IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO CCT/25/94

In the matter between:

MHLUNGU AND FOUR OTHERS Applicants

and

THE STATE Respondents

HEARD ON : 23 February 1995

DELIVERED ON : 8 June 1995

JUDGMENT

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[1] **MAHOMED J**: I have had the privilege of reading the judgment of Kentridge AJ in this matter and the comments made thereon by some of my esteemed colleagues. I respectfully agree that -

(a) section 102 of the Constitution of the Republic of South Africa, 1993 ("the Constitution") did not entitle the Court *a quo* to refer to this Court the issue of the proper interpretation of section 241(8) of the Constitution;

(b) for the reasons given by Kentridge AJ the proper interpretation of section 241(8) is relevant in the present proceedings and should be determined by this Court.

[2] I have, however, considerable difficulty with the proper interpretation of section 241(8) which reads as follows:

> "All proceedings which immediately before the commencement of this Constitution were pending before any court of law, including any tribunal or reviewing authority established by or under law, exercising jurisdiction in accordance with the law then in force, shall be dealt with as if this Constitution had not been passed: Provided that if an appeal in such proceedings is noted or review proceedings with regard thereto are instituted after such commencement

> such proceedings shall be brought before the court having jurisdiction under this Constitution".

The attraction of the analysis of section 241(8) which Kentridge AJ has made, is that it is consistent with the literal words of the main part of the sub-section which could, on that approach, simply be reduced to read as follows:

> "All proceedings which immediately before the commencement of this Constitution were pending ..... shall be dealt with as if this Constitution had not been passed."

[3] This literal interpretation involves, however, a number of formidable difficulties.

[4] In the *first* place it leads to some very unjust, perhaps even absurd, consequences. Thus, merely because an accused person was served with an indictment before 27 April 1994, (and even if no evidence whatever was lead before that date) he could not contend that the provisions of section 217(1)(b)(ii) of the Criminal Code were unconstitutional. In the result, the Court could be compelled to convict him (and in consequence thereof even to imprison him for a substantial period) in circumstances where it has a reasonable doubt whether his confession was freely and voluntarily made and therefore even if the Court has a reasonable doubt about his guilt. Another accused charged as his co-conspirator could be acquitted simply because the indictment was served on him on 28 April 1994 in respect of an offence arising from exactly the same incident and the same evidence.

[5] The right of each of these accused to a "fair trial" in terms of section 25(3) of the Constitution (including the right to counsel in terms of section 25(3)(e)) could similarly be different because of the one day difference in the date of the service of the indictment, although both accused were equally indigent and equally in need of counsel in order to avoid "substantial injustice". The result again may well be a conviction and resultant imprisonment for one accused and the total acquittal of the other, based purely on arbitrary circumstances, totally unjustified by any objective considerations.

[6] A Judge passing sentence on the accused charged with committing exactly the same offence, on the same date and in exactly the same circumstances, would be entitled to sentence one accused to death, and may be disentitled to do so in respect of the other accused in the same trial, merely because when the indictment was sought to be served on 26 April 1994, the one accused was at home and the other could not be located until the next morning.

Exactly the same irrational discrimination would be present if corporal punishment was sought to be imposed. Such a sentence would be competent in respect of the one accused and might be incompetent in respect of the other, on the sole ground that the one indictment was served on the day before and the other on the day after the commencement of the Constitution.

[7] South African statutory law, prior to the enactment of the Constitution, is replete with the most disgraceful and offensive legislation which discriminates against South Africans of colour and criminalizes arbitrarily and purely on the grounds of race and colour, perfectly innocuous acts of life and living by such citizens. It is possible that a citizen charged with such an offence before the commencement of the Constitution could, on the literal interpretation, be convicted and sentenced, even after 27 April 1994, for having contravened a law, which sought to punish him on racial grounds, if his case was pending when the Constitution came into operation. This is a plainly outrageous consequence. It is suggested by Kentridge AJ that the legislature and the executive can avoid such a consequence by taking steps to repeal the law or to cause the prosecution to be withdrawn. This is of scant comfort to the accused person concerned, who might have no means to compel such a decision or who might be exposed to the risk of a conviction before the bureaucratic machinery of the State reacts to afford relief. He is entitled to say: "The Constitution affords every person equal protection against unfair racial discrimination. I claim that right for myself and my family. You, the Court must protect me".

[8] What these and many other examples would suggest is that the approach favoured by Kentridge AJ would remove the protection of fundamental rights to substantial groups of people in the country, simply because the proceedings in which the protection of such rights might be crucial for a person, had begun prior to the commencement of the Constitution on 27 April 1994, although the substance of the proceedings takes place only after that date. I would be extremely distressed to accept that this is what the Constitution intended. It seems to negate the very spirit and tenor of the Constitution and its widely acclaimed and celebrated objectives. Fundamental to that spirit and tenor was the promise of the equal protection of the laws to all the people of this country and a ringing and decisive break with a past which perpetuated inequality and irrational discrimination and arbitrary governmental and executive action. The literal interpretation would invade all these objectives in its arbitrary selection of one category of persons who would become entitled to enjoy the human rights guarantees of the Constitution and the arbitrary exclusion of another group of

persons from such entitlement. The Courts must strive to avoid such a result if the language and context of the relevant provision, interpreted with regard to the objectives of the Constitution, permits such a course. What must be avoided, if this is a constitutionally permissible course, is a result which permits human rights guaranteed by the Constitution to be enjoyed by some people and denied arbitrarily to others. Such a consequence would effectively allow substantive parts of a disgraced and unacceptable culture from the past to continue into a future, protected by the Constitution. In proceedings which might affect their lives and liberties, large numbers of South African citizens would, on purely fortuitous grounds, be unable to assert the expanding human rights guaranteed by Chapter 3 of the Constitution, including the fundamental right to a fair trial protected by section 25(3). Such a result would be inconsistent with the international culture of constitutional jurisprudence which has developed to give to constitutional interpretation a purposive and generous focus. It seeks to avoid what Lord Wilberforce called

> "the austerity of tabulated legalism" (*Minister of Home Affairs (Bermuda) v Fisher* 1980 AC 319 at 328H).

This is because

> "A Constitution is an organic instrument. Although it is enacted in the form of a statute it is *sui generis*. It must broadly, liberally and purposively be interpreted so as to avoid "the austerity of tabulated legalism" and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government." (*Government of the Republic of Namibia and Another v Cultura 2000 and Another* 1994 (1) SA 407 at 418).

[9] An interpretation of section 241(8) which withholds the rights guaranteed by Chapter 3 of the Constitution from those involved in proceedings which fortuitously commenced before the operation of the Constitution would not give to that Chapter a construction which is "most beneficial to the widest possible amplitude" and should therefore be avoided if the language and context of the relevant sections reasonably permits such a course. (*S v Zuma and Others* 1995(4) BCLR 401 (SA) ; *James v Commonwealth of Australia* [1936] AC 578 at 614; *Minister of Defence, Namibia v Mwandingi* 1992 (2) SA 355 (NmS) at 361-3; *S v Acheson* 1991 (2) SA 805 (Nm) at 813A-C; *S v Marwane* 1982 (3) SA 717 (A) at 748-749G; *Ex parte Cabinet for the Interim Government of South West Africa: In re Advisory Opinion in terms of s 19(2) of Proc R101 of 1985 (RSA) (supra* at 853C-G); *Hewlett v Minister of Finance and Another* 1982 (1) SA 490 (ZS);

Minister of Home Affairs and Others v Dabengwa and Another 1982 (4) SA 301 (ZS) at 306E-H; *Minister of Home Affairs v Bickle and Others* 1984 (2) SA 439 (ZS) at 447C-G; *Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd* 1984 (2) SA 778(ZS); and *Bull v Minister of Home Affairs* 1986 (3) SA 870 (ZH & ZS) at 872J-873C and at 880J-881C.)

[10] The *second* difficulty I have with the literal approach is that if the death sentence or corporal punishment are held to be unconstitutional, the Court would be imposing sentences which could not lawfully be executed in terms of section 7(2) of the Constitution. The lawmaker should not lightly be imputed with the intention to authorise the Court to impose sentences which could not lawfully be executed. Even if the Constitution had intended to vest in the Court, irrationally, the authority to impose sentences which would not constitutionally be implemented, what happens to accused persons who have received such sentences? No obvious and easy legal machinery is created for the substitution of a competent sentence after the implementation of the constitutionally impermissible sentence has been restrained, perhaps by a Court order.

[11] There is *another* problem: if pending proceedings have literally to be dealt with as if the whole of the Constitution had not been passed, by virtue of what law could the Court in such proceedings refer any question for determination by the Constitutional Court? It could not rely on section 102 to do so because this is a provision of the Constitution and if it relied on it, it would not be dealing with the matter "as if this Constitution had not been passed." It is true that if this Court makes a decision on the question so referred to it by the Supreme Court it would be exercising a jurisdiction given to it in terms of the Constitution but that does not overcome the difficulty that its jurisdiction can only be exercised in the circumstances if there has been a proper referral and if the Court making the referral had no jurisdiction to do so there could not have been a proper referral.

[12] On the interpretation favoured by Kentridge AJ the reference in section 241(8) to -

> "any court of law, exercising jurisdiction in accordance with the law then in force"

is quite incongruous and difficult to understand. If the intention of the section was simply that all proceedings which were pending before the commencement of the Constitution before a Court of law or other tribunal should be dealt with as if the whole of the Constitution had not been passed, the qualification that such a Court of law or tribunal had to be "exercising jurisdiction in accordance with the law then in force" would

appear to be quite unnecessary. If that phrase was absent, could it conceivably have been contended that the reference to "any court of law" or “tribunal” included a reference to illegal tribunals such as informal kangaroo courts? In my view, "any court of law" or “tribunal” must mean one lawfully exercising its jurisdiction. The qualification that it must be a “court of law” or “tribunal” "exercising jurisdiction in accordance with the law then in force" would therefore add nothing to the meaning of "any court of law" or “tribunal” without any qualification.

[13] On the interpretation favoured by Kentridge AJ the relevant phrase therefore serves no purpose. On the interpretation which I favour and which I will deal with later, it does serve an important purpose: it serves to emphasise that the object of the section is to preserve the authority of Courts dealing with pending matters to continue to discharge their functions as such Courts.

[14] In his analysis Kentridge AJ refers to various presumptions of application in the interpretation of statutes and states that

> "it is against this background that the purpose of section 241(8) can be understood".

Included in the presumptions which he applies is the presumption that

> "a statute is as far as possible to be construed as operating only on facts which come into existence after its passing"

and the presumption that a new statute is

> "not to effect matters which are the subject of pending legal proceedings".

Kentridge AJ considers these presumptions to support the conclusion to which he arrives in the proper construction of section 241(8). I have no difficulty with his views on the content of these presumptions but if the section simply seeks to achieve what would in any event be the result of these presumptions, it would seem to me to be unnecessary. The presumptions do not have to be statutorily re-articulated in order to preserve their effect.

