



**THE ADMISSIBILITY OF EXTRINSIC EVIDENCE IN THE INTERPRETATION OF DOUBLE TAX
CONVENTIONS -**

A SOUTH AFRICAN PERSPECTIVE

By

Theunis Cornelis Claassen

(Student Number: CLSTHE001)

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Supervisor: Professor Jennifer Roeleveld, Department of Finance and Tax

University of Cape Town

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ABSTRACT

A recent South African judgment concerning the application of the most favoured nation clause in the South Africa/ Netherlands double tax convention has once again raised questions regarding the correct approach to the interpretation of treaties in South Africa and what information should be admissible as part of this process. In particular the court's strict approach to the admissibility of extrinsic evidence in the interpretation of double tax treaties and the application of the parol evidence rule requires further investigation.

This dissertation considers this question by first analysing the approach to interpretation and the admission of extrinsic evidence as provided for under the Vienna Convention on the Law of Treaties. Thereafter, the South African domestic approach to interpretation and the principles regulating the admission of extrinsic evidence is considered. A particular focus is placed on the parol evidence rule as applied by South African courts.

Following this analysis, the dissertation proceeds with a comparison of the two approaches in order to determine any commonalities and differences that might exist. Through this process of comparison, the dissertation finds that the contemporary South African approach to interpretation, is largely aligned with the approach in the Vienna convention, subject to certain limitations on evidence admissibility as provided for under the domestic parol evidence rule.

The dissertation concludes that it would be appropriate for a South African court to apply the ordinary domestic principles of interpretation when interpreting tax treaties, provided that this process must still be informed by the principles of the Vienna Convention, other sources of customary international law and foreign case law on the interpretation of treaties. The interpretive process would nevertheless remain subject to the domestic principles of evidence admissibility and the parol evidence rule.

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LIST OF ABBREVIATIONS

Abbreviation	Description
BIT	Bulletin for International Taxation
DWT	Dividends Withholding Tax
DTC	Double Tax Convention (used interchangeably with treaty)
ICJ	International Court of Justice
ILC	International Law Commission
ITA	Income Tax Act, 58 of 1962
ITBL	International Tax and Business Lawyer
ITLR	International Tax Law Reports
OECD	Organisation for Economic Cooperation and Development
OECD MTC	OECD Model Tax Convention on Income and on Capital
RSA	Republic of South Africa
SCA	South African Supreme Court of Appeal
SARS	South African Revenue Service
VCLT	Vienna Convention on the Law of Treaties (23 May 1969)

CHAPTER 1 – INTRODUCTION

1.1 Background

1.1.1 The Dispute

The recent judgment of *ABC Proprietary Limited v Commissioner for the South African Revenue Services*¹ has once again raised the often-contentious question of what the correct approach to the interpretation of double tax conventions (DTC) should be in South Africa.

The taxpayer, a South African tax resident company, was the wholly owned subsidiary of a Dutch company. It declared dividends to the parent during 2012 and withheld and paid dividends withholding tax (DWT) on these distributions at the reduced rate of 5% as provided for under article 10(2)(a) of the South Africa Netherlands DTC (the SA/Netherlands DTC)². In 2013, upon making a further distribution, the taxpayer and its parent reconsidered the issue and instead applied a rate of 0% on the basis that article 10(10) of the SA/Netherlands DTC would allow for a complete exemption. A refund was also claimed in relation to the DWT that was previously paid over. SARS rejected the claim, arguing that a 5% withholding tax is payable on the distributions.

In summary article 10(2)(a) of the SA/Netherlands DTC provides for a reduced DWT rate where the beneficial owner is a company holding more than 10% of the capital in the company declaring the dividend.³ However, this is qualified by article 10(10) which provides that in the event that South Africa concludes another DTC with a third country after the date of conclusion of the SA/Netherlands DTC that provides for a lower rate than the 5% contemplated above, this lower rate will also apply under the SA/Netherlands DTC. This is commonly referred to as the ‘most-favoured nation’ (MFN) clause.

¹ *ABC Proprietary Limited v The Commissioner of the South African Revenue Services* (2019) JOL 46057 (TC).

² *Convention between the Republic of South Africa and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital* (23 January 2009), Treaties, IBFD; as amended by the Protocol dated 23 January 2009.

³ Article 10(2).

Subsequent to the conclusion of the SA/Netherlands DTC, South Africa concluded a new DTC with Sweden (the SA/Sweden DTC) which like the SA/Netherlands DTC provided for a 5% DWT coupled with a MFN clause.⁴ However, unlike the SA/Netherlands DTC, the MFN clause contained in the SA/Sweden DTC did not limit its application to only DTCs concluded after the conclusion of the SA/Sweden DTC. The Sweden MFN clause could also be invoked where South Africa had a pre-existing DTC that provided for a lower rate than 5%.⁵

The taxpayer argued that the Sweden MFN clause was triggered immediately upon conclusion of the SA/Sweden DTC, as South Africa provided more favourable DWT rates under a pre-existing DTC, i.e. the South Africa Kuwait DTC (the SA/Kuwait DTC) which gave exclusive taxing rights to the recipient state.⁶ As a result, no DWT would be imposed under the SA/Sweden DTC. Based on this, the taxpayer argued that the MFN clause of the SA/Netherlands DTC was also triggered, as a subsequent treaty (i.e. the SA/Sweden DTC) provided for a more favourable rate than the 5% provided under the SA/Netherlands DTC.

SARS argued that the SA/Netherlands DTC should be interpreted restrictively taking account of the intention of the contracting states and that the MFN clause should only be triggered where preferential treatment was afforded directly to another country in terms of a subsequent DTC and not indirectly through a pre-existing DTC as was the current case.⁷ It further contended that where the words of a treaty do not mirror the intention of the contracting states, the words should be ignored, augmented or supplemented to give effect to the contracting parties' true intention.⁸ In this regard the judgment records that evidence was led by the Respondent as to the intention of South Africa in concluding the tax treaties and that the Netherlands shared this intention.⁹

⁴ *Convention between the Republic of South Africa and the Kingdom of Sweden for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (22 December 1995)*, Treaties, IBFD; as amended by the Protocol dated 23 April 2012.

⁵ Article 10(6).

⁶ *Agreement between the Government of the Republic of South Africa and the Government of the State of Kuwait for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (20 April 2007)*, Treaties, IBFD.

⁷ *ABC Proprietary Limited* supra note 1 para 16.

⁸ *Ibid* para 22.

⁹ *Ibid*.

On the facts of *ABC Proprietary Limited*, the court considers SARS' argument as essentially requiring the reading-in of words into the Sweden MFN clause to limit its application to only future DTCs that provide more favourable rates.¹⁰

The taxpayer in turn argued that the terms of the SA/Netherlands DTC are clear and unambiguous and that there is no scope for reading additional terms into the treaty to give effect to the alleged intention of the contracting states.¹¹

1.1.2 The Court's Approach to Interpretation

In evaluating these arguments, the Court states that although a treaty has statutory authority in accordance with section 108 of the ITA, they are nevertheless the product of agreement and not the result of a legislative decision making.¹² They should therefore be interpreted in accordance with the principles relating to the interpretation of written agreements and specifically those concluded in the realm of international law.¹³ The court concludes that the starting point is therefore South African domestic law and "if appropriate" private international law (sic) of which the primary source is the Vienna convention on the Law of Treaties (VCLT).¹⁴

The court refers to the two ends of a 'continuum' or 'spectrum' that a court is confronted with in interpretational disputes.¹⁵ Firstly in relation to the terms of the written agreement itself, the words can range from entirely clear and unambiguous to vague, ambiguous and uncertain (the continuum of accuracy). Secondly the interpretational method applied by our courts range from a strict application of the actual words (literalism) to an approach that favours the intention of the parties, with the words of the agreement merely serving as a guide (intentionalism) (the continuum of approach). The court states that there is no absolute answer on which approach should be applied by our courts and that this would be determined on the facts of each case.

¹⁰ Ibid para 18.

¹¹ Ibid para 21.

¹² Ibid para 19.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid para 20.

On the facts of *ABC Proprietary Limited*, both parties were *ad idem* that the words of the agreement were clear and unambiguous, but they argued for different approaches to be followed in the interpretation of the treaty. SARS essentially argued for a “reading-in” of words to align the treaty with the alleged intention of the contracting parties. The taxpayer on the other hand argued for a literal interpretation of the unambiguous words used.

In evaluating the contrasting approaches advocated for, the court analyses several cases from the Supreme Court of Appeal (SCA) dealing with the domestic approach to interpretation and in particular the admissibility of extrinsic evidence as part of the interpretation process.¹⁶ Based on this analysis the court concludes that the principles regarding the admissibility of extrinsic evidence as articulated in the case of *KPMG* remains part of our law and has not been detracted from by the subsequent SCA cases on interpretation.¹⁷

The court concludes (having regard to the principles from *KPMG*) that it would therefore not be allowed to consider extrinsic evidence regarding the intention of the contracting parties where the provisions of the applicable treaties were clear and unambiguous.¹⁸

Further the court states that it has considered domestic law in reaching its conclusion, and that based on the merits of the decision, no purpose would be served by referring any further to international law or prior foreign judgments or the principle of comity.¹⁹

1.2 Research question

The judgment of *ABC Proprietary Limited* raises important questions regarding the correct approach to interpretation and what evidence can be led and used in the interpretation of a DTC. Does the domestic parol evidence rule as articulated in *KPMG* apply without more or is there justification for a more liberal admission of evidence in the interpretation of DTCs by South African courts?

¹⁶ Cases considered includes *Johnson v Leal* 1980 (3) SA 927 (A); *Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A); *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA); *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA); *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) and *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* (2019) 1 All SA 291 (SCA).

¹⁷ *ABC Proprietary Limited* supra note 1 para 30.

¹⁸ Ibid.

¹⁹ Ibid para 33.

ABC Proprietary Limited indicates that the starting point for the interpretation of international treaties is domestic law and ‘if appropriate’ private international law of which the primary source is the VCLT. The court stating that:

*“...the principles applicable to the interpretation of international tax treaties in South African law and International Law are the same as those applied by our courts in construing statutes and agreements. This is also in accordance with the principles enunciated in Krok and Another v CSARS 2015 (6) SA 317 (SCA) in particular paragraph [27].”*²⁰

However, paragraph 27 of the *Krok* judgment provides that –

*“Regarding the approach to be adopted in construing the relevant provisions, consideration must be had to the rules applicable to the interpretation of treaties which are binding on South Africa and all states as rules of customary international law. These rules, which are essentially no different from those generally applied by our courts in construing statutes and agreements, are set out in arts 31 and 32 of the Vienna Convention on the Law of Treaties, 1969 (Vienna, 23 May 1969; TS 58 (1980); Cmnd 7964) which read...”*²¹ (footnotes omitted and emphasis added)

The statement in *Krok* that the rules applicable to the interpretation of treaties are essentially no different from those applied domestically by our courts was substantiated with a footnote that referred to paragraphs 18 and 19 of the *Natal Joint Municipal Pension Fund judgment*. It is therefore the approach to interpretation as articulated by Wallis JA in *Endumeni* which the court in *Krok* contended was no different from the approach contained in articles 31 and 32 of the VCLT.²²

The *Krok* judgment also makes it clear that a court must have regard to the customary international law as contained in articles 31 and 32 of the VCLT and that this is not merely

²⁰ Ibid.

²¹ *Krok and another v Commissioner for the South African Revenue Services* 2015 (6) SA 317 (SCA).

²² Ibid para 27.

something to consider where appropriate as contemplated in *ABC Proprietary Limited*.²³ As stated by *Hattingh* in his commentary on the *Krok* judgement in the ITLR:

*“The affirmation of arts 31 and 32 of the Vienna Convention as a binding norm is a welcome development, particularly since it now provides a clear injunction to lower courts on how to approach treaty interpretation...”*²⁴

Unfortunately, despite some brief references to the VCLT, the court in *ABC Proprietary Limited* fails to engage in detail with the interpretation guidelines as set out in the VCLT, nor does it consider previous South African judgments in which DTCs were interpreted to consider whether this provides any basis for a divergence from our ordinary domestic interpretation rules and the application of the parol evidence rule. The court also does not provide clear reasons for its cursory dismissal of foreign judgments as an interpretative aid.

