A LEGAL FALLACY? TESTING THE ORDINARINESS OF 'ORDINARY MEANING'

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ABSTRACT

The canon that dictates that words be interpreted according to their ordinary meaning has been widely debated. Many studies have either highlighted the shortcomings of the ordinary meaning principle or have tried to debunk its existence altogether. Despite efforts to introduce a new approach to the interpretation of statutes in South Africa (through Endumeni*), the application of the ordinary meaning rule persists and remains a contested issue. Weighing in on the debate by scholars such as Cowen (1980) and Labuschagne (1998), this contribution tests if the phenomenon of ordinary meaning actually exists. Rooted in the argument that ordinary meaning is representative of a so-called reasonable speaker's understanding, data were collected through a survey approach. The survey tested ten words taken from South African case law that were interpreted according to the ordinary meaning principle. The results were then compared with the meanings assigned by the respective courts and those appearing in the iWeb corpus. Interpreted against the demographic information of 151 participants, the preliminary results indicate correspondence between the courts' understanding of the selected words and that of the respondents. Therefore, the findings cautiously confirm the existence of the ordinary meaning principle as a phenomenon within a specific spectrum of society.*

I INTRODUCTION

(a) Defining 'ordinary meaning'

There is no better guarantee of binding a judge to the law, says Smith, than through the wording of the law.[1] The interpretation of a statute usually starts with the words of legislation themselves.[2] This relationship between law and language is one of instrumentality; ultimately, law uses language to accomplish certain objectives.[3] Bix describes this instrumentality as

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[1] C E Smith 'Het woord als grenswachter: Functies van taalkundige interpretatie voor de rechtsvinding' (2009) 2 *Themis* 61 at 61, 63.

[2] Frederick Schauer *Thinking Like a Lawyer* (2009) 151. According to Schauer, many controversies centre around the question of whether words should also be the ending point of legal interpretation.

[3] Ralf Poscher 'Ambiguity and vagueness in legal interpretation' in Peter M Tiersma & Lawrence M Solan (eds) *The Oxford Handbook of Language and Law* (2012) 133. One such objective is 'meaning-generation'; a text must be interpreted to give it meaning. In this regard, see Marius van Staden & Stefan van Eck '"Deemed" to be an employee: Adopting the teleological interpretation of statutes' (2018) 30 *SA Mercantile Law Journal* 416 at 419.

guidance: law is guided by language.[4] One such guiding instrument is the ordinary meaning rule. The rule of law in many countries determines that when a contested word, phrase or sentence is undefined within legislation, it must be given its 'ordinary meaning',[5] which means its clear, everyday meaning.[6] It is impractical, if not impossible, for a legislator to define every word in an Act. Also, errors occur in the language used to enact laws.[7] Understandably, this leaves plenty of room for interpretation and subsequent squabbles. If a word has more than one possible ordinary meaning, the relevant context must be studied for clarity.[8] A court may veer from the indicated ordinary meaning only in the event that such a word is absurd, leads to injustice,[9] or when the wording is 'unsuccessful in conveying a perfectly clear message'.[10] As such, ordinary meaning functions almost like a supervisory body, whose task is to explain what is meant, within reason and within set boundaries.[11] Though ordinary meaning has a function of setting boundaries within which interpretation should take place and expresses the distance between the ordinary and the legal or technical definition, it is not easily deducible beforehand where these boundaries must lie.[12] Slocum describes the ordinary meaning rule as

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[4] Brian H Bix 'Legal interpretation and the philosophy of language' in Peter M Tiersma & Lawrence M Solan (eds) *The Oxford Handbook of Language and Law* (2012) 145.

[5] D V Cowen 'The interpretation of statutes and the concept of "the intention of the legislator"' (1980) 43 *THRHR* 374 at 379–80; Lawrence M Solan 'Linguistic issues and statutory interpretation' in Peter M Tiersma & Lawrence M Solan (eds) *The Oxford Handbook of Language and Law* (2012) 94. In a different publication, Solan keenly observes that the definitions themselves can be ambiguous and troublesome, seeing as they are also formulated using words and structured syntactically; see Lawrence M Solan *The Language of Statutes. Laws and Their Interpretation* (2010) 23. However, despite potential tautologies or obscurities, a court still needs to give defined words some meaning – see Lourens Marthinus Du Plessis *Re-Interpretation of Statutes* (2002) 204.

[6] Christopher Hutton *Word Meaning and Legal Interpretation: An Introductory Guide* (2014) 39. One of the assumptions here is that the legislator does not speak in riddles – see David A Strauss 'Why plain meaning' (1997) 72 *Notre Dame Law Review* 1565 at 1573; Du Plessis op cit note 5 at 103–4.

[7] Solan op cit note 5 at 4.

[8] J M T Labuschagne 'Gewone betekenis van 'n woord, woordeboek en die organiese aard van uitleg' (1998) 13 *South African Public Law* 145 at 145; John Bell & George Engle *Cross Statutory Interpretation* (1995) 49.

[9] Cowen op cit note 5 at 380–81; Labuschagne ibid at 145; Gail-Maryse Cockram *Interpretation of Statutes* (1987) 36–48; Bell & Engle ibid at 49. The application of the ordinary meaning rule can also lead to absurdity, as illustrated by the debate between legal philosophers HLA Hart and Lon Fuller. In this regard, see Schauer op cit note 2 at 152–55. In the event of obvious absurdity and ambiguity, a court may venture beyond the text in search of clarity; see Linda D Jellum & David Charles Hricik *Modern Statutory Interpretation. Problems, Theories, and Lawyering Strategies* (2006) 73–4, 80; see also Du Plessis op cit note 5 at 103–104.

[10] J de Ville 'Meaning and statutory interpretation' (1999) 62 *THRHR* 373 at 387. Also see Peter M Tiersma *Legal Language* (1999) 126. Tiersma points out that the plain meaning rule constrains meaning within statutes to the words and sentences used by the legislator, rather than exploring the intention of the speaker; Bell and Engle op cit note 8 at 49; Schauer op cit note 2 at 157.

[11] Ralph Christensen & Christian Kübbeler 'Wortlautgrenze und Wörterbuch' (2011) 2 *Zerl* 1 at 1; F T Groenewegen 'De relatieve waarde van de grammaticale interpretatiemethode' in E T Feteris, H Kloosterhuis, H J Plug & J A Pontier (eds) *Alles Afwegende: Bijdragen aan het Vijfde Symposium Juridische Argumentatie, 22 Juni 2007 te Rotterdam* (2007) 243; Dietrich Busse 'Was ist die Bedeutung eines Gesetzestextes? Sprachwissenschaftliche Argumente im Methodenstreit der Juristischen Auslegungslehre – Linguistisch Gesehen' in Friedrich Müller (ed) *Untersuchungen zur Rechtslinguistik. Interdisziplinäre Studien zu Praktischer Semantik und Strukturierender Rechtslehre in Grundfragen der Juristischen Methodik* (1989) 132.

[12] Hutton op cit note 6 at 42.

'foundational' in the interpretation of most legal text types.[13] He goes further by saying that determining ordinary meaning is often the first step in the process of the interpretation of statutes and usually forms the basis for the application of a court's other interpretive tools.[14] The act of determining meaning happens alongside jurisprudential debate and is often linked to the purpose of the legislation.[15]

Ordinary meaning, as a legal rule, remains a contested issue and is an elusive concept to many people. Synonyms used to describe it, such as 'everyday', 'grammatical', 'literal' or even 'natural meaning',[16] are often as problematic as the term itself.[17] The fact that words such as 'everyday', 'grammatical' and 'natural meaning' remain undefined in many legal systems[18] only begs the question: Who determines what these words mean? Therefore, what constitutes an everyday word may differ greatly from one person to the next.[19] This becomes apparent when we realise that, for many people, everyday language is synonymous with commonsense language, which is never found in official documentation.[20] The issue is further compounded in multilingual countries where the law is practised in a lingua franca, with which citizens might not be fully conversant or in which communication skills are limited to conversational registers.[21] If asked what the word 'money' means, how would an additional language speaker of English define it? Would a court of law be satisfied with such a definition? Following Oliver

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[13] Brian G Slocum 'Linguistics and "ordinary meaning" determinations' (2012) 33 *Statute Law Review* 39 at 40; Van Staden & Van Eck op cit note 3 at 418.

[14] Slocum ibid at 40; Strauss op cit note 6 at 1565, 1566–67.

[15] Bell & Engle op cit note 8 at 31–2.

[16] Cowen op cit note 5 at 379; Labuschagne op cit note 8 at 145; Smith op cit note 1 at 62–3.; Du Plessis op cit note 5 at 108, 199.

[17] The complexity is exacerbated when distinctions are made between words like 'ordinary' and 'literal', for instance. These distinctions are not adhered to by everyone; sometimes these words are used interchangeably. This is also visible in South African case law (see note 73 below). For typical synonyms, see Brian G Slocum *Ordinary Meaning* (2015) 287–88. For distinctions, see Robert S Summers & Geoffrey Marshall 'The argument from ordinary meaning in statutory interpretation' (1992) 43 *Northern Ireland Legal Quarterly* 213 at 215–16. Further distinctions are made by Bell & Engle (op cit note 8 at 63–8), between 'ordinary', 'primary', 'secondary' and 'fringe' meanings.

[18] R M Klopper & N J C van den Bergh 'Die toepasbaarheid van die modern linguistiese benadering op wetsuitleg' (1980) 5 *Tydskrif vir Regswetenskap* 1, in general.

[19] Hutton op cit note 6 at 56.

[20] In the words of Du Plessis (op cit note 5 at 201): 'Usage and convention furthermore dictate that statutory and constitutional language cannot be slang […]'.

[21] Georgina Heydon & Eliseu Mabasso 'The impact of multilingualism on reporting domestic violence in Mozambique' (2018) 49 *Language Matters* 84, in general; Jan Engberg 'Word meaning and the problem of a globalized legal order' in Peter M Tiersma & Lawrence M Solan (eds) *The Oxford Handbook of Language and Law* (2012) 175; Zakeera Docrat *The Role of African Languages in the South African Legal System: Towards a Transformative Agenda* (unpublished MA thesis, Rhodes University, 2017) in general; Rosemary Henrietta Moeketsi *Of African Languages and Forensic Linguistics: The South African Multilingual and Multicultural Criminal Courtroom* (unpublished PhD dissertation, University of South Africa, 1997) in general.

