

From Text to Context: The Unitary Approach to Interpretation in the Law of Testate Succession.

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Overview

- Introduction
- Traditional approach to wills and their interpretation
- The new unitary approach to interpretation
- *Spangenberg v Engelbrecht NO*
- Practical implications
- Conclusion

Introduction

- **Intention of the Testator**
 - The **central and most important aspect** of the law of testate succession
- **Law of Testate Succession**
 - Defined as:
 - A complex of norms that regulates inheritance in terms of the **intention of the testator as expressed in a will**
- **From Intention to Expression to Legal Effect**
 - The will-making process:
 - Intention formed in the mind of the testator
 - Given legal effect through a **juristic act**
 - Known as the **act of testation**
 - Expressed in a **testamentary disposition (bequest)**
- **The Will as Carrier of Intention**
 - The will is the **primary vehicle** for expressing intention
 - In South African law:
 - Only the **statutory (underhand) will** is recognised. It presumes a written, signed and attested document

Interpretation of Wills: Practical Context

Informal interpretation

(reading of the will):

- By testator, drafter, beneficiaries, executor, and Master
- Where wording is clear:
 - **Intention is evident**
 - Will is implemented without dispute

Formal interpretation

By a court:

- Required where:
 - **Ambiguity or uncertainty** exists
 - **Disputes** arise regarding the testator's intention
- The clearer the expression of intention, the **less likely judicial intervention becomes**

Interpretation of Wills: Practical Context

Thorn v Dickens:

“all for mother”

Spangenberg v Engelbrecht NO:

“1. I give and bequeath my entire estate as follows: -

A...

B. To my daughters Maria ... and Christina ... the following:

(i) My plots 243 and 741 subject to the right of *habitatio* in favour of my spouse until her death or remarriage whichever may occur first.”

Formal Interpretation: The Traditional Position

- The basic (key) principles of interpretation:
 - The purpose of interpreting a will is to ascertain the testator’s intention.
 - The intention must be ascertained in the first instance from the will itself (as it appears from the words used in the will). Where necessary, however, admissible evidence outside of the will (extrinsic evidence) may be used (also surrounding circumstances and appropriate presumptions).
 - In the process of interpretation, a court cannot make a new will for the testator (De Waal & Schoeman-Malan 2015:220-221 and 232).
- Sources of interpretation:
 - The will (“kenbron”) – “Now the golden rule for the interpretation of ...” (*Robertson*)
 - *Aliunde* evidence (extrinsic evidence / *parol* evidence) – evidence outside the will
 - Role of evidence and admissibility uncertain – e.g., armchair evidence
 - Implied (tacit) provisions
 - Presumptions

Problem: The Three-Word Will

- A validly executed will comprising only three words: “all for mother”.
- *Thorn v Dickens* [1906] W.N. 54. The testator’s mother predeceased him, so the will created an ambiguity, and that led in the extrinsic evidence to show that “mother” is actually the testator’s wife.
- Literal meaning failed (mother predeceased)
- Context revealed:
 - Wife called “mother”
- Lesson:
 - Words alone do not always determine the testator’s intention
 - Context is essential
- What if the testator’s mother was still alive...

The Unitary Approach to Interpretation

In *Natal Joint Municipal Pension Fund v Endumeni Municipality*, [par 18] the seminal case, on interpretation of documents, Wallis JA stated that:

'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. ... 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.' [Emphasis added.] [Spangenberg par 14]

Unitary Approach to Interpretation

University of Johannesburg v Auckland Park Theological Seminary and Another [2021] ZACC 13:

[64] The Supreme Court of Appeal famously set out the position in the following widely-quoted statement in its decision in *Endumeni* [par 18]: “Interpretation ... ”

[65] This approach to interpretation requires that “from the outset one considers the context and the language together, with neither predominating over the other”. In *Chisuse*, although speaking in the context of statutory interpretation, this Court held that this “now settled” approach to interpretation, is a “unitary” exercise. This means that interpretation is to be approached holistically: simultaneously considering the text, context and purpose.

[66] The approach in *Endumeni* “updated” the previous position, which was that context could be resorted to if there was ambiguity or lack of clarity in the text. The Supreme Court of Appeal has explicitly pointed out in cases subsequent to *Endumeni* that context and purpose must be taken into account as a matter of course, whether or not the words used in the contract are ambiguous. A court interpreting a contract has to, from the onset, consider the contract’s factual matrix, its purpose, the circumstances leading up to its conclusion, and the knowledge at the time of those who negotiated and produced the contract.