In view of these questions, the author therefore seeks to evaluate the court’s strict approach to the admissibility of extrinsic evidence in the interpretation of double tax treaties. The author proposes to conduct research on the admissibility of extrinsic evidence having regard to the VCLT, international case law and commentary on the application of the VCLT. Thereafter the author will consider the domestic application of the parol evidence rule and selected SCA cases on interpretation. Finally, the author will compare the VCLT approach with our domestic approach to interpretation and in particular the admissibility of evidence.

Through this process, the author seeks to evaluate the suitability (or not) of the South African domestic approach to interpretation and our rules regarding the admission of evidence in the interpretation of DTCs.

1.3 Research method

Legal research is traditionally classified as doctrinal, theoretical and reform orientated, although these three categories are in no way all encompassing.²⁵ Regardless of the approach

²³ Ibid

²⁴ *Krok and another v Commissioner for the South African Revenue Services* (2015) 18 ITLR 42 at 46.

²⁵ Teresa M. Pidduck *Tax research methodology for untested legislation: An exemplar for the tax scholar*, South African Journal of Accounting Research (2019), Vol 33(3), 205 at 208.

adopted, legal research needs to be conducted by way of a process that is systematic, purposeful and conducted within a robust framework.²⁶

It is generally agreed that doctrinal research is the most accepted method of legal research.²⁷ It has been described as the traditional or 'black-letter' law approach and is characterised by a systematic process of identifying, analysing, organising and synthesising statutes, case law and commentary.²⁸ This is typically regarded as a library based undertaking, focused on reading and scholarly analysis.²⁹ Doctrinal research has also been described as research which provides a systematic exposition of rules governing a legal issue, analyses relationships between rules, considers areas of difficulty and predicts development.³⁰

A doctrinal approach has been applied as part of this study, following a structure in accordance with the recommended steps described by Hutchinson & Duncan including³¹:

- Assembling the relevant facts.
- Identifying and analysing the legal issues with a view on focusing the search for applicable law.
- Reading background material (including commentary from international authors, textbooks, journal articles).
- Locating primary material (multilateral and bilateral conventions, statutes, case law).
- Synthesising all the issues and material in context.
- Reaching a conclusion.

The study will therefore include:

- Assembly of facts - As indicated previously the focus of this study will revolve around the South African domestic approach to interpretation and the admissibility of extrinsic evidence in the interpretation of DTCs against the background facts of the recent tax court judgment of *ABC Proprietary Limited*.

²⁶ Margaret McKerchar "Philosophical Paradigms, Inquire Strategies and Knowledge Claims: Applying the Principles of Research Design and Conduct to Taxation" (2008), Vol 6(1) eJournal of Tax Research 5.

²⁷ Terry Hutchinson and Nigel Duncan "Defining and Describing What We Do: Doctrinal Legal Research." Deakin Law Review (Oct 2012), vol. 17(1), p. 83-120 at 102.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Hutchinson & Duncan op cit note 27 at 101.

³¹ Ibid at 106.

- Identify the legal issues to be considered – The study considers whether the South African domestic principles regarding interpretation and the admissibility of evidence would apply equally when interpreting a DTC, or whether customary international law and in particular the guidelines set out in the VCLT would require a deviation from these principles. The author also considers the relevance of foreign judgments as an interpretational aid.
- Reading background material – The author will conduct a comprehensive review of past and current commentaries on the interpretation of international tax treaties and analyse the South African domestic approach to interpretation with reference to contemporary case law and commentary.
- Identify primary material - Consideration will be given to the applicable bilateral treaties, the VCLT and applicable case law on both treaty interpretation and the application of the parol evidence rule under domestic law.
- Conclusion – Following the conclusion of the study the author hopes to provide more clarity on the relationship between South Africa’s domestic rules on the admissibility of extrinsic evidence and the guidelines provided under the VCLT.

1.4 Limitations of study

This study will be limited to the narrow issue of comparing the South African approach to interpretation and evidence admissibility with the customary international law principles as reflected in the VCLT. It is not intended as a general commentary on the correct approach to interpretation under South African law.³² The study is furthermore not intended as a general summary of the current South African approach to the interpretation of DTCs as evidenced by past case law.³³

³² For a recent article that considers the current state of contractual interpretation in South African Law, see Franziska Myburgh *Thomas Kuhn’s Structure of Scientific Revolutions, Paradigm Shifts, and Crises: Analysing recent changes in the Approach to Contractual Interpretation in South African Law* (2017) Vol 3 SALJ 514.

³³ For a general summary of the South African approach to the interpretation of treaties, see Izelle du Plessis, *Some Thoughts on the Interpretation of Tax Treaties in South Africa* (2012) 24 SA Merc LJ 31.

1.5 Chapter outline

Chapter 1 – This chapter introduces the background giving rise to the legal issue under consideration and explains the purpose and intended outcome of the study. It also explains the research methodology that will be employed as part of the study, the limitations that will apply and summarises the chapter structure.

Chapter 2 – This chapter will consider the rules of interpretation provided under the VCLT with a focus on the admissibility of extrinsic evidence and international commentary on the application of the VCLT. Following this analysis, the chapter will provide a conclusion on evidence admissibility under the VCLT.

Chapter 3 – This chapter will consider the South African domestic approach to interpretation and the admissibility of extrinsic evidence. This will be done with reference to case law and academic commentary. Following this analysis, the study will provide a summary on the current approach to interpretation and the application of the parol evidence rule under domestic law.

Chapter 4 – This chapter will compare the approaches to admissibility as discussed in chapters 2 and 3. The purpose of this chapter is to ascertain whether there is any material differences between the two approaches, and if so, whether this would justify a variation from the ordinary domestic rules of interpretation and the admission of evidence when interpreting a DTC in South Africa.

Chapter 5 – This chapter provides a summary of the main findings from the previous chapters and concludes with an overall finding on the question of whether there is a basis (if any) for distinguishing between the approach to interpretation and admissibility of evidence in the interpretation of domestic documents versus the interpretation of DTCs.

CHAPTER 2 – INTERPRETATION IN ACCORDANCE WITH THE VCLT

2.1 Nature of a DTC

DTCs unlike ordinary domestic legislation, have a dual nature in that they are international agreements concluded between states which limits their respective fiscal jurisdiction, while also forming part of the domestic tax law of each state.³⁴ This is no different in South Africa, where DTCs are incorporated into domestic law by virtue of the application of section 108 of the ITA which provides that upon approval by Parliament of the DTC and its publication in the Government Gazette, the DTC shall have effect as if enacted in the ITA.³⁵ Guidance on the process by which a treaty comes into existence and is adopted under South African domestic law is not considered in further detail for present purposes.³⁶

A DTC assumes that both states will continue to apply their respective domestic tax laws and therefore alters the application of the domestic law by either excluding the application of domestic law in one of the contracting states or by obligating one of the states to provide a credit in relation to taxes imposed under its domestic law.³⁷ Contrary to what has been indicated in *ABC Proprietary Limited*³⁸, a DTC therefore does not elect the domestic law of one state to apply to the exclusion of another (as would be the case under private international law), but rather limits the application of each state's domestic law and is therefore more appropriately described as 'international administration law'.³⁹

2.2 The role of the VCLT in the Interpretation of Treaties

Although local courts often interpret DTCs in accordance with ordinary domestic interpretation rules, as indicated above it remains an international agreement and as such

³⁴ Philip Baker *Double Tax Conventions* 3 ed Release 27 (2014) para B.01.

³⁵ Section 108(2) of the Income Tax Act.

³⁶ For further guidance see John Dugard *Dugard's International Law – A South African Perspective* 5 ed (2018) at 610; Lynette Olivier & Michael Honiball *International Tax, a South African Perspective* 5 ed (2011) at 293; see also Baker op cit note 34 para C.01 on the conclusion and negotiation of treaties.

³⁷ Klaus Vogel *Double Tax Treaties and Their Interpretation* (1986) Vol 4(1) ITBL 14.

³⁸ *ABC Proprietary Limited* supra note 1 para 19.

³⁹ Vogel op cit note 37.

forms part of international law.⁴⁰ Botha states that where a treaty is incorporated by reference into domestic law (as per section 108(2) of the ITA), the treaty will remain intact as an international agreement and the customary international law rules of treaty interpretation will apply.⁴¹ In this regard it is widely accepted that articles 31 to 33 of the VCLT constitutes a codification of the customary international law rules of interpretation.⁴²

2.3 Role of Customary International Law in South Africa

In terms of section 232 of the South African Constitution, customary international law is regarded as law in the Republic unless it is inconsistent with the Constitution.⁴³ As such, it enjoys a status at least equal to that of domestic legislation and common law and must be accounted for accordingly by our domestic courts.⁴⁴

Section 233 of the Constitution further provides that when interpreting any legislation (including DTCs that have been incorporated into our domestic legislation by virtue of section 108(2) of the ITA), a court **must** prefer any reasonable interpretation of the legislation (treaty) that is consistent with international law over any other interpretation that is inconsistent with international law.

The generally accepted sources of international law include amongst others treaties, international custom, general principles of law and the judicial decisions and teachings of highly qualified publicists.⁴⁵ As such the VCLT constitutes a source of international law and will therefore have to be taken into account by a South African court in the interpretation of legislation. The SCA has also previously confirmed that a court must have regard to the rules

⁴⁰ John F Avery Jones *Treaty Interpretation* Global Tax Treaty Commentaries IBFD (2018) para 1.1.1; M. Lang, *Introduction to the Law of Double Taxation Conventions* 2 ed (2013), IBFD Online Books para 4.1.

⁴¹ NJ Botha 'International Law' in *The Law of South Africa* 2 ed vol 11 (2008) para 447; Baker op cit note 34 para E.03.

⁴² Baker op cit note 34 para E.03; Dugard op cit note 36 at 608; Olivier op cit note 36 at 308.

⁴³ Section 232 of the Constitution of the Republic of South Africa, 1996

⁴⁴ Botha op cit note 41 para 453

⁴⁵ Ibid para 437 where the author refers to the sources listed under article 38 of the Statute of the International Court of Justice.

applicable to the interpretation of treaties (as contained in the VCLT) when interpreting a DTC, as these rules are binding customary international law.⁴⁶

Lastly both the SCA and the UK Court of Appeal have previously accepted that the VCLT will apply to both signatories and non-signatories (such as South Africa), given that it constitutes customary international law.⁴⁷

2.4 The Vienna Convention

Before analysing the rules of interpretation set out in the VCLT, it is important to consider the original intention behind the introduction of these rules. In this regard, guidance can be found in the Report of the International Law Commission (ILC) that provided commentary on the draft articles of the VCLT (the Commentary).⁴⁸

The Commentary acknowledges the three traditional approaches to interpretation as is also common in domestic law, i.e. the textual, subjective and teleological approach.⁴⁹ In short, the textual approach emphasises the primacy of the text and the need to give effect to the grammatical meaning of the words as the authentic expression of the parties' intention and is normally associated with a strict limitation on the admission of extrinsic evidence.⁵⁰ The subjective approach emphasises the intention of the parties and admits liberal recourse to extrinsic evidence in establishing the intention of the parties.⁵¹ Finally, the teleological approach emphasises the object and purpose of the document being interpreted and is generally more willing to go beyond the text in achieving purpose.⁵²

Although the ILC acknowledged that it would be inadvisable to try and attempt a prescriptive codification of the principles of interpretation (given that they depend on the particular context and circumstances), it nevertheless emphasised that the ILC must take a clear position

⁴⁶ *Krok* op cit note 21 para 27.

⁴⁷ See *Krok* op cit note 21 para 27; *Ben Nevis (Holdings) Ltd v Her Majesty's Revenue and Customs* 2013 EWCA Civ 578 para 17; see also Baker op cit note 34 para E.03 for a list of international cases in which the VCLT has been referred to as part of interpreting DTCs.

⁴⁸ *Report of the International Law Commission on the work of its Eighteenth Session, 4 May – 19 July 1966, Official Records of the General Assembly, Twenty-first Session, Supplement No. 9 (A/6309/Rev.1)* available at <http://www.un.org/law/ilc/index.htm> last accessed on 21 April 2020.

⁴⁹ *Ibid* at 218.

⁵⁰ *Ibid*; see also Dugard op cit note 36 at 622.

⁵¹ Commentary on the VCLT op cit note 48 at 218.

⁵² *Ibid*.

in regard to the role of the text in treaty interpretation, given the divergent approaches to interpretation.⁵³ Notwithstanding this stated intention, some authors have criticised the VCLT for being wide enough to support any of the three interpretive approaches.⁵⁴

The Commentary regards these approaches as constituting for the most part principles of logic and good sense and that they are only valuable as guides to assist in appreciating the meaning which the parties may have intended to attach to the text⁵⁵. The ILC therefore confined itself to codifying a few key principles which it considered to constitute the generally accepted rules of treaty interpretation.⁵⁶ These principles are contained in article 31 and 32 of the VCLT and are set out in Appendix A below.

