Endumeni and Water Trading in the Superior Courts: Falling Short of a Unitary Approach to Statutory Interpretation

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Abstract

This article critiques recent decisions on water trading in the superior courts in light of the approach to statutory interpretation set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA). The *Endumeni* approach, which is the preferred modern approach to statutory interpretation, entails a unitary interpretive technique whereby text and context are interpreted together from the outset. Following *CSARS v United Manganese of Kalahari (Pty) Ltd* 2020 4 SA 428 (SCA), context extends beyond the statutory enactment to constitutional, historical and purposive considerations. The article presents an updated account of the *Endumeni* approach and analyses five water trading decisions through this lens. It finds that the water trading decisions fall short of a unitary approach as a result of their failure to anchor their analysis in the correct parts of section 25 of the *National Water Act* 36 of 1998, over-reliance on the statutory context, limited consideration of constitutional, historical and purposive contexts, and reliance on arguments indirectly invoking the intention of the legislature.

Keywords

Statutory interpretation; *Endumeni*; modern approach; *United Manganese*; water trading; *Lötter.*

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1 Introduction

The High Courts, Supreme Court of Appeal (SCA) and Constitutional Court (CC) recently ruled on the transfer of water use entitlements and the lawfulness of water trading under section 25 of the *National Water Act* 36 of 1998 (*NWA*). The judgments that constitute the "water trading cases" for purposes of this article are the decisions in the *Lötter* series: First, the decision of a full bench in the Pretoria High Court[1] per Mothle J (hereafter referred to as *Lötter* High Court); second, the four-one split decision in the Supreme Court of Appeal[2] in which Plasket JA wrote the decision for the majority (hereafter referred to as *Lötter* SCA majority) and Makgoka JA dissented (hereafter referred to as *Lötter* SCA minority); and third, the unanimous decision of the Constitutional Court[3] per Madlanga J (hereafter referred to as *Lötter* CC). In addition, Griffiths J of the Eastern Cape High Court considered water transfers and water trading in the *Ramah Farming* matter.[4]

The *Lötter* cases consolidated three applications seeking a declaratory order on the proper interpretation of section 25 after the Department of Water and Sanitation (DWS) refused to issue water use licences to the buyers in contractual arrangements for the purchase and sale of water use authorisations. In *Ramah Farming* the parties sought declaratory orders on the extent of water use entitlements encumbered by prior agreements of purchase and sale, which also required determining whether section 25 allows for water trading. At issue in all the water trading cases was (i) whether the references to "another property" and "other land" in section 25 refer to the property or land of the holder of a water user authorisation, or the property or land of a third party, and (ii) whether the holder could sell or receive compensation for the surrender and transfer of a water use authorisation.

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1 *South African Association for Water Users Associations v Minister of Water and Sanitation; Lötter v Minister of Water and Sanitation; Wiid v Minister of Water and Sanitation* (71913/2018; 42072/2018; 90498/2018) [2020] ZAGPPHC 516 (12 August 2020) (hereafter *Lötter* High Court).

2 *Lötter v Minister of Water and Sanitation* 2022 1 SA 392 (SCA) (hereafter *Lötter* SCA).

3 *Minister of Water and Sanitation v Lötter; Minister of Water and Sanitation v Wiid; Minister of Water and Sanitation v South African Association for Water Users Associations* 2023 4 SA 434 (CC) (hereafter *Lötter* CC).

4 *Ramah Farming v Great Fish River Water Users Association* 2021 2 SA 547 (ECG) (hereafter *Ramah Farming*).

The water trading courts disagreed on the answers to these two questions. The *Lötter* High Court dismissed the applications on the basis that the *NWA* does not allow for water trading. *Ramah Farming* held that section 25 allows for third party transfers as well as water trading. The *Lötter* SCA majority agreed that section 25 allows for third party transfers and ruled that trading in water use entitlements is not unlawful. But the *Lötter* SCA minority found that while section 25 allows for water transfers, water trading is disallowed. Finally, the *Lötter* CC held that section 25 allows for water transfers and trading.

This article seeks to examine the divergent outcomes in the water trading cases through the lens of the courts' approach to statutory interpretation. More particularly, it seeks to critique the water trading cases in the light of the preferred "modern" approach to statutory interpretation set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[5] (hereafter referred to as *Endumeni*). In *Endumeni* Wallis JA put the notion of the intention of the legislature to rest and purportedly settled the century-old tension between textualism and contextualism in favour of a unitary approach that requires text and context to be read together from the outset.[6] The decision in *Endumeni* has become the "bellwether" of the correct approach to statutory construction in South Africa and has been widely cited by the superior courts.[7] In *CSARS v United Manganese of Kalahari (Pty) Ltd* (hereafter referred to as *United Manganese*)[8] the SCA further clarified its understanding on the external context that can be brought to bear on the text as part of a unitary approach to interpretation.

Two of the water trading courts (*Ramah Farming* and the *Lötter* SCA majority) cited *Endumeni* as the precedent guiding their approach to statutory interpretation. The *Lötter* SCA minority and the CC cited *Cool Ideas 1186 CC v Hubbard* (hereafter referred to as *Cool Ideas*).[9] As explained below, the CC apparently equates the *Cool Ideas* and *Endumeni* approaches, notwithstanding apparent contradiction.[10] The *Lötter* High Court is an outlier, having cited *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*,[11] a precedent that emphasises the importance of context.

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5 *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) (hereafter *Endumeni*).

6 Perumalsamy 2019 *PELJ* 2.

7 Seligson 2021 *Business Tax and Company Law Quarterly* 12.

8 *Commissioner for the South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* 2020 4 SA 428 (SCA) (hereafter *United Manganese*).

9 *Cool Ideas 1186 CC v Hubbard* 2014 4 SA 474 (CC) (hereafter *Cool Ideas*).

10 Perumalsamy 2019 *PELJ* 13.

11 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) (hereafter *Bato Star*).

Section 2 explains the modern approach to statutory interpretation with reference to Schreiner JA's identification of two lines of approach in the seminal case of *Jaga v Donges*,[12] the key elements of the *Endumeni* approach, the reception of *Endumeni*, including clarification of the application of the *Endumeni* approach to statutes, the scope of external context, the impact of administrative practice on interpretation; and the relationships between *Endumeni* and the *Cool Ideas* and *Bato Star* precedents. As an essential backdrop to understanding how the water trading courts engaged with text and context in their decision-making, section 3 then outlines the parties, issues and arguments in the water trading cases. Section 4 presents a detailed analysis of the water trading cases to show how the courts balanced text, and internal and external contexts in their reasoning processes. The reasons underpinning the main finding of the analysis – that none of the water trading courts rose to the challenge of a unitary approach – are elaborated in section 5: The courts' textual focus was too narrowly focused on words relating to transfer and trade with no attempt to interpret the words "another property" and "other land"; their understanding of context was largely restricted to the internal context of the *NWA* with very limited and superficial understanding of the constitutional, historical and purposive considerations that constitute the external context; and the spectre of the intention of the legislature still haunts the courts' reasoning through inferences resting on the *absence* of legislative text.

The detailed and extended analysis of the water trading cases is important because it holds the superior courts to the *Endumeni* standard of statutory interpretation, which is taken to be the modern, preferred approach. More than that, it challenges courts to a deeper, more historically accurate and more contextually informed understanding of equity and sustainability in the water sector, which has relevance for other resource-based sectors where colonial and apartheid legislation has resulted in racial and gendered enclaves that control access to water, minerals, coastal land, and living marine resources. Finally, water is held in public trust for the benefit of all the people of South Africa, hence the manner in which the courts develop water law is a matter of significant public interest.

