EDITORIAL: SPECIAL EDITION
Legal Interpretation after *Endumeni*: Clarification, Contestation, Application

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Online ISSN
1727-3781

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Date Submission

24 October 2019

Date published

6 November 2019

Guest Editor W le Roux

How to cite this article

Le Roux W "EDITORIAL: SPECIAL EDITION - Legal Interpretation after *Endumeni*: Clarification, Contestation, Application" *PER / PELJ* 2019(22) - DOI http://dx.doi.org/10.17159/1727-3781/2019/v22i0a7510

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DOI
http://dx.doi.org/10.17159/1727-3781/2019/v22i0a7510

Abstract

This special edition consists of a selection of contributions delivered during a conference "Towards an integrated approach to the interpretation of legal documents: contracts, wills and statutes", hosted by the University of the Western Cape, on 23 March 2018. The aim of the conference was to take stock of the state of legal interpretation in South Africa five years after the watershed judgment in *Joint Natal Municipal Pension Fund v Endumeni Municipality*. The papers in the special edition provide clarifications, contestations and applications of the *Edumeni* approach to the interpretation of legal documents.

Keywords

Legal interpretation; golden rule; textualism; limited contextualism; unlimited contextualism; integrated approach; holistic approach; iterative approach; purposivism.

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Editorial

On 23 March 2018 the Law Faculty at the University of the Western Cape hosted a conference entitled "Towards an integrated approach to the interpretation of legal documents: contracts, wills and statutes". The aim of the conference was to take stock of the state of legal interpretation in South Africa five years after the so-called "golden rule" of legal interpretation was abolished in *Joint Natal Municipal Pension Fund v Endumeni Municipality*.[1] The judgment written on behalf of a unanimous court by Wallis JA immediately distinguished itself from surrounding case law for two reasons. First, the judgment self-consciously sought to bring an end to the ongoing debate about the proper approach to the interpretation of legal documents in South Africa. The judgment contains a short summary of the correct approach to legal interpretation, comprehensively argued and justified by a discussion of the most important global trends in legal interpretation. Wallis JA explained that these global trends favoured a one-stage or contextual approach over the outdated two-stage or textual approach traditionally associated with the “golden rule” of interpretation.[2] Wallis JA furthermore made clear that the one-stage approach[3]

> … is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate.

Second, the judgment suggested that the one-stage or contextual approach should be uniformly applied to the interpretation of all legal documents, from wills to patents, contracts to constitutions.[4] In short, *Endumeni* sought to draw a line under the era dominated by the golden rule of legal interpretation

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1 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) (hereafter *Endumeni*) para 22. See also *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 2 SA 494 (SCA) paras 11-12.

2 The language used to describe the two approaches is not important here. The textual approach can also be called the literalist-cum-intentionalist approach, the linear approach, or the qualified contextual approach. The contextual approach can also be called the purposive approach, the unqualified contextual approach, the iterative approach, the holistic approach or the pluralistic approach.

3 *Endumeni* para 19. Wallis JA later repeated in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 2 SA 494 (SCA) para 12 that the approach to the interpretation of contracts, statutory instruments and patents set out in *Coopers & Lybrand v Bryant* 1995 3 SA 761 (A) 768A-E "is no longer consistent with the approach to interpretation now adopted by South African courts" an therefore that "it is no longer helpful to refer to the earlier approach".

4 *Endumeni* para 18

and to embrace a new era dominated by a modern, globally recognised and fully integrated approach to legal interpretation.

The desire to modernise our law of statutory interpretation clearly touched a nerve. In less than a decade *Endumeni* has become one of the most cited authorities in the history of South African law.[5] At the same time, as references to the *Endumeni* judgment continues to multiply, it is slowly becoming clear that the summary statement of the contextual approach provided in paragraph 18 of the judgment is not always understood in the same manner. Some uncertainty seems to persist in our recent case law around two issues: whether anything remains of the golden rule after *Endumeni,* and whether the modern *Endumeni* approach can indeed be applied uniformly to all legal documents. Given these uncertainties, it appeared appropriate to academically revisit the *Endumeni* judgment and its rapid assimilated into our case law. A call for papers was drafted which posed the following questions to potential presenters: Has the *Endumeni* judgment resulted in an integrated approach to legal interpretation that can be applied uniformly to wills, contracts, and statutes? If so, what exactly is the new integrated approach, how does it differ from the older fragmented approach, and why is the old approach no longer appropriate? The call for papers attracted the attention of academics from five South African Universities. The conference was divided into three sessions dealing with the interpretation of wills, contracts and statutes respectively. Justice Malcolm Wallis was invited and generously agreed to present the keynote address.

