properly and lawfully in terms of Act 116 of 1976, \textit{before} the repeal, the act \textit{remains} effectual. For example, the registration of a teacher, who was properly registered in terms of Act 116 of 1976, remains effectual even if drastic changes have been instituted by Act 103 of 1986. Bear in mind that in casu section 12(2)(b) does not have the effect that administrative legislative acts, such as proclamations, regulations, by-laws and departmental circulars which were issued in terms of a repealed law (for example, a parliamentary law), will remain in force. Subordinate legislation will \textit{lapse} when the legislation from which its authority is derived, is repealed – unless the contrary is intended. What is of significance is the fact that the administrative act which existed between the SATC and the teacher, remains effectual notwithstanding the repeal of the general legislative act which instituted the conditions for registration. Refer to \textit{administrative legislative acts} and purely administrative acts supra.

\textsuperscript{45} This subsection deals with the \textit{rights, privileges and duties} acquired or incurred in terms of legislation. The rights must have been acquired in terms of the repealed law and must not have existed independently \textit{before} the coming into operation of the repealed law. Furthermore, the rights and duties must have been \textit{acquired or incurred} before the repeal. With reference to the example given in the previous discussion, the rights, duties and privileges which the \textit{registered} teacher \textit{acquired} in terms of Act 116 of 1976, for example to teach, earn a salary and qualify for leave, will remain effectual even after Act 103 of 1986 has repealed the previous conditions regarding registration.

\textsuperscript{46} A teacher who, in terms of Act 116 of 1976, had been barred from teaching as a result of inadequate qualifications for registration, could be charged and sentenced in terms of section 20(2). If he had been convicted and fined, the conviction and sentence would not be affected by the repealing Act. The teacher remains responsible for the offence he has committed and remains subject to the sentence.
Sections 11 and 12 of the Interpretation Act may raise complicated questions of interpretation. The practical examples used above illustrate the application of these sections very simply but cannot be regarded as model solutions. When similar interpretation problems arise, each case must be considered individually.

Résumé

The Interpretation Act applies to all rules that have the force of law unless the legislation concerned contains provisions to the contrary.

The above-mentioned discussion covered only certain sections of Part I of the Act. A copy of this Act should be at hand when education legislation is to be interpreted.

6. MODIFICATION OF THE PLAIN, ORDINARY TEXTUAL MEANING

6.1. Introduction

Certain inherent or fundamental rules are acknowledged in statutory interpretation. For instance, words must bear their ordinary meaning and the interpreter is not allowed to usurp the legislative process by adding extensive provisions or omitting others. These basic rules are, however, subject to the predominant purpose or aim of legislation which enables the interpreter to deviate from them under special circumstances.

47 In terms of sections 18 and 19 of Act 116 of 1976, the SATC had the power to enquire into a teacher's alleged transgression of the professional code. If the enquiry has already been instituted, it will continue and the teacher will eventually be charged and sentenced in terms of the above-mentioned sections as if Act 103 of 1986 had never been passed. The teacher could also have been acquitted by the committee of enquiry and reinstated in his post. If the subsequent Act comes into operation and his previous conduct would be irregular under this new Act, he will not be charged in terms of the new Act. These matters are in fact, similarly provided for in the new section 8C of the National Education Policy Act 39 of 1967. These procedures may, of course, differ in terms of express provisions to that effect.
The ordinary textual meaning of a text must always be tested against the **purpose** of the legislation. This means that the **purpose of legislation**, in its **contextual** relationship, must be regarded as the **qualifier** (or qualifying factor) in the interpretation process. One could say that ambiguities, vaguenesses and absurdities are "**indicators**" or indications that deviation from the ordinary textual meaning is possible. Irrespective of the form of modification or deviation, the **qualifier** and **indicators** must be used as the starting point for such modifications or deviations.

The various **forms** of **modification** will now be discussed briefly.

### 6.2. Restrictive interpretation

This form of interpretation comes into play if the **meaning** of the legislation has a **wider** connotation than its **purpose**. The meaning is then altered to reflect the true purpose of the legislation. Two forms of restrictive interpretation are applied in South African law.