2 The modern approach to statutory interpretation in South Africa

The section firstly frames the significance of *Endumeni* by the broader historical trajectory of statutory interpretation in South Africa, which has been characterised by tension between approaches that place greater and lesser emphasis on text and context respectively. It goes on to explain the

12 *Jaga v Donges* 1950 4 SA 653 (A).

key elements of the *Endumeni* approach and elaborates on how the precedent has been received and subsequently developed in the superior courts. It flags, in particular, the SCA's subsequent decision in *United Manganese* which settles application of the *Endumeni* approach to statutes and the scope of external context. Finally, it discusses how the precedents in *Cool Ideas* and *Bato Star* relate to the *Endumeni* approach.

2.1 Battle of text and context and Schreiner's "two lines of approach"

South Africa has a legal tradition that extends back to Roman, Roman-Dutch and English legal authorities. The "battle" between text and context marking the historical trajectory of statutory interpretation in South Africa has roots in the textualism favoured by the English legal tradition, and the contextualism preferred by Roman-Dutch authorities.[13] In *Jaga v Donges*,[14] decided seventy years ago, Schreiner JA captured the tension between these two traditions by distinguishing two "lines of approach" to statutory interpretation. These two lines of approach can be distinguished on the basis of whether they require a split or a unitary inquiry.[15]

According to Schreiner JA, the first line of approach rests on the rule that words and phrases in a statute must be given their ordinary, grammatical meaning.[16] This entails splitting the inquiry into two parts, concentrating in the first instance on determining whether the language to be interpreted has one clear ordinary meaning, and turning to context only in cases where "the language appears to admit of more than one meaning".[17] The second line of approach is that words and expressions in a statute must be interpreted in the light of their context,[18] and thus entails a unitary approach whereby context and language are considered together from the outset.[19] Schreiner optimistically observed that the result should be the same, whichever line of approach is adopted since "the object to be attained is unquestionably the ascertainment of the meaning of the language in its context".[20]

Wallis JA illustrates the difference between the split and unitary approach with an engaging example.[21] Consider a newspaper poster bearing the headline *BULLS GORE SHARKS*, he suggests. Using the split approach,

13 Perumalsamy 2019 *PELJ* 4-11.
14 *Jaga v Donges* 1950 4 SA 653 (A) (hereafter *Jaga v Donges*).
15 Both approaches constitute what Kroeze has termed "foundationalist" theories of interpretation which assume the possibility of finding clear and stable meaning in law. Foundationalist theories accept that courts deal with political questions and have political elements but refute the reductionist claim that law is politics in another guise. See Kroeze 2007 *TSAR* 20.
16 *Jaga v Donges* paras 662G-H.
17 *Jaga v Donges* paras 662H-663A.
18 *Jaga v Donges* para 662G.
19 *Jaga v Donges* para 663A.
20 *Jaga v* Donges para 664C.
21 Wallis 2019 *PELJ* 6.

judges would first consider the ordinary grammatical meaning of "bulls", "gore", and "sharks". This conjures up the absurd scenario "that male bovines somehow encountered a school of aquatic animals and savaged them with their horns".[22] At this point, textualists would invoke contextual considerations that could assist in understanding that the phrase is about rugby. A unitary approach, however, would factor context in from the outset.[23]

In *Jaga v Donges* Schreiner cautioned that each line of approach has its "peculiar dangers".[24] While a textualist approach risks "verbalism" and a consequent failure to discover the "intention of the law giver",[25] the unitary approach may lead to a situation where the context in a particular case "receives an exaggerated importance so as to strain the language used".[26]

Over the course of the twentieth century, the split approach, later designated the "literalist-cum-intentionalist" approach,[27] became the primary method of interpreting South African statutes, with Schreiner's unitary approach finding only sporadic approval.[28] Also known as the "traditional approach" to statutory interpretation or "golden rule", the literalist-cum-intentionalist approach requires a court construing a statutory provision to ascertain the intention of the legislature by giving effect to the "ordinary grammatical meaning" of the language of the provision.[29]

The second of Schreiner JA's approaches became known as a rule of construction that "tempered" the golden rule. This supplementary rule instructed courts to interpret words in the light of their context, including the matter, apparent scope and purpose and (within limits) the background of the statute concerned.[30]

2.2 Endumeni: *Embracing the unitary approach*

In *Endumeni*, the SCA embraced the unitary approach, relegating the golden rule of statutory interpretation "to the dustbin of legal history".[31] *Endumeni* sought to "draw a line" under a legal era dominated by the golden rule of legal interpretation.[32] Wallis JA held that the proper approach to the interpretation of documents – be they legislation, other statutory instruments, or contracts – was that "from the outset one considers the

22 Wallis 2019 *PELJ* 6.
23 Wallis 2019 *PELJ* 6.
24 *Jaga v Donges* para 664C
25 *Jaga v Donges* paras 644C-F.
26 *Jaga v Donges* para 644D.
27 Du Plessis *Re-interpretation of Statutes* 93-96.
28 Perumalsamy 2019 *PELJ* 2.
29 Seligson 2021 *Business Tax and Company Law Quarterly* 10.
30 Seligson 2021 *Business Tax and Company Law Quarterly* 10.
31 Seligson 2021 *Business Tax and Company Law Quarterly* 10.
32 Le Roux 2019 *PELJ* 2.

context and the language together, with neither predominating over the other".[33] This approach was now "received wisdom elsewhere".[34]

The modern approach to statutory interpretation, Wallis JA further explained, is the process of attributing meaning to the words used in a document having regard 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 [the provision] is directed; and the material known to those responsible for its production.[35]

The language of the provision would be the "inevitable point of departure", but this must be read in context, having regard to the purpose of the provision, and the background to the preparation and production of the document.[36] A "sensible meaning" should be preferred over one that undermines the apparent purpose of the document.[37]

Searching for the "intention of the legislature" is a pitfall of statutory interpretation, Wallis JA warned.[38] One cannot speak of the intention of the legislature in relation to specific words or phrases, of which the multiple social actors who participate in the social process of creating legislation might have been only dimly aware, if at all.[39] Echoing the peculiar dangers highlighted by Schreiner JA, he emphasised that the pitfalls of intentionalism fall at two extremes: Either justifying a "studied literalism" that denied resort to matters "beyond the 'ordinary grammatical meaning' of the words", or legitimating an approach that divines the intention of the legislature and then adapts the language of the provision to justify that conclusion.[40]

Purpose, however, should be distinguished from intention. The "broad purpose of the relevant legislative body", Wallis JA held, is "highly relevant to the process of interpretation, as is the mischief at which the legislation is aimed".[41] Both purpose and mischief are bound by the constraints of the language adopted by the legislature.[42]

By citing *Endumeni*, both *Ramah Farming*[43] and the *Lötter* SCA majority[44] signalled support for the unitary approach and rejection of the construction

33 *Endumeni* para 19.
34 *Endumeni* para 19.
35 *Endumeni* para 18.
36 *Endumeni* para 18.
37 *Endumeni* para 18.
38 *Endumeni* paras 20-24.
39 *Endumeni* para 20.
40 *Endumeni* para 22.
41 *Endumeni* para 22.
42 *Endumeni* para 22.
43 *Ramah Farming* para 24.
44 *Lötter* SCA majority para 43.

of the "intention of the legislature". But whether they followed through in applying this approach is another question all together, as further considered in section 4 below.

