SA MERCANTILE LAW JOURNAL
Vol 30 No 3 2018

Date of publication: June 2019

CONTENTS

Articles

Racism in the workplace: A view from the jurisprudence of courts in the past decade ..... *Bongani Khumalo* (University of the Western Cape) 377

The notion of conflict of interest from a South African insolvency law perspective ..... *Juanitta Calitz* (University of Johannesburg) 395

'Deemed' to be an employee: Adopting the teleological interpretation of statutes ..... *Marius van Staden & Stefan van Eck* (University of Pretoria) 416

Compliance notices in terms of the Companies Act 71 of 2008: Some observations regarding the issuing of and objection to compliance notices ..... *S de Lange* (University of Stellenbosch) 434

The trade mark similarity threshold and function in dilution law: A comparative analysis ..... *Chris Job* (University of Pretoria) 456

Warrantless inspections by the SARS: Limitation of taxpayers' privacy? ..... *Fareed Moosa* (University of the Western Cape) 477

Case note

Regulatory overeach v judicial overreach: Du Bruyn NO & others v Karsten ..... *Mzukisi Niven Njotini* (University of Johannesburg) 499

'DEEMED' TO BE AN EMPLOYEE: ADOPTING THE TELEOLOGICAL INTERPRETATION OF STATUTES

MARIUS VAN STADEN*
Doctoral Candidate, University of Pretoria

STEFAN VAN ECK**
Professor, Department of Mercantile Law, University of Pretoria

Abstract

Recent legislative amendments to the Labour Relations Act 66 of 1995 have introduced so-called 'deemed' provisions of employment to assist in the identification of the parties to triangular employment relationships. This article explores the significance of statutory interpretation in identifying the parties to the employment relationship and the approach of the judiciary in interpreting the term 'deemed'. The 'teleological model' of statutory interpretation is described and the interpretive approach of the Labour Appeal Court is assessed against this model. Teleological interpretation requires that legislative provisions be interpreted to advance their purpose in light of constitutional values. The interpretation that best advances constitutional values must be preferred. In determining such a constitutionally appropriate meaning of the provision, the courts must also have regard to the textual, contextual, teleological, historical, and comparative elements in which the provision occurs. In a recent decision, the Labour Appeal Court failed to consider key constitutional values, the history of the legislative provision, and the comparative law dimension in which the relevant legislative provision is found. The court made little attempt to understand the historical circumstances that led to the adoption of the statutory provision and considered no comparative experience.

* LLB LLM (UJ). Lecturer, Department of Public Law, University of Johannesburg. Orchid ID https://orcid.org/0000–0002–7515–1423. This article is an adapted version of a part of my doctoral thesis at the University of Pretoria entitled *Identification of the Employment Relationship: An Appraisal of the Teleological Interpretation of Statutes.*

** BA LLB LLD (Pret). Professor of Labour Law, Department of Mercantile Law, University of Pretoria. Chair of the African Labour Law Society and the Centre for Insolvency, Labour and Company Law. Orcid ID orcid.org/0000–0002–1563–6736.

I INTRODUCTION

The purpose of section 198(2) of the Labour Relations Act (the LRA)[1] is to identify the true employer of a placed agency worker in the triangular employment relationship. Is the 'temporary employment service' (the TES) or the 'client' the employer under the LRA? This section of the LRA was conceived as the conventional tests of employment, both common-law and statutory, do not cater adequately for the circumstances of TES employees. The section provides, inter alia:

> '(2) For the purposes of this Act, a person whose services have been procured for or provided to a *client* by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer' (emphasis added).

Section 198(2) is clear as to both wording and meaning. The TES, and not the client, is the designated employer and, as such, bears the corresponding responsibilities. Section 198A deals with the protection of agency employees earning below a certain threshold[2] and states, inter alia:

> '(3) For the purposes of this Act, an employee —
> *(a)* performing a temporary service as contemplated in subsection (1) for the client is the employee of the temporary employment services in terms of section 198 (2); or
> *(b)* not performing such temporary service for the client is —
> (i) *deemed* to be the employee of that client and the client is *deemed* to be the employer' (emphasis added).

The LRA provides additional protection to employees earning below the threshold and who work for the client for longer than three months. They 'must be treated on the whole not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment'.[3] They also become indefinitely employed by the employer after a three-month period.[4] In addition, the Minister of Labour may, subject to certain procedural requirements, publish a notice regarding which categories of work should be deemed a TES.[5] It is therefore clear that an inquiry into the

[1] 66 of 1995.
[2] The current threshold is R205 433.30 per year.
[3] Section 189A(5).
[4] Section 189A(3)(*b*).
[5] Section 189A(1)(*c*).

meaning of the term 'deemed' is of paramount importance to a proper construction of the statutory provisions concerned.

In what follows the emphasis is on the significance of statutory interpretation in identifying the parties to the employment relationship. Thereafter, the approaches of the Commission for Conciliation, Mediation, and Arbitration (the CCMA), the Labour Court, and the Labour Appeal Court in interpreting the term 'deemed' are considered. The study then describes and explains the 'teleological model' of statutory interpretation and assesses the interpretive approach of the Labour Appeal Court against this model.

