OF SOUTH AFRICA

In the appeals of:

No 159/96

MERIC ANTONY CROMHOUT..... Appellant

versus

MULTILATERAL MOTOR VEHICLE
ACCIDENTS FUND..... Respondent

and

No 445/96

SANTAM BEPERK..... Appellant

versus

EUNITE WILLIAMS..... Respondent

CORAM: Smalberger, Howie, Olivier, Zulman JJA et Streicher AJA

DATE OF HEARING: 15 September 1997

DATE OF JUDGMENT: 26 September 1997

J U D G M E N T

/HOWIEJA:...

HOWIE JA:

For many years the various compulsory motor vehicle accident insurance enactments applicable from time to time allowed a "workman" (as defined in the now repealed Workmen's Compensation Act, 30 of 1941) who was entitled to third party compensation, only a limited sum in the event of injury in an accident where the vehicle concerned was owned or driven by such third party's employer. However, by an amendment in 1991 to the legislative provisions then current, the limitation was confined to a workman being conveyed in such a vehicle. The effect of the amendment, therefore, was to remove the limit in the case of a workman who was not a passenger in such a vehicle and whom, for convenience, I shall refer to as a pedestrian workman. (In every case, of course, the recoverable sum was subject to reduction by all amounts payable under the Workmen's Compensation Act but in that, and other respects, I have endeavoured

to state the introductory background as crisply as possible).

The question for decision now is whether a pedestrian workman injured before the amendment but whose claim is still pending after the amendment is restricted to the limited compensation.

That question has arisen in a series of cases in the Provincial Divisions, reported and unreported. Two of them jointly form the subject of this appeal. I shall refer to them as "Cromhout" and "Williams" respectively. The latter has been reported as Williams v Santam Bpk 1996 (4) SA263 (C. In Cromhout the limit was held still to apply. In Williams the converse was decided. In Cromhout the appeal is with the leave of this Court and in Williams, with the leave of the trial Judge.

At present Williams stands on its own. The decisions in the other cases on the topic are in line with Cromhout. They are Matlhoane v Mutual and Federal Insurance Co Ltd 1995 (1) SA 340

(W), Van der Merwe v Mutual and Federal Insurance Co Ltd 1997 (1) SA 78 (C) and Mehlane v Santam Limited. Appeal Case A1575/94, a Full Court decision of the Transvaal Provincial Division in which judgment was given on 17 June 1997.

The legislation now in issue is the Multilateral Motor Vehicle Accidents Fund Act, 93 of 1989 ("the Act"). Set out in the Schedule to the Act is an agreement entitled "Agreement Establishing a Multilateral Motor Vehicle Accidents Fund" ("the agreement"). In terms of s 2 (1) of the Act the agreement has the force of law and applies as if it were a statute. By s 2 (2) the President is empowered to ratify amendments to the agreement and, by proclamation, to amend the Schedule so as to give effect to such ratified amendments.

The question for decision concerns the provisions of art 47 of the agreement. Before amendment by Proclamation 102 of 1991 the relevant provisions of the article were these:

> "Without any liability of the MMF or its appointed agent to pay costs awarded against it or him, in any legal proceedings, being affected by anything in this article contained, where the loss or damage contemplated in Chapter XII is suffered as a result of bodily injury to or the death of an employee of the driver or owner of the motor vehicle concerned and the third party is entitled to compensation under the South African Workmen's Compensation Act, 1941. . . in respect of such injury or death —
>
> (a) the liability of the MMF or its appointed agent, as the case may be, in respect of the bodily injury to or death of any one such employee shall be limited in total to the sum representing the difference between the amount which that third party could, but for the provisions of this paragraph, have claimed from the appointed agent or the amount of R25 000 (whichever is lesser) and any lesser amount to which that third party is entitled by way of compensation under the said Workmen's Compensation legislation; and . . ."

Broken down into its component parts, the article comprises a

preamble followed by paragraph (a). The latter contains the monetary limitation and was unaffected by the amendment.

The amendment came into force on 1 November 1991 ("the effective date"), and as a result the article (omitting irrelevant words) now reads:

> "Without any liability of the MMF or its appointed agent to pay costs awarded against it or him, in any legal proceedings, being affected by anything contained in this Article where the loss or damage contemplated in Chapter XII is suffered as a result of bodily injury to or the death of <u>any person who, at the time of the occurrence which caused that injury or death, was being conveyed in or on the motor vehicle concerned and who was an employee of the driver or owner of that motor vehicle</u> and the third party is entitled to compensation under the South African Workmen's Compensation Act, 1941 ... in respect of such injury or death".