Wendell Holmes, Smith states that the meaning assigned to a word by a presiding officer must be the same as the meaning given to that word by the ordinary language user.[22]

Some scholars have tried to define what 'ordinary meaning' is,[23] while others have tried to debate whom the concept is actually meant for.[24] The existence of ordinary meaning has also been questioned.[25] Some are of the opinion that there is no such thing as ordinary meaning.[26] For them, meaning can be constructed only through its context and should never be divorced from the act of legal interpretation.[27] A similar point is made by Christensen, who argues that meaning is not something that can be determined before a legal argument is constructed.[28] He does not see ordinary meaning as an innate characteristic of a text, but rather as a relational phenomenon that forms part of a semantic chain and a broader culture of legal interpretation. Ordinary meaning must therefore be seen as relations within a larger network of meaning. De Ville states that not only does the construction of meaning depend on language and exists through the interplay between text and interpreter,[29] but it also remains unstable.[30] Meaning is

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[22] Smith op cit note 1 at 63. See also Slocum op cit note 17 at 4. This links to what Tiersma (op cit note 10 at 115–16) says, that the meaning of a term is dependent on how it is used. This notion is not new, but rather something associated with Ludwig Wittgenstein's idea of 'use as meaning'. However, Tiersma argues that a public body like a legislator is not prescriptive, unless they define a word for a specific purpose. In that case, the word's meaning is authoritative.

[23] Its definition should explicitly include the label 'legal fiction', see Hutton op cit note 6 at 56 and Christensen & Kübbeler op cit note 11 at 7-9.

[24] J M T Labuschagne 'Die woord as kommunikasiebasis in die wetgewingsproses' (1988) 3 *South African Public Law* 34 at 42. Labuschagne mostly argued that there is no such thing as an ordinary meaning, but if it did exist, it was limited to the understanding of legal scholars and law practitioners and not something involving the public. A similar sentiment was expressed by Hoexter JA in *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein* (129/84) [1985] ZASCA 71, paras 70–1: The natural or ordinary meaning should be viewed through the eyes of someone who knows the subject matter, who is not ignorant of what the word means within this specific context. See also Strauss op cit note 6 at 1568.

[25] Labuschagne op cit note 8 in general; Hutton op cit note 6 in general; Terrence R Carney & Luna Bergh 'Exploring the different ordinary meanings in ritualised and ceremonial courtroom practices and their relation to everyday ritual'. *Paper presented at the Linguistics Society of Southern Africa / Southern African Applied Linguistics Association / Southern African Association for Language Teaching Joint Annual Conference 2016*, Cape Town.

[26] Cowen op cit note 5 at 386; Labuschagne op cit note 8 at 146; J M T Labuschagne 'Regsnormvorming: Riglyn vir 'n nuwe benadering tot die tradisionele reëls van wetsuitleg' (1989) 4 *South African Public Law* 205 at 208; A Soeteman 'Het nutteloze nut van grammaticale interpretatie' in E T Feteris, H Kloosterhuis, H J Plug & J A Pontier (eds) *Alles Afwegende: Bijdragen aan het Vijfde Symposium Juridische Argumentatie, 22 Juni 2007 te Rotterdam* (2007) 257–58; Hutton op cit note 6 at 197.

[27] Cowen op cit note 5 at 386, 391; J M T Labuschagne 'Die begrip "dubbelsinnigheid" by wetsuitleg' (1987) 12 *Tydskrif vir Regswetenskap* 96 at 99; Labuschagne op cit note 8 at 147; see also Klopper & Van den Bergh op cit note 18 at 10.

[28] Ralph Christensen 'Wortlautgrenze' available at *http://www.rechtslinguistik.de/glossar_jm/index.htm*, accessed on 12 March 2019.

[29] Busse (op cit note 11 at 148) reminds readers that interpretation can never be free of the intentions of the interpreter; see also Du Plessis op cit note 5 at 110, 199.

[30] De Ville op cit note 10 at 375, 380; Christensen & Kübbeler (op cit note 11 at 5) on presiding officers: 'Er arbeitet mit und durch die Sprache.' [He works with and through language.]

unstable because it is ever changing and elusive. De Ville's postmodernist[31] approach extends to the instability of context; he refers to context as 'boundless',[32] implying that a sound dependence on context to infer a word's meaning should be done with caution, since it provides no guarantee of clarity.

The postmodernist notion that meaning is elusive remains a somewhat foreign concept in a legal system that has been shaped by textualism and intentionalism. Both these theories of interpretation relied on the sovereignty of a text and the straightforwardness of the words embedded within. Meaning was usually gleaned from the word itself or by studying its syntax (and grammar). This idea is strongly vested in a structuralist school of thought. Structuralism was dominant between the 1920s and the 1960s (coinciding with the periods of textualism and intentionalism). Structuralists viewed language as a large system and meaning was always constructed inside this system. They saw reality not as things but as signs, and these signs always stood in relation to one another. In turn, the relations revealed permanent structures. Because the system cannot change, meaning can only be inferred by studying the relations, the structures and the entire system; nothing exists outside of the system.[33] The belief that a word's 'ordinary meaning' will simply reveal itself when studying its immediate context (its sentence, paragraph or the entire Act) relates to the structuralist's idea of meaning making.

However, individuals like Jacques Derrida stressed the fact that words have more than one meaning, which could lead to a multitude of possibilities. This means language can no longer be seen as a closed system, a belief shared by cognitive semanticists for whom meaning construction goes beyond our immediate world.[34] The distinction between word meaning and speaker meaning is blurred and 'context' now includes encyclopaedic and experiential knowledge.[35] When meaning construction is viewed in this way, the concept of an 'ordinary meaning' as the language output of 'ordinary people' can (finally) be interrogated.

(b) A new standard for interpretation

Labuschagne opines that because the legislator is dependent on language to communicate with its people, it would be erroneous to assume that the law would always be infallible and precise

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[31] One of the fundamental axioms of postmodernism is that there is no such thing as an absolute truth; it is not possible to speak of 'the truth' or 'the meaning'. See Jeff Malpas 'Retrieving truth: Modernism, postmodernism and the problem of truth' (1992) 75 *Soundings* 287, in general; Peter Salmon 'The moment of truth' (2018) Spring *New Humanist* 26 at 30.

[32] De Ville op cit note 10 at 375–6, 381, 384.

[33] Dirk Geeraerts *Theories of Lexical Semantics* (2010) 48–50.

[34] Geeraerts op cit note 33 at 182.

[35] Ibid at 204.

in its formulation.[36] Furthermore, this would assume that people are exactly the same and that words always have the same meaning. This is, of course, not true. Words are ambiguous, vague and sometimes unknown, despite their context.[37] Or, as Solan puts it, "the most pervasive linguistic problem confronting statutory interpreters concerns what to do when an event occurs that could legitimately be described by the statutory word, but typically one would not use that word in those circumstances to describe the situation."[38] This links to what Busse has argued: the theories used to interpret statutes and set the necessary legal boundaries draw the interpreter into a semantic discussion.[39] It becomes a dichotomy of determining and fixing meaning.[40] The issue is complicated further by questioning whose meaning should be dealt with. As Lee and Mouritsen state, words are not only used differently by people from diverse speech communities, but they also differ between registers.[41] All of this leaves courts and legal practitioners with semantic and pragmatic challenges, for which solutions are often sought in dictionaries and case law.[42]

Even though studies have demystified the idea that ordinary meaning is equal to a dictionary definition,[43] and despite the fact that a number of alternative approaches to statutory interpretation are available,[44] dictionary definitions, on the one hand, and examples and

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[36] Labuschagne op cit note 27 at 96.

[37] For a good discussion on ambiguity and vagueness in law, see Poscher op cit note 3. Also see Labuschagne op cit note 27 at 97; Michael S Moore 'Do we have an unwritten constitution' (1989) *California Law Review* 107 at 130-31; Schauer op cit note 2 at 157.

[38] Solan op cit note 5 at 92.

[39] Dietrich Busse 'Semantische Regeln und Rechtsnormen. Ein Grundproblem von Gesetzesbindung und Auslegungsmethodik in Linguistischer Sicht' in Rudolf Mellinghoff and Hans H Trutz (eds) *Die Leistungsfähigkeit des Rechts – Methodik, Gentechnologie, Internationales Verwaltungsrecht* (1988) 23; see also Dennis Davis 'The twist of language and the two Fagans: Please sir may I have some more literalism!' (1996) 12 *South African Journal of Human Rights* 504 at 509; and Christensen & Kübbeler op cit note 11 at 2.

[40] Busse op cit note 36 at 24. This is an important observation by Busse. It implies that meaning is not something that is found, but rather something that is constructed. And once it is constructed, that specific meaning stands. See also Roger Colinvaux 'What is law? A search for legal meaning and good judging under a textualist lens' (1997) 72 *Indiana Law Review* 1133 at 1151; and Tiersma op cit note 10 at 129-130.

[41] Thomas R Lee & Stephen C Mouritsen 'Judging ordinary meaning' (2018) 127 *Yale Law Review* 788 at 827.

[42] As in most countries, South African courts are allowed to refer to precedent judgments; see Cockram op cit note 9 at 148-151; Bell & Engle op cit note 8 at 59; Schauer op cit note 2 at 36–41.

[43] Lawrence Solan 'When judges use the dictionary' (1993) 68 *American Speech* 50; Note *Harvard Law Review* (1994) 107 'Looking it up: Dictionaries and statutory interpretation' 1437 (law student note; unsigned); Ellen P Aprill 'The law of the word: Dictionary shopping in the Supreme Court' (1998) 30 *Arizona State Law Journal* 275; Stephen C Mouritsen 'The dictionary is not a fortress: Definitional fallacies and a corpus-based approach to plain meaning' 2010 *Brigham Young University Law Review* 1915, Samuel A Thumma & Jeffrey Kirchmeier 'The lexicon has become a fortress: The United States Supreme Court's use of dictionaries' (1999) 47 *Buffalo Law Review* 241, Terrence R Carney ''n Forensies-semantiese beskouing van die woordgebruik "onkoste" in die hofsaak CSARS v Labat Africa Ltd' (2012) 30 *Southern African Linguistics and Applied Language Studies* 487.

