NOTES / AANTEKENINGE

SOME REFLECTIONS ON THE PRESUMPTION THAT LEGISLATION APPLIES PROSPECTIVELY, AND ITS SIGNIFICANCE FOR A CONTEMPORARY THEORY OF INTERPRETATION

1 Introduction

1 1 The nature of legal interpretation

As a consequence of section 39 of the Constitution literal interpretation, which prevailed under the previous legal and constitutional dispensation, has been replaced by a purposive/value-based method and theory of interpretation. A new and creative method of legal reasoning has emerged that facilitates social justice. This involves a deontic element, which incorporates ethical and moral evaluation (Goodrich *Reading the Law* (1986) 154). A far more holistic approach is now adopted, and legal interpretation is now applied in a manner that is allied to the discipline of hermeneutics as found in literature and philosophy. Interpretation has become holistic in this process. The theory of holism has a South African connection since the term has its genesis in Smuts's book, *Holism and Evolution,* first published in 1926. Semantic holism is a doctrine in the philosophy of language to the "effect that a certain part of language can only be understood through its relations to a larger segment of language, possibly the entire language" (Mastin *The Basics of Philosophy* 2008 1 Philosophybasics.com/ branch_ holism.html (accessed 2016-05-01)).

This note is intended to show how the application of the presumption relating to retrospectivity reflects the new approach, which is creative and supersedes the old mechanical approach that had its origin in the sovereignty of parliament that gave rise to literal or textual interpretation (Botha *Statutory Interpretation* (2012) 91). There has been a paradigmatic shift in the process of interpretation of statutes in South Africa, from a methodology that tended to be rule-bound to one that requires that the use of rules or canons must give expression to the cardinal values found in the Constitution and its Bill of Rights. This requires a semantic holism as explained above. This should emerge from a deontic method of legal reasoning, which must complement deductive and inductive reasoning, by taking into account principles of morality and the values found in the Constitution as explained by Devenish (*Interpretation of Statutes* (1992) 266

et seq). Such interpretation was in exceptional cases used before the advent of the new constitutional dispensation such as that found in the meritorious majority judgment of Innes CJ in *Dadoo Ltd v Krugersdorp Municipal Council* (1920 AD 530). Such holistic interpretation is now the rule and not merely an exception.

2 The nature of the presumptions

In our common law the so-called presumptions of interpretation are principles that are employed to assist the courts in the process of interpreting statutory law (Devenish *Interpretation of Statutes* 156). These principles are, strictly speaking, not presumptions but the time-hallowed rules of the common law that developed over a period of time ensuring that fairness and equity applied in the operation and application of the law, in so far as permitted by legislation. This is *par excellence* the position in relation to the specific presumption in favour of the prospective operation of any statute. In this regard in *Von Weiligh v The Land and Agricultural Bank of South Africa* (1924 TPD 62 66), the court held that "the rule is both of English and of Roman-Dutch law that the law is not presumed to be retrospective, unless such was clearly the intention of the Legislature".

The principles these presumptions give expression to are important, indeed seminal, and according to Pearce, in relation to the position in Australia, they constitute "in effect a common-law bill of rights – a protection for civil liberties of the individual against the state" (Pearce *Interpretation in Australia* (1981) 81). To a greater or lesser extent this was also the position in relation to South Africa, before the advent of the Interim Constitution with its Bill of Rights in 1994 (Devenish *Interpretation of Statutes* 156).

With the emergence of the new constitutional dispensation this has changed in that many of the presumptions have been subsumed into the provisions of the Bill of Rights (Du Plessis *Re-interpretation of Statutes* (2002) 153). For instance, section 35(3)(i) of the Constitution, which deals *inter alia* with arrested, detained and accused persons, prohibits the creation of any new crime from applying retroactively. This provision states that:

> "Every accused person has a right to a fair trial, which includes:
> not to be tried for an offence in respect of an act or omission that was an offence under either national or international law at the time it was committed or omitted".

This clearly means that a statute like the notorious and now defunct Terrorism Act 83 of 1967, which was promulgated on 27 June 1967, was in general made retroactive to 27 June 1962, could not apply today because of its retroactive application. In the extant constitutional dispensation, such a statute can no longer apply by virtue of the provision contained in section 35(3)(i).

Such retroactive legislation created a legal fiction, or as Botha (*Statutory Interpretation* 57) explains, created a "virtual reality or legal make believe" because it was deemed to apply at an earlier date. This was possible at the time due to the sovereignty of the South African Parliament which excluded a substantive testing right for the courts. Furthermore, at the time there was

no bill of rights that was entrenched and enforceable. This kind of legislation flowing from a sovereign parliament overruled the common-law presumption against retroactivity. This presumption was described in the old English judgment *Gardner v Lucas* ((1878) 3 App 582) as a "general rule of every civilized country".

