CASES / VONNISSE

THE QUESTION OF INTERPRETATION IN THE NICHOLSON JUDGMENT

Jacob Zuma v The National Director of Public Prosecutions [2009] I All SA 54 N

1 Introduction

It is interesting that prior to Nicholson J's judgment in the matter of *Jacob Zuma v The National Director of Public Prosecutions,* that Judge President Tshabalala stated quite categorically that he did not want the judge who was to preside over the corruption trial of Jacob Zuma to be placed under scrutiny (see "Zuma Judge Gets Legal Professional's Approval" 31 July 2008 *Business Day* 3). However, since Nicholson J's decision of the Jacob Zuma trial, both the judge and his judgment have invariably become the subject of intense scrutiny. Nicholson J's judgment is fraught with inconsistencies, incongruities and controversy. Nevertheless, no matter what the views are regarding the findings of Nicholson J, it has to be conceded that it resulted in one of the most far reaching political decisions in South African legal history, which resulted in the ousting of the country's president (Thabo Mbeki). While the judgment raises a plethora of both political and legal issues, it is not the intention of the author to venture into the political arena; rather an analysis of the approach adopted to statutory interpretation which influenced the court's decision, is considered.

2 Facts and judgment

What is abundantly clear from the judgment is that there were essentially two issues in respect of which Nicholson J had to deliberate:

1 A broader issue of the independence of the judicial system, which effectively brought the credibility of the National Director of Public Prosecutions (hereinafter "the NDPP") as a prosecuting authority into question; and

2 a narrower issue of whether Jacob Zuma's rights were infringed upon by the NDPP not granting him prior consultation (as provided for and articulated in terms of section 22(2) of the National Prosecuting Authority Act 32 of 1998).

The controversy flowing from the reception of the judgment was whether Nicholson J was required to go beyond his authority and comment on the cauldron of political issues that beset the case. It is clear that the learned judge opted "to tackle the big political issues head on" on the basis of supporting documents presented by the applicant's legal team "that the prosecution was politically motivated" (see "Judge has Left Legal System Open to Future Abuse" 16 September 2008 *Cape Times* 2008 9). The recurring question in the judgment and one that was asked on countless occasions, was whether "to prosecute or not to prosecute" the accused. However, to place the matter in context what emanates from an examination of the background, is that the National Prosecuting Authority (hereinafter "the NPA") had been vacillating over this very issue even well before Nicholson J's judgment. In 2003 the NDPP Ngcuka made a decision to prosecute Shaik but not Jacob Zuma. In 2007 the NDPP Mpshe decided that he would prosecute Jacob Zuma, and proceeded to do so. In terms of section 22(2)(c) of the National Prosecuting Authority Act 32 of 1998 it is specifically stipulated that the NDPP:

> "may review a decision to prosecute or not to prosecute, after consulting the relevant DPD and after taking representations within a period specified by the NDPP, from the following:
>
> (i) The accused person;
>
> (ii) The complainant; and
>
> (iii) Any other person or party whom the National Director considers to be relevant".

As has already been mentioned, in construing the above statutory provision, Nicholson J was of the opinion that the NDPP ought to have taken representations from the applicant before deciding to prosecute him (par [126]). The applicant submitted that a refusal to hear his representations was as a direct result of "political meddling" which he maintained had "bedeviled his prosecution from the outset"(par [139]).

In terms of section 90(2) of the Constitution of RSA Act 108 of 1996, the President is entrusted with the function of appointing and dismissing the Deputy President and cabinet Ministers. In applying section 90(2), the erstwhile President (Thabo Mbeki) dismissed the applicant. What is interesting is that these were in fact mirror images of the charges against Mr Shaik (par [159]). The applicant contended that all of this was part of a "political strategy" that had been effected by the president (Thabo Mbeki), and was the accumulative effect of an ongoing rivalry between himself and the then President (par [159]). The final outcome of the findings of the court was that the decision taken by the NPA to prosecute the applicant was found to be unlawful and set aside (par [247]).

3 Comment

Among the host of issues that the matter brings into contention, it has to be conceded that the approach to statutory interpretation that was adopted by the court, was pivotal to the findings that were reached. The aim of this note is directed at exploring the court's approach to statutory interpretation which ultimately influenced the judge's decision.

Section 22(2)(c) of the National Prosecuting Authority Act 32 of 1998 mirrors section 179(5)(d) of the Constitution and these are to be read in tandem (see par 2 above for an examination of the contents of section 22(2)(c)). In interpreting the relevant legislation, it should be noted that Nicholson J found that it was necessary to consider the "intention of the legislation" (par [76] and [77]). What can be observed from the relevant paragraphs of the judgment sees Nicholson J embarking on an unmistakable literal analysis of the legislation in question. The stance of the judge in broaching the question of interpretation from the perspective of the literal mode of interpretation is not only jurisprudentially unsound but also inherently flawed. The reasons for this submission are discussed in more detail hereunder.