II SIGNIFICANCE OF STATUTORY INTERPRETATION

Legislation has become an indispensable source of contemporary law, both generally and in the context of labour law. Consequently, the role of statutory interpretation has grown significantly and no area of the law has escaped legislative intervention.[6] Similarly, the interpretation of statutes has been described as 'the foundation of legal science'.[7] Labour law is no exception. An enormous number of statutory arrangements, mainly directed at the protection of employees and the advancement of section 23 of the Constitution of Republic of South Africa, 1996 (the Constitution) have been enacted.[8]

There are many reasons for inquiring into the interpretive approach of the judiciary. Chief amongst these is the concern that the neglect of such inquiries will impair the predictability of legal dispositions.[9] If

[6] Spigelman, 'The poet's rich resource: Issues in statutory interpretation' (2001) 21 *Australian Bar Review* 224 at 224.

[7] Von Savigny, *System des Heutigen Romischen Rechts* (Veit 1840) para 32.

[8] Grogan, *Workplace Law* (Juta 2014) 4. These include the Constitution of the Republic of South Africa, 1996 (including s 23 and other relevant provisions); the National Economic, Development and Labour Council Act 35 of 1994; the Labour Relations Act 66 of 1995 (including regulations, guidelines and notices issued by the Minister of Labour, rules of the CCMA, rules of the Labour Court, rules of the Labour Appeal Court, codes of good practice issued by NEDLAC, and essential service notices); the Basic Conditions of Employment Act 75 of 1997 (including regulations, determinations by the Minister of Labour and codes of good practice) (the BCEA); the Employment Equity Act 55 of 1998 (including regulations and codes of good practice); the Skills Development Act 97 of 1998 and Skills Development Levies Act 9 of 1999 (including regulations); the Occupational Health and Safety Act 85 of 1993 (including regulations); the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (including rules and regulations); the Unemployment Insurance Act 63 of 2001 and Unemployment Insurance Contributions Act 4 of 2000 (including regulations); the Mine Health and Safety Act 29 of 1996 (including regulations); and the Employment Services Act 4 of 2014. See Du Plessis, *Re-Interpretation of Statutes* (LexisNexis 2002) 12 for an exploration of what constitutes legislation.

[9] Scalia & Gardner, *Reading Law: The Interpretation of Legal Texts* (Thompson West 2012) xxvii.

litigants in labour matters are unable to predict what legislative provisions require of them, legal certainty is compromised.[10] The purpose of any legislative and constitutional provision is to create a norm to which citizens' conduct should conform.[11] Predictability of outcomes is key to legal certainty and a central requirement of the rule of law.[12]

In law, meaning-generation is a function of interpretation and every application of a text to particular circumstances entails interpretation.[13] Text has no pre-interpretive meaning.[14] This means that every text must be interpreted to attach meaning to provisions and this also applies to labour legislation.[15] Thus, if one appears to encounter a legislative provision that does not need to be interpreted, it has probably been interpreted already. Interpretive principles are always at work.[16] A meaning that appears to leap off the page is a meaning that flows from interpretive assumptions that are so deeply entrenched that they have become invisible.[17] This is so because a statute is a legal instrument that is 'a normative text with a technical effect' in that 'the law itself has techniques for determining the effect of the normative text'.[18]

A second reason why labour lawyers should be concerned with matters of interpretation is that the courts, through their power of interpretation, have the potential to assist in the transformation of South African society.[19] It may be argued that the only way in which the judiciary can contribute to the transformation of society and the achievement of social justice, is through its power of interpretation. This is because the Constitutional Court has firmly established the so-called subsidiary principle that '[w]here there is legislation giving effect to a

[10] Maxeiner, 'Some realism about legal certainty in the globalization of the rule of law' (2008) 31 *Houston Journal of International Law* 27 at 30. See also *President of the Republic of South Africa & another v Hugo* 1997 (4) SA 1 (CC) para 102.

[11] Endicott, 'The value of vagueness' in Marmor & Soames (eds), *Philosophical Foundations of Language in the Law* (OUP 2013) 14 at 16.

[12] Maxeiner, (2008) 31 *Houston Journal of International Law* 30 and s 1(*c*) of the Constitution.

[13] Scalia & Garner, (Thompson West 2012) 53.

[14] Sunstein, 'Interpreting statutes in the regulatory state' (1989) 103 *Harvard Law Review* 405 at 411.

[15] Barak, *Purposive Interpretation in Law* (Princeton University Press 2005) 12.

[16] Sunstein, *The Partial Constitution* (Harvard University Press 1993) 104.

[17] Fish, *Doing What Comes Naturally*: *Change Rhetoric, and the Practice of Theory in Legal Studies* (University Press Durham 1989) 358.

[18] Endicott, (OUP 2013) 15.

