CASE NO. 366

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

MINISTER OF SAFETY & SECURITY Appellant

and

DOREEN DIKELEN MOLUTSI and First Respondent
PETER MCHEDI Second Respondent

CORAM: CORBEIT,CJ;VANHEERDEN, F H GROSSKOPF, HARMS et MARAIS JJA

HEARD: 19 February 1996

DELIVERED: 3 June 1996

JUDGMENT

MARAIS JA/

MARAIS JA:

The judgment in this matter was prepared in March. It was not delivered then because it was thought that a pending decision of the Constitutional Court in the matter of Du Plessis and Others v De Klerk and Another. Case No CCT 8/95 (the "Pretoria News" case) might have an important bearing upon some aspects of the case, and it was considered desirable to await delivery of the judgment in that matter. Judgment was delivered on 15 May 1996 and cognisance of that judgment and certain other judgments of that Court delivered on the same day has been taken.

The first issue raised by this appeal is whether the provisions of section 32 of the Police Act 7 of 1958 ("the Act") or section 17 of the South African Police Service Rationalisation

Proclamation, R 5 of 1995 dated 27 January 1995 ("the Proclamation"), are applicable to allegations which first respondent sought to introduce by way of amending the particulars of claim she had issued against appellant in an action for damages arising out of an allegedly unlawful and fatal shooting by second respondent, a policeman, of her husband on 7 August 1993. The action was commenced on 21 December 1993. Appellant (the Minister of Safety and Security) was cited as the first defendant and second respondent (the policeman) as the second defendant. At that time section 32 (1) of the Act was in force. It read:

> "Any civil action against the State or any person in respect of anything done in pursuance of this Act, shall be commenced within six months after the cause of action arose, and notice in writing of any civil action and of the cause thereof shall be given to the defendant one month at least before the commencement thereof."

First respondent alleged in the particulars of claim that she had complied with the provisions of section 32. This is a reference to a "notice in terms of section 32 of the Police Act No 7 of 1978" which first respondent's attorney had sent to appellant by registered post on 17 August 1993. The cause of action pleaded was the unlawful intentional or negligent killing of first respondent's husband by second respondent acting within the course and scope of his employment as a policeman. In April 1994 a plea was filed in which it was denied that second respondent had acted in the course and scope of his employment when shooting the person whom he shot, and alleged that he had fired the shot in self-defence. The matter was enrolled for trial in the Witwatersrand Local Division on 22 February 1995.

On the day assigned for the trial no judge was available and the matter stood over to 23 February 1995. First respondent took

the opportunity of drafting a notice of intention to amend the particulars of claim. The amendment was to cater for the contingency that the denial that second respondent had acted within the course and scope of his employment when shooting the deceased might be upheld. It was sparked by first respondent's legal representatives learning from documents disclosed by appellant that the gun with which the deceased had been shot while second respondent was allegedly not on duty, had been issued to him by other functionaries in the police force, and that he had been convicted on 23 November 1992 of assault to do grievous bodily harm by kicking a person with his shod foot. It read:

> "9A. In shooting and killing the deceased, the said member (hereinafter referred to as the Second Defendant) used an official firearm which had been issued to him by a member, or members, of the South African Police Force (whose name/s and rank/s are unknown to the Plaintiff)

who had given the Second Defendant the authority to carry the said firearm on his person at all times, even when he was not on duty.

9B. In issuing the said firearm to the Second Defendant and in authorising him to carry the said firearm on his person when he was not on duty, the said member or members whose name/s and rank/s are unknown to the Plaintiff acted wrongfully and intentionally, alternatively negligently, in that he/they foresaw the possibility, or ought reasonably to have foreseen the possibility, that the Second Defendant would use the said firearm in circumstances similar to those in which he did.

9C. As a result of the wrongful and intentional, alternatively negligent, conduct referred to in paragraph 9B above, the deceased was killed,"

On 23 February 1995 appellant filed a notice of objection to the proposed amendment. The grounds were first, that the proposed amendment would introduce a new cause of action without there having been compliance with section 32 of the Act or section 17 of the Proclamation, and secondly, that the long delay in seeking the amendment was prejudicial to appellant. Second respondent did not

join in the objection. Indeed, he was no longer professionally represented by that time, the State Attorney having withdrawn as his attorney of record on 6 January 1995.

The reference in appellant's objection to the Proclamation was a consequence of its promulgation on 27 January 1995 (after the issue of summons in the matter), its repeal of the Act, and the new provisions which it contained regarding the giving of notice of intention to commence legal proceedings and the time within which they had to be instituted. I shall set out those provisions of the Proclamation which are relevant in due course. The trial did not proceed on 23 February and first respondent's application to amend the particulars of claim came before Labe J. in April 1995, He allowed the amendment, taking the view that it was unnecessary to decide whether a new cause of action was being introduced because section

32 of the Act and not section 17 of the Proclamation governed the case, and because the notice given by first respondent in terms of section 32 might prove to be a sufficient compliance with that provision even as regards the new allegations contained in the proposed amendment.

Appellant responded by filing a special plea to paragraphs 9A to 9C of the amended particulars of claim. In essence it set up the contention that the allegations amounted to a new cause of action, that that cause of action arose at latest by 7 August 1993, that if it was to be invoked and enforced by legal proceedings, the provisions of section 32 of the Act had to be complied with, and that they were not complied with in that first respondent failed to give notice in writing of the new cause of action and failed within the time prescribed by section 32 to institute proceedings in respect of it, with the

consequence that it became unenforceable by reason of the provisions of that section.

First respondent countered with a replication in which she denied that the amendments amounted to a new cause of action, asserted that her claim was founded upon a single cause of action which arose on 7 August 1993, and contended that section 32 of the Act was inapplicable because of its repeal by the Proclamation and that section 17 of the Proclamation was now applicable to the action. She denied that section 32 precluded her from relying upon the allegations in paragraphs 9A to 9C, basing her denial on one or more of the following grounds:-

(1) Section 32 of the Act is inconsistent with sections 8 and 22 of the Constitution of the Republic of South Africa, 1993, Act 22 of 1993 (the "interim Constitution") and therefore of no force and effect.

(2) Section 17 of the Proclamation is for the same reason of

no force and effect.

(3) The interests of justice require that the requirements and prohibitions of subsections 17 (1) and 17 (2) of the Proclamation be dispensed with.

(4) First respondent had complied with section 17 read with subsections 12 (2) (d) and 12 (2) (i) of the Proclamation.

(5) Section 32 of the Act has been repealed by subsection 12 (1) of the Proclamation and appellant is precluded from relying upon it.

(6) First respondent had complied with section 32 of the Act or substantially complied with it in that its objects had been achieved.