The Unitary Approach to Interpretation

- Developed in **Endumeni**
- Confirmed in **University of Johannesburg v Auckland Park**
- Interpretation = **single integrated process**:
 - Text
 - Context
 - Purpose
 - Background circumstances→ holistic approach

Spangenberg v Engelbrecht NO

- **Will (1991)**
The testator bequeathed plots 243 and 741 to his daughters
- **Disputed clause**
“To my daughters ... the following: My plots 243 and 741 **subject to the right of *habitatio*** in favour of my spouse until her death or remarriage whichever may occur first.”
- **Key context**
 - Plot 243 – family home; wife already had a right of habitatio (ANC, 1985)
 - Plot 741 – undeveloped in 1991; subdivided and developed
- **Central issue**
Did the testator intend habitatio over plot 243 only or both plots 243 and 741?

Spangenberg v Engelbrecht NO

- **Legal issues:**
 - Interpretation of the disputed clause
 - Role of **extrinsic (armchair) evidence**
 - Application of the new **unitary approach**

Spangenberg: Arguments & Decision

- **Appellants**
- Clause must be interpreted in light of:
 - **Wording, context, and surrounding facts**
- Argument:
 - No intention to grant habitatio over **plot 741**
- Submitted:
 - Will is **ambiguous**
 - **Extrinsic evidence** should be considered
 - Required under the **unitary approach**
- Relied on key facts:
 - Plot 243: existing home + habitatio (ANC, 1985) and Plot 741: **undeveloped** at time of will (1991)

Respondents

- Clause is **clear and unambiguous**
- Ordinary meaning:
 - Habitatio applies to **both plots**
- Therefore:
 - **No extrinsic evidence admissible**

SCA Decision

- Clause held to be **clear**
- Preferred **literal approach**
- No ambiguity → no consideration of context
- **Extrinsic evidence excluded**
- Appeal dismissed as **“ill-fated” with costs**

Spangenberg: The Unitary Approach to Interpretation

[15] Although *Endumeni* did not deal with the interpretation of a will, the ‘golden rule’ and the ‘armchair approach’ can now be seen in the light of the principles enunciated in *Endumeni*. In his article published in the Potchefstroom Electronic Law Journal (PELJ),¹⁹ Justice Wallis opined that: ‘There are areas of interpretation that are untouched by the contents of this paper, which has concentrated on contracts and statutes, rather than other areas of law. **Perhaps the most obvious omission is the fertile field of the construction of wills and the extent to which the *Endumeni* approach to interpretation can be adapted to that situation.** That is a particular omission, given that in articulating his golden rule Lord Wensleydale specifically said that it applied to “wills and, indeed statutes and all written instruments”. **Wills are of course unilateral documents, but so are statutes, patent specifications and judgments, yet they all demand a broadly similar approach.’**

[26] *Endumeni* is a general exposition on the interpretation of documents. It does not exclude a will. Whether one adopts the ‘golden rule’, the ‘armchair approach’ or the unitary approach, in the interpretation of a will, a court must ascertain the wishes of the testator from the language used. In endeavouring to ascertain these wishes, the will must be read in the light of the circumstances prevailing at the time of its execution.

Spangenberg: Key Background Facts

- The ANC was concluded in **1985** (granted **a right** as opposed to '**subject to the right...**').
- In **1991**, the deceased and the appellants informally agreed to divide plot 741 into three portions, with each sibling being allocated a specific portion.
- The deceased executed his will in **1992 (1991)**.
- Plot 741 was at that stage undeveloped and plot 243 contained the homestead where the deceased and his wife resided.
- In **1996**, the deceased paid for and erected a house for daughter 1 on her portion of plot 741. She has lived on that property since 1996.
- In **1996**, the son began to reside on his portion of plot 741 and developed a number of flats thereon. From 1996 to date, he has maintained the units he had erected and collected the income generated by them.
- In **1998**, the deceased erected and paid for the house for daughter 2 on her portion of plot 741. She has lived in that house from that date until the date of the application.
- In **2009**, the deceased requested his son to erect a storage facility for himself on plot 741 in order to enable him to remove his plant and equipment from plot 243, which he did.
- The deceased passed away on 15 January **2010**.

Spangenberg: Discussion

- **Important case** – the **SCA confirmed that the new unitary approach also applies to the interpretation of wills**
- The interpretation of the will became quite a complex matter. Unfortunately, the **SCA did not apply the unitary approach**, but rather favoured a conservative approach to protect the words of the will, it might seem. In doing so, the court aimed to safeguard the wife's position to the point that **the court's will-making power became an issue**. The court rejected all extrinsic evidence, yet appeared to rely on it selectively to deduce the testator's intended meaning (intention).
- Whether one agrees with the outcome in *Spangenberg*, there was a substantial body of evidence that the court could have considered, or at least properly characterised (for example, as armchair evidence).
- **Some other criticism:**
 - Fails to consider the ANC, despite its relevance – the ANC contained provisions relating to succession, which should have been taken into account
 - Overlooks established (traditional) rules of interpretation
 - Adopts an approach inconsistent with accepted legal principles

The Essence of a Will

all for mother

Testator:

P.S. Smith

Witnesses:

A.B. Cox

T.M. Am

The three-word will illustrates that a **will, in essence**, is about the **disposition of assets** (a testamentary disposition – *Ex parte Estate Davies*). The testator intended for his assets to be inherited by his wife, whom he called “mother” (the **distributive intention** – “who-inherits-what”), and this disposition was accompanied by the necessary **animus testandi** (being the intention for the dispositions to be given legal effect upon the testator’s death).

