CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 68/19

In the matter between:

INDEPENDENT INSTITUTE OF EDUCATION (PTY) LIMITED	Applicant
and	
KWAZULU-NATAL LAW SOCIETY	First Respondent
LAW SOCIETY OF SOUTH AFRICA	Second Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
MINISTER OF HIGHER EDUCATION AND TRAINING	Fourth Respondent
SOUTH AFRICAN QUALIFICATIONS AUTHORITY	Fifth Respondent
COUNCIL ON HIGHER EDUCATION AND TRAINING	Sixth Respondent
NATIONAL FORUM ON THE LEGAL PROFESSION	Seventh Respondent
GENERAL COUNCIL OF THE BAR	Eighth Respondent
CAPE LAW SOCIETY	Ninth Respondent
LAW SOCIETY OF THE FREE STATE	Tenth Respondent
LAW SOCIETY OF THE NORTHERN PROVINCES	Eleventh Respondent

NELSON MANDELA UNIVERSITY	Twelfth Respondent
UNIVERSITY OF KWAZULU-NATAL	Thirteen Respondent
UNIVERSITY OF PRETORIA	Fourteenth Respondent
UNIVERSITY OF JOHANNESBURG	Fifteenth Respondent
UNIVERSITY OF VENDA	Sixteenth Respondent
RHODES UNIVERSITY	Seventeenth Respondent
UNIVERSITY OF THE WESTERN CAPE	Eighteenth Respondent
UNIVERSITY OF CAPE TOWN	Nineteenth Respondent
UNIVERSITY OF STELLENBOSCH	Twentieth Respondent
UNIVERSITY OF WITWATERSRAND	Twenty-first Respondent
UNIVERSITY OF FORT HARE	Twenty-second Respondent
NORTH WEST UNIVERSITY	Twenty-third Respondent
UNIVERSITY OF FREE STATE	Twenty-fourth Respondent
UNIVERSITY OF LIMPOPO	Twenty-fifth Respondent
UNIVERSITY OF ZULULAND	Twenty-sixth Respondent
WALTER SISULU UNIVERSITY	Twenty-seventh Respondent
UNIVERSITY OF SOUTH AFRICA	Twenty-eighth Respondent

Neutral citation: *Independent Institute of Education (Pty) Limited v Kwazulu-Natal Law Society and Others* [2019] ZACC 47

Coram: Mogoeng CJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J, and Victor AJ

Judgments: Mogoeng CJ (majority): [1] to [34]
Theron J (concurring): [35] to [54]

Heard on: 29 August 2019

Decided on: 11 December 2019

Summary: Application for confirmation of an order of constitutional invalidity by the High Court — Section 26(1)(a) Legal Practice Act 28 of 2014 — Meaning of the term "university" — Principles of statutory interpretation—Section 39(2) of the Constitution.

ORDER

In an application for the confirmation of the order of the KwaZulu-Natal Division of the High Court, Pietermaritzburg, the following order is made:

1. The order by the KwaZulu-Natal Division of the High Court, Pietermaritzburg that section 26(1)(a) of the Legal Practice Act 28 of 2014 is constitutionally invalid, is not confirmed.
2. It is declared that a Bachelor of Laws graduate of the Independent Institute of Education (Pty) Limited is eligible for admission and enrolment as a legal practitioner in terms of the Legal Practice Act 28 of 2014.
3. The KwaZulu-Natal Law Society must pay the costs of the Independent Institute of Education (Pty) Limited in this Court and in the High Court, including costs of two counsel.

JUDGMENT

MOGOENG CJ (Jafta J, Khampepe J, Madlanga J, Mathopo AJ, Mhlantla J, and Victor AJ concurring):

[1] It would be a woeful misrepresentation of the true character of our constitutional democracy to resolve any legal issue of consequence without due deference to the pre-eminent or overarching role of our Constitution.[1]

[2] The interpretive exercise is no exception. For, section 39(2) of the Constitution dictates that "when interpreting any legislation . . . every court, tribunal, or forum must promote the spirit, purport and objects of the Bill of Rights". Meaning, every opportunity courts have to interpret legislation, must be seen and utilised as a platform for the promotion of the Bill of Rights by infusing its central purpose into the very essence of the legislation itself.