2.3 Reception of the Endumeni *approach*

The *Endumeni* approach has been widely cited and applied by South African courts.[45] According to Gracies Index and Noter-Up, as of April 2025 the case had been affirmed in 190 cases, neutrally cited in a further 435, and distinguished in only one.[46] It received the unqualified approval of the Constitutional Court in *Airports Company South Africa v Big Five Duty Free (Pty) Ltd*[47] where the court stated that "[t]here is no dispute about the principles of interpretation" because the SCA had summarised the "correct approach to the interpretation of documents" in *Endumeni*.[48] In the recent decision of *Ezulwini Mining Company (Pty) Ltd v Minister of Mineral Resources and Energy*[49] the SCA found it unnecessary to repeat the "much-cited passage" from *Endumeni* as the approach to interpretation was now well settled.[50] In this decision, as well as *Capitec Bank Holdings Limited v Coral Lagoon Investments 194 (Pty) Ltd*[51] the SCA was at pains to emphasise that modern approach to interpretation is a unitary exercise and not a "mechanical consideration of text, context, and purpose". [52] In *Capitec Holdings* Unterhalter AJA stated that:[53]

> It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined.

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45 Seligson 2021 *Business Tax and Company Law Quarterly* 12.

46 In *Kingswood Golf Estate (Pty) Ltd v Witts-Hewinson* 2014 2 All SA 35 (SCA) para [19], the Supreme Court of Appeal held that reliance on Endumeni was misplaced for the proposition that in order to determine a clause in a written contract, reliance can be placed on post-contractual extrinsic material. The SCA nevertheless reaffirmed that *Endumeni* mandates the "proper approach" to the interpretation of documents, which is that context and language need to be considered together from the outset, with neither predominating over the other.

47 *Airports Company South Africa v Big Five Duty Free (Pty) Ltd 2019* 5 SA 1 (CC).

48 *Airports Company South Africa v Big Five Duty Free (Pty) Ltd 2019* 5 SA 1 (CC) para 29.

49 *Ezulwini Mining Company (Pty) Ltd v Minister of Mineral Resources and Energy* 2023 5 SA 112 (SCA) (hereafter *Ezulwini Mining Company*).

50 *Ezulweni Mining Company* para 28.

51 *Capitec Bank Holdings Limited v Coral Lagoon Investments 194 (Pty) Ltd* 2022 1 SA 100 (SCA) (hereafter *Capitec Holdings*).

52 See *Ezulweni Mining Company* para 28.

53 *Capitec Holdings* para 25.

Notwithstanding these assurances, opinion has diverged on at least three issues, namely the application of the *Endumeni* approach to statutes, the scope of external context, and the place of administrative practice as part of external context.

2.3.1 Application of the Endumeni *approach to statutes*

In *Endumeni*, Wallis JA stated that the unitary approach applies to the interpretation of all documents, be this legislation, other statutory instruments, or contracts.[54] But the minority judgment in *Commissioner of the South African Revenue Services v Daikin Air Conditioning South Africa (Pty) Ltd*[55] (per Majiedt JA and Davis AJA) drew a distinction between the interpretation of legislative enactments and contracts.[56] Majiedt JA pointed out that the process leading up to the adoption of a legislative enactment was quite different to the negotiations preceding the conclusion of a contract, "commercial sensibility" could play no role when interpreting legislation, and statutes applied to all equally, meaning that their interpretation could not vary from one factual matrix to the next.[57] Thus, while "context" which is "fact-specific" could be applied to the interpretation of contracts and like documents, it could not be applied to statutes.[58]

The SCA refuted this argument directly in *Telkom SA SOC Limited v Commissioner for the South African Revenue Service*.[59] A unanimous court stressed that the *Endumeni* approach entails a unitary exercise in methodology, not a uniform approach to the interpretation of documents. It is the same fundamental *interpretative technique*, which draws in context from the outset, that constitutes a purposive approach to interpretation and not the literalist-cum-intentionalist view espoused by the minority in *Daikin*.[60] Wallis JA also confirmed the application of the *Endumeni* approach to statutes in *United Manganese*.[61]

In agreement with other scholars,[62] the author of this article, therefore, is of the view that the *Endumeni* is not document specific. In so far as *Endumeni* states "rules of interpretation" these are of a general nature and are open to adaptation so far as the context may require.

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54 *Endumeni* para 19.

55 *Commissioner of the South African Revenue Services v Daikin Air Conditioning South Africa (Pty) Limited* (185/2017) [2018] ZASCA 66 (25 May 2018) (hereafter *Daikin Air Conditioning*).

56 *Daikin Air Conditioning* para 31.

57 *Daikin Air Conditioning* para 31.

58 *Daikin Air Conditioning* para 31.

59 *Telkom SA SOC Limited v Commissioner for the South African Revenue Service* 2020 4 SA 480 (SCA) (hereafter *Telkom SA*) paras 13-17.

60 *Telkom SA* para 14.

61 *United Manganese* para 16.

62 Seligson 2021 *Business Tax and Company Law Quarterly* 13, Moosa 2021 *PELJ* 2.

2.3.2 Scope of external context

The context of a statute is highly relevant to its interpretation.[63] The internal context of a statute refers to constituent parts of the legislation as a whole. It includes "the document's scope, subject matter, heading, format, structure, content and wording".[64] The external context may refer to commission reports, the legislation *in pari materiae*, and the mischief which the statute addresses.[65] While *Endumeni* is clear on the relevance of internal context, the judgment begs the question of the scope of external context. Perumalsamy, for example, argued that Wallis JA leaves one with a great deal of confusion about the permissibility of context. He argues that Wallis JA's understanding of context is narrower than that of Schreiner JA in *Jaga v Donges*; and that context is essentially limited to the internal context since Wallis JA insisted that the text is the only relevant medium through which law-makers or contracting parties express their intention.[66]

In *United Manganese*, Wallis JA addressed the scope of the "context" relevant to interpreting statutes. His expansive vision of context debunks an approach that limits context to the statutory enactment itself. The context that may be "highly relevant" to statutory interpretation encompasses:[67]

> In the first instance there is the injunction in s 39(2) of the Constitution that statutes should be interpreted in accordance with the spirit, purport and objects of the Bill of Rights. Second, there is the context provided by the entire enactment. Third, 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. Fourth, the legislative history may provide useful background in resolving interpretational uncertainty. Finally, the general factual background to the statute, such as the nature of its concerns, the social purpose to which it is directed and, in the case of statutes dealing with specific areas of public life or the economy, the nature of the areas to which the statute relates, provides the context for the legislation.

From the foregoing, it is clear that context incorporates teleological or values-based interpretation that requires the courts to interpret every document through the prism of "relevant constitutional and other legal norms and standards";[68] the internal context; and various sources of historical material, such as reports of drafting committees, drafting history, and the history of legislation in the area.

Wallis JA's fifth category is expansive, incorporating considerations of the mischief which the statute addresses, its purpose, and the relationship

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63 *United Manganese* para 17; Seligson 2021 *Business Tax and Company Law Quarterly* 13; Moosa 2021 *PELJ* 15, 17.
64 Kroeze 2007 *TSAR* 25; Moosa 2021 *PELJ* 16.
65 Kroeze 2007 *TSAR* 25.
66 Perumalsamy 2019 *PELJ* 18.
67 *United Manganese* para 17.
68 Moosa 2021 *PELJ* 19.

between the statute and specific areas of public life or the economy. In *United Manganese*, for example, the court was seized with interpreting various provisions of the *Mineral and Petroleum Resources Royalty Act* 28 of 2008. As "background" to the Act, the court took into consideration the vastness of South Africa's mineral wealth, the fact that this is primarily exploited by private enterprise in a heavily regulated environment, the export of minerals after only limited beneficiation, and the "common practice" of contracts for the sale of bulk minerals.[69] In the context of the interpretation of wills, Moosa undertook a comprehensive analysis of the broad range of external factors courts have considered when interpreting testamentary legislation.[70] In the case of fiscal legislation, external considerations have included common trading patterns and the legislative history of the provision.[71]

Restricting context to internal context is therefore untenable. What will be "relevant and admissible" will vary from case to case. One must be able to tolerate a certain level of uncertainty, there is no checklist, formula or algorithm. This need not be cause for anxiety, however, because there are two guardrails that constrain an over-reliance on context. The first is that in judicial law-making contextual considerations are frequently grounded in other authoritative texts (starting with the Constitution), or in sources of authority that fall within the ambit of judicial notice. The second is the burden of transparency and accountability that comes with the doctrine of transformative constitutionalism.[72] Judges should be able to draw reasonable linkages between contextual considerations and the text that sits at the heart of the interpretive exercise.

