THE SIGNIFICANCE OF THE APPROACHES TO CONSTITUTIONAL INTERPRETATION IN S V MHLUNGU 1995(7) BCLR 793(CC)

by

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SUMMARY

The dissertation consists of an analysis of the Constitutional Court decision S v Mhlungu 1995(7) BCLR 793 CC. The analysis focuses on the significance of the different interpretative approaches adopted by the members of the Court in analysing section 241(8) of the Constitution of the Republic of South Africa Act 200 of 1993. The theoretical approaches to constitutional interpretation are first briefly discussed. This is followed by a description of the four respective judgments in the decision. The case is then analysed in respect of section 35, Chapter 3 and the Constitution itself in order to determine the significance. The jurisprudence of the Court (developed in its first eight decisions) is evaluated to assess the approach of the Constitutional Court to Chapter 3 and the remainder of the Constitution respectively. The conclusion is reached that the Court has endorsed a generous/purposive approach to constitutional interpretation and that this extends to the entire text of the Constitution.

KEY TERMS

Constitutional Interpretation, Constitutional Court, Interim Constitution, Interpretative Approaches, S v Mhlungu 1995(7) BCLR 793, Chapter Three, Interpretation Clause, Constitutional Jurisprudence, Transitional Provisions.

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INTRODUCTION

On 27 April 1994, the Constitution of the Republic of South Africa Act 200 of 1993 ("the Constitution") was promulgated and overnight, the political and legal landscape of South Africa was transformed. The impact can be gauged from the words of section 4(1) :-

> "This Constitution shall be supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force or effect to the extent of the inconsistency."

The era of constitutionalism has been born.

The doctrine of constitutionalism replaced the Westminster system of parliamentary sovereignty which had prevailed in South Africa since 1910. Implicit in the doctrine of constitutionalism is a profoundly altered role for the judiciary. The Constitution contains a Chapter of Fundamental Rights (Chapter 3) and creates a Constitutional Court[1] ("the Court") which is declared to be "the court of final instance over all matters relating to the interpretation, protection and enforcement of the provisions of this Constitution".[2] The Court therefore fulfils the dual role of interpreter and guardian of the new constitutional dispensation, the latter by ensuring that the government operates within the framework of the Constitution. It is not a simple task. The process of constitutional interpretation has generated a vast amount of literature and debate, and several theoretical approaches. At the heart of the debate lie different conceptions of democracy. Reconciling the wishes of a democratically elected legislature with the power of an unelected judicial body to thwart those wishes, lies at the core of the respective theoretical interpretative

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[1]Section 98(1)

[2]Section 98(2)

approaches.[3] An analysis of the process of constitutional interpretation therefore of necessity, involves an exercise in political theory.

The difficulties inherent in a process of constitutional interpretation were clearly demonstrated in Mhlungu[4], one of the earliest judgments of the Court. The Court, in this decision was effectively split - the source of the division being conflicting interpretations of a seemingly innocuous provision of the constitution - section 241(8). Mhlungu[5] therefore serves as a valuable case study on the complexities inherent in the interpretive process and its significance will be analysed against a background of the theoretical approaches to interpretation and the emerging jurisprudence of the Constitutional Court (as reflected in the first eight decisions up to and including Zantsi[6]).

[3]Davis D. Democracy - Its influence upon the process of Constitutional Interpretation S.A.J.H.R Vol. 10 Part 1 1994

[4]1995(7) BCLR 793 CC

[5]Supra note 4

[6]CCT /24/94

CHAPTER 1

CONSTITUTIONAL INTERPRETATION - A THEORETICAL BACKGROUND

An analysis of the respective theoretical approaches to constitutional interpretation is essential in order to place Mhlungu[7] in perspective. In terms of the Westminster system of parliamentary sovereignty which prevailed in South Africa prior to 1994, the judiciary was subordinate to a sovereign parliament. As there existed no justiciable bill of rights, the function of the judiciary was to interpret and apply original legislation as promulgated by the sovereign parliament. This was achieved by a search for the "intention of the legislature".