[19] Smit, 'Towards social justice: An elusive and challenging endeavour' (2010) 1 *TSAR* 1 at 11.

right in the Bill of Rights, a claimant is not permitted to rely directly on the Constitution.'[20]

Subsidiarity does not mean that the Constitution will play no role in adjudication as a provision must be interpreted in terms of section 39(2) of the Constitution in order to 'promote the spirit, purport and objects of the Bill of Rights'. In *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others; In re: Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others,* the Constitutional Court stated that '[a]ll statutes must be interpreted through the prism of the Bill of Rights'.[21] Subsidiarity means that the Constitution must inspire the meaning attributed to legislative provisions.

This sentiment is undoubtedly relevant in the context of identifying the parties to an employment relationship. Few other issues have the potential to contribute to or undermine the realisation of social justice. The primary purpose of the LRA is to 'advance economic development, social justice, labour peace and the democratisation of the workplace'.[22] The protection extended by labour legislation is only extended to those persons who are defined as 'employees' — those who find themselves outside the borders of this definition are denied protection.[23]

III IMPORTANCE OF IDENTIFYING PARTIES TO EMPLOYMENT RELATIONSHIP

The label 'employee' is a badge of dignity and personhood for all workers.[24] Labour laws regard employees as being in need of protection, while those who fall outside the definition of employee, such as independent contractors, are seen to require a lower level of protection. These workers will have to rely on the law of contract and resolve their disputes through the general court system.[25] Because of the subsidiary principle, workers who fall outside the scope of the term 'employee' will

[20] *Sali v National Commissioner of the South African Police Service & others* (2014) 9 BLLR 827 (CC) paras 4, 72 and n 2. See also *S v Mhlungu & others* 1995 (3) SA 867 (CC) para 59; *MEC for Education: KwaZulu-Natal & others v Pillay* 2008 (1) SA 474 (CC); and *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) para 51.

[21] 2001 (1) SA 545 (CC) para 21.

[22] Section 1 of the LRA.

[23] Le Roux, 'Independent contractors and employees: Some recent distinctions made by the courts' (2015) 25/1 *Contemporary Labour Law* 1 at 1.

[24] *Affordable Medicines Trust & others v Minister of Health & another* 2006 (3) SA 247 (CC) para 59.

[25] Harpur & James, 'The shift in regulatory focus from employment to work relationships: Critiquing reforms to Australian and UK occupational safety and health laws' (2014–2015) 36 *Comparative Labour Law and Policy Journal* 111.

also not be able to rely on the protection of section 23 of the Constitution without first challenging the constitutionality of their exclusion. As Deakin and Wilkinson have shown, '[i]t is no exaggeration to think of the classification of work relationships as the central, defining operation of any labour law system. Without classification, the law cannot be mobilised'.[26]

It is not surprising that the law reports are littered with cases where courts have had to determine whether a person is to be regarded as an employee for the purposes of labour legislation. The statutory definition of the term 'employee' begs as many questions as have been raised by its common-law equivalent.[27] In *National Labor Relations Board v Hearst Publications*, the United States Supreme Court noted: 'Few problems in the law have given greater variety of application and conflict in result than cases arising in the borderline between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing.'[28]

Although the legislature and the International Labour Organisation (the ILO) have done much to assist interpreters in determining the border between employment and commercial relationships, it is foreseen that courts will have to deal with a proliferation of cases where the scope of coverage of labour protection will have to be considered. In the wake of the 'fourth industrial revolution' — a technological revolution that will profoundly alter the way in which we live, work, and relate to others[29] — many will find themselves in new forms of work that bear little resemblance to the archetypes of the twentieth century. Many workers will find themselves in the grey area between employment and self-employment.[30]

Also, many employers actively disguise employees as independent contractors in order to avoid meeting the requirements of labour law.[31] To this should be added the problem of those who find themselves excluded from legislative protection and in illegal or unauthorised forms of work, as well as the phenomenon of labour broking, outsourcing, and short-term contracts. As a result, many workers will find themselves

[26] *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (2005) 4.

[27] Grogan, (Juta 2014) 16.

[28] 322 US 111 (1944) at 121.

[29] Schwab, *The Fourth Industrial Revolution: What it Means, How to Respond,* available at http://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond.

[30] Benjamin, 'An accident of history: Who Is (and who should be) an employee under South African labour law' (2004) 25 *ILJ* 787 at 789.

[31] Benjamin, (2004) 25 *ILJ* 787 at 789.

beyond the scope of labour law protection — a situation already facing millions globally.[32]

Le Roux has indicated that as more workers find themselves in positions where they are excluded from the protection afforded by labour law, the global response has not been to address the emerging failure of the de-commodified contract of employment, but rather to 'stall the inevitable by defining an employee more extensively in the hope that more workers will be drawn into the net of labour law'.[33]

