CONSTITUTIONAL COURT OF SOUTH AFRICA

LEACH MOKELA MOHLOMI Plaintiff

versus

MINISTER OF DEFENCE Defendant

Heard on 21 November 1995
Decided on 26 September 1996 Case CCT 41/95

J U D G M E N T

DIDCOTT J:

[1] In the case that we now have before us, a civil action which has come here from the Witwatersrand Local Division of the Supreme Court, the plaintiff is suing the defendant for damages. They are claimed as compensation for the consequences of injuries which the plaintiff is said to have sustained on 2 May 1994 when a soldier shot him intentionally. The litigation began while he was still a minor. So he started it with the help of his father and natural guardian. The pleadings in the action have closed, but it has not yet gone to trial.

[2] The claim is contested by the defendant, whose plea denied all the allegations of fact on which it was based. He also filed a special plea, invoking section 113(1) of the Defence Act (44 of 1957) and taking the preliminary point of non-compliance with that. The sub-section decrees that:

> "No civil action shall be capable of being instituted against the State or any person in respect of anything done or omitted to be done in pursuance of this Act, if a period of six months ... has elapsed since the date on which the cause of action arose, and notice in writing of any such civil action and of the cause thereof shall be given to the defendant one month at least before the commencement thereof."

Those dual requirements, according to the defendant, governed the litigation but were not met. He complained, firstly, that the time which passed from 2 May 1994 until the date when the action was instituted had exceeded six months and, secondly, that the necessary notice had been given to him less than a month in advance of that later date. A replication to the special plea followed, in which the plaintiff disputed the first charge, conceded the second one, and contended that neither mattered because the sub-section clashed with sections 8, 22 and 28 of the interim Constitution (Act 200 of 1993) and was therefore invalid.

[3] The plaintiff then applied to the Witwatersrand Local Division for an order under section 102(1) of the Constitution which referred to us, for our ruling on it, the issue raised by that contention. Goldblatt J, who heard the application, granted the order that had been sought. He accounted for his decision by saying:

> "I consider that it is in the interest of justice that the matter be referred to the Constitutional Court in that at present the merits of the plaintiff's claim cannot be considered because he is barred from proceeding therewith by virtue of his failure to give notice timeously to the defendant in terms of section 113(1) of the Defence Act."

Such was indeed the effect of section 113(1), as dictated by the judgment delivered in *Hartman v Minister van Polisie*[1] which had placed that peremptory construction on an analogous provision couched in comparable terms. Goldblatt J did not allude in addition to the late start of the litigation which had been alleged and denied. But the result of that, if established, was the same under the sub-section as the one that he mentioned when dealing with the notice, barring the action in so many words, and its significance called for no separate comment. The order of referral, I had better add, questioned the constitutionality of the sub-section in both its parts.

[4] The first complaint voiced by the defendant has now, as it happens, fallen away. Counsel agreed during the hearing before us that the summons had in truth been issued, and the plaintiff had thus instituted the action,[2] on the day preceding the last permissible one. That fact was readily ascertainable all along. It is safe to suppose that, had the defendant's counsel received adequate instructions initially, the objection would never have been taken. Although the point remained in dispute on the pleadings at the time of the referral, the dispute was always an artificial one which I shall ignore, viewing the case as it would have looked from the beginning with no such feature.

[5] The other circumstances that are germane to the constitutional issue have all been common cause from the outset. They are simply these. The action is indeed the sort which section 113(1) describes and accordingly covers. The requisite notice was

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[1]1983(2) SA 489(A) at 496 F-G.

[2]See *Labuschagne v Labuschagne; Labuschagne v Minister van Justisie* 1967(2) SA 575(A) at 585D-586B.

given to the defendant in the correct form and terms. That occurred, however, twenty-eight days before the date when the litigation commenced instead of the thirty-one comprising a month at the time of the year that counted.

[6] The affidavit filed in support of the application for the referral explained the lateness of the notice. No part of the story that it told was then or is now challenged. What emerges is this. After the shooting the plaintiff was admitted to a hospital, where he remained for some seven weeks. A couple of months later he approached and sought assistance from the Campus Law Clinic of the University of the Witwatersrand, an office run by attorneys and students which provides indigent people with free legal services. It undertook to handle his case. During a consultation that followed the student interviewing him gained the mistaken impression, and recorded in the file, that a policeman had shot him. The sequel was a notice saying so which the Clinic sent at once to the Minister of Safety and Security in professed compliance with section 32(1) of the Police Act (7 of 1958), a provision resembling section 113(1) that operated then with reference to the police force. The attorney in charge of the case, who knew that a soldier was said to have done the shooting, detected the mistake six weeks afterwards when he had the occasion to examine the file. He immediately gave the defendant the notice which concerns us now. By that time, however, the deadline for the institution of the action was too close to brook the delay in launching it that would have allowed thirty-one days to elapse before its commencement.