2.3.3 The significance of administrative practices as external context

In *Commissioner South African Revenue Service v Bosch*,[73] Wallis JA held that some weight must be accorded to "consistent interpretation for a substantial period of time by those responsible for the administration of the legislation", thus affording administrative practice some contextual weight.[74] Wallis JA ruled this custom was admissible, could tip the balance in favour of one interpretation over another, and was entirely consistent with the contextual approach to statutory interpretation because it served as evidence of how reasonable persons in the position of the administrator understood and construed a provision in question.[75] However, in *Marshall v*

69 *United Manganese* para 18.
70 Moosa 2021 *PELJ* 16-17.
71 Seligson 2021 *Business Tax and Company Law Quarterly* 14.
72 Klare 1998 *SAJHR* 146.
73 *Commissioner South African Revenue Service v Bosch* 2015 2 SA 174 (SCA) (hereafter *CSARS v Bosch*).
74 Seligson 2021 *Business Tax and Company Law Quarterly* 17.
75 *CSARS v Bosch* para 17.

Commissioner, South African Revenue Service,[76] Froneman J said that evidence of consistent administrative practice should be avoided on the basis that the unilaterally determined conduct of one party should not play a role in the reasonable meaning given to a statutory provision.[77] In the case of statutory interpretation, giving undue weight to administrative practice also invokes separation of powers concerns.

2.4 Relationship between Endumeni*,* Cool Ideas *and* Bato Star

As noted above, however, only two of the five water trading decisions cited *Endumeni* as the precedent guiding their approach to statutory interpretation. The *Lötter* SCA minority and the CC cited *Cool Ideas* and the *Lötter* High Court cited *Bato Star*. Before examining how the water trading courts balanced text and context in their reasoning, this section briefly considers the relationship between *Endumeni* and the *Cool Ideas* and *Bato Star* precedents respectively.

2.4.1 Cool ideas: *Leaning more towards a split inquiry*

Cool Ideas is a 2014 Constitutional Court decision. The majority judgment, per Majiedt AJ, includes a paragraph on statutory interpretation reaffirming the "fundamental tenet" that "the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity".[78] At face value, this statement signals the first of Schreiner JA's two lines of approach and could justify Perumalsamy's passing comment that *Endumeni* and *Cool Ideas* stand for contradictory approaches to statutory interpretation.[79]

But according to Majiedt AJ, this fundamental tenet is subject to three interrelated riders. Firstly, that statutory provisions should always be interpreted purposively; second, that the relevant statutory provision must be properly contextualised; and third, that all statutes must be construed consistently with the Constitution.[80] For all three "riders" Majiedt AJ cited relevant precedent, including Schreiner JA's minority opinion in *Jaga v Donges*.[81] With these riders in focus, it appears that Majiedt AJ is endorsing a purposive-contextualist rather than a literalist-cum-intentionalist approach, with a strong emphasis on teleological interpretation. However, the language used (fundamental tenet, riders) invokes a split inquiry

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76 *Marshall v Commissioner, South African Revenue Service* 2019 6 SA 246 (CC).
77 *Marshall v Commissioner, South African Revenue Service* 2019 6 SA 246 (CC) para 10.
78 *Cool Ideas* para 28.
79 Perumalsamy 2019 *PELJ* 13.
80 *Cool Ideas* para 28.
81 *Cool Ideas* fn 20.

because the riders only become relevant when the ordinary grammatical meaning is unclear.

To add to the confusion, in the recent decision of *Transnet SOC Limited v Total South Africa (Pty) Limited*,[82] Madlanga J conflated *Cool Ideas* and *Endumeni*, as follows:[83]

> Although writing in the context of statutory interpretation, Majiedt AJ said, in *Cool Ideas*, "[a] fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity' but that there are three important interrelated riders. These include that 'statutory provisions should always be interpreted purposively".
>
> Likewise, in *Endumeni* Wallis JA said: "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".

This blithe equation of the two precedents, without considering what each stands for in terms of interpretive technique is – at best – confusing. At worst, it is an undesirable muddying of the waters that detracts from the straightforward and coherent approach that *Endumeni* sought to achieve.[84]

2.4.2 Bato Star: *(Over)emphasising context?*

What remains is the *Lötter* High Court's reliance on *Bato Star*. This 2004 Constitutional Court decision, interestingly, also referred to Schreiner's dissenting opinion in *Jaga v Donges*.[85] Here Ngcobo J voiced his discomfort with an interpretive approach that pays too much attention to the ordinary meaning of words[86] and asserted that the technique of considering context in statutory construction is now required by the Constitution. Context colours language, Ngcobo J said, and includes the constitutional commitment to achieving equality.[87] Ngcobo's context categories are not as broad as those of Wallis JA in *United Manganese*, however, and the failure to emphasise the centrality of text could lead to the risk of overemphasising context. Nevertheless, *Bato Star* is aligned with a purposive-contextualist approach.

2.5 Summary statement: **Endumeni** *as the modern approach to interpretation*

The *Endumeni* approach is an interpretive technique that applies to the interpretation of documents, including statutes. It entails a unitary approach

82 *Transnet SOC Limited v Total South Africa (Pty) Limited* 2023 3 BCLR 333 (CC).
83 *Transnet SOC Limited v Total South Africa (Pty) Limited* 2023 3 BCLR 333 (CC) para 60.
84 Wallis 2019 *PELJ* 1.
85 *Bato Star* paras 89-90.
86 *Bato Star* para 92.
87 *Bato Star* para 92.

to analysis whereby text and context are considered together from the outset. The triad of text, context and purpose should not be applied in a mechanical fashion. Rather, courts should endeavour to determine the meaning of the text in context by paying attention to the relationship between the words used, the concepts expressed by those words, the place of the contested provision within the scheme of the document, the values framework of the Constitution, relevant historical materials including legislative history, and the general factual background to the document in question. Evidence of administrative practice must, however, be treated with caution.

3 Background to the water trading cases: Parties, issues and arguments

To illuminate the ensuing analysis of the water trading decisions in the light of the *Endumeni* approach, this section sets out essential background in the form of the parties, facts, issue and arguments.

3.1 Parties

The applicants in the first two *Lötter* cases were parties to transactions giving effect to the transfer for compensation of water use entitlements in the vicinity of Somerset East and Upington respectively. The monetary stakes were high as the value of the transactions ranged from R1.95 million to R15.4 million for individual entitlements.[88] In the third *Lötter* case, the applicants were the South African Association for Water User Associations (SAAFWUA)[89] and two additional private parties. The court *a quo* did not expressly mention the race and ethnicity of the applicants, but in the SCA Makgoka JA said it was "common cause" that the applicants fell within the category of historically advantaged white people "with access to land and to economic power".[90] The respondents in the *Lötter* cases were the Minister, Director-General and various Deputy Directors-General of the Department of Water and Sanitation.