In the Preamble to the Employment Relations Recommendation, 2006, the ILO has acknowledged the centrality of interpretation (or application) in establishing whether or not an employment relationship exists in situations where the respective rights and obligations of the parties concerned are not clear. Brassey indicates that although the definition of 'employee' is open to expansive interpretation, courts prefer to interpret the term conservatively.[34] Instead, our courts have searched for 'a single definitive touchstone to identify the employment relationship'.[35] Some have argued for a new approach to the interpretation of the statutory definition of an employee, rooted in purposive interpretation, which will lead to a more expansive interpretation of the definition of an employee.[36] This interpretation requires that the term be interpreted to give effect to the Constitution and the purpose of a statutory provision.[37] As some have indicated, our courts 'have not yet developed an adequate policy-driven approach in dealing with what has become a significant challenge to the efficacy of employment legislation'.[38] Benjamin has argued that 'the jurisprudential basis for identifying the reality of an employment relationship in our law remains unclear'.[39]

IV MEANING OF 'DEEMED'

The section 189(A)(3)(*b*) meaning of 'deemed' has given rise to interpretive difficulty.[40] Does the client become the employer of the

[32] Davidov & Langille, 'Goals and means in the regulation of work' in Bogg et al (eds), *The Autonomy of Labour Law* (Hart 2015) 1.

[33] Le Roux, 'Employment: A dodo, or simply living dangerously?' (2014) 35 *ILJ* 30 at 32.

[34] Brassey, *Employment and Labour Law* (Juta 2000) B:iii.

[35] Benjamin, (2004) 787.

[36] Benjamin, (2004) 788.

[37] Benjamin, (2004) 798.

[38] Kasuso, '*The Definition of an "Employee" under Labour Legislation: An Elusive Concept*' (unpublished thesis UNISA 2015) 4.

[39] Benjamin, (2004) 794.

[40] Benjamin, 'Restructuring triangular employment: The interpretation of section 198A of the Labour Relations Act' (2016) 37 *ILJ* 28 and Aletter, '*Protection of Agency Workers in South*

placed workers when a period of three months has elapsed, or does the TES remain the employer while the client is merely assumed to be the employer for the purpose of the LRA? In *Assign Services Pty Ltd and Krost Shelving & Racking Pty Ltd*,[41] the National Union of Metalworkers of South Africa (the NUMSA), and a temporary employment service, Assign Services (Assign), submitted a test case to the CCMA to secure interpretive clarity both on the meaning of 'deemed' and on this question. The question arose whether the client becomes the sole employer of the workers — the 'sole employment approach' (contended for by the NUMSA), or whether the TES continues to be the employer for all purposes and may, for instance, terminate the employee's services on behalf of the client — the 'dual employment approach' (as alleged by Assign).[42]

Assign argued that the word 'deemed' has no technical or ordinary meaning and that its meaning and effect must be determined from its context in accordance with the ordinary canons of construction.[43] Two contextual factors were relied on to support the argument that dual employment would establish greater protection for vulnerable workers. Firstly, it was pointed out that subsequent to the three-month period, the deeming provision ends neither the agreements between the employment agency and the client, nor those between the employment agency and the workers.[44] Secondly, it was pointed out that in terms of section 198(4A) of the LRA, employment agencies and clients are jointly liable for breaches of the LRA and the Basic Conditions of Employment Act 95 of 1997 (the BCEA), and that such liability is only possible in circumstances of dual employment.[45]

The NUMSA submitted that the word 'deem' is often used in legislation in a loose sense, and that it could easily be replaced by 'is'. The dictionary meaning of 'deem' was considered, and it was argued that it means 'regard as being'. It was therefore argued that 'deemed' creates a legal fiction that 'the client is the employer of the placed workers, irrespective of what the situation would have been if the legal rule had not been enacted by the legislative provision'.[46] In response to the

Africa: An Appraisal of Compliance with ILO and EU Norms' (unpublished thesis University of Pretoria 2016) 155. See also Aletter & Van Eck, 'Employment agencies: Are South Africa's recent legislative amendments compliant with the International Labour Organisation's standards?' 2016 *SA Merc LJ* 285.

[41] (2015) 36 *ILJ* 2408 (CCMA).

[42] Benjamin, (2016) 28.

[43] *Assign* (CCMA) para 4.1.

[44] *Assign* (CCMA) para 4.4.

[45] *Assign* (CCMA) para 4.5.

[46] *Assign* (CCMA) para 4.2.

argument that in terms of section 198(4A) of the LRA, employment agencies and clients are jointly liable for breaches of the LRA and the BCEA, and that such liability is only possible in circumstances of dual employment, it was argued that 'the section merely provides for an opportunity for an employee to institute proceedings against a party that is liable'.[47]

The CCMA held that 'the correct interpretation is the one that will provide greater protection for the vulnerable class of employees identified by section 198A of the LRA'.[48] This approach is clearly in line with the purposes and values underlying the legislative provision. The Memorandum of Objects on Labour Relations Amendment Bill, 2012, states that the amendments seek to regulate the employment of persons by a TES 'in a way that seeks to balance important constitutional rights' and to 'restrict the employment of more vulnerable, lower-paid workers by a TES to situations of genuine and relevant ''temporary work'''. The CCMA interpreted 'deemed' to mean 'that the client becomes the sole employer of the placed workers for purposes of the LRA, provided that they earn below the threshold and that the three-month period has lapsed'.[49]