[44] Not all alternative approaches might be practical or helpful to judiciary systems that suffer from workload and time and money constraints, but legal practitioners and presiding officers now have the luxury of choosing. Alternative approaches include: The Natural Semantic Metalanguage model (Cliff Goddard 'Can linguists help

theories of interpretation taken from case law, on the other, continue to be the most common way to deal with contested words and phrases.[45] However, the most recent guideline for legal interpretation in South Africa, put forward in *Natal Joint Municipal Pension Fund v Endumeni Municipality,*[46] departs somewhat from the ordinary meaning rule. Writing for a full bench, Wallis JA sets the following standard for what he refers to as the proper approach:

> Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.[47]

He goes on to say that a 'sensible meaning' should be sought and that judges must tread carefully not to 'substitute' the actual words used for words they consider to be 'reasonable,

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judges know what they mean? Linguistic semantics in the court-room' (1996) 3 *Forensic Linguistics* 250; Ian Langford 'Forensic semantics: The meaning of murder, manslaughter and homicide' (2000) 7 *Forensic Linguistics* 1350) and most notably, corpus linguistics (Malcolm Coulthard 'On the use of corpora in the analysis of forensic text' (1994) 1 *Forensic Linguistics* 27; Mouritsen op cit note 43; Lawrence M Solan & Tammy Gales 'Finding ordinary meaning in law: The judge, the dictionary or the corpus? (2016) 1 *International Journal of Legal Discourse* 253; Friedemann Vogel, Hanjo Hamann & Isabelle Gauer 'Computer-assisted legal linguistics: Corpus analysis as a new tool for legal studies' (2017) 43 *Law & Social Inquiry* 1340; Lee & Mouritsen op cit note 41). In South Africa, the use of frame semantics (Terrence R Carney 'Using frames to determine ordinary meaning in court cases: The case of "plant" and "vermin"' (2016) 45 *Stellenbosch Papers in Linguistics* 31) and prototype theory (TR Carney & L Bergh 'Using prototype theory to determine the ordinary meaning of words' (2016) 79 *THRHR* 486; SP van Zyl & TR Carney 'A cry for certainty as to the application of "accrued to" for purposes of section 1 of the Income Tax Act 58 of 1962' (2018) 81 *THRHR* 484) have also been illustrated as a possible means to establish the ordinary meaning of words with or without the aid of dictionaries. For semantic analysis, see Michael S Moore 'Plain meaning and linguistics: A case study' (1995) 73 *Washington University Law Quarterly* in general. Some of these approaches have at least been utilised in American court cases: With reference to corpus linguistic approaches, see *Sate v Rasabout* 2015 UT 72 356 P3d 1258; *People v Harris* 72 Ill 2d 16 377 NE2d 28, 1978 Ill17 Ill Dec 838; *Muscarello v United States* (524 US 125 (1998)), and *United States v Costello* (666 F3d 1040 (2012)). With reference to prototype theory, see *Magnesium Elektron North America Inc. v National Union Fire Insurance Company Pittsburgh* Ill 3d unreported case, cause no 12 MR 336 (14 June 2018).

[45] See, for instance, *Harvey NO and Others v Crawford NO and Others* 2019 (2) SA 153 (SCA); *CSARS v Daikin Air Conditioning* (185/2017) [2018] ZASCA 66; *CSARS v Big G Restaurants (Pty) Ltd* (157/18) [2018] ZASCA 179; *Smyth v Investec Bank Ltd and Another* 2018 (1) SA 494 (SCA); *CSARS v Bosch* 2015 (2) SA 174 (SCA); *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA); *S v Okah* 2018 (1) SACR 492 (CC); *S v Liesching* 2019 (1) SACR 178 (CC); *S v Pedro* 2015 (1) SACR 42 (WCC)*; S v Jordaan* 2018 (1) SACR 522 (WCC); *Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd* 2016 (2) SA 586 (SCA); *Marine 3 Technologies Holdings (Pty) Ltd v Afrigroup Investments (Pty) Ltd* 2015 (2) SA 387 (SCA); *Democratic Alliance v Speaker, National Assembly* 2016 (3) SA 487 (CC).

[46] 2012 (4) SA 593 (SCA). For an argument in favour of the teleological model of interpretation, which focuses on the purpose of statutory provisions, see Van Staden & Van Eck op cit note 3 at 426–31.

[47] Para 18; see also C E Smith 'Enkele varianten van taalkundige interpretatie' in E T Feteris, H Kloosterhuis, H J Plug & J A Pontier (eds) *Alles Afwegende: Bijdragen aan het Vijfde Symposium Juridische Argumentatie, 22 Juni 2007 te Rotterdam* (2007) 250.

sensible or businesslike'.[48] This is similar to what Slocum has observed – courts 'often favour inappropriately broad meanings' to capture what is 'possible', rather than what is 'ordinary'.[49] According to Wallis JA, the language must be considered together with the context, simultaneously and in equal measure.[50] Seeking the intention of legislative draftsmen is no longer encouraged, since these enquiries are unhelpful and unreliable.[51] Boldly, Wallis JA also does away with the notion of an 'ordinary grammatical meaning', implying that it is an outdated approach that does not help to clarify vague or ambiguous words.[52] Where the context does not elucidate the meaning, the court must assign a meaning through restriction or extension.[53] Furthermore, Wallis JA notes that the language must be interpreted as it is understood at the time of contestation.

Ultimately, Wallis JA's proper approach imprisons meaning within the text being contested. This implies a very restricted, structuralist interpretation, in which the context is tied to the text and the language system itself. The language is then studied synchronically without considering a broader network of meaning. In doing so, we can indeed no longer speak of an ordinary meaning, or the meaning used by ordinary, reasonable people. The notion that meaning could be sought outside an Act and its addenda (and by implication its grammar and syntax) remains moot. *Endumeni* creates no space for pragmatic meaning, that is, meaning constructed through lived experiences in which the context goes beyond the immediate text. *Endumeni* would have had a far richer yield if meaning were to be interpreted conceptually instead of structuralistically.

Therefore, despite the new direction suggested by Wallis JA in *Endumeni*, contested words still need clarification, and where a court has to deal with a non-technical word, it will most likely be dealt with according to its ordinary or everyday characteristics, as understood in its

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[48] Para 18.

[49] Slocum op cit note 13 at 40.

[50] Para 19. This viewpoint is strongly supported by Groenewegen (op cit note 11 at 239–40, 242), who believes that grammatical meaning can in no way contribute any clarity outside of context. To him, vagueness is exactly resultant of meaning apart from its immediate, syntactical context. However, recent judgments have criticised the application of *Endumeni*, saying that a broadened focus on context has led to an increase in inadmissible evidence and textual interpretation. See *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* (106/2018) [2018] ZASCA 176 (3 December 2018), and *ABC (Pty) Ltd v Commissioner for the South African Revenue Services* (14287) [2019] ZASCA (12 June 2019).

[51] Paras 20-4; Cowen (op cit note 5 at 382–4) makes the interesting observation that presiding officers often refer to the intentions of the legislator when they actually seek to understand the meaning of the words used by the legislator.

[52] Para 25; see once more Groenewegen, op cit note 11.

[53] Para 25.

textualist sense.[54] Slocum points out a number of reasons why the ordinary meaning doctrine is influential: it functions best as a default rule when disputes become costly, it is a democratic approach that is (supposedly) free from political control, it could be seen as the best indication of legislative purpose, and it is 'more consistent with the judiciary's other tools of interpretation', which favour narrower interpretation.[55]

(c)   Problem statement

In many respects, the ordinary meaning rule is reliant on two assumptions, namely

- the legal fiction of the reasonable person, and
- the legal fiction of the speaker of ordinary language.[56]

Though the reasonable person can be described as someone with ordinary intelligence and development,[57] the term remains problematic.[58] Who exactly qualifies as a reasonable person? Is it the same as an average person? Is someone with a higher education and a good command of language more reasonable than an unschooled person with commonsense language use? What about people who are more conservative than others? Are people belonging to different age groups or cultural assimilations equally reasonable? Reasonability is a relative concept and different for each individual or community.[59] It is also dependent on the circumstances and needs of each case.[60] The reasonable person is, practically speaking, Joe Soap. He or she is an ordinary commuter, neighbour, office worker and consumer. Even if he or she is capable of higher thought and problem-solving, this individual uses standard or commonsense language

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[54] Perumalsamy aptly illuminates the stark contrast of courts that seemingly agree with the new approach to interpretation set by *Endumeni*, but end up doing the very opposite of what the judgment dictates by invoking textualist principles instead. See Kessler Perumalsamy 'The life and times of textualism in South Africa' (2019) 22 *PELJ* 1 at 12-13.

[55] Slocum op cit note 17 at 5, 8-10.

[56] Hutton op cit note 6 at 44; Summers & Marshall (op cit note 17 at 220) very vaguely describe an ordinary language user as a competent individual, who is also 'a purposive user, but in a qualified way'.

[57] J Neethling, J M Potgieter & P J Visser *Dilektereg* (1996) 332. For instance, American tort law does not value cognitive abilities as a characteristic of a reasonable person, but American trade law does. See Laura A Heymann 'The reasonable person in trademark law' (2008) 52 *St Louis University Law Journal* 781 at 782.

[58] The term seldom has a fixed meaning, making it very vague. See Sandra F Sperino 'Retaliation and the reasonable person' (2015) 67 *Florida Law Review* 2031 at 2053. Its definition also changes to some degree according to its context. See Heymann ibid at 784.

[59] See also Richard A Posner *The Problems of Jurisprudence* (1990) 263.

[60] See also Donald Braman 'Cultural cognition and the reasonable person' (2010) 14 *Lewis & Clark Law Review* 1455 at 1456, footnote 2.

to navigate daily life. A reasonable person knows the basics of right and wrong behaviour; what is permissible and what is not.[61]

There is also the belief that this reasonable person has a way of speaking that can aid in understanding how a court should interpret words. His or her language is characterised as accessible and ordinary; it does not typically contain jargon. This standard of language is considered to be basic enough to communicate a variety of concepts between individuals of all walks of life;[62] characteristic of an idealised speaker of a language community.[63] This suggests something of frequency of usage; the meaning people typically associate with words used in similar circumstances to what a court is investigating.[64] It is usually the meaning assigned to words by this reasonable person that a court of law supposedly tries to establish and confirm. But this idea is not without its problems.[65] As Slocum has observed, courts often go beyond what an 'ordinary person' would be likely to do when confronted with the same text or situation, for instance giving grammar and semantics the same critical consideration as a presiding officer.[66] Also, the language of this 'idealised interpreter' is often perceived to be more sophisticated than that of the ordinary language user being imagined.[67] According to Slocum, it would be more accurate to refer to an astute person, someone that has a more sophisticated outlook on the way ordinary folk would use language.[68]

However, if we cannot fully define who the reasonable person is, then we cannot identify the language standard used by him or her with much certainty either. If an ordinary meaning can be assigned to a contested word, and if it is accepted that this ordinary meaning would have been assigned by an ordinary, reasonable person, then surely this could be tested? If results prove that a court's interpretation of words is the same as that of the so-called ordinary person, then its existence can actually be confirmed. However, if the results prove a clear discrepancy

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[61] According to Braman ibid at 1457, and footnote 11 at 1458), the reasonable person standard should be informed by what he calls 'factualization' and 'cultural cognition'. Factualisation evaluates an individual's demographic information, whereas cultural cognition explains how an individual conforms his or her factual beliefs to his or her core values and cultural commitments. This approach helps investigators better understand an individual's perceptions and behaviour. See also Moore op cit note 37 at 116–17, and Slocum note 17 above at 103-104.

[62] My description deviates from that of Summers & Marshall (op cit note 17 at 221), who define an ordinary language user as someone who is educated, with a general knowledge, who knows the basics of many different topics and who can distinguish between a word's different senses. To them, this speaker is not a 'common or popular talker', but it is to me. Moore op cit note 37 at 116–17; Du Plessis op cit note 5 at 109.

[63] Slocum op cit note 17 at 103.

[64] See also Solan op cit note 5 at 53.

[65] Hutton op cit note 6 at 56.

[66] Slocum op cit note 17 at 104.

[67] Ibid at 105.

[68] Ibid at 105–6.

between a court's interpretation and that of a reasonable person, then the concept of an ordinary meaning within law is a fallacy.