Unlike the *Lötter* cases, which pitted the private sector against government, *Ramah Farming* involved a dispute between two private parties over the extent of water use entitlements encumbered through water trading on the part of the applicant's predecessors in title. The Great Fish River Water User Association and the Minister and officials from the Department of Water and Sanitation were also cited as respondents.

88 *Lötter* High Court paras 12-20.

89 SAAFWUA is a national association of 121 irrigation boards and water user associations. See SAAFWUA 2023 https://www.saafwua.com/about-us.

90 *Lötter* SCA minority para 78.

3.2 Facts

The facts in the water trading cases centred, firstly, on the ambiguity of section 25 of the *NWA* and associated provisions; and secondly, on the executive's approach to water transfers and trading pre- and post-2017.

3.2.1 Water transfers and trading under an ambiguous law

The water transfers and trading at the centre of the *Lötter* and *Ramah Farming* cases were taking place under an ambiguous law, since the *NWA* does not expressly authorise third-party transfers and water trading. This is curious as the 1994 water policy included among its "key proposals" that although water use allocations would no longer be permanent, provision would be made for the transfer or trade of water use rights between users, subject to Ministerial consent.[91]

Section 25 of the *NWA* is titled "Transfer of water use authorisations". Section 25(1) states that a water management institution may allow a person authorised to use water for irrigation under the Act "to use some or all of that water for a different purpose" or "to allow the use of some or all of that water on *another property* [my emphasis] in the same vicinity for the same or a similar purpose". Section 25(2) allows a person "holding an entitlement to use water from a water resource *in respect of any land* [my emphasis]" to surrender that entitlement or part thereof (i) to facilitate a particular licence application under section 41 "for the use of water from the same resource in respect of *other land*"; and (ii) on condition that the surrender only becomes effective if and when such application is granted.

Notwithstanding inclusion of the word "transfer" in section 25's title, the wording of the section is ambiguous in three respects. First, while it is clear that water use entitlements are tied to property and land, it is unclear whether "another property" and "other land" refers to additional land to which the entitlement holder has lawful title or access (the single holder interpretation), or to property or land held or accessed by a third party (the third-party holder interpretation). If the third-party holder interpretation is correct, then section 25 allows for the transfer of entitlements between users, if the single holder model is preferred it simply allows the holder of a water use authorisation to transfer entitlements between properties.

Second, it is unclear whether sections 25(1) and 25(2) deal with mutually exclusive transfer scenarios, or whether they should be read as part of a single legislative scheme that accommodates trade between users. If the latter, then section 25(1) is the permitting provision, while section 25(2)

91 Department of Water Affairs and Forestry *White Paper on a National Water Policy* 5.

outlines procedure (surrender coupled with a new water use licence application).

Third, section 25 is silent on the pecuniary implications of transfer or surrender. Section 29(2) of the *NWA* nevertheless provides that "if a licensee has agreed to pay *compensation* to another person in terms of *any arrangement* to use water [my emphasis]", the licensing authority could make that obligation a condition of the licence. Further, section 26(1)(l) allows the Minister to make regulations "relating to transactions in respect of authorisations to use water" which include (but are not limited to) the circumstances under which a transaction may be permitted, the conditions subject to which a transaction may take place, and the procedure to deal with a transaction.

3.2.2 The Department's approach to water transfers and trading pre- and post-2017

In Legal Services Circular 18 of 2001, the then Director-General of the Department of Water expressed the view that on a proper interpretation of section 25, water use rights could be "traded to a willing buyer on the same scheme or even outside the scheme", if such trading could be facilitated in terms of section 25.[92] By the early 2000s, willing buyers and sellers were already using the arrangement which the *NWA* appeared to facilitate, namely: (i) a private contract between a willing seller and buyer for the transfer and sale of a water use entitlement; (ii) surrender of a water use entitlement to the water management institution on the part of the seller; and (iii) submission of a new water use licence application on the part of the buyer.[93] Thus, buyers and sellers were using private and public law in tandem to facilitate trade in water use entitlements.

The first National Water Resource Strategy (NWRS I) published under the authority of section 5 of the *NWA*[94] supported the policy position set out in Circular 18 of 2001. The NWRS I stated that section 25 accommodates two types of water rights transfers: Under section 25(1), a holder could transfer a water right to another property, "which need not necessarily be held by a third person", while section 25(2) allowed for "permanent transfers" and thus constituted trade in water use authorisations.[95]

For the next fifteen years, the DWS allowed a market in water use entitlements to operate under the auspices of section 25. But a change in the winds of policy became evident from 2013 with the publication of the

92 *Lötter* SCA majority fn 2.
93 Armitage *Economic Analysis of Surface Irrigation Water Rights Transfers*.
94 GN 65 in GG 27199 of 28 January 2005 (National Water Resource Strategy I).
95 *Lötter* High Court para 38.

second edition of the NWRS.[96] In an about turn, NWRS II flagged the need to review water policy to abolish water trading.[97] This policy change was subsequently concretised in the National Water Policy Review of 2013[98] and Legal Services Circular No 1 of 2017 (issued on 19 January 2018), in which the Director-General held that section 25 does not authorise a holder to transfer a water use entitlement to a third party, and that the transfer and surrender mechanism in this section does not permit a holder to trade in or sell an entitlement to a third party.[99]

On the basis of this new interpretation, the Director-General of the DWS declined the buyers' applications for a water use licence in the *Lötter* matters.[100] This interpretation of section 25 also suited the applicant in *Ramah Farming*, who thereupon refused to co-operate with the second respondent by signing documents that would have allowed the latter to proceed with the application for a new water use licence.[101]

3.3 Issues and arguments

The applicants in *Lötter* and the second respondent in *Ramah Farming* contended, firstly, for an interpretation of "another property" and "other land" in section 25 to mean the property or land of a third party, and not the land of the entitlement holder themselves (the third-party holder model); and secondly, that section 25 read with other provisions of the *NWA* permits a holder to sell or receive compensation for the surrender and transfer of a water use entitlement, in effect, allowing for water trading. In *Ramah Farming* the second respondent also maintained that the *NWA* did not abolish the practice of water trading existing when the *NWA* came into effect and that the statutory presumption against extinguishing existing rights and obligations applied; that is, existing rights and obligations would not be extinguished unless the statute clearly provided otherwise, or its language clearly showed such a meaning.[102]

The position of the Minister and Department of Water and Sanitation and the applicant in *Ramah Farming*, was that the property and land referenced in section 25 could only refer to the property or land of the entitlement holder themselves, and that section 25 of the *NWA* makes no provision for the holder to trade in or sell water use entitlements.

The State respondents further contended that an interpretation allowing for water trading under section 25 would be "irrational, unlawful and

96 GN 845 in GG 36736 of 16 August 2013 (National Water Resource Strategy II).
97 *Lötter* High Court para 39.
98 Department of Water and Sanitation *National Water Policy Review* 8-9.
99 *Lötter* High Court para 9.
100 *Lötter* High Court para 10.
101 *Ramah Farming* para 3.
102 *Ramah Farming* para 18.

unconstitutional".[103] They argued that very wealthy farmers, who are largely white, have created an enclave for trading water, which is a scarce national resource. This perpetuated the imbalances of the past and infringed on the right to equality.[104] The third-party holder model would be at odds with redressing the results of past racial and gender discrimination, which is one of the policy objectives of the *NWA*; the legislature had made no explicit provision for water trading, and had therefore "set its face" against it; and it made no sense for the trade in water use to fetch such "huge amounts", when the wealthy farmers concerned had paid only "paltry administrative fees" when applying for their entitlements.[105]

4 The dynamic interplay between text and context in the water trading cases

The purpose of this section is to critique the water trading cases in the light of the *Endumeni* approach outlined above by examining how the courts balanced text and context. This entails paying attention to the parts of the text the courts used to anchor their interpretation, their reliance on the internal statutory context, and reference to various dimensions of external context.