In *Assign Services Pty Ltd v CCMA & others*,[50] the Labour Court found that '[t]he issue that arises is whether the [TES] continues to have a relationship with the worker and, if so, whether the relationship remains one of employment'.[51] The court criticised the characterisation of the dispute in terms of the label of either 'sole employment' or 'dual employment'. The court said that the label 'sole employment' was misleading as the contractual relationship between the workers and the TES, and the ensuing rights and obligations embodied therein, remained in force.[52] The label 'dual employment' was also found to be misleading and 'a fertile source of confusion'.[53] This is so, the court held, as the client does not become privy to the contract between the employment service and the worker; nor is it vested with the rights and obligations contained in that contract.[54]

Instead, the court found that the only issue was whether the employment agency continues to be an employer, together with the allied rights

[47] *Assign* (CCMA) para 4.7.
[48] *Assign* (CCMA) para 5.8.
[49] *Assign* (CCMA) para 6.1.
[50] (2015) 36 *ILJ* 2853 (LC).
[51] (2015) 36 *ILJ* 2853 (LC) para 1.
[52] (2015) 36 *ILJ* 2853 (LC) para 3.
[53] (2015) 36 *ILJ* 2853 (LC) paras 4, 26.
[54] (2015) 36 *ILJ* 2853 (LC) para 5.

and responsibilities, for purposes of the LRA alone, and not for the rights and responsibilities flowing from the contractual relationship. It stated:[55]

> 'There seems no reason, in principle or practice, why the TES should be relieved of its statutory rights and obligations towards the worker because the client has acquired a parallel set of such rights and obligations. The worker, in contracting with the TES, became entitled to the statutory protections that automatically resulted from his or her engagement and there seem to be no public policy considerations, such as pertain under the LRA's transfer of business provisions (s 197), why he or she should be expected to sacrifice them on the fact that the TES has found a placement with a client, especially when (as is normally so) the designation of the client is within the sole discretion of the TES.'

There was no factual dispute before the court, and the court therefore refused to replace the CCMA award whilst setting aside the CCMA decision.[56] The left the issue of the correct interpretation of 'deemed' unclear,[57] and prompted Aletter to propose that the purpose of the 'deemed' provision is to create one employment relationship and one contract of employment. Firstly, the author argues that if two relationships were intended, the legislator would have distinguished between the duties of the employment agency and those of the client.[58] Benjamin argues that a single employer should be identified so as to avoid irresolvable conflicts when it comes to matters of control over an employee.[59] Secondly, it is essential to note that the 'deemed' provision was introduced into the LRA in order to provide increased protection for vulnerable groups of employees.[60] Thirdly, the worker will still be entitled to institute proceedings against either the employment agency, the client, or both, in terms of section 189(4A)(*a*) of the LRA, even though he or she is not dually employed.[61]

In *NUMSA v Assign Services*,[62] the Labour Appeal Court, which had no problem in dealing with the labels rejected by the Labour Court, endorsed the 'sole employment approach'[63] and rejected the 'dual employment approach' as 'not consonant with the context of section

[55] (2015) 36 *ILJ* 2853 (LC) para 12.
[56] (2015) 36 *ILJ* 2853 (LC) para 18.
[57] Aletter, (LLD Thesis 2017) 161, 163. For a detailed critique of the decision see Benjamin (2016) 28.
[58] Aletter, (LLD Thesis) 163. See also Aletter & Van Eck, 2016 *SA Merc LJ* 285.
[59] Benjamin, (2016) 36.
[60] Aletter, (LLD Thesis) 164.
[61] Aletter, (LLD Thesis) 164.
[62] (2017) 38 *ILJ* 1978 (LAC).
[63] (2017) 38 *ILJ* 1978 (LAC) para 38.

198A and [its] purpose'.[64] The Labour Appeal Court held that the purpose of the measure is to ensure that employees 'are not treated differently from the employees employed directly by the client', and that it 'should not be interpreted to support the contention that the deemed employees are employed by both the [TES] and the client'.[65] The purpose was not to transfer the contract of employment from the TES to the client.[66] The Labour Appeal Court rejected the submission that because in terms of section 198(4A) of the LRA employment agencies and clients are jointly liable for breaches of the LRA and the BCEA, this liability is only possible in circumstances of dual employment. The court found that this was only a measure to reinforce the protection of vulnerable workers, and consequently that these provisions served the same legislative purpose.[67] Key to this finding is the Labour Appeal Court's emphasis that the employment relationship between the placed worker and the client arises by legal operation, irrespective of any contract of employment between the placed worker and the temporary employment service.[68]

V TELEOLOGICAL MODEL OF INTERPRETATION

In 1976 Cowen expressed the need for a clearly articulated and consistently followed general theory of interpretation of statutes.[69] Although the courts have used several theories (such as intentionalism, contextualism, and purposivism) on various occasions, literalism has dominated. The meaning of an enacted provision was deduced from the exact words in which a provision was couched, regardless of the consequences. [70] Other theories were also not developed to their fullest extent as they were often qualified by the literalist postulate that interpreters could only look beyond the text when the text was vague or when strict adherence would lead to absurdity.[71]

Following the advent of constitutional democracy, much of the received wisdom of the common-law theories of statutory interpretation