Those aspects of the special plea which did not bear on the constitutionality of section 32 of the Act and section 17 of the Proclamation were considered by the Court a quo after hearing evidence and considering the affidavits which had been filed in the antecedent application by first respondent to amend her pleadings. (It had been agreed that those affidavits should be considered.) In the result, the special plea was dismissed with costs. In reasons for

judgment filed subsequently it appeared that the Court a quo concluded that paragraphs 9A to 9C of the amended particulars of claim did amount to a new cause of action, that section 17 of the Proclamation and not section 32 of the Act was applicable, that first respondent could not reasonably have known of the existence of the new cause of action until shortly before the original date for trial (22 February 1995), that she had applied for the amendment within 12 months of that date and so complied with section 17 (1), but that she had not complied with section 17 (2). The Court a quo concluded further that in the exercise of the discretion conferred by section 17 (5) compliance with that particular requirement should be dispensed with. An ensuing application by appellant for leave to appeal to this Court was granted.

As its name implies, the Proclamation was designed to

rationalise the law applicable to the South African Police Force and to bring within its purview a number of police forces of previously independent states and self-governing territories such as Bophuthatswana, Transkei, Ciskei, Kwazulu, and the like. Subject to certain transitional qualifications and the specific retention of certain provisions in them, the respective Police Acts in all such states and self-governing territories were repealed by section 12 (1) of the Proclamation. So too was the Police Act 7 of 1958 of South Africa although certain of its provisions were specifically preserved and continue to apply.

Section 1 of the Proclamation defined the word "Force" as meaning (unless the context indicates otherwise) "a police force or police service established in terms of a law referred to in Annexure A to this Proclamation". The laws referred to in Annexure A were the

Police Acts of South Africa, Bophuthatswana, Transkei, Gazankulu, Qwaqwa, Kwazulu, Ciskei, Venda, Lebowa, KwaNdebele, and KaNgwane. "Service" was defined in section 1 as meaning (unless the context indicated otherwise) "the South African Police Service contemplated in section 214, read with section 236 (7) of the Constitution". Section 12 was devoted to transitional arrangements. I shall quote only those parts of it which are or might be thought to be relevant.

" 12. TRANSITIONAL ARRANGEMENTS

(1) Subject to the provisions of subsection (2), the laws mentioned in Annexure A are repealed to the extent indicated in the third column of that Annexure.

(2) Notwithstanding the repeal of the laws referred to in subsection (1), but subject to the provisions of this Proclamation and the Constitution -

(a) any force, Reserve Police Force or any administration, office or other institution established by or under or functioning in

accordance with any such law, shall continue to so exist and function until abolished by direction of the National Commissioner or otherwise dealt with under this Proclamation;

(b).....

(c).....

(d) Anything done, including any regulation made or standing order issued or other administrative measure taken, or any contract entered into or any obligation incurred under any law mentioned in Annexure A, which is capable of being done, made, taken, issued, entered into or incurred under any provision of this Proclamation shall be deemed to have been done, made, taken, issued, entered into or incurred, as the case may be, under such corresponding provision until amended, abolished, withdrawn or repealed under or by virtue of a provision of this Proclamation;

(e).....

(f) .....

(g) .....

(h) all provisions creating an offence, and providing for penalties or any other matter in connection therewith, in any law referred to in Annexure A and in force immediately prior to the coming into operation of this Proclamation, shall continue to be in force: Provided that the aforegoing provisions

shall not apply where an offence is so created in respect of another provision of such law which is not kept in force in terms of this subsection, except where a provision corresponding to such last-mentioned provision is contained in this Proclamation or kept in operation in terms thereof, in which case any reference in the provision creating the offence to such last-mentioned provision shall be construed as a reference to such corresponding provision; (i) any cause of action that arose against a force established by a law referred to in Annexure A, before the commencement of this Proclamation, will be actionable against the Service, subject also to any limitations or defences that may be applicable prior to the commencement of this Proclamation: Provided that the provisions of section 17 shall be applicable to all such causes of action; (j) (i) any disciplinary action in connection with alleged misconduct attributed to a member of the Service, serving in a pre-rationalised post, prior to the date of his or her appointment in a post in the fixed establishment of the Service, may be proceeded with or instituted by a competent member of the Service, as if such alleged

misconduct had been committed after such date;

(ii) appeals resulting from disciplinary action instituted against a member of the Service appointed in a pre-rationalised post and not finally disposed of upon his or her appointment in a post in a fixed establishment of the Service, shall be disposed of by a competent member of the Service in terms of the legal provisions applicable to members of the Service appointed in posts in the fixed establishment of the Service; and

(iii) where a member of the service, serving in a pre-rationalised post, had been convicted on a disciplinary charge and had not as yet exercised his or her right of appeal upon his or her appointment in a post in the fixed establishment of the Service, such member may, within 30 days from such appointment, appeal against his or her conviction and/or sentence to the competent authority in the Service, and such an appeal shall be dealt with in accordance with the legal provisions applicable to members of the Service, appointed in posts in the fixed establishment of the Service; and

(k) the following provisions of the Police Act, and of any regulations, standing or other orders, and instructions relating thereto, made or issued under the said Act, as they existed immediately prior to the repeal of that Act, shall, mutatis mutandis continue to apply in the whole of the National Territory, with respect to this Proclamation, the President, the Minister, the National Commissioner, the Service, of any member of the Service, respectively, namely: sections 3 (1), (1A), (2), (3); 4 (3); 6A; 7; 8; 9; 10G; 11; 17; 18; 19; 20; 21; 22; 23; 24; 25; 26; 26A; 27; 27A; 28; 29; 30; 31; 32bis; 34; 34E and 34F.

Section 17 reads:

"17. LIMITATION OF ACTIONS, NOTIFICATION OF ACTION AND CAUSE THEREOF, AND SERVICE OF CERTAIN PROCESS.

(1) No legal proceedings shall be instituted against the State or any body or person in respect of any alleged act performed in terms of this Proclamation, or an alleged failure to do anything which should have been done in terms of this Proclamation, 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 earliest date.

(2) No such legal proceedings 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.

(3) If any notice contemplated in subsection (1) is given to the National Commissioner or the Provincial Commissioner within whose province the cause of action arose, it shall be deemed to be notification to the defendant concerned.

(4) Any process by which any action contemplated in subsection (1) is instituted and in which the Minister is the defendant or respondent may be served on the National Commissioner, or Provincial Commissioner referred to in subsection (3).

(5) Subsections (1) and (2) shall not be construed as precluding a court of law from dispensing with the requirements or prohibitions of those sections where the interests of justice so require."