The extent of the amendment is indicated by the underlined words. Originally the limitation burdened

"an employee of the driver or owner of the vehicle concerned".

By the amendment it is imposed on that employee only when "being conveyed in or on the motor vehicle concerned".

Taking the Provincial judgments referred to earlier, and those now on appeal, in the chronological order in which they were decided, the first was Matlhoane. There the reasoning, in broad summary and in favour of the insurer (as I have indicated) was, firstly, that the case of Swanepoel v Johannesburg City Council; President Insurance Co Ltd v Kruger 1994 (3) SA 789 (A) (much relied on by the various plaintiffs, and to which I shall revert) was distinguishable because it concerned a different question. Secondly, it was held that the words in the amended article "at the time of the occurrence which caused (the) injury" did not indicate that the lifting of the limit in the case of a workman pedestrian operated retroactively.

Those words, so it was explained, applied, expressed or unexpressed, to all third party accidents as was illustrated, for example, by their use in the earliest third party statute, with regard to the compensation of other categories of passenger. (One may add that they are still in use in art 46 of the agreement in respect of such other categories.) Thirdly, despite the legislative intention to afford the greatest possible protection to third parties, the general presumptions against retroactivity and interference with vested rights were left undisturbed. This point was illustrated by reference to various anomalies which could result were the amendment to apply retroactively.

The second case in the series was Van der Merwe. It is to be noted that it was decided in March 1995 but only reported this year. The first contention in favour of that plaintiff was that even if the amendment operated only prospectively, the words of the amended article - with emphasis on the already quoted expression "at the time

of the occurrence which caused (the) injury" - were capable of applying also to claims not yet disposed of on the effective date. As to the quoted expression, the Court adopted the reasoning in Matlhoane and went on to hold that a claim arising before the amendment, but not yet disposed of on the effective date, had to be determined according to the unamended article. The Court in Van der Merwe expressed the view (at 80 G - H) that because the plaintiff there had, as at the date of his accident, acquired a workman's compensation claim in excess of the limit in art 47, the position was that, without the amendment's being retroactive, he had never acquired a third party claim. The conclusion was untenable, so it was held, that the amendment served to convert a non-existent claim into a valid one. Swanepoel's case was again distinguished, as also the case of Adampol (Pty) Ltd v Administrator. Transvaal 1989 (3) SA 800 (A) (another decision to which I shall revert). Finally, the Court held that

the case before it did not conform to any of the common law exceptions to the rule against retroactivity even although the amendment conferred benefits or favours on third party claimants.

Cromhout was decided in January 1996. Like Matlhoane. it was a case in the Witwatersrand Local Division. For the plaintiff it was argued, in reliance upon Swanepoel and Protea International Investments (Pty) Ltd v Peat Marwick Mitchell and Co 1990 (2) SA 566 (A) that Matlhoane was clearly wrong. The Court, however, distinguished both Swanepoel and Protea International Investments and pointed out that certain examples given by Voet 1.3.17 of supposed exceptions to the rule against retroactivity (and relied on by counsel for the plaintiff) were held in Protea International Investments (at 571 E and 572 C-D) not to be instances of retroactivity at all. Those examples concerned a reduction in the maximum prescribed rate of interest and the extended application of a certain prescriptive period,

in both of which instances the amending laws, although operating only from the date when they came into effect, nonetheless applied also to existing debts as yet unpaid. Rejecting the argument that, in effect, the plaintiff's claim was, equally, an existing debt as yet unpaid, the Court in Cromhout reasoned that the collision in which the plaintiff was injured was, in so far as the amended art 47 was concerned, a past event which the amendment could only govern if it was truly retroactive. As to retroactivity, so it was held, Matlhoane. far from being clearly wrong, was right.