[15] None of these very serious difficulties can justify a refusal to give effect to the words of the section if they were not reasonably capable of an alternative construction. Such an alternative construction would have to be based not only on the literal meaning of the words "as if this Constitution had not been passed" in isolation but, in its proper context. The relevant context would be section 241(8) itself, section 241 as a whole and the larger context of the Constitution regarded as a holistic and integrated document with critical and important objectives. The crucial question is whether, adopting this

approach, such an alternative construction to section 241(8) is reasonably available.

[16] In the decided cases in the Provincial and Local Divisions of the Supreme Court at least three alternatives are suggested. The first is the approach adopted by Cloete J in *Shabalala and Others v The Attorney-General of the Transvaal and Others* 1994 (6) BCLR 85 (T); 1995 (1) SA 608 (T) and followed in *Jurgens v The Editor, The Sunday Times Newspaper and Another* 1995 (1) BCLR 97 (W). What it amounts to is that the reference to "pending proceedings" in section 241(8) means simply the particular proceedings within the case which were pending immediately before the commencement of the Constitution. Thus, an application made before the commencement of the Constitution for legal representation at State expense, or to admit a confession in terms of section 217 of the Criminal Code or even an application to impose the death sentence or corporal punishment would have to be dealt with as if the Constitution had not been passed. Other applications made after the commencement of the Constitution, would be dealt with in terms of the Constitution.

[17] Attractive as the consequences of this approach may otherwise be, I am unable to support it. What section 241(8) applies to is "all proceedings which are pending". What the approach favoured by Cloete J effectively does is to limit its application to interlocutory procedures within such proceedings. There seems scant justification for this either in the language of section 241(8) or its context. Moreover it is inconsistent with the use of the word "proceedings" in section 241(9) which provides that "any legal proceedings instituted before or after the commencement of the Constitution" by or against certain functionaries which ceased to exist after such commencement, could be continued by or against the relevant functionary which superseded the original functionary. Clearly, the ambit of "proceedings" in this regard cannot be limited to interlocutory proceedings within the larger case. There is no persuasive reason why it should have such a limited meaning in section 241(8).

[18] The second approach is that favoured by the Cape Provincial Division in *S v W and Others* 1994 (2) BCLR 135(C); 1994 (4) SA 126 (C). Substantially what it amounts to is that there is a distinction between fundamental rights of a procedural nature and those of a substantive nature and that the proper meaning of section 241(8) is that only fundamental rights of a procedural nature sanctioned by the Constitution would not be available to an accused person in pending proceedings.

[19] A serious difficulty which I have with this approach is that there is nothing in section 241(8) which seeks to distinguish between rights of a procedural nature from those of a substantive nature. Moreover, the distinction made raises the complex problem of satisfactorily classifying what right in Chapter 3 can be said to constitute a procedural right as distinct from a substantive right. (See *Yew Bon Tew v Kenderaan Bas Mara* [1982] 3 All ER 833 (PC) at 838f-g; *Industrial Council for the Furniture Manufacturing Industry (Natal) v Minister of Manpower and another* 1984 (2) SA 238(D) at 242F; *Euromarine International of Mauren v The Ship Berg and Others* 1984 (4) SA 647 (N) at 661I-662A.) Furthermore, this distinction assumes that a right is either procedural or substantive. It could be a hybrid right involving both. What is the right set out in section 25(3) to "legal representation at State expense if substantial injustice would otherwise result"? Is it procedural or substantive? If it involves both substantive and procedural elements, what is the dominant element? Is that the test to be applied in classifying the right? If it is and the dominant element is procedural, how does it help the argument that section 241(8) was never intended to take away fundamental rights in pending proceedings? Is the right to “legal representation at State expense if substantial injustice would otherwise result” any the less fundamental for being procedural? I find it difficult to accept that the law-maker intended to leave uncertain and unresolved serious disputes of this kind in the crucial area of fundamental rights.

[20] A third alternative suggested by some of the cases in the Provincial and Local Divisions of the Supreme Court is that the object of section 241(8) is to preserve the continuing territorial jurisdiction of the Courts in which the case was pending immediately before the commencement of the Constitution (*Qozoleni v Minister of Law and Order and Another* 1994 (1) BCLR 75 (E); 1994 (3) SA 625 (E); *S v Majavu* 1994 (2) BCLR 56 (CKGD); 1994 (4) SA 268 (Ck); *Gardener v Whitaker* 1994 (5) BCLR 19(E); *S v Shuma* 1994 (2) SACR 486 (E)). In my view, the special emphasis on "territorial jurisdiction" is not justified by section 241(8), but the emphasis on the jurisdictional objectives of the section provides a basis for an alternative approach to the meaning of the section that can constitutionally be defended.

[21] What the section seeks to preclude is an attack on the authority of any Court of law or tribunal to continue dealing with proceedings which were pending before the commencement of the Constitution. What the section would then mean is that:-

"All proceedings which immediately before the commencement of this

> Constitution were pending before any Court of law, including any tribunal or reviewing authority, established by or under law, exercising jurisdiction in accordance with the law then in force, shall be dealt with as if the passing of this Constitution had not impacted on that jurisdiction: provided that if an appeal in such proceedings is noted or review proceedings with regard thereto are instituted after such proceedings, such proceedings shall be brought before the Court having jurisdiction under this Constitution and the Court or tribunal which might otherwise in terms of this section have had authority to deal with such appeal or review shall have no such authority."

(See, for example, *S v Smith and Another* 1994 (1) BCLR 63 (SE); 1994 (3) SA 887 (SE); *S v Saib* 1994 (2) BCLR 48 (D); *S v Sixaxeni* 1994 (3) BCLR 75 (C); 1994 (3) SA 733 (C).)

[22] To appreciate why sections 241(8) had to be enacted to give effect to this intention it is necessary to understand that what the Constitution does is to establish a new legal and political order involving a new Parliament, a new Executive and a new Judiciary. In terms of Chapter 7 of the Constitution, a new Constitutional Court is established in section 98, a new Supreme Court is established in terms of section 101 and other new Courts are established in terms of section 103. But, the mechanics of the contemplated establishment of the new Courts had to await the rationalisation process contemplated by section 242. That left a vacuum in the interim which section 241 seeks to fill. It does that in section 241(1) by providing that every Court of law which existed immediately before the commencement of the Constitution shall be deemed to have been duly constituted by the Constitution or the laws in force after such commencement. The word "deemed" means that the Courts which existed before the Constitution were in truth not Courts established under the Constitution or any law in force after its commencement but that they should fictitiously be assumed to have been so constituted (see *S v Voigt* 1965 (2) SA (N) 749 at 752F-G; *Queen v Norfolk County Council* (1891) 60 L.J.Q.B. 379; *Chotabhai v Union Government (Minister of Justice) and Registrar of Asiatics* 1911 AD 13 at 33).

[23] The effect of section 241(1) is that the pre-Constitution Courts are legitimized as new post-Constitution Courts as if there was a separate section in the Constitution or in some law after the Constitution creating such Courts. Section 241(1) therefore would allow a pre-Constitution Court to exercise jurisdiction in cases arising after the commencement of the Constitution but, it might not be sufficient to authorize them to continue hearing cases which had commenced before the Constitution came into operation. It seems to me that it is for that contingency that

section 241(8) was enacted. I say this because what section 241(1) “deems" is that the pre-Constitution Courts are to be taken to have been established in terms of the Constitution and this must therefore mean with effect from the date of the Constitution. It cannot mean from some date prior to the Constitution because the Constitution operates prospectively in establishing new Courts and not retrospectively. The Constitution does not contemplate that the new Legislature, the new Executive or the new Judiciary should be established at any date before the commencement of the Constitution. Thus interpreted, a meaningful role is determined for the phrase "exercising jurisdiction in accordance with the law then in force" in section 241(8). Its role is to make clear that in proceedings which were pending before the commencement of the Constitution, the authority and jurisdiction conferred on the relevant Court or tribunal by "the law then in force", would continue unimpaired by the Constitution "as if this Constitution had not been passed" and as if it had not impacted upon that authority. This interpretation gives to what is a substantial part of the section, a significant purpose. The literal interpretation, in my respectful view, does not. This part could be omitted entirely without detracting in any way from the purpose of the section said to be protected on the literal approach.

[24] Kentridge AJ, in paragraph 69 of his judgment, agrees with my conclusion that the reference to the relevant Court or tribunal "exercising jurisdiction in accordance with the law then in force" in section 241(8) was indeed intended to preserve the authority of a pre-Constitution Court to continue its function of adjudication after the commencement of the Constitution in cases which were pending before such commencement; but he suggests that section 241(8) has a second purpose and that purpose is to ensure that such pending cases should be determined as if the Constitution had not been passed at all. I have some difficulty with that suggestion. If Kentridge AJ is correct in concluding that "another purpose" of section 241(8) was to ensure that the whole of the Constitution, including the protection of fundamental rights enshrined in Chapter 3, would be inapplicable in pending proceedings, both these suggested purposes would have been achieved at the same time by providing that

> "all proceedings which immediately before the commencement of this Constitution were pending before any court of law ...shall be dealt with as if this Constitution had not been passed"

without including the phrase

> "exercising jurisdiction in accordance with the law then in force"

to qualify the Court of law referred to. If pending proceedings

were to be dealt with as if the whole of the Constitution had not been passed, the Courts of law (or any other relevant tribunal) would in any event be "exercising jurisdiction in accordance with the law then in force" because the Constitution which impacted upon that authority would have to be ignored and the authority of the pre-Constitution Courts to continue in pending matters would therefore have remained "as if this Constitution had not been passed". In my respectful view, therefore, the language of section 241(8) is not, in the circumstances, cogently supportive of the suggestion that it had two purposes. The proposition that its only purpose was to preserve the authority of pre-Constitution Courts to continue to function as Courts for the purposes of adjudication in pending cases, appeals to me as a more persuasive interpretation of the section. At the very least it seems to me to be an interpretation of the section which is reasonable and the fact that it is more effective in securing the equal protection of the Constitution for all persons makes it significantly more attractive and defensible.

[25] Although, on this interpretation, a Court "exercising jurisdiction in accordance with the law then in force" would have its authority limited to the territorial area in which it has jurisdiction in terms of that law, in my view, the purpose of section 241(8) is not simply to regulate the territorial jurisdiction of the relevant Court before which proceedings are pending. That issue is sufficiently covered by section 241(1) and more particularly the amendment thereto introduced by section 15 of Act 13 of 1994. This amendment introduces a proviso to section 241(1) which defines the areas of jurisdiction of the Appellate Division, the Provincial and the Local Divisions of the Supreme Court of South Africa, any other Supreme Court or general division thereof and any other Courts. Section 241(8) was therefore not introduced specifically to deal with the areas of jurisdiction of the Courts before which proceedings were pending at the commencement of the Constitution but to ensure that their authority to deal with pending cases was not assailed because of the fact that the Constitution creates new Court structures with effect from the commencement of the Constitution. Section 241(8) creates Constitutional legitimacy for a pre-Constitution Court, to continue to operate as a Court after the commencement of the Constitution in respect of pending matters. Every Court needs such Constitutional authority to function as a Court (see *Smith and Brazier: Constitutional and Administrative Law* 7th Ed (1994 Penguin p. 69); *Brown v Leyds N.O* (1897) 4 OR 17; *Madzimbamuto v Lardner Burke* 1968 (2) SA 284 at 331-2 (AD); *Madzimbamuto v Lardner Burke* (1969) 1 AC 645).