[7] The notice would have complied fully with section 113(1) had the month during which it was given happened to be February rather than October, the actual one. Its

lateness by a few days strikes me as a matter of no great moment, especially when so fortuitous a factor is borne in mind. That the loss of those days caused any prejudice to the other side, or even inconvenience, was never suggested and sounds most unlikely. One wonders why the defendant, or the official entrusted with the decision if he was not personally responsible for that, chose in all those circumstances to lodge the objection and, in particular, to persist with it after learning what had accounted for the unpunctuality.[3] The President of this Court put that very question to the defendant's counsel when the case was argued here, but he was unable to answer it. The hard line taken seems on the whole, and in the absence of information casting a better light on it, to have been unfortunate.

[8] The most pertinent of the three constitutional provisions on which the plaintiff relies in attacking section 113(1) is obviously section 22. It proclaims that:

> "Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum."

Whether the sub-section invades that right is the first question which presents itself. An affirmative answer poses in turn the second question, which is whether section 33(1) of the Constitution nevertheless excuses the invasion.

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[3] The defendant could competently and effectively have waived the objection since section 113(1) was conceived in the interests and designed for the benefit of his department rather than the general public: cf *Steenkamp v Peri-Urban Areas Health Committee* 1946 TPD 424 at 428-9; *Minister van Polisie en 'n Ander v Gamble en 'n Ander* 1979 (4) SA 759 (A) at 770C; *SA Eagle Insurance Co Ltd v Bavuma* 1985(3) SA 42(A) at 49G-50F.

[9] An insistence on notices of the kind required by section 113(1) is by no means peculiar to the particular proceedings that it governs. Similar conditions precedent to the institution of actions are and have long been familiar features of our statutory terrain, especially the part occupied by departments of state, provincial administrations and local authorities once they become prospective defendants.[4] The conventional explanation for demanding prior notification of any intention to sue such an organ of government is that, with its extensive activities and large staff which tends to shift, it needs the opportunity to investigate claims laid against it, to consider them responsibly and to decide, before getting embroiled in litigation at public expense, whether it ought to accept, reject or endeavour to settle them.[5] Over the years some judges have drawn attention, even so, to the adverse effect on claimants of requirements like those. Innes JA described them in *Benning v Union Government (Minister of Finance)*[6] as "(c)onditions which clog the ordinary right of an aggrieved person to seek the assistance of a court of law". One was thought by Watermeyer J in *Gibbons v Cape*

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[4]Some other contemporary examples will be found in section 343(1) of the Merchant Shipping Act (57 of 1951), section 90(2) of the Correctional Services Act (8 of 1959), section 96(1) of the Customs and Excise Act (91 of 1964), section 2(1)(a) of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act (94 of 1970), section 25(1)(a) of the National Roads Act (54 of 1971) and section 57(2) of the South African Police Service Act (68 of 1995).

[5]See *Stevenson NO v Transvaal Provincial Administration* 1934 TPD 80 at 84; *Osler v Johannesburg City Council* 1948(1)SA 1027(W) at 1031; *Administrator, Transvaal v Husband* 1959(1)SA 392(A) at 394B; *Dease v Minister van Justisie* 1962(2)SA 302(T) at 305D-E; *Pakco (Pty) Ltd v Verulam Town Board and Others* 1962(4)SA 632 (D) at 634G; *Stokes v Fish Hoek Municipality* 1966(4)SA 421 (C) at 423H-424C; the case of *Labuschagne* (cited in footnote 2) at 588A-C; *Sarrahwitz v Walmer Municipality* 1967(4)
SA 286 (E) at 288C-D; *Minister of Defence v Carlson* 1971(2)SA 231 (N) at 235D-E.

[6]1914 AD 180 at 185.