It is important to note that the ILC intended for all these elements to be considered as a singular and closely integrated 'general rule of interpretation'. The process of interpretation should therefore involve a unitary exercise in which all the elements are thrown into a crucible to deliver the relevant interpretation.⁵⁷ The elements making up article 31 should not be applied in a rigid hierarchical fashion with one element taking preference over another.

Unlike the elements of article 31 which all relate to the agreement between the parties at the time when or after it received expression in the text, the supplementary means and preparatory work contemplated in article 32 does not have the same authentic character. As such the ILC noted that considerable discretion must be exercised in determining the value of supplementary means as an element of interpretation.⁵⁸ Despite this, the ILC's intention is not to draw a rigid line between the use of article 31 and 32, but rather that there should be a general link between the application of article 31 and the use of supplementary interpretative aids to confirm the result emanating from the general rule of interpretation.⁵⁹ As Vogel and Prokisch explain, the VCLT identifies the most important elements of

⁵³ Ibid at 219.

⁵⁴ See Brian Arnold *The Interpretation of Tax Treaties: Myth and Reality* (2010) Vol 64(1) BIT para 3.2; Dugard op cit note 36 at 608, Lang op cit note 40 para 4.1.

⁵⁵ Commentary on the VCLT op cit note 48 at 218.

⁵⁶ Ibid.

⁵⁷ Ibid at 220; see also Avery Jones op cit note 40 para 3.4.1.

⁵⁸ Commentary on the VCLT op cit note 48 at 220.

⁵⁹ Ibid.

interpretation and puts them in a relationship to each other to aid the interpreter to assign relative weights to the different elements.⁶⁰

2.4.1 Article 31

Paragraph 1 provides that the treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Four elements can therefore be identified. The author deals with each of these below.

2.4.1.1 Good faith

The Commentary states that the concept of good faith flows from the principle of *pacta sunt servanda*.⁶¹ Where a treaty is open to two interpretations, one of which does and the other which does not enable the treaty to have its appropriate effect, good faith and the object and purpose of the treaty will demand that the former interpretation should be adopted. However, this would not call for an extensive or liberal interpretation that goes beyond the expressed or necessarily implied terms of the treaty. Avery Jones considers the application of good faith to require that the technicalities of interpretation should not apply and that good faith interpretation is to be determined with reference to compelling standards of honesty, fairness and reasonableness prevailing in the international community at such time.⁶²

2.4.1.2 Ordinary meaning

Furthermore, the parties are presumed to have such intention as appears from the ordinary meaning of the text used by them and that the text must be presumed to be the authentic expression of the parties' intention.⁶³ The starting point of interpretation is therefore an elucidation of the text's meaning and not an investigation *ab initio* into the intention of the contracting parties. With reference to a judgment of the ICJ, the Commentary furthermore emphasises that it is not the function of interpretation to revise a treaty or read terms into

⁶⁰ Klaus Vogel & Rainer G. Prokisch *Interpretation of Double Tax Conventions*, IFA Cahiers vol. 78a (1993), Online Books IBFD at 67.

⁶¹ Commentary on the VCLT op cit note 48 at 221.

⁶² Avery Jones op cit note 40 para 3.4.3.

⁶³ Commentary on the VCLT op cit note 48 at 221.

them which they do not expressly or by implication contain.⁶⁴ This is illustrative of the article's textual approach to interpretation. As Vogel states, the subjective intention of the parties is rejected and only relevant to the extent expressed in the text.⁶⁵ However, as indicated before, the ordinary meaning must not be determined in the abstract, but in the context of the treaty and having regard to the object and purpose.

2.4.1.3 Context

As to what constitutes context for purposes of treaty interpretation, paragraph 2 of article 31 attempts to define this concept. According to paragraph 2, this includes the entire text of the treaty, the preamble, and any annexures to the treaty. In addition the context includes any agreements between the contracting parties in relation to the conclusion of the treaty and any instrument which was made by one or more of the parties in connection with the conclusion of the treaty and which instrument has been accepted by the other parties as an instrument related to the treaty.

The Commentary states that this definition of context has been based on the principle that unilateral documents cannot be regarded as context for purposes of article 31 unless said documents were made in connection with the conclusion of the treaty and have been accepted by the other parties.⁶⁶

It is further indicated that context should not be regarded as mere evidence to which recourse may be had in the case of ambiguity, but rather that it should inform the unitary process of ascertaining the ordinary meaning contemplated in paragraph 1.⁶⁷

Vogel commenting on paragraph 2 states that this would include explanations on the DTC provided at the time of conclusion provided these have been accepted by both parties.⁶⁸ This could include letters and notes exchanged by the parties during the signing of the treaty. Unilateral expressions of intent such as technical explanations and oral statements by people involved in the negotiation process that have not been expressly confirmed by the other side,

⁶⁴ Ibid referring to the case of *United States Nationals in Morocco case*, I.C.J Reports 1952 at 196 and 199.

⁶⁵ Vogel op cit note 37 at 35.

⁶⁶ Commentary on the VCLT op cit note 48 at 221.

⁶⁷ Ibid.

⁶⁸ Vogel & Prokisch op cit note 60 at 69.

cannot be regarded as context under paragraph 2.⁶⁹ These are regarded as supplementary means of interpretation at best (see discussion below).⁷⁰

2.4.1.4 Subsequent agreements and practice

Paragraph 3 provides that there shall be taken into account *together with the context* any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation and any relevant rules of international law applicable in the relations between the parties.

This would be subject to the restriction that any subsequent agreement or practice that alters the original text of a treaty, would only be effective to the extent that it complies with the applicable domestic treaty implementation requirements (e.g. parliamentary approval under section 108(2) of the ITA).⁷¹

Save for a formal amendment of the text as contemplated above, Vogel comments that subsequent agreements and practice cannot change the content of the treaty and must remain within the scope of interpretation.⁷²

As to the reason for splitting up paragraph 2 and 3, Avery Jones suggests that this is to distinguish between the contemporaneous intrinsic elements in paragraph 2, and the extrinsic elements such as subsequent agreements and practice in paragraph 3.⁷³ Notwithstanding this distinction and the fact that the phrase "*together with the context*" might suggest that the items listed in paragraph 3 are to be regarded as being of lesser importance than the context in paragraph 2, this is not the case. As previously indicated, the

⁶⁹ Ibid; see also Avery Jones op cit note 40 para 3.4.5.2.

⁷⁰ Ibid.

⁷¹ Vogel op cit note 37 at 35; Avery Jones op cit note 40 para 3.4.5.6.

⁷² Vogel & Prokisch op cit note 60 at 70.

⁷³ Avery Jones op cit note 40 para 3.4.5.4.

elements of article 31 are not arranged hierarchically and one element should therefore not take preference over another.⁷⁴

2.4.1.5 Object and purpose

The final element provides that the treaty must be interpreted in light of its object and purpose. In this regard the commentary mentions that the ICJ has on more than one occasion had recourse to the object and purpose of a treaty as reflected in the preamble to interpret a particular provision.⁷⁵

Vogel contends that the purpose referred to in the VCLT is not the subjective intention of the contracting parties, but rather the overall goal of the entire treaty and not the purpose of a single treaty provision.⁷⁶ The overall purpose of a DTC is generally considered to be the avoidance of double tax, the fair distribution of tax revenues, the elimination of tax barriers to trade, the encouragement of foreign investment and the avoidance of double non-taxation.⁷⁷

However, the function of purpose as an interpretative aid is subordinated to the text and should merely elucidate the terms of the treaty.⁷⁸ It does not function as an independent means of interpretation.⁷⁹ Given these limitations, the utility of purpose in the interpretation process is questioned by some authors.⁸⁰

2.4.1.6 Special meaning

Finally, paragraph 4 provides that a special meaning can be attributed to a term if it is established that the parties so intended. The Commentary indicates that this is intended to cover those exceptional cases where notwithstanding the apparent meaning of a term in its context, it is established that the parties intended for a special or technical meaning to

⁷⁴ This view is confirmed by Avery Jones op cit note 40 para 3.4.5.4.

⁷⁵ Commentary on the VCLT op cit note 48 at 221.

⁷⁶ Ibid; see also Alexander Rust et al, *Klaus Vogel on Double Taxation Conventions* 4 ed (2015), Kluwer Law International at 39.

⁷⁷ Vogel & Prokisch op cit note 60 at 72.

⁷⁸ Vogel op cit note 37 at 35.

⁷⁹ Rust op cit note 76 at 39.

⁸⁰ Vogel & Prokisch op cit note 60 at 72.

apply.⁸¹ The burden of proof will fall on the party alleging the existence of a special meaning.⁸² It is therefore presumed that a party should be able to lead evidence as to its subjective intention to prove the existence of a special meaning.

2.4.2 Article 32

2.4.2.1 Supplementary means of interpretation

Article 32 the VCLT provides that recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion (i.e. the *travaux préparatoires*) in order to confirm the meaning resulting from the application of article 31. It can only be used to determine the meaning when the interpretation according to article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.

Importantly there is no limitation under article 32 on the admissibility of supplementary means as part of the interpretative process, it merely limits the use of said information.⁸³ This accords with the VCLT's textual approach to interpretation as discussed above.

With respect to article 32, the Commentary provides that the object of interpretation is the elucidation of the treaty text and not an investigation *ab initio* of the parties' supposed intention.⁸⁴ However, it is acknowledged that it would be unrealistic to have no recourse to extrinsic material such as the *travaux préparatoires* until such time as the application of article 31 renders a result that is manifestly absurd or unreasonable.⁸⁵ Accordingly it was decided that the supplementary means can be introduced from the outset as part of the interpretation process contemplated in article 31 to confirm the meaning.⁸⁶

The supplementary means do not provide for an alternative or autonomous means of interpretation, but only serves to aid the interpretive process governed by the general rule

⁸¹ Commentary on the VCLT op cit note 48 at 222.

⁸² Ibid.

⁸³ Arnold op cit note 54 para 54.

⁸⁴ Commentary on the VCLT op cit note 48 at 223.

⁸⁵ Ibid.

⁸⁶ Ibid.

under article 31.⁸⁷ Where the application of the general rule results in ambiguity or leads to a result which is manifestly absurd or unreasonable, the supplementary means can be used to determine the meaning. This exception must however be strictly limited and should be confined to those cases where the interpretation under article 31 provides a manifestly absurd or unreasonable result.⁸⁸

In other words where the meaning derived from the supplementary means does not confirm the ordinary meaning resulting from the application of article 31 (assuming this meaning is not ambiguous or manifestly absurd or unreasonable), it will not be able to override the ordinary meaning.⁸⁹ Alternatively to this view, it could be argued that the supplementary means may in fact demonstrate another possible meaning under article 31 which can then be confirmed by the supplementary means, or it may disclose an ambiguity not previously recognised that can then be resolved through the supplementary means.⁹⁰

The ILC decided against defining the ambit of *travaux préparatoires* for fear that this might inadvertently exclude relevant evidence.⁹¹ Vogel indicates that this would generally not include unilateral material such as technical explanations, reports to the senate/parliament or memorandum accompanying a draft of the treaty implementing legislation, as these only represent the subjective interpretation of only one treaty partner.⁹² These items would only fall under article 32 to the extent that they reproduce notes or exchanged letters between initialling and final signature (i.e. representing bilateral intention).⁹³ Therefore documents that do not meet this requirement would not be admissible as part of interpreting a treaty.⁹⁴

Avery Jones also cautions against the use of unilateral material, stating that this can only be used where there is certainty regarding the acceptance thereof by the other contracting

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Avery Jones op cit note 40 para 3.5.1.2.

⁹⁰ Ibid.

⁹¹ Commentary on the VCLT op cit note 48 at 223.

⁹² Vogel op cit note 37 at 36 ; see also Vogel & Prokisch op cit note 60 at 74.

⁹³ Ibid.