A limited jurisprudence of the constitutional interpretation does exist from this era, the most famous example being the "Harris"[8] cases of the early 1950's. The creation of the four "independent" homelands in the late seventies and early eighties ironically also resulted in a broadening of the scope of constitutional interpretation (and jurisprudence) - the most important source being Bophuthatswana with its justiciable Bill of Rights. (S v Marwane[9] - a decision in which certain sections of the South African Terrorism Act were declared invalid, provides an excellent example). However the vast majority of the judiciary had been schooled in the Westminster tradition of constitutional interpretation and the introduction of a doctrine of constitutionalism required a new conceptual approach.[10]

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[7]Supra note 4

[8]See Minister of Interior v Harris 1952(4) SA 769 (A)

[9]1982(3) SA 717 (A)

[10]For a detailed analysis of South African constitutional jurisprudence and the theoretical issues involved see :-

(I) Du Plessis L M and De Ville J R. Bill of Rights Interpretation in the South African

It states clearly in the Constitution that international human rights law and conventions must play a major role in the developing South African constitutional jurisprudence.[11] The Constitution contains a number of provisions which refer to international law *viz* sections 35(1), 82(1)(i), 116(2), 227(2) and 231. Section 231(4) emphasises the importance of customary international law and its role in South African law but the most important clause in section 35(1) - the interpretation clause. This clause emphasises the importance of public international law and comparative case law in the process of constitutional interpretation. South Africa is new to the doctrine of constitutionalism and as a result the language of particularly, the Chapter of Fundamental Rights (Chapter 3) bears a strong resemblance to foreign bills of rights and international human rights instruments.[12] The provisions which deal with international law, arguably serve a dual purpose. They firstly inform the politicians, lawyers and the public that the new constitutional state aims to conform to all the prescriptions of the new international legal order. Secondly they inform the international community of South Africa's commitment to international law.[13] Clearly the influences of foreign jurisprudence on the development of a South African approach to constitutional interpretation will be strong.

Context (1) Diagnostic Observations 1993. Stell. L.R Pg 63

(ii) Du Plessis L M and De Ville J R. Bill of Rights Interpretation in the South African Context (2) Prognostic Observations. Stell. L.R 1993 2 Pg 199

(iii) Du Plessis L M and De Ville J R. Bill of Rights Interpretation in the South African Context (3) Comparative Perspectives and Future Prospects. Stell. L.R 1993 3 Pg 356

[11]Dugard J. The Role of International Law in Interpreting the Bill of Rights. Vol. 10 Part 2 1994

[12]Marcus G. Interpreting the Chapter of Fundamental Rights. S.A.J.H.R Vol. 10 Part 1 1994

[13]Dugard J. International Law and the "Final" Constitution S.A.J.H.R Vol. 11 Part 2 1995

There has been once central theme, which courts charged with the interpretation of constitutions have acknowledged - a justiciable constitution is a document enjoying a status very different from that of an ordinary statute.[14] The role of a constitution in a society was aptly summarised by Mahomed AJ (as he then was) in S v Acheson[15] when he described a constitution as a "mirror reflecting the national soul".[16] In Hunter et al v The Southam Inc[17] the Canadian Supreme Court stated :-

> "The task of expounding a constitution is crucially different from that of construing a statute".[18]

Whilst there is then agreement about the unique nature of a constitution, interpretive jurisprudence is replete with contrasting approaches. An overview of local and international jurisprudence is therefore apposite. The three main approaches to constitutional interpretation can be classified respectively as the literal approach, the generous approach and a purposive approach. Each will be discussed separately.

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[14]Supra note 12

[15]1991(2) SA 805 (Nm HC)

[16]At 813 A-B

[17](1985) 11 DLR (4th) 641

[18]At 649

A THE LITERAL APPROACH

A literal approach to the interpretation of a constitution was summarised by Galgut AJA in Government of the Republic of Bophuthatswana v Segale[19] when he said :-

> "The task of the Courts is to ascertain from the words of the statute in the context thereof what the intention of the legislature is. If the wording of the statute is clear and unambiguous they state what that intention is. It is not for the Courts to invent fancied ambiguities and usurp the functions of the legislature".

The literal approach therefore of necessity involves a restricted approach and is characterised by a search for the intention of the legislature.

Literalism is closely linked to the Westminster doctrine of parliamentary sovereignty. Implicit in a literal approach is the understanding that it is not the role of the judiciary to substitute its will for the wishes of sovereign parliament. In Bongopi v Chairman of the Council of State, Ciskei,[20] the court stated :-

> "This Court has always stated openly that it is not the maker of laws. It will enforce the law as it finds it. To attempt to promote policies that are not to be found in the law itself or to prescribe what it believes to be the current public attitudes or standards in regard to these policies is not its function".