[64] (2017) 38 *ILJ* 1978 (LAC) para 40.
[65] (2017) 38 *ILJ* 1978 (LAC).
[66] *Assign* (LAC) para 43.
[67] *Assign* (LAC) para 41.
[68] *Assign* (LAC) para 45.
[69] Cowen, 'Prolegomenon to a restatement of the principles of statutory interpretation' (1976) 2 *TSAR* 131 at 137.
[70] Du Plessis, 'Interpretation' in Woolman et al (eds), *Constitutional Law in South Africa* (Juta 2008) 32–29.
[71] *Reynolds Bros Ltd v Chairman, Local Transportation Board, Johannesburg & another* 1984 (2) SA 826 (W) 828G.

was reconsidered. The judiciary adopted an approach to the interpretation of statutes that sought to animate and give life to the values and rights in the Constitution. Following the toppling of the notion of the 'intention of the legislature' by constitutional supremacy and the constitutional injunction to look beyond the text of a legislative provision, 'broad', purposive, or 'teleological interpretation' supplanted literalist theories of statutory interpretation.[72] Section 39(2) of the Constitution provides that anyone '[w]hen interpreting any legislation must promote the spirit, purport and objects of the Bill of Rights'. The Constitutional Court in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & another,*[73] found that where two conflicting interpretations of a statutory provision are possible, and both can be said to reflect the values of the Constitution, the interpretation which *better* reflects those values should be adopted.

Botha alludes to the fact that the 'fundamental principle of statutory interpretation is that the purpose of the legislation must be determined in the light of the spirit, purport, and objects of the Bill of Rights in the Constitution'.[74] It is striking that this principle endorses the purposive approach whilst at the same time qualifying it. Indeed, teleological interpretation can be seen as a species of purposive interpretation that goes beyond simply establishing the purpose of a legislative provision.

Du Plessis warns that teleological interpretation simpliciter 'has the potential to turn into a rather unruly horse if three *caveats* are not heeded'.[75] Firstly, the processes involved in the interpretation of statutes are too complicated for the purpose of a statutory provision to be described in a simple catchword or catchphrase. Secondly, merely asking what the purpose of a statutory provision is may be restrictive, because the purpose may indeed be restrictive. Merely inquiring into the purpose of a statutory provision can be limiting and ignores the injunction placed upon the courts by section 39 of the Constitution. Thirdly, the warning should be heeded that purpose can also only be determined through processes of interpretation, and that 'the purpose of a provision can simply not be known prior to interpretation'. Such a narrow approach 'too easily seduces an interpreter to read a purpose or object into a provision prematurely, and therefore in an arbitrary manner,

[72] Du Plessis, (Juta 2008) 32–52.
[73] 2009 (1) SA 337 (CC) para 46.
[74] Botha, *Statutory Interpretation: An Introduction for Students* (Juta 2005) 10, 66, 75.
[75] Du Plessis, (Juta 2008) 32–54.

shedding the responsibility to justify or, at least, explain his or her preference'.[76]

The Constitutional Court has endorsed a method of statutory interpretation referred to as 'teleological interpretation',[77] a 'value-activating strategy',[78] or the 'value-coherent theory' of statutory interpretation.[79] The approach was best described in *African Christian Democratic Party v Electoral Commission & another*[80] where the Constitutional Court held that courts must understand provisions in light of their legislative purpose within the overall legislative framework and that, that framework must be understood in the light 1992)of the important constitutional rights and values that are relevant. It may thus be argued that 'broad' purposivism with its alliance to constitutional values is a preferred alternative and a solution to the problems of conventional purposivism. The Constitutional Court has expressly endorsed this approach with regard to labour matters. In *NEHAWU v UCT & others*[81] it was held that the proper approach to construction is to construe a section as a whole and in the light of its purpose and the context in which it appears in the LRA. In addition, regard must be had to the declared purpose of the LRA of promoting economic development, social justice, and labour peace.[82]

Teleological interpretation assumes that the goal of statutory interpretation is to give effect to the purpose of a statutory provision in light of constitutional values. However, the purpose of a statute can only be determined through a process of interpretation. The elementological approach to the interpretation of statutes acknowledges this fact by requiring interpreters to have regard to all the elements of a statutory provision to determine what the purposes of a provision is. These elements are the text, context, telos, history, and comparative environment of a provision. The elementological approach does not intend to suggest a formula to determine or calculate legislative purpose. Instead, according to Du Plessis, statutes are made up of grammatical, systematic, purposive, or historical 'elements' which should be seen as 'simulta-

[76] Du Plessis, (Juta 2008) 32–55.
[77] Botha, (Juta 2005) 59.
[78] Devenish, *Interpretation of Statutes* (Juta 1992) 40.
[79] Devenish, (Juta 1992) 39.
[80] 2006 (3) SA 305 (CC) para 34.
[81] 2003 (3) SA 1 (CC).
[82] *NEHAWU* para 62. See also *Aviation Union of South Africa & another v South African Airways (Pty) Ltd & others* 2012 (1) SA 321 (CC) paras 34, 35.