A preliminary question must be answered first. Do the allegations made in paragraphs 9A to 9C of the amended particulars of claim amount to a new cause of action? Only if they do will it be

necessary to consider whether section 32 applied, and if so, whether appellant complied with its requirements. Counsel for first respondent contended that those allegations should not be construed as a new cause of action but merely as an amplification of the grounds upon which the cause of action rested which first respondent had originally invoked. In my view, that contention cannot be upheld. The original cause of action against appellant was squarely founded upon his vicarious liability for the allegedly deliberate or negligent unlawful killing of the deceased by a particular policeman acting within the course and scope of his employment as such. The allegations made in paragraphs 9A to 9C postulate a failure to prove that appellant is vicariously liable for that act of that policeman. The allegations in those paragraphs found the alleged vicarious liability of appellant upon other actions of other members of the force. It now becomes actions

antecedent to the shooting which constitute the unlawful conduct for which it is sought to hold appellant vicariously liable. It is true that had the shooting not occurred no question of liability could have arisen but that does not alter the fact that, on this hypothesis, appellant is sought to be held vicariously liable, not for the unlawful act of the policeman who killed the deceased, but for the allegedly unlawful acts of those who permitted him while he was not on duty to have the gun which he used to shoot the deceased. That is a separate and distinct cause of action. Both causes of action entail an allegation of vicarious liability but the source of the liability is entirely different in each case: each flows not only from the primary liability of a different actor but from the commission of different acts. That distinguishes the case from a case such as Maroka v Minister van Polisie en n Ander 1984 (2) SA 325 (W).

It was not entirely clear to me whether or not counsel for first respondent contended that the interim Constitution had some bearing on this particular problem which I regard as simply one of classifying the allegations made by respondent in paragraph 9A to 9C in accordance with the accumulated learning on the subject of what constitutes a cause of action. I do not understand the interim Constitution to outlaw the use of so indispensable an aid to the solution of a problem such as this. What I did understand counsel for first respondent to contend (echoing an approach adopted by the Court a quo), was that the interim Constitution had a special bearing upon the interpretation of the expressions "cause of action" and "notice in writing of any civil action and of the cause thereof" in section 32. While conceding that in the past it had been consistently held by the courts that the expressions "any civil action and.....the cause

thereof and "cause of action" in section 32 are synonymous, and that it is not a sufficient compliance with section 32 to merely describe the happening of an incident, counsel for first respondent submitted that section 35 of the interim Constitution necessitated a reconsideration of the interpretation given in the past to section 32. More specifically, it was contended that in the light of sections 8 and 22 of the interim Constitution, an interpretation which would be more harmonious with those provisions should be adopted. It was suggested that, as the Court a quo had held, the word "cause" should be interpreted to mean "proximate cause" so that in this particular instance it sufficed, when giving the notice of intention to sue which section 32 requires, to give only details of the shooting of the deceased because it was the unlawful killing of the deceased which was the proximate cause of the action. By parity of reasoning it was argued that the allegations made

in the original particulars of claim were effective harbingers of the allegations made later in paragraphs 9A to 9C, and that first respondent could rely upon the latter allegations even although they were first made in the pleadings after more than six months had elapsed since the shooting occurred, and no prior written notice of intention to invoke those allegations in the action had been given.

I shall assume, without purporting to decide, that sec 35(3) of the interim Constitution may require a court to interpret afresh legislation enacted before the interim Constitution was even conceived, far less enacted, as if the interim Constitution had existed when the legislation was passed. I shall assume too, again without purporting to decide, that a court may be required to do this even when it is sought to apply the result of such re-interpretation to acts or omissions which occurred or events or situations which arose or

existed, before the enactment of the interim Constitution. I shall assume too that interpretations given previously by this Court to section 32 did not bind the Court a quo and that it was open to it to re-interpret section 32 differently by virtue of the provisions of section 35(3) of the interim Constitution. I shall make these assumptions in favour of the first respondent despite the many problems inherent in them and without identifying and discussing them.

That said, it remains necessary when engaged in the process of re-interpretation not to exceed the power of interpretation which section 35(3) confers. There are plainly limits to the power so given. Section 35(2) of the interim Constitution shows that to be so; it provides in terms that a law (meaning in this context a statute - the Pretoria News case, supra) which prima fasie exceeds Chapter 3 limits, may be construed as not exceeding such limits but only

"provided such a law is reasonably capable of a more restricted interpretation". And it is obvious that it must be so unless the very real distinction between restrictive interpretation and substantive amendment is to be thrown entirely to the winds. Nothing in section 35(3) or in any other provision of the interim Constitution empowers a court to assign to either a pre-constitution or post-constitution statute a meaning which its language cannot reasonably bear or which is in flat contradiction of the ordinary and plain meaning of the language used in the statute. If that results in the statute clashing irreconcilably with Chapter 3 rights and freedoms it may mean that the statute is unconstitutional and liable to be so declared by a court having jurisdiction to do so, but it would not entitle a court to pervert its meaning to avoid that result by purporting to exercise the powers of interpretation conferred by section 35(3). I find nothing in the

judgment of the majority (or for that matter, the minority) of the Constitutional Court in the Pretoria News case, supra, which is inconsistent with that view of the scope of section 35.

It is here that first respondent is forestalled at the outset. The invitation or exhortation to the Court to re-interpret section 32 is premised upon the assumption that the language used in the section is reasonably capable of bearing the construction which first respondent would have the Court assign to it. In my view, the assumption is not warranted. Had the language been capable of that construction (the "proximate cause" construction) it would have been recognised by the courts long ere now. Far from acknowledging that the language permits of such an interpretation, the courts have consistently and, in my opinion, correctly, held that it does not. See for example Grundling v Minister of Law and Order and Another 1987 (1) SA

627 (SE); Ferreira and Others v Minister of Police and Others 1981 (1) SA 73 ((C); Malou and Others v Minister of Police and Others 1981 (2) SA 544 (E); Navo v Commissioner of Police 1989 (3) SA 456 (Ck); Ntombela v Minister of Police 1985 (3) SA 571 (O). On any view of the matter it was therefore not open to the Court a quo to purport to re-interpret section 32 in the manner in which it did. It is therefore unnecessary to consider whether or not the interpretation hitherto accorded section 32 does indeed involve an infraction of the principles enshrined in section 8 and 22 of Chapter 3 of the interim Constitution. That is perhaps fortunate for it obviates my having to consider what the true import of those provisions is - something which I might have felt obliged by section 35(3) to undertake if the language of section 32 had been less intractable than it is.

No attempt was made by counsel for first respondent to argue that first respondent's original notice of intention to sue given on 17 August 1993 complied with the requirements of section 32 as hitherto interpreted by the courts and it is sufficient to say that it obviously does not. It contains no reference whatsoever to any of the allegations which are now made in paragraphs 9A to 9C of the amended particulars of claim. The matter must therefore be dealt with on the footing that, if section 32 was indeed applicable, first respondent failed to comply with it both in that she failed both to give appellant prior notice of her intention to invoke the new cause of action raised by the amendment and in that she failed to take appropriate steps to commence action in respect of that cause of action within six months of it arising.