⁹⁴ Rust op cit note 76 at 40.

state.⁹⁵ Over and above the *travaux préparatoires*, he considers the following as possible examples of supplementary means:

- i) the wording of other tax treaties to which one of the parties is a party;
- ii) foreign court decisions on the same treaty wording;
- iii) domestic law in the treaty partner states;
- iv) Commentaries on the OECD Model; and
- v) the writings of experts.⁹⁶

Unfortunately, the basis for admissibility of the abovementioned sources under the VCLT are often left unstated in judgments.⁹⁷ Hattingh commenting on the *Krok* judgment, mentions our courts' failure to clarify the status of the OECD Commentary under the VCLT.⁹⁸ Based on the court's reliance on the *Ben Nevis* judgment, it would however appear to have been treated as supplementary means under article 32.⁹⁹

Although the Commentary suggests that article 32 would cover published as well as unpublished, but accessible *travaux préparatoires*¹⁰⁰, Avery Jones notes that the *travaux préparatoires* is normally of little importance in the interpretation of DTCs as they are generally inaccessible.¹⁰¹

With reference to the phrase "*the circumstances of its conclusion*", which typically relates to the historical setting in which the treaty was entered into, he notes that this is unlikely to have much relevance given that DTCs are usually not entered into by virtue of a particular historical imperative.¹⁰² The author considers that this would not always be the case and that sometimes a country might have a particular historical or domestic imperative that

⁹⁵ Avery Jones op cit note 40 para 3.5.1.4.

⁹⁶ Ibid para 3.4.90 and para 3.5.1.4; see also Jonathan Schwarz '*Tax Treaty Interpretation after Ben Nevis (Holdings) Ltd v Her Majesty's Revenue and Customs (2013)*' 2014 Vol 68(1) BIT para 5.1 to 5.7 where the admissibility of a number of these supplementary sources were considered by the author in light of the judgment in *Ben Nevis (Holdings) Ltd v Her Majesty's Revenue and Customs*.

⁹⁷ See Schwarz op cit note 96 para 5.1

⁹⁸ Hattingh op cit note 24 at 47.

⁹⁹ Hattingh op cit note 24 referring to the court's reliance on *Ben Nevis (Holdings) Ltd v Revenue and Customs Comrs* (2013) 15 ICLR 1003; see also Income Tax Case No 1878 77 SATC 349.

¹⁰⁰ Commentary on the VCLT op cit note 48 at 223.

¹⁰¹ Avery Jones op cit note 40 para 3.5.1.3; see also the Canadian Tax court case of *Klaboe v Her Majesty the Queen* (2007) 9 ICLR 1099 where the taxpayer obtained an order compelling the discovery of the *travaux préparatoires* in relation to a particular article of a DTC.

¹⁰² Ibid.

necessitates a change in its DTCs, as was the case in South Africa with the introduction of DWT and the resultant conclusion of a number of protocols to its existing treaties to provide for a withholding tax at source.

2.4.2.2 Foreign Judgments as an interpretative aid

Although foreign judgments do not necessarily fit into the ambit of supplementary means, they are generally accepted as relevant to the interpretation process by most international commentators.¹⁰³ The author agrees that in the interest of common interpretation of DTCs and given the desirability of uniform interpretation, domestic courts must be aware of, and take account of how these provisions have been interpreted by courts in other jurisdictions (especially where this relates to the same treaty wording), regardless of its particular classification under the VCLT.¹⁰⁴

There has also been a growing number of international cases in which the courts have referred to foreign judgments in pursuance of the principle of common interpretation.¹⁰⁵ As to the correct approach to be applied in the use of foreign judgments, the often-quoted extract from the UK case of *Fothergill v Monarch Airlines* is repeated below:

*“As respects decision of foreign courts, the persuasive value of a particular court's decision must depend on its reputation and its status, the extent to which its decisions are binding on courts of co-ordinate and inferior jurisdiction in its own country and the coverage of the national law reporting system.”*¹⁰⁶

Baker is of the view that courts should consider and preferably follow the relevant decisions of other courts, unless they are convinced that those decisions are wrong.¹⁰⁷ Vogel in turn

¹⁰³ Baker op cit note 34 para E.26; Avery Jones op cit note 40 para 3.5.1.6; Vogel op cit note 37 at 39; W Wijnen, *Some Thoughts on the Convergence and Tax Treaty Interpretation* (2013) Vol 67(11) BIT; David Ward *Use of foreign court decisions in interpreting tax treaties* in Guglielmo Maisto (ed) *Courts and Tax Treaty Law* (2007) Vol 3 para 7.6.

¹⁰⁴ Baker op cit note 34 para E.27; Vogel op cit note 37 at 37.

¹⁰⁵ See Baker op cit note 34 para E.28 where he refers to a number of jurisdictions in which foreign judgments have been considered as part of the interpretation of DTCs. See for example Australia: *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338; *Commissioner of Taxation v Lamesa Holdings BV* (1997) FCA 785. Canada: *R v Crown Forest Industries Limited* (1995) 2 S.C.R 802; UK: *IRC v Commerzbank AG* (1990) STC 285; *Memec plc v IRC* (1998) All ER (D) 255.

¹⁰⁶ *Fothergill v Monarch Airlines* (1980) 2 All ER 696 at 708; these principles have been approved by Vogel op cit note 37 at 38.

¹⁰⁷ Baker op cit note 34 para E.26.

states that foreign case law should not be accepted as binding without review, and supports the approach as described in *Fothergill* above, i.e. that the persuasive value of foreign decisions depends on amongst other things, the reputation and rank of the foreign court in question.¹⁰⁸

Vogel further states that a judge interpreting a DTC is obliged to consider the decisions of foreign courts, at least those that are brought to his attention by the parties and that relates to the treaty in question.¹⁰⁹ A judge should use all reasonable means available to him/her to find relevant foreign case law on the treaty under consideration.¹¹⁰ However, he admits that the threshold of what would be regarded as reasonable, would often be exceeded quite easily given the limited access to foreign tax judgments and the foreign language barrier.

As indicated before, Avery Jones considers that foreign judgments on the same treaty wording qualifies as supplementary means of interpretation and can therefore be used in accordance with article 32.¹¹¹ He emphasises that a domestic court, while being aware of such judgments, would not necessarily be bound to follow them, but that this awareness will help to ensure a common interpretation of widely used treaty provisions.¹¹²

He also acknowledges that given the relatively small amount of litigation on tax treaties in most jurisdictions, most domestic judges typically have limited experience with the interpretation of treaties, and therefore the benefit to be gained from considering foreign judgments is significant.¹¹³

The author considers that many of the original concerns identified by Vogel regarding access to foreign decisions, although very applicable at the time of writing his article in 1986, have since become less relevant given the development of the internet, easier access to translated case law and translation services. It is therefore considered that where a domestic court interprets a DTC, they must take account of foreign judgements on the same issue, subject to

¹⁰⁸ Vogel op cit note 37 at 38-39.

¹⁰⁹ Vogel op cit note 37 at 39.

¹¹⁰ Ibid.

¹¹¹ Avery Jones op cit note 40 para 3.5.2.

¹¹² Ibid.

¹¹³ Ibid.

the considerations set out in *Fothergill*. Furthermore, this should not be limited to only decisions on the same treaty but should also include decisions on the same treaty wording.¹¹⁴

2.4.3 Summary of VCLT Provisions

Based on the preceding discussion, the author has attempted to provide a summary of the elements contained in articles 31 and 32 of the VCLT. This summary considers the admissibility of these elements and how they should be used as part of the interpretation process. The summary is set out in Appendix B.

2.4.4 Conclusion on the application of the VCLT

As indicated before, the VCLT was never intended to codify the principles of treaty interpretation, but rather to serve as a general guide by documenting a number of key principles that have traditionally been followed in the interpretation of treaties.

Although the VCLT prescribes the material that can be admitted as context for purposes of applying the general rule of interpretation, it says very little about how this material should subsequently be used as part of the interpretive process. The actual process of interpretation therefore remains an exercise of the interpreter's judgment.¹¹⁵ As Waibel states:

*"A central reason for the open-ended character of the VCLT's principles of interpretation is that Article 31 leaves it to each treaty interpreter how to mix the four elements of the crucible....Article 31 is silent on the question how much weight treaty interpreters ought to give to each of the four elements..."*¹¹⁶

The interpreter can consider supplementary means (which includes a variety of extrinsic materials) and use such information within the confines of article 32. Importantly though,

¹¹⁴ Ibid.

¹¹⁵ Avery Jones op cit note 40 para 3.6.

¹¹⁶ Michael Waibel *Principles of Treaty Interpretation Developed for and Applied by National Courts?* (2015) Legal Studies Research Paper Series, University of Cambridge, Paper No. 16/2015 available at <http://www.law.cam.ac.uk/ssrn/>; Arnold op cit note 54 para 3.2 is also especially critical of the VCLT's utility in practice given this vagueness.

article 32 at no stage limits the admissibility of such material as part of the interpretative process.¹¹⁷

Given that article 31 and 32 must be applied as part of a unitary process, this then leads to the question of how this supplementary material should be admitted as part of the interpretative approach. As Arnold critically explains:

“Nevertheless, attempting to limit the use of information without limiting access to the information does not accurately reflect how the interpretive process actually takes place. If a judge or other interpreter consults supplementary material that clearly suggest that a treaty provision should be interpreted in a particular way (even in a way other than that suggested by the application of the rules in Art. 31), it is unrealistic (and defies common sense) to assume that he would then be able to disregard or limit the use or the weight to be given to the material. Once material has been taken into account, the only issue is the weight to be given to it...Art 31 is so vague and general and self-evident that it cannot provide any real guidance for – or control over – the interpretative process. Art 32, which appears to be more rule-like, is equally meaningless because it allows reference to supplementary materials in all instances, but then attempts to limit the use (but not the weight) of such material.”¹¹⁸

Although the author agrees that the general rule provided by the VCLT leaves a degree of discretion to the interpreter and that the approach to supplementary material under article 32 could have been more clear on the issue of admissibility (particularly as far as it relates to the interaction of article 32 with the general rule), it is nevertheless considered that the VCLT

¹¹⁷ Arnold op cit note 54 para 3.2.

¹¹⁸ Ibid.

provides a useful guide that should be considered and applied by domestic courts when interpreting treaties. In particular the VCLT:

- I) Affirms the primacy of the treaty text. Although the interpreter might have a degree of discretion under the general rule, there is a distinct emphasis on the primacy of the text.
- II) Confirms the use of a unitary interpretative process in which the text is considered in good faith together with the treaty's context, object and purpose.
- III) Expressly defines what material should be considered as part of context.
- IV) Admits supplementary means of interpretation in all instances as part of the unitary process, albeit that the use of this information is limited under article 32.

The author now proceeds to consider the domestic approach to interpretation that has been applied by South African courts and in particular their approach to the admissibility of extrinsic material as part of the interpretative process.

CHAPTER 3 – SOUTH AFRICAN DOMESTIC APPROACH TO INTERPRETATION

There has been (and arguably always will be) some academic debate in South Africa about the correct approach to the interpretation of documents, in particular whether this should be a subjective or objective approach.¹¹⁹ However, the focus of this thesis is not to provide a critical analysis of the South African domestic approach to interpretation, but rather to consider the interpretative principles of the VCLT in comparison with the most commonly applied approach to interpretation in South Africa, in order to determine whether the VCLT would demand a change in practice from our ordinary domestic principles where a court is tasked with interpreting a DTC.

This discussion will therefore focus on the approach as originally set out by Wallis JA in the case of *Natal Joint Municipal Pension Fund v Endumeni Municipality*, given that this approach has subsequently been widely adopted and endorsed by courts throughout South Africa.¹²⁰

In particular, the recent Constitutional Court judgment of *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others* stated that there is no longer a dispute about the principles of interpretation in South Africa.¹²¹ The highest court in the country has expressly endorsed the approach of Wallis JA as set out in *Endumeni* as the correct approach.¹²² This endorsement follows a series of approvals by the Constitutional Court and the SCA of the *Endumeni* approach.¹²³

¹¹⁹ Myburgh op cit note 32; see also *Blair Atholl* supra note 16 para 55 to 61 where the court summarises the various academic views on the issue.

¹²⁰ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 594 (SCA) para 18.

¹²¹ *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others* (2018) ZACC 33 para 29.

¹²² *Airports Company* supra note 121 para 29.

¹²³ *Endumeni* has been cited with approval by the Constitutional Court in *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) at fn 105 and *AMCU v Chamber of Mines of South Africa* 2017 (3) SA 242 (CC) at fn 28. It has also been cited with approval in various SCA judgments such as *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) para 12; *Firststrand Bank Ltd v Land and Agricultural Development Bank of South Africa* 2015 (1) SA 38 (SCA) para 27; *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) para 28; *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* 2019 (3) SA 398 (SCA) para 61; *Telkom SA Soc Limited v CSARS* 2020 ZASCA 19 (unreported case 239/19) para 17; *CSARS v United Manganese of Kalahari (Pty) Ltd* 2020 ZASCA 16 (unreported case 264/19) para 8.