However, such a provision, that is, section 35(3)(i) in the Bill of Rights, does not mean that the common-law presumption that legislation applies prospectively is now without any consequence. There are indeed circumstances where the presumption could indeed still be operative, although its scope has been considerably narrowed. Furthermore, "even where a statute is expressed to be retrospective, the presumption still operates when the extent of its retrospectivity is not clear, so as to narrow its operation rather than enlarge it" (Devenish *Interpretation of Statutes* 189).

3 A new terminology

The operation of the presumption against retrospectivity over a period of time, has spawned a new terminology. What has emerged is an additional distinction between retroactive and retrospective operation of provisions, rather than merely the distinction between retrospective and prospective operation. In our case law this distinction has its roots in the judgment of the Supreme Court of Appeal (SCA) in *National Director of Public Prosecutions v Carolus* (1999 (2) SACR 607 par 33–34; Botha *Statutory Interpretation* 55–56). In this case the SCA distinguished between on the one hand retroactivity or a strong retro-effect, as illustrated by the defunct Terrorism Act referred to above, or on the other hand, mere retrospectivity or a weak retro-effect, as illustrated by Botha (*Statutory Interpretation* 57) by his reference to section 17 of the Children's Act (38 of 2005), which states "A child, whether male or female, becomes a major upon reaching the age of 18 years." The date of commencement of section 17 was proclaimed to be 1 July 2007.

With reference to the above, Botha (*Statutory Interpretation* 57) explains that, when section 17 commenced it repealed the Age of Majority Act 57 of 1972, which provided that a person reached the age of majority upon reaching the age of 21 years. However, after 1 July 2007 a person becomes a major immediately upon reaching the age of 18. To illustrate the meaning of retrospectivity as opposed to retroactivity Botha (*Statutory Interpretation* 57) poses the question: what if on 1 July the person were 19 years old, that is, he or she is no longer a child, in terms of the new Act, but not 21? This means that the age of majority in the repealed Act of 1972 no longer applies. However, the Act is not retroactive to his 18th birthday in the past, but applied to him immediately on 1 July at the age of 19. In effect it provides that the provisions of the new statute apply forthwith to a present situation. This immediate operation is termed "retrospectivity" and is described as having a weak retro-effect. Its immediate operation and subsequent prospective character are that which makes it retrospective, rather than retro-active.

This is further explained in the case note discussion by Devenish of *Malcolm v Premier, Western Cape Government NO* ((207/2013) [2014]

ZASCA 14 March 2014; "Transformative Constitutionalism – The Impact of the Constitution on Statutory Interpretation in South Africa" *THRHR* (2015) 318–323 321). In this case the weak form of a retro-effect was indeed applied in the form of "retrospectivity". The appellant, Malcolm, was born on 21 June 1987. As an infant aged 6 in 1993 he was diagnosed with a disease known as stage 1 of Hodgkins Lymphoma, and as a result he was admitted to the Red Cross Children's Hospital in Cape Town for treatment. Whilst undergoing treatment there was an outbreak of Hepatitis B at the hospital. He was diagnosed with Hepatitis B in October 1994, which he allegedly contracted as a result of his stay in the hospital. He ascribed his infection with Hepatitis B to the medical negligence on the part of the hospital and its staff, and as a consequence sought to recover damages. This claim for damages encountered a special plea based on prescription, which Louw J, upheld in the court *a quo,* using the traditional literal approach to interpretation. He subsequently obtained leave to appeal to the Supreme Court of Appeal (par 1).

This Court held that, considering that the appellant who on 1 July 2007 was 20 years old and was thus no longer a "child", i.e. already older than 18 years, but not 21 years of age, such a person cannot become a major in terms of the repealed Age of Majority Act by virtue of section 17 of the Children's Act. In the appellant's case in relation to a 20-year-old person, the Act was to have retrospective effect as soon as he became within the ambit of section 17 after 1 July. However, of cardinal importance, the Act was not retroactive since persons who reached the "previous" age of majority of 21 after 1 July were not to be affected, and their age of majority was not to be adjusted retroactively to that of 18 somewhere in the past. This meant that the prescription period of three years, could only start to run for the applicant from 1 July 2007, and had not prescribed by the date on which he instituted summons. This was a holistic and value-based decision that can be considered *in favorem liberatis.*

4 Origin of the distinction between the two forms of retro-effect

Devenish (*Interpretation of Statutes* 188) points out that the above terminology involving the terms "retrospectivity" and "retroactivity" apparently has its origin in Driedger (*Construction of Statutes* (1983) 185–186), where he explains the difference between the two terms as follows:

> "A retroactive statute is one that operates backwards, that is to say, it is operative as of a time prior to its enactment. It makes the law different from what it was during the period prior to its enactment".