The goal of this contribution is exactly that – to gauge whether the public understands words in the same way that judges do. The test is a simple one: Participants had to select between two options – a court's interpretation of the particular word's ordinary meaning, and an alternative meaning presented to the court. Participants also needed to define a number of words that were previously contested in court, without the aid of resources such as a dictionary. The initial hypothesis was that the public would generally choose and define words differently from the interpretations that stood up in court, thus proving that ordinary meaning assigned by a reasonable person – as described in this study – is different from the ordinary meaning rule that exists in legal scholarship and practice.

Before the results of the experiment can be discussed, an outline of the methodology will be provided.

II METHODOLOGY

(a) Method

In order to test whether meaning assigned to disputed words in court cases matches the understanding of reasonable people who use everyday language, data were collected through a survey approach.[69] The main goal of the survey was to determine if participants were capable of identifying the definition best suited for its legal purpose and whether they were able to define selected words unaided. The survey, operated by Google Forms, was kept simple and populated with two categories: demographic information and a word test. The survey was distributed electronically by means of electronic mail, short message service and a learning management system utilised by a South African university. The aim was to reach participants from all walks of life; this means people from varying backgrounds who differ, based on levels of education, language group and proficiency, and profession. Participation was voluntary, anonymous and restricted to people within the borders of South Africa.

The survey had to be completed electronically, either by computer or smartphone. Once the survey was submitted, Google Forms generated statistics for multiple-choice-type questions and recorded participants' responses, where written answers were expected. For the purpose of

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[69] Ethical clearance to conduct this research was granted by the College of Human Sciences of the University of South Africa; reference number 2018-CHS-0110.

analysis and owing to time constraints, the responses were capped at 151 responses.[70] Owing to the small sample size (and its limitations), this contribution should be viewed as a preliminary and explorative study only.

(b)   Design

As mentioned above, the survey was divided into two parts: a demographic section and a word test. For the demographic information, participants had to provide details such as age, occupation, level of education and language. For the language profile, participants had to indicate what they considered to be their first language – in this case, 'first language' referred to the language they used most often and were most comfortable using. This was followed by an indication of the participant's proficiency in South African English. Proficiency levels were taken from the Common European Framework of Reference for Languages, which sets a 'can-do' standard for proficiency levels in English.[71] It is important to keep in mind that the proficiency levels in this survey are self-reported. This specific set of demographic data was collected to better understand who the 'reasonable person' behind the results was.

The word test was likewise divided into two parts (Sets A and B) and consisted of ten words in total (see table 1 below).[72]

Table 1: Summary of selected words	
Set A	**Set B**
grab	export
parent	money
value	road

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[70] The researcher can lock the survey at any given time. When this survey was locked and the numbers tallied, the participant total stood at 151. A decision was made not to interfere with the dataset by deleting one participant for a more rounded number; instead the data was left intact.

[71] Council of Europe 'The CEFR Levels' available at *https://www.coe.int/en/web/common-european-framework-reference-languages/level-descriptions*, accessed on 14 March 2019. It is worth noting that the CERF functions as a framework only and has been extended to include languages outside of Europe such as Arabic, Bahasa and Swahili for instance. Though it is not tailored to the South African context specifically, it is widely used by South African institutions that teach English as a foreign or second language. The CERF is better recognised around the world than most other literacy levels. However, this does not mean that the framework is not flawed. For more information on the CERF, see David Little 'The Common European Framework of Reference for Languages: content, purpose, origin, reception and impact' (2006) 39 *Language Teaching* 167. For a view on CERF in South Africa, see Charlotte Mbali 'Appropriate assessment of English language competency for South African teachers-in-training' (2017) 35 *Southern African Linguistics and Applied Language Studies* 285.

[72] 'Road' in *Bell v Road Accident Fund* 2007 (6) SA 48 (SCA); 'export' in *De Beers Marine (Pty) Ltd v CSARS* 2002 (5) SA 136 (SCA); 'money' in *Feldman v Midgin* 2006 (6) SA 12 (SCA); 'parent' in *Fish Hoek Primary School v GW* 2010 (2) SA 141 (SCA); 'invest' in *King v Attorneys Fidelity Fund Board of Control* 2010 (4) SA 185 (SCA); 'absence' in *Natal Rugby Union v Gould* 1999 (1) SA 432 (SCA); 'value' in *Paola v Jeeva* 2004 (1) SA 396 (SCA); 'strike' in *SASRIA Ltd v Slabbert Burger Transport (Pty) Ltd* 2008 (5) SA 270 (SCA); 'crush' in *CSARS v Coltrade International CC* (54/2015) [2016] ZASCA 53; 'grab' in *S v Salmans* 2006 (1) SACR 333 (C).

strike	absence
crush	invest

These ten words were selected from South African case law. Initially, a search was conducted on the Juta Law Online Publications database for South African law reports. The search term 'ordinary meaning' was used to sort cases. Cases that featured this search term were further scrutinised for words that were explicitly interpreted according to the ordinary meaning rule.[73] Though great pains were taken to ensure that jargon or other technical words were not included in the test, there were no specific criteria for inclusion. Words were listed on the survey in sequence and not all at once.

Set A consisted of the first five words of the test. Each word in Set A was defined according to two definitions, which were very similar. One definition was formulated to reflect the court's interpretation of the disputed word's ordinary meaning and the other definition reflected the interpretation issues addressed by the relevant court. Participants had to choose between these two options; they could select only one option. In Set B, participants were given five words that they needed to describe using their own words, without the aid of resources such as a dictionary. A blank copy of the survey is included at the end of this article (see the appendix).

(c)   Analysis

As in the case of the demographic information, statistics for Set A were generated by Google Forms. Because participants simply had to choose between two options, the statistics indicated a clear answer. However, because the respondents had to provide text to describe the words in Set B, their answers were analysed using the corpus analysis programme,[74] AntConc.[75] Responses for each word in Set B were extracted and placed in separate documents. The documents were converted to plain text format (txt) and then uploaded to AntConc respectively as sub-corpora. In order to make inferences, the wordlist, concordance and n-gram tools were utilised to study these words in context. Keyword lists and the collocate tool were not used.

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[73] Some presiding officers used slightly more specific qualifications, such as 'ordinary grammatical meaning' (*King*), 'generally accepted meaning' (*Coltrade International*), 'ordinary dictionary meaning' (*SASRIA*), 'literal ordinary meaning' (*Fish Hoek Primary*), and 'ordinary commercial meaning' (*De Beers Marine*)'.

[74] A corpus analysis toolkit is a variety of software tools that allows researchers to study everyday speech and writing by conducting various word searches on a selected text corpus. Common tools include a concordancer, wordlists, parts-of-speech taggers, annotators, collocations, parsers, n-grams and keyword lists. By identifying frequency and patterns, we can draw important conclusions about speakers' typical (ordinary) language use.

[75] Laurence Anthony *AntConc Computer Software* version 342 (2014).

First, a wordlist was generated. Words were sorted by frequency and the most frequent nouns, verbs and adjectives were recorded. Words had to occur at least 4 times within each sub-corpus to be considered. Thereafter, the identified lexical items were searched in the concordancer of AntConc. Searches in the concordance tool were done using a wildcard for each term in order to study the lexeme;[76] their occurrences were recorded and their contexts scrutinised for clarity, ambiguity and vagueness. Lastly, a search was done on each sub-corpus, using the cluster tool. When n-grams were studied, frequency was set at 3 (min) and the size of n-grams were set between 3 (min) and 5 (max). When clusters were sorted by word, the frequency was set at 3 (min) and the size was set between 1 (min) and 5 (max) and sorted on the left of the search term. These parameters delivered the most sensible results within sub-corpora this small.

The statistical results for Set A (taken from Google Forms), together with the results of Set B (from the AntConc corpus analysis), were then compared with the information gathered from the iWeb corpus[77] and the meanings assigned to these words by the respective courts. The words were then discussed, based on the different sets of results.

iWeb was employed because it is large, contains many corpus analysis tools that simplify analyses and has a user-friendly interface. It was released in 2018 and consists of 14 billion words taken from 22 million web pages. The corpus is mostly representative of English used in the USA, Canada, the UK, Ireland, Australia and New Zealand.[78] Not only is iWeb very different to most corpora, but it is unique in what the architecture offers users. When searches are based on the top 60 000 words in the corpus (as was the case for this study), each word's definition,[79] parts of speech, synonyms and antonyms (where available), related topics

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[76] A wildcard is a setting that helps the concordance user to search for different forms of the same word (the lexeme) simultaneously. For instance, using the search term 'put*' will deliver results for 'put', 'puts' and 'putting'.

[77] Brigham Young University (BYU) 'iWeb' available at *https://corpus.byu.edu/iweb/*, accessed on 24 January 2020.

[78] According to the corpus overview, iWeb does not include texts from Nigeria, Singapore or India. Evidently, South Africa is also excluded. However, some results for the search terms 'punjabi' and 'zulu' are derived from Indian and South African websites respectively, that do not use the .za or .in domain indicators. This means that results are not based solely on web pages from the countries listed but include web pages from South Africa. Ideally, a South African English (SAE) corpus should be consulted; however, the existing SAE corpus is limited in its representation of English in South Africa and it is not publically accessible. This motivates researchers to use other available corpora. iWeb forms part of the BYU corpus stable, which offers the largest collection of words in the English language and the most widely-used corpora at present. For more information on the SAE corpus and subsequent developments, see amongst others Leela Pienaar and Vivian de Klerk 'Towards a corpus of South African English: Corralling the sub-varieties' (2009) 19 *Lexikos* 353, and Bertus van Rooy 'Corpus linguistic work on Black South African English' (2013) 29 *English Today* 10.

[79] The definitions provided by iWeb are based on other dictionary websites and are therefore not related to its corpus data. However, everything else (parts of speech, topics, clusters, collocates, etc) is derived from iWeb's

(prototype based) as well as collocates and clusters are provided in a user-friendly results page.[80] This results page looks like a virtual dictionary though it remains a corpus based text. Apart from the usual corpus features like concordance lines and frequency information, users can look up a word's pronunciation and translation, and consult images and videos related to that word or concept.[81] iWeb has revolutionised corpus usage and makes it ideal for semantic interpretation tasks like statutory interpretation, especially because it can be read like an interactive dictionary.

Using corpora this big (instead of traditional dictionaries) enables researchers to get a better idea of the words and phrases used by everyday speakers.[82] Such corpora often derive their data from naturally occurring language samples and they regularly help to fill gaps left by dictionaries.[83] Since a corpus allows users to study language in use, it can provide a better view of context because words can be examined together with their co-occurring words.[84] Moreover, based on high frequency, a corpus can provide clues to prototypicality better than a standard dictionary can.[85] As cited literature indicate, corpora are ideal for ordinary meaning investigations. This study relied on (and scrutinised) the following features for its interpretations: definitions, word relations, collocates, clusters, topics and its concordance lines.