[3] And this is what this application is really about— giving an interpretation to a legislative provision primarily concerned about its consistency, not with another legislation but, with the Bill of Rights. This should be done in recognition of the ever-abiding guiding or instructive hand of our Constitution.

Background

[4] The Independent Institute of Education (Pty) Limited (Institute) is a duly registered private higher education institution. It has also been accredited to offer and confer a four-year Bachelor of Laws (LLB) degree on its graduates. It is common cause that its LLB programme meets the same requirements and standards set for public universities.

[1] Section 1(c) provides:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> . . .
>
> (c) Supremacy of the constitution and the rule of law."

Section 2 provides:

> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

[5] And when the South African Qualification Authority gave accreditation to the Institute's LLB programme, it pointed out that one of the degree's stated objectives was to equip prospective graduates for "the professional practice of law and the administration of justice in the modern South African constitutional state" and that "graduates will be able to apply for admission as legal practitioners".

[6] That notwithstanding, the KwaZulu-Natal Law Society (Law Society) took the position that it would not register articles of clerkship of aspirant attorneys with LLB degrees from the likes of the Institute. Here is why.

[7] Section 26 of the Legal Practice Act provides in relevant parts:

> "(1) A person qualifies to be admitted and enrolled as a legal practitioner, if that person has—
>
> (a) satisfied all the requirements for the LLB degree obtained *at any university registered in the Republic*, after pursuing for that degree—
>
> (i) a course of study of not less than four years; or
>
> (ii) a course of study of not less than five years if the LLB degree is preceded by a bachelor's degree other than the LLB degree, as determined in the rules of the university in question and approved by the council…"

[8] The Law Society contended that the words "any university registered in the Republic" exclude the Institute. This is said to be so because, although the Legal Practice Act does not define the word "university", the Higher Education Act[2] does so but in a way that excludes institutions like the Institute. It defines a "university" as—

> "a higher education institution providing higher education and with a scope and range of operations, including undergraduate and postgraduate higher education programmes, research and community engagement, which meets the criteria for recognition as a university as presented by the Minister under section 69(d); and
>
> . . .

[2] Act 101 of 1997.

(a) registered as private university, in terms of this Act."[3]

[9] The Minister of Higher Education has not yet set the "criteria for recognition as a university" to be met by a private university or private institution of higher learning desirous of being accordingly registered.[4] In the absence of that criterion, the Institute cannot, so it is argued, be said to have met unknown registration criteria. For this reason, it is not a "university" within the meaning of the Higher Education Act and by extension section 26(1)(a) of the Legal Practice Act.

[10] As a result of this perceived hurdle, the Institute challenged the constitutionality of section 26(1)(a) of the Legal Practice Act on the grounds that it is inconsistent with sections 9, 22 and 29(3) of the Constitution. It did so in the KwaZulu-Natal Division of the High Court, Pietermaritzburg (High Court).[5] Relying on the definition of "university" in the Higher Education Act, the High Court concluded as follows:

> "For these reasons the answer to the question whether "university" can be read to include the [Institute], must be [answered] in the negative. The KZN Law Society can therefore not be faulted for its failure to give a different and wider meaning to the concept of university. The 'decision' did not ignore the provisions of the Higher Education Act, it in fact applies them, given that the Act maintains the distinction between various types of higher education institutions."[6]

It went on to say:

> "I find that, having shown that the applicant meets the criteria set out in section 29(3) and those in Chapter 7 of the Higher Education Act, the applicant enjoys the same rights to offer the accredited four-year LLB as public universities, and its exclusion from section 26(1)(a) of the Legal Practice Act, limits this right."[7]

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[3] Section 1 of the Higher Education Act 101 of 1997.

[4] As envisaged in section 69(d) of the Higher Education Act.

[5] *Independent Institute of Education (Pty) Ltd v The KwaZulu- Natal Law Society* 2019 (4) SA 200 (KZP) (High Court judgment).

[6] Id at para 23.

[7] Id at para 26.