4.1 The Lötter High Court: Unbridled contextualism

The *Lötter* High Court thrust the textual interpretation of section 25 aside and immediately jumped to the lawfulness of water trading, thus presenting an instance of unbridled or textually unanchored contextualism. Mothle J held that the issue of the proper construction of section 25 was of no moment and a "collateral issue", the real dispute was whether the *NWA* allowed for water trading or not.[106]

In finding that water trading was no longer permissible, the *Lötter* High Court relied on the *absence* of empowering provisions in the *NWA* as a whole. The *NWA* conferred no authority on the holders of water use entitlements to continue to identify and choose who the recipients of surrendered and transferred entitlements should be, the court pointed out.[107] Further, there is no authority in the *NWA* permitting water trading.[108]

While seemingly based on the context of the broader statutory enactment, arguments based on textual absences inevitably invoke the spectre of the intention of the legislature, because they only hold any weight if the next thought is: "If the legislature had intended to permit water trading, it would

103 *Lötter* High Court para 9.
104 *Lötter* CC para 14.
105 *Lötter* CC para 14.
106 *Lötter* High Court para 36.
107 *Lötter* High Court para 42.
108 *Lötter* High Court para 43.

have done so expressly." Thus, in light of the *Endumeni* approach the High Court decision is problematic for failing to anchor its interpretation in the text of section 25 and for indirectly invoking the intention of the legislature. The idea that private transactions are only allowed to the extent that the State permits them also signals unarticulated background assumptions about property and the economic order, subsequently highlighted by the *Lötter* SCA majority and CC.

The court bolstered its decision on the unlawfulness of water trading in two additional ways. First, it resorted to a form of consequentialist reasoning[109] by holding that permitting water trading would result in the "privatization of a scarce national resource" to which all should have access. This would in turn undermine the Minister's obligation to "ensure that water is allocated equitably and used beneficially in the public interest".[110] This is problematic because consequentialist reasoning has not been addressed or accepted as part of the context that should be applied as part of the *Endumeni* approach.

Second, it turned to the constitutional value of equality by holding that the private sale of water use entitlements discriminated against those who could not afford the prices demanded by sellers, maintaining established farmers' monopoly access to water resources.[111] Water trading would "keep historically disadvantaged persons out of the agricultural industry" (another consequentialist turn).[112] The main problem with the High Court's discrimination argument is that it failed to cite and discuss any evidence of this discriminatory effect, as *Ramah Farming*[113] and the *Lötter* SCA majority subsequently pointed out.

In summary, the *Lötter* High Court falls short of a unitary approach to interpretation due to: Failure to identify a textual anchor in section 25, indirect reliance on the intention of the legislature by relying on the absence of an empowering provision, invocation of consequentialist reasoning as a form of background context; and failure to proffer evidence in support of its discrimination argument.

4.2 Ramah Farming: A unitary approach largely limited to statutory context

In *Ramah Farming,* Griffiths J placed particular emphasis on the fact that the text of section 25(2) refers to a "particular" licence application. With this

109 Consequentialist reasoning is a form of reasoning that judges whether something is right or wrong by what its consequences are.
110 *Lötter* High Court para 43.
111 *Lötter* High Court para 44.
112 *Lötter* High Court para 45.
113 *Ramah Farming* para 42.

textual anchor, the judgment largely relied on the internal context constituted by sections 25, 26 and 29 of the *NWA* to rule on the permissibility of water transfers and trading.[114] The judgment also made passing reference to the history of water trading and, like the *Lötter* High Court, to the absence of legislative text – ironically, to reach a diametrically opposed conclusion. Constitutional and purposive arguments did not feature as part of the context used to interpret section 25.

Griffith J's textual and statutory context reasoning comprised the following steps: (i) the court noted that section 25(2) provides for the surrender of a water use entitlement to facilitate a "particular" licence application;[115] (ii) that a particular licence application is envisaged fitted hand in glove "with an underlying transaction between parties such as the trade of an entitlement, or even a donation";[116] (iii) section 25(2)(b) lends further credence to this interpretation as if provides that a surrender would only be effective if and when "such" application was granted, thus dovetailing with the use of "particular" in the immediately preceding subsection;[117] (iv) section 29(2) resonated with section 25(2) and appeared to acknowledge that it was lawful to enter into a private law transaction relating to water with another person and for this transaction to involve the payment of compensation;[118] and (v) under section 26 the Minister was authorised to make regulations relating to transactions in respect of authorisations to use water, public tenders and auctions.[119] While the persuasiveness of this argument rests on the *prima facie* coherence of the legislative text, it also relies on an unexplored background assumption that reference to a particular licence application invokes an underlying transaction such as a trade or donation.

Griffiths J prefaced this reasoning by noting that the *NWA* "has no provision that expressly prohibits water trading, or indeed any transaction in water use entitlements between private individuals".[120] Like the *Lötter* High Court, his point of departure was to note a textual absence, but the absence of a *prohibition*, rather than the absence of an empowering provision. Clearly, this is simply another indirect way of searching for the intention of the legislature.

Griffiths J did not elaborate on the purpose of the *NWA*, and yet his view that section 25 is restricted to a particular licence application and surrender implies that the purpose of the provision is not to free up water allocations for subsequent allocation on the part of the State, but rather to entrench

114 *Ramah Farming* para 26.
115 *Ramah Farming* para 27.
116 *Ramah Farming* para 27.
117 *Ramah Farming* para 27.
118 *Ramah Farming* para 30.
119 *Ramah Farming* para 31.
120 *Ramah Farming* para 27.

State oversight of a transaction where private parties have already determined to whom the traded water use entitlement should be allocated. As will become apparent, this resonates with the *Lötter* SCA majority and CC's distinction between the purposes of law in relation to public and private spheres of functioning. This would not result in "privatization" as the *Lötter* court had contended, Griffiths J said, because the State still maintained control over water use entitlements and any transaction had to comply with the provisions of the Act.[121] In fact, he subsequently found that the transactions *in casu* did not constitute a "surrender" for purpose of section 25(2).[122]

Griffiths J also introduced historical context by stating that "extensive trading in water rights had occurred for many years prior to the coming into being of the Act".[123] This clearly refers to water trading under the 1956 Act and not during the democratic era. The judge did not present any evidence of this "extensive trading", but merely invoked the presumption that statutes must be interpreted in a way that does not extinguish existing rights. He noted that the *NWA* does not expressly prohibit the existence of such rights prior and subsequent to its promulgation.[124]

Ramah Farming appears to use a unitary interpretive technique by invoking the statutory context provided by sections 25(2), 26 and 29 to interpret the words "particular", "such", and "transaction". Notwithstanding a passing reference to historical context, the court's approach to external context is otherwise limited. Like the *Lötter* High Court it too succumbs to the spectre of intentionalism by emphasising the absence of a prohibition.

4.3 Lötter SCA majority: Limited reliance on external context

The *Lötter* SCA majority took the court *a quo* to task for failing to interpret the text of section 25.[125] This was a necessary antecedent step, the court said, before determining whether parties could put contractual arrangements in place for the lease or sale of water use entitlements.[126]

The court cited Unterhalter AJA's caution in *Capitec Holdings* against a mechanical application of the *Endumeni* triad of "text, context, and purpose"[127] but its sequential consideration of the ordinary rules of grammar and syntax, the statutory context, and a limited consideration of purpose has more than a whiff of mechanical application.