Divisional Council[7] to be "a very drastic provision" and "a very serious infringement of the rights of individuals".[8] In *Avex Air (Pty) Ltd v Borough of Vryheid*[9] Botha JA spoke in the selfsame vein of another "(h)ampering as it does the ordinary rights of an aggrieved person to seek the assistance of the courts". And Corbett CJ echoed that comment in *Administrator, Transvaal, and Others v Traub and Others*[10] when he observed that the provision then in question "undoubtedly hampers the ordinary rights of an aggrieved person to seek the assistance of the courts". Yet, given its obviously useful and apparently legitimate purpose, I would have felt disinclined to rate the condition precedent set by section 113(1) as one intrinsically repugnant to section 22 had that stood alone or been accompanied by a lot more latitude than the sub-section allowed in the time fixed for the start of the ensuing action and consequently for compliance with it a month earlier. For the obstacle to the litigation which it presented would then have been seldom difficult to surmount.

[10] The condition does not, however, stand on its own. It forms part and parcel of a composite scheme constructed by section 113(1), with the rest of which it is linked

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[7]1928 CPD 198 at 200. There the notice had to be given within the exceptionally short period of seven days after the incident from which the claim arose. One month before suing was the time legislatively specified in the other cases cited in this paragraph.

[8]That second passage was quoted with approval by Van Winsen J in the case of *Stokes* (cited in footnote 5) at 425H and by Eksteen J in the one of *Sarrahwitz* (also cited there) at 288 G.

[9]1973(1) SA 617(A) at 621F-G.

[10]1989(4) SA 731 (A) at 764E.

inextricably. Nor do its surroundings leave space for such greater leeway. The other

component of the scheme eliminates that by producing this rigid effect. That the notice precedes the commencement of the litigation by a month or more can never suffice independently. The notice must also be given no later than five months after the cause of action arose. Too short a period will otherwise remain to issue the summons in time. It would therefore be artificial and unrealistic to appraise the requirement for notification in isolation, heedless of the further one regulating the institution of the action with which it was coupled and calibrated. Instead we need to examine the sub-section as a whole and in all its implications. The stipulation governing the start of the proceedings has then to be considered, although it was obeyed in this case. To that I shall accordingly turn my attention. No jurisdictional or procedural barrier confronts us there, I mention in parenthesis, since the referral placed the entire topic squarely on our agenda and we heard full argument on it.

[11] Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.

[12] It does not follow, however, that all limitations which achieve a result so laudable are constitutionally sound for that reason. Each must nevertheless be scrutinised to see whether its own particular range and terms are compatible with the right which section 22 bestows on everyone to have his or her justiciable disputes settled by a court of law. The right is denied altogether, of course, whenever an action gets barred eventually because it was not instituted within the time allowed. But the prospect of such an outcome is inherent in every case, no matter how generous or meagre the allowance may have been there, and it does not *per se* dispose of the point, as I view that at any rate. What counts rather, I believe, is the sufficiency or insufficiency, the adequacy or inadequacy, of the room which the limitation leaves open in the beginning for the exercise of the right. For the consistency of the limitation with the right depends upon the availability of an initial opportunity to exercise the right that amounts, in all the circumstances characterising the class of case in question, to a real and fair one. The test, thus formulated, lends itself to no hard and fast rule which shows us where to draw the line. In anybody's book, I suppose, seven years would be a period more than ample during which to set proceedings in motion, but seven days a preposterously short time. Both extremes are obviously hypothetical. But I postulate them in order to illustrate that the enquiry turns wholly on estimations of degree.

[13] A handy yardstick against which to measure the limitation imposed by section 113(1) on the actions that it controls will be found in chapter III of the Prescription Act (68 of 1969). The chapter deals in general with debts extinguished by the effluxion of time, or prescribed as it calls the process. It consists of sections 10 to 16. In terms

of section 11(d), as read with section 10(1), the period of prescription pertaining to delictual debts is three years, "save where an Act of Parliament provides otherwise". It starts to run, according to section 12(1), "as soon as the debt is due". Section 12(3) deems the debt not to be due, however, "until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises" or until he or she could have learnt of those circumstances "by exercising reasonable care". Section 13(1)(a) caters for minors, extending the period in their cases. And section 16(1) ordains that:

> "(T)he provisions of this chapter shall, save in so far as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which ... an action is to be instituted in respect of a debt ..., apply to any debt arising after the commencement of this Act."

The Appellate Division of the Supreme Court held in *Hartman v Minister van Polisie*[11] that the provisions of the chapter were indeed inconsistent with section 32(1) of the old Police Act, its counterpart to section 113(1). It followed that the time allowed there for actions to begin against the police was no alternative period of prescription regulated otherwise by the chapter, but a "vervaltermyn" to which none of the relaxations applied and the expiry of which therefore exhausted the allowance automatically and immediately. That the same went for section 113(1) itself was decided by the Appellate Division in the later case of *Pizani v Minister of Defence*, where Corbett JA said:[12]

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[11]See para 3 of this judgment, footnote 1; at 499 C-H and 500 D.