Closely allied to literalism is the theory of original intent, developed by the U.S jurist Robert Bork. The key to this theory of interpretation lies in identifying the thoughts of the framers of a constitution, about the constitution. As was stated earlier, at the core of the debate over constitutional interpretation is a debate about the meaning of democracy itself. According to Bork, the theory of original intent seeks to analyse a constitution as a document expressing the

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[19] 1990(1) SA 434 B.A. at 448 F

[20] 1992(3) SA 250 (CK) at 265 H-I

"coherent and concrete expectations" of those politicians who wrote and approved the constitution. He sees a constitution as representing a political pact, whereby a particular society seeks to constrain the wishes of a majority and for the court to read too much into the words of the original framers is therefore undemocratic and results in the imposition by the courts of its own values and preferences on society.[21] (To determine the "original intent" in South Africa could prove particularly difficult considering the complexity and compromises of the Multi-Party Negotiating Process at Kempton Park).

The literal approach therefore implies (whilst acknowledging the difference conceptually), interpreting a statute and a constitution in a similar manner and is closely allied to the theory of original intent. It the approach which has prevailed since 1910 in South Africa and in which our judiciary has been schooled.

B THE GENEROUS APPROACH

In contrast to literalism, the generous approach to constitutional interpretation requires the widest possible interpretation of the language of a constitution. The generous approach seeks to grant individuals the full measure of their fundamental rights and freedoms as conferred on them in a constitution. In terms of striking a balance between the wishes of a democratic parliament and the rights of the individual, this approach clearly favours the protection of fundamental rights. In

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[21]For more on the theory of original intent see :-

(I) Cachalia, Cheadle et al. Fundamental Rights in the New Constitution Juta & Co 1994 Pg 9-12

(ii) Van Wyk, Dugard et al. Rights and Constitutionalism : The New South African Legal Order Juta & Co 1994 Pg 12-14

Minister of Home Affairs (Bermuda) v Fisher,[22] the court in detailing its approach to constitutional interpretation called for a generous interpretation, avoiding what has been called the "austerity of tabulated legalism",[23] suitable to give individuals the full measure of fundamental rights and freedoms which had been conferred on them.

Good examples of a generous approach can be found in Indian jurisprudence. This approach to interpretation, developed after 1978 in India, has as its foundation the stated goal of the Indian Constitution of the creation of a democratic welfare state. The core value underpinning the process of constitutional interpretation was identified as that of social justice. Furthermore the directive principles of the Indian Constitution were seen as complimentary to the fundamental rights, allowing the courts therefore to expand the scope of the fundamental rights through a generous interpretation. An example of this approach can be found in State of Himachal Pradesh v Sharma[24] where the court ordered the state government to construct a road, in a remote mountain area, declaring that the lack of a road in this remote area constituted a violation of the villagers' right to life in terms of Article 21 of the Indian Constitution.[25]

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[22]1980 AC 319

[23]Supra at 328 H

[24]1986(2) SCC 68

[25]For more on Indian "social justice" interpretation see Van Wyk Dugard et al. Rights and Constitutionalism Pg 47-61

The generous approach shifts the balance in favour of individual rights. By defining the provisions of a constitution as widely as possible to favour the rights of the individual against the wishes of a sovereign parliament, the judiciary thrusts itself into the political arena and is required to engage in an exercise in political theory, as occurred in India.

C THE PURPOSIVE APPROACH

A clear distinction can be drawn between a generous approach and a purposive approach to constitutional interpretation. A generous approach implies the widest possible interpretation, whilst the purposive approach is based upon determining the purpose of the provision to be analysed. The result is that it is not necessarily the widest interpretation which is found to be the most appropriate. A purposive and a generous approach are therefore not synonymous. In the Canadian decision R v Big M Drug Mart[26] the court stated :-

> "The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee : it was to be understood in other words in the light of the interests it was meant to protect".

A purposive approach seeks to identify the particular values fundamental to a constitution and views a constitution as an entity seeking thereby to place a particular provision in context.

In the constitution, section 35(1) provides statutory support and the context for a purposive approach, enjoining the judiciary to promote the values which underlie an "open and democratic society based upon freedom and equality". For the effective utilisation of a purposive approach a conceptual understanding of the role of a constitution within the legal system and political

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[26](1985) 18 DLR (4th) 321

structure of a society is necessary.[27] For example, Article 20(1) of the German Constitution states that the Federal Republic of Germany is a democratic and social federal state. This principle of social justice is an important underlying value and provides "purpose" to the interpretation of the German Constitution by the Federal Constitutional Court. In conclusion then, whilst a generous and a purposive approach are often considered to be synonymous, they are not. A purposive approach seeks to interpret a right in such way to avoid reaching behaviour that is outside the purpose of the right i.e. behaviour that is not considered to be worthy of constitutional protection.[28]

SUMMARY

In essence then, the factor that distinguishes the respective theories of constitutional interpretation from each other, is the perceived role of the judiciary in a democratic state with a justiciable constitution. All three theories attempt to strike a balance between the wishes of a democratic parliament and the provisions of the particular constitution. The more generous the approach, the more the court is required to exercise a political choice. The balance shifts in all three theories.