[11] The High Court went on to hold that section 26(1)(a) of the Legal Practice Act was constitutionally invalid by reason of its inconsistency with sections 9, 22 and 29(3) of the Constitution. This it said because it was satisfied that the word "university" in section 26(1)(a) of the Legal Practice Act clearly excludes private higher education institutions, duly registered and accredited to offer the LLB degree.[8]

[12] The High Court correctly referenced the meaning of the word "university" in the Oxford English Dictionary. There it is defined as "a high-level educational institution in which students study for degrees and academic research is done". But, even after referring to a collation of interpretive principles in *Cool Ideas*,[9] that is not the meaning it gave to "university" in section 26(1)(a) as it concluded that the applicant did not fall within that meaning.

[13] Several questions thus arise. Is the Institute not "a high-level educational institution in which students study for degrees and academic research is done"? Would it be absurd to give the word "university" its ordinary grammatical meaning? Would an absurdity not arise when "university" is construed in a way that excludes what is in reality a university? Is there anything about the contextual or purposive interpretation of section 26(1)(a) that supports the meaning of the words "any university" that excludes a private higher education institution? There is, in my view, no sound reason for not giving the word "university" its ordinary grammatical meaning and for not concluding that its contextual and purposive construction ought to save section 26(1)(a) from constitutional invalidation. To do otherwise would be absurd.

[14] Additionally, there is no principle of interpretation that requires a court without more to interpret one piece of legislation with reference to another. I say without more advisedly, because a special meaning given to a word or expression in one

[8] Id at para 52 and paragraph 2 of the High Court's order.

[9] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) (*Cool Ideas*).

statute may not be assigned to the same word or expression in another statute which does not define that same word either at all or in the same terms.

[15] That said, where a provision of a statute is either sought to be interpreted or tested for constitutional validity, it may at times be appropriate to consider how another statute deals with a similar issue. But even under those circumstances, the latter statute cannot be any more than an interpretive aid. It would thus be impermissible to use as a standard to be adhered to or to attach more weight to a word in a statute that is not being challenged, to determine the constitutionality of an impugned statute. The Constitution is the standard to be complied with in determining the constitutionality of any legislation. More importantly, where the ascertainment of the meaning or constitutionality of a provision may be enabled by direct guidance from the Bill of Rights as in this case, then that superior interpretive aid or measurement of constitutionality should render unnecessary any reference to whatever legislation might appear to be relevant. Put bluntly, if when considering the constitutionality of a particular legislation it becomes apparent that its provisions are consistent with or promote the Bill of Rights, there would be no need to still ascertain whether its provisions are consistent with those of another related legislation.

[16] More tellingly, the Higher Education Act opens its definition section in these terms:

> "In this Act, unless the context otherwise indicates – "university" means any university established, deemed to be established or declared as a university under this Act."[10]

[17] It follows that the special meaning given to "university" in that Act is confined to instances where the Higher Education Act itself applies. But, even then, the definition applies subject to context. Room is left for the word "university" to be given a meaning that is at variance with that specially defined one even where the

[10] Section 1 of the Higher Education Act.

Higher Education Act applies. And this is in line with our jurisprudence. In *Liesching I* we said:

> "'Appeal' is defined in section 1 of the Superior Courts Act. Where a word is defined in a statute, the meaning ascribed to it by the Legislature must prevail over its ordinary meaning. The definition makes plain that the word 'appeal' would only bear the meaning ascribed to it by the Legislature if the context so requires. If, however, there are compelling reasons, based on the context, to disregard the ascribed meaning then the ordinary meaning of the word must be used. If a defined word or phrase is used more than once in the same statute it must be given the same meaning unless the statutory definition would result in such injustice or incongruity or absurdity as to lead to the conclusion that the Legislature could never have intended the statutory definition to apply."[11]

[18] To concretise this approach, the following must never be lost sight of. First, a special meaning ascribed to a word or phrase in a statute ordinarily applies to that statute alone. Second, even in instances where that statute applies, the context might dictate that the special meaning be departed from. Third, where the application of the definition, even where the same statute in which it is located applies, would give rise to an injustice or incongruity or absurdity that is at odds with the purpose of the statute, then the defined meaning would be inappropriate for use and should therefore to be ignored. Fourth, a definition of a word in the one statute does not automatically or compulsorily apply to the same word in another statute. Fifth, a word or phrase is to be given its ordinary meaning unless it is defined in the statute where it is located. Sixth, where one of the meanings that could be given to a word or expression in a statute, without straining the language, "promotes the spirit, purport and objects of the Bill of Rights", then that is the meaning to be adopted even if it is at odds with any other meaning in other statutes.