#### 6.2.1. The rule *cessante ratione legis, cessat et ipsa lex*

The maxim literally means that if the **reason** for the law ceases to exist, the law itself also falls away. **Legislation** cannot be abolished by custom or altered circumstances but must be revoked by the **positive conduct** of the legislature itself. Only the **common law** can be abrogated through custom or altered circumstances. The maxim is applied when the provisions of legislation are **not** revoked, but their **operation** merely **suspended** because the **purpose** of the legislation has already been achieved in some other fashion. The rule applies in only two instances:

- if application of the legislation would be **futile**, for instance, to impose a punishment where the accused has already died before sentence is passed;
- if application of the legislation would **defeat** its very **purpose**.

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48 In this case the **meaning** must be **tailored** in order to correspond to the **purpose** of the legislation. Note that no **words** are omitted from the text; only the **meaning** is restricted. **Modificative interpretation** which is discussed **infra**, includes the addition and omission of **words**.

49 A general example would be provided by the case where legislation provides for a **maintenance order** in terms of which the parent must pay a monthly maintenance fee for his child in an institution; the payment lapses when the child is discharged from the institution. Although the maintenance order is not repealed by an **amending Act**, the **purpose** of the original Act is that maintenance should be paid while the child is still institutionalised. In this particular case the **reason** for the **application** or **enforcement** of the legislation has fallen away.
6.2.2. The *eiusdem generis* rule

This term literally means "of the same kind" and is based on the principle that words are known by *others with which they are associated*. The words are thus qualified by their *relationship* to other words, which means that the meaning of *general* words must be established in terms of *specific* words. Various other prerequisites must also be satisfied before the rule is applied:

- the rule cannot be applied unless the *specific* words refer to a *definite genus* or category. If the specific words refer to divergent instances the rule cannot be applied,\(^{50}\)

- *specific* words must not have *exhausted* the *genus*;\(^{51}\)

- the rule may be applied even when *one* specific word *precedes* the general words. The order in which the words occur, is in any event, not important.

The *eiusdem generis* rule is applied with circumspection. Each time the question must be raised whether the *purpose* of the legislation points *unequivocally* to such a restrictive interpretation.

6.3. Extensive interpretation

Extensive interpretation may be regarded as the *opposite* of restrictive interpretation: the *purpose* of the legislation is therefore *wider* than that which is indicated by the *meaning of the words* used in the text. The *central meaning* of the text must be *extended* in order to give effect to the *wider purpose* of the legislation.\(^{52}\) There are two forms of extensive interpretation:

\(^{50}\) In *Director of Education v. McCagie* 1918 AD 616 the Appellate Division held that the phrase "a university degree or other evidence of the necessary qualifications" could be interpreted according to the *eiusdem generis* rule. The court decided that the general word is "other evidence" and the specific word, "university degree". The specific word refers to a particular qualification, a *university* degree. If this qualification had referred to a teaching diploma or another non-degree qualification, the meaning would have been too divergent and a "common quality" which is required for a *genus* would be missing.

\(^{51}\) See the example illustrated in the previous footnote.

\(^{52}\) Only the *meaning* of the text is extended. No physical addition of words takes place as in the case of modificative interpretation, *infra*. 
the meaning of the text is extended to a case implied by the legislation (interpretation by implication); or

- the meaning of the text is extended to a similar or analogous case which is not expressly provided for (interpretation by analogy).

6.3.1. Interpretation by implication

In this form of inclusive interpretation, express provisions of the text are extended by implicit provisions. There are various interpretative grounds which may serve to indicate that inclusive interpretation should be used. However, these indicators remain guidelines and are subject to the purpose of the legislation in its contextual sense.

Bear in mind that a clear distinction cannot always be made between the various grounds for interpretation by implication. Only a few grounds are discussed.

**Ex contrariis**

Where the Act provides for a specific situation, it is assumed ex contrariis that the opposite arrangement will apply for the opposite situation. The maxim unius inclusio est alterius exclusio (inclusion of the one means the exclusion of the other) also applies in this case. This ground constitutes no more than a prima facie (on the face of it) indication of the purpose of the legislation and must be approached with circumspection.

**Ex consequentibus**

This maxim provides that where legislation prohibits a certain result, by implication the action/conduct which caused the result, is also prohibited. Transactions which are concluded in fraudem legis (fraudulently), in order to achieve prohibited results by seemingly lawful means, are also prohibited.

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53 Section 24 of Act 116 of 1976 provided that the aggrieved teacher could within three months after the SATC’s action against him, appeal to the Supreme Court. Because a period of three months is expressly provided for, one must assume that it was not intended that the appeal could be lodged within six months.