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[27]For more on a purposive approach see :-

(I) Cachalia, Cheadle et al. Fundamental Rights Pg 9-12

(ii) Van Wyk, Dugard et al. Rights and Constitutionalism Pg 122-126

(iii) Davis D. Democracy - Its Influence on the Process of Constitutional Interpretation S.A.J.H.R Vol 10 Part 1 1994 Pg 117-121

[28]Hogg P W. Interpreting the Charter of Rights : Generosity & Justification Osgoode Hall Law Journal 1990 818-837

The literal approach seeks to minimise the scope of judicial choice by searching for the "intention of the legislature". In contrast the generous/purposive approach sees the judiciary as guardian of a constitution - the function of the court being to uphold the values and principles and rights enshrined in a constitution. All interpretation takes place within this context. The emphasis however between a generous and a purposive approach differs as we described above.

However in spite of the differing emphasis, the generous and the purposive approach can be harmonised. The purposive approach coupled with a generous approach acts to limit the width implicit in a generous approach. Therefore a generous approach determines the outer limits of a particular interpretation. The purposive approach limits the scope of the generous interpretation by focusing on the specific purpose of the provision, in order to avoid reaching beyond the purpose of the provision. Thus the purposive approach serves to refine the effects of the generous approach and in this way are harmonised.

Against this background of the theoretical approaches, Mhlungu[29] will be analysed and followed by a discussion of the emerging jurisprudence of the Constitutional Court to determine which path of interpretation the Court has chosen to walk.

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[29]Supra 4

CHAPTER 2 - MHLUNGU - AN ANALYSIS

A BACKGROUND

The judgment was delivered on 8 June 1995 and was the third judgment of the Constitutional Court. At issue was the correct interpretation of section 241(8) which reads as follows :-

All proceedings which immediately before the commencement of this Constitution were pending before any court of law, including any tribunal or reviewing authority established by or under law, exercising jurisdiction in accordance with the law then in force, shall be dealt with as if this Constitution had not been passed : Provided that if an appeal in such proceedings is noted or review proceedings with regard therefore are instituted after such commencement, such proceedings shall be brought before the court having jurisdiction under this Constitution.

Section 241 is part of Chapter 15 of the Constitution entitled General and Transitional Provisions. The case came before the Court by way of a referral in the course of a criminal trial in the Natal Provincial Division (the same trial gave rise to the first judgment of the court - Zuma,[30] a decision in which section 217(1)(b)(ii) of the Criminal Procedure Act 1977 was declared unconstitutional). In essence then, as the trial had commenced on 11 March 1994 (when the indictment was served), it was "pending" immediately prior to the commencement of the Constitution - making section 241(8) applicable. The admissibility of confessions tendered by the prosecution in terms of section 217(1)(b)(ii) was contested by the defence - the issue was whether the provisions of the

[30] 1995(4) BCLR (CC), 1995 2 SA 642 (CC)

Constitution were applicable to the trial in view of section 241(8). However what seemed at face value to be a relatively straightforward statutory provision subsequently resulted in an illuminating exercise in the complexity of constitutional interpretation. Section 241(8) had given rise to conflicting judgments in the Provincial and Local Divisions (c.f the three conflicting approaches respectively in Gardener v Whitaker,[31] Shabalala v Attorney General, Transvaal and Another[32] and Kalla and Another v The Master and Others[33]). It was therefore the task of the Court to interpret section 241(8) and finally bring clarity.

The court was divided as follows. Mahomed J (with Langa J, Madala J, Mokgoro J and O'Regan J concurring) held that the purpose of section 241(8) was to provide authority for a court (in pending proceedings) established and existing in terms of the previous constitution to continue to function as court. Section 241(8) therefore preserved the authority of the pre-Constitutional courts and was not intended to exclude the provision of the Constitution from trials which had commenced prior to 27 April 1994. Kentridge AJ (with Chaskalson P, Ackermann J and Didcott J concurring) held that the only reasonable meaning was that section 241(8) excluded the provisions of the Constitution from cases which were pending on 27 April 1994. Kriegler J and Sachs J both agreed with Mahomed J but for different reasons. The respective judgments will now be examined in more detail.

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[31] 1994(5) BCLR 19 E

[32] 1995(1) SA 608 T

[33] 1994(4) BCLR 79(T), 1995(1) SA 261(T)

B KENTRIDGE J

Kentridge J in his minority judgment adopted an approach akin to literalism in his analysis of section 241(8). He allies himself with a purposive approach (paragraph 63) but expresses a cautionary note when he states that "the Constitution cannot wipe out all traces of the past in one blow and does not attempt to do so" (paragraph 64). He emphasises the transitional function of section 241(8) by placing it into its context of Chapter 15. Kentridge J identifies a dual purpose of section 241(8).