[19] The Higher Education Act does not itself have a fixed general meaning of "university" that necessarily applies to the Act in its entirety. Parliament knows all

[11] *Liesching v The State* [2016] ZACC 41; 2017 (2) SACR 193 (CC); 2017 (4) BCLR 454 (CC) at para 33 (*Liesching I*). *Liesching I* confirms *Canca v Mount Frere Municipality* 1984 (2) SA 830 (Tks) at 832B–G.

pieces of legislation it has passed. Had it wanted to ascribe to "university" in the Legal Practice Act the same meaning it gave to it in the Higher Education Act, it would have been all too easy for it to do so. But, it chose not to. This despite the fact that it knew that words carry their ordinary meaning unless a special meaning is ascribed to them. Absent a defined special meaning in the Legal Practice Act, "university" must thus be given its ordinary meaning.

[20] Section 26(1)(b) of the Legal Practice Act requires that a graduate seeking to practice law in South Africa with a law degree from another country, holds a degree of the quality or standard that "is equivalent to the LLB degree and recognised by the South African Qualifications Authority". The Institute offers such a recognised degree. How then can a foreign equivalent of the LLB degree awarded by our public universities be acceptable in terms of the Legal Practice Act but a domestic equivalent by a private higher education institution is not acceptable just because the institution is not referred to as a "university or public university"? Surely the mere absence of the section 69(d) registration criteria may not disqualify what is in reality a "university" from being treated as such.

[21] The Legal Practice Act exists to facilitate entry into the legal profession by all who have acquired a four-year LLB degree of a standard acceptable to the South African Qualifications Authority. It bears repetition that in accrediting the Institute's LLB degree the Authority said that the degree would equip the graduates "for the professional practice of law" and enable them "to apply for admission as legal practitioners".

[22] Section 26(1)(a) was declared constitutionally invalid, not because it defined "university" in a way that excludes the Institute and that is thus inconsistent with the Constitution. But because it did not include certain words contained in the definition of "university" in the Higher Education Act. That approach gives rise to the injustice

and absurdity alluded to in *Liesching I*.[12] This is so because there is nothing in or about the Legal Practice Act that compels that the definition of "university" in the Higher Education Act must apply to it. And the ordinary meaning of "university" accords with the provisions of section 29 of the Constitution and promotes the very essence of the Bill of Rights.

[23] It is section 26(1)(a) itself that must be construed with reference to relevant constitutional provisions to determine what it means and whether it is constitutional— not a definitional section of the Higher Education Act. More importantly, that interpretive exercise, properly done in obedience to the dictates of section 39(2) of the Constitution, must be sensitive to the obligation courts have to promote the fundamentals of the Bill of Rights. And the Bill of Rights provides for private institutions of learning in section 29. The relevant part of section 29 says:

> "(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that—
> (a) do not discriminate on the basis of race;
> (b) are registered with the State; and
> (c) maintain standards that are not inferior to standards at comparable public educational institutions."

[24] The Institute is "an independent educational institution" envisaged by section 29(3) of the Constitution. There is no suggestion that it seeks to discriminate on any constitutionally-objectionable basis. It is registered with the State and the accreditation of its LLB programme confirms that it is of a standard that is not inferior to that of a public university. It too offers a four-year LLB degree. The establishment of a constitutionally-compliant institution, like the Institute, promotes the spirit, purport and objects of section 29 of the Constitution. It increases the pool wherefrom higher education of an appropriate standard could be made accessible to many. We

[12] See *Liesching I* above n 7 at para 33.

must guard against our judgment mistakenly undermining or frustrating the essence of the Bill of Rights.