(d)   Limitations

Even though this was a preliminary investigation, its ambitions were constrained by its limitations. Firstly, the study was limited to willing participants. This fact, together with access

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corpus. This was confirmed by iWeb's creator, Mark Davies, in personal correspondence dated 28 February 2020. To ensure the necessary rigour, definitions taken from Oxford's online dictionary were added to the analysis.

[80] For a better overview of iWeb's many functions and features, please consult its overview document: Brigham Young University 'The iWeb corpus' available at *https://corpus.byu.edu/iweb/help/iweb_overview.pdf,* accessed on 23 January 2020.

[81] Brigham Young University op cit note 78.

[82] Stefan Th Gries & Brian G Slocum 'Ordinary meaning and corpus linguistics' (2018) 2017 *Brigham Young University Law Review* 1417; John D Ramer 'Corpus linguistics: Misfire or more ammo for the ordinary-meaning canon' (2017) 116 *Michigan Law Review* 303; Lawrence M Solan & Tammy Gales 'Corpus linguistics as a tool in legal interpretation' (2018) 2017 *Brigham Young University Law Review* 1311; Solan & Gales op cit note 44; Lee & Mouritsen op cit note 41. Not everyone is positive about the use of corpora in legal interpretation. See the following for an alternative view: Carissa Byrne Hessick 'Corpus linguistics and the criminal law' (2018) 2017 *Brigham Young University Law Review* 1503.

[83] Lauren Simpson '#OrdinaryMeaning: Using Twitter as a corpus in statutory analysis' (2018) 2017 *Brigham Young University Law Review* 487 at 492–3. This is specifically true for iWeb. Because it is web-based, users have access to ordinary language users' language output. It is even possible to be redirected from within the corpus to video that feature the word in spoken context, see Brigham Young University op cit note 78.

[84] Gries & Slocum op cit note 83 at 1441.

[85] Ibid.

to the survey through computers and smartphones, limited the number of potential participants. The latter severely compromised participation by individuals with lower income and literacy profiles, which had a visible impact on the data through absence.

Secondly, the medium of English used to conduct the research may have had an impact on the decision to participate, as well as on the answers provided by those participants who did not have as good a command of the language as they thought they had. This relates specifically to participants' proficiency levels. Participants would need a B1 or B2 to understand and complete the survey; whereas distinguishing between the words in Set A, probably requires a much higher linguistic capability than the B level enables. Paper-based copies and translations of the survey could have been distributed to financially vulnerable communities and individuals with limited English proficiency in order to gain a more representative view, but this approach was constrained by the study's financial and time resources. Furthermore, South African courts use English as the lingua franca, which makes a fair translation of the words used in court cases challenging.

A third limitation is the lack of significant South African English representation in iWeb, which means that interpretations based on this corpus does not account for any country and culture specific differences in meaning. Typical South African nuances therefore remain absent. A case in point could be the word 'parent' or 'family', which might be interpreted very differently according to diverse cultural practices.

A fourth concern relates to the demographic profile of participants. As will be seen from the data, the profile of participants is skewed and does not reflect the South African population in terms of representation. This is noteworthy, because conclusions drawn from the data must be done with caution and cannot be extrapolated to South Africans in general.

(e)   Accountability and confirmation bias

It is important to reflect on accountability and the influence of confirmation bias on the analysis and conclusions to follow. Without considering these two aspects, it might seem as if the results indicate no more than that the judicial interpretation accords with the lexical corpus and the corpus reflects 'ordinary' usage. What assumptions are at play here and how do they impact the conclusion?

McEnery and Hardie warns that if you approach a corpus with a specific theory in mind, it can be easy to "unintentionally focus on and pull out only the examples from the corpus that

support the theory".[86] This is referred to as confirmation bias. The danger in this approach is that you can never prove the theory to be false.[87] To prevent this, McEnery and Hardie advise to use the entire corpus – and all the relevant evidence that emerge from the analysis – on which the hypothesis is based.[88] Ideally, a researcher should avoid conscious or motivated selection of data to fit the hypothesis.[89] As will be seen, this is not the case for the present study.

Because iWeb is sourced through the world wide web, it is termed as a web corpus. Apart from being generally very large, it has the potential to continue growing.[90] It will contain mostly written text, both edited and unedited and the data are usually not divided by genre. The survey corpus is better described as an opportunistic corpus. This kind of corpus does not pretend to adhere to a rigorous sampling frame and it does not attempt to deal with issues of skew; instead, this corpus "represents nothing more nor less than the data that it was possible to gather for a specific task".[91] Therefore, no claims are made that the data presented here are robust. The results are exploratory and allow the researcher to speculate, which in turn (hopefully) leads to more prodding and investigation. The fact that the results did not confirm the hypothesis, should give some indication that the instruments used were not purposefully manipulated.

The data were collected with the aim to test a hypothesis. To avoid confirmation bias and to prevent opportunistic selection, both corpora were used in their entirety and no active sampling was done. This rings true for the selection of court cases and the participants of the survey as well. As already indicated, the cases were selected as objectively as possible and the participation was anonymous.

Nevertheless, it is nearly impossible to achieve perfect balance and representativeness in corpus linguistic research of this kind,[92] therefore residual research bias and influence is acknowledged. Even if the methods used are reasonably objective (which may be arguable by some), the study remains text based and relies on interpretation; all inferences are foremost those of the researcher. Conclusions are therefore drawn with care.

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[86] Tony McEnery & Andrew Hardie *Corpus Linguistics. Method, Theory and Practice* (2011) 14.
[87] Ibid.
[88] Ibid at 15.
[89] Ibid.
[90] Ibid at 7.
[91] Ibid at 11.
[92] Ibid at 10.

III RESULTS

In this section, the data from the questionnaire are provided and discussed in relation to the issues addressed in the problem statement.

(a)   Demographic data

Demographic data give some indication of who the participants were and enable the researcher and readers to infer to what extent these persons were 'reasonable' and 'ordinary'. They also assist in determining the limitations of the study and provide the researcher with a background against which the results of the word test should be interpreted (see table 2 for a summary).

Table 2: Summary of demographic data (n 151)								
Age	**18-30**	**31-50**	**51-70**	**>70**				
	36%	49%	11%	4%				
Education	**Left shool**	**Finis hed schoo l**	**Diplo ma**	**Bache lor**	**Postgr ad**			
	2%	20%	13%	17%	25%			
Occupa tion	**Studen t**	**Law**	**IT**	**Busin ess**	**Educat ion**	**Othe r**		
	11%	6%	9%	7%	29%	12%		
Langua ge	**Afrika ans**	**Engli sh**	**isiZul u**	**isiXho sa**	**Setswa na**	**Sesot ho sa Lebo wa**	**Sesot ho**	**Tshive nda**	**Non-South Africa n langu age**
	52%	27%	7%	3%	3%	2%	0.5%	1%	4%
SA English Proficie ncy	**C1**	**C2**	**B1**	**B2**	**A1**	**A2**		
	46%	18%	11%	17%	3%	5%		

Participants in this survey had to choose between four age categories: 18 to 30 years; 31 to 50 years; 51 to 70 years; and older than 70 years. Thirty-six per cent of participants fell within the first category and 49 per cent were between the ages of 31 and 50. Eleven per cent were older than 50, and only four per cent were older than 70. With regard to their level of schooling, two per cent did not finish school and 20 per cent had only a school-leaving certificate. Almost 11 per cent of participants had received post-school training without any kind of accreditation and another 12 per cent had received post-school training with official documentation. Fifty-

four per cent of participants held a qualification from a tertiary institution; 13 per cent had a tertiary diploma; 17 per cent had a bachelor's degree; and 25 per cent were already in possession of a postgraduate qualification. Participants indicated different forms of occupation: at 29 per cent, the majority of participants worked in the education sector; seven per cent worked in business; six per cent worked in legal fields; nine per cent were in IT; another eleven per cent indicated that they were students; and 12 per cent chose the 'Other' category.

The language profile of participants revealed that 52 per cent considered themselves speakers of Afrikaans and 27 per cent indicated English as their first language.[93] A further seven per cent spoke isiZulu, whereas Setswana and isiXhosa were both represented by three per cent of participants. Sesotho sa Lebowa came in at two per cent, followed by Tshivenda with one per cent and Sesotho with less than one percent. Speakers of Xitsonga and isiNdebele were not reflected in the data. Four per cent of the participants indicated that they spoke a non-South African language (but did not specify). Considering that South Africans use English (and different vernaculars thereof) as the lingua franca to navigate daily life and that the majority of participants had tertiary schooling of some kind, it was not surprising that 46 per cent indicated that they spoke English at C2 level. A further 18 per cent placed themselves at C1 level and 17 per cent at B2 level. Eleven per cent considered themselves to be at B1 level and about eight per cent indicated that they had a poor level of proficiency in English (three per cent at A1 and five per cent at A2). Of course, this is a perceived level of proficiency and does not signify a true reflection of language capability. Research by Carstens, Maes and Gangla-Birir pointed out that people often read at a lower level than what they believe they do.[94]

The demographic data show that the majority of participants were educated, worked in a professional setting and were sufficiently proficient in South African English to communicate at a commonsense language level and to understand basic concepts. In other words, the

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[93] At this point, the demographic profile of participants already indicates an obvious discrepancy with population statistics. According to the South African census of 2011, about thirteen per cent of South Africans speak Afrikaans, more than nine per cent speak English, sixteen per cent speak isiXhosa and more than twenty-two per cent are isiZulu speaking. Approximately twelve per cent have some kind of post-school education and three per cent have a qualification from a university. This is remarkably different from the demographic profile of the present study. Inferences should be made with caution and within context. See Statistics South Africa 'Census 2011 Key Results' available at *http://www.statssa.gov.za/census/census_2011/census_products/Census_2011_Key_results.pdf*, accessed on 16 May 2019.

[94] Adelia Carstens, Alfons Maes & Lilian Gangla-Birir 'Understanding visuals in HIV/AIDS education in South Africa: Differences between literate and low-literate audiences' (2006) 5 *African Journal of Aids Research* 1. However, due to the cognitive load of the survey, participants would have to manage a proficiency level of B2 and higher in order to complete the survey meaningfully. Because participants had to report their perceived proficiency levels, it is very likely that those who indicated A1 and A2 were in fact more proficient than they thought.

participants were not representative of the entire country, especially not of the most vulnerable groups within South Africa, which often fall prey to the legal system because of linguistic, educational and financial barriers. However, does representation equate 'ordinary' and 'reasonable'? Because participants were not representative of South Africa in general, they might also not be considered 'ordinary' by some. The same applies to the notion of reasonability: when Braman as well as Summers and Marshall's concepts of 'reasonable' are considered, then participants in this study qualify.[95] Once more, participants in the present study should rather be described as 'astute' than 'reasonable' and 'ordinary'.[96]

(b)   Results of Set A

For the first five words of the word test, participants had to choose between two definitions. The definitions were constructed based on the semantic issue that the relevant court had to clarify. One definition was constructed to reflect an 'ordinary meaning', while the other reflected the issue before the court. What follows are the facts of each case, related data from the iWeb corpus and the results from the survey.[97]

In the case of *Fish Hoek Primary*, the court had to study the word 'parent', as set out in s 40(1) of the South African Schools Act 84 of 1996.[98] As Ponnan JA explained, the court had to decide whether 'parent' had to be given a broader definition, to include non-custodians, or a more restrictive denotation.[99] In this instance, the court found the definition of 'parent' in s 40(1) of the Act to be deliberately broad in order to include non-custodians as well, especially when it comes to financial responsibilities such as debt owed to schools.[100] This effectively means that a 'parent' is someone who is actively involved in a child's life, as well as someone who is related to that child only biologically.