I turn to the question of whether first respondent's new

cause of action is governed by section 32 or by section 17. It is important when considering the question to recall what had already happened in this particular matter prior to the promulgation of the Proclamation on 27 January 1995. By that time the new cause of action was already no longer actionable because in terms of section 32 of the Act it had ceased to be so six months after it arose on 7 August 1993. Consequently, appellant had acquired a vested right consisting of an immunity from suit in respect of that cause of action. In my view, neither at common law nor by virtue of any provision in the interim Constitution or the Interpretation Act 33 of 1957 is there any justification for interpreting the Proclamation as having stripped appellant of a vested and accrued immunity from suit. It would be tantamount to disinterring and resurrecting a cause of action which had been finally laid to rest by operation of law prior to the promulgation

of the Proclamation. One of the main holdings in the Pretoria News case, supra, was that the interim Constitution cannot be invoked to render lawful an act which occurred prior to its enactment and was unlawful at the time when it was performed. The obverse side of the proposition, namely, that acts lawful at the time of their execution prior to the enactment of the interim Constitution could not be rendered unlawful by its advent, was laid down by the Constitutional Court in another judgment delivered on the same day, 15 May 1996. (Key v Attorney General. Cape of Good Hope Provincial Division. Case No CCT 21/94). In yet another judgment of that Court delivered on the same day (Brink v Kitshoff NO.. Case No CCT 15/95) the Pretoria News case, supra, was interpreted as holding "that the Constitution would not ordinarily be construed as interfering with rights which had vested before it came into force". It is but a short

step from there to the conclusion that a defendant who had an accrued and vested defence to a claim for damages prior to the enactment of the interim Constitution is not directly and retroactively deprived of that defence simply by virtue of the enactment of the interim Constitution.

While the use of the word "all" in the proviso to subsection 12 (2) (i) might, if viewed in isolation and after taking into account only the use of the words "any cause of action that arose" in the first part of the subsection, superficially suggest that section 17 is to be applicable to literally any cause of action which arose against a force prior to the commencement of the Proclamation, I think that closer examination shows that that is not what was intended. The preservation in the selfsame subsection of any pre-existing limitations or defences is not compatible with a construction of the proviso to

subsection 12 (2) (i) which would deprive appellant of the immunity from suit with which he was vested prior to the commencement of the Proclamation. Nor is it a construction which shows any or sufficient deference to the well-established common law presumption against retrospective interference with accrued and vested rights. It also flies in the face of subsections 12 (2) (a), (b) and (c) of the Interpretation Act. The interim Constitution, far from providing any justification for so interpreting subsection 12 (2) (i), appears to me to enjoin an approach to the interpretation of statutes which would be mindful of society's distaste for retroactive legislation and which would be characterised by a reluctance to accept that accrued and vested rights are intended to be retroactively set at nought unless the legislation in question makes that plain. Here, to my mind, there is no such clear indication. On the contrary, the indications appear to me to be all the

other way.

There is another readily understandable explanation for the use of the word "any" in the opening words of subsection 12 (2) (i) and the use of the word "all" in the proviso: the causes of action which might have arisen prior to the promulgation of the Proclamation were many and varied and they might even have lain against "foreign" policemen and "foreign" police forces. Those police forces were to disappear de jure if not de facto and to be subsumed in the South African Police Service. Indeed, the states which employed them had ceased to exist and had been re-incorporated in the Republic of South Africa. The manifest object of section 12 was to provide would-be claimants with a substitute police service against which they could institute and pursue all manner of claims even although that service did not even exist when the cause of action arose. It involved an

artificial assumption of liability by the new service. The use of the words "any" and "all" is thus explicable but non constant that they are intended to convey that even such claims as had already foundered by reason of the prior operation of section 32 of the Act can be successfully maintained. I think that the absurdity of the proposition that it applies even to such claims is shown by the unacceptable consequences of its application. It would trample underfoot eminently sensible doctrines to which it has over the centuries been found essential to adhere if members of society are to be adequately protected from the potential tyranny of litigation: doctrines such as interest reipublicae ut sit finis litium;res iudicata ius facit inter partes; and res indicatas instaurari exmplo grave est. Decided cases in which plaintiffs had failed in their claims for want of compliance with section 32 of the Act could be re-commenced. So

could cases which had been withdrawn by a plaintiff with the consent of a defendant as a consequence of the raising of a plea based upon section 32. Documentary and even real evidence reasonably disposed of in the justifiable belief that a threatened claim was no more would no longer be available for use in defendant's defence. Track might have been lost of witnesses. The potential prejudice to a defendant is boundless; a fortiori where the basis for the alleged liability is almost always vicarious. It is no answer to say the plaintiff may have suffered like prejudice.

These considerations seem to me to show that the words "all such causes of action" in the proviso to section 12 (2) (i) of the Proclamation could not have been intended to relate to causes of action which were no longer actionable but only to any and all surviving causes of action which were not yet time-barred. The

context in which they are used also shows that to be the case. They appear in a proviso after it has been made clear in the preceding part of the section that despite the broad sweep of the opening words of the section ("any cause of action----will be actionable"), there will be some such actions which will not be actionable because of the existence of a limitation of defence which became applicable prior to the commencement of the Proclamation. The proviso, which at first blush might appear to make section 17 applicable to all the causes of action referred to in the opening words of the section, can obviously not apply to those which are not actionable for whatever reason they may not be actionable. The use of the expression "all such causes of action" in the proviso must therefore be taken to mean all the causes of action referred to earlier in the section but excluding those which were not actionable by reason of the prior existence of a limitation or

defence.

Unless that interpretation is given to the proviso, there would be a contradiction between, on the one hand, that part of section 12 (2) (i) which preserves any (my emphasis) pre-existing limitations and defences and, on the other, the proviso. The accrued and vested defence to the action would be available in terms of the first part of section 12 (2) (i) but unavailable in terms of the proviso. That self-contradiction is avoided if the proviso is restricted to cases in which the defence provided by section 32 had not yet come into existence so that the defendant was not vested with the right to raise it if and when sued.

That conclusion is reinforced when one searches the Act for the "limitations or defences" which could have been contemplated by section 12 (2) (i) and one finds virtually nothing except the

limitation or defence provided by section 32. Counsel for first respondent was hard pressed to point to any other limitations or defences in the Act to which section 12 (2) (i) might apply. He suggested that sections 12 (3), 17B, 18, 20, 21, 31, 32 bis and 35 were examples. That cannot be so. Sections 20, 21, 31 and 32 bis of the Act were not repealed. They were specifically and separately kept in operation by section 12 (2) (k) of the Proclamation. They could therefore not have been the limitations or defences contemplated in section 12 (2) (i). As for sections 12 (3), 17B and 35, whatever else they may be, they are not limitations or defences which could be invoked in a "cause of action that arose against a force" within the meaning of section 12 (2) (i). Section 12 (3) has to do with domestic disciplinary proceedings and precludes the taking of certain specified disciplinary steps against a member of the Force if he did not have

legal representation at his trial or was not afforded the opportunity to be represented and assisted by a defence officer. Section 17B provides for summary dismissal of a member of the Force who strikes or conspires to strike; it creates no special defences and imposes no limitations. It too has no relevance to the "causes of action that arose against a force" contemplated by section 12 (2) (i). Section 35 deals with political activities of members of the Force and the remarks made about section 17B are equally applicable.