On the other hand a retrospective statute:

> "Changes the law only for the future, but it looks to the past and attaches new… consequences to completed transactions… A retrospective statute operates as of a past time in a sense that it opens up a closed transaction and changes its consequences, although the change is effective only for the future".

Driedger (*Construction of Statutes* 186) explains further that these two terms are, however, used interchangeably in the law reports and legal texts. In this regard Devenish (*Interpretation of Statutes* 188) comments that the *South African Law Reports* invariably use the term "retrospective" for both phenomena.

Goldstone in his judgment in *Van Lear v Van Lear* (1979 (3) SA 1162 (W) 1164) on the other hand, explains the distinction as follows:

> "In its narrow connotation and enactment it is only retrospective if it provides or has the effect that, as at a particular date, the law shall be taken to be that which it was not. However, a statute is also deemed to be retroactive when it interferes with existing rights and obligations".

5 The condonation of retroactivity

Under certain circumstances retroactivity can be condoned where, for instance, only procedural changes are envisaged as explained by Devenish (*Interpretation of Statutes* 192) and discussed further below. Similar to many other rules or canons relating to interpretation of statutes, the presumption should not be applied mechanically or in a literal manner (Devenish *Interpretation of Statutes* 193). In certain circumstances a retro-effect can be condoned. These are set out and explained below. This constitutes a creative and holistic interpretation of the law.

6 Explanatory or confirmatory provisions

In circumstances where a subsequent law is actually only explanatory of confirmatory of the common law or an extant statute (Devenish *Interpretation of Statutes* 189). In such circumstances there is no retroactive operation in the ordinary sense, but rather a process of legislative clarification (Devenish *Interpretation of Statutes* 188). Exemplary of such a state of affairs is the reasoning found in *Ex parte Christodoulides* (1959 (3) SA 838 (T) 841), in which Williamson J, observed that "[f]irst of all, a statute which has been a matter of some doubt and which is intended to clarify and settle doubt, does not operate retrospectively".

This state of affairs should be contrasted with legislation designed to protect a putative interest of the legislature, as occurs with indemnity legislation, which alters the ordinary civil and criminal liability of the State to favour the political *status quo*, usually after the forceful suppression of civil unrest. This could have been enacted by virtue of the sovereignty of Parliament under the previous constitutional dispensation. This, by its very nature, is very controversial and is used after the suppression of unrest by a state. This was used by the apartheid Government from time to time, such as the Indemnity and Undesirables Special Deportation Act (1 of 1970; Carpenter *Introduction to South African Constitutional Law* (1987) 111).

An analogous situation in this regard is illustrated by the Constitutional Court in *Azanian People's Organisation (AZAPO) v President of the Republic of South Africa* ((1996) 8 BCLR 1015 CC 1037 C–D par 37), Mahomed DP, held that section 20(7) of the Promotion of National Unity and Reconciliation

Act, the legality of which had been challenged by the applicants because it retroactively precluded civil and political liability in respect of acts, omissions or offences committed with a political objective prior to the cut-off date. It was, however, held not to be unconstitutional. The reason for this was that the "national unity and reconciliation" clause found in the epilogue, read with section 33(2) of the Interim Constitution, specifically authorized and contemplated such amnesty applied in terms provided in section 20(7) of the said Constitution. The amnesty granted applied to both criminal and civil liability since the epilogue of the Interim Constitution directed that "amnesty shall be granted in respect of acts, omissions and offences" and not merely in relation to offences. However, in light of the provisions of the Bill of Rights, particularly section 34, dealing with access to the courts, an indemnity act, such as relating to the tragic deaths that occurred at Marikana, should be found to be unconstitutional. The reason for this is that our extant parliament is no longer sovereign, and that there is an entrenched and enforceable bill of rights. Furthermore, the interpretation and application of legislation must comply with the ethical values enunciated in the bill of rights, such as human dignity, equality and freedom. The latter necessitates a deontic method of legal reasoning as explained above.