He firstly, (in agreement with Mahomed J) describes the purpose of the section as being to preserve the authority of courts operating under the previous Constitution. It is his second purpose that diverges from the opinion of Mahomed J. As Kentridge J puts it :-

> "It is clear from the language used that there was another purpose and that was to ensure that there would be orderly transition from the old to the new legal order, so as to avoid the dislocation which would be caused by introducing a radically different set of legal concepts in the middle of ongoing proceedings". (paragraph 69)

In reaching this second conclusion, Kentridge J adopts a literalist view point.

Kentridge J makes several observations pertaining to constitutional interpretation. In paragraph 73 he states :-

> "With all respect to the judges who have taken a different view, I find it difficult to see what other meaning can reasonably be given to the language used".

More significantly, he warns in paragraph 78 :-

> "There are limits to the principle that a Constitution should be construed generously so as to allow to all persons the full benefit of the rights conferred on them, and those limits are to be found in the language of the Constitution itself".

He summarises his approach later in the same paragraph by stating :-

> "When the language is clear, it must be given effect and this has been stressed in cases in several different jurisdictions".

Kentridge's rejection of a generous interpretation is evidenced by his quoting (from Zuma[34]) of the warning issued by Lord Wilberforce in Minister of Home Affairs (Bermuda) v Fisher and Another.[35] In Zuma Kentridge warned :-

> "If the language used by the law giver is ignored in favour of a general resort to "values", the result is not interpretation, but divination".[36]

The interpretation adopted by Kentridge J, allocates to section 241(8) its literal meaning - notwithstanding the seemingly unjust anomalies which result. (He discusses these anomalies and rejects them as "the price which the lawmakers are prepared to pay for the benefit of orderly transition" (paragraph 84). He rejects the narrow literal approach as evidenced in Republic of Bophuthatswana and Others v Segale.[37] However the judgment of Kentridge J closely resembles a literalist approach and he specifically rejects the generous approach adopted by Mahomed J by warning that the values espoused in section 35 are not promoted by "doing violence to the language of the Constitution in order to remedy what may seem to be hard cases" (paragraph 84).

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[34]Supra 30

[35]Supra 22

[36]Paragraph 18

[37]Supra 19

C MAHOMED J

In contrast to Kentridge J, Mahomed adopts a generous approach to section 241(8). He commences by warning against the formidable difficulties posed by a literal interpretation (paragraph 3) and he deals with the unjust consequences of a literal interpretation. He criticises Kentridge J in paragraph 8 by stressing the role of the Constitution and the underlying values and states that a literal interpretation "would be inconsistent with the international culture of constitutional jurisprudence which has developed to give constitutional interpretation a purposive and generous focus".[38]

Mahomed J emphasises the importance of contextualising section 241(8). This context he describes as "section 241(8) itself, section 241 as a whole and the larger context of the Constitution regarded as a holistic and integrated document with critical and important objectives" (paragraph 15). He rejects the second purpose identified by Kentridge J (to ensure an orderly transition) by stating that this could not be the correct interpretation in view of the role of and values underpinning the Constitution, but admits to "considerable difficulties in all the theories which have become manifest in the interpretation of section 241(8)" (paragraph 45). Mahomed J summarises his approach in paragraph 45 when he states :-

> "I am of the view, however, that on a balance, my interpretation is to be preferred because it gives force and effect to the fundamental objectives and aspirations of the Constitution, because it is less arbitrary in its consequences and because it is more naturally in harmony with the context of section 241(8) itself and the Constitution as a whole".

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[38]For a discussion on the harmonisation of the generous and purposive approach see Pg 10

He rejects the literal interpretation by stating that it has "none of these advantages and is not compelled by the text of the section, read in its context and with regard to the objects of the Constitution" (paragraph 46).

Mahomed J is thus concerned with the harsh effects of a literal interpretation. He attempts, by giving a generous interpretation to section 241(8), to find the solution which is least likely to infringe upon the rights enshrined in Chapter 3 of the Constitution and is more in harmony with its values. He expressly rejects the literal approach adopted by Kentridge J and whilst acknowledging the potential flaws in his judgment, stresses the role and purpose of the Constitution and its underlying values in arriving at what he regards as the most just interpretation of section 241(8).