This special edition contains three of the papers that were presented at the conference. The three papers are best read in the order in which they appear here. The first contribution is a reworked version of the keynote address delivered by Justice Wallis.[6] Justice Wallis explains why it had become necessary to provide a restatement of the law and reveals that two background principles animate the judgment: *Endumeni* aims to enhance both the efficiency and accountability with which our courts engage in processes of legal interpretation. *Endumeni* seeks to enhance the efficiency of adjudication by providing lawyers and judges with "a single reasonably clear standard by which to approach questions of interpretation, without the need to trawl through a mountain of inconsistent judgments and dicta".[7]

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5 The noter-up on the SAFLII website contains 141 references to the judgment between March 2012 and October 2019. These references include 24 by the Constitutional Court and 87 by the Supreme Court of Appeal.

6 Wallis 2019 *PELJ* 1.

7 Wallis 2019 *PELJ* 7.

Endumeni seeks to enhance judicial accountability by demanding that judges "articulate their reasons, both linguistic and contextual, for arriving at their decisions on questions of the construction of documents".[8]

The desire to rid our case law of superficial canon-based rationalisations of legal decisions therefore lies at the heart of the *Endumeni* approach. By describing interpretation as a single unified process, the judgment shifts the focus from individual canons of interpretation to the context in which the process of interpretation unfolds. The role of the context is not primarily to clarify the legal meaning of a text but rather to ensure the best available justification of the legal meaning ascribed to a text. It no longer suffices to claim that context is not needed where the meaning of the text is clear, as textualists did for many years. This is so because the clarity of the law must be contextually justified against equally pressing demands for greater consistency, efficiency and social justice in the application of the law. *Endumeni* seems to embrace all four these foundational values of the legal order as co-equal aims of the interpretive process, without ranking them in any order of priority. *Endumeni* further accepts that it is difficult to harmonise these considerations and that complex compromises between the clarity, consistency, efficiency and justice of the law lie at the heart of the interpretive process. By insisting that text and context must be considered together from the start,[9] *Endumeni* forces courts to justify why, for example, the clarity of a text ("the language used in the light of the ordinary rules of grammar and syntax") outweighs the internal consistency of the text ("the context in which the provision appears"), the efficiency of the text ("the apparent purpose to which it is directed and the material known to those responsible for its production"),[10] or the public policy or social justice implications of the text.[11] While the same four factors constitute the relevant

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8 Wallis 2019 *PELJ* 22.

9 *Endumeni* para 19.

10 *Endumeni* para 18.

11 It is one of the unfortunate features of the *Endumeni* judgment that it does not explicitly incorporate the last-mentioned consideration into the "single reasonably clear standard for the interpretation of documents" that it provides. S 39(2) of the *Constitution of the Republic of South Africa*, 1996 is nowhere mentioned. On the contrary, the judgment relies heavily on developments in commonwealth countries, especially Australia, where a model of strong judicial review under a transformative constitution is unknown and actively resisted. See Gardbaum *New Commonwealth Model* 21-46. To be fair, *Endumeni* does refer once to the previous attempt by Ngcobo J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 90 to come to terms with the implications of s 39(2) for the interpretation of legal documents. Ngcobo described s 39(2) as the constitutionalisation of "the emerging trend in statutory interpretation" around the world (para 90).Wallis JA traces the same trend in *Endumeni* as it unfolded in the interpretation of patents and contracts in commonwealth jurisdictions.

legal context of every act of interpretation, the importance of each of the four factors within that context varies from one act of interpretation to the next. There is therefore also no longer any fixed hierarchy or sequence in which the relevant contextual factors must be considered. Wallis JA describes the one-stage process of interpretation as "iterative" in nature,[12] sharply contrasting it with the linear nature of the traditional two-stage process under the golden rule.

It is the iterative nature of fully contextualised legal interpretation that arguably holds the key to the second aspiration of the *Endumeni* judgment, namely to formulate one integrated approach to the interpretation of all legal texts. It seems clear that an integrated approach to legal interpretation must also be an iterative approach to legal interpretation. The point has been forcefully argued by Aharon Barak,[13] one of the leading champions of a purposive approach to legal interpretation. According to Barak, the legal meaning of a legal text is generated by combining the subjective purpose (author's intention) and objective purpose (constitutional telos) of that text. Barak therefore does not find it necessary to challenge authorial intent in the way Wallis JA does in *Endumeni* and accepts that evidence of such intention is always admissible and relevant where it is available. What Barak does not accept is that this evidence is always of equal importance during the interpretation process. The weight carried by the intention of the author, relative to the public telos of a text, is always dependent on the context. Factors such as the private nature and age of the text are relevant when this contextual judgment must be made. Generally speaking, a clear subjective intention would be more important in the case of a private law text such as a will, compared to a public law text such as a statute or constitution, where the telos of the text would in turn be more important. The shifting importance Barak ascribes to the intention of the author - be it a testator or a legislator - applies to all the other contextual factors that must be considered during the interpretive process. Within the growing family of purposivist judges, Barak would certainly encourage Wallis JA to more fully embrace the unlimited nature of the legal context as a necessary precondition to achieve the two aspirations of *Endumeni*.