[26] This interpretation is also supported by the direction that pending proceedings "shall be dealt with" as if the Constitution had not been passed. This is an unusually colloquial expression to be found in a formal statutory instrument. If the intention of the law-maker was to say that pending proceedings should be adjudicated on the basis that the Constitution in all respects should be ignored, it could have used clearer language. Law-makers are often concerned with the problem which arises when a new statutory regime replaces the old but there is a continuing residue of proceedings from the old. This was the position when the Criminal Procedure Act 51 of 1977 replaced the previous Criminal Procedure Act of 1955. Section 344(3) of the 1977 Act sought to protect the previous proceedings which were still pending by directing that if such proceedings had not been concluded at the commencement of the new Act "they should be continued and concluded" as if the previous Act had not been repealed. Similar provisions appear in other statutes. This is illustrated by section 12(2)(e) of the Interpretation Act of 1957 which provides in clear language that unless the contrary intention appears the repeal of a law "should not affect any investigation, legal proceeding, or remedy in respect of any such right ... and any such investigation, legal proceeding or remedy may be instituted, continued and enforced ... as if the repealing law had not been passed". What this kind of phraseology emphasises is a desire by the legislature to ensure that the provisions of the previous regime will in the relevant circumstances apply inexorably to the final end and determination of the proceedings. "Deal with" is a more protean, inherently more tentative idea. The New Shorter Oxford English dictionary (Volume 1; page 601) discusses the meaning of the word "deal" when it is followed by the word "with" in the following passage:

> "**deal**... Foll. by *with:* be concerned with (a thing) in any way; busy or occupy oneself with, esp. with a view to discussion or refutation. Also, take (esp. punitive or corrective) measures regarding, cope with, handle (a difficult person, situation, etc.). ME. **11** *v.i.* Foll. by *with* or *by:* behave towards, treat (a person etc.) (in a specified way). Also *absol.,* act towards people generally (in a specified way), conduct oneself. ME **12** *v.i.* Take action, act, proceed (in a matter).ME-M17. **13** *v.i.* Set to work, practise (*up)on. arch. rare.* L16".

The phrase therefore has different nuances but one of its well recognized meanings is to "Take action, act, proceed (in a matter) ... Set to work, practise". These are perfectly appropriate expressions to confer authority on a Court or tribunal to proceed with or take action under the authority vesting in it in terms of "the law then in force". The "Oxford English Dictionary" to which Kentridge AJ refers also includes in its discussion of the phrase "to deal with" the meaning: "to

grapple with" and it also refers to "deal" as meaning "to take action, act, proceed". These meanings are consistent with my view of the purpose of the section. It is true that the idea of "disposing" the matter is in some contexts also a permissible nuance in the meaning of the phrase "deal with", but the very fact that it ordinarily bears the meaning of "setting to work" or "proceeding" demonstrates its inherently fluid and uncertain content. It is probably for this reason that it does not ordinarily appear in statutes which seek to convey the idea that something should be "continued and concluded" as if the relevant law had not been passed. If the intention of the Constitution was to say that pending matters should be "continued and concluded" as if the Constitution had not been passed it would have been a simple matter to say so in such a phrase of well-known usage in our statute law instead of recourse being had to something so colloquial, flabby and uncertain as "deal with".

[27] I have examined the two cases mentioned by Kentridge AJ in which it is said that the phrase "dealt with" is used synonymously with "continued and concluded" (*S v Thomas and Another* 1978 (1) SA 329 (A) at 334; *Pinkey v Race Classification Board* 1968(4) SA 628 at 636 C-D). With respect, I do not think they detract from what I have said. In *Pinkey's* case *(supra)* the Court was concerned with the effect of a statutory amendment under the notorious race classification procedures of Act 30 of 1950 and reliance had been placed on section 12 of the Interpretation Act of 1957 (which provided that in the absence of a contrary intention a repealing law shall not affect any investigation, legal proceeding or remedy in respect of any right or privilege and "any such investigation, legal proceeding or remedy may be instituted, continued or enforced ... as if the repealing law had not been passed"). The Court held that this protected Mr Pinkey from the statutory change made by the subsequent statute. In the passage referred to by Kentridge AJ, Jansen JA stated that there was no contrary intention and that

> "it follows that pending cases should be dealt with... as if the repealing law had not been passed".

The Court was never called upon to apply its mind to the distinction between "dealt with" and "continued and concluded". It was never an issue in that case. It could never be, because the relevant part of section 12(2) of the Interpretation Act effectively included both meanings. It allowed legal proceedings to "be instituted, continued or enforced". The case of *S v Thomas (supra)* similarly was not concerned with this distinction.

[28] Whatever be the exact phraseology used, however, the basic idea of legitimizing the authority of the old to continue that authority under a new regime has a long and very well-

established constitutional history. Thus, section 116 of the South African Act, 1909, provided that all appeals to the King-in-Council which were pending at the establishment of the Union should proceed as if that Act had not been passed. The object was simply to legitimise the authority of the Privy Council to continue to hear appeals which were pending before it at the date of the commencement of the Constitution. This same objective was sought to be achieved by section 1(2) of the Special Courts for Blacks Abolition Act 34 of 1986 which provided that an action pending in the Commissioner's Courts or an Appeal Court for Commissioner's Courts on the date identified should be dealt with as if the section had not been introduced. The purpose was to legitimize the authority of those Courts to deal with cases which were pending before them. Substantially the same formula is followed when Parliament purports to create new States and Republics. Thus the Constitutions of the Transkei, Bophuthatswana, Ciskei and Venda all provide that proceedings which were pending before the commencement of the relevant Constitutions in certain Courts (created by South African statutes in respect of its Black citizens) should be continued and concluded as if that Constitution had not been passed. The object was again to legitimize the authority of such Courts to deal with cases which were pending before them prior to the commencement of the Constitution. (See section 54(c)(ii) of the Republic of Transkei Constitution Act 15 of 1976; section 91 of the Republic of Bophuthatswana Constitution Act 18 of 1977; section 52(1)(d) of the Republic of Venda Constitution Act 9 of 1979 and section 76(1)(d) of the Republic of Ciskei Constitution Act 20 of 1981.)

[29] These kinds of statutory formulae were not confined to the TBVC States. Apart from the provisions of the South African Act of 1909, they also appear in section 116 of the Republic of South Africa Act 32 of 1961 which seeks to sanction the authority of the Courts to conclude pending proceedings which were initiated before the Constitution in the name of the Queen who ceased to be the Constitutional authority in South Africa in terms of the Constitution.

[30] It seems to me therefore that section 241(8) does no more than carry on a well-established constitutional tradition that when there is a change of legal regimes, proceedings instituted but uncompleted in Courts under the previous regime have to be protected against a potential attack on the grounds that they have no authority to dispose of such cases after the commencement of the new regime. It must be conceded, however, that in many of these statutes the formula adopted for the purposes of allowing pending proceedings to continue after the change of the regime, created no comparable problems with regard

to whether or not such Courts could ignore the provisions of the substantive law of the new regime in disposing of their pending cases. This is because some of these statutory instruments contained no Bills of Rights and the other statutes of the previous regime pertaining to substantive law were perpetuated by suitable provisions in the new statutes. This does not detract from the fact, however, that the basic objective in sections analogous to section 241(8) is to confer authority on Courts to continue to hear cases pending before them prior to the Constitution, notwithstanding the fact that the Constitution itself creates a new structure of Courts. This is the position in terms of statutes which authorize such Courts to "continue and conclude" pending proceedings as if the Constitution had not been passed. *A fortiori* this must be the position where the language is less tight such as in the expression "dealt with" in section 241(8).

[31] It must also be remembered that although most of the Constitutions and statutory instruments to which I have referred do not create fundamental rights and do not therefore involve the problem of deciding whether the relevant sections also entitle the Courts to ignore the substantive provisions of the Constitutions guaranteeing such rights, some Constitutions do have such fundamental rights entrenched. The Constitution of Bophuthatswana does. Significantly, however, the formula used is substantially the same and it has never been contended that in pending cases the Courts in that territory were entitled to ignore the guarantees conferred by the Chapter enacting fundamental rights.

[32] My view of section 241(8) is also supported to some degree by the proviso to section 241(8). A proviso qualifies the substantive part (*Mphosi v Central Board for Co-operative Insurance Ltd* 1974 (4) SA 634 (A) at 645; *R v Dibdin* [1910] P 57 at 125). The ordinary consequence of the substantive part of section 241(8) would have been that all appeals and reviews in pending proceedings would have had to be continued in the old Courts established prior to the Constitution. The proviso reverses that consequence by directing that such appeals or reviews must (notwithstanding the substantive provision) be instituted in the Courts which are given jurisdiction in terms of the Constitution and not the Courts which would have had jurisdiction under the old law. On that interpretation the proviso flows naturally and logically to qualify the substantive provision in section 241(8), if the substantive provision itself were to be limited in its purpose to a legitimization of the old Courts and tribunals from the date when the proceedings before such bodies commenced. This is what attracted some of the local and provincial judges of the Supreme Court when they said that

the literal interpretation of section 241(8) did not involve a "rational connection" between the substantive part of section 241(8) and the proviso (see, for example, *S v Sixaxeni (supra)*, BCLR at 78D-E). I think there is merit in the suggestion that the proviso in section 241(8) flows more easily and naturally if the substantive part is confined to the purpose of conferring authority on the Courts to continue to function as such Courts and tribunals in respect of matters pending before them at the commencement of the Constitution. To that extent my interpretation of section 241(8) is supported by the proviso. But, it is not a decisive consideration : there could be a logical if not particularly natural interpretation of the section which would break the substantive part of section 241(8) into two elements, the first dealing with the jurisdiction or authority of the Courts or tribunals to continue to function in pending cases and the other dealing with their right and capacity to ignore the Constitution in so exercising their functions and the proviso could be interpreted so as to limit the first element and not the second. The argument based on the proviso is therefore only one of many elements which must be weighed in the proper interpretation of section 241(8).