3 1 The literal theory of interpretation

According to the literal theory, the true meaning of the text is to be sought virtually exclusively in the *ipissima verba* or the actual words used by the legislature. Devenish posits that the *modus operandi* of the literal method of interpretation is problematic as words do not have intrinsic meaning in language. He asserts that the meaning of words can invariably only be determined by a concatenation of contextual factors (Devenish *Interpretation of Statutes* (1992) 26). He further contends that the application of a literal methodology is flawed because it is "primitive, naïve and antiquated" (Devenish 28). What is therefore evident, is that the approach adopted by Nicholson J is not only obsolete but also anachronistic as it is based on primitive literalism (par [76]).

3 2 The tree rules of the literal theory of interpretation

What can be gleaned from the judgment is that in attempting "to ascertain the intention of the legislature" Nicholson J sought to explore the "mischief" that the new provisions were designed to remedy (par [77]). In the words of the judge "to properly understand the provisions of the section", it was necessary to garner a more holistic perspective of the circumstances that led to the promulgation of the National Prosecuting Authority Act 32 of 1998. As a result thereof, use and reference to the mischief rule is noted (par [77]-[83]).

The mischief rule is the third rule of the literal methodology. It is appropriate here also to consider the other rules of the literal theory, namely the literal rule and the golden rule. The primary rule is that words are to be given their ordinary, grammatical or natural meaning. This is the first step in the process of interpretation. According to the literal theory, the primary rule may be deviated from:

> "where it would lead to obscurity or a result which is unjust, unreasonable or inconsistent with the other provisions or repugnant to the general object, tenor or policy of the statute".

This is in essence a description of the golden rule (Devenish 28; *Venter v Rex* 1907 910; and *Grey v Pearson* (1857) 6 HL Cas 61,106). A criticism that has been leveled against the application of the golden rule is that "what

seems an absurdity to one man might not necessarily seem absurd to another" (Devenish 29). Du Plessis also echoes these reservations. He drives the point with a series of questions, for example, who and what determine what an absurdity is and when is an absurdity sufficiently glaring to allow the golden rule to kick in? He further remarks, how much nonsense should an interpreter be expected to stomach before (s)he concludes that an absurdity is "utterly glaring"? (Du Plessis *Re-interpretation of Statutes* (2002) 105).

Where words are ambiguous, it is permissible to have recourse to outside sources for the purpose of discovering the true meaning. The rule regarding surrounding circumstances in the interpretation of statutes basically means that the interpreter must heed the situation prior to and during the passing of the Act to interpret an obscure or ambiguous provision. This is the third rule of the literal theory referred to as the mischief rule and is to be applied in instances of ambiguity (See Devenish 130-131). The mischief rule which was first expounded in the old English case of *Heydon* ((1584) 3 Co Rep 7a and 7b) provides:

> "That for the sure and true interpretation of all statutes in general … four things are to be discerned and considered:
>
> (1) What was the common law before the passing of the Act;
>
> (2) What was the mischief and defect for which the common law did not provide;
>
> (3) What remedy Parliament had resolved and appointed to cure the disease of the commonwealth;
>
> (4) The true reason of the remedy.
>
> And then the office of all the judges is always to make such construction as shall suppress the mischief and advance the remedy."

In the landmark case of *Hleka v Johannesburg City Council* (1949 1 SA 842 (A) 852), Van den Heever JA sets out the above rules as articulated in *Heydons* case, and calls on history to show what facts existed to bring about the relevant statute, namely the War Measure Act 18 of 1947 (see Devenish 131). Devenish notes that the surrounding circumstances must be such that a court is able to take judicial notice of them. He nevertheless also criticises the application of the golden and the mischief rules in that they "appear to be capricious" and therefore are bound to result in uncertainty (Devenish 133).

With respect, in giving consideration to the mischief rule, not only does Nicholson J give legitimacy to an outmoded and discredited approach to interpretation but he gives credence to a theory of literalism which is clearly in conflict with section 39(2) of the Constitution.

3 3 Application of section 39(2) of the Constitution

Section 39(2) which provides:

> "When interpreting any legislation and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights,"

clearly encapsulating the broad purposive or teleological mode of interpretation. Botha submits that the search for the purpose of legislation, requires a purpose-orientated approach which recognizes the contextual framework of the legislation right from the outset and not only in cases where a literal text-based approach has failed (Botha *Statutory Interpretation* (2005) 51). He therefore expresses disapproval with the approach to statutory interpretation adopted by the courts in the recent cases of *Kalla v The Master* (1995 1 SA 261 (T) 269C-G), *Commissioner SARS v Executor, Friths Estate* (2001 2 SA 261 (SCA) 273); and *Geyser v Msunduzi Municipality* (2003 5 SA 19N 321), where the traditional rules of interpretation were applied. He is critical of the purely mechanical and formalistic approach to statutory interpretation applied by the courts in respect of these decisions (Botha 58). In fact, he makes a resounding statement that "the legislative function is a purposive activity" (Botha 50).