3.1 The Endumeni approach

The present-day approach to interpretation was described by Wallis JA in 2012 as follows:

*“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.”*¹²⁴ (emphasis added and footnotes omitted)

The judgement continues by emphasising that the approach described above is a unitary one and that one must consider from the outset the words used in the context of the document as a whole and in light of all the relevant circumstances, with neither predominating over the other.¹²⁵ It is further stated that courts should not set out to undermine the legislative

¹²⁴ *Endumeni* supra note 120 para 18.

¹²⁵ *Ibid* para 19 and 24.

purpose, but rather to give it effect within the constraints imposed by the language adopted by the legislature.¹²⁶

Endumeni therefore presents a unitary objective approach to interpretation in which the interpreter should take account of the wording of the text together with the context, the apparent purpose of the document and the circumstances of its coming into existence, which includes the material know to those responsible for its production.

Furthermore a sensible meaning (i.e. one that doesn't undermine the apparent purpose of the document) should be preferred. However the primacy of the text remains and interpreters are cautioned against substituting the actual text for their subjective views of what is considered sensible or businesslike.

The judgment unfortunately does not elaborate on what material should be regarded as admissible for purposes of informing this unitary approach, i.e. what is considered context and what would constitute admissible evidence. Some guidance on this issue can found in the subsequent case of *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*.¹²⁷ In this case one of the parties cited the earlier 'golden rule' approach to interpretation as set out in *Coopers & Lybrand and Others v Bryant* which provides that:

"The correct approach to the application of the 'golden rule' of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

- (1) *to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract...*
- (2) *to the background circumstances which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted...*
- (3) *to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering*

¹²⁶ Ibid para 22.

¹²⁷ *Bothma-Batho* supra note 123.

*previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions...*¹²⁸

The golden rule approach contemplates a staggered consideration of evidence in which the ordinary meaning is first established in isolation, and only thereafter should context, purpose and background circumstances inform the process. Only where this meaning is ambiguous, can surrounding circumstances (i.e. evidence as to previous negotiations, correspondence, and subsequent conduct, but excluding direct evidence of the parties' intention) be taken into account.

Wallis JA states in *Bothma-Batho* that this is no longer the approach to be adopted by South African courts and reaffirms the *Endumeni* approach. Although the starting point remains the wording of the text, the process of interpretation does not stop at the perceived literal meaning of those words, but rather considers them in light of all the relevant and admissible context, including the circumstances under which the document came into being.¹²⁹

Furthermore, the distinction under the golden rule between background and surrounding circumstances has fallen away and the approach no longer occurs in stages, but rather as a unitary exercise.¹³⁰ *Bothma-Batho* confirms that the *Endumeni* approach reflects recent developments in regard to contractual interpretation, including the principles as enunciated in the case of *KPMG Chartered Accountants (SA) v Securefin Ltd and Another*.¹³¹ This case is considered in further detail below in relation to the admission of extrinsic evidence and the Parol Evidence rule.

In *Firststrand Bank Ltd v Land and Agricultural Development Bank of South Africa*, Wallis JA again elaborated on the *Endumeni* approach, stating that it was incumbent on counsel to identify the meaning for which they contended, in order for it to be tested against the actual

¹²⁸ *Coopers & Lybrand and Others v Bryant* 1995 (3) SA 761 (A) at 768.

¹²⁹ *Bothma-Batho* supra note 123 para 12.

¹³⁰ *Ibid.*

¹³¹ *Bothma-Batho* supra note 123 para 11 referring to *KPMG* supra note 123.

words used.¹³² If the words of the document are unable to bear the meaning argued for, then such meaning will be impermissible.¹³³

A year after the *Firststrand* judgment, the *Endumeni* approach was again considered by the SCA in *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd*.¹³⁴ Lewis JA who has traditionally advocated for a subjective approach to interpretation states the following in respect of the *Endumeni* approach:

"I do not understand these judgments to mean that interpretation is a process that takes into account only the objective meaning of the words (if that is ascertainable), and does not have regard to the contract as a whole or the circumstances in which it was entered into. This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties — what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. KPMG, in the passage cited, explains that parol evidence is inadmissible to modify, vary or add to the written terms of the agreement, and that it is the role of the court, and not witnesses, to interpret a document. It adds, importantly, that there is no real distinction between background circumstances and surrounding circumstances, and that a court should always consider the factual matrix in which the contract is concluded — the context — to determine the parties' intention.

*The passage cited from the judgment of Wallis JA in *Endumeni* summarises the state of the law as it was in 2012. This court did not change the law, and it certainly did not introduce an objective approach in the sense argued by *Novartis*, which was to have regard only to the words on the paper.... A court must examine all the facts — the context — in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing."¹³⁵ (emphasis added)*

¹³² *Firststrand* supra note 123 para 27.

¹³³ *Ibid.*

¹³⁴ *Novartis* supra note 123.

¹³⁵ *Ibid* para 27 and 28.

As indicated in the extract, Lewis JA considers the goal of interpretation to be that of ascertaining the intention of the parties. Wallis JA in turn considers this a misnomer insofar as it suggests an enquiry into the mind of the contracting parties, and rather considers the enquiry restricted to ascertaining the meaning of the text itself.¹³⁶

Notwithstanding these differences, Lewis JA's judgment confirms both the continued application of the parol evidence rule (as explained in *KPMG*) and affirms the *Endumeni* approach as a summation of the South African approach to interpretation as at 2012. The judgment also confirms that the 'objective' approach referred to in *Endumeni* does not contemplate peering at the text in isolation. As previously indicated, the interpretative process is a unitary one in which the wording of the text is read in context, having regard to the purpose of the provision and the background to the preparation and production of the document.

These similarities in approach were also confirmed by Navsa ADP and Motlale AJA in the case of *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association*.¹³⁷ The judges state that no practical purpose would be served by selecting one of the approaches (i.e. subjective or objective) above the other.¹³⁸ They affirm the *Endumeni* approach by stating that our courts have moved away from a narrow peering at the words and that a restrictive interpretation of the words without context should be avoided.¹³⁹ Furthermore, the distinction between background and surrounding circumstances have fallen away (thus endorsing the *KPMG* approach on parol evidence) and the purpose of the provision should also be taken into account.¹⁴⁰ All of these factors should be taken into account as part of a unitary approach with a sensible (or businesslike) result being sought. In the author's view, the approach endorsed in *Blair Atholl* is therefore essentially the *Endumeni* approach.

However, unlike the *Endumeni* judgment, the court elaborates on the admissibility of evidence and confirms the foundational principles as set out in *KPMG*.¹⁴¹ This comes in view of the fact that following the *Endumeni* judgment, South African courts have seen an increase

¹³⁶ *Endumeni* supra note 120 para 20.

¹³⁷ *Blair Atholl* supra note 16 para 61.

¹³⁸ *Ibid* para 60

¹³⁹ *Ibid* para 61.

¹⁴⁰ *Ibid*.

¹⁴¹ *Ibid* para 64.

in cases where the written text was being relegated and extensive inadmissible evidence was being led. The author proceeds to consider the principles of evidence admissibility under South African law in further detail below.

3.2 Admissibility of extrinsic evidence

It goes without saying that it would be very unproductive for a trial to be conducted without any constraints on the admissibility of evidence, and then to expect the judge to sift the wheat from the chaff during argument or ultimately at the stage of judgment.¹⁴² It impacts negatively on a judge's decision making, the prompt adjudication of cases and costs.¹⁴³ It is accordingly important that evidence be limited to only that which is relevant and admissible, while simultaneously not prohibiting information that could be material to the proper interpretation of a document.

The SCA historically distinguished between three different categories of evidence that could be admitted at different stages in the interpretative process. This approach was summarised in *Delmas Milling Co Ltd* as follows:

“Where although there is difficulty, perhaps serious difficulty, in interpretation but it can nevertheless be cleared up by linguistic treatment this must be done. The only permissible additional evidence in such cases is of an identificatory nature; such evidence is really not used for interpretation but only to apply the contract to the facts.

*Such application may, of course, be itself the cause of the difficulty, giving rise to what is sometimes called a latent ambiguity. If the difficulty cannot be cleared up with sufficient certainty by studying the language, recourse may be had to 'surrounding circumstances' i.e. matters that were probably present to the minds of the parties when they contracted (but not actual negotiations and similar statements). It is commonly said that the Court is entitled to be informed of all such circumstances in all cases (cf. *H Richter's case supra* at page 69; *Garlick v Smartt and Another, 1928 AD 82* at p. 87; *Cairns (Pty.) Ltd v Playdon & Co. Ltd., supra* at p. 125). But this does not mean that if sufficient certainty as to the meaning can be gathered from the language alone*

¹⁴² *Van Aardt v Galway* 2012 (2) SA 312 (SCA) para 10.

¹⁴³ *Ibid.*

it is nevertheless permissible to reach a different result by drawing inferences from the surrounding circumstances. Whether there is sufficient certainty in the language of even very badly drafted contracts to make it unnecessary and therefore wrong to draw inferences from the surrounding circumstances is a matter of individual judicial opinion on each case. Cases of this class, though they are generally spoken of as cases of ambiguity, might conveniently be given some such name as 'cases of uncertainty' to distinguish them from the third class of case where even the use of surrounding circumstances does not provide 'sufficient certainty'.

These are cases of ambiguity in the narrow sense, where after the surrounding circumstances have been considered there is still no substantial balance in favour of one meaning rather than another. The usual examples of such true ambiguity come from testamentary documents, but examples are conceivable in the case of contract. In these cases, which will naturally be much rarer than those of uncertainty, recourse may be had to what passed between the parties on the subject of the contract. One must use outside evidence as conservatively as possible but one must use it if it is necessary to reach what seems to be a sufficient degree of certainty as to the right meaning.”¹⁴⁴ (emphasis added)

A more contemporary summary of the principles of evidence admissibility were set out by Harms DP in the *KPMG* judgment as follows:

“First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning

Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses

Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent

¹⁴⁴ *Delmas Milling Co Ltd v Du Plessis* 1955 3 SA 447 at 455 to 456.

Fourth, to the extent that evidence may be admissible to contextualise the document (since 'context is everything') to establish its factual matrix or purpose or for purposes of identification, 'one must use it as conservatively as possible' ... The time has arrived for us to accept that there is no merit in trying to distinguish between 'background circumstances' and 'surrounding circumstances'. The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The term 'context' or 'factual matrix' ought to suffice...¹⁴⁵ (emphasis added)

Although *KPMG* confirms that extrinsic evidence should be admitted conservatively in establishing context, it discards with the distinction between background and surrounding circumstances and rather uses an all encompassing concept of context. It also affirms the principle from *Delmas* that a witness or party to the contract should not be allowed to lead evidence on what a particular provision means to him or her.

Wallis JA has also since discarded *Delmas'* staggered approach to evidence admissibility in favour of a unitary approach as set out in *Endumeni*.¹⁴⁶ This contemplates that from the outset the interpreter considers the text in light of all the relevant and admissible context, including the circumstances in which the document came into being.¹⁴⁷ All relevant admissible evidence is therefore considered from the start. However, this should not be considered as a licence to admit anything. Evidence contrary to the parole evidence rule remains inadmissible, for example regarding the contracting parties' intention or prior negotiations.¹⁴⁸ The author considers this rule in further detail below.

3.3 The Parol Evidence rule

The SCA has confirmed on a number of occasions that the parole evidence rule remains part of South African law and that the same principles of evidence admissibility apply regardless of the nature of the document being interpreted.¹⁴⁹

¹⁴⁵ *KPMG* supra note 16 para 39.

¹⁴⁶ *Bothma-Batho* supra note 123 para 12.

¹⁴⁷ *Ibid.*

¹⁴⁸ See *Van Aardt* supra note 142 para 9, where both the *KPMG* and *Delmas* judgments are cited with approval in relation to his statement.

¹⁴⁹ *KPMG* has been cited with approval in a number of SCA cases including, *Blair Atholl* supra note 16 para 69; *Novartis* supra note 123 para 27; *Endumeni* supra note 120 para 18; *Van Aardt* supra note 142 para 9.