Coming now to Williams, in which judgment was given in July 1996, the Court there was not referred to either Van der Merwe (not yet reported) or Cromhout. The learned Judge in Williams disagreed with the approach in Matlhoane, namely, to enquire whether the amendment was retroactive, and then, on finding the answer to be in the negative, to hold that claims arising before the effective date

were not covered. Instead, he said, one had to start by focusing on the language of the amendment and construing it according to its plain language. Then one had to bear in mind not only that an enactment's interference with existing rights did not necessarily bring about its retroactive operation but that exceptions to the rule against retroactivity (relying on Voet 1.3.17) existed where a benefit was conferred. Therefore, because the amendment was intended to benefit injured persons such as the plaintiff it ought to be widely interpreted in his favour and extended to cases arising before, but still pending on, the effective date. In the view of the Court the language of the amended article was clear and unambiguous and its application involved no absurdity, inconsistency or hardship. In so far as the Fund's rights in regard to pending pre-amendment claims were concerned the learned Judge reasoned as follows. Art 66 of the agreement made provision for amendments to be made by members of

the Fund, which amendments became law upon ratification by the President in terms of s 2(2) of the Act. It followed that amendments could not be foisted on the Fund; the latter was always involved in their making and if a proposed amendment involved prejudice to the Fund such result would clearly have been one which the Fund intended. From the language used in the amendment it appeared that there had been no intention to confine it to injury suffered after the effective date or to extend the pre-amendment limitation beyond the effective date in cases then still pending. Consequently, so it was reasoned, if it had really been the Fund's intention to effect such extension it could easily have made that clear. It was unthinkable, too, that the intention in amending arts 55 and 57 by the same Proclamation (found in Swanepoel to be an intention to extend the prescriptive period also in respect of claims pending on the effective date) would have differed from the intention with which art 47 was

amended. Finally, in the Court's opinion there was no material difference between, on the one hand, instituting a new liability for the payment of interest on a pending expropriation claim (as in Adampol's case) and, on the other, enabling a potential third party claim arising before the effective date but which had become unenforceable by the claimant's entitlement to an amount of workmen's compensation in excess of the art 47 (a) limit, to be resuscitated by the amendment.

Last in the relevant series of cases, there is the Full Court judgment in Mehlape, decided in June 1997. The first contention for the plaintiff there was that the unamended article, on a liberal interpretation (which was necessary in the context and which warranted a departure from the ordinary meaning) in any event confined the limitation to a passenger workman. ' All that need be said is that the Court had no difficulty in rejecting that argument. The second submission, that the limitation was restricted to cases where the

third party compensation was R25 000 or less and had no application to a claimant entitled to more than that sum, received, rightly, equally short shrift. The final argument, founded on the decision in Williams, was that the amended article applied also to claims pending on the effective date. Relying on dicta in Euromarine

International of Mauren v The Ship Berg 1986 (2) SA 700 (A) (to which I shall later return) the Court in Mehlape held that the amendment took no vested claimant's right away; it created a new right and there was nothing in the amended article or the Proclamation which suggested that this new right enured to the benefit of claimants injured before the effective date. The creation of such new right had been overlooked in Williams and the Full Court disagreed with the decision in that case. It concluded that extending the amendment to cases pending on the effective date imported a retroactivity for which no express provision had been made.

In arguing the present appeal the rival causes were founded, by and large, on the same main submissions respectively accepted and rejected in the five cases just reviewed.

Essential to what I might term the plaintiffs' cause, is approval of the decision in Williams. It is appropriate, therefore, to proceed forthwith to consider the correctness of that decision.

That there is always the need to focus carefully on the language used in an enactment and to have regard to its plain meaning in order to find the legislative intention (Williams at 267 A - 268 A) is unquestionably so. There being no express retroactivity conveyed in the amendment (an example of which one finds in Shewan Tomes and Co Ltd v Commissioner of Customs and Excise 1955 (4) SA 305 (A)), the enquiry is then whether one has on one's hands a case really demanding determination of the ambit and scope of the amendment or, rather, a case requiring the answer to the question from when the

amended article must be taken to be the law. The latter question concerns retroactivity in the true sense: Workmen's Compensation Commissioner v Jooste [1997] 3 All SA 157 (A) at 161 g - h.