While the paragraphs under scrutiny (par [76] and par [77]) have been criticized on the basis that they reflect a qualified contextual approach, a closer analysis of the judgment reveals that Nicholson J did in fact also apply a purposive or an unqualified contextual approach to interpretation (par [119]). In referring to section 39, a value-based method of interpretation espoused by the interpretation clause of the Constitution is given expression to:

> "If it is clear that when interpreting the Bill of Rights, a court must promote the values that underlie an open and democratic society that is based on human dignity, equality and freedom. The provision of the right to make representations to an accused would pay appropriate tribute to his right to human dignity, given the approbrium that is normally attendant upon a criminal trial. It would be grossly unequal to allow representations to an accused on the happenstance that this case emanated from a decision by a DPP and not the Deputy National Director, who was the head of the DSO …" (par [120]).

The core values of human dignity, equality and freedom that are referred to above should, according to Devenish in the interpretive analysis, triumph over a particular purpose inferred from a specific provision of the Constitution. It is provided that it does not mean that a particular section of the Constitution is irrelevant, but that it should be regarded as a determining factor and not the only factor in the process of interpretation. It is therefore maintained that a teleological evaluation would render the interpretation compatible with the overall purpose of the Constitution (Devenish *The South African Constitution* (2005) 204).

The approach employed in paragraph [120] above is clearly consistent with that mandated by the Constitution. It is quite inexplicable therefore, as to why the judge also chose to utilize the literal method of interpretation which has no bearing and relevance in terms of the interpretation provision of the Constitution. In terms of the approach to statutory interpretation *in casu*, an unmistakable, glaring contradiction is noted which sees the judge vascillating between a literal method and a purposive method of interpretation. It is unfortunate that there is an element of ambivalence in the Nicholson judgment. It has to be emphasized that it is imperative that judges take an unequivocal stand on the question of interpretation in favour of a value-based theory of interpretation or an unqualified contextual

methodology and not use the methods and phraseology of a discredited literal approach.

A teleological interpretation requires such an unqualified contextual weighing up of linguistic, legal and jurisprudential considerations. In the process of "weighing up of all of the elements," it has to be stressed that although the literal text is an important consideration in the process of interpretation, it should not result in the exclusion of contextualization (Devenish 53-55). In the landmark case of *Jaga v Donges* (1950 4 SA 653 (A)) which is a classic example of contextual interpretation, Schreiner JA remarked that "the object to be attained is unquestionably the ascertainment of the meaning of the language in its context" and "the clearer the language the more it dominates over the context, and *vice versa*, the less clear it is the greater the part that is likely to be played by the context" (664B-C and E-F). The relevant section that the court had to consider was section 22 of Act 22 of 1913. The issue that had to be decided on was whether the imposition of a suspended sentence of imprisonment on a convicted person meant that he was liable to be deported as an undesirable habitant.

In construing the relevant section, while the majority as per Centlivres JA adopted a literal approach, the dissenting Schreiner JA postulated that a wider contextual approach was the more appropriate mode of interpretation and articulated his reasoning as follows:

> "Bearing in mind the context – the drastic nature of the provision, the wide range of persons potentially affected and the important differences in the purpose and effect of suspended and unsuspended sentences – it seems to me that section 22 should not be read as covering suspended sentences in the absence of clear language to show that this was intended" (667H).

What is evident is that the approach adopted by Schreiner JA which requires a "weighing up of competing interests," (Devenish 54) is clearly reflective of a value-coherent or a teleological approach.

4 Concluding remarks

It is necessary to consider whether a teleological evaluation would have affected the outcome of the decision in the Nicholson judgment. It has to be conceded that while a teleological evaluation undoubtedly "places the process on a sounder jurisprudential footing" (Devenish 55), it might not necessarily have affected the final outcome of the case. It is possible that the same conclusion might have been reached. However, what is noteworthy is that the use of the literal approach in the Nicholson judgment is incorrect, on the basis that it gives credence to an obsolete and archaic system. With the advent of the new democratic Constitution, South African jurisprudence has made a paradigmatic shift from a system based on parliamentary sovereignty, legal positivism and the literal interpretation of statutes. Our Constitution is now supreme law and endorses a purposive or value-based methodology of interpretation.

It is therefore incumbent on judicial officers to heed the new jurisprudence that is more compatible to a rights culture and give expression to the values embodied in these rights. The interpreter is required in the interpretative

process to give credence to a contextual framework by striking a balance between the text and the context of the legislation. Nevertheless, notwithstanding the fact that a purposive or a teleological approach is mandated by the Constitution, what can be gleaned from an examination of case-law (see *Adampal (Pty) Ltd v Administrator* 1989 3 SA 800; *RPM Bricks (Pty) Ltd v City Tshwane Metropolitan Municipality* 2007 9 BCLR (TPD); *Swanepoel v JHB City Council* 1994 3 SA 789 (A); and *Public Carriers Association v Toll Road Concessionaries* (Pty) Ltd 1990 1 SA 924 (A)), is that there are still a number of cases where courts invoke the orthodox primary rule of interpretation which espouses the literal method of interpretation. To suggest a possible reason for the outmoded stance maintained by courts, the submission by Du Plessis (90) might perhaps shed light on revealing the dilemma faced by judicial officers:

> "Judicial officers and practitioners do not habitually reflect on and ask questions about the interpretation of statutes in everyday practice. They are hard pressed to arrive at results and therefore resort to tools that expedite rather than complicate their quest for an outcome …"

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