[33] The literal interpretation of section 241(8) involves a very radical constitutional consequence because, as I have said, it would deny to a substantial group of people the equal protection of fundamental rights guaranteed by Chapter 3. I would therefore expect it to be articulated conspicuously in Chapter 3 itself. But section 7, which deals with the application of the Chapter on fundamental rights, makes no such qualification. It says in section 7(2), in rather peremptory and promissory terms, that this Chapter shall apply to <u>all</u> law in force and <u>all</u> administrative decisions and acts performed during the period of the Constitution and it does not contain any qualification or proviso that the rights of persons in proceedings pending at the commencement of the Constitution are not included in the word "all". It does not make section 7(2) subject to section 241(8); nor does it say that section 7(2) shall apply save in cases which were pending when the Constitution commenced. Instead, if the literal interpretation is correct, that radical consequence is to be inferred from an obscure sub-section dealing with transitional arrangements for the <u>Judiciary</u> and not even in section 229 which deals with the transitional provisions pertaining the continuation of <u>Laws</u>. I feel no confidence in seeking to infer from such a provision a meaning which would entail the radical consequences which must inevitably follow for so many people, if the literal approach is adopted. I am also not persuaded that this would affect only a tiny segment of the community. The present Constitution has a limited life and a good deal of the litigation in the Courts might indeed be a

residue of proceedings commenced before the Constitution. Significantly, section 241(8) has become relevant for this very reason in the majority of the cases which the Constitutional Court has so far heard. Kentridge AJ, in paragraph 83 of his judgment, suggests that "the tension between Chapter 3 and section 241(8) is likely to arise only in the respect of the fair trial requirements of section 25(3)". I am respectfully unable to agree. The Constitutional attacks on capital punishment, corporal punishment, civil imprisonment for debt and statutes founded on unfair racial discrimination, for example, are legally vulnerable without any reliance on section 25(3).

[34] My suggestion that the purpose of section 241(8) was indeed to provide the authority for a Court in pending proceedings to continue as a Court is also supported by other sub-sections of section 241. Thus, the authority of the Chief-Justice, the Judge President and other judges to continue in office is provided in section 241(2) and 241(3). The authority of the Attorney-General to so continue is provided in section 241(4). Their authority to continue to receive remuneration, pension benefits, gratuities and similar privileges is sanctioned by section 241(5). Section 241(8) appears in that context. It is a transitional arrangement to legitimize the authority of important structures in the judicial system in circumstances where that authority might otherwise have been assailable. This approach to the objectives of section 241 is consistent with the objectives also apparent in the preceding transitional arrangements pertaining to Legislative authorities in section 234, to Executive authorities in section 235, to the Public administration in section 236 and to the Public service commissions in terms of section 238.

[35] It must be readily conceded that the interpretation which I have favoured in this judgment is not free from difficulties. One difficulty with it is section 241(10) which provides that the laws and other measures which immediately before the commencement of the Constitution regulated the jurisdiction of the Courts of law, Court procedures and all other matters pertaining to the establishment and functioning of Courts of law, shall continue in force subject to any amendment or repeal thereof by a competent authority. It could be argued that the terms of this sub-section are wide enough to preserve the authority of the old Courts in pending proceedings to deal with and dispose of such matters before them and that section 241(8) was therefore not needed to confer such authority, as I have suggested. That argument does have merit but I think that the answer to it lies in the distinction between the authority of such Courts to continue as Courts at all in order to dispose of pending matters after the commencement of the Constitution and

their authority to continue in particular areas and over particular persons and in terms of particular procedures (if they have authority to continue to function as Courts). The former authority is not sanctioned by 241(10). The latter is. It is the former authority which is provided by section 241(8). Without it, it could have been argued that the old Courts had no authority to function in pending cases although section 241(10) would have defined how and what they could do if they had such authority.

[36] I am also alive to another difficulty in my interpretation of section 241(8). Although it gives to the phrase "exercising jurisdiction in accordance with the law then in force" a meaning and a role which is absent from the literal approach to the section which I have described, it is not necessarily inconsistent with the inference that when the section directs that pending proceedings "shall be dealt with as if this Constitution had not been passed" it means that the whole of the Constitution, including the Chapter on fundamental rights, should therefore be ignored in such circumstances. That observation is not without weight, but it is necessary to bear in mind that the relevant phrase is also not inconsistent with the inference that the direction is simply a direction to proceed with pending cases as if the Constitution had not impacted on the authority of a pre-Constitution Court to continue to function as a Court. Indeed, the phrase "exercising jurisdiction in accordance with the law then in force" makes this inference more probable. What the phrase emphasizes is that the relevant Court must exercise jurisdiction in accordance with the law then in force, not that it must, in the exercise of that jurisdiction, ignore the substantive law of the Constitution. This reference to the exercise of jurisdiction immediately precedes the direction that it should deal with the proceedings as if the Constitution had not been passed. It therefore derives some flavour, colour, substance and purpose from its neighbour. Such an approach would also be consistent with other well-known canons of construction such as the presumption that the law giver must not be imputed with the intention to enact irrational, arbitrary or unjust consequences. (*Hleka v Johannesburg City Council* 1949 (1) SA 842 (A) at 852; *Venter v R* 1907 TS 910 at 914-915 and 921; *Lister v Incorporated Law Society Natal* 1969 (1) SA 431 (N) at 434; *R v Sachs* 1953 (1) SA 392 (A) at 399).

[37] I have considered whether there is perhaps another rule of interpretation which might in the circumstances of this case justify a result different from the one which I have favoured. The rule I have in mind is the presumption that, unless the

contrary intention appears, a statute does not operate retrospectively to impact upon pending proceedings. (*Bell v Voorsitter van die Rasklassifikasieraad en Andere* 1968 (2) SA 678 (A) at 683; *Thom v Moulder* 1974 (4) SA 894(A); *Bellairs v Hodnett and Another* 1978 (1) SA 1109 (A) at 1148.)

[38] On this approach it could be contended that since the Constitution was not in operation when the proceedings became pending within the meaning of section 241(8), an interpretation which compels a Court to apply the Chapter on Fundamental Rights to such proceedings constitutes a breach of this presumption. In my view, this is not a sound argument. In the first place the presumption is not inflexible. It operates only if there is no contrary intention. In a very important sense a document as fundamental as a Constitution can itself be the basis for the inference of such a contrary intention. This is particularly true of the Chapter on Fundamental Rights. The presumption to which I have referred is intended as a protection against an invasion of rights which might have occurred in litigation; it is not intended to exclude the benefits of rights sanctioned by new legislation. Chapter 3 of the Constitution seeks not to invade but to expand rights. The relevant presumption can have scant application in such circumstances (*R v Sillas* 1959 (4) SA 305 (A) at 311; *S v Williams* 1979 (3) SA 1270 (C); *Van Lear v Van Lear* 1979 (3) SA 1162 (W) at 1167G-H; *Dys v Dys* 1979 (3) SA 1170 (O)).

[39] I have also applied my mind to the criticism that the interpretation of section 241(8) favoured by me might be open to the pragmatic objection that it could cause some measure of "dislocation" in the running of trials which were pending on the date of the commencement of the Constitution. This objection undoubtedly has some merit, but the weight which must be attached to this consideration must, with respect, be balanced having regard to the degree of "dislocation" involved, the capacity and the skill of the Court fairly and sensibly to manage its effects and the grave consequences of any alternative approach denying to an important and not insubstantial sector of the citizenry, the equal protection of fundamental rights guaranteed to all. Thus approached, I am not convinced that the "dislocation" factor is sufficiently compelling to favour the literal approach to the interpretation of section 241(8). My interpretation of the section does not involve any re-opening of trials which were completed before the commencement of the Constitution. Such trials can be eliminated as potential targets of "dislocation". Moreover, even in respect of trials which had commenced but had not been concluded before the date of the commencement of the Constitution, no Constitutional

challenge based on section 25(3) would be competent in respect of any decision already made during the trial but before the commencement of the Constitution. If, for example, an accused person had at the commencement of the trial and before the Constitution came into operation, applied for and been refused legal representation at State expense, a challenge to that decision could not competently be proffered after the Constitution came into operation notwithstanding section 25(3)(e). What could be asserted would be the right of the accused to be so represented from a date after the commencement of the Constitution. If the application is granted and the legal practitioner seeks to recall witnesses for cross-examination it will not be on the grounds that the original decision to deny such representation should be reviewed, but simply another example of the experience known to all practising lawyers when an attorney is engaged on the third day of the trial and then applies to recall witnesses. He does not assert a right, but simply the invocation of a discretion in the interests of justice. It is often allowed by the presiding officer. It causes no "disruption". Indeed, it is often welcomed because it assists the Court.

[40] Other potential "disruptions" of this sort can sensibly be managed in this kind of way by a balanced and mature judicial officer. The danger of such disruptions is limited and containable. In my view, it is not of a magnitude sufficient to justify the plainly untenable denial of fundamental human rights to accused persons who were fortuitously charged just before the commencement of the Constitution but whose trials had not yet been concluded on that date.

[41] On my interpretation of section 241(8) appeals would not create any "dislocation" either. Appeals arising from proceedings which were commenced and concluded after the Constitution came into operation should, in principle, be determined in the ordinary course on the basis that Chapter 3 of the Constitution was clearly of application and if the protection of that Chapter had wrongly been denied to the Appellant, the Court on appeal would take that into account in making its order. In respect of appeals arising from proceedings which had commenced before the Constitution came into operation but were only concluded thereafter, there should again be no "dislocation". If the particular fundamental right relied on by the Appellant was of operation at the relevant time of the trial, the Appellant was entitled to rely on it and if it had been wrongly denied to him he would be entitled to suitable relief on appeal.(*Regina v Antoine 4 CRR 126).* If it did not exist at the relevant time, the Appellant would have no legitimate cause for complaint. The remaining category concerns appeals arising from trials which

had commenced and were completed before the Constitution came into operation. In my view such appeals must be disposed without applying Chapter 3 of the Constitution, because an appeal inherently contains the complaint that the Court *a quo* had erred in terms of the law which was then of application to it and not in terms of a law which subsequently came into operation. There should therefore also be no "dislocation" arising from this category of appeals. There is nothing in the wording of section 241(8) which, on my interpretation, would entitle an Appellant on appeal to rely on Chapter 3 if the proceedings against him had been concluded before the commencement of the Constitution. Such an Appellant would have to confine himself to the substantive law which applied during his trial. The case of *S v Thomas (supra)* is not inconsistent with that conclusion. That case was concerned with section 344(3) of Act 51 of 1977 which provided as follows:

> "Notwithstanding the repeal of any law under sub-section (1) [the Criminal Procedure Act of 1955 was such a law] criminal proceedings which have under such law at the date of the commencement of this Act been commenced in any ... court ... and in which evidence has at such date been led in respect of the relevant charge, shall, if such proceedings have at that date not been concluded, be continued and concluded under such law as if it had not been repealed".

It was held that the Appellant in that case was not entitled on appeal to rely on the provisions of Act 51 of 1977 which provided special machinery to persons suffering from psychopathic disorder. It therefore confirmed the approach that the law to be applied on appeal was the law which was of application at the time of the trial and not the law as it was amended at the time of the appeal.

[42] In the result there are no "dislocations" arising from appeals or any other considerations which would justify the plainly unequal consequences of the literal approach.

[43] I have also had regard to the fact that even on my interpretation of section 241(8) not every anomaly is eliminated. Kentridge AJ suggests some such anomalies in paragraph 83 of his judgment. Included in that analysis is the suggestion that the results of appeals might depend on when they had been noted or when they had been set down. For the reasons I have referred to, these are not anomalies resulting from my interpretation.