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121 *Ramah Farming* para 28.
122 *Ramah Farming* para 47.
123 *Ramah Farming* para 41.
124 *Ramah Farming* para 32.
125 *Lötter* SCA majority para 25.
126 *Lötter* SCA majority para 42.
127 *Lötter* SCA majority para 43.

Turning to the ordinary rules of grammar and syntax, and contrary to Griffiths J's focus on the words "particular" and "such", the SCA majority fixated on the fact that section 25(1) uses the word "allow" twice. As noted above, the second part of section 25(1) provides that a water management institution may *allow* a person authorised to use water for irrigation under the Act "to use some or all of that water for a different purpose or to *allow* the use of some or all of that water on another property". This double use of "allow" contemplates a transfer from the holder to a third party, the majority said. It would make no sense to seek a water management institution's approval for an entitlement holder to allow him or herself to use water on another property.[128]

The word "transfer", which appears in the heading of section 25, was also significant. Invoking the statutory presumption that when a word appears in a statute it bears the same meaning wherever it appears, the court said it would be incongruous if section 25(1) allows for the temporary transfer of water use entitlements to third parties, while the "transfer" contemplated in section 25(2) did not.[129] Section 25(2) thus contemplated the permanent transfer of water use entitlements to third parties.

Turning to the broader statutory context, the majority largely agreed with Griffiths J's observations on how sections 25, 26(1)(l) and 29(2) dovetailed with each other to support the interpretation that the *NWA* allows for third-party transfers.[130]

Moving to the final element of the *Endumeni* triad, the majority noted that the *NWA's* purposes include "promoting the efficient, sustainable and beneficial use of water in the public interest" and "facilitating economic development".[131] Third-party transfers supported these purposes, the majority said, because if the holder of a water use entitlement could not use all of the allocation optimally and had excess water for their needs, the excess could be transferred to another person for beneficial use, rather than going to waste.[132]

Having determined that section 25 contemplates the transfer of water use entitlements to third parties, the SCA majority turned to the question whether the provision allows for water trading. In finding that it does,[133] the court relied on a contextual argument focused on the different purposes of law in relation to the public and private spheres. Curiously, this argument

128 *Lötter* SCA majority para 46.
129 *Lötter* SCA majority para 47.
130 *Lötter* SCA majority paras 48-49.
131 Sections 2(d) and (e) of the *National Water Act* 36 of 1998 (NWA).
132 *Lötter* SCA majority para 50.
133 *Lötter* SCA majority para 61.

was not linked to any constitutional, historical or purposive South African context, resting instead on an English legal precedent.

The SCA majority took the court *a quo* to task for over-emphasising the absence of an empowering provision for water trading and had erroneously conflated how the law deals with public bodies, on the one hand, and private individuals, on the other. To illustrate the "true distinction" that holds between the public and private spheres and the law respectively, the court cited *R v Somerset County Council, ex parte Fewings*[134] where Laws J held:[135]

> For private persons, the rule is that you may do anything you choose which the law does not prohibit. It means that the freedoms of private citizens are not conditional upon some distinct and affirmative justification for which he must burrow in the law books. Such a notion would be anathema to our English legal traditions. But for public bodies the rule is opposite, and so of another character altogether. It is that any action to be taken must be justified by positive law.

That private individuals may do anything which the law does not prohibit also upholds the important freedom of contract, the SCA majority said.[136]

The SCA majority also disagreed that water trading had a discriminatory or exclusionary effect, pointing to the lack of evidence of discrimination, and agreed with *Ramah Farming* that concerns about privatisation and undermining of the Minister's trusteeship role were overblown.[137]

In summary, the SCA majority nominally applied the *Endumeni* approach by considering the statutory context and purpose of the *NWA* from the outset to interpret "allows" and "transfer" in the text of section 25. But its sequential consideration of text context and purpose and limited invocation of broader constitutional, historical and purposive contexts makes its interpretation seem mechanical and limited. Further, its argument on the relationship of law to the public and private spheres was not anchored in the current or historical South African legal context.

4.4 Lötter *SCA minority: Straining the text*

In contrast to the majority, and notwithstanding citation of *Cool Ideas*, the *Lötter* SCA minority decision (per Makgoka JA) framed the *NWA* with reference to the constitutional commitment to equality and heroically attempted to bend the language of the *NWA* to conform with the idea that transformation in water allocation can only be achieved through State reallocation.

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134 *R v Somerset County Council, ex parte Fewings* [1995] 1 All ER 513 (QB).
135 *R v Somerset County Council, ex parte Fewings* [1995] 1 All ER 513 (QB) 524e-g.
136 *Lötter* SCA majority para 61.
137 *Lötter* SCA majority paras 56, 59, 60.

Makgoka JA echoed the majority's emphasis on text, context and purpose, but also stressed the importance of "the material known to those responsible for the enactment of the Act".[138] (Thus better aligning with the understanding of context elaborated in *United Manganese*.) Historical context is important, Makgoka JA said, and it was useful to state from the onset that "[a]ccess to water has historically been the privilege of predominantly white people with access to land and economic power".[139]

Like the court *a quo*, for Makgoka JA, the absence of an express empowering provision for water trading created an "insurmountable difficulty".[140] This was apparent from the whole statutory context.[141] Like the *Lötter* High Court and *Ramah Farming*, therefore, the SCA minority indirectly invoked the intention of the legislature.

Disagreeing with *Ramah Farming* and *Lötter* SCA majority, Makgoka JA found that the statutory context provided by sections 26(1) and 29(2) of the *NWA* fails to support water trading. The Minister's power to make regulations section 26(1) was "procedural" rather than "substantive" in nature and needed to be read against section 25(2) as the empowering provision.[142] The meaning of "transaction" in section 26(1)(l) had to be determined, not by a dictionary definition, but by the "semantic context" established by sections 25 and 41 which indicated that it referred only to temporary transfers.[143] Further, the word "compensation" in section 29(2) referred to these temporary transfers and not the permanent transfers contemplated in section 25(2).[144]

Makgoka JA further invoked historical context. Because the *Water Act* 54 of 1956 (1956 *Water Act*) made express reference to trading in water use entitlements, the absence of an empowering provision in the *NWA* was all the more notable, he said.[145] Thus, while Griffiths invoked extensive water trading under the 1956 Act to justify a continued right to trade, Makgoka JA used the same "fact" to argue against it.

Makgoka JA held that allowing water trading would offend the *NWA*'s purpose of redressing the results of past racial discrimination.[146] Echoing the consequentialist reasoning of the High Court, he noted that colonialism and apartheid had created "water allocation patterns and enclaves".[147]

138 *Lötter* SCA minority para 77.
139 *Lötter* SCA minority para 78.
140 *Lötter* SCA minority para 97.
141 *Lötter* SCA minority paras 85-88.
142 *Lötter* SCA minority para 80.
143 *Lötter* SCA minority paras 90-91.
144 *Lötter* SCA minority paras 92-94.
145 *Lötter* SCA minority para 97.
146 *Lötter* SCA minority para 98.
147 *Lötter* SCA minority para 99.

Historically advantaged white farmers were now in a position "to afford the unilaterally determined prices, to the exclusion of everyone else" and allowing these market players to trade their allocations would reduce the Minister's role as public trustee of water resources to that of a "rubber stamp".[148] It was also unfair that white farmers were able to profit from the trade of a scarce national resource when they had obtained their water use entitlements for the "paltry administrative fee" of R114.[149] As such, Makgoka JA relied on a discrimination argument based on price.