It is therefore particularly interesting that, in the second contribution included in this special edition, Kessler Perumalsamy takes issue with the *Endumeni* approach precisely because it fails to sufficiently *limit* the relevant context

12 *Endumeni* para 18 ft 15.
13 Barak *Purposive Interpretation* 110-120.

in which legal texts must be interpreted.[14] According to Perumalsamy, this is also the reason why *Endumeni* has not had the stabilising effect on statutory interpretation that Wallis JA might have hoped for.[15] By retelling the story of the long-standing conflict between the text and the context in South African law, Perumalsamy concludes that *Endumeni* "does leave one with a great deal of confusion as to the extent of the permissibility of the context".[16] He then boldly asserts that in spite of *Endumeni*, the "old textualist approach is not dead".[17] This is not just a descriptive claim but also a normative assessment. Perumalsamy seeks to restore the primary place of the text in the contextual scene and openly challenges the claim that "meaning can be determined only with reference to the full context in which words are used".[18] This, insists Perumalsamy, is not always the case. The history of statutory interpretation teaches us that sometimes deep forays into the context are not necessary or even helpful:[19]

> [W]e adopted the textualist rule, not because we didn't think that the context is important. We did, but we did not think that it was always important. Sometimes it helps us because the ordinary meaning is absurd, vague or ambiguous, but most of the time it is not. And the context does nothing to help us.

Perumalsamy's contestation of the *Endumeni* approach aims to reconstruct the law of statutory interpretation around the perspective of the reasonable reader. According to him this means that any *Endumeni*-like restatement of the interpretive process should clearly identify which aspects of the context are always inadmissible (evidence of the negotiating or legislative history of a text, for example) and under which limited circumstances courts may consult those aspects of the context that are admissible as interpretive aids. Perumalsamy spends most of his time establishing the importance of these questions but also provides important suggestions about the best way of answering them.

In the final contribution included below,[20] Brighton Mupangavanhu does not take issue with the unlimited contextual approach of *Endumeni* but rather seeks to bolster the importance of the transformative aspirations of the Constitution[21] or transformative constitutionalism within that context. This

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14 Perumalsamy 2019 *PELJ*.
15 Perumalsamy 2019 *PELJ* 3.
16 Perumalsamy 2019 *PELJ* 18.
17 Perumalsamy 2019 *PELJ* 12.
18 Perumalsamy 2019 *PELJ* 22.
19 Perumalsamy 2019 *PELJ* 23.
20 Mupangavanhu 2019 *PELJ* 3.
21 *Constitution of the Republic of South Africa*, 1996.

suggests that the constitutional dimension of the legally relevant context remained under-explored in *Endumeni*. Mupangavanhu argues that a normative framework is needed to evaluate interpretations of the *Companies Act* 71 of 2008 and embraces the purposive approach formulated by Wallis JA in *Endumeni* as the starting point of this framework.[22] Mupangavanhu points out that the common law approach championed by Wallis JA overlaps with the statutory mandate to interpret and apply the *Companies Act* in a manner that gives effect to the purposes of the Act, most importantly to promote compliance with the Bill of Rights. Having established that the spirit of the Bill of Rights forms part of the legally relevant interpretive context, Mupangavanhu takes up the question raised by Perumalsamy to explain at which stage a consideration of this aspect of the context might be necessary or helpful. Mupangavanhu concludes that the constitutional purpose or telos of the *Companies Act* must be considered from the start and not merely when the constitutionality of a provision in the Act is at stake. He then proceeds to explore some of the further implications of a teleological or unlimited contextual approach to statutory interpretation.

The three contributions included below thus differ significantly in the way each understands *what* belongs to the context and *when* the various aspects of the context may be considered. On the one side of the argument, a case is made for unlimited contextualism, first by justice Wallis in the name of judicial accountability and then by Mupangavanhu in the name of the transformative constitutionalism. On the other side of the argument, a case is made by Perumalsamy for limited contextualism, sometimes also known as new textualism or new purposivism,[23] on the basis of classic rule of law and separation of powers arguments. This means that the conference that gave rise to these clarifications, contestations and applications of the *Endumeni* approach did nothing to strengthen the hegemony of the contextual approach as an integrated approach to legal interpretation in South Africa. By redefining and hopefully re-animating the ongoing debate about the nature of legal interpretation in South Africa after *Edumeni*, the three contributions published below might have achieved something far more important.

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Legislation

Companies Act 71 of 2008

Constitution of the Republic of South Africa, 1996

List of Abbreviations

CLR	California Law Review
Colum L Rev	Columbia Law Review
PELJ	Potchefstroom Electronic Law Journal