The language of the amended article viewed in isolation is indeed clear (cf Williams 269 J). Literally, it imposes the limit only upon a passenger workman. The accompanying effect, however, is that a pedestrian workman has since the amendment acquired the entitlement to third party compensation commensurate with the full extent of the damages suffered (less workmen's compensation). Whether, strictly speaking, that acquisition constitutes a new right, the practical result is that what was a limited right has become what for convenience may be termed an unlimited one, denoting, not the right to unlimited compensation but a right free of statutory limitation . Such an unlimited right in the case of a workman pedestrian is something new. It has never existed in the history of third party

legislation. It equates pedestrian workmen with all other pedestrians. It confines the limitation to passenger workmen and that is in keeping with the limitation that has for decades burdened certain passengers who are not workmen (art 46 of the agreement and its respective forerunners in Act 29 of 1942, Act 56 of 1972 and Act 84 of 1986). If the amendment does not operate retroactively the plaintiffs in the present matter cannot enjoy the unlimited right. Retroactivity is necessary to remove, as at the dates on which the plaintiffs' respective causes of action arose, the limit which then restricted their claims, and thus to apply law which did not then exist. In the circumstances one is not really called upon to determine the ambit and scope of the amending words so much as to answer the question: from when did the drafter intend the unlimited right to apply? Put another way, can retroactivity properly be said to have been implied?

The case of Adampol is in my view distinguishable.

Before the amending enactment in issue there an expropriates had, under existing legislation, no right to interest on the compensation payable. The amendment introduced such right and, while obviously applying only from its commencement date, also contained words indicating - unmistakably in the view of the majority of the Court -that it pertained not only to future compensation but also to compensation due as on that date but not yet paid. The words in question were "interest shall be paid on any outstanding amount of compensation", those underlined being held to be words of "unqualified generality" (810 G - H). The amendment to art 47 contains no such indications that it pertains also to pending claims. As to the examples in Voet 1.3.17, relied on by the Court in Williams, they concerned legislation which either clearly treated not only of the present but also the past, or conferred favours or benefits and where benevolent extension of such advantages to existing,

unresolved cases was effected because of the absence of injustice: Adampol 806 D -H, 807 E and 808 G -I. One would not ordinarily speak of the creation of a new right or the extension of an existing right as a special favour or benefit. But in any event the amendment with which we are concerned does not merely concern the conferring of a new right to ancillary relief such as interest. It pertains to the substantive relief claimable from the Fund - the essential substance of the third party's right and the Fund's liability. And it could never be said that stripping the Fund of its benefit to accrued limited liability in cases already pending on the effective date was something not involving injustice to it.

Swanepoel's case is distinguishable too. It concerned the amendment, also by way of Proclamation 102 of 1991, of arts 55 and 57 of the agreement and the deletion of arts 58, 59 and 60. They had all to do with the prescription of claims. As very clearly stated in the

judgment in that case at 793 G - I, the effect of the amendment was plainly prospective but that did not entail that existing rights were not affected. That amendment related to the enforceability of claims and their expiry after the effective date. It did not deal, as the present amendment does, with the creation of an unlimited right in the sense mentioned earlier. Moreover, the abolition of arts 58, 59 and 60 served, in the light of their contentious history, to strengthen the conclusion that the intention was to replace an unsatisfactory prescriptive system with a simpler, more generous one. That being so, it was inevitable that the new system would apply also to all claims not yet disposed of for otherwise the untenable position would obtain whereby the old and new systems applied alongside one another. Nothing in that judgment or the order made there conveys, even impliedly, that the conclusion reached would or could have application to the amendment of art 47. It follows that the reliance

on Swanepoel in Williams at 270 C - F was misplaced.

I come now to the conclusion in Williams that if the amendment detracts from the Fund's rights the Fund must be taken to have intended that result. That conclusion, supported by counsel for the respective plaintiffs involved in the appeal, to my mind involves a misreading of the agreement.

The agreement begins with what is titled an "Introductory Article". This declares that the Fund is a juristic person whose purpose is to govern and administer the payment of third party compensation. Art 4 provides for membership of the Fund. The five original Members, being the parties who entered into the agreement, were the Republic of South Africa and the then Republics of Transkei, Bophuthatswana, Venda and Ciskei. Membership is open to any independent state and any registered company (within a state) having sole jurisdiction in that state over the administration of third party

insurance.

The Fund has a Council, a Board and a Chief Executive Officer (art 17). Each member of the Fund may appoint one Councillor to represent its interests (provision also being made for alternates) and the Council's powers include appointment of Board members and approval of proposed amendments to the agreement (art 18). The Board comprises one member appointed by each Fund Member; six to ten members appointed by the Council; the Chief Executive Officer; and non-voting co-opted members with specialised knowledge (art 19). The latter article also spells out the Board's powers which are i a to make recommendations to the Council in respect of amendments to the agreement. The current business and the operation of the Fund are the responsibility and function of the Chief Executive Officer and the staff of the Fund (art 20).