[25] All these considerations point to no other conclusion but that a registered independent higher institution of learning, like the Institute, whose character and programmes meet the constitutional and statutory requirements of an equivalent public institution, is a "university". To conclude otherwise would amount to putting form over substance. And it would give rise to an absurdity and injustice because everything about the Institute demonstrates beyond doubt that it is a "university" properly so called.

Conclusion

[26] The Law Society sought to interpret a word in one piece of legislation through the prism of a special meaning ascribed to it in another. This is impermissible in law barring, for example, instances where the need to do so flows effortlessly from context or from the provisions of the statutes being used as a guideline, or where for example the impugned provision cross-references a meaning of the same word or expression in another legislation. But even then, without disregarding the very provisions of legislation sought to be relied on or inadvertently side-lining the section 39(2) injunction.

[27] No attempt was made to grapple with the possibility of giving "university" in section 26(1)(a) its ordinary grammatical meaning, to properly reflect on its contextual and purposive meaning or to interpret this word consistently with section 29(3) of the Constitution. The sad reality is that the determinative issue in the High Court was the definition of "university" in the Higher Education Act which was not challenged or sought to be interpreted. This is what brought us where we are.

[28] The words "any university" in section 26(1)(a) are thus capable of and should be given a meaning that is in conformity with the provisions of section 29(3) of the Constitution. And that gives significance to section 39(2). The High Court order

declaring section 26(1)(a) of the Legal Practice Act constitutionally invalid will thus not be confirmed.

Costs

[29] The Institute has asked for costs against the Minister of Justice and Correctional Services. The basis is that he failed to take measures admittedly necessary to have section 26(1)(a) amended to include "private higher education institutions duly accredited and registered to provide the LLB degree".

[30] The Minister does not oppose this application and has expressed an intention to initiate the process that would culminate in Parliament hopefully passing an amendment that addresses the Institute's concerns. But a proper interpretation has shown that section 26(1)(a) does not preclude the Institute's LLB graduates from being admitted as legal practitioners. Meaning, the Minister has not failed to do anything that he was supposed to do.

[31] The Law Society took the view that an accredited LLB degree from a duly registered "private higher educational institution in which students study for degrees" is not a university for the purpose of section 26(1)(a). The Law Society's mistake is therefore the source of the problem. And it has effectively been unsuccessful. Costs ought ordinarily to follow the result.

[32] Mindful of this possible outcome, we invited the parties, including the Law Society, to file submissions explaining why the Law Society should not be ordered to pay costs of the application in this Court and in the High Court, including costs of two counsel. The Institute is not opposed to that order whereas the Law Society is.

[33] We are satisfied that it is the Law Society, not the Minister, who should bear costs in this Court and in the High Court. Accordingly, the Law Society or its

successor, the KwaZulu-Natal Provincial Legal Council, will be ordered to pay costs of the Institute, including costs occasioned by the employment of two counsel.

Order

[34] The following order is made:

1. The order by the KwaZulu-Natal Division of the High Court, Pietermaritzburg that section 26(1)(a) of the Legal Practice Act 28 of 2014 is constitutionally invalid, is not confirmed.
2. It is declared that a Bachelor of Laws graduate of the Independent Institute of Education (Pty) Limited is eligible for admission and enrolment as a legal practitioner in terms of the Legal Practice Act 28 of 2014.
3. The KwaZulu-Natal Law Society must pay the costs of the Independent Institute of Education (Pty) Limited in this Court and in the High Court, including costs of two counsel.

THERON J (Froneman J concurring):

Introduction

[35] I have had the pleasure of reading the comprehensive judgment by the Chief Justice, Mogoeng CJ (first judgment). I agree with the proposed order and general reasoning in the first judgment. I write this concurrence only to address the narrow principle that courts should interpret legislative provisions with reference to, and consistently with, other legislation.

Approach to statutory interpretation

[36] The High Court gave "university" in section 26(1)(a) of the Legal Practice Act the meaning ascribed to "university" in the Higher Education Act. The first judgment finds that the High Court erred in this regard. The first judgment gives "university" its

ordinary, grammatical meaning "a high-level educational institution in which students study for degrees and academic research is done".

[37] The question thus arises regarding the extent to which a court should consider other legislation when interpreting a specific legislative provision. In particular, what is the relationship between our statutory canons and a contextual approach to interpretation, which requires consideration of other legislation, and the constitutional injunction to interpret legislation so as to promote the sprit, purport and objects of the Bill of Rights?

