



## THE SCIENCE OF ENVIRONMENTAL COMPLIANCE : EVIDENCE-BASED ACTIONS FOR EMIS

10TH ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT LEKGOTLA | 18 - 21 NOVEMBER 2024 | KZN

# The 'science' of legal interpretation

Prof Jenny Hall

 Find us:  
Department of Forestry,  
Fisheries & the Environment

 Follow us:  
@EnvironmentZA

 Follow us:  
EnvironmentZA

Call centre: +27 86 111 2468  
[www.dffe.gov.za](http://www.dffe.gov.za)



## The context



---

Good environmental laws are an essential pillar in the architecture of the environmental rule of law to the various environmental crises that the world is facing

---



---

The effectiveness of many provisions in those laws depends heavily on officials making good decisions i.e. those that are transparent, legally sound and focused on achieving the environmental objectives that the relevant legislation

---



---

This can be challenging as environmental decisions are often complex ones and officials are required to make decisions in the context of individual situations that involve balancing legislatively mandated environmental goals with specific legislative requirements, technical considerations, social ramifications and diverging opinions amongst interested and affected parties

# Room for improvement ...



- +
  - Monitoring and enforcing listed activities
- - pollution and waste management legislation, making decisions on the application of a listed activity can be tricky to navigate as a high degree of understanding is required of technical processes, the operation of legal jurisdictional facts and the environmental impacts of a particular undertaking
- ... and they are open to challenge:
  - *Ingrain SA Proprietary Ltd v Olowa NO*
  - *Calderys South Africa (Pty) Ltd v Member of Executive Council Gauteng Department of Agriculture and Rural Development*
  - *Minister of Environmental Affairs and Another v ArcelorMittal South Africa Limited*

# Shifting approaches to interpretation

- Literal approach
  - acontextual
  - servitude and obedience to the text, irrespective of the consequences



- Purposive approach
  - values-based approach to legislative interpretation
  - Focused on giving effect to constitutional rights



The Group Areas Act; represent a colossal social experiment and a long term policy. It necessarily involves the movement out of Group Areas of numbers of people throughout the country. Parliament must have envisaged that compulsory population shifts of persons occupying certain areas would inevitably cause disruption and, within the foreseeable future, substantial inequalities. Whether all this will ultimately prove to be for the common weal of all the inhabitants, is not for the Court to decide. But in that connection reference might perhaps be made to the Group Areas Development Act, 69 of 1955, sec. 12 of which empowers the Board to develop group areas and to assist persons to acquire or hire immovable property in such areas. The question before this Court is the purely legal one whether this piece of legislation impliedly authorises, towards the attainment of its goal, the more immediate and foreseeable discriminatory results complained of in this case. In my view, for the reason which I have given, it manifestly does.<sup>27</sup>

## Does it really matter?

- *Homes JA Minister of Interior v Lockhart* 1961 (2) SA 587 (A) – Group Areas Act authorizes discrimination
- *Omar v Minister of Law and Order* 1987 (3) SA 859 (A) – upheld emergency regulations under the Public Safety Act 3 of 1953 and authorised the administrative detention without a hearing and prohibiting access of detainees to others, including legal representatives

## Does it really matter to EMIs?



- ***HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism*** 2006 (5) SA 512 (T). SCA required to decide whether a section 32 of the ECA requiring all directives to be published in the *Government Gazette* for comment applied to section 31A.
  - The majority found the text to be self-explanatory & words in Act presumed to have the same meaning
  - Hamstrung government's ability to respond urgently in situations of serious environmental impacts
  - Jafta J, in his minority judgment, reached the opposite conclusion using a purposive approach
  - Overturned by CC using purposive approach (*MEC: Department of Agriculture, Conservation and Environment v HTF Developers (Pty) Ltd* 2008 (2) SA 319 (CC))
- ***Interwaste (Pty) Ltd v Petlane N.O. and Others*** (44773/2016) 2018 GPPHC 28 (13 February 2018) - in adopting a very literal approach the court set aside the compliance notice and ordered the Department to issue a waste management licence which was compliant with section 51(1)(e) of the Waste Act, without any mention of the impact which surrounding communities alleged the landfill site was having on their environmental right



# Does it really matter to EMIs? (cont)

01

Yes, EMIs have an important role to play in securing the environmental objectives of legislation

02

Yes, inappropriately regulating without environmental impact

- Wastes EMI resources
- Can result in legal challenges
- Unfairly imposes costs on the person targeted by the action

03

Yes, EMIs can provide guidance in litigation to assist courts reach decisions that are best for the environment