neously given, co-equal modes of existence or being that are ''on the move'', overlapping and interacting'.[83]

Firstly, grammatical interpretation is used to limit the possible meaning of a provision and focuses on how the convention of natural language assists the interpreter.[84] It is not a throwback to literalism and does not claim that only textual elements may be taken into consideration.[85] Grammatical interpretation merely acknowledges that text should serve as a starting point, and that the richness of the textual environment can greatly assist the interpreter in determining the meaning of a statutory provision. This element also means that interpreters are required to observe the conventions of the language in which the provision is couched.[86]

Secondly, systematic or contextual interpretation requires that a legislative provision be understood in light of the intra-textual and extra-textual environment of which it forms part.[87] Contextual interpretation requires that we understand a legislative provision in the light of the text of the Act (ie, the Constitution) as a whole (the 'intra-textual environment') and of principles outside of the Act (the 'extra-textual environment'). The 'intra-textual environment' includes the Preamble to the Act, the long title, the definition clause, the objects of an Act, interpretation provisions, headings above chapters, headings above articles, and annexures. The 'extra-textual environment' refers to the 'wider network of enacted law and other normative law-texts such as precedents' as well as to 'the political and constitutional order, society and its legally recognized interests and the international legal order'.[88]

Contextual interpretation requires that a legislative provision be understood in light of the 'logic' or 'system' of which the provision forms part. When these intra-textual and extra-textual text-components are not integrated with the particular statutory provision, they become 'dis-integrated' from the rest of the legal system and will be understood in isolation from each other.[89]

Thirdly, teleological or broad purposive interpretation requires that a statute be understood in light of its purpose.[90] It is presumed that the

[83] Du Plessis, 'The (re-) systematization of the canons of and aids to statutory interpretation' (2005) 122 *SALJ* 591 at 611.
[84] Du Plessis, (Juta 2008) 32–159.
[85] Du Plessis, (LexisNexis 2002) 198.
[86] Du Plessis, (LexisNexis 2002) 208.
[87] Du Plessis, (Juta 2008) 32–159.
[88] Du Plessis, (Juta 2008) 32–159, 32–166.
[89] Tribe & Dorf, *On Reading the Constitution* (Harvard University Press 1991) 21–30.
[90] Du Plessis, (Juta 2008) 32–160.

aim of all legislation is to advance broader societal purposes.[91] Teleological interpretation endeavours to advance the values of the legal order.[92] Traditionally, purposive interpretation has been anchored in two objective elements. Firstly, interpreters should assume that the legislature is composed of 'reasonable people seeking to achieve reasonable goals in a reasonable manner'. Secondly, interpreters should accept that the legislature 'sought to fulfil their constitutional duties in good faith'.[93]

The Constitutional Court has held that contextual and purposive interpretation are interlinked and that interpretations must therefore be context-sensitive.[94] Purposive interpretation without contextual interpretation is impossible as it is only through the context of a statutory provision that we are able to determine the purpose of a provision. Conversely, purpose is also an important contextual factor to be considered. The point is, therefore, that in the interpretation of constitutional values, the interpreter will have to take cognisance of other textual and intra-textual components in the environment of the constitutional value. The interpreter will not be able to ignore the arguably more substantive provisions of the Constitution and rely 'merely' on constitutional values.

Fourthly, historical interpretation requires the interpreter to consider the tradition from which a provision emerged and allows him or her to consider material relevant to the genesis of the written text and other historic events.[95] Historical interpretation requires the interpreter to identify the historical situation that gave rise to the law, although it is sufficient that the spirit of the history be taken into account. The mischief rule acknowledges the link between purposive and statutory interpretation. Teleological interpretation which does not take account of the history of a provision is therefore not possible.[96]

Fifth, comparative interpretation allows the interpreter to understand a provision in light of international standards and to seek guidance from other legal systems.[97] In terms of section 39(1) of the Constitution, '[w]hen interpreting the Bill of Rights, a court, tribunal or forum ... must consider international law' and 'may consider foreign law'. International and foreign authorities are important because courts in these

[91] Du Plessis, (Juta 2008) 32–168.
[92] Du Plessis, (Juta 2008) 247.
[93] Barak, (Princeton University Press 2005) 87.
[94] *Matatiele Municipality & others v President of the Republic of South Africa & others* 2006 (5) SA 47 (CC) paras 36, 37.
[95] Du Plessis, (Juta 2008) 32–160.
[96] Du Plessis, (Juta 2008) 32–170.
[97] Du Plessis, (Juta 2008) 32–160.

jurisdictions have already analysed arguments for and against propositions and have shown how they have dealt with the matter.[98] The Constitutional Court has held that the Conventions and Recommendations of the ILO are the most important source of South Africa's public international law obligations in respect of labour law.[99]

VI APPROACH OF LABOUR APPEAL COURT IN *ASSIGN SERVICES*

Three significant points can be abstracted from the above. First, the term 'deemed' must be interpreted to advance the purpose of section 189A(3) of the LRA in light of constitutional values. Second, the interpretation that best advances the constitutional values relevant to the provision must be preferred. Third, in determining such a constitutionally appropriate meaning of the provision, the courts must have regard to the textual, contextual, teleological, historical, and comparative elements in which the provision occurs.