[44] What is nevertheless true is that there may be some residual anomalies arising from the mere fact that some accused might fortuitously have been charged, convicted and sentenced just before the commencement of the Constitution without the benefit of one or other fundamental right identified in Chapter 3 whilst

other accused are fortuitously charged just after the commencement of the Constitution and therefore have the advantage of asserting such rights. But that kind of anomaly is inherent in any situation where one legal regime based on human rights values is replaced on a particular date by another legal regime which had denied such rights: it does not justify extending the anomaly to accused persons who were merely charged with offences before the commencement of the Constitution, but who seek to assert their fundamental rights during their trials at a time when the Constitution is of operation.

[45] I confess to considerable difficulties in all the theories which have become manifest in the interpretation of section 241(8). None of them are without problems. Its controversial nature manifests itself in the diversity of opinion which has agonized judicial deliberations on the meaning of the section almost from the very inception of the Constitution. In my view, the difficulties involved in the approach adopted by Cloete J in *Shabalala's case (supra),* by the Cape Provincial Division of in *S v W and Others (supra)* and by the Eastern Cape Provincial Division of the Supreme Court in the case of *Qozoleni (supra)* and other cases following thereupon, are more formidable than the difficulties involved in the interpretation based on the literal approach and the interpretation which I have favoured in this judgment. I have sought to deal with some of the difficulties arising from my interpretation and contrasted them with some of the difficulties inherent in the literal approach. I am of the view, however, that on a balance, my interpretation is to be preferred because it gives force and effect to the fundamental objectives and aspirations of the Constitution, because it is less arbitrary in its consequences and because it is more naturally in harmony with the context of section 241(8) itself and the Constitution as a whole.

[46] The literal interpretation, in my respectful view, has none of these advantages and it is not compelled by the text of the section, read in its context and with regard to the objects of the Constitution. It is clear from the express objectives of the Constitution, that it seeks to articulate and to guarantee the fundamental right to a fair trial to all persons; the literal interpretation would deny such right to many. The Constitution seeks to secure for indigent persons the right to legal representation at State expense if substantial injustice would otherwise result; the literal approach would reserve this for an arbitrarily delineated class. The Constitution secures the right to life and human dignity and guarantees protection from inhuman or degrading treatment or punishment to all persons; the literal approach would deny reliance on this promise by those sought to be punished after the Constitution simply because the

proceedings against them commenced before the Constitution. The Constitution expressly entrenches the presumption of innocence allowing an accused person the right to protection from laws which effectively reverse this presumption; the literal approach denies such protection to potentially large classes of persons, including the very accused in this case. The contrast, in every area of legitimate concern for the ends of justice, is stark and distressing. I am not persuaded that a proper reading of the Constitution compels me to accept these distressingly anomalous consequences of the literal approach.

[47] The result of this view is that the Applicants in the case before Page J were entitled to invoke the protection of the Constitution in the attack on section 217(1)(b)(ii) of the Criminal Procedure Act of 1977 which this Court has held to be invalid in its judgment (in the *Zuma* case (*supra*)) on 5 April 1995. Notwithstanding the fact that the trial of the accused in the present matter was pending on the date of the commencement of the Constitution, they are entitled to contend that the onus was on the State to prove that their confessions were freely and voluntarily made and without any undue influence. In my view, they are therefore still entitled to contend before Page J that in his determination of their guilt or otherwise, he should proceed on the basis that section 217(1)(b)(ii) is inconsistent with the Constitution and therefore invalid. The Applicants are therefore entitled to a declaration to that effect. I think also that it would be proper to make a declaration in terms of section 98(6) of the Constitution invalidating the application of section 217(1)(b)(ii) of Act 51 of 1977 in any criminal proceedings in which the final verdict of the relevant Court was or may be given after 27 of April 1994.

[48] These conclusions also make it necessary to deal with an issue which was deferred by Kentridge AJ in the *Zuma* case *(supra)* in the following passage (in paragraph 44):

> "Whether an order under section 98(6) may and should encompass proceedings which were pending before 27 April 1994, depends on the proper interpretation of the Constitution. As indicated at the beginning of the judgment that issue is deferred for determination in the Mhlungu case".

It follows from what I have said that the question deferred in *Zuma's* case *(supra),* in the passage I have quoted, should be answered by saying that an order in terms of section 98(6) may encompass proceedings which were pending immediately before 27 April 1994. Because of the issues left undecided in the *Zuma* case *(supra),* the order in that case invalidated the application of section 217(1)(b)(ii) of Act 51 of 1977 only in respect of criminal trials which commenced on or after 27 April 1994 and in which the verdict had not, at the date of the order, been given. It did not, however, preclude an extension of these limits in the present case. In my view, the declaration should also

invalidate any application of section 217(1)(b)(ii) of Act 51 of 1977 in proceedings which were pending immediately before the commencement of the Constitution. It would also be arbitrary and irrational to deny to an accused person the right to rely on such invalidity merely because the declaration of invalidity by the Court took place on a date subsequent to the date when his pending trial was fortuitously completed. All accused persons whose trials either began after the Constitution or which were pending immediately before the Constitution commenced, are entitled to be treated equally. I therefore make the following order:

1. It is declared that section 241(8) does not preclude an accused person in a criminal trial from relying on any of the applicable provisions of Chapter 3 of the Constitution in proceedings which were pending before a Court of law immediately before the commencement of the Constitution.

2. In terms of sub-section (6) of section 98 of the Constitution it is ordered that the declaration of invalidity made by this Court in the case of *S v Zuma and Others*, 1995(4) BCLR 401 (SA) invalidates any application of section 217(1)(b)(ii) of the Criminal Procedure Act, 1977 in any criminal trial, irrespective of whether it commenced before, on or after 27 April 1994, and in which the final verdict was or may be given after 27 April 1994.

Langa J, Madala J, Mokgoro J and O'Regan J concur in the judgment of Mahomed J.

[49] **KENTRIDGE AJ** : This case came before this Court by way of a referral by Page J in the course of a criminal trial in the Natal Provincial Division. It was heard in this Court at the same time as the case of *S v Zuma and Others* 1995(4) BCLR 401(SA), in which judgment was given on 5th April 1995. Both referrals raised the question whether section 217(1)(b)(ii) of the Criminal Procedure Act, 1977, is inconsistent with the provisions of the Constitution of the Republic of South Africa, 1993. The referral by Page J also raised the question of the proper construction of section 241(8) of the Constitution, an issue which did not arise in the *Zuma* case. In the latter case we declared section 217(1)(b)(ii) of the Criminal Procedure Act to be invalid, but deferred the question relating to section 241(8) for consideration in this case. This question still requires resolution, as the applicability of our declaration to

the present case may depend on the interpretation of section 241(8). In order to explain why this is so it is necessary to recount what took place at the trial before Page J.

[50] The accused were charged with murder and other crimes alleged to have been committed in April 1993. An indictment in Afrikaans was served on all five accused at Newcastle on 11th March 1994. Possibly because they did not understand Afrikaans they requested a copy in English. An indictment in English was served on them, but only on 4th May 1994. The accused appeared before the Circuit Court for remand on 11th May and on 18th May, 1994 and pleaded not guilty to the charges before Page J, sitting with assessors. At an early stage of the trial, the prosecution tendered evidence of confessions made by four of the accused, in each case before a magistrate. In respect of three of them it relied on the presumptions created by proviso (b) to section 217(1). Defence counsel at once informed the court that he would contend that sub-paragraph (ii) of proviso (b) was in conflict with the provisions of section 25 of the Constitution and therefore no longer of any force or effect, and would if necessary ask for the referral of the issue to the Constitutional Court. As Page J said in his judgment, given on 28th October 1994, a question which arose at the outset of the enquiry was whether, in view of section 241(8) of the Constitution, provisions such as section 25 had any application to the case before him. Section 241(8) reads as follows -

> "(8) All proceedings which immediately before the commencement of this Constitution were pending before any court of law, including any tribunal or reviewing authority established by or under law, exercising jurisdiction in accordance with the law then in force, shall be dealt with as if this Constitution had not been passed : Provided that if an appeal in such proceedings is noted or review proceedings with regard thereto are instituted after such commencement such proceedings shall be brought before the court having jurisdiction under this Constitution."

The question raised by Page J was whether, in the first place, the proceedings before him could be said to have been "pending" immediately before the commencement of the Constitution, i.e. 27th April 1994; and, if so, whether on its proper construction section 241(8) rendered the Constitution inapplicable to those proceedings. Page J made no finding on either of these questions.

[51] With regard to the first issue, further findings of fact may have been necessary. The term "pending" in relation to proceedings may have different connotations according to its context. See *Noah v Union National South British Insurance Co Ltd* 1979(1) SA 330(T), 332 per Eloff J ; *Arab Monetary Fund and others v Hashim, NO (No 4)* [1992] 1 WLR 553. As Hoffmann J said

in the latter case at 558, in the normal meaning of the term proceedings "are pending if they have begun but not yet finished." It is clear enough that a "pending" proceeding is one not yet decided. See *King v King* 1971(2) SA 630(O), 634; *Groenewald v Minister van Justisie* 1972(4) SA 223(O), 225. What is not so clear is when a legal proceeding may be said to have begun.

[52] Section 144(4) of the Criminal Procedure Act 1977, requires an indictment to be served on an accused at least ten days before the date appointed for trial, and section 76 states that the proceedings at a summary trial in a superior court shall be commenced by the serving of an indictment on the accused and the lodging thereof with the registrar of the court concerned. There is nothing in the judgment of Page J to indicate whether the Afrikaans indictment was withdrawn or was lodged with the registrar and, in the latter event, on what date it was lodged. These matters and, in general, the date of commencement of the proceedings, were and are questions for the trial court to decide. All that one can say at this stage is that unless a duly served indictment was lodged with the registrar before the 27th April, there would appear to be no basis on which it could be contended that on 27th April, 1994, the proceedings were "pending" in terms of section 241(8).[1] But it does not follow that, in the context of section 241(8), proceedings are pending as soon as the indictment is lodged. It may be that for the purposes of that section criminal proceedings are pending only on plea, or when the evidence has begun. (Compare section 344 (3) of the Criminal Procedure Act, 1977.) That is a question we do not now decide.

[53] At all events, at the trial before Page J the State *prima facie* established that in relation to at least two of the confessions tendered, the requirements of section 217(1) (b)(ii) had been satisfied. But before any further evidence was led, and after hearing argument, the learned judge decided to refer the constitutional issues to this Court. His reasoning, in essence,

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[1] In parenthesis, I point out that section 241(8) applies to civil as well as criminal proceedings. In Roman Dutch law there was some controversy whether civil proceedings were pending only upon *litis contestatio* or upon service of the summons. Modern authority favours the latter view. *Michaelson v Lowenstein* 1905 TS 3241 ; *Van As v Apollos and Others* 1993(1) SA 606(C), 609. See also *S v Saib 1*994(2) BCLR 48(D), 53; 1994(4) SA 554(D), 559 per Thirion J.

was that fairness to the accused required that they knew with certainty where the onus lay before they decided whether to give evidence in the *voir dire*. The parties in this case having made no agreement under section 101(6) of the Constitution, the learned judge considered that the issue might be decisive and held that it was in the interests of justice to refer the issue immediately to the Constitutional Court. He accordingly did so, and suspended the proceedings before him in terms of section 102(2) of the Constitution.