- The testator’s **act of testation**, as a juristic act, finds expression in the **bequest** and is embodied in a document that qualifies as a will by virtue of containing such an act.
- The act of testation must be contained in a written document and must comply with all the formality requirements of the *Wills Act* to be considered valid in law.
- A traditional will consists of several **distinct and identifiable components**. While its primary function is to regulate the **devolution of property upon death**, it may also address a range of other matters, such as revocation of prior wills, nomination of an executor or guardian, funeral arrangements, and organ donation, etc.

Interpretation post-Spangenberg

- Juristic act contained in a formal legal document
 - Legal consequences + role and function of formality requirements
- Golden Rule – linked to Freedom of Testation – intention is in the words used (intention to be extracted from the words used)
- Armchair evidence – relevant – context
- Parol evidence rule – “still of full force and effect” Wallis (PER 2023)
- A will is not a static document; it should be understood as part of a broader context and not interpreted in isolation
- The words – as embodied in the juristic act – contain the intention; the question is not what the words mean, but what the testator meant to say by using those words

Interpretation post-Spangenberg

Hofmeyr and Paleker 2023:689 explain the basic principle of interpretation of wills after *Endumeni*:

“The basic principle regarding the interpretation of wills is that the court must attempt to ascertain the testator’s intention as it existed at the time of the execution of the will from the language of the will construed in its contextual setting. This contextual setting includes the immediate or internal context, being the will as a whole, and the external context, being the admissible extrinsic evidence [variously described as ‘armchair evidence’, ‘background circumstances’ or ‘surrounding circumstances’]. Only if the court is unable to determine the testator’s intention after applying this basic principles can recourse be had to the recognised presumptions and canons or rules of construction. The sources of interpretation are accordingly the following: (i) the language of the particular provision; (ii) the internal context (the will as a whole); (iii) the external context (the admissible extrinsic evidence); and (iv) the applicable presumptions and canons of construction, if any.”

Practical Implications

- Drafting of wills often involves **legal or financial experts**, on account of their specialist knowledge and skills
- Testator typically:
 - Provides instructions
 - Reviews and approves the draft
 - Adopts it as their own

Practical Implications

- In *Back v The Master of the Supreme Court*, Van Zyl J held:

“Another reality is that many would-be testators give full instructions as to their final wishes to their attorneys or bankers and the attorneys or bankers have draft wills prepared in accordance with such instructions. **If a draft will is subsequently perused and approved in every detail by a testator**, he then ... associates himself with and adopts it as his own.”
- Van der Merwe and Rowland (1990:572) argue that, when involving a third party in the drafting of a will;
 - the drafter first needs to make certain that the testator knows what (s)he requires, and then ensure that (s)he fully grasps the testator’s intention.
 - The drafter then sets about drawing up the will to be a clear reflection of the testator’s wishes.
 - **Finally, the drafter is expected to explain the will to the testator in order for the testator to fully understand what the drafter has written, as well as what the effect will be upon the testator’s death.**

Practical Implications

- Role of the Drafter
 - Must:
 - Ensure the testator knows what they want
 - Accurately understand the testator's intention
 - Draft the will as a **clear reflection** of that intention
 - Explain the content and legal consequences
 - Risk:
 - Misalignment between **intention** and **wording**

Practical implications

- **To minimise the risk:**
 - **Effective estate planning is essential**
 - Requires:
 - Clear communication between the parties
 - Proper understanding of the will's content
 - Open discussion of intentions with relevant parties
 - Ultimately:
 - A will must **accurately and clearly reflect the testator's true intention**

Conclusion

- The **unitary approach** expands interpretation beyond text to include **context and purpose**
- Consequence:
 - Likely **increase in litigation** over wills
- Litigation implications:
 - **Time-consuming and costly** (Spangenberg – Death: 15 Jan 2010; SCA judgment delivered: 14 June 2023) – and then the administration process...
 - Matters may be **dismissed with costs**
- Additional risk:
 - Potential claims by **disappointed beneficiaries**
 - Liability for **pure economic loss arising from “negligent drafting”**
- **Final insight:**
 - The shift from **text to context** centres on giving effect to the **testator’s true intention**, but potentially increases **uncertainty and legal risk**
 - **Careful drafting, clear intention, and sound estate planning are essential**

Thank you