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[95] Braman op cit note 61, and Summers & Marshall op cit note 17 at 61–62.
[96] Slocum op cite note 17 at 105–6.
[97] Evidently, all inferences made from the data which are not explicitly related to a presiding judge or court of law are my own.
[98] Supra note 73 para 1.
[99] Supra note 73 paras 1 and 3.
[100] Supra note 73 paras 8-12.

iWeb[101] defines a 'parent' as a mother or father, or as someone who has adopted a child. The Oxford dictionary[102] describes 'parent' as the progenitor of a child, but extends the definition to someone who has parental responsibilities toward a child (like a stepfather or adoptive mother). The relationship between parent and child is further described by adjectives such as 'legal', 'adoptive', 'concerned' and 'custodial'. Compound and possessive nouns, such as 'single parent', 'teen parents', 'school parents' 'child's parents' and 'parent's house', provide a similar view of a custodial relationship between child and guardian. However, the corpus includes the adjective 'biological' and the compound noun 'birth parent'. Although these words are not restricted to non-custodians, they contribute to a broadening of the ordinary meaning of 'parent' to suggest the inclusion of non-custodial individuals.

Eighty-seven per cent of participants said a parent is a biological or adoptive father/mother, or a legal guardian, who is an active participant in the child's life, while 13 per cent agreed that a parent could be either an active participant in the child's life or someone with no contact or knowledge of that child. While iWeb does allow for a broadening of the ordinary meaning, the participants viewed 'parent' in a restrictive sense, which differs from the court's interpretation.

In the *Paolo* case, the word 'value' was contested in terms of s 7(1)*(b)*(ii)*(aa)(ccc)* of the National Building Regulations and Building Standards Act 103 of 1977 in relation to property. The court had to clarify whether the meaning of 'value' could go beyond a property's financial worth to include an owner's well-being and emotional comfort, as a result of a property's fine view.[103] The appellant argued that his property's value would diminish once the respondents' newly built property had obscured his 'unsurpassed view', which had been unobstructed for about twenty years.[104] Farlam JA concluded that the ordinary meaning of 'value' is limited to its commercial sense, namely market value.[105]

iWeb results[106] point in the same direction. 'Value' is interpreted as 'market value' in relation to free-standing property. It is seen as the amount (of money, goods or services) considered to be a fair equivalent for something else; a numerical quantity measured, assigned

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[101] Brigham Young University op cit note 78. Be reminded that iWeb differs from other well-known corpora in the sense that it does actually provide lexicological information such as definitions. However, because iWeb takes definitions from other websites, these definitions are complemented with information taken from Oxford's online dictionary. See Brigham Young University op cit note 80 and Davies correspondence op cit note 80.

[102] Oxford English Dictionary 'parent' available at *https://www.oed.com/view/Entry/137816?rskey=lWXtVL&result=1&isAdvanced=false&print*, accessed on 3 March 2020.

[103] Supra note 73 paras 19, 23.

[104] Supra note 73 para 3.

[105] Supra note 73 para 23.

[106] Brigham Young University op cit note 78.

or computed. The Oxford dictionary[107] corresponds, but includes estimations of worth and usefulness. The relationship between 'value' and 'property' is further confirmed by nouns frequently associated with the contested word, such as 'money', 'market', 'property', 'asset' and 'core'. Value, as a quantifiable measurement, and its association with tangible goods is also visible in compound nouns such as 'value ratio', 'value stocks', 'face value', 'default value', 'cash value', 'property value', 'resale value' and 'home value'.

Eighty-one per cent of participants agreed with the definition indicating financial worth, while 19 per cent thought that 'value' includes an owner's well-being and emotional comfort. This is a clear indication that the majority understood the word in the same way as the applicable court.

The third word tested in the survey was 'strike'. The respondent in the *SASRIA* case, who was a transport-fleet operator, suffered severe damages when one of its trucks was set alight during a strike.[108] The fleet was insured by the appellant against damages caused by strikes, riots or public disorder.[109] The court had to determine whether 'strike' had the same meaning as 'riot' and 'public disorder'; in addition, the court had to consider to what extent the meaning of 'strike' could/should contain violence as a criterion.[110] Ultimately, the court decided that 'strike' should be given its ordinary meaning (to stop working in order to gain a concession from an employer)[111] and that the damage to the truck had to be dealt with as a peril listed in the insurance policy.[112]

Not surprisingly, iWeb[113] defines 'strike' as a group's refusal to work in protest against low pay or bad working conditions. According to the Oxford dictionary,[114] 'strike' means to stop working in order to obtain 'some concession from the employer'. Synonyms ('industrial action', 'slowdown', 'walkout'), adjectives ('general', 'joint', 'unarmed') and compound nouns ('strike action', 'hunger strike') confirm that strike action is traditionally non-violent.

Similarly, 71 per cent of the survey participants chose the definition indicating 'strike' as a group's refusal to work in protest against low pay or bad working conditions. In contrast, 29

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[107] Oxford English Dictionary 'value' available at *https://www.oed.com/view/Entry/221253?rskey=CeCOl7&result=1&isAdvanced=false&print*, accessed on 3 March 2020.
[108] Supra note 73 paras 3-4.
[109] Supra note 73 para 4.
[110] Supra note 73 para 9.
[111] Supra note 73 para 9.
[112] Supra note 73 paras 10-1.
[113] Brigham Young University op cit note 78.
[114] Oxford English Dictionary 'strike' available at *https://www.oed.com/view/Entry/191631?rskey=gKyNbU&result=1&isAdvanced=false&print*, accessed on 3 March 2020.

per cent considered violence and public disturbance as an integral part of strike action. Even though the majority of respondents viewed strike action as non-violent, 29 per cent is a reasonably high percentage for an opposing interpretation. This interpretation could be linked to an increase in violence during industrial action in South Africa.[115]

In the *Coltrade International* case,[116] the Supreme Court of Appeal had to interpret the word 'crush' as it related to the question of which tariff subheading applied to coconut milk, coconut cream and coconut powder, as set out in s 47(1) of the Customs and Excise Act 91 of 1964, in accordance with sched 1 of the Act. For about seven years, Coltrade International CC had their imported coconut products cleared under one tariff subheading (TH2008.19), but as of 2012, the South African revenue authority classified the imported products under a new subheading (TH2106.90.90).[117] To determine whether the correct classification was issued, the court had to look at the way in which the imported products were described and processed.[118] To fall under subheading TH2008.19, the product had to be whole, in pieces or crushed. For the Commissioner of the South African Revenue Service, the final product was processed to such an extent that it could no longer be viewed as whole, in pieces or crushed, resulting in an entirely different product altogether.[119] Consequently, the word 'crush' was at the core of the dispute. However, the court finally decided to apply the ordinary meaning of 'crush', namely to break into smaller pieces or to reduce to pulp or powder.[120]

iWeb[121] describes the verb 'crush' as the compressing of an item out of its natural shape or condition. The Oxford dictionary[122] adds that crushing is a violent act that breaks, bruises and brays into smaller pieces (especially ore, quartz, seeds, etc.). The transformation from one format to another is visible in synonyms such as 'cream', 'squeeze', 'pound' and 'mash', as well as in related verbs such as 'chew', 'grind', 'extract' and 'chop'. Even the adverbs 'lightly' and 'finely' imply the force of crushing and the texture and consistency of the end result. The implication is that an item no longer retains its original shape. Yet, nothing in these words imply that the crushed item can no longer be classified within its main category. For instance, a crushed orange might be reduced to juice, but its new format is still related to an orange.

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[115] Ernest Manamela & Mpfari Budeli 'Employees' right to strike and violence in South Africa' (2013) 46 *CILSA* 308 at 322-324.
[116] Supra note 73 para 2.
[117] Supra note 73 para 3.
[118] Supra note 73 paras 9-14.
[119] Supra note 73 para 16.
[120] Supra note 73 paras 20, 21 and 24.
[121] Brigham Young University op cit note 78.
[122] Oxford English Dictionary 'crush' available at *https://www.oed.com/view/Entry/45270?rskey=DL6Umi&result=2&print*, accessed on 3 March 2020.

Sixty-one per cent of participants felt that 'crush' means an object is broken into smaller pieces, powder or liquid by applying force in the form of pressing or squeezing. Thirty-nine per cent thought that an object is changed into something else entirely by applying force in the form of pressing or squeezing. Although the gap between the results was considerably smaller than in the case of the other words, the majority's understanding of the word 'crush' still corresponded with the court's interpretation and that of the iWeb corpus data.

The last word to be tested in Set A was 'grab'. In *Salmans*, Foxcroft J had to determine whether, among other things, the appellant was correctly convicted of robbery instead of theft, as put forth by his counsel.[123] Of importance was the question as to what extent the word 'grab' connotes violence or force.[124] The court concluded that the grabbing of a cellphone from the victim's hand qualified as an act of violence, implying that 'grab' connotes violence or force.[125]

iWeb[126] defines 'grab' as taking hold of something, seizing quickly, snatching, restraining or even stopping motion. In addition, the Oxford dictionary[127] explicitly mentions unscrupulous appropriation to oneself. These definitions imply physical contact, which contrasts with acts of theft, where contact is limited and veiled. Synonyms validate the physical contact and implied force, for instance 'clutch', 'grasp', 'grip' and 'remove'. In addition, violence is clearly present in the adverbs 'forcefully' and 'tightly' that collocate frequently with the word 'grab'.

Seventy-nine per cent of participants said that 'grab' means an object is taken with some force and physical contact, whereas 21 per cent said the word implies little or no contact and indicates an activity that goes unnoticed by the owner of the object taken.

(c)   Results of Set B

As explained in the methodology section, the corpus analysis program, AntConc, was used to analyse respondents' written results in order to find commonalities by means of frequency and clustering. Each of the words in Set B will be discussed separately below.

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[123] Supra note 73 at 335.
[124] Supra note 73 at 336–39.
[125] Supra note 73 at 341.
[126] Brigham Young University op cit note 78.
[127] Oxford English Dictionary 'grab' available at *https://www.oed.com/view/Entry/80363?redirectedFrom=grabbing&print*, accessed on 3 March 2020.