## Implications

- *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA) par 18

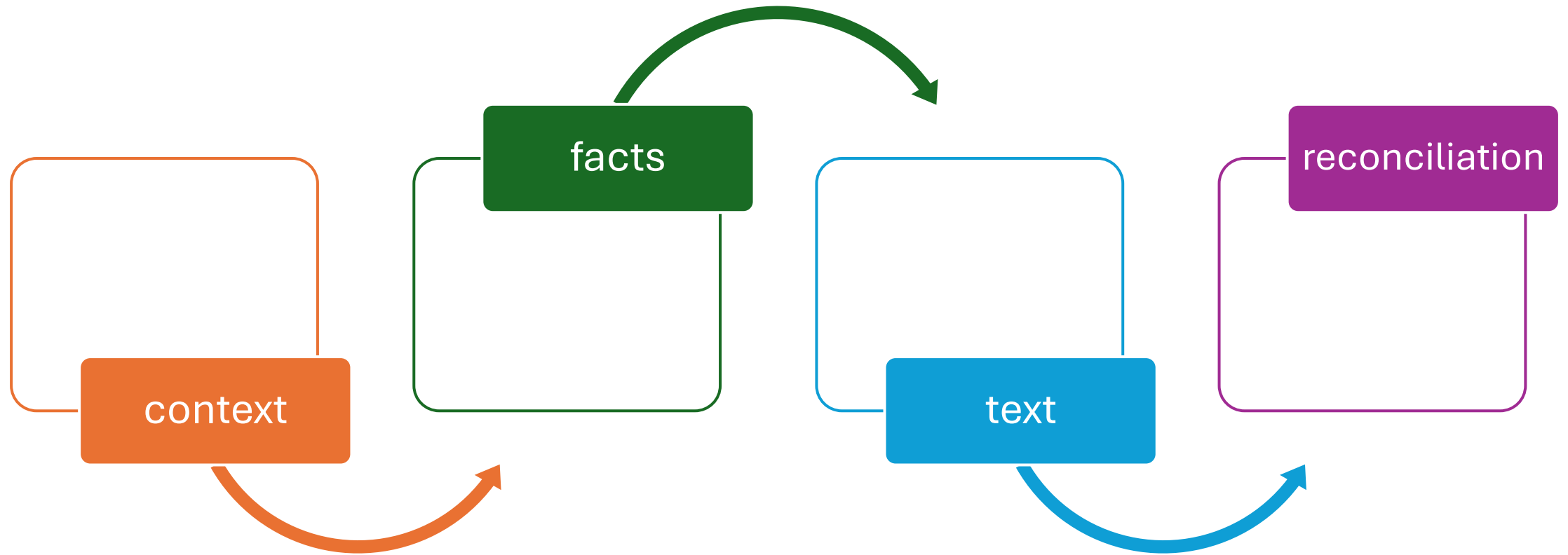
“... consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. ... A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation”.



# Arguing for *substantive ecological purposivism*

- Achieving environmental objectives lies at the heart of decision-making
- In the case of listed activities e.g. the Air Quality Act it ought to involve a circular or iterative process in which
  1. the legislative context is considered with reference to the history of the Act and relevant subordinate legislative instruments such as the National Framework; the purpose of section 21 and the environmental mischief that it aims to address; and the structure and purpose of the Air Quality Act as a whole with particular attention being paid to its relationship with the environmental right;
  2. the facts are assessed with the aim of assessing whether the operation in question is *per se*: (i) a significant emitter that (ii) emits the substances referred to in the MES i.e. it meets the requirements of section 21;
  3. the wording of the listed activity is analysed; and
  4. the resulting interpretation leads to a decision in which the facts, text and context are aligned and reconcilable with an environmentally sound outcome.

EMIs have improved with textual analysis – *but it's only one part of the interpretation process*





# THE SCIENCE OF ENVIRONMENTAL COMPLIANCE : EVIDENCE-BASED ACTIONS FOR EMIS

10TH ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT LEKGOTLA | 18 – 21 NOVEMBER 2024 | KZN

# THANK YOU



Find us:  
Department of Forestry,  
Fisheries & the Environment



Follow us:  
@EnvironmentZA



Follow us:  
EnvironmentZA

Call centre: +27 86 111 2468

[www.dffe.gov.za](http://www.dffe.gov.za)



**forestry, fisheries  
& the environment**

Department:  
Forestry, Fisheries and the Environment  
REPUBLIC OF SOUTH AFRICA