[38] It is a well-established canon of statutory construction that "every part of a statute should be construed so as to be consistent, so far as possible, with every other part of that statute, and with every other unrepealed statute enacted by the Legislature".[13] Statutes dealing with the same subject matter, or which are *in pari materia*, should be construed together and harmoniously.[14] This imperative has the effect of harmonising conflicts and differences between statutes. The canon derives its force from the presumption that the Legislature is consistent with itself. [15] In other words, that the Legislature knows and has in mind the existing law when it passes new legislation, and frames new legislation with reference to the existing law. Statutes relating to the same subject matter should be read together because they should be seen as part of a single harmonious legal system.

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[13] *Chotabhai v Union Government (Minister of Justice)* 1911 AD 13 at 24.

[14] In *Commander v Collector of Customs* 1920 AD 510 at 513 the reasoning of the court of first instance, per Dove-Wilson JP is quoted as follows:

> "Customs Management Acts and their relative Tariff Acts may, I think, very fairly be taken to be statutes *in pari materia*, and the rule was thus laid down by Lord Mansfield, CJ, as far back as 1788 in the *King v Loxdale*: 'Where there are different statutes *in pari materia*, though made at different times, or even expired, and not referring to each other, they shall be taken and construed together as one system, and as explanatory of each other.' Or as Lord Esher, MR, in *Hodgson v Bell* puts it: 'It is a clear rule of construction that, where you find a construction has been put upon words in a former Act, which is *in pari materia* with the one under consideration, and when you find that the same words are used in the later Act as in the former, you must apply the same construction to the later Act'."

This reasoning was endorsed by the Appellate Division as being "conclusive" at 522.

[15] *Principal Immigration Officer v Bhula* 1931 AD 323 at 335.

[39] This canon of statutory interpretation was expressly recognised and affirmed by this Court in *Shaik*.[16] In that case it was held that the words "any person" in section 28(6) of the National Prosecuting Authority Act,[17] despite their wide ordinary meaning, should be construed restrictively to avoid a clash with a provision in another statute.[18]

[40] More recently, this Court in *Ruta*[19] interpreted provisions of the Immigration Act[20] together and in harmony with those of the Refugees Act.[21] In a unanimous judgment, this Court noted that "[w]ell-established interpretive doctrine enjoins us to read the statutes alongside each other, so as to make sense of their provisions together."[22]

[41] This canon is consistent with a contextual approach to statutory interpretation. It is now trite that courts must properly contextualise statutory provisions when ascribing meaning to the words used therein.[23] While maintaining that words should generally be given their ordinary grammatical meaning, this Court has long recognised that a contextual and purposive approach must be applied to statutory interpretation.[24]

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[16] *Shaik v Minister of Justice and Constitutional Development* [2003] ZACC 24; 2004 (3) SA 599 (CC); 2004 (4) BCLR 333 (CC) at para 18.

[17] 32 of 1998.

[18] *Shaik* above n 16 at paras 17-8. In *Shaik*, the Court cited *Chotabhai* above n 13 as authority for this canon. However, the Court refused leave to appeal because it was not in the interests of justice to hear the appeal.

[19] *Ruta v Minister of Home Affairs* [2018] ZACC 52; 2019 (2) SA 329 (CC); 2019 (3) BCLR 383 (CC).

[20] 13 of 2002.

[21] 130 of 1998.

[22] *Ruta* above n 19 at paras 41-6.

[23] See *Saidi v Minister of Home Affairs* [2018] ZACC 9; 2018 (4) SA 333 (CC); 2018 (7) BCLR 856 (CC) at para 36 in which this Court said:

> "This Court has noted on numerous occasions that text is not everything. Unless there is no other tenable meaning, words in a statute are not given their ordinary grammatical meaning if, to do so, would lead to absurdity."

[24] *Road Traffic Management Corporation v Waymark (Pty) Limited* [2019] ZACC 12; 2019 (5) SA 29 (CC); 2019 (6) BCLR 749 (CC) at para 29 citing *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 18. See also *Cool Ideas* above n 9 at para 28.