[54] In this case were it not for the issue under section 241(8), there would be no reason to doubt the competence of the referral of the issue of the validity of section 217(1)(b)(ii). That issue entails an inquiry into the constitutionality of a provision in an Act of Parliament. In terms of sub-sections (2) and (3) of section 98 of the Constitution, read with section 101(3) that enquiry is within the exclusive jurisdiction of the Constitutional Court. The course taken by Page J accords with the provisions of sub-sections (1) and (2) of section 102 of the Constitution which read as follows-

> (1) If, in any matter before a provincial or local division of the Supreme Court, there is an issue which may be decisive for the case, and which falls within the exclusive jurisdiction of the Constitutional Court in terms of section 98(2) and (3), the provincial or local division concerned shall, if it considers it to be in the interest of justice to do so, refer such matter to the Constitutional Court for its decision: Provided that, if it is necessary for evidence to be heard for the purposes of deciding such issue, the provincial or local division concerned shall hear such evidence and make a finding thereon, before referring the matter to the Constitutional Court.
>
> (2) If, in any matter before a local or provincial division, there is any issue other than an issue referred to the Constitutional Court in terms of subsection (1), the provincial or local division shall, if it refers the relevant issue to the Constitutional Court, suspend the proceedings before it, pending the decision of the Constitutional Court.

Page J found that the issue was one which might be decisive of the case and that, for the reasons which he gave, the referral to this Court was in the interests of justice. As to the proviso to section 102(1), there was no factual finding which was necessary for the determination of the validity of section 217(1)(b)(ii). As there were other issues remaining to be dealt with by the trial court the judge suspended the proceedings as required by sub-section (2).

[55] What is open to doubt is the basis on which the issue arising under section 241(8) was referred to this Court. This Court has jurisdiction under section 98(2) "over all matters relating to the interpretation... of the provisions of this Constitution".

But that, it seems to me, cannot be an exclusive jurisdiction. Although section 101(3) does not in terms give the Provincial and Local Divisions of the Supreme Court jurisdiction over matters relating to the interpretation of the Constitution, such jurisdiction must be implied. Otherwise they could not exercise their undoubted jurisdiction under paragraph (a) of section 101(3) to determine whether there has been a violation of a fundamental right entrenched in Chapter 3. It follows that Page J had jurisdiction to interpret section 241(8) of the Constitution and to determine its effect on the case before him. He ought therefore to have made the necessary findings of fact to enable him to decide whether or not the case was a "pending" one in terms of section 241(8). I may add that there have been numerous (and conflicting) decisions in Provincial and Local Divisions of the Supreme Court on the interpretation of section 241(8).

[56] What then of the competence of the learned judge's referral of that issue? I cannot read section 102 as entitling the judge to refer to this Court a constitutional issue which is within his own jurisdiction. In my opinion sub-section (2) of section 102 deals only with procedure on references under sub-section (1). Under sub-section (2) the words "any issue other than an issue referred to the Constitutional Court in terms of subsection (1)" include other constitutional issues as well as non-constitutional issues. But no power to refer those other constitutional issues is conferred on the judge. In contrast to sub-section (1), sub-section (2) contains no words granting such power. Nor does it require any finding of fact relevant to those other constitutional issues - a requirement which one would expect if the power to refer such issues were intended. A similar point arises in sub-section (3), which reads as follows -

> "(3) If, in any matter before a provincial or local division, there are both constitutional and other issues, the provincial or local division concerned shall, if it does not refer an issue to the Constitutional Court, hear the matter, make findings of fact which may be relevant to a constitutional issue within the exclusive jurisdiction of the Constitutional Court, and give a decision on such issues as are within its jurisdiction."

That sub-section is not well drafted, but it too requires findings of fact only in relation to issues within the exclusive jurisdiction of the Constitutional Court, and it contains no words which authorise any other reference. In spite of the lack of clarity in the sub-section the only reasonable construction, it seems to me, is that the words "if it does not refer an issue to the Constitutional Court" must be read as referring only to references under sub-section (1). Similarly, in sub-section (2) the words "the relevant issue" mean the issue referred under

sub-section (1).

[57] The only other provision authorising a reference by a Provincial or Local Division is sub-section (8) of section 102, which provides -

> "(8) If any division of the Supreme Court disposes of a matter in which a constitutional issue has been raised and such court is of the opinion that the constitutional issue is of such public importance that a ruling should be given thereon, it may, notwithstanding the fact that the matter has been disposed of, refer such issue to the Constitutional Court for a decision."

It may at some time have to be decided at what stage it can be said that a court has disposed of a matter under that sub-section. In this case the sub-section plainly has no application.

[58] The referral of the issue of the proper interpretation of section 241 (8) was therefore not competent.

[59] It is convenient at this point to say something about the practice of referrals to this Court under section 102(1) of the Constitution. The fact that an issue within the exclusive jurisdiction of this court arises in a Provincial or Local Division does not necessitate an immediate referral to this Court. Even if the issue appears to be a substantial one, the court hearing the case is required to refer it only

(i) if the issue is one which may be decisive for the case; and
(ii) if it considers it to be in the interest of justice to do so.

In section 103(4) of the Constitution, which deals with the referral to this Court of matters originating in inferior courts, the referring Provincial or Local Division must in addition be of the opinion "that there is a reasonable prospect that the relevant law or provision will be held to be invalid." In *S v W and Others* 1994(2) BCLR 135(C), 147G; *S v Williams and Five Similar Cases* 1994(4) SA 126(C), 139F, Farlam J said that although that was not an express requirement of section 102(1) it was implicit therein. I respectfully agree. See also *Matiso and Others v The Commanding Officer, Port Elizabeth Prison and Others* 1994(3) BCLR 80(SE), 89G - 90D; *Matiso and Others v The Commanding Officer, Port Elizabeth Prison and Another* 1994(4) SA 592(SE), 599G - 600E. The reasonable prospect of success is, of course, to be understood as a *sine qua non* of a referral, not as in itself a sufficient ground. It is not always in the interest of justice to make a reference as soon as the relevant issue has been raised. Where the case is not likely to be of long

duration it may be in the interests of justice to hear all the evidence or as much of it as possible before considering a referral. Interrupting and delaying a trial, and above all a criminal trial, is in itself undesirable, especially if it means that witnesses have to be brought back after a break of several months. Moreover, once the evidence in the case is heard it may turn out that the constitutional issue is not after all decisive. I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed. One may conceive of cases where an immediate reference under section 102(1) would be in the interests of justice - for example, a criminal trial likely to last many months, where a declaration by this Court of the invalidity of a statute would put an end to the whole prosecution. But those cases would be exceptional. One may compare the practice of the Supreme Court with regard to reviews of criminal trials. It is only in very special circumstances that it would entertain a review before verdict. See Hiemstra, *Suid-Afrikaanse Strafproses* (5de uitgawe), 764. In any event, the convenience of a rapid resort to this Court would not relieve the trial judge from making his own decision on a constitutional issue within his jurisdiction.

[60] I should make it clear that these remarks are in no way intended as a criticism of the decision of Page J to refer the issue on section 217(1)(b)(ii). At the stage when he did so this Court had not yet been convened, and no guidelines for referrals had been laid down. The issue was, moreover, one of great and pressing concern to all criminal courts, and it was right that it be resolved as soon as possible.

[61] It may be asked at this stage why it is necessary or competent for this Court to consider section 241(8) in this case. The reason is that if the proceedings before Page J were pending immediately before the 27th April 1994, and if that section means that the proceedings had to be completed in all respects in accordance with the law as it existed before that date, it would follow that the judge would have to deal with the case in accordance with the requirements of section 217(1)(b)(ii), notwithstanding the fact that this Court in the *Zuma* case declared that section to be invalid. In order to answer the question whether Page J is to apply the ruling in the *Zuma* case when the trial resumes, the question left open in the *Zuma* case has to be decided, namely, whether an order in terms of section 98(6) should encompass proceedings pending on the 27th April. To answer that question the meaning of section 241(8) has to be determined. Moreover, we know that there are other criminal

cases which may have been pending on the 27th April 1994, in which the same question may arise, although of course we have no way of knowing how many. We heard full argument on this issue and we are consequently able to deal with it, and it is appropriate that we should do so.

[62] There have been a number of competing interpretations of section 241(8) in Provincial and Local Divisions of the Supreme Court. I shall not cite all those decisions, still less attempt to analyse them. It will be sufficient to identify in summary form the differing interpretations placed on the sub-section.

a) Some judges have held that section 241 (8) is intended to do no more than preserve the territorial jurisdiction of the courts in relation to cases pending on 27th April 1994 and that the Constitution, including Chapter 3, must otherwise be applied fully to those cases. See e.g. the judgments of Froneman J in *Qozoleni v Minister of Law and Order and Another* 1994(1) BCLR 75(E); 1994(3) SA 625(E) and *Gardener v Whitaker* 1994(5) BCLR 19(E);

b) Other judges have held that section 241(8) preserves the existing law in pending cases only in matters of procedure. Fundamental rights of a substantive nature are thus to be applied in pending cases. See e.g. *S v W and Others supra*. In some cases it has been held that procedural rights which are fundamental are not necessarily excluded by section 241(8), but that where existing procedures have been followed in pending cases they are to remain undisturbed. See e.g. *Shabalala and Others v The Attorney-General of Transvaal and Others* 1994(6) BCLR 85(T); *Shabalala v Attorney-General, Transvaal, and Another* 1995(1) SA 608(T).

In all the above cases the judges have concluded that, given the fundamental concerns and values of the Constitution, it is unthinkable that a court should after 27th April 1994 pronounce any verdict or sentence which has the effect of violating a fundamental constitutional right of the person before the court.

c) The third line of decisions holds that section 241(8) excludes any application of the Constitution in cases which were pending at its commencement. See e.g. *Kalla and Another v The Master and Others* 1994(4) BCLR 79(T); 1995(1) SA 261(T).

[63] In interpreting section 241(8) I would accept that it would not be right to ignore what Froneman J called the "fundamental concerns" of the Constitution, (*Qozoleni's* case BCLR at 86A), or "the spirit and tenor of the Constitution" (*Shabalala's* case BCLR at 95F). A purposive construction is as appropriate here

as in other parts of the Constitution. Nonetheless, a purposive construction requires one to search for the specific purpose of section 241(8) within its context in the Constitution. Its immediate context is a section headed "Transitional arrangements : Judiciary", in a chapter (chapter 15) headed "General and Transitional Provisions".