It is hardly likely that it was common law defences which were contemplated. Those would obviously remain applicable as the repeal of the Act by the Proclamation has no bearing upon them and it was quite unnecessary to cater for their preservation in the Proclamation. Limitations and defences provided solely by the Act were another matter. The Act was to be abolished (save for certain

excepted provisions). There would no longer be a section 32. How might that impact upon causes of action against a force which arose before its repeal? No particular problem was presented by cases in which such causes of action had already become time-barred. An amending statute (indeed any statute) is ordinarily taken to be concerned with the present and the future but not the past. It may of course be intended to apply to concluded matters but that is regarded as so contrary to accepted norms that any intention to do so will have to be expressed in terms that are clear. Nothing is said in the Proclamation which shows unequivocally that the proviso to section 12 (2) (i) is intended to apply even to cases in which section 32 had already operated to bar an action prior to its repeal.

Lest it be thought that it has been overlooked, something must be said about the distinction which is often drawn when

interpreting statutes between those which are classified as "procedural" and those which are not. The former are regarded prima facie as being applicable even to situations which arose before their enactment whereas the latter are not so regarded prima facie. The imprecision of the dichotomy and the sometimes elusive nature of the distinction has been frequently remarked upon. I do not find it necessary to review the debate. It is sufficient to say that while there can be no vested right in purely procedural provisions, it is now well recognised that even although a statute may have procedural dimensions, if it adversely affects vested rights which are not purely procedural, it will be construed as pro tanto prospective. See Yew Bon Tew v Kenderaan Bas Mara [1982] 3 All ER 833 (PC) at 836b; Euromarine International of Mauren v The Ship Berg and Others 1986 (2) SA 700 (A) at 709-710; Transnet Ltd v Ngcezula 1995 (3)

SA 538 (A) at 545D-552H. As it was pithily put by Sloan JA in the Australian case of Dixie v Roval Columbian Hospital (1941) 2 D.L.R. 138 at 139-40 "unless the language used plainly manifests in express terms or by clear implication a contrary intention - (a) A statute divesting vested rights is to be construed as prospective. (b) A statute, merely procedural, is to be construed as retrospective. (c) A statute which, while procedural in its character, affects vested rights adversely is to be construed as prospective". Thus, even if section 32 of the Act and section 17 of the Proclamation are properly classifiable as procedural in character, the fact remains that section 32 provided appellant with a substantive and absolute defence to respondent's claim and the proviso to section 12 (2) (i) and section 17 should therefore not be construed as having been intended to deprive appellant of that defence ex post facto. I may add that it appears to me to be inaccurate

to describe as purely procedural a provision which prohibits absolutely the invocation of any procedure by which litigation may be commenced to enforce a cause of action merely because a procedure was prescribed which, if followed, would have avoided that result. It is of the essence of procedural law that there be subject matter to which the procedure can be applied. Once section 32 has operated adversely to a prospective claimant there is, for all practical purposes and whatever theoretical right may yet exist in vacuo, no actionable cause of action to which procedural laws can apply. It is thus not, in my view, a true example of a purely procedural law.

The next class of case (at the opposite end of the pole) might be one in which the action was not yet time-barred by section 32 but nothing had yet been done by the prospective plaintiff to alert the defendant to his intention to institute action. That class of case is

plainly governed by the proviso for a number of reasons. First, any such cause of action would still be actionable so that the basic premise of statutory interpretation, namely, that unless plainly otherwise provided, the legislature legislates for that which is happening or may happen in future, and not for that which has already happened, is accorded due recognition. Secondly, no arbitrary retroactive deprivation of vested rights is involved because no such right could exist until section 32 had actually taken its toll. Until that happened a defendant had at best a spes that he might acquire such a defence. Thirdly, the words "any cause of action that arose ....before the commencement of the Proclamation" and "all" in section 12 (2) (i) must obviously relate to at least one identifiable category of such causes of action and this is the category which falls most readily within its purview without any concomitant violation of the principles

reflected in the two important canons of construction just mentioned. Between these two poles are variants which may or may not be governed by section 17 read with section 12 (2) (i). Some examples (all postulate a cause of action which arose prior to the commencement of the Proclamation):

(1) Notice properly given and summons issued in compliance with section 32 of the Act prior to commencement of the Proclamation;

(2) Notice properly given in terms of section 32, time which must elapse before summons may be issued expired but summons not yet issued; time to do so still available in terms of section 32 when the Proclamation came into operation;

(3) As in (2) but time which must elapse before summons may be issued not yet expired when the Proclamation came into operation.

It would serve no sensible purpose to subject case (1) to the regime of section 17 (2) (i). Such a plaintiff has no need of the amelioration of section 32 of the Act provided by section 12 (2) (i)

read with section 17 (1) of the Proclamation. He or she has already been able to comply with section 32 and has done so. Nor would the defendant's position be affected. The whole object of section 32 was to ensure both that the defendant received timely warning of a plaintiffs intention to commence legal proceedings and that such proceedings were commenced within six months of the date upon which the cause of action arose. Those objects have been achieved. Indeed, the provisions of section 12 (2) (d) show clearly that section 17 does not apply to such a case in the sense that actual compliance with its provisions after the date of its commencement is required. It provides for a deemed compliance with section 17. To me, that reflects exactly what one would ordinarily expect: a recognition that if section 32 had already played its role the result should stand notwithstanding its repeal and the substitution of a new provision with

which the plaintiff might also be able to comply. It would have been rankly discriminatory to give a plaintiff the benefit of action taken in terms of section 32 but to deny a defendant the benefit of a defence which arose because of a plaintiffs failure to take the action required by section 32. Hence the specific preservation of pre-existing limitations and defences.

Case (2) is similar to case (1) in one respect and different in another. It is similar in that the notice is deemed to have been given in compliance with section 17; it differs in that the actual commencement of legal action cannot be governed by section 32 for it no longer exists and legal action was not commenced while it did exist. It seems to follow that it can be governed only by section 17 in which event both the commencing date and the terminal date of the permitted period within which action may be instituted will have to be

determined in accordance with its provisions and not in accordance with those of section 32 of the Act. It will therefore not matter whether summons is issued before or after the expiry of the six month period for which section 32 provided as long as summons is issued within the twelve month period for which section 17 provides (calculated from the date upon which the claimant became aware, or might reasonably have been expected to have become aware, of the relevant act or omission). Here then is another instance of a cause of action which arose before the coming into operation of the Proclamation to which section 17 can be applied without prejudicing a defendant's vested rights.