In *Assign* the Labour Appeal Court expressly endorsed a purposive approach to the interpretation of legislative provisions.[100] The Labour Appeal Court referred to the interpretive principles in section 39(2) of the Constitution[101] and section 3 of the LRA,[102] as well as to the purposes

[98] *S v Makwanyane* 1995 (3) SA 391 (CC) para 34.

[99] *NUMSA & others v Bader Bop Pty Ltd & another* 2003 (3) SA 513 (CC) para 28.

[100] *Assign* (LAC) para 31. The court referred to *Natal Joint Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18, where the SCA commented as follows on what it believes to be the proper approach to statutory interpretation: 'The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The ''inevitable point of departure is the language of the provision itself'', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.' What is striking in this passage is the absence of any reference to the Constitution. It is unclear why the LAC did not refer to the rich jurisprudence of the Constitutional Court.

[101] *Assign* (LAC) para 28.

[102] *Assign* (LAC) para 29.

of the LRA contained in its section 1.[103] The Labour Appeal Court held that the purpose of the measure is to ensure that employees 'are not treated differently from the employees employed directly by the client' and that it 'should not be interpreted to support the contention that the deemed employees are employed by both the TES and the client'.[104] The court further noted that 'the intention must have been to upgrade the temporary service to the standard employment and free the vulnerable worker from atypical employment by the TES'.[105]

However, the question arises whether the purpose that the court has identified best gives effect to the values contained in the Constitution. For example, can it not be argued that employees would be better protected if, in fact, deemed employees were to be employed by both the TES and the client? If such a possibility could exist, then such an interpretation could arguably better further the constitutional values of fair labour practices and human dignity. In light of the stated purposes of section 189A(3) of the LRA and the entitlement of these workers to institute proceedings against either the employment agency, or the client, or both, in terms of section 189(4A)(*a*) of the LRA, it is reasonable to think that an interpretation where deemed employees are employed by both the TES and the client would better serve the constitutional values. It is lamentable, however, that the Labour Appeal Court did not justify its interpretation with reference to relevant constitutional values. In doing so, the court has left its judgment open to attack.

It can nevertheless not be said that the Labour Appeal Court regarded the matter in a literalist or orthodox fashion. In fact, the court was at pains to balance the various elements to be taken into account when interpreting a legislative provision. The court noted that '[t]he plain language of s198A(3)(b) of the LRA, interpreted in context unambiguously supports the sole employer interpretation and is in line with the purpose of the amendment, the primary object of the LRA and protects the rights of placed workers'.[106] What is absent from the Labour Appeal Court's analysis, however, is an exploration of the constitutional values, the history of the legislative provision, and the comparative law dimension (including international and foreign law) in which a legislative provision is found. The court made little attempt to understand the historical circumstances that led to the adoption of the statutory

[103] *Assign* (LAC) para 30.
[104] *Assign* (LAC) para 30.
[105] *Assign* (LAC) para 43.
[106] *Assign* (LAC) para 43.

provision and considered no comparative experience, although it was prompted to do so by counsel.[107]

VII CONCLUSION

The Labour Appeal Court undoubtedly reached the correct decision, but the judgment was poorly supported by authoritative sources. In fact, the court only referred to relevant legislative provisions, one academic article, and four precedents.[108] Also, the court failed to consider whether the 'dual' employment relationship would not have provided employees with improved protection.

This is not to say that the findings of the court are not to be welcomed. However, although a judgment can be regarded as correct, this does not mean that the desirability of an outcome excuses or justifies poor legal science. This point is important because the judiciary might not always get it right, and, therefore, the courts may realise Du Plessis's warning that purposive interpretation without consideration of constitutional values has the potential to turn into a rather unruly horse.[109]

It is trite that ignorance of historic and teleological considerations is restrictive. It could mean that a court will be unable to understand the fullness of the purpose of a legislative provision, and could lead to a situation where the interpretation of legislative provisions does not advance the (transformative) vision of the Constitution.

The judiciary would do well to advance a teleological model of statutory interpretation that serves the values of our social order, firmly rooted in the elements of text, context, values, history, and foreign and international law. Such interpretive methodology would advance both interpretive predictability and the transformative vision of the Constitution. In addition, the approach is sufficiently flexible to respond effectively to rapidly changing socio-economic contextual factors.

As the employment relationship becomes increasingly regulated by legislation, labour lawyers will be increasingly required to consider matters related to interpretation. However, this will require labour lawyers to be cognisant of the public-law requirements of the interpretation of statutes and to accept the notion that the ultimate meaning given to a legislative labour provision will often require more than an in-depth knowledge of labour law as a discipline.

[107] *Assign* (LAC) para 27.

[108] *Assign* (LAC) 1–6.

[109] Du Plessis, (Juta 2008) 32–54. Note that subsequently the Constitutional Court has handed down judgment in this matter in *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa* 2018 (5) SA 323 (CC).