In the *De Beers Marine* case,[128] the court had to decide what the word 'export' meant in the context of s 20(4)*(d)* of the Customs and Excise Act 91 of 1964.[129] Was its meaning restricted to 'taking out of South Africa', or did it include 'importing into another country'? The unusual scenario brought before the court dealt with the transportation of bunker fuel used during diamond mining operations off the Namibian coast.[130] Fuel is transported from Cape Town to bunkers off the Namibian coast, stationary over the South African continental shelf (and therefore considered part of the Republic of South Africa). The specialised mining vessels are refuelled from these bunkers to continue their operations in Namibian waters. Is the fuel being taken out of South Africa and imported into another country (Namibia), or does the use of fuel in this context qualify as 'home consumption'? The court understood the ordinary meaning of 'export' to denote 'carrying away' or to 'remove'.[131] A narrower commercial meaning was also considered by the court and extends to transport 'from one country to another in the course of trade'.[132]

iWeb[133] defines 'export' as the selling or transferring of something abroad, as well as the spreading of something to another part of the world. The Oxford dictionary[134] is more precise when it refers to the sending out of commodities from one country to another. Its synonyms are related to the logistics of exporting, for instance 'distribute', 'ship', 'freight', 'transfer' and 'sell abroad'. The idea of movement from one place to another is similarly present in the prepositions 'to' and 'from', which collocate frequently with 'export' in this corpus. Its association with distribution is further expressed by its adverbs, for example 'overseas', 'abroad', 'globally', 'worldwide' and even 'illegally'.

Respondents in this survey did not struggle to explain what they understood the word to mean. From 1 522 tokens, the results revealed that 'export' was seen by participants as the moving of items from one country to another for financial gain. Lexical items that stand out include 'sending' (50 occurrences),[135] 'selling', 'moving', 'taking', 'transport' and 'trade'. When doing an n-gram search on the word 'to', phrases 'to another country', 'one country to

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[128] Supra note 73.
[129] Supra note 73 para 1.
[130] Supra note 73 para 1.
[131] Supra note 73 para 5.
[132] Ibid. The court decided in favour of CSARS and determined that 'home consumption' (as opposed to 'export') applied; see supra note 73 para 17.
[133] Brigham Young University op cit note 78.
[134] Oxford English Dictionary 'export' available at *https://www.oed.com/view/Entry/66698?rskey=upttCg&result=2&isAdvanced=false&print*, accessed on 3 March 2020.
[135] The indication of occurrences here (and elsewhere) applies to the lexeme (written in its base form) and not to a particular form of the word only. The lexical item 'send' has 38 occurrences and 'sending' has 12.

another' and 'to move goods' occurred frequently as well. Respondents' understanding of the word 'export' clearly matches that of the court and the iWeb corpus. In other words, one can safely conclude that 'export' denotes the movement of goods or services across borders.[136]

In the *Feldman* case,[137] the court had to decide if the word 'money', as set out in s 46 of the Administration of Estates Act 66 of 1965, included cheques or if it applied only to cash/notes and coins. The contested issue relates to the duties of an executor, who must open a bank account and pay the relevant money of an estate into that account.[138] In *Feldman*, there was no sign of any money being deposited into the relevant account, but there were several cheques that were never collected and subsequently became stale.[139] The court a quo decided that 'money' included cheques, because the legislator would otherwise have used the word 'cash'.[140] The court of appeal disagreed.

'Money' is defined in iWeb[141] as the official currency issued by a government or national bank as a common medium of exchange. Its synonyms are indicated as 'cash', 'change', 'currency', 'coinage', 'stock', 'income' and 'earnings'. Frequent adjectives such as 'extra', 'earned', 'payable', 'wasted' and 'borrowed' might imply the use of cash instead of cheques; however, they refer to the use of cheques in certain contexts as well (payable by cheque, this cheque is wasted, I earned my cheque). With regard to compound nouns, the concept of cash or money in e-format once again comes to the fore. Consider 'money laundering', 'money problems', 'prize money', 'pocket money', 'insurance money' and 'money transfers'.

Interestingly, iWeb and the Oxford dictionary[142] both define 'cheque' as a written order directing a bank to pay money. Verbs associated with 'cheque' include 'write', 'accept', 'receive' and 'present'. This is noticeably different from how 'money' is denoted. This discrepancy becomes more visible when collocations such as 'personal cheque', 'bank cheque', 'certified cheque' and 'monthly cheque' are considered. The cluster 'cash or cheque' also suggests that a cheque is a different aspect of money as opposed to paper or coinage. That being

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[136] See for instance supra note 73 paras I and J in the headnote, Even though the court disagreed with the appellant that exportation took place, they still considered the word 'export' to denote movement across borders and consumption outside of South Africa.

[137] Supra note 73 para 1.

[138] Supra note 73 para 8.

[139] Supra note 73 para 14.

[140] Supra note 73 para 15.

[141] Brigham Young University op cit note 78.

[142] Oxford English Dictionary 'cheque' available at *https://www.oed.com/view/Entry/31299?redirectedFrom=cheque&print,* accessed on 3 March 2020.

said, the Oxford dictionary[143] extends the definition of 'money' to include any record (written, printed, electronic) that confirms its monetary values and which can in turn be exchanged for notes or coins (and their e-formats). Its reference to any written, printed or electronic record as an acceptable object of exchange includes cheques.

By means of 1 418 tokens, respondents described 'money' in terms of instrumentality: we use money to buy things or to pay for items and services. It is also something that can be exchanged. Additionally, 'money' was defined in terms of what it was, namely coins, notes, paper and cash. More importantly, none of the respondents mentioned the word 'cheque'.[144] Here, too, participants' understanding of what money is coincides with the relevant court's ordinary meaning of the contested word and that of the iWeb corpus.

In the *Bell* case,[145] the court had to interpret a number of words, among them 'flatbed transporter', 'motor vehicle' and 'road'. One of the court's main considerations was to determine whether a flatbed transporter qualified as a motor vehicle. It was further argued that the flatbed transporter in question was designed for use on an airport road specifically. This led the court to question if a motor vehicle must then also be designed for use on a public road. The court held that the word 'road' should be interpreted according to its ordinary meaning and not be extended to include specifications such as 'public', 'private' or 'airport'.[146] In referring to *Chauke v Santam Ltd* 1997 (1) SA 178 (A), the court denoted the ordinary meaning of 'road' as 'a line of communication, especially a specially prepared track between places for use by pedestrians, riders and vehicles'.[147]

The word 'road' is defined in iWeb[148] as an open way for travel or transportation. The Oxford dictionary[149] also describes 'road' as a way wide enough for various vehicles to pass. This way usually has a prepared surface. The corpus adds that a road is generally public and provides synonyms such as 'street', 'path', 'highway', 'motorway' and 'thoroughfare'. Adjectives give some indication of the conditions of a road, for example 'paved', 'busy',

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[143] Oxford English Dictionary 'money' available at *https://www.oed.com/view/Entry/121171?rskey=8Yvoov&result=1&isAdvanced=false&print*, accessed on 3 March 2020.

[144] Though the majority of participants (30 years and older) would most likely have had experience using cheques, it is true that most could possibly have forgotten about them seeing as cheques have almost become redundant since this case was decided in 2006.

[145] Supra note 73 para 9.

[146] Supra note 73 para 10.

[147] Supra note 73 para 10. In other words, a road is not restricted to 'public', but includes forms like 'airport'.

[148] Brigham Young University op cit note 78.

[149] Oxford English Dictionary 'road' available at *https://www.oed.com/view/Entry/166506?rskey=xUB4rm&result=1&isAdvanced=false&print*, accessed on 3 March 2020.

'narrow', 'rough', 'rural', 'winding' and 'quiet'. The corpus clearly distinguishes between different kinds of road, which entail different uses. For example, a highway and a path are used differently and under varying circumstances; speed limits may be different for each. Different uses may likewise imply that some vehicles are not meant for certain types of road. This distinction is further visible in compound nouns such as 'dirt road', 'gravel road', 'country road', 'mountain road', 'service road' and 'toll road'. However, when defining 'road' as 'generally public', the word 'generally' suggests that the definition is not absolutely restrictive.

Reflecting a token count of 1 468, the survey results described 'road' in terms of its construction (tar, paved, gravel) and its purpose (driving, travel, journey, transport, commute). The respondents also defined 'road' as a 'path' (47 occurrences) and a 'surface' (25 occurrences) made for travelling by vehicle or on foot. It is seen as a route between two destinations, connecting one place with another. The only distinction (in terms of type) reflected in the results was that of 'public', which occurred once. Participants' idea of a road was similar to that held by the court and the iWeb corpus.

In *Natal Rugby Union*,[150] the court dealt with the word 'absence' and how it related to the election of a new union president. The election of 3 March 1995 saw Mr Parkinson appointed as the new president, but this election was soon called into question. Subsequently, a re-election was held in which Mr Parkinson was once more elected president of the rugby union. Owing to the conflict of interest, Mr Parkinson excused himself from the meeting at which the re-election was held.[151] Consequently, Mr Parkinson's absence was considered by some as a contravention of the union's constitution and reason for disqualification. Clause 15 of the union's constitution addresses the disqualification of council members and stipulates that a president, deputy president or any vice-presidents may not absent themselves more than three times from meetings without leave of absence. This behaviour could lead to disqualification.[152] However, the court of appeal indicated that the use of 'absence' in clause 13 of the constitution applied to the case at hand and had to be given its ordinary meaning, that is, the lack of being physically present.[153] The court dismissed the notion that the word 'absence' can be extended to include legal disqualification.[154]

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[150] Supra note 73 at 436H–J; 437A–J.
[151] Supra note 73 at 437E.
[152] Supra note 73 at 439A–D.
[153] Supra note 73 at 440G–J.
[154] Supra note 73 at 441A.

iWeb[155] defines the noun 'absence' as a failure to be present, and the Oxford dictionary[156] defines it as being away from a place or the company of people. Its synonyms 'nonappearance' and 'nonexistence' and its adjective 'excused' express a similar meaning. Clusters such as 'leave of absence', 'absence from work', 'absence of any evidence' and 'absence makes the heart grow fonder' all imply a lack of physical presence.

The same idea can be inferred from the 1 073 token corpus. Lexemes such as 'presence', 'physical' and 'missing' occur frequently enough to be noticeable. When examining clusters containing the word 'not', the lack of physicality becomes very apparent. Sixteen clusters express this idea, for instance: 'not being present', 'not being there', 'not being available', 'not being around', 'not attending' and 'not showing'. Participants' understanding of 'absence' as being not physically present supported the meaning allocated by the court, as well as that recorded in iWeb.

The last word in Set B was 'invest'. A court heard a case in which more than R33 000 000 was handed to a law firm in Port Elizabeth for investment in accordance with s 47(1)*(g)* of the Attorneys Act 53 of 1979. The money was subsequently misappropriated, resulting in losses for all investors.[157] Being undefined in the Act, the presiding officer in *King* confirmed the meaning of 'invest' as the placing of money into a financial scheme (or shares, or property) to increase its value.[158]

According to the Oxford dictionary[159] one puts money into assets in order to earn income or profit over time. The concept of 'financial gain' is present in iWeb's classification of 'invest' as well.[160] Clusters that occur frequently, namely 'invest in the company', 'invest in real estate', 'invest in stock' and 'will continue to invest', clearly confirm this court's view of the word. Profiting is further expressed through synonyms such as 'capitalise', 'advance' and 'enable', as well as through adverbs such as 'heavily', 'wisely', 'actively' and 'continually'. Undoubtedly, investment is seen within this corpus as putting money into a different entity with the expectation that the money will increase within a given period.