[12]1987(4)SA 592(A) at 602 D-G.

> "The consequence ... is that a plaintiff who has failed to comply with the time limitation of section 113(1) is generally debarred from suing and cannot rely upon any of the grounds which delay the commencement of the running of prescription (see section 12 of the Prescription Act) or delay the completion of prescription (see section 13 of the Prescription Act). One of the grounds which delays the commencement of the running of prescription is the creditor's lack of knowledge of the identity of the debtor and the facts from which the debt arises ... From a general equitable point of view, it seems unfortunate that this provision of the Prescription Act, at least, does not apply to expiry periods."

The remedy for the inequity lay, he added,[13] in the hands of the legislature. The hint has not, however, been taken. So section 113(1) remains one that differs markedly and materially in its effect from the provisions of the chapter, not only requiring actions to be instituted much earlier but also insisting on strict compliance with the requirement in all cases governed by it, no matter how harsh that may turn out to be in the circumstances of some individual ones.[14]

[14] That disparity must be viewed against the background depicted by the state of affairs prevailing in South Africa, a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and

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[13]at 606E.

[14]The actual impossibility of compliance is the only exception which has yet been recognised. See *Montsisi v Minister van Polisie* 1984(1)SA 619(A) at 638 H.

what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons. The severity of section 113(1) which then becomes conspicuous has the effect, in my opinion, that many of the claimants whom it hits are not afforded an adequate and fair opportunity to seek judicial redress for wrongs allegedly done to them. They are left with too short a time within which to give the requisite notices in the first place and to sue in the second. Their rights in terms of section 22 are thus, I believe, infringed.

[15] The question which arises then is whether section 33(1) of the Constitution countenances the infringement. That depends, in the first place, on its passing the tests of reasonableness and justifiability which are set there. Both tests require the competing interests and values that it impairs and promotes to be weighed against one another for an appraisal of their proportionality. Some factors which count on that leg of the enquiry, and the most telling of those as I see them, were underlined by Chaskalson P in *S v Makwanyane and Another* [15] when he listed -

> "... the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."

[15]para 104: 1995(3)SA 391 (CC) at 436 E-F; 1995(6) BCLR 665 (CC) at 708 F-G.

[16] The nature and importance of the right proclaimed by section 22 speak for themselves and call for no elaboration. The purpose of requirements like those imposed by section 113(1) was canvassed, and the arguments for and against them were analysed, by the South African Law Commission a decade ago.[16] They revolved around the peculiar difficulties, largely logistical, that were said to beset the state whenever it was sued. Those the Commission discounted on the whole. With some minor exceptions it recommended, in vain as things turned out, that all such special requirements should be scrapped, that the general and ordinary ones for which the Prescription Act provided should apply instead to litigation brought against departments of state and other organs of government, that a prior notification of the intention to sue any of those for a delict ought to be the only extra condition regulating an action aimed at it, and that the courts should be empowered to condone non-compliance there.

[17] The defendant had to satisfy us that the invasion of section 22 was reasonable and justifiable. His counsel tried to demonstrate that by repeating but adding nothing to the very arguments which had failed to convince the Commission. I shall discuss neither those nor the reasons given by it for having believed that the adoption and implementation of its proposals would suffice to meet whatever real difficulties the state might encounter on such occasions. For, when it comes to the last consideration highlighted by Chaskalson P in the passage quoted a moment ago, there is no need

[16]See its report entitled *Investigation into Time Limits for the Institution of Actions against the State*: Project 42, October 1985.

to go beyond a comparison between section 113(1) and the corresponding provisions of the South African Police Service Act (68 of 1995), a statute passed and put into operation last year after Proclamation R5 of 1995 repealed the Police Act. It replaced section 32(1) of that with its own section 57, the first and second sub-sections of which now govern litigation directed at the police and stipulate that:

> "(1) No legal proceedings shall be instituted against the Service or any body or person in respect of any alleged act performed under or in terms of this Act or any other law, or an alleged failure to do anything which should have been done in terms of this Act or any other law, unless the legal proceedings are instituted before the expiry of a period of 12 calendar months after the date upon which the claimant became aware of the alleged act or omission, or after the date upon which the claimant might be reasonably expected to have become aware of the alleged act or omission, whichever is the earlier date.
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> (2) No legal proceedings contemplated in sub-section (1) shall be instituted before the expiry of at least one calendar month after written notification of the intention to institute such proceedings has been served on the defendant, wherein particulars of the alleged act or omission are contained."