Case (3) is, I think, no different in principle from Case (2) and again it is an example of a case to which section 17 can be applied without there being any interference with vested rights. There

are no doubt yet further variations of the theme imaginable but these suffice to show that there remains a legitimate field of application for the proviso to section 12 (2) (i) and that one does not render it nugatory by excluding from its field of application cases in which section 32 had already either been complied with or not complied with (with fatal effect) by the time the Proclamation came into operation.

Much of counsel for first respondent's largely rhetorical appeal to section 35 (3) of the Constitution and various dicta in decisions of the Constitutional Court was predicated upon the assertion that section 32 was a relic of the "oppressive past" which the Proclamation was designed to destroy because of its incompatibility with the ideals enshrined in the Constitution, and that that provided further justification for assigning to the Proclamation a retroactive effect so extensive that even jural relations already forged on the anvil

of section 32 could be unilaterally consigned by a claimant to the furnace for reshaping on the anvil of section 17. The assumption lurking in this kind of argumentation is that all or most claims against the police are meritorious and that it is really of little moment whether they be instituted sooner rather than later or whether any prior notice of intention to sue is given or not: any legislation limiting a claimant's freedom of action in suing the police is therefore oppressive and calls either for outright nullification by a court with jurisdiction to do so, or the strictest possible interpretation in favorem a claimant which the language will bear by a court which has no jurisdiction to nullify the legislation. That approach ignores the mischief which such legislation is designed to prevent and which has been spelt out on a number of occasions. That mischief is first, the disability under which both policemen and their employer, the State, are likely to labour in

responding appropriately to claims made against them when the passing of time may have hampered investigation of the claims and handicapped the police in their defence of the claims, and secondly, the precipitate institution of action by a claimant without the State having been given any prior opportunity to examine the claim, investigate it, take legal advice, consider questions of policy which may arise, and gather such evidence as may exist. Those difficulties are obviously not peculiar to the police; they may be present in the case of other defendants but the difference lies in the size of the police force, the nature of its functions and duties and the potential answerability of the State for the conduct of many thousands of policemen. See Hartman v Minister van Polisie 1983 (?) 489 (A) at 497 F 498 F; Labuschagne v Labuschagne: Labuschagne v Minister van Justisie 1967 (2) SA 575 (A) at 587 G - 588 A. That

does not mean of course that a highly technical and demanding approach is appropriate when considering whether a claimant has fulfilled the requirements of section 32 (1) relating to the giving of notice. As was said in Minister van Wet en Orde en 'n Ander v Hendricks 1987 (3) SA 657 (A) at 663 D-E, the approach of the Courts should be to interpret the provision (to the extent of course that its language reasonably allows) in a manner which affords the police the protection which the provision is intended to give them without placing an unnecessarily heavy burden upon a claimant.

It is certainly so that circumstances could and did arise in which section 32 operated harshly upon a claimant. It is no less certain that that was the very mischief to which an end was intended to be put by its repeal and the substitution for it of section 17. However, what is equally plain is that the principle of conferring

special protection upon the police in the sphere of litigation was not regarded as inherently pernicious for it was perpetuated in section 17 of the Proclamation albeit in a benign form designed to eradicate the harsher aspects of section 32. It does not follow however that the mere identification of the mischief to which the Proclamation was intended to put an end entitles one to give so extensive a retroactive effect to section 17 of the Proclamation that vested rights, including even those which have been acknowledged in prior litigation by the upholding of special pleas of non-compliance with section 32, are set at nought. In Bell v Voorsitter van die Rasklassifikasieraad 1968 (2) SA 678 (A) the mischief which the amending legislation was designed to end was plain enough: it was to abolish appeals by third parties. Yet despite a deeming provision which showed that the amendment was intended to have retroactive effect, this Court held

that it could not be interpreted as being applicable to pending appeals. That illustrates tellingly the understandable reluctance of courts to conclude that legislation is intended to destroy rights which have already vested, and a fortiori those which have already been exercised or invoked, unless that intention is so plainly expressed that there is no room for doubt.

Counsel for first respondent ultimately wavered somewhat when faced with the implications of his principal submission that section 12 (2) (i) should be interpreted so widely that all pre-existing causes of action were to be governed by section 17 including even those which had already been successfully met with a plea of non-compliance with section 32. He suggested that one could limit the language to exclude such cases. To my mind that demonstrates the untenability of the interpretation for which first respondent contends.

Once it is recognised that section 12 (2) (i) does not require section 17 to be applied to all pre-existing causes of action, it becomes necessary to decide where the dividing line is to be drawn between those pre-existing causes of action to which it does apply and those to which it does not. In the absence of any clear indication from the lawgiver that it is to apply even to cases in which section 32 had already provided a defendant with a defence, both the common law presumption against the retroactive deprivation of vested rights and the statutory injunction in the Interpretation Act to the same effect impel the conclusion that section 17 is not intended to apply to such cases. A fortiori must that be the conclusion when one takes into account the preservation of pre-existing defences and limitations to be found in section 12 (2) (i) itself.

There is yet another consideration which militates against

the construction for which first respondent contends. While section 17 is of application to both the particular policeman and the State, section 12 (2) (i) is confined to causes of action which arose against a force; it is silent as regards causes of action which arose against the particular policeman. If section 17 is held to be applicable to the case against the State but not to the case against the policeman, one could be faced with the absurdity of a policeman directly responsible for the commission of a delict being entitled to an immunity from action derived from the operation of section 32, but the State whose liability (if it exists) is only vicarious (as in this case), being exposed to action. The repercussions of such a state of affairs upon the right of recourse of the State is also disturbing. If it is maintainable against the policeman, he will be called upon to defend, if he can, an action which the claimant lost the right to bring against him. If it is not

maintainable, the State may have been deprived not only of a defence to the claimant's claim, but also of its right of recourse against the policeman directly responsible for the commission of the delict. These manifestly unsatisfactory results cannot arise if the interpretation for which appellant contends is adopted.

No serious attempt was made to argue that, if section 32 was applicable and the allegations in paragraphs 9A to 9C of the amended particulars of claim did amount to a new cause of action, it was impossible for first respondent to have obtained the information upon which the allegations are based prior to the date upon which her legal representatives did obtain it. The maxim lex non cogit ad impossibilia can therefore not be called in aid by Erst respondent.

In my view the appeal should succeed. It is upheld with costs as against first respondent, including the costs of two counsel.

The order of the Court a quo is set aside and there is substituted for it the following order: The alternative cause of action set forth in paragraphs 9A to 9C of the amended particulars of claim is dismissed with costs, including the costs of two counsel.