D SACHS J

Sachs J concurs with the conclusion reached by Mahomed J but differs with his methodologies. He rejects the literal approach adopted by Kentridge J stating that this interpretation "gives far too little weight to the overall design and purpose of the Constitution, producing results the framers could never had intended" (paragraph 105). He however rejects the generous approach of Mahomed J by stating that his method of interpretation "unnecessarily strips section 241(8) of its more obvious meaning" (paragraph 105).

Sachs J adopts what can best be described as a purposive approach to the interpretation of section 241(8). He compares the function and purposes respectively of section 241(8) (purely functional)

and Chapter 3 (rights that are deeply entrenched). He dwells on the impact and purpose of the Constitution describing it as an "intensely value laden document" (paragraph 111). Sachs J utilises a technique he describes as "interactive proportionality" (paragraph 107) in his attempt to interpret section 241(8). This involves seeking out the "essential purposes and interest to be served by the two competing sets of provisions and then using a species of proportionality, balance them against each other" (paragraph 116). The intention is therefore to harmonise the two sets of provisions thereby preserving as much as possible of both.

Sachs J acknowledges the novelty of the technique he utilises when he states :-

> "I realise that the approach I am suggesting is relatively new in South Africa". (paragraph 126).

He stresses however the function of the court in creating a new jurisprudence in "an appropriately South African way" (paragraph 127).

The judgment of Sachs J represents a fine attempt to develop the jurisprudence relating to constitutional interpretation in South Africa. His technique does not win the approval of his colleagues and he himself acknowledges the novelty of his approach. However Sachs J, is in no doubt as to his role as guardian of the Constitution, and his attempt to reconcile section 241(8) and Chapter 3 so that as he puts it "David and Goliath refrain from mortal strife" (paragraph 145) must be welcomed as a positive contribution, albeit novel, to constitutional jurisprudence in South Africa.

E KRIEGLER J

Kriegler J concurs with the conclusion reached by Mahomed J - albeit for different reasons but rejects the approach of Kentridge J. In a concise judgment, Kriegler J states that his colleagues, in interpreting section 241(8) have asked themselves the incorrect question. He suggests that the correct method lies not in seeking the effect of section 241(8), but rather to ask whether "an accused whose case was pending when the Constitution came into operation is entitled to the benefits it confers" (paragraph 86).

Kriegler J criticises the "proportionality" test utilised by Sachs J on the grounds that Chapter 15 and Chapter 3 in his opinion are of entirely different fields of application and are therefore not in conflict with each other (paragraph 100). He instead contextualises the function of section 241(8) in terms of Chapter 15. (General and Transitional Provisions). Kriegler J, in contrast to Sachs J, draws a qualitative distinction between Chapter 15 and Chapter 3 and advocates as a result, a different interpretive approach to these respective Chapters of the Constitution. He describes section 241(8) as operating "at a different level" to Chapter 3. He specifically rejects a purposive or generous approach to the interpretation of section 241(8). Kriegler J describes the purposive approach as being appropriate for "the broad brush strokes of the constitutional canvas" (paragraph 97). In contrast he describes section 241(8) as having a "narrow, technical and brief purpose and scope" which requires "a close reading" (paragraph 97).

Kriegler's approach then is to read "different parts of the Constitution with different spectacles" (paragraph 100-5). He describes section 241(8) as being a vaguely worded "obscure subsection

of a prosaic transitional provision" (paragraph 92). He rejects the generous approach for the purpose of interpreting section 241(8) and by placing section 241(8) in context, identifies the purpose of the provision as the "mundane" function of designating courts required to deal with pending cases. He does not see Chapter 15 as dealing with substantive law and therefore adopts a restrictive interpretation in keeping with the function (as he sees it) of this chapter.

CHAPTER 3

DISCUSSION

Prior to discussing Mhlungu,[39] it is essential to firstly examine what the Constitution itself says about its interpretation. The interpretation clause is contained in Chapter Three and more specifically in section 35. Section 35(1) states :-

> "In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law".

The key words in section 35(1) are "provisions of this Chapter". This section is applicable only to the interpretation and application of the Chapter of Fundamental Rights. Section 35(3) states :-

> "In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter".

The relationship between section 35(1) and 35(3) will be discussed below.

Mhlungu[40] is a unique judgment in two respects. It was the first judgment resulting in a division amongst the members of the Court and secondly (and most significantly) it was the first decision to involve an analysis of a provision of the Constitution other than Chapter 3. Section 35(1) was therefore not applicable to the interpretation of section 241(8). Mahomed J specifically adopted a generous/purposive interpretation to section 241(8). The question is whether there exists a

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[39] Supra 4

[40] Ibid

dichotomy between the interpretation of Chapter 3 and the remainder of the Constitution as a result of section 35(1). Paraphrasing Kriegler J, do "different parts of the Constitution need to be read with different spectacles?" (paragraph 100). Mhlungu[41] will be analysed in the context of the Constitution itself, section 35 specifically and the jurisprudence of the Court.