Turning now to art 66, it reads as follows:

" (a) (i) Proposals to introduce amendments to this Agreement or any schedule or protocol thereto, whether emanating from a Member, members of the Council or Board, shall be communicated to the Chief Executive Officer who shall bring the proposal before the Board.

(ii) The Board shall consider the proposal and report to the Council with regard to its acceptance.

(iii) If a proposed amendment is approved by the Council, the MMF shall by registered notice enquire from the Members of the MMF whether they accept the proposed amendment.

(b) When at least three-fifths of the Members having at least four-fifths of the total voting power, have accepted the proposed amendment the MMF shall so certify by formal communication addressed to the Members.

(c) A reply by the Members to the MMF in respect of a proposed amendment shall be transmitted to the Chief Executive Officer within three (3) months after the date of dispatch of the notice."

It is plain from these provisions that although the Board must report on a proposed amendment, and may even initiate it, the decision to amend is not that of the board but of the Members. Of course, the

Council must first approve the amendment before the Members are at liberty to make the decision but the Council, after all, consists solely of Members' representatives who are there to act in Members' interests. The point is that the Fund is a juristic person, not an association of Members, and the latter do not constitute even a component of the Fund. Legally speaking, they stand apart from it. That being the position, therefore, an amendment cannot be construed as necessarily being something the Fund intends or desires. It may involve a change of which the Chief Executive Officer and the majority of the Board do not approve. It can indeed be thrust upon the Fund just as much as under previous legislation Parliament could extend insurers' previously existing categories or limits of liability.

It follows that I respectfully disagree with the essential reasoning in Williams on which the finding in favour of that plaintiff was based.

In my view the correct approach to the question now in issue was stated by Innes CJ in Curtis v Johannesburg Municipality 1906 TS 308 at 311 as follows:

> "The general rule is that, in the absence of express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation."

This dictum was approved and applied in The Ship Berg (referred to earlier) at 709 H - 710 E. The legislation under consideration in that case was the Admiralty Jurisdiction Regulation Act, 105 of 1983. Consequent upon an analysis of its provisions, it was held that the statute had created substantive rights and obligations in regard to security for and payment of maritime claims and was therefore a "new" Act, not only because of the recency of its commencement but

mainly because it had introduced "bold departures from the old" (711 E - F). In addition, its applicability to claims which arose prior to its commencement would involve prejudice to existing rights (713 D -E). The judgment concluded (at 713 E - F):

> "Looking at the Act in its entirety, as one must do, I cannot find justification for a conclusion that for the fulfilment of its purpose the new enactment required that the innovative provisions therein were to apply in respect of claims which arose before its commencement, or that that was what the Legislature intended."

The amendment in the present case undoubtedly introduced a bold departure from the old order. I have already indicated why. And although it invades no existing claimants' rights, it would certainly prejudice the Fund's entitlement to limited liability were its operation to be retroactive. To alleviate the hardship imposed on a pedestrian workman under the unamended article and its

precursors is one thing. To replace it with hardship in the form of unlimited liability on the part of the Fund is another. That result would not be equitable or necessary for the fulfilment of the amendment's purpose. The Fund, as pointed out in Matlhoane at 344 B - C, was entitled to order its affairs prior to the amendment on the basis that no claim of the present kind could exceed R25 000. The presumption against retroactivity has not been disturbed.

I conclude, therefore, that Williams was wrongly decided and that the decision in Cromhout was right. This conclusion renders it unnecessary to express any view on the correctness of the proposition stated in Van der Merwe at 80 G - H (and echoed by counsel for the appellant in Williams) that where, as at the time of an accident, a third party acquires a claim to workmen's compensation in excess of R25 000 that per se means that no third party claim can in law arise.

Because Williams had already received workmen's compensation in excess of the art 47 limit by the time his case came before the Court below the appropriate order for that Court to have made was one dismissing his claim with costs.

The following order is made:

1. The appeal in Cromhout v Multilateral Motor Vehicle Accidents Fund is dismissed with costs.

2. The appeal in Santam Beperk v Eunite Williams is upheld, with costs. The order of the Court a quo is set aside. Substituted for it is the following:

"Die eis word van die hand gewys met koste".

C T HOWIE

SMALBERGER JA)
OLIVIER JA) ZULMAN J A)
CONCUR STREICHER AJA)