R M MARAIS
JUDGE OF APPEAL

CASE NO 366/95

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

MINISTER OF SAFETY & SECURITY Appellant

and

DOREEN DIKELEN MOLUTSI and First Respondent
PETER MCHEDI Second Respondent

CORAM: CORBETT CJ, VAN HEERDEN, F H GROSSKOPF,
HARMS et MARAIS, JJA

HEARD: 19 FEBRUARY 1996

DELIVERED: 3 JUNE 1996

J U D G M E N T

HARMS JA/

CASE NO 366/95

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

MINISTER OF SAFETY & SECURITY — Appellant

and

DOREEN DIKELEN MOLUTSI and — First Respondent
PETER MCHEDI — Second Respondent

CORAM: CORBETT CJ, VAN HEERDEN, F H GROSSKOPF, HARMS et MARAIS, JJA

HEARD: 19 FEBRUARY 1996

DELIVERED:

J U D G M E N T

HARMS JA/

HARMS JA:

I have carefully considered the comprehensive judgment of Marais JA and I agree that the appeal should succeed and that an order as formulated by him should be issued. Having said that, I have some reservations about the advisability of expressing views on the constitutional matters raised in his judgment. In my respectful view, the result of his judgment can be achieved without raising or deciding those issues.

As stated in his judgment, the appellant relied in his special plea to the "new" cause of action on the provisions of s 32 of the Police Act 7 of 1958. The validity of that plea falls to be decided with reference to the allegations in the replication. The six of them have been set out in Marais JA's judgment.

The constitutionality of s 32 and of s 17 of the Proclamation was not decided by Levin AJ and there was no appeal (nor could there have been any) on the issue to this

Court in terms of s 102(4) of the interim Constitution. There was, also, no request for a referral of it to the Constitutional Court — assuming that we have, in the circumstances, the jurisdiction to do so (something I doubt because s 102(6) admits referral only if the matter is before us because of an appeal in terms of s 102(4)). In any event, in the light of the fact that the cause of action arose before the effective date of the interim Constitution, the constitutionality of s 32 cannot arise in this case (see the Pretoria News case). Because of the finding (to which I shall return) that the provisions of the Proclamation do not govern this case, its constitutionality, likewise, does not arise.

I agree with Marais JA, for the reasons stated by him, that the alternative claim set out in par 9A to 9C amounted to a new cause of action. That finding raises the question whether the first respondent had complied, fully or substantially, with the provisions of s 32 of the Act. Her

counsel conceded that there had not been compliance with these provisions according to the "traditional" interpretation by this Court. In this regard the novel interpretation of s 32 by Levin AJ was espoused. According to him, the section should be reinterpreted in the light of the interim Constitution to provide that the action "shall be commenced within six months after the cause of action arose, and notice in writing of any civil action and the proximate cause [in this case the shooting] thereof shall be given to the defendant one month at least before the commencement thereof".

Whether the meaning of the section could have changed as a result of the interim Constitution, need not be decided. Assuming that it could, Levin AJ was concerned with its meaning before its date (27 April 1994), more particularly, on the date of the delict (7 August 1993) or on the last day for notice (5 months later). He was bound by decisions of this Court in that regard, specifically, that

"cause" meant "cause of action" and not "proximate cause". Since it was not suggested that those decisions were wrong, that puts an end to the debate.

That leaves for consideration the question whether first respondent's "new" claim was resurrected and is governed by s 17 of the Proclamation. On this point I once again, wish to refrain from a constitutional debate and prefer to subscribe to the reasoning of the learned Chief Justice.

L T C HARMS
JUDGE OF APPEAL

VAN HEERDEN JA)
CONC
UR F H GROSSKOPF JA)

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISIONS

In the appeal between:

THE MINISTER OF SAFETY AND SECURITY . . Appellant

and

DOREEN DIKELEN MOLUTSI.....1st Respondent

PETER MCHEDI.....2nd Respondent

CORAM Corbett CJ, Van Heerden, F H Grosskopf, Harms et Marais JJA

DATE OF HEARING: 19 February 1996

DATE OF JUDGMENT: 3 June 1996

J U D G M E N T

/ CORBETT CJ :
.....

CORBETT CJ:

Dubitande and with some reluctance I concur in the order proposed by my Brother Marais. I agree with my Brother's conclusion that the allegations made in paragraphs 9A to 9C of the amended particulars of claim amount to a new cause of action. I also agree for the reasons stated by Marais JA that the matter must be dealt with on the footing that, if sec 32 of the Police Act 7 of 1958 as amended ("the Police Act") applies to this new cause of action, the first respondent failed to comply with either the duty to give notice in writing or the duty to commence action within six months. My hesitations concern the applicability of sec 32.

For convenience I repeat the wording of sec 32(1):

> "Any civil action against the State or any person in respect of anything done in pursuance of this Act, shall be commenced within six months after the cause of action arose, and notice in writing of any civil action and of the cause thereof shall be

given to the defendant one month at least before the commencement thereof."

It is not disputed that the section, in so far as it relates to a six month period within which action must be commenced, provides for an expiry period ("vervaltermyn"), and not a prescriptive period; and generally that a plaintiff who has failed to comply with this provision is debarred from suing and cannot rely upon any of the grounds which delay the commencement of the running of prescription or its completion (see Hartman v Minister van Polisie 1983 (2) SA 489 (A), 499 C-H; cf Pizani v Minister of Defence 1987 (4) SA 592 (A), 602 C-F). Hitherto the only exception allowed is where compliance with sec 32 was at the relevant time impossible: lex non cogit ad imposibilia (see Montsisi v Minister van Polisie 1984 (1) SA 619 (A)). It may be taken that in the absence of impossibility failure to comply with sec 32 results in effect in the extinguishment of the plaintiffs cause of action (see Montsisi's case, supra, at 637 F - 638

A).

Proclamation No R5, 1995 relating to the Rationalisation of the South African Police Service ("the Proclamation") was made and promulgated in terms of sec 237 (3) of the Constitution of the Republic of South Africa Act 200 of 1993 ("the Constitution"). As its name indicates, the purpose of this Proclamation is to rationalise the Police Service in order to achieve the aims of establishing an effective administration as described in sec 237 (1) of the Constitution. The President is empowered by sec 237(3) to do this by proclamation in the Gazette. The Proclamation was promulgated on 27 January 1995.

The Proclamation repeals practically the whole of the Police Act, including sec 32 thereof. The corresponding provision relating to the limitation of actions in the Proclamation is sec 17 thereof, the relevant portions of which read as follows:

"(1) No legal proceedings shall be instituted against the State or any body or person in respect of any alleged act performed in terms of this Proclamation, or an alleged failure to do anything which should have been done in terms of this Proclamation, 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 earliest date.

(2) No such legal proceedings 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.