7 Penalty clauses

The manner in which the courts have dealt with penalty clauses illustrates clearly that their approach is not mechanical, but teleological or value-oriented. In this regard two specific cases need to be compared. These are *R v Mazibuko* (1958 (4) SA 353 (A)) and *R v Sillas* (1959 (4) SA 305 (A)).

The former Appellate Division held that after the trial and sentence of the accused, should an amending Act increase the penalty of an extant law, then the presumption against retroactivity must become operative. In this case the Criminal Procedure Act (56 of 1955) had been amended subsequent to the commission of the crime, but prior to the trial and sentence of the accused. In terms of the amendment the death penalty as a result could be imposed for a conviction of robbery with aggravating circumstances. As the court found that the intention of the legislature was equivocal, it invoked the presumption against retroactivity and correctly held that the lesser penalty applied. In sharp contrast, where in the factual situation a criminal penalty was reduced by virtue of a subsequent amendment, as was the case in *R v Sillas*, the court correctly declined to invoke the presumption against retroactivity and imposed the lesser penalty (314). Therefore, where an enactment benefits all the subjects by its operation its retroactivity is condoned. This is a creative approach to interpretation, rather than it is literal or mechanical. Once again this is a holistic and creative application of the law, rather than one that is rule-bound.

This kind of interpretation of penalty clauses is now reflected in section 35(3)(n) of the Constitution which provides expressly that an accused has the right to the benefit of the least severe of the prescribed punishment if the prescribed punishments for the offence has been changed between the time that the offence was committed and the time of sentencing.

8 Questions of procedure

An important exception to the presumption that statutes should only be construed to apply prospectively is "the rule that statutes which deal with matters of procedure are of necessity both prospective and retrospective in operation" (see *Lek v Estate Agents Board* 1978 (3) SA 160 (N) 169). The *locus classicus* in this regard is the judgment of Innes CJ, in *Curtis v Johannesburg Municipality* (1906 TS 308), who indicated that a purely procedural amendment to the law could operate in a retroactive manner, stating that: "To the extent to which it does that, but to no greater extent, a law dealing with procedure is said to be retrospective".

Botha (*Statutory Interpretation* 61) perceptively comments that "[a]lthough procedure may seem to be neutral and harmless, the courts have indicated that there is a fine line between 'neutral procedure (formalities) and substantive rights'". Therefore, according to Botha (*Statutory Interpretation* 61), if substantive rights and obligations were not prejudicially affected, the retrospective procedure, can indeed be condoned, as occurred in *Minister of Public Works* v *Haffejee* (1996 (3) SA 745 (A)). In contrast, in *Euromarine International of Mauren v The Ship Berg* (1986 (2) SA 700 (A)), the court held the opposite, since the relevant legislation not only created a new remedy, but also imposed a new obligation on individuals who had no obligations in the past, in effect prejudicially affected.

The Constitutional Court in *Transnet Ltd v Ngcezula* (1995 (3) SA 538 (A) par 23) summed the position up as follows:

> "The principle against interference with vested rights is a component of the presumption against retrospectivity. No statute is to be construed as having retrospective operation, which would have the effect of altering rights acquired and transactions completed under existing laws, unless the legislature clearly intended the statute to have that effect. This stems from the belief that at some point the state and third parties are entitled to rely on a common understanding of the nature of the rights acquired or transactions completed".

This relationship was also set out by the Constitutional Court in *Du Toit v Minister of Safety and Security* (2010 (1) SACR 1 (CC) fn 23) as follows:

> "The principle against interference with vested rights is a component of the presumption against retrospectivity. No statute is to be construed as having retrospective operation, which would have the effect of altering rights acquired and transactions completed under existing laws, unless the legislature clearly intended the statute to have that effect".

Botha (*Statutory Interpretation* 60) points out that there are aspects of other entrenched rights that would have to be considered in determining whether legislation can have a retro-effect, or whether it can only apply prospectively. These are for instance, the rights to property, to fair administration and information. Also in this regard, by virtue of section 37(2)(a), a state of emergency can only be prospective and never retroactive. The correct approach to dealing with retroactivity in relation to procedural and substantive issues is clearly enunciated by Lord Bightman in *Yew Bon Tew v Kenderaan Bus Mara* ([1982] 3 All ER 833 (PC) 836b–d), as

quoted by Mayat J, in *Nkabinde v Judicial Service Commission* (2014 (12) BCLR 1477 (GJ) par 79):

> "A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already passed. There is, however said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for conduct of an action for the time being prescribed.
>
> The expressions "retrospective" and "procedural", though useful in any particular legal context can be equivocal and therefore misleading. A statute which is retrospective in relation to one aspect of a case (e.g. because it applies to a pre-statute cause of action) may at the same time be prospective in relation to another aspect of the same case (e.g. because it applies only to post-statute commencement of proceedings to enforce that cause of action); and an Act which is procedural in one sense may in particular circumstances do more than regulate the course of proceedings, because it may, on one interpretation, revive or destroy the cause of action itself ..."