54 To illustrate this point, our law prohibits donations between spouses. It follows that a transaction in which one spouse gives something to a third party so that the latter can, in turn, give it to the other spouse, will also be prohibited.
The opposite also holds true. Where a certain act or result is required or allowed, it follows that everything which *within reason* is necessary to bring about the result or to perform the act effectively, is also permitted or required. The underlying criterion should be whether the conferred power can be exercised *effectively*.

*Ex accessorio eius, de quo verba loquuntur*

This ground is derived from the *ex consequentibus* rule. It means that if legislation prohibits (or permits) a *principal* matter, any *ancillary* or *accessory* matters are also prohibited (or permitted).

When an enabling Act confers powers, it confers, by *implication* those powers which are *within reason* necessary to achieve the principal aim.\(^{55}\)

### 6.3.2. Analogous interpretation

As is mentioned above, this method involves the extension of provisions from one case to an *analogous* one when the *language* of the text does not *expressly* provide for such an extension. If the *purpose* of the legislation *includes* the analogous cases, the meaning of the provisions must be extended accordingly. Our courts will, however, not apply this method extensively as in most cases it will amount to supplying a *casus omissus*.\(^{56}\)

### 6.4. Modificative interpretation

It has been mentioned above that modificative interpretation differs from extensive and restrictive interpretation. The latter methods involve limitations

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\(^{55}\) Following the discussion of the powers of the principal and delegation of these powers, *supra*, this rule of interpretation provides that *implied* or *ancillary* powers will have the same meaning as powers which are *necessary* *within reason*. In *Brakpan Town Council v. Burstein* 1932 TPD 336 the court also held that only powers which are *necessary, within reason* to achieve the principal aim, may be regarded as *implied* powers. The *implied* or *ancillary* powers of the school principal, which may be regarded as *necessary* powers, will by *implication* be included here. This explanation tallies with the discussion earlier on: the powers are necessary, *within reason*, for effective *school policy and management*.

\(^{56}\) In the well-known *Dadoo* case *supra*, the court refused to apply analogous interpretation in order to avoid a *casus omissus*. This was not really a case of analogous interpretation but of *modificative* interpretation: a *casus omissus* had to be supplied. See the discussion on modificative interpretation *infra*. 
and extensions to the meaning of the text while modificative interpretation involves the physical addition or omission of words in order to achieve the clear purpose of the legislation. From the practical point of view, it concerns the actual insertion, omission or alteration of words.

In accordance with the purely textual or slavish application of the literal approach, and as a result of various other reasons mentioned above, the courts have often not been prepared to follow this method of interpretation. However, they have in many cases rectified deficiencies in the language of the text while in other instances they have even been prepared to supply a casus omissus.

The courts will, however, not lightly make use of modificative interpretation. Only when it is established that the purpose of the legislation is not reflected in the ordinary meaning of the text and the words lend themselves to such a construction, will the court be able to apply modificative interpretation.

A final question which merits attention relates to the extent to which the courts may apply modificative interpretation. The answer is that the courts are restricted to less radical and less extensive modifications. Penal provisions or restrictive provisions constitute factors which could limit the scope of modificative interpretation.

Furthermore, the presumption that the legislature does not intend to create legislation which is nugatory or meaningless, could constitute indicators in favour of the application of modificative interpretation.

Résumé

If the ordinary meaning of the text, seen from a contextual point of view, does not reflect the purpose of the legislation, certain modifications may be made.

57 This approach led to the infamous Dadoo case, supra.


59 This is in keeping with the view that the interpreter may deviate from the clear, unambiguous meaning to achieve the purpose of the legislation.
The meaning of the text will be limited or extended, as the case may be, via the application of restrictive and extensive interpretation to reflect the purpose of the legislation.

Modificative interpretation is a drastic form of interpretation as words are added or omitted in order to bring the text in line with the purpose of the legislation in its contextual sense. Although modificative interpretation is applied only in exceptional cases, the presumption against laws which are nugatory or meaningless, will be an indicator in favour of such interpretation.