The parol evidence rule has been described as consisting of two independent rules, namely the integration rule and the interpretation rule.¹⁵⁰ Under the first rule it defines the limits of a contract, while under the second it determines when and to what extent extrinsic evidence may be adduced to explain or inform the meaning of the words contained in a written document.¹⁵¹

In broad terms the integration rule provides that where a jurial act is incorporated in a complete written memorial, the text will be regarded as the exclusive memorial of the transaction and no extrinsic evidence may be led to contradict, add or vary its terms.¹⁵² Although the evidence excluded under the rule would usually be oral in nature, it can also include other documentary evidence.¹⁵³

Christie's Law of Contract in South Africa explains the rule as follows:

*"...where parties have decided that their contract should be recorded in writing and that such contract shall be the sole, complete record of their agreement, their decision will be respected, and the resulting document, or documents, will be accepted as the sole evidence of the terms of the contract."*¹⁵⁴

However, where the parties did not intend for a written contract to be the exclusive memorial of their agreement, but merely to record a portion thereof with the remainder being left oral (a so called partial integration), the integration rule would only prohibit the admission of evidence to contradict the written portion and will not preclude evidence of the supplemental oral agreement.¹⁵⁵ In order to ascertain whether the parties intended for the written instrument to constitute a partial integration, the court will be entitled to consider not only the document, but also surrounding circumstances and the negotiations between the parties

¹⁵⁰ *Johnston v Leal* 1980 (3) SA 927 (A) at 943.

¹⁵¹ *Ibid.*

¹⁵² DP van der Merwe et al 'Evidence' in *The Law of South Africa* 3 ed vol 18 (2015) para 167; *Johnston* supra 150 at 938D; *Mike Ness Agencies CC t/a Promech Boreholes v Lourensford Fruit Company (Pty) Ltd* 2019 ZASCA 159 (unreported case no: 922/2018) para 15.

¹⁵³ Van der Merwe op cit note 152 para 167.

¹⁵⁴ GB Bradfield *Christie's Law of Contract in South Africa* 7 ed (2016) at 226.

¹⁵⁵ *Johnston* supra 150 at 944; see also Van der Merwe op cit note 152 para 167.

leading up to the conclusion of the agreement, provided the use of this evidence will be limited to this function.¹⁵⁶

As to the interpretation rule, it is accepted that extrinsic evidence may be led in aid of interpreting the written memorial in certain exceptional circumstances.¹⁵⁷ However, these cases do not constitute an exception to the integration rule, given that there is no addition or variation to the text of the document.¹⁵⁸ The purpose is rather clarification.

Furthermore, where a contract appears to be incomplete *ex facie* the document, evidence may be led to explain the lack of completeness, to ascertain why the parties left blanks in the particular contract and to ascertain what the integration actually comprises.¹⁵⁹ The object of this evidence is therefore not to contradict, add or modify the text, but merely to explain the lack of completeness in the contract and is not contrary to the integration rule.

Although the parol evidence rule would not preclude evidence regarding a subsequent oral agreement that alters, adds or varies the written agreement, such oral agreement would only be effective where, having regard to the particular nature of the agreement (for example a sale of land), there has been compliance with the legal formalities required to establish a binding agreement.¹⁶⁰ This is particularly relevant to the amendment of a DTC, given the formalities prescribed under section 108 of the ITA.¹⁶¹

Notwithstanding the benefits provided by the parol evidence rule, it also presents an opportunity for abuse and could be used as a mechanism to enforce fraud where a contracting party tries to enforce an agreement, knowing that it does not represent the true agreement between the parties. As such the rule has often been departed from by courts in favour of achieving a fair result. *Christie's Law of Contract* describes the interaction of the rule and the possible exceptions thereto as follows:

¹⁵⁶ Ibid.

¹⁵⁷ Van der Merwe op cit note 152 para 176 where he refers to examples such as (i) evidence adduced to show that words were used in a specialised or technical sense; (ii) evidence to identify the persons and objects referred to in a document; and (iii) evidence to place the interpreter in the position of the author by reference to facts of which the author of the document was aware.

¹⁵⁸ Ibid.

¹⁵⁹ *Johnston* supra 150 at 943.

¹⁶⁰ *Johnston* supra 150 at 938G.

¹⁶¹ See discussion op cit note 71 which deals with a similar principle in relation to DTCs.

“Perhaps the best way to look at the rule is to see it as a backstop that comes into operation only in the absence of some more dominant rule, giving way to rules concerning misrepresentation, fraud, duress, undue influence, illegality or failure to comply with the terms of a statute, mistake and rectification....In all such cases, of course, the burden is on a party who has signed a written contract to displace the maxim caveat subscriptor by proving lack of the necessary animus.”¹⁶²

The example of rectification is often referred to in cases as a basis for admission of extrinsic evidence contrary to the written text.¹⁶³ However as indicated in *Blair Atholl*, this admission would only be possible where a claim for rectification has been pleaded.¹⁶⁴ Under a claim for rectification, the claimants allege that the actual words of the agreement under consideration fails to reflect their common intention and that such wording should therefore be amended to reflect the actual intention.¹⁶⁵ Given that the onus falls on the claimant to prove the true intention of the parties, it would be essential to allow extrinsic evidence in these circumstances to prove the actual intention of the parties and explain the reasons for the error.

As far as application is concerned, the parol evidence rule has been applied by our courts to not only written contracts, but also judgments and other negotiable instruments.¹⁶⁶ This broad application was also confirmed in *KPMG*, where it was stated the rules regarding admissibility of evidence do not depend on the nature of the document.¹⁶⁷ As such, it is considered that the rule would apply to any jural act couched in documentary form.¹⁶⁸ This has also been confirmed by the SCA in two recent judgments, where it was stated that as part of the interpretative process, the rules regulating the admissibility of evidence do not change depending on the nature of the document.¹⁶⁹ In the author’s view, the judgment of *ABC*

¹⁶² GB Bradfield op cit note 154 at 228.

¹⁶³ *Blair Atholl* supra note 16 para 70; *Van Aardt* supra note 142 para 9.

¹⁶⁴ *Ibid*, see also Van der Merwe op cit note 152 para 168.

¹⁶⁵ *Ibid*.

¹⁶⁶ Van der Merwe op cit note 152 para 167 where a number of cases are cited in which the parol evidence rule was applied in respect of each of these types of agreements.

¹⁶⁷ *KPMG* supra note 16 para 39.

¹⁶⁸ Van der Merwe op cit note 152 para 167.

¹⁶⁹ *United Manganese* supra note 123 para 16; *Telkom* supra note 123 para 14.

Proprietary Ltd is therefore correct in stating that the parol evidence rule would equally apply to DTCs.

3.4 Context under the *Endumeni* approach

By its very nature context is something that would depend on the particular document under consideration and it would therefore be very difficult to create an acceptable all-encompassing definition of what could be regarded as context when interpreting a document.

As previously mentioned, *KPMG* held that extrinsic evidence may be admissible to contextualise a document to establish its factual matrix or purpose or for purposes of identification, but that 'one must use this evidence as conservatively as possible'. The court also discarded the traditional distinction between 'background circumstances' and 'surrounding circumstances' as artificial and vague and rather preferred to use the term 'context' or 'factual matrix'.¹⁷⁰

In *Blair Atholl*, the court considered this statement to mean that extrinsic evidence led to contextualise a document was limited to that function and must not extend beyond established parameters. For example, a party is not entitled testify about how they understood the words used in an agreement, their negotiations leading up to the agreement or what their intention had been.¹⁷¹

In recent times the question of context under the *Endumeni* approach was expressly considered by the SCA in two concurrent tax cases.¹⁷² Both cases respond in part to what was said in the minority judgment of Majiedt JA and Davis AJA in *SARS v Daikin Air Conditioning South Africa (Pty) Ltd*.¹⁷³ In this minority judgement it was stated that:

“Contrary to Endumeni, above at 603 (fn14) which, on the authority of KPMG Accountants (SA) v Securifin Ltd 2009 (4) SA399 (SCA), suggests that there is no distinction in the interpretation of contracts, statutes and other documents, we can find nothing in the judgment of Harms DP in KPMG that prevents a drawing of the

¹⁷⁰ *KPMG* supra note 16 para 39.

¹⁷¹ *Blair Atholl* supra note 16 para 66; *Van Aardt* supra note 142 para 9; *Mike Ness* supra note 152 para 16.

¹⁷² *United Manganese* supra note 123; *Telkom* supra note 123.

¹⁷³ *SARS v Daikin Air Conditioning South Africa (Pty) Ltd* 2018 ZASCA 66 (unreported case no: 185/2017).

distinction that we have drawn between the interpretation of legislation and contracts or similar documents...It is difficult to see how 'commercial sensibility', alluded to by Van der Merwe JA, can play any role in interpreting a statute. And a statute must apply to all equally – its interpretation cannot be dependent on a particular contextual setting, nor can it vary from one factual matrix to the next. Context is fact-specific and can be applied in the interpretation of contracts and like documents, but not of statutes."¹⁷⁴ (footnotes omitted)

The judgment therefore firstly contends that the interpretive technique to be employed in the interpretation of contracts, statutes and other documents is not a unitary one, and that different methods would apply depending on the nature of the document being interpreted. Secondly the judgment provides that context should not play a role in the interpretation of statutes.

Wallis JA received an opportunity to deal with these contentions in the subsequent case of *CSARS v United Manganese of Kalahari (Pty) Ltd.*¹⁷⁵ In response to the first issue, he states that the minority has misconstrued what was said in *Endumeni*. He clarifies that the reference in *Endumeni* to *KPMG*, was to the proposition that the rules of admissibility of evidence in the interpretation of documents do not change depending on the nature of the document. Wallis JA further reasons that if one were to accept that a common evidential rule applies regardless of the document, it should follow that the basic approach to interpretation should also not vary depending on the nature of the document being interpreted.¹⁷⁶

Regarding the relevance of context in the interpretation of statutes, Wallis JA reaffirms that context is fundamental in approaching the interpretation of all written instruments.¹⁷⁷ However, he does acknowledge that context would differ depending on the nature of the document.¹⁷⁸ By way of example, the context of a carefully formulated contract drafted by a team of lawyers would invariably differ from a basic agreement scribbled on a page in a

¹⁷⁴ Ibid para 31.

¹⁷⁵ *United Manganese* supra note 123.

¹⁷⁶ Ibid para 16.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

notebook. Likewise, the difference in the genesis of legislation compared to that of contracts would result in a different context (or factual matrix) for each.

Wallis JA further states that legislation will undoubtedly have a context that may be highly relevant to their interpretation. In this regard he refers to five sources of context in relation to statutes:

- a) Section 39(2) of the Constitution requires that all statutes should be interpreted in accordance with the spirit, purpose and objects of the Bill of Rights.
- b) Context provided by the enactment in its entirety.
- c) Where legislation flows from a commission of enquiry or the establishment of a specialised drafting committee, reference to their reports is permissible and may provide helpful context.
- d) Legislative history can provide useful background as part of the interpretative process.
- e) The general factual background to a statute, including the nature of its concerns, the social purpose to which it is directed and in the case of statutes dealing with a particular area of public life or the economy, the nature of that area.¹⁷⁹

The judge therefore rejects the minority view and concludes that context is as important in construing statutes as it is in relation to the interpretation of any other documents.¹⁸⁰

The minority judgment from Daikin was also considered by the SCA in *Telkom SA SOC Limited v CSARS*.¹⁸¹ The court (Swain JA) regards the interpretive technique contemplated under *Endumeni* as being a unitary exercise (regardless of the nature of the document to be interpreted), but not uniform in nature.¹⁸²

As a unitary exercise, it requires the consideration of the text (having regard to the ordinary rules of grammar and syntax), the context of the provision, the apparent purpose of the provision and the material known to those responsible for its production, regardless of the nature of the document. In other words, the interpretative technique remains unchanged.¹⁸³

¹⁷⁹ Ibid para 17.

¹⁸⁰ Ibid

¹⁸¹ *Telkom* supra note 123.

¹⁸² Ibid para 14; this judgment was also confirmed by Wallis JA in *United Manganese* supra note 123 para 17.

¹⁸³ Ibid.