In summary, Makgoka JA largely focused on the meaning of "transaction" and "surrender" and used the statutory context to *refute* the argument that sections 26 and 29 support water transfers and trading. This appears strained, however, due to his distinction between "semantic" and "procedural" parts of an Act. He invoked broad constitutional, purposive and historical factors to argue against the lawfulness of water trading, but his analysis of these contexts is under-developed. The spectre of the intention of the legislature also underlies Makgoka JA's emphasis on the absence of empowering provisions for water trading.

4.5 Lötter *CC: Reverting to textual arguments*

For its part, the *Lötter* CC refocused the interpretation of section 25 on the ordinary rules of grammar and syntax, avoidance of absurdity, the statutory context, and the purpose of law in relation to public and private spheres, an argument previously introduced by the SCA majority.

Like the SCA majority, the CC found that the double appearance of "allow" in section 25(1) "most naturally" contemplated a situation where the holder of an entitlement allows a third party to use water on nearby land, and that "[o]ne would not ordinarily say that the holder of a right allows her- or himself to use the water elsewhere".[150] That an interpretation of section 25(1) allowing for third-party transfers was the most apt was also supported by the word "transaction" in section 26(1)(l). Implicitly rejecting Makgoka JA's call for a "semantic" reading, Madlanga J used a dictionary definition to support his plain understanding of a transaction as involving more than one person.[151]

The Constitutional Court pointed out that the Minister's interpretation against third-party transfers necessitated the insertion of a limited qualifier to the otherwise broad language of section 25(2); that is, that the application for a licence envisaged in this section could only be made by the title holder surrendering the water use entitlement. Relying on *Masethla v President of*

148 *Lötter* SCA minority paras 99-100.
149 *Lötter* SCA minority para 96.
150 *Lötter* CC para 22.
151 *Lötter* CC para 27.

the Republic of South Africa[152] the court pointed out that words cannot be read into a statute by implication, unless the implication is necessary in the sense that without it effect cannot be given to the statute as it stands, and the ostensible object of the legislation cannot be realised. Since effect could be given to section 25(1) without the implied limiting qualifier contended for by the Minister, nothing made the implication necessary.[153] The court thus held that the licence application envisaged in this section could be made by a third party.

The broader statutory enactment had a role to play and supported an interpretation that allowed for water trading.[154] The court dismissed Makgoka JA's argument that sections 26(1)(i) and 29(2) were "procedural" rather than substantive or norm-setting. These sections referred to "transactions" and "compensation" and from this it was plain that money could change hands. Further, the maxim *ut res magis valeat quam pereat* required that every word in a statute should be given meaning. Agreeing with *Ramah Farming* and the majority SCA decision, the CC held that section 25(1) was the substantive provision contemplated in sections 26(1)(l) and 29(2).[155]

The court also dismissed concerns about the disparity between the "huge fees" earned through water trade vis-à-vis the paltry amounts paid for being awarded a water licence. Upholding the logic of the property market and property relations (by pointing out that a farm with water use rights is worth more one without)[156] the court agreed with the SCA majority and the English precedent of *Somerset County Council*, that the principles governing the relationship between public bodies and private entities and the law were different. In the *absence* of a clear proscription on the right to trade water use entitlements "private persons must surely be perfectly entitled so to trade".[157] For these reasons, the court saw no impediment to a fee being charged for water use – either under the second part of section 25(1), or in respect of the surrender of a water use entitlement under section 25(2).

The court nevertheless acknowledged the politics of water trade and the need to racially transform access to water use entitlements in a curiously titled "epilogue to the analysis".[158] The epilogue states that the decision is "not dismissive" of the state's concerns that water remains "largely in the hands of advantaged white farmers" and affirmed "the reality of the racially

152 *Masethla v President of the Republic of South Africa* 2008 1 SA 566 (CC).
153 *Lötter* CC para 30.
154 *Lötter* CC para 33.
155 *Lötter* CC para 34.
156 *Lötter* CC para 35.
157 *Lötter* CC para 36.
158 *Lötter* CC para 39.

skewed enjoyment of water use entitlements".[159] The State's desire to redress the injustice brought about through the disproportionate enjoyment of water use entitlements was understandable. Unfortunately, section 25 did not admit of the redress the Minister of Water desired.

The Constitutional Court's decision is thus the most textualist of the water trading cases as a result of its emphasis on the ordinary meaning of words, the grammatical construction of section 25 (the two "allows"), its arguments based on absurdity, and citation of precedents and rules of construction relating to the text (when to insert a "qualifier" for instance). Like the SCA majority, it invokes a broad contextual argument based on the function of law in relation to the public and private spheres, but its "epilogue" is proof more than anything else that if refused to bring a broad contextual approach to bear on the text of section 25 from the outset.

5 Conclusion: Water trading cases fall short of a unitary approach

This article started by providing a coherent, comprehensive, and updated account of the *Endumeni* approach to statutory interpretation. It then analysed the water training decisions in the light of this approach.

The principal finding is that the superior courts fell far short of the *Endumeni* approach. This is because none of the water trading courts anchored their interpretation in the correct parts of the legislative text, which are the words "another property" and "other land" in section 25. They skirted around these terms by interpreting "particular", "such", "allow", and "transaction" and none considered how similar terms were used in the 1956 *Water Act*. With the exception of the *Lötter* High Court, all of the courts relied on the internal statutory context constituted by sections 25, 26 and 29 of the *NWA*. Three decisions found that internal context leans more toward allowing water transfers and trading. The *Lötter* SCA minority disagreed, but the reasoning used strikes one as strained. The *Lötter* High Court and SCA minority invoked constitutional and purposive arguments centred on discrimination but framed this argument in a way that allowed the other courts to dismiss it on the basis of a lack of evidence. There was otherwise startlingly little values-based reasoning across the board on an issue which touches the constitutional rights to equality, property and the environment. *Ramah Farming* and the *Lötter* SCA minority made passing reference to historical context in the form of water trading under the 1956 Act (which led these courts to divergent findings), but other than these superficial references there was no consideration of the legislative history in the water sector that could have assisted in interpreting section 25 of the *NWA*. Other than the

159 *Lötter* CC para 39.

broadsides on how water allocation had created racial enclaves and unsupported consequentialist reasoning on what allowing water trading might lead to, none of the courts grounded their analysis in a general factual background of the *NWA* which should include the broad purposes of this Act, the allocation of land and water rights and how this has shifted over thirty years of democracy, policy positions for and against water trading, and the status of water trading. As such, the water trading courts over-relied on the internal context with a very limited and superficial understanding of the constitutional, historical and purposive considerations that constitute the external context.

While the *Lötter* SCA majority and CC both relied on the broad contextual argument of the function of law in relation to the public and private spheres, the link between the English authority cited and the South African context was not made clear, and the baseline political economy assumptions (a market led economy supported by the rights of property and contract) were completely unarticulated. This is contrary to the transparency transformative constitutionalism requires of the judiciary. Finally, with the exception of the *Lötter* CC, all of the courts invoked the spectre of the intention of the legislature through the emphasis they placed on the absence of empowering provisions or prohibitions.

Seen through the lens of *Endumeni*, therefore, the water trading cases disappoint. This opens up an opportunity for a re-writing project that will demonstrate how the *Endumeni* approach should have been applied to the issues before the court – a task that a forthcoming article will address.

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List of Abbreviations

CC	Constitutional Court
CSARS	Commissioner for the South African Revenue Service
DWS	Department of Water and Sanitation
NWA	National Water Act 36 of 1998
NWRS	National Water Resource Strategy
PELJ	Potchefstroom Electronic Law Journal
SAAFWUA	South African Association for Water User Associations
SAJHR	South African Journal on Human Rights
SCA	Supreme Court of Appeal
TSAR	Tydskrif vir die Suid-Afrikaanse Reg