6.5. Guidelines for peremptory and directory statutory provisions

If legislation prescribes the manner in which an act is to be performed, or prohibits it, it becomes necessary to ascertain what the results would be if such an act is not performed in accordance with the prescribed rules. If the Act expressly declares such an act to be void, no problems will arise. However, as soon as legislation fails to stipulate clearly whether such an act will be void, other indicators will have to be examined.60

Where legislation does not clearly provide that non-compliance would lead to nullity, the nature of the provisions should be ascertained to determine whether they are **peremptory** or **directory**.61 In the case of non-compliance with peremptory provisions, the act so performed could be invalid.

Although the purpose of the legislation would still be the decisive factor, certain **guidelines** or “tests” have been devised to help the interpreter in this regard. These guidelines are not binding legal rules but merely pragmatic solutions having persuasive force. Numerous guidelines exist but only a few will be mentioned here:62

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60 An act that is null and void (ab initio namely, from the beginning) is deemed to have no legal existence whatsoever – it is a nullity. An administrative act which is said to be defective, however (sometimes the term “invalid” is used, which could be confusing), is not void but voidable. In other words, it remains operative until it has been declared invalid by some higher authority. The significance of this distinction lies in the fact that a void administrative act may be disregarded by the individual while a voidable act cannot; at any rate until it has been declared invalid. Valid and invalid acts are discussed supra under requirements for validity and state liability.

61 In principle, though, all statutory provisions must be regarded as peremptory provisions. A more appropriate question would be whether the competent body has the power to dispense with the provisions under these circumstances.

62 These guidelines were proposed in Sutter v. Scheepers 1932 AD 173 and Pio v. Franklin 1949 3 SA 442 (C).
- the word “shall” usually indicates a peremptory provision and non-compliance may result in the act being null and void;

- a provision couched in a negative form (“no person shall”), is deemed to be peremptory rather than directory;

- a provision couched in a positive form with no penal sanction attached to non-compliance with the provision, is deemed to be merely directory;

- if strict compliance with the provision would lead to injustice or even fraud, and no penal sanction or a provision regarding nullity has been attached, there is a presumption in favour of validity;\(^{63}\)

- if the freedom of the individual is at stake, the peremptory nature of a provision will be stressed – naturally it should be to the advantage of the individual;\(^{64}\)

- the attachment of a penal provision to a command or prohibition, strengthens the presumption in favour of nullity. However, the addition of a penal provision may be an indication that the penalty is sufficient and that the resulting act should not be declared null and void.\(^{65}\)

Consult the bibliography for additional material on this topic.

**Résumé**

General guidelines or tests are used to ascertain whether statutory provisions are peremptory or directory. Under such circumstances the legisla-  

\(^{63}\) This guideline actually means that validity is preferred to nullity: in the latter case, the decision to declare the act null and void, would cause more inconvenience and undesirable results than the prohibited act itself.

\(^{64}\) To illustrate this point, it was decided by the court that even where a detained immigrant was a prohibited person, he was still entitled to written information on the reasons for his detention. In casu the furnishing of reasons was peremptory. Notwithstanding the fact that he was in principle not allowed in the country, his freedom still had to be protected and respected in law: *Macara v. Minister of Information, Immigration and Tourism* 1977 2 SA 264 (R).

\(^{65}\) In some cases the legislature regards commands or prohibitions as of the utmost importance and a penal sanction is attached to indicate its disapproval with or rejection of such an act. Under these circumstances the null and void act is “punished” with an additional penal clause: *Rooiberg Minerals Development Co Ltd v. Du Toit* 1953 2 SA 505 (T). In other cases a prohibited act which is burdened with a penal sanction, would be merely invalid (voidable) and not null and void. The penalty, would then be regarded as a sufficient deterrent: *Eland Boerdery (Edms) Bpk. v. Anderson* 1966 4 SA 400 (T).
tion usually does not give a clear indication regarding the effects of non-compliance with these provisions.

The guidelines are merely tests which enjoy some persuasive force and the purpose of the legislation remains the predominant criterion.

PART TWO GUIDELINES ON THE PRACTICAL APPLICATION OF THE RULES OF INTERPRETATION

7. INTRODUCTION

The first part of this discussion deals with the theoretical material which demarcates this field of study and determines the various methods of interpretation. These various working tools are used to solve or explain practical problems. The practical application of the working tools is described as concretisation.

As the school principal’s administrative acts of management were highlighted in the earlier discussion, it seems appropriate in this section to examine the particular administrative legislative rules which govern his powers and duties.

The various methods of application which are proposed cannot be regarded as models, but could be useful as guidelines in a step-by-step approach.  