However, the exercise of this unitary technique is not uniform, because depending on the nature of the document being interpreted, context would differ and the background preparation and production of the particular document would need to be considered from the outset.¹⁸⁴

3.5 Reading-in

One last aspect to consider in this chapter is the issue of implied or tacit terms and the interpretative technique of 'reading in'. Although technically not part of the interpretative technique contemplated under *Endumeni*, this is nevertheless an issue that is often raised by parties in disputes about the proper interpretation of treaties and informs the process of treaty interpretation.¹⁸⁵ By way of example, in the recent case of *ABC Proprietary Ltd*, SARS argued for tacit terms to be read into the DTC under consideration on the basis that this would give effect to the true intention of the contracting parties.¹⁸⁶

In short, the terms of a contract can either be express or implied.¹⁸⁷ Implied terms are those terms binding on the parties without any explicit agreement having been concluded in writing, and can be further subdivided into *ex lege* terms (i.e. those implied by law) and tacit terms (i.e. those implied from the facts).¹⁸⁸

A tacit term derives from the common intention of the parties as inferred from the express terms of the contract, circumstances surrounding the conclusion of the treaty and the subsequent practice of the parties.¹⁸⁹ It could be either actual (i.e. where the parties thought about it, but didn't bother to express it) or imputed (i.e. parties would have agreed on the

¹⁸⁴ Ibid.

¹⁸⁵ See *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150 (A) at 175; *LJ Downing v SIR* Unreported Case No 6737 (1972) Natal Income Tax Special Court (2 August 1972); *ABC Proprietary Limited* supra note 1 para 17.

¹⁸⁶ Ibid.

¹⁸⁷ RH Christie et al 'Contract' in *The Law of South Africa* 3 ed vol 9 (2014) para 356.

¹⁸⁸ Ibid.

¹⁸⁹ RH Christie op cit note 187 para 358.

issue had they thought about it, but did not do so because they overlooked it or failed to anticipate the eventuality in which the term would be required).¹⁹⁰

However, a court will be reluctant to impute a tacit term into an agreement merely because it would be reasonable (or sensible in the circumstances). Our courts have historically applied the so-called 'bystander' test in order to ascertain whether a tacit term should be read into the agreement. This test asks the question: "What would the parties have answered if at the time of conclusion of the agreement, a bystander had asked them 'What would happen in such a case?'" If both parties would have replied in agreement that so-and-so would have been the case, but they just didn't trouble to say it because it was so clear, then that consequence is deemed to have been intended and a term to that effect can be read into the agreement.¹⁹¹

Where the suggested term is required to give business efficacy to a contract (or where the object of the contract would be frustrated in the absence of the term being implied), it may more readily be accepted that the parties had the term in mind or would have assented to it under the bystander test.¹⁹² However, where the imputed term is not necessary to render the agreement (or treaty) fully functional, and it would merely have been reasonable or sensible

¹⁹⁰ Ibid.

¹⁹¹ Test applied in *Pan American* supra note 185 at 175.

¹⁹² RH Christie op cit note 187 para 358.

or convenient for the parties to have adopted it, it would not necessarily follow that the parties had it in mind or would have agreed to it.¹⁹³

Importantly, a tacit term cannot be implied directly in conflict with an express term of the agreement, provided that in the case of ambiguity the express terms may leave room for a tacit term to be applied.¹⁹⁴

3.6 Conclusion

Following the analysis above, the author concludes that the approach to interpretation as originally described in *Endumeni* has become settled law and is regarded as an accurate reflection of the contemporary South African interpretive approach.

It contemplates an objectively purposive approach to interpretation in which the text must be interpreted, properly contextualised (taking account of the document as a whole, material known to the persons responsible for its production, circumstance attendant upon its creation and such other sources of context as might be applicable to the particular document under consideration) and having regard to the apparent purpose of the document. The interpretive process is a unitary one in which all the elements need to be considered from the outset without hierarchy.

As with any interpretation a sensible (or businesslike) interpretation should be preferred to one that is not, provided that this should not be used as justification by an interpreter for interposing a meaning which contradicts the actual words of the text.

Importantly, our courts (both in *Endumeni* itself and thereafter) have reiterated that *Endumeni* has not introduced unlimited leeway to lead evidence and parties remain subject to the ordinary principles of evidence admissibility and the parol evidence rule. Save for certain exceptions to the parol evidence rule, parties will not be allowed to lead evidence of

¹⁹³ Ibid.

¹⁹⁴ Ibid, *Pan American* supra note 185 at 175.

their prior negotiations and stated intentions at the time of concluding the agreement and evidence should be limited to the function of contextualising the agreement.

A summary of the key principles identified in this chapter has been included in Appendix C below. In the next chapter the author will compare the interpretive approaches identified in chapter 2 and 3 with the view of identifying commonalities and/or differences between the two approaches.

CHAPTER 4 – COMPARISON OF THE APPROACHES

Following on the analysis in chapter two and three, the author now proceeds to compare the two approaches. This comparison looks at the general interpretive method applied, as well as the constituent elements of the two approaches.

4.1 General interpretive approach

Both approaches contemplate a unitary purposive approach to interpretation in which the starting point is the text of the document, properly contextualised and having regard to the purpose of the treaty. All these elements must be considered from the outset without hierarchy.

Both approaches also advocate for an objective approach to interpretation in which the text remains the authentic expression of the parties' intention and the focus of interpretation is the elucidation of the text's meaning and not an investigation *ab initio* into the subjective intention of the parties.

4.2 Good faith

The VCLT approach requires that a treaty be interpreted in good faith. This requires that where two possible interpretations are possible, the one that enables the treaty to have its appropriate effect should be preferred as determined with reference to good faith (and the principle of *pacta sunt servanda*) and the purpose of the treaty. The *Endumeni* approach in turn requires a sensible or businesslike interpretation to be adopted over an interpretation that undermines the purpose of the document.

The author considers that both essentially require the same thing, i.e. a sensible interpretation that doesn't undermine the purpose of the DTC. Furthermore, both reiterate

that this should not be used as a basis for substituting the actual text with the interpreter's subjective views.

4.3 Context

In terms of both approaches context needs to be taken into account from the outset as part of the unitary process regardless of whether the text is ambiguous or not. Under the South African approach context is understandably not defined and our courts have to consider the nature of the particular document being interpreted to determine what constitutes context. The VCLT in turn deals with a particular set of documents (i.e. international treaties) and is therefore able (in part) to define what should be considered as part of the context of a treaty.

Under the *Endumeni* approach evidence informing context is subject to the ordinary principles of evidence admissibility, which includes the parol evidence rule. As such evidence informing context would generally be admissible, provided it does not constitute evidence of the parties' prior negotiations or their intention at the time of concluding the agreement. The VCLT does not contain any limitations on the admissibility of this type of evidence, provided it qualifies as either context or supplementary means of interpretation.

4.4 Object and Purpose

As with context, both methods provide that the object and purpose of a treaty must be considered from the outset as part of the unitary interpretive process. The purpose of a treaty would need to inform the process regardless of whether there is ambiguity in the text. Both approaches indicate that the purpose of the treaty would not be considered as an independent means of interpretation that could justify a meaning contrary to the treaty text, but rather serves to elucidate the text and facilitate a sensible meaning that gives effect to this purpose.

4.5 Subsequent agreements and practice

In terms of the VCLT, subsequent agreements, practice and rules of international law would need to be considered together with the context as part of the unitary process. Although the domestic approach does not expressly deal with these items, it is considered that they can

possibly be introduced into the unitary process as context, especially when one considers that context would be informed by the nature of the document being interpreted. As such it would remain subject to the ordinary domestic principles regulating the admissibility of evidence.

Insofar as a subsequent agreement or practice alters the treaty this would only be effective insofar as there has been compliance with the formalities prescribed under domestic law.

4.6 Supplementary means of interpretation

Apart from stating that it expressly includes the preparatory work to the treaty and the circumstances of its conclusion, 'supplementary means' is not defined in the VCLT. As such there has often been debate about what evidence will fall under this category. Under the *Endumeni* approach, no reference is made to the concept of supplementary means, but it provides that consideration must be given to the to the material known to those responsible for the treaty's production and the background to the preparation.

In terms of the VCLT, supplementary means of interpretation can always be used to confirm the ordinary meaning determined under the general rule. However, it can only serve as an independent means of interpretation to determine the meaning of a treaty where the ordinary meaning is ambiguous, obscure or leads to a result which is manifestly absurd or unreasonable. Accordingly, although the VCLT imposes certain limitations on the use of supplementary material, there are no restrictions placed on the admissibility of such information and it can be introduced up front as part of the unitary process.

Under the *Endumeni* approach, one must consider the material known to those responsible for the treaty's production and the background to the preparation as part of the unitary process, regardless of whether the ordinary meaning is ambiguous or not. This evidence can

therefore also be introduced upfront as part of the unitary process and admissibility will be subject to the ordinary principles of evidence admissibility.

4.7 Evidence admissibility

As previously indicated the VCLT does not expressly impose any limitations on the admissibility of evidence, provided it can be included under one of the categories listed under article 31 and 32.

The South African domestic approach remains subject to the ordinary domestic principles of evidence admissibility, including the parol evidence rule. Our courts have confirmed that the principles of evidence admissibility apply regardless of the nature of the document to be interpreted and would therefore equally apply to the interpretation of a DTC as it would to a domestic contract.

In applying the parol evidence rule, our courts would therefore not allow extrinsic evidence to be led that contradicts, adds or modifies the text of a DTC, irrespective of whether such evidence informs context or is regarded as supplementary means under the VCLT. Evidence regarding the contracting parties' intention or prior negotiations would generally be prohibited under the parol evidence rule. However, unilateral statements of intent would in any event also be inadmissible under the VCLT as it would not fall under any of the categories mentioned in article 31 and 32.

However, a court would need to consider whether any of the exceptions to the rule possibly apply. Examples would include where the contracting parties plead rectification of the treaty text, where they allege the existence of a special/technical meaning, or in support of proving

partial integration. In these cases, the parties would be able to lead evidence as to their intention to prove the abovementioned.

Finally, the parol evidence rule would not prevent extrinsic evidence from being led that merely clarifies or elucidates the text of the treaty

4.8 Special Meaning

Both approaches acknowledge that in some instances a special or technical meaning (other than that suggested by the ordinary grammatical meaning of the text) might have been intended by the parties. In such a case, the onus would be on the party alleging the special meaning. Accordingly, evidence as to the parties' intention and prior negotiations could be admissible in this context. Evidence in support of a special meaning would not be contrary to the parol evidence rule, provided it does not add or vary the actual text.

4.9 Conclusion

Although the comparison above indicates that the two approaches align with each other to a large extent, there are certain areas in which the domestic approach differs somewhat from the VCLT. These differences are listed below:

- i) Categories of interpretive aids: The VCLT categorises interpretive aids into defined subcategories under article 31 and 32 (i.e. "context" as defined, "subsequent agreements, practice and rules of international law" and "supplementary means"). In contrast the South African approach does not categorise interpretive aids into categories, but rather works with the overarching concept of context (or the factual matrix).
- ii) Context as defined: The VCLT expressly defines context. Under the South African domestic approach, context will depend on the nature of the document being interpreted. Accordingly, the determination of context under the domestic approach can (and should) be informed by the guidance provided under the VCLT.

- iii) Use of supplementary means: The VCLT places a limitation on the use of supplementary means. The South African domestic approach does not distinguish supplementary means from other context, and accordingly this information (provided it is admissible) will inform the interpretive process from the outset.

- iv) Admissibility of evidence: The VCLT does not expressly deal with evidence admissibility. Limitations could potentially be inferred with reference to the categories of interpretive aids that are considered relevant under article 31 and 32, but as indicated before, this does present the possibility of admitting supplementary means (and as such extrinsic material) in all instances, subject only to the limitations on use. The South African approach on the other hand remains subject to the domestic principles regulating the admissibility of evidence. As indicated above, these principles are applied by our domestic courts in the interpretation of all documents, including treaties.

In the final chapter the author summarises the findings of the foregoing chapters and considers how the two approaches can be applied in a cohesive manner by our domestic courts.

CHAPTER 5 – CONCLUSION

Following the recent judgment of *ABC Proprietary Ltd*, the author sought to obtain greater clarity on the appropriate domestic approach to the interpretation of treaties and in particular the admissibility of evidence, while taking account of the fact that the interpretation of a DTC remains subject to the rules on interpretation prescribed under the VCLT.

In chapter two the author analysed article 31 and 32 of the VCLT as informed by international case law and commentary. Through this process the author was able to identify the approach to the interpretation of treaties as recommended by the VCLT and ascertain the limitations (if any) imposed on the admissibility of evidence and the use of extrinsic means of interpretation under customary international law.

In chapter three the author considered the contemporary South African approach to interpretation and the admissibility of evidence. The author also considered under what circumstances a court would read words into the text of a document as part of the interpretative process. Upon conclusion of this chapter, the author was able to identify the recommended domestic approach to the interpretation of documents and the rules regulating the admissibility of evidence.