As a result of the above arguments the judge came to the following conclusion:

> "Whether a statute has retrospective effect cannot in all cases safely be decided by classifying the statute as procedural or substantive ... their Lordships consider that the proper approach to the construction of ... an Act ... is not to decide what label to apply to it, procedural or otherwise, but to see whether the statute, if applied retrospectively to a particular type of case, would impair rights and obligations".

Once again this is a creative and holistic approach to statutory interpretation, rather than one that is mechanical. Furthermore, a careful weighing up of jurisprudential issues needs to take place.

9 Conclusion

What is clear from the operation of this presumption is that the process of interpretation is not merely a literal or mechanical one, involving hard and fast rules, but a creative jurisprudential one, involving important values that are manifestly evident in our Constitution and Bill of Rights. This could, and indeed was, the position in a few cases even under the old constitutional dispensation in terms of the common law, as Devenish (*Interpretation of Statutes* 182) explains: "[i]n general our courts have not construed the presumption mechanically but perceptively, thereby ensuring that the law is as justly and reasonably applied as the elasticity of language permits". In the new political dispensation the criterion is no longer elasticity of language, but the values in the entrenched Bill of Rights.

Furthermore, the kind of legal reasoning involved is not merely deductive or inductive in nature, but deontic, which encapsulates ethical and moral evaluation (Devenish *Interpretation of Statutes* 272). In this regard Goodrich (*Reading the Law* 154) explains the position as the relevance of moral reasoning as follows:

> "the point remains that the interpretation of legal categories is an exercise in an exercise of moral reasoning … in which rules play only a very general and really limited role".

The *Shorter Oxford Dictionary* volume 1 (1964) (483) defines "deontology" as "[t]he science of duty or moral obligation".

As indicated above, this was indeed the position to a much lesser degree and in an unarticulated way even before the inception of the new constitutional dispensation. The judgment of Innes CJ, in Dadoo *Ltd v Krugersdorp Municipal Council* (1920 AD 530), clearly illustrates this (Devenish *Interpretation of Statutes* 79). *A fortiori* it is the position in the light of the Constitution and its progressive bill of rights, by virtue of section 39, which mandates a purposive/value-based theory of interpretation, which involves moral reasoning, rather than relying exclusively on inductive and deductive reasoning. The interpretation and application of a statute must ensure that justice is done according to the values encapsulated in the Constitution, such as for instance, the seminal values of human dignity, equality, non-racialism, non-sexism, transparency and accountability. It is important to note that the interpretive technique of reading down, in terms of which "the courts should as far as possible try to keep legislation constitutional - and therefore valid" (Botha *Statutory Interpretation* 196) must by its very nature involve deontic reasoning. Reading down requires that the interpretation and application of a statute must be in accordance with the values in the Constitution, which are moral and ethical in nature, giving rise to deontic reasoning, as explained above. Another way of understanding the nature of interpretation in the present constitutional dispensation is to view it as "holistic" (see *Nkabinde v Judicial Service Commission supra* par 76), where the whole is greater than the individual parts. The idea of "holism" was conceived by Smuts ((South Africa's philosopher, statesman) in *Holism and Evolution* (1926) http://dictionary.com/browse/holism (accessed 2015-05-07)). This theory postulates that "parts of the whole are in intimate connection, such they cannot exist independently of the whole or cannot be understood without reference to the whole, which is thus regarded as greater than the sum of its parts. It is applied to mental states, language and ecology" (http//www.oxforddictionaries.com/definition/English/holism (accessed 2015-05-07)). Such holistic interpretation must of necessity reflect the seminal values set out above.

It is submitted that deontic and holistic interpretation can make an important contribution to understanding the character of the jurisprudence of a transformative Constitution for South Africa (Pieterse "What Do we Mean When we Talk about Transformative Constitutionalism?" 2005 20(1) *SA Public Law* 155-166). Interpretation by its very nature must contribute to transformation, in which, it is submitted, both "holism and the process of evolution are combined" (Mowat "Holism and the Law" 1991 *SALJ* 343 344; also Singh *Impact of the Constitution on Transforming the Process of Statutory Interpretation in South Africa* (2015) unpublished doctoral thesis UKZN 229).

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