A THE JURISPRUDENCE OF THE COURT - SECTION 35 AND CHAPTER 3

The Court has clearly stated its approach to the interpretation of Chapter 3. In Zuma[42] - in which the subject of constitutional interpretation was discussed at length, Kentridge J quoted Lord Wilberforce in Minister of Home Affairs (Bermuda) v Fisher[43] when he called for a generous interpretation - suitable to give individuals the full measure of their fundamental rights (paragraph 14). Kentridge J expresses a cautionary note by quoting Lord Wilberforce's warning that a constitution is a legal instrument subject to legal rules (paragraph 14). He endorses the purposive approach detailed in R v Big M Drug Mart[44] and then quoting from Qozoleni v Minister of Law and Order[45] states that the Constitution must be interpreted in such a way "to give clear expression to the values it seeks to nurture for a future South Africa" (paragraph 17). Kentridge J therefore specifically endorses the values detailed in section 35(1) in the interpretation of

[41]Ibid

[42]Supra 30

[43]Supra 22

[44]Supra 26

[45]1994(1) BCLR 75 E, 1994(3) SA 625 (E)

Chapter 3. However whilst advocating a generous/purposive approach he warns against ignoring the language of the Constitution.

In the subsequent judgment of Makwanyane and Mchunu[46] Chaskalson P quoted the interpretive approach in Zuma[47] with the approval but expanded on the subject. He specifically endorses a purposive approach in the judgment but elaborates as to how the purpose is to be determined. Chaskalson P states that the purpose of a particular provision is to be sought "by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined and where applicable, to the meaning of purpose of the specific rights and freedoms with which it is associated within the text of the Chapter" (paragraph 9). Chaskalson proceeds further to call for a "generous rather than a legalistic" interpretation and he stresses the importance and the background to the adoption of the Constitution (paragraph 10). Chaskalson P thus gives a clear judicial stamp of approval to a purposive approach, coupled with a generous approach, in order to afford the individual the full benefit of the protection of Chapter 3.

In Williams,[48] Langa J in dealing with the interpretation of section 11(2) of Chapter 3 states :-

> "The interpretation of the concepts contained in section 11(2) involves the making of a value judgment by the Court" (paragraph 22).

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[46] 1995(3) SA 391 (CC), 1995(6) BCLR 665 (CC)

[47] Supra 30

[48] 1995(7) BCLR 861 CC

Quoting further from Ex Parte Attorney General, Namibia " in re Corporal Punishment[49] he states that in making this value judgment, the value judgment must be objectively articulated and identified, "regard being had to the contemporary norms, aspirations, expectations and sensitivities of the people as expressed in its national institutions and its Constitution and having further regard to the emerging consensus of values in the civilised international community" (paragraph 22). Thus Langa J in elaborating on the background to a purposive approach to Chapter 3 details further the role the underlying values play and the importance of placing the Constitution in its context of a wider South African society.

Dealing also with the values underpinning the Constitution, Sachs J in Coetzee and Matiso[50] states that the process of interpretation is best achieved by placing the process within a "holistic, value-based and case-oriented framework" (paragraph 46). Referring to section 35(1) he describes the notion of an open and democratic society as "not being merely aspirational or decorative, but normative" and "furnishing the matrix of ideals within which we work" (paragraph 46). The values in section 35(1) being normative therefore provide purpose to interpretation - requiring a purposive interpretation. There is thus clear judicial endorsement for the adoption of a purposive approach in the application of section 35(1) to Chapter 3. The relationship between section 35 and the remainder of the Constitution will now be examined.

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[49] 1991(3) SA 76 (Nm Sc)

[50] Case No. CCT 19/94

B SECTION 35 AND THE CONSTITUTION

The key provision of section 35 is section 35(3). This requires a court to have "due regard" to the provisions of Chapter 3 in the interpretation of any law. Thus section 35(3) compels ("shall") a court to have regard to the values (or the spirit, purport and objects) of Chapter 3 when interpreting any provision.

Equally importantly, the Constitution itself provides several important indicators to its purpose. The Preamble states that there is a need to create a "new order in which all South Africans will be entitled to a common South African citizenship within a sovereign and democratic constitutional state". The Postscript of the Constitution (the Afteramble) describes the Constitution as an "historical bridge between the past of a deeply divided society characterised by strife, conflict and untold suffering and injustice and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex".[51] Finally section 232(4) provides that the Schedules to the Constitution have equal status and are for all purposes part of the substance of the Constitution.