Courts must have due regard to the context in which the words appear, even where "the words to be construed are clear and unambiguous".[25]

[42] This Court has taken a broad approach to contextualising legislative provisions having regard to both the internal and external context in statutory interpretation.[26] A contextual approach requires that legislative provisions are interpreted in light of the text of the legislation as a whole (internal context).[27] This Court has also recognised that context includes, amongst others, the mischief which the legislation aims to address,[28] the social and historical background of the legislation,[29] and, most pertinently for the purposes of this case, other legislation[30] (external context). That a contextual approach mandates consideration of other legislation is clearly demonstrated in *Shaik*. In *Shaik*, this Court considered context to be "all-important" in the interpretative exercise.[31] The context to which the Court had regard included the "well-established rules of criminal procedure and evidence" and, in particular, the provisions of the Criminal Procedure Act.[32]

[43] Consequently, the provisions of the Higher Education Act form part of the context which should be considered by this Court in interpreting section 26(1)(a) of the Legal Practice Act. Section 26(1)(a) of the Legal Practice Act requires that the LLB must have been conferred by a university *registered in the Republic*. The Higher Education Act is the legislation in terms of which higher education institutions

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[25] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 90. See also *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) (*Goedgelegen*) at para 53.

[26] For a discussion on the internal and external context see Kroeze "Power Play: A Playful Theory of Interpretation" (2007) *SALJ* 19 at 25.

[27] *Goedgelegen* above n 25 at para 53. In *Goedegelegen*, this Court, per Moseneke DCJ, recognised that "[w]e must understand the provision within the context of the grid, if any, of related provisions and of the statute as a whole including its underlying values".

[28] Id.

[29] Id.

[30] *Shaik* above n 16 at para 18.

[31] Id at para 17.

[32] 51 of 1977 and id at paras 17-8.

are registered in South Africa. In addition, the Preamble of the Higher Education Act recognises that it is part of the purpose of the Act to "establish a single co-ordinated higher education system". It is therefore relevant to the interpretation of section 26(1)(a) of the Legal Practice Act that "university" is ascribed a particular meaning in the Higher Education Act. In these circumstances, it is undesirable to have a different and conflicting meaning ascribed to "university" from that in the Higher Education Act.

[44] I agree with the first judgment that the definition of a word in one statute does not automatically apply to the same word in another statute.[33] However, the Higher Education Act is the primary legislation governing higher education institutions in South Africa, including universities. It is the legislation in terms of which universities are registered in South Africa. In these circumstances, it is relevant to the interpretative exercise in respect of section 26(1)(a) of the Legal Practice Act that "university" bears a particular meaning in the Higher Education Act.

[45] However, and importantly, legislation must be interpreted through the "prism of the Bill of Rights".[34] In *Hyundai*, this Court held that section 39(2) requires that all legislative provisions must be read "so far as is possible, in conformity with the Constitution".[35] Thus, an interpretation which is constitutionally compliant must be preferred over an interpretation which is not.[36]

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[33] First judgment at [18].

[34] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079; (*Hyundai*) at para 21. This limitation was further explained by this Court, per Sachs J, in *South African Police Service v Public Servants Association* [2006] ZACC 18; 2007 (3) SA 521 (CC); [2007] 5 BLLR 383 (CC) at para 20 in which it was said:

> "Interpreting statutes within the context of the Constitution will not require the distortion of language so as to extract meaning beyond that which the words can reasonably bear. It does, however, require that the language used be interpreted as far as possible, and without undue strain, so as to favour compliance with the Constitution."

[35] *Hyundai* id at para 22.

[36] Id at para 23.

[46] Although the Higher Education Act does recognise both public and private universities, the meaning ascribed to "university" in the Act is narrower than the ordinary grammatical meaning of the term.[37] An interpretation of section 26(1)(a) of the Legal Practice Act which gives "university" the same meaning as that ascribed to the term in the Higher Education Act would exclude the applicant's students from entry into the legal profession. This is because the applicant is not a "university" as defined in the Higher Education Act.