In chapter four the author compared the two approaches and identified commonalities and differences between the two approaches. The comparison was structured with reference to the underlying elements that inform the two approaches, i.e. the general interpretive technique applied, the role of good faith, the object and purpose of the document, subsequent agreements and practice and finally supplementary means of interpretation and the application of the parol evidence rule.

5.1 Approach going forward

As indicated at the beginning of this dissertation, the author did not include an analysis of South African cases on the interpretation of DTCs.¹⁹⁵ The reason for this is that many of the recent South African treaty cases (including *ABC Propriety Ltd*) merely took the view that

¹⁹⁵ For a summary of South African cases on treaty interpretation see Du Plessis op cit note 33.

treaty interpretation is no different from our ordinary domestic principles as set out in *Endumeni*. As a result, our domestic courts generally do not deal with the VCLT rules in any particular detail as part of their judgments, but rather tend to revert to the ordinary domestic principles of interpretation and evidence admissibility.

In one of the very few SCA judgments on treaty interpretation the full bench (which included Wallis JA) held that:

*“Regarding the approach to be adopted in construing the relevant provisions, consideration must be had to the rules applicable to the interpretation of treaties which are binding on South Africa and all states as rules of customary international law. These rules, which are essentially no different from those generally applied by our courts in construing statutes and agreements, are set out in arts 31 and 32 of the Vienna Convention on the Law of Treaties...”*¹⁹⁶

The author agrees with Hattingh that this statement reflects the SCA’s desire to synthesise the approach to legal interpretation in South Africa and work towards a less disparate process of legal interpretation that is not dictated by the type of legal document under consideration.¹⁹⁷

This movement towards a synthesised approach has been confirmed in subsequent judgments of the SCA, the most recent of which include *Telkom* and *United Manganese* mentioned in chapter 3. In both cases the SCA full bench confirmed that:

- i) the rules regulating the admissibility of evidence does not change depending on the nature of the document; and
- ii) the fundamental interpretive technique or approach to interpretation will not vary depending on whether the document under consideration is a contract, a statute or some other type of document.¹⁹⁸

In view of the comparison in chapter 4, the author does not consider there to be any reason why the *Endumeni* approach could not be applied equally to the interpretation of DTCs. The

¹⁹⁶ *Krok* supra note 21 para 27.

¹⁹⁷ See Hattingh’s commentary on the *Krok* judgement op cit note 24 at 46D-E.

¹⁹⁸ *Telkom* supra note 123 para 14; *United Manganese* supra note 123 para 16.

author considers a synthesised approach to interpretation as suggested by the SCA to be both acceptable and preferred in relation to DTCs.

Similarly, in relation to evidence admissibility, a court should not consider the lack of express regulation under the VCLT to constitute a licence to admit evidence more liberally when interpreting treaties. The parties remain subject to the ordinary domestic principles of evidence admissibility as confirmed in *KPMG*.

The author considers that a synthesised approach like this would contribute towards legal certainty as judges will be tasked with applying a unitary interpretive technique and will adjudicate the admissibility of evidence on the same basis regardless of the document under consideration.

However as indicated by the SCA in *Telkom* and *United Manganese*, context will naturally vary depending on the nature of the document being interpreted.¹⁹⁹ As such, a court should be mindful of and be guided by the VCLT on what constitutes context in relation to a treaty. In addition, section 233 of the Constitution requires that when interpreting a DTC, an interpretation consistent with international law (which includes the VCLT principles) must be preferred.

In conclusion the author therefore considers it appropriate to apply the domestic principles of interpretation and evidence admissibility when interpreting a DTC, provided that the court's approach is informed by (and consistent) with the VCLT and other relevant sources of international law. The court should also be cognisant of foreign judgments as an interpretive aid, particularly where similar treaty wording has been considered.

¹⁹⁹ Ibid.

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APPENDIX A

“Article 31, GENERAL RULE OF INTERPRETATION

1. *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
 - (a) *Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;*
 - (b) *Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*
3. *There shall be taken into account, together with the context:*
 - (a) *Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
 - (b) *Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
 - (c) *Any relevant rules of international law applicable in the relations between the parties.*
4. *A special meaning shall be given to a term if it is established that the parties so intended.*

Article 32. SUPPLEMENTARY MEANS OF INTERPRETATION

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31 :

- (a) *Leaves the meaning ambiguous or obscure; or*
- (b) *Leads to a result which is manifestly absurd or unreasonable.”²⁰⁰*

²⁰⁰ Extract from *Vienna Convention on the Law of Treaties* (23 May 1969), United Nations Treaty Series.

APPENDIX B

Provision	Element	Admissibility	Use
31(1)	Treaty text	Always	<p>The point of departure under the general rule is that the text must be interpreted in good faith, in accordance with the ordinary meaning properly contextualised and in the light of its object and purpose.</p> <p>The general rule contemplates a unitary exercise in which all the elements are thrown into a crucible to deliver the relevant interpretation. The elements are not applied in a hierarchical fashion with one element taking preference over another.</p> <p>The text must be presumed to be the authentic expression of the parties' intention. The starting point of interpretation is therefore an elucidation of the text's meaning and not an investigation ab initio into the intention of the contracting parties.</p> <p>Where a treaty is open to two interpretations one of which does and the other which does not enable the treaty to have appropriate effects, good faith and the object and purpose of the treaty will demand that the former interpretation should be adopted. However, this would not call for an extensive or liberal interpretation that goes beyond the expressed or implied terms of the treaty.</p>

Provision	Element	Admissibility	Use
31(1)	Object and Purpose	Always	<p>The Unitary process requires that the treaty be interpreted in light of its object and purpose.</p> <p>This does not equate to the subjective intention of the contracting parties, but rather the goal of the entire treaty and not the purpose of a single treaty provision.</p> <p>Object and purpose is subordinated to the actual text and does not function as an independent means of interpretation, but merely to elucidate the treaty text.</p>

Provision	Element	Admissibility	Use
31(2)	Context	Always	<p>Primary interpretative material to be considered as part of the unitary process (regardless of whether the treaty text is ambiguous or not),</p> <p>Context is expressly defined in the VCLT and includes in addition to the text, the preamble, and the annexes, the following:</p> <ul style="list-style-type: none"> a) agreements between parties in connection with conclusion of treaty; and b) instruments made by a contracting party in connection with the conclusion of the treaty and accepted by all other parties. <p>These documents are not subject to the same limitations on use as those prescribed under article 32 and can always be used to inform context.</p> <p>Unilateral documents (e.g. technical explanations and statements from people involved in negotiations) will only be included to the extent that this has been expressly accepted by the other side.</p>

Provision	Element	Admissibility	Use
31(3)	"Together with context"	Always	<p>The following documents to be considered from the outset together with the context as part of the unitary process:</p> <ul style="list-style-type: none"> a) subsequent agreement between the parties regarding interpretation of treaty/application of treaty provisions; b) subsequent practice in application of the treaty which establishes agreement regarding interpretation; and c) rules of international law applicable to relationship between parties. <p>Distinguished from paragraph 2 on the basis that this is not intrinsic contemporaneous documents, but subsequent agreements/practice extrinsic to the original agreement.</p> <p>No hierarchy applies under article 31 and these items carry equal weight to the items listed in paragraph 2.</p> <p>To the extent that any subsequent agreement/practice alters treaty text, this will only be effective insofar as compliant with prescribed domestic formalities.</p>

Provision	Element	Admissibility	Use
31(4)	Special meaning	Always – Subject to onus on party alleging existence of special meaning.	<p>Notwithstanding the apparent ordinary meaning determined under the general rule, where the parties intended for a special/technical meaning to apply this will trump ordinary meaning.</p> <p>Burden of proof would be on the party alleging the existence of such a meaning.</p>

Provision	Element	Admissibility	Use
32	Supplementary means of interpretation	Always, but subject to limitations on use.	<p>Despite imposing limitations on use, article 32 does not limit the admissibility of supplementary means in any way. This information can therefore be introduced from the start as part of the unitary process.</p> <p>The function of supplementary means is limited to the confirmation of the article 31 meaning.</p> <p>It only serves as an autonomous means of interpretation where article 31 leads to an ambiguous or obscure meaning or results in a manifestly absurd or unreasonable result.</p> <p>As to what constitutes ‘supplementary means’, this is not defined, although preparatory work to the treaty (<i>travaux préparatoires</i>) and the circumstance of its conclusion is expressly included.</p>

APPENDIX C

Element	Admissibility	Use
Text of the document	Always	<p>Point of departure is the language of the provision (taking account of ordinary rules of grammar and syntax) read in light of the document as a whole, having regard to the context and purpose of the document, the material known to those responsible for its production and the circumstance attendant upon its coming into existence.</p> <p>The process contemplated above is a unitary and objective one in which all the elements are considered from the outset. However, it is not uniform, and context will vary depending on the nature of the document being interpreted.</p> <p>A sensible or businesslike interpretation is to be preferred to one that undermines the purpose of the document. Notwithstanding this, the primacy of the text remains, and interpreters should not use this as a basis for substituting the actual text with their subjective views.</p>

Element	Admissibility	Use
Context	Always, subject to domestic parol evidence rule.	<p>Regardless of whether the text is ambiguous or not, context <u>must</u> be considered from the outset as part of the unitary process contemplated above.</p> <p>What constitutes context would depend on the nature of the document and is not defined. Our courts have stated that possible sources of context in relation to a statute could include:</p> <ul style="list-style-type: none"> ○ The Bill of Rights ○ The enactment considered as whole (arguably this would already be considered as part of the unitary process described above) ○ Reports prepared by specialised drafting committees, commissions of enquiry and the like. ○ Legislative history ○ General background to the statute (e.g. regarding preparation and production of the particular document), the concerns it was intended to address, the social purpose it is directed towards etc. <p>The admissibility of evidence informing context will be subject to the parol evidence rule. Parties will therefore not be able to lead evidence of their prior negotiations and what their intentions were at the time of concluding the agreement. The evidence should be limited to the function of contextualising the agreement.</p>

Element	Admissibility	Use
Purpose	Always, subject to domestic parol evidence rule.	<p>The purpose of the provision under consideration <u>must</u> be considered from the outset as part of the unitary process. As with context this is required regardless of whether the ordinary meaning is ambiguous.</p> <p>A sensible (businesslike) meaning that gives effect to the purpose of the provision is to be preferred, this would be subject to the constraints imposed by the words adopted.</p>
Subsequent agreements and practice	Always, subject to domestic parol evidence rule.	<p>The parol evidence rule would not preclude evidence regarding subsequent agreements and practice. However, to the extent that such subsequent agreement or practice alters the written agreement under consideration, this would need to comply with such formalities as may be prescribed under domestic law.</p> <p>For example in relation to the conclusion of a DTC (or amendments thereto by way of protocol), this would need to be done in compliance with section 108(2) of the ITA as read with the Constitution.</p>

Element	Admissibility	Use
Supplementary means of interpretation	Always, subject to domestic parol evidence rule.	<p>According to the <i>Endumeni</i> approach consideration <u>must</u> be given to the material known to those responsible for the production of the document being interpreted and the background to the preparation.</p> <p>Consideration of this information is not subject to the existence of ambiguity in the text.</p>

Element	Admissibility	Use
Parol Evidence	Places overall limitation on evidence admissibility	<p>Where the document under consideration was intended to provide a complete memorial of the agreement, extrinsic evidence cannot be led that contradicts, adds or modifies the text. Irrespective of whether such evidence informs the context (factual matrix), it would be inadmissible.</p> <p>Evidence regarding the contracting parties' intention or prior negotiations would generally be prohibited in accordance with the parol evidence rule.</p> <p>In the event of partial integration (i.e. where the written agreement is not intended as a complete memorial of the agreement), the rule will only prohibit extrinsic evidence on the written portion and evidence can still be led in relation to the existence of a supplemental oral agreement.</p> <p>This rule would further be subject to a number of exceptions, for example where the parties claim rectification or to prove partial integration. Evidence may also be led in clarification of the agreement, provided it does not add or vary the text.</p> <p>Rules regarding evidence admissibility apply regardless of nature of document being interpreted.</p>

Element	Admissibility	Use
Special meaning	Always	<p data-bbox="564 259 1386 465">Onus would be on person alleging the existence of special or technical meaning. Accordingly, party should be allowed to lead evidence on intention and prior negotiations in this limited context.</p> <p data-bbox="564 551 1386 645">Such evidence would not contravene the parol evidence rule provided it does not add/vary the actual text.</p>