[64] As stated in the preamble, the Constitution creates a new legal order in South Africa. The afterword recites *inter alia* that the Constitution is a bridge from a past characterised by injustice to a future founded on the recognition of human rights. But the Constitution cannot wipe out all traces of the past in one blow, and does not attempt to do so. It was necessary for the Constitution to consider how far the new legal order, especially the fundamental rights provisions of Chapter 3, should affect actions taken or acts performed under the old legal order before the Constitution came into force. This is a perennial legal problem, which arises whenever a new statute repeals an old one. Sometimes repealing statutes contain provisions which give a clear answer to the problem. All too often they do not, and canons of statutory interpretation have been developed over the years to assist in solving the problem. In general, our courts have held that in the absence of a discernible contrary intention, it is presumed that a new statute is not intended to have retroactive or retrospective effect. This is not the place for a detailed analysis of the presumption, but a reminder of its scope may help to explain the purpose of section 241(8).

[65] First, there is a strong presumption that new legislation is not intended to be retroactive. By retroactive legislation is meant legislation which invalidates what was previously valid, or *vice versa*, i.e. which affects transactions completed before the new statute came into operation. See *Van Lear v Van Lear* 1979(3) SA 1162(W). It is legislation which enacts that "as at a past date the law shall be taken to have been that which it was not". See *Shewan Tomes & Co. Ltd. v Commissioner of Customs and Excise* 1955(4) SA 305(A), 311H per Schreiner ACJ. There is also a presumption against reading legislation as being retrospective in the sense that, while it takes effect only from its date of commencement, it impairs existing rights and obligations, e.g. by invalidating current contracts or impairing existing property rights. See *Cape Town Municipality v F. Robb & Co. Ltd.* 1966(4) SA 345(C), 351 per Corbett J. The general rule therefore is that a statute is as far as possible to be construed as operating only on facts which come into existence after its passing.

[66] There is a different presumption where a new law effects changes in procedure. It is presumed that such a law will apply to every case subsequently tried "no matter when such case began or when the cause of action arose" - *Curtis v Johannesburg Municipality* 1906 TS 308, 312. It is, however, not always easy to decide whether a new statutory provision is purely procedural or whether it also affects substantive rights. Rather than categorising new provisions in this way, it has been suggested, one should simply ask whether or not they would affect vested rights if applied retrospectively. See *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553 (PC), 563; *Industrial Council for Furniture Manufacturing Industry, Natal v Minister of Manpower and Another* 1984(2) SA 238(D), 242.

[67] There is still another well-established rule of construction namely, that even if a new statute is intended to be retrospective in so far as it affects vested rights and obligations, it is nonetheless presumed not to affect matters which are the subject of pending legal proceedings. See *Bell v Voorsitter van die Rasklassifikasieraad en Andere* 1968(2) SA 678(A); *Bellairs v Hodnett and Another* 1978(1) SA 1109(A), 1148.

[68] Problems of retrospectivity may arise in relation to new Constitutions as they do in relation to other new statutes. They arose in relation to the introduction of the Canadian Charter of Rights. See *R v Antoine* (1983) 4 CRR 126. In the South African Constitution express provisions obviate at least some of the major problems of retrospectivity. Section 4(1) provides -

> "This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force or effect to the extent of the inconsistency."

Section 7(2), which is part of Chapter 3, provides -

> "This Chapter shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution."

These provisions mean that Chapter 3 *prima facie* has effect as from the commencement of the Constitution even if the result is to impair a vested right. In that sense it is retrospective.[2]

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[2] As Chapter 3 for the most part confers rights on individuals rather than removes them there will not be many instances where retrospectivity in

The importance of section 7(2) is that it enables any person to invoke the Constitution as a protection against any unconstitutional official action taken against him or her, after 27th April 1994, even if that action arises from that person's conduct before 27th April 1994. On the other hand it follows from section 7(2) that official acts completed before 27th April 1994 are not invalidated by anything in the Constitution.[3]

[69] It is against this background that the purpose of section 241(8) can be understood. The purposes, I suggest, were twofold. First, to ensure that Courts which had derived their power to hear cases from the old Constitution, could continue to hear them under the new Constitution. Here I am in agreement with Mahomed J, and broadly with the reasons which he has given for that conclusion. But that is not the only purpose of section 241(8). It is clear from the language used, that there was another purpose, and that was to ensure that there would be an orderly transition from the old to the new legal order, so as to avoid the dislocation which would be caused by introducing a radically different set of legal concepts in the middle of ongoing proceedings.

[70] There is no warrant for reading section 241(8) as merely preserving the territorial jurisdiction of the courts in pending matters. First, the sub-section states no such limitation. Second, sub-sections (1) and (10) of section 241, expressly preserve jurisdiction of existing Courts, in all proceedings. If section 241(8) merely preserved territorial jurisdiction in pending cases it would be entirely superfluous. The reliance which some judgments place on the proviso is in my opinion misconceived. The effect of a proviso is to except something from the preceding portion of the enactment which, but for the proviso, would be within it. It cannot be construed as if it were an enacting clause. *R v Dibdin* [1910] P 57, 125; *Mphosi v Central Board for Co-Operative Insurance Ltd.* 1974(4) SA 633(A), 645. "Pending proceedings" include an appeal from the original proceedings - *S v Thomas and Another* 1978(1) SA 329(A). The proviso to section 241(8) in my view does no more than ensure that, notwithstanding the main enactment, appeals may go

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the sense explained will arise. A theoretical example would be the invalidation of a statute which conferred rights on a section of the population on a discriminatory basis. This might destroy the vested rights of those previously favoured.

[3] For that reason it seems to have been unnecessary to invoke section 241(8) in *Kalla v Master of the Supreme Court, supra*: the case could have been decided in the same way be reference to section 7(2).

to appeal Courts other than those to which they would have gone under the old law.

[71] The words in section 241(8), "any court of law, including any tribunal or reviewing authority established by or under any law" are qualified by the words "exercising jurisdiction in accordance with the law then in force". They lend weight to the view that, in the general context of section 241, sub-section (8) is concerned with the jurisdiction of the Courts seized of pending proceedings. I emphasise "jurisdiction", because "jurisdiction" is not limited to "territorial jurisdiction". The term embraces territorial jurisdiction but in ordinary usage territorial limits are only a part of what is meant by a Court's jurisdiction. The accepted meaning of "jurisdiction" is -

> "a lawful power to decide something in a case, or to adjudicate upon a case".
>
> *Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in liquidation)* 1987(4) SA 883(A), 886D.

It is -

> " ... the power vested in a court by law to adjudicate upon, determine and dispose of a matter."
>
> *Ewing McDonald & Co Ltd v M & M Products Co* 1991(1) SA 252(A), 256G.

In *Garthwaite v Garthwaite* [1964] P 356, Diplock L.J. said at 387 -

> "In its narrow and strict sense, the "jurisdiction" of a validly constituted court connotes the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves of its process by reference 1) to the subject-matter of the issue or 2) to the persons between whom the issue is joined or 3) to the kind of relief sought, or to any combination of these factors. In its wider sense it embraces also the settled practice of the court as to the way in which it will exercise its power to hear and determine issues which fall within its "jurisdiction" (in the strict sense) ...."

[72] If the broad purpose of section 241(8) is, as stated by Mahomed J to be, "to ensure that the jurisdiction of Courts to deal with pending cases was not assailed because of the fact that the Constitution creates new Court structures with effect from the commencement of the Constitution", the drafters of the Constitution would have to address two matters. First, courts and tribunals would have to be empowered to continue and complete pending cases. Second, they would have to be told how

to deal with cases heard partly under one legal order and partly under another. They could have been told to deal with pending cases in the period after the new Constitution comes into force, in accordance with the provisions of that Constitution, or to deal with them as if the Constitution had not been passed. Rightly or wrongly the framers of the Constitution chose the latter option, and we are required to give effect to that choice.

[73] With all respect to the judges who have taken a different view, I find it difficult to see what other meaning can reasonably be given to the language used. Even if the language were to be read, as Mahomed J suggests it should be, as "a direction to proceed with pending cases as if the Constitution had not impacted on the authority of the pre-Constitution Court to continue to function as a Court ... [and] emphasizes ... that the relevant Court must exercise jurisdiction in accordance with the law then in force", the conclusion would not in my view be any different. The power of the Court in accordance with the law in force when it commenced the proceedings did not include the power to strike down an Act of Parliament. On the contrary, it was quite explicitly stated in section 34(3) of the Republic of South Africa Constitution, Act 110 of 1983 that no such power existed. The power to strike down such legislation comes from the 1993 Constitution. It is, subject to section 101(6), a power which can be exercised only by this Court, but a challenge to the validity of an Act of Parliament can be raised in proceedings before other Courts and Tribunals. It is only pursuant to powers vested in the courts by the 1993 Constitution that a challenge to the validity of section 217(1)(b)(ii) of the Criminal Procedure Act can be raised; but section 241(8) states in as many words that pending proceedings shall be dealt with as if that Constitution had not been passed. Consequently, even if section 241(8) is to be read as meaning that a court or tribunal before which proceedings were pending should exercise its "jurisdiction" "as if this Constitution had not been passed", the result would be the same. Its jurisdiction would not include the constitutional jurisdiction conferred on the Supreme Court under section 101(3), because such powers are derived from the new Constitution, and did not exist under the old one.

[74] Equally, I see no warrant for limiting the operation of section 241(8) to the preservation of existing court procedure. Again, there is no such limitation in the sub-section, and existing "court procedures" are expressly preserved by sub-section (10). Nor can I find in section 25 or any other section of the Constitution any meaningful distinction between procedure and substance. If the lawmakers had intended that those provisions of the Constitution which had a procedural character were not to

be applied in pending proceedings, whereas purely substantive provisions were to be applied it would not be easy to find less appropriate words than "... shall be dealt with as if this Constitution had not been passed".

[75] The words which I have just quoted from section 241(8) echo wording used for over 100 years by legislators wishing to make it clear that new statutes did not affect pending proceedings. Thus the Interpretation Act, 1957 (like the Interpretation Act, 1910 and the English Interpretation Act, 1889) provides in section 12(2)(e) that the repeal of law shall not affect (*inter alia*) any right or obligation accrued or incurred under the repealed law, and shall not affect any legal proceedings in respect of such right or obligation, and such legal proceedings may be continued "as if the pending law had not been passed." Section 344(3) of the Criminal Procedure Act, 1977 provides

> "(3) Notwithstanding the repeal of any law under subsection (1), criminal proceedings which have under such law at the date of commencement of this Act been commenced in any superior court, regional court or magistrate's court and in which evidence has at that date been led in respect of the relevant charge, shall, if such proceedings have at that date not been concluded, be continued and concluded under such law as if it had not been repealed."

Similar words appear in section 115 of the Magistrate's Courts Act 24 of 1944 (see *Janover v Registrar of Deeds* 1946 TPD 35) and in older statutes such as the Administration of Estates Act, 1913. See *George Municipality v Freysen NO* 1973(2) SA 295(C) 300. Such provisions have often been judicially applied. It has never been suggested that they relate only to territorial jurisdiction or procedure. See e.g. *S v Thomas supra*; *S v Swanepoel* 1979(1) SA 478(A).