[47] It was accepted by all the parties before us that an interpretation of section 26(1)(a) of the Legal Practice Act which excludes the students of the applicant from entry into the legal profession limits various constitutional rights, including the right of the applicant's students to equal protection and benefit of the law under section 9(1) of the Constitution.[38]

[48] There is no rational basis for differentiating between law graduates of public universities and those of the applicant. The applicant is a higher education institution registered in terms of the Higher Education Act. It has been accredited by the Council on Higher Education and registered by the South African Qualifications Authority to provide the LLB degree. There is no relevant difference for the purposes of entry into the profession between the LLB degree provided by the applicant and one provided by a public university. This was confirmed by the Council on Higher Education, which stated that the LLB degree offered by the applicant is "on par" with that offered by public universities.

[49] The Minister of Justice and Correctional Services accepted that there is a legislative omission in section 26(1)(a) of the Legal Practice Act to the extent that it

[37] First, the institution must meet the criteria for recognition as a university which are contemplated in the Act (these criteria have not yet been promulgated). Second, the institution must either be established or declared a public university or be registered as a private university in terms of the Act.

[38] For the law on the application of section 9(1) of the Constitution see *Phaahla v Minister of Justice and Correctional Services* [2019] ZACC 18; 2019 (2) SACR 88 (CC); 2019 (7) BCLR 795 (CC) at paras 46-8; *Harksen v Lane N.O.* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at para 43; and *Prinsloo v Van der Linde* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at paras 24-6.

excludes private higher education institutions which are registered in terms of the Higher Education Act, and which have been accredited and registered to provide the LLB degree. This is also the position held by the Minister of Higher Education and Training. Neither of these Ministers have sought to advance any rational basis for excluding the students of the applicant from entry into the legal profession.

[50] Where constitutional rights are implicated, as in this case, the desirability of consistency with other legislation is trumped by the necessity of consistency, in so far as reasonably possible, with the Constitution as the supreme law. Where the ordinary, elementary meanings of the words used in the impugned provision give effect to constitutional rights and values, the words must bear that meaning rather than the meaning ascribed to those words in another piece of legislation. This is in accordance with the injunction in section 39(2) of the Constitution.

[51] The only limitation imposed on the imperative to interpret legislation so as to promote the spirit, purport and objects of the Bill of Rights is that the legislative provision must be "reasonably capable" of bearing the meaning ascribed to it by the court.[39] In other words, the interpretation must not be "unduly strained".[40]

[52] This limitation serves a foundational value of our constitutional democracy, namely, the rule of law.[41] The rule of law requires that the law be clear and ascertainable.[42] The need for statutory interpretation to result in reasonable certainty was expressly recognised by this Court in *Abahlali Basemjondolo*.[43] This Court, while recognising the importance of giving a legislative provision a constitutionally

[39] *Hyundai* above n 34 at para 24.

[40] Id.

[41] See Bishop and Brickhill "'In the Beginning was the Word': The Role of Text in the Interpretation of Statutes" (2012) 129 *SALJ* 681 at 696-8.

[42] *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 108.

[43] *Abahlali Basemjondolo Movement SA v Premier of the Province of Kwa-Zulu Natal* [2009] ZACC 31; 2009 JDR 1027 (CC); 2010 (2) BCLR 99 (CC) (*Abahlali Basemjondolo*).

compliant interpretation, cautioned against giving an interpretation which "cannot be readily inferred from the text of the provision".[44]

[53] While the meaning given to "university" in the first judgment differs from the definition thereof in the Higher Education Act, the interpretation it endorses is not unduly strained. First, the interpretation shows fealty to the language of the legislative provision it gives the word "university" its ordinary, elementary meaning. Second, the interpretation gives effect to the stated purpose of the Legal Practice Act, which is to "remove any unnecessary or artificial barriers for entry into the legal profession".[45] Third, the interpretation neither results in any clash (as opposed to mere difference) between the Legal Practice Act and the Higher Education Act, nor does it render any part of the Higher Education Act ineffective.

Conclusion

[54] For these reasons, I support the conclusion reached in the first judgment regarding the meaning of "university" in section 26(1)(a) of the Legal Practice Act.

[44] Id at para 120.

[45] Preamble to the Legal Practice Act.

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