(5) Subsections (1) and (2) shall not be construed as precluding a court of law from dispensing with the requirements or prohibitions of those sections where the interests of justice so require."

Although sec 17 of the Proclamation has the same general purpose as sec 32 of the Police Act had, there are certain important

differences between the two enactments. Firstly, the expiry period has been extended from six months to twelve calendar months. Secondly, whereas under sec 32 the expiry period commenced to run as from the date when the cause of action arose, under sec 17 this period commences as from the date upon which the claimant became aware of the act or omission constituting his cause of action or as from the date when the claimant might be reasonably expected to have become aware of the act or omission, whichever is the "earliest" (sic) date. This change means that sec 17 is more or less in line with sec 12(3) of the Prescription Act 68 of 1969. And, thirdly, whereas under sec 32 the Court had no power to dispense with the requirements of the section, under sec 17(5) there is provision for such a dispensing power, to be exercised where the interests of justice so require. There is no doubt that sec 32 was a somewhat Draconian measure in that a claimant who was unaware that he had a cause of action when it arose or who failed for reasons falling short of impossibility to prosecute his claim within the time limits laid down received no special consideration or redress. Sec 17 was obviously introduced in order to ameliorate the position (cf Pizani's case, supra,

at 602 D - H).

The problem in the present case arises from one of the transitional provisions in the Proclamation, viz sec 12 (2) (i), which reads:

> "Notwithstanding the repeal of the laws referred to in subsection (1), but subject to the provisions of this Proclamation and the Constitution -
>
> (i) any cause of action that arose against a force established by a law referred to in Annexure A, before the commencement of this Proclamation, will be actionable against the Service, subject also to any limitations or defences that may be applicable prior to the commencement of this Proclamation: Provided that the provisions of sec 17 shall be applicable to all such causes of action/'

(The laws referred to in subsection (1) include the Police Act.)

Sec 12(2)(i) is retrospective in the sense that it applies the provisions of sec 17 to causes of action which arose prior to the commencement of the Proclamation. The proviso, which makes sec 17 applicable, speaks of "all such causes of action". This refers back

to the opening words of para (i), "any cause of action". "Any" is an all-embracing term.

> "In its natural and ordinary sense 'any' - unless restricted by the context - is an indefinite term which includes all of the things to which it relates."
>
> (Pre Innes JA in Hayne & Co v Kaffrarian Steam Mill Co Ltd 1914 AD 363, at 371.)

The critical question in this case is whether "any cause of action" in the opening part of para (i) should be given an all-inclusive or a restricted meaning. Should the term be interpreted to comprehend cases where prior to the commencement of the Proclamation the claimant in respect of a cause of action which arose against the Police Force had not complied with the requirements of sec 32 and as at the commencement of the Proclamation time had run out; or should it be read to restrict its provisions to such cases where as at the commencement of the Proclamation time had not yet run out? (For convenience I shall refer to these respectively as "the extensive interpretation" and "the restricted interpretation".)

I have found this a very difficult question and I have, with respect to my Brother Marais, not derived much assistance from the

fact that prior to the commencement of the Proclamation claims might have lain against foreign policemen and foreign police forces. While no doubt such claims would be comprehended by the words "any cause of action", this phrase remains one of wide import. ' Nor do I think that the extensive interpretation would necessarily result in the possibility of decided cases being reopened and of boundless liability and prejudice to the defendant Police Force. What does, however, seem to me to be of cardinal importance is the effect which the extensive interpretation would have on vested rights or immunities. In Bellairs v Hodnett and Another 1978 (1) SA 1109 (A) this Court held as follows (at 1148 F-G):

> "There is a general presumption against a statute being construed as having retroactive effect and even where a statutory provision is expressly stated to be retrospective in its operation it is an accepted rule that, in the absence of contrary intention appearing from the statute, it is not treated as affecting completed transactions and matters which are the subject of pending litigation (Bell v. Voorsitter van die Rasklassifikasieraad en Andere, 1968 (2) S.A. 678 (A.D.); Pinkey v Race Classification Board and Another, 1968 (4) S.A. 628 (A.D.); Steyn, Uitleg

van Wette, 4th ed., pp. 86-92)."

In similar vein is this dictum from National Iranian Tanker Co v MV Pericles GC 1995(1) SA 475 (A), at 483 H-I.

> "There is at common law a prima facie rule of construction that a statute (including a particular provision in a statute) should not be interpreted as having retrospective effect unless there is an express provision to that effect or that result is unavoidable on the language used. A statute is retrospective in its effect if it takes away or impairs a vested right acquired under existing laws or creates a new obligation or imposes a new duty or attaches a new disability in regard to events already past."

Reference may also be made to sec 12(2) of the Interpretation Act 33 of 1957 which provides that, where a law repeals any other law, then, unless the contrary intention appears, the repeal shall not, infer alia, revive anything not in force or existing at the time at which the repeal takes effect or affect the previous operation of any law so repealed or affect any right or privilege acquired under any law so repealed.

In the present case the new cause of action arose on 7

August 1993, but application to amend the particulars of claim in order to incorporate this new cause of action was made only on 22 February 1995. Clearly the requirements of sec 32 were not complied with and by February 1994, approximately a year before the promulgation of the Proclamation, the appellant had acquired a vested right not to be sued in respect of this new cause of action. Sec 32 had come into operation and first respondent's claim based upon the new cause of action had been extinguished. In the light of the authorities on retrospectivity to which I have alluded there is no doubt that in this type of case a strong argument can be advanced in favour of a restricted interpretation of sec 12(2)(i) of the Proclamation. Moreover, there is much to be said for the view that when sec 12(2)(i) of the Proclamation speaks of "any cause of action" it means a cause of action which is still, at the commencement of the Proclamation, extant and does not include one which in effect has ceased to exist by reason of the provisions of sec 32.

On the other hand, I am very conscious of the clearly expressed intention of the legislator to ameliorate the harshness of sec 32 and to make such amelioration not purely prospective. I am also

struck by the incongruity of reaching an interpretation of sec 12(2)(i) which will mean that a claimant whose cause of action arose 5 months and 29 days before the commencement of the Proclamation and had not done anything about sec 32 would in terms of sec 12(2)(i), read with sec 17, have a further six months within which to give notice and to institute proceedings, whereas a claimant who had also failed to comply with sec 32, but whose cause of action had arisen 6 months before the commencement of the Proclamation, would be forever time-barred.

Having given the matter anxious consideration, I have come to the conclusion that there is insufficient indication of a legislative intent to warrant interference with the vested right of the defendant Police Force in whose favour the expiry term provided by sec 32 has run its course. I, therefore, opt for the restricted interpretation of sec 12(2)(i) of the Proclamation It follows that the appeal must succeed and that an order in the form formulated by my Brother Marais should be made.

M M CORBETT