Sub-section (5), a highly important one, follows in the wake of those, declaring that:

> "Sub-sections (1) and (2) shall not be construed as precluding a court of law from dispensing with the requirements or prohibitions contained in those sub-sections where the interests of justice so require."

The wording of that looks odd. It appears to have presupposed a power inherent in the courts to condone defaults of the kind covered which needed to be preserved. But courts have no such inherent power, and none derived from any source unless and until it is conferred on them. That the sub-section grants them the power in the circumstances mentioned must necessarily be implicit in its terms, however, since they make no sense otherwise.

[18] Whether section 57 passes constitutional muster is a question that does not arise now and one on which I shall say nothing in case we are required to consider it more thoughtfully on some future occasion. All that matters at present is this. Its provisions go to show what satisfies Parliament nowadays as a scheme sufficient yet effective for the protection of the state's legitimate interests in actions instituted against the police force. There is no reason to doubt that the same type of scheme would serve its interests equally, and therefore adequately, in proceedings brought against the army. In their incidence and frequency, after all, those can scarcely exceed the ones that relate to the police, indeed probably fall well short of them. Nor on any other score which occurs to me is the need of the state for protection an iota greater there.

[19] The contrasts between section 113(1) and section 57 are striking. The time allowed by the latter for the start of any action, and accordingly for the prior notification of its imminence, is twice as long as that fixed by the former. The period begins to run not from the date when the cause of action arises, an occurrence of which a claimant may well be unaware at the time, but from the date when both the conduct in question and the identity of its perpetrator becomes or should reasonably become known to him

or her. Ignorance of that second fact, more common perhaps than of the first, is easily illustrated. One thinks, for instance, of a hit and run collision caused by an unidentified motorist or an assault committed by somebody clad in battle dress of the sort worn by soldiers and the police alike which no civilian witness to the incident can tell apart. Then, in empowering the court to condone non-compliance with its requirements, section 57 permits account to be taken of the claimant's fault or the lack of that and the prejudice suffered by the state or its absence, factors that are wholly irrelevant to the operation of section 113(1). While paying due attention to the state's interests, section 57 is consequently much less stringent and detrimental to the interests of claimants than section 113(1).

[20] I thus conclude that the encroachment by section 113(1) on the right which section 22 proclaims cannot rightly be rated as, and has certainly not been shown to be, either reasonable or justifiable in the light of the option readily available to Parliament of emulating section 57. It follows that, in my judgment, section 33(1) does not sanction the intrusion and section 113(1) is therefore constitutionally invalid.

[21] Section 113(1) was also attacked, as I mentioned initially, on the grounds of its alleged incompatibility with section 8 of the Constitution, the one guaranteeing equality before and the equal protection of the law, and with the entrenchment by section 28 of the right to property. The inequality lay, so it was said, in the discrimination between the general run of plaintiffs and those whose cases the sub-section affected, to their

disadvantage, and furthermore between the state when sued and in suing. The other alternative challenge depended on the proposition that a right of action amounted to a species of incorporeal property which was shielded. The conclusion to which I have come about the impact of section 22 on the sub-section makes it unnecessary for me to consider either of those additional contentions.

[22] Counsel who appeared for the defendant relied on the decisions given in three cases to which I had better refer before finishing. They were *Stambolie v Commissioner of Police*,[17] *The Chairman of the Council of State v Qokose* [18] and *Mwellie v Ministry of Works, Transport and Communication and Another*,[19] which had to do respectively with the Constitutions of Zimbabwe, the Ciskei and Namibia. A statutory limitation on the time within which a particular class of litigation might be launched was assailed unsuccessfully in each of those cases. They are not, however, in point now. None of them involved a provision like section 22.

[23] The *Qokose* and *Mwellie* matters turned on the issue of equality. On both occasions the reasonableness of the requirements was admittedly a question which arose in that context. The *Mwellie* ones satisfied the court. But they were a lot more lenient than those of section 113(1) and are distinguishable with ease from it. In the *Qokose* case Rabie JA, who wrote the judgment, found that the unreasonableness

[17]1990(2)SA 369 (ZSC).