The Constitution therefore provides several indicators that it is to be regarded as an indivisible entity and that a holistic approach is necessary when interpreting the Constitution. With this background, what then is the significance of Mhlungu?[52]

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[51] See E Mureinik - A Bridge to Where? Introducing the Interim Bill of Rights. S.A.J.H.R Vol 10 Part 1 1994

[52] Supra 4

C MHLUNGU - THE IMPLICATIONS

Besides being a valuable case study on the complexity of constitutional interpretation, the real significance of the case is to be found in the majority judgment of Mahomed J. The generous/purposive interpretation utilised to analyse a provision of the Constitution external to Chapter 3 indicates that although section 35(1) may not be directly applicable, in term of section 35(3), the values (or the spirit, purport and objects) underpinning Chapter 3 infuse the entire Constitution and thus the interpretive approach advocated in section 35 radiates throughout the text of the Constitution.

Mhlungu[53] is thus a rejection of the "different spectacles" approach adopted by Kriegler J and implicit in the judgment of Kentridge J. (This could explain his more restrictive approach in Mhlungu[54] when compared to his judgment in Zuma[55]). Mahomed J thus gives a clear indication that he sees the Constitution as an indivisible entity and that whilst different Chapters may perform different functions, the Constitution must be viewed holistically.

Evidence for the view can be found in the other judgments which involved the interpretation of a provision external to Chapter 3. In Executive Council of the Western Cape[56], the Court declared that the Constitutional Principles in Schedule 4 held the same status as any other part of the

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[53]Supra 4

[54]Ibid

[55]Supra 30

[56]CCT 27/1995

Constitution. Chaskalson P whilst underling the interim nature of the Constitution, the fact that different parts differed functionally he said did not detract from their equal status. Further support for the proposition that the Constitution must be viewed holistically from an interpretive perspective can be found in Zantsi[57]. In this decision, Trengove J, whilst not dealing any detail with the subject of interpretation, specifically adopts a purposive approach in analysing section 101(2) and (3) of the Constitution (paragraph 37).

Thus, it was shown earlier that the Court has clearly endorsed a generous/purposive approach to the interpretation of Chapter 3 (in terms of section 35(1)). Mhlungu[58] indicates that this approach is now applicable to the entire Constitution and this is confirmed by subsequent judgments.

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[57]CCT/24/94

[58]Supra 4

CONCLUSION

Mhlungu[59] serves as a valuable case study on the complexity of constitutional interpretation in a constitutional democracy. The seemingly simple task of interpreting a straightforward provision of the Constitution resulted in an illuminating exercise of the difficulties involved. The Court as evidenced by its jurisprudence has clearly endorsed a generous/purposive approach to the interpretation of the Chapter of Fundamental Rights. Mhlungu[60] indicates that this is the approach to be utilised in the interpretation of the entire Constitution. The Constitution is thus subject to one style of interpretation and that there exists no inherent interpretive distinction between Chapter 3 and the remainder of the Constitution.

The Constitution is specifically intended to be a "bridge" between a past characterised by both formal and substantive inequality and future built on a foundation of respect for entrenched fundamental rights. As an "interim" Constitution it inevitably contains transitional provisions. Mhlungu[61] serves to reject the contention that different interpretive approaches are applicable to different Chapters of the Constitution and extends the generous/purposive approach to the entire ambit of the Constitution with the effect that the values in section 35 are seen to radiate throughout the Constitution.

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[59]Ibid

[60]Ibid

[61]Ibid

In conclusion, the jurisprudence developed thus far will serve as the valuable foundation for the interpretation of the "final" Constitution. The proposed interpretation clause (section 39) (contained in Chapter 2 - the proposed bill of rights) bears a strong similarity to section 35 and therefore it is likely that the Court will adopt the approach developed in Mhlungu to interpret the "final" Constitution.

This decision then, reinforces the importance of the values which underlie the Constitution and introduces a measure of consistency and clarity to the field of constitutional interpretation. However, perhaps Sachs J summarises the potential difficulties inherent in the interpretive process, best when he says in Mhlungu[62] :-

> "I might add I regard the question of interpretation to be one to which there can never be an absolute and definitive answer and that in particular, the search of where to locate ourselves on the literal/purposive continuum or how to balance competing provisions, will always take the form of a principled judicial dialogue, in the first place between members of this Court, then between our Courts, the legal profession, law schools, Parliament and indirectly, with the public at large" (paragraph 129).

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[62]Ibid

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