8. THE PRACTICAL PROCESS

8.1. Legislation placed in contextual perspective by means of the application of aids to interpretation

If the school principal wants to establish the juridical meaning of a provision in the Manual for General School Organisation, the rules of

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66 Each interpretation problem requires individual attention. For example, if the principal has to interpret a provision in subordinate legislation, he will not apply the aids to interpretation in the same manner as in the case of parliamentary legislation. In the latter case, where internal aids (such as the text in the other language) have to be applied, the text of the legislation signed by the State President will prevail when an irreconcilable conflict exists. In the case of regulations (subordinate legislation), both texts must under all circumstances be read together and in the case of a conflict, the interpretation most beneficial to the individual must be followed.
statutory interpretation will apply: the provisions of the Interpretation Act also apply to rules which have the force of law, unless the contrary applies. Internal administration and policy are governed mainly by internal legislation and, as is mentioned above, the courts are very reluctant to interfere in these matters and will in any event, not make a decision on school policy.\(^6^7\) One may say that if the internal organs and other bodies of control fail to settle an interpretation problem internally, the courts may be approached to settle the dispute or to offer legal advice on the matter.\(^6^8\)

Among the legislation which is relevant to this discussion there is, of course, the Manual which is regarded as subordinate legislation.\(^6^9\) Chapter 5 of the Manual deals with the Functions and duties of teaching staff and the powers, functions and duties of the principal are listed under 5.1. The particular section must be seen in context and therefore interpreted within the framework of the Manual as a whole. These departmental rules which are applicable to the principal in his official capacity must be regarded as internal subordinate legislation. Subordinate legislation is, however, subject to main legislation (empowering enactments), which in this instance could be higher (second level) subordinate legislation – provincial ordinances, and central legislation – parliamentary laws. The body of empowering legislation is thus indirectly applicable and will form part of the wide contextual approach in the interpretation process.\(^7^0\)

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\(^6^7\) Refer to the discussion on the control of administrative acts and, in particular, the reference to the incident relating to the management council of Menlo Park High School. In this case, which dealt in principle with the interpretation of the powers (relating to school sports) of a school management council, the court also refused to interfere. Even the Minister refrained from making a decision on the internal school policy. The issues relating to the proper election of the management council and its representative nature, also raised questions of interpretation.

\(^6^8\) It if happens that the interpretation of an Act is in dispute, and a satisfactory solution or explanation cannot be reached internally, the court may interfere and give an authoritative decision on the case. In other instances the court may be approached to supply an opinion on an interpretation problem: this opinion is not a decision. The courts will, however, in most cases refuse to give such an opinion on the interpretation of school policy. Refer to the discussion of judicial control and the requirements for a judicial act supra.

\(^6^9\) The 1986 Manual of the Transvaal Education Department has been used. The other provinces will have similar manuals.

\(^7^0\) The main legislation authorises subordinate legislation and determines the scope of the powers of the organ involved.
8.2. The purely textual approach

When the purely textual approach is followed, only the literal meaning of the particular words or sentences in 5.1. of the Manual will be examined. This narrow approach will prevent the use of the other intra-textual aids, namely, the text in the other language, the preamble, paragraphs and schedules. Extra-textual aids, namely, the “surrounding” education legislation, the history of the legislation, preceding discussions on the Manual, relevant reports of commissions of enquiry and the Interpretation Act, would also be ignored. All these contextual (intra- and extra-textual) aids would be consulted only when the meaning of the words in 5.1. was vague or ambiguous. In other words, only when the literal meaning does not reflect the intention of the legislature would the interpreter look for the contextual meaning.

Résumé

In order to determine the juridical meaning of the powers, functions and duties of the principal in its contextual relation, the relevant legislation must be analysed as a whole but also in its wider context. Through this process, the broad spectrum of education legislation pertaining to the powers of the principal, is scrutinised.

All the internal and external aids should be used in order to establish the purpose of the legislation in its contextual sense. This is the only way to complete the interpretation process.

If the textual approach has been followed, the interpreter would change to contextual interpretation only if the literal meaning of the words does not express the intention of the legislature.