[18]1994(2)BCLR 1(CkAD).

[19]1995(9)BCLR 1118 (NmH).

of the restriction had not been proved by the evidence adduced. There, I believe, he took too narrow a view of the matter. The facts pertinent to it were so notorious that they surely called for no evidential demonstration. I have in mind the heavy handicaps described earlier[20] that burden countless claimants throughout Southern Africa and the hardship inherent everywhere in rigid requirements which cannot be relaxed even when the failure to comply with them has been neither blameworthy nor prejudicial to the other side.

[24] The case of *Stambolie* concerned a provision of the Zimbabwean Constitution which entrenched the right to compensation for any unlawful arrest or detention. The statutory limitation applicable to actions brought against the police force was held not to be inconsistent with the entrenchment. It therefore hit an action for the enforcement of the right. Gubbay JA had this to say about it:[21]

> "It was not urged that the periods of time prescribed ... are so inadequate as, in a practical sense, to nullify the fundamental right in question."

The dimensions of the particular limitation, one thus sees, were not in issue there. Gubbay JA nevertheless passed some general remarks on the topic by adding:

> "Although one may envisage situations in which the person would be absolutely unable to give notice and commence action within

[20] See para 14 of this judgment.

[21] at 374H.

> the times permitted, for instance he may have been incapacitated in an accident, the adequacy of the period must be tested against the normal and not the extraordinary situation. For statutes of limitation do not distinguish between just and unjust delay. This means that in the very rare case a person with a good claim, through no dilatoriness or fault on his part but due to circumstances beyond his control, will be barred from asserting a constitutional right."

Store was set in argument by that passage. My comments on it and the preceding one are these. The flaw that counts under our Constitution does not have to go the length of "nullifying" an entrenched right. Its infringement on any given occasion will do. In investigating that we too would scarcely test a statutory provision against some truly extraordinary situation. Nor, on the other hand, would we necessarily postulate none but the normal sort. One sufficiently conceivable for the prospect of it to be regarded as realistic amounts always to an acceptable hypothesis. Such a situation is certainly encountered here once the circumstances are those described in the last sentence of the second passage. They are by no means rare in this country, as all our lawyers experienced in handling delictual work know full well. That is precisely why failures to differentiate between excusable and inexcusable delays worry us. It also explains why some South African statutes do indeed differentiate between the two,[22] illustrating that the generalisation to the contrary is not in any event apt here. So, in a number of pertinent respects, that case too can be distinguished clearly from the present one.

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[22]Instances of provisions permitting the difference to be taken into account, besides section 57 (5) of the South African Police Service Act, are seen in section 14(3) of the Motor Vehicle Accidents Act (84 of 1986) and section 39 (3) of the Public Service Act (Proclamation 103 of 1994).

[25] All that remains to be considered is the form which the ensuing order should take. Section 113(1) must be struck down, I believe, in its entirety. The portion that affects proceedings brought against "any person", as distinct from the state, is no less objectionable than the rest and can hardly be preserved. The invalidation will operate fairly and serve the interests of justice by encompassing the cases for which the order is about to cater under section 98(6) of the Constitution. They will all be regulated by chapter III of the Prescription Act until Parliament produces a suitable replacement for section 113(1). For the provisions of that chapter which exclude from its ambit matters governed elsewhere will not apply to those cases once they have been removed from and while they then remain beyond such separate control. The date mentioned in the order is, of course, the one when the Constitution came into force. That leaves only the question of costs, which counsel answered by agreeing on no order with regard to them.

[26] In the result an order is now made in the terms that follow.

(a) Section 113(1) of the Defence Act is declared to be inconsistent with section 22 of the interim Constitution and to be invalid for that reason.

(b) Such declaration of invalidity will apply to and govern all actions instituted either before or since 27 April 1994 which were not already barred by section 113(1) on that date and which, at the time of this order, have not yet been finally determined by judgments delivered at first instance or on appeal or by settlements duly concluded.

(c) The present case is remitted to the Witwatersrand Local Division so that the action may be tried there.

Chaskalson P, Mahomed DP, Ackermann J, Kentridge AJ, Kriegler J, Langa J, Madala J, Mokgoro J, O'Regan J, and Sachs J all concurred in the judgment of Didcott J.

For the plaintiff: G J Marcus, with him B E Leech, instructed by the Campus Law Clinic of the University of the Witwatersrand.

For the defendant: Z F Joubert SC, with him P Stais, instructed by the State Attorney.