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[155] Brigham Young University op cit note 78.
[156] Oxford English Dictionary 'absence' available at
https://www.oed.com/view/Entry/645?redirectedFrom=absence&print, accessed on 3 March 2020.
[157] Supra note 73 paras 1–11, 15.
[158] Supra note 73 para 33.
[159] Oxford English Dictionary 'invest' available at
https://www.oed.com/view/Entry/99029?rskey=yHkXkz&result=2&isAdvanced=false&print, accessed on 3 March 2020.
[160] Brigham Young University op cit note 78.

The 1 880 tokens clearly indicate that investment is about 'money' (102 occurrences) that is placed ('put' 60 occurrences) into accounts, property, schemes and shares in order to make more money. Words expressing an increase of the investment are 'grow', 'gain', 'more', 'profit', 'return', 'interest' and 'value'. This is confirmed by studying n-gram tokens, which include phrases like 'put your money in something', 'put money away' and 'in order for it to grow'.[161] The presence of the lexemes 'expect' and 'hope' adds to the outcome envisioned by investors, but also reveals something about the uncertainty of investment.

IV DISCUSSION AND CONCLUSION

It is important to keep in mind that the sample size of this study was small and the demographics of the participants were not representative of the entire South African population. For this reason, we need to be cautious in making any definitive conclusions. Any inferences are true for this study alone. Nevertheless, the results do give some indication of how an astute person[162] in South Africa interprets ordinary words that are disputed in court cases.

Considering that the hypothesis was that the public would differ from legal counsel and presiding officers in its interpretation of words, and that this would prove the fallacious nature of the ordinary meaning rule, it is surprising that the results did just the opposite. The results from both Sets A and B indicate correspondence between the survey results, the iWeb corpus data and the respective courts' interpretation of the contested words. Even in the case of 'parent' (Set A), where the court's decision favoured a broader definition, the interpretation by the majority of survey participants coincided with the ordinary meaning assigned by a court and the data from iWeb.

None of the results in Set A were unanimous or exceeded a 90 per cent selection, and none of the data generated in Set B indicated unanimous agreement between participants in the way they described the given words. This suggests that people conceptualise words differently for a number of reasons, implying that disagreement will usually take place. This was clear in the minor differences in interpretation in the results of the word 'crush': the fact that nearly 40 per cent chose the alternative definition is indicative of the vagueness and uncertainty underlying the broader concept of crushing, especially concerning the transformation of an item from one form to another and its subsequent classification.

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[161] To gain a better picture, the n-gram size was set at minimum 4 and maximum 7.

[162] See section I (c) of this article for an explanation of 'reasonable person', as well as Slocum's notion of an 'astute person' (op cit note 17 at 105–6), which is the better description here.

It is worth mentioning that participants' responses could be influenced by an array of factors such as culture, religion and other personal beliefs and experiences. For instance, the way multicultural South Africa understands the concept 'family' can lead to significant differences in the definition of a word like 'parent'. Not only does this once again stress why the concept of 'ordinary meaning' is so contentious, but it also begs for a more comprehensive and representative dataset to determine (1) whether societal differences really are noteworthy; and (2) whether the law can incorporate meaning constructed by the people and not by the establishment.

Nevertheless, based on the interpretive capabilities of astute persons in this study, there is an argument to be made in favour of the existence of ordinary meaning as understood in its legal context. Participants did not know from which cases the contested words were taken and, therefore, had no prior knowledge of how the relevant courts interpreted these words. While the researcher cannot know the extent to which the respondents made use of additional resources to look up the meanings of words before they submitted the survey, the data from the survey include idiosyncratic language in participants' definitions of words in Set B, suggesting an extent of personal involvement.[163] The results clearly show that the participants – the majority of which speak English as an additional language – understand contested words in the same way as the legal fraternity and an international community of English language users, as represented by the iWeb corpus.

To claim, then, that ordinary meaning does not exist or that the concept is too vague to define would be unsubstantiated at this stage. Rather, it would be more accurate to argue – along with Slocum[164] and Labuschagne[165] – that the ordinary meaning concept is best attributed to a certain spectrum of society, that is, to astute persons who are mindful of fine distinctions in meaning. Therefore, instead of defining a 'reasonable speaker' as representative of the average person, careful attention should be given to defining a 'reasonable speaker who is mindful of ordinary language'. In addition, the phenomenon of ordinary meaning should be redefined.[166]

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[163] A verbatim example of idiosyncratic language by participants for the word 'absence': 'When you are nit present in a place or in somebody's live'. Of course, idiosyncratic formulations are no guarantee that a participant did not ask someone or consulted a dictionary.

[164] Slocum op cit note 17 at 105–6.

[165] Labuschagne op cit note 24 at 42.

[166] Solan & Gales have started this process by questioning what is included in the concept of ordinary meaning, for instance context and speaker intuition. They distinguish between two kinds of ordinary meaning. For this reason, they argue that a court should have a clear notion of which ordinary meaning is relevant to the case in question. Their work confirms that 'ordinary meaning' should be redefined and potential types should be identified and described. See op cit note 82 at 1319–20; 1332 and 1342–43.

Of course, more information is necessary before such definitions and claims can be confirmed. The need for a study with a much wider scope and demographic representation is apparent in order to determine the extent to which – if at all – a distinction can be made between an average person and an astute person. Are these two different individuals? If so, do they understand words completely differently? The present study should also be replicated to see if a similar demographic composition will provide the same results, that is, a clear correspondence between the understanding of the courts and the public.

The study in question also implies that ordinary meaning should perhaps be considered as the sense assigned to a word mostly unaided, that is, mainly dependent on an individual's active vocabulary. In this regard, there is agreement between the outcome of this study and Smith and Holmes's[167] understanding of what 'ordinary meaning' entails, namely everyday speakers' conceptualisations.

Appendix

I DEMOGRAPHIC INFORMATION

1. To what age group do you belong?

- 18-30 years
- 31-50 years
- 51-70 years
- older than 70 years

2. What level of education do you have?

- high school diploma
- post-school training without official documentation (accreditation)
- post-school training with official documentation (accreditation)
- tertiary diploma
- bachelor's degree
- postgraduate degree
- schooling not completed

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[167] Smith op cit note 1 at 63.

3. In which field do you work?

- I am a full-time student.

- education (primary, secondary, tertiary, training, skills development, etc)

- law (paralegal, lawyer, advocate, justice, etc)

- medicine (receptionist, nurse, medical representative, doctor, specialist, therapist, paramedic, assistant, etc)

- emergency services (fire and rescue, etc)

- armed forces (police, army, navy, air force, correctional services, security services, etc)

- building and construction

- business (managerial, accounting, administration, procurement, etc)

- IT

- administration

- project management

- the arts (fine art, music, the written word, cinematography, photography, mixed media, etc)

- government administration

- I am unemployed (jobless, a pensioner).

- other

4. What language do you consider to be your first language? (This is the language you are the most comfortable and proficient in.)

- isiZulu

- isiXhosa

- Afrikaans

- Sesotho

- Setswana

- Sesotho sa Leboa

- siSwati

- Xitsonga

- Tshivenda

- isiNdebele

- English

- other

5. How proficient are you in South African English? Choose **one** option that best describes your proficiency.

A1: I can understand and use basic words for daily needs. I can also introduce myself to others and follow basic conversations. It is easier for me to understand others than it is to express myself.

A2: I can communicate simple and routine tasks, as required. I can also describe items and events by using simple words. I understand longer sentences and frequently use expressions related to basic topics.

B1: I can understand the main points relating to familiar subject matter at work, school or in leisure activities. I can also deal with most situations when travelling in an area where English is widely spoken. In addition, I can produce texts on topics that are familiar to me and can describe experiences, events, dreams and hopes by using simple and clear language.

B2: I can understand the main ideas in complex texts containing both concrete and abstract topics. I can also interact with a degree of fluency and spontaneity, which makes interaction with native speakers of English possible. In addition, I can produce clear, well-structured texts on a wide range of topics and explain my viewpoint.

C1: I can understand complex texts that include longer clauses and implicit meanings. I can also express ideas fluently and spontaneously without having to search for expressions. In addition, I can use language for social, professional and academic purposes and can produce clear, well-structured detailed texts on complex subject matter.

C2: I can understand with ease everything written or spoken in the language. I can also summarise information from different written and spoken sources, that is, deconstructing and restructuring arguments. In addition, I can express myself fluently and precisely without hesitation.

II GIVEN DEFINITIONS

Each word below has been given two possible definitions. Choose the option that you most agree with. (You may choose only **one** option.)

6. Which one of the following two options better describes the meaning of the word 'parent'?

   (a) It is the biological father and mother of a child who is either a participant in the child's life or who has no contact with or knowledge of the child.

   (b) It is the biological or adoptive father and mother of a child, or the child's legal guardian, who is a participant in the child's life.

7. Which one of the following two options better describes the meaning of the word 'value'?

   (a) In terms of property, it refers to a homeowner's well-being and emotional comfort in relation to his/her property.

   (b) In terms of property, it refers to its financial worth or the amount considered to be its fair equivalent.

8. Which one of the following two options better describes the meaning of the word 'strike'?

    (a) It is a group's refusal to work in protest against low pay or bad working conditions.

    (b) It is a group's use of violence and public disturbance to protest against low pay or bad working conditions.

9. Which one of the following two options better describes the meaning of the word 'crush'?

    (a) It means to change an object to something else entirely by applying force in the form of pressing or squeezing.

    (b) It means to break into smaller pieces, powder or liquid by applying force in the form of pressing or squeezing.

10. Which one of the following two options better describes the meaning of the word 'grab'?

    (a) In terms of a crime, to grab something means that you take it without the owner's noticing; there is no or little physical contact.

    (b) In terms of a crime, to grab something means that you take it by applying some degree of force and physical contact.

III THE MEANING OF SELECTED WORDS

Define the following words. If any of these words is unfamiliar to you, you need to indicate this by writing, "I don't know". **Do not** use a dictionary or similar resource to find the meaning.

Briefly describe the following terms in your own words:

11. Briefly describe - in your own words - what the word here below means.
'export' (verb)

12. Briefly describe - in your own words - what the word here below means.
'money' (noun)

13. Briefly describe - in your own words - what the word here below means.
'road' (noun)

14. Briefly describe - in your own words - what the word here below means.
'absence' (noun)

15. Briefly describe - in your own words - what the word here below means.
'invest' (verb)

<p style="text-align:center;">**CONTRIBUTOR AGREEMENT**</p>

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