8.3. The basic rules inherent in the interpretation process

Certain fundamental rules must be considered when the powers and duties of the principal are interpreted within the contextual framework of the legislation. The legal presumptions, as common-law rules of fairness, are in reality “built” into legislation and must be used as guidelines in establishing the purpose of the legislation. For example, if 5.1. is construed in such a way as to render parts of the Manual meaningless or nugatory, the presumption against futile or nugatory provisions will apply unless the contrary is clear; the presumption in favour of promoting the public interest may also apply when a particular interpretation of the principal's
would lead to incompetent conduct and would not serve the public interest (for instance, the interest of pupils, parents and other teachers). All the presumptions must be tested in the same way against the purpose of the legislation involved in order to ensure fair and equitable interpretation.

The other basic rules must also be borne in mind constantly; for example, the ordinary meaning of the words under the particular circumstances, must be adopted; no addition or subtraction must be made to the text; a balance must be maintained between text and context. Although the basic rules form the structure of the interpretation process, they are subject to the predominant aim or purpose of the legislation. If the interpretation of the principal’s powers in 5.1. does not tally with the purpose of the legislation in its contextual framework, the meaning of the words may be altered through extensive or restrictive interpretation, or physical modification of words may take place through the application of modificative interpretation.

Résumé

All the basic rules must be borne in mind from the outset and throughout the interpretation process in order to achieve the clear purpose of the legislation in question. In other words, in applying the various aids of interpretation, the interpreter must always be mindful of the basic rules of interpretation.

The application of presumptions may be excluded only by express provision or by necessary implication. The other basic rules also ensure that interpretation takes place within the limits provided for by the purpose of the legislation, and prevent legislative powers from being usurped by the interpreter.

8.4. Linking the particular practical situation

The results thus far obtained in the interpretation process should be regarded as possible answers or solutions to the problem. These results

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71 In order to determine the ordinary meaning of the words in a particular case, one should at this stage of the interpretation process also devote attention to the guidelines on peremptory and directory provisions. To illustrate this point, the question could be asked whether the peremptory nature of the word “shall” would under the particular circumstances be regarded as the ordinary meaning intended for the words.
must, however, be seen in relation to the real situation which applies to the particular legislation. Consequently, the formal, provisional answers must, through the process of concretisation, be applied to the specific practical problem in question. The formal answers/solutions must be compared with the possible answers in the practical situation.\footnote{A hypothetical example could be mentioned: in principle all school principals have the same management powers and functions although different circumstances have to be considered in each case. Up to this stage of the interpretation process, the powers of the principal have been interpreted as applicable to all principals. The real situation in which the principal of a small primary school in a rural area has to exercise his powers are, however, totally different from that of a principal of a big suburban school. In other words, the particular practical situation of the principal concerned, must be considered.}

It is impossible to provide for all the different practical situations in which legislation operates. If it becomes clear that the words of the text cannot transmit the purpose of the legislation to the particular practical situation, certain modifications must be made. This is done to achieve "reconciliation" between the legislation concerned and the particular situation in question. Under these circumstances the meaning of words is extended or limited, or words are added to fill shortcomings, or superfluous words are omitted.

Extensive, restrictive and modificative interpretation is used at this stage of the process in order to achieve “logical correlation” and “reconciliation”. The contextual purpose of the legislation in correlation with the practical solution, is still the predominant aim of this exercise. To put it crisply, under these circumstances the purpose of the legislation can be grafted on to the practical situation only by way of the different forms of modification.\footnote{Legislation is there to serve the community and therefore applies within the environmental milieu. The purpose of legislation must not only exist in the theoretical sense but must be grafted onto its practical application.}

8.5. The final solution or explanation

In most cases the interpreter will not encounter conflicting possibilities during this stage of the process. Correlation through the different forms of modification would then be unnecessary. For example, if a clear solution has been apparent right from the outset of the interpretation process, it needs only to be transferred to the practical situation.

Whether correlation has been discovered or construed or whether it has been apparent right from the start, the interpreter still has to find a final
solution to his problem. The next step then, is to materialise the solution or explanation by testing it against the legal presumptions. Bear in mind, though, that the application of presumptions may also be excluded here when, for instance, express provision is made for retrospective force, or to bind the state.

Résumé

The proposed step-by-step method does not offer a magic formula for the interpretation of statutes. Different interpretations and effects may still result from the same legislation. A measure of subjectivity may arise during the stage of concretisation in particular. The interpreter will always have to make choices: choice-making must, however, be legally bound and not made arbitrarily.

74 It has been mentioned above that legal presumptions form part of the juridical reality and for this reason will also constitute part of concretisation.