[76] As far as I am aware the words "shall be dealt with", used in section 241(8), are not found in the statutes to which I have referred. In those the words commonly used are "continued" or "concluded", or both. In at least two cases in the Appellate Division judges have used the phrase "dealt with" as synonymous with "continued" and "concluded" as used in section 344(3) of the Criminal Procedure Act and section 12(2)(e) of the Interpretation Act. See *S v Thomas supra* at 334H; *Pinkey v Race Classification Board and Another* 1968(4) SA 628(A), 636C-D. This accords with the ordinary meaning of the words. "Dealt with" is not a term of art. The phrase is part of colloquial English usage. A judge, in ordinary parlance, deals with a case by conducting the hearing in accordance with the law of evidence, by finding the facts, applying the law and finally pronouncing the decision. More shortly, he exercises his jurisdiction in the general sense explained above. A judge

bound to deal with a case as if the Constitution had not been passed must exercise his jurisdiction as if the Constitution had not been passed. By contrast, a court does not "deal with" proceedings simply by retaining its territorial jurisdiction. There is no basis in law, language or logic for giving "dealt with" some different meaning in the context of section 241(8), even if a different meaning could be found.

[77] I cannot accept that the words "dealt with" are words of uncertain meaning. According to the Oxford English Dictionary the ordinary meaning of these words is "to act in regard to, to administer, handle, dispose in any way (of a thing)". In the context of section 241(8) these words quite clearly relate to the conduct of a "pending proceeding" in the period after the Constitution has come into force. There is nothing "tentative" or "uncertain" in the injunction that "pending proceedings shall be dealt with as if this Constitution had not been passed"; nor, in my view, can these words reasonably be understood as meaning that in the period after the 27th April 1994 courts and tribunals should deal with pending proceedings in terms of the law then in force. On the contrary, they have precisely the opposite meaning.

[78] There are limits to the principle that a Constitution should be construed generously so as to allow to all persons the full benefit of the rights conferred on them, and those limits are to be found in the language of the Constitution itself. Thus, in *Minister of Home Affairs (Bermuda) v Fisher and Another* [1980] AC 319 (PC) at 329E-F, Lord Wilberforce was at pains to point out that a constitution is a legal instrument, and that respect has to be paid to the language used. This was accepted in the unanimous judgment delivered by this Court in *S v Zuma (supra)* where it was said:

> "We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination."

The existence of such limits is also recognised by section 4(1) of the Constitution which provides that "...any law or act inconsistent with [the Constitution's] provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency." (my emphasis)

Section 241(8) of the Constitution provides expressly that pending cases shall be dealt with as if the Constitution had not been passed. When the language is clear it must be given effect, and this has been stressed in cases in several different jurisdictions. See for example: *S v Marwane* 1982(3) SA 717(A)

at 749D-G; *Bull v Minister of Home Affairs* 1986(3) SA 870(ZSC) at 881E-H; *Ex Parte Cabinet for the Interim Government of South West Africa: In re Advisory Opinion in terms of S 19(2) of Proc R101 of 1985 (RSA)* 1988(2) SA 832(SWA) at 853G; *Tam Hing Yee v Wu Tai Wai (1992)* LRC (Const.) 596 (Hong Kong) at 600; *Attorney-General v Moagi* 1982 (2) Botswana LR 124,184.

With all respect to the judges who have taken a different view I find it difficult to see what meaning other than that which I have suggested can reasonably be given to the language used.

[79] It follows that, although my reasoning is by no means identical, I agree with the conclusion of van Dijkhorst J in *Kalla and Others v The Master and Others supra*, BCLR at 88C, that section 241(8) excludes the application of the substantive provisions of the Constitution in pending cases. The courts in the conflicting lines of cases to which I have referred have objected that this interpretation would lead to anomalies and injustices. Thus in *S v W and Others supra* BCLR at 145H, Farlam J said that he was satisfied that the framers of the Constitution could not have intended that cruel, inhuman or degrading punishment could be imposed even in pending cases. In *Qozoleni v Minister of Law and Order and Another supra* BCLR at 86D, Froneman J asked whether the Constitution could countenance any discrimination based on race even in pending proceedings, and answered his own question in the negative. The example has been suggested of two accused on the same charge, with the indictment served on 26th April 1994 on the one and 27th April 1994 on the other. These apparent anomalies may arise in the limited and reducing number of cases, civil and criminal, which were pending on 27th April 1994. They are the inevitable result of a transitional provision such as section 241(8). Nor are they as serious as the examples given may suggest. If it be assumed that a Court in some "pending proceeding" may have felt compelled to pass a sentence of a type which this Court may subsequently hold to be cruel, inhuman or degrading, it certainly does not follow that such sentence will be carried out after such declaration has been made. The carrying out of the sentence would be an unconstitutional executive act which this Court would restrain under section 98(7) of the Constitution, and no court would knowingly impose a sentence which cannot lawfully be carried out. Issues arising out of racial or other discrimination in civil cases may involve questions of public policy which would depend, not on the enforcement of any Constitutional provision, but on public policy prevailing at the time the case is heard. See *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984(4) SA 874(A).

[80] In his judgment Mahomed J contends that if pending proceedings are to be dealt with literally "as if this Constitution had not been passed" a Supreme Court could not refer a matter to this Court in terms of section 102(1) because, by utilising the provisions of section 102(1) it would not in fact be dealing with the proceedings as if the Constitution had not been passed. In my view there is a twofold answer to this contention. In the first place the Supreme Court in referring the matter to this Court pursuant to the provisions of section 102(1) is not "dealing" with proceedings, it is seeking directions from the Constitutional Court as to how to deal with proceedings. In the second place, even if the contention were correct, this would not end the matter; for this Court could still be seized with the matter on appeal after the Supreme Court had construed the provisions of section 241(8), and deal with the matter in accordance therewith.

[81] It is in theory possible that as late as 26th April 1994, there could have been a prosecution pending for the cotravention of (for example) a racially discriminatory local authority by-law which had somehow survived the process of repeal of discriminatory laws. A conviction on such a charge after 27th April 1994, would indeed seem to be extraordinary. But it must not be forgotten that the courts are not the only organs of state bound to respect and enforce the Constitution. Legislative and executive organs of state at all levels are similarly bound - see: sections 4(2) and 7(1) of the Constitution. In the hypothetical case envisaged it would be open to Parliament or the appropriate Provincial legislature to repeal the offending by-law. And one would expect the executive in the person of the Attorney-General having jurisdiction, to withdraw such a prosecution.

[82] It should be borne in mind that we are not concerned here with the meaning of rights guaranteed under the Constitution, but with whether guaranteed rights can be claimed in pending proceedings; nor are we concerned with a provision drafted with "an eye to the future", requiring it to be interpreted then in the light of changed conditions. Section 241(8) is a transitional provision, intended to deal with a limited number of cases, covering a defined and comparatively short period of time. It is moreover a provision which has only limited and indirect application to the fundamental rights entrenched in Chapter 3 of the Constitution. Chapter 3 governs acts performed and decisions taken **after** the Constitution comes into force, and there will not ordinarily be such issues in litigation pending on the date the Constitution came into force.

[83] The tension between Chapter 3 and section 241(8) is likely to

arise only in respect of the fair trial requirements of section 25(3). There will be anomalies in the conduct of trials which flow from what I consider to be the clear meaning of section 241(8). But there will also be anomalies flowing from the other constructions that have been suggested. The "day before" and "day after" anomalies exist where judgement has been reserved in comparable cases and is given either immediately before or immediately after the 27th April; the outcome of cases in which convictions were correctly imposed before the 27th April on the basis of presumptions later to be declared "unconstitutional", could depend on whether appeals had or had not been noted, or on the dates when particular appeals were set down for hearing; proceedings could be disrupted because of the need on the 27th April for unrepresented accused in part-heard cases to exercise rights under section 25(3)(e); witnesses may have to be recalled to be cross-examined by the newly appointed counsel; prosecutions based on partially completed cases, involving "unconstitutional presumptions" may have to be re-opened to call evidence which had previously been considered to be unnecessary, and so on. The point is that there are anomalies on both sides, and even if we were to think that the wrong choice was made, or that on balance, there would be fewer or less serious anomalies if the framers of the Constitution had chosen differently, we would not be entitled to depart from the clear language of the section. Nor is it strange, as some judges have suggested, to find that this choice is set out in section 241(8) and not in Chapter 3. A transitional provision is precisely where one would expect such a choice to be recorded, because the intention is not to limit rights generally, but to limit their application only in respect of pending cases, affected by the transition.

[84] The reluctance of some judges to give literal effect in particular cases to the language of section 241(8) is no doubt understandable. But I believe that the anomalies which disturb them are the price which the lawmakers were prepared to pay for the benefit of orderly transition and for avoiding the disruption which would be caused by changing the applicable law in the middle of a case. In the same way existing laws, although they may be held in due course to be unconstitutional, *prima facie* continue to have effect until they are actually struck down - see sections 98(6) and 229 of the Constitution. The danger of regarding a text as necessarily having a single objective meaning has already been adverted to in the Zuma case. I am also fully aware that it is a Constitution and not an ordinary statute that we are expounding. One of the distinctions between them is that a constitution is drafted with an eye to the future. Another is that a constitutional bill of rights should as far as possible be read as protecting

individual rights, if necessary against the public interest. I thus agree with the approach to constitutional interpretation found in the judgment of the Supreme Court of Canada in *Hunter et al v Southam Inc.* (1984) 9 CRR 355, at 364-5, and find the narrow approach to the language of a constitution exemplified by *Government of the Republic of Bophuthatswana and Others v Segale* 1990(1) SA 434(B AD), especially at 448-9, unacceptable. Nonetheless, there are some provisions, even in a constitution, where the language used, read in its context, is too clear to be capable of sensible qualification. It is the duty of all courts, in terms of section 35, to promote the values which underlie a democratic society based on freedom and equality. In the long run, I respectfully suggest, those values are not promoted by doing violence to the language of the Constitution in order to remedy what may seem to be hard cases.

[85] This, I fear, over-long consideration of section 241(8) is motivated, if not excused, by the need to resolve the considerable conflicts of judicial opinion to which I have referred. The immediate result of it is that in my view the retrospectivity which we gave to our ruling in the *Zuma* case under section 98(6) must remain limited to cases in proceedings which began on or after 27th April 1994, i.e. which were not pending on that date. We cannot override section 241(8). Since this is a minority judgment nothing need be said about the form of order.

Chaskalson P, Ackermann J and Didcott J concur in the judgment of Kentridge AJ.

[86] **KRIEGLER J:** In another case argued contemporaneously with this one,[4] we held that section 217(1)(b)(ii) of the Criminal Procedure Act, 1977 is unconstitutional because it assails the right of an accused to a fair trial.[5] In this case the same question arose but judgment was held over because the case raises the further question whether an accused whose case was pending when the Constitution came into operation is entitled to the benefits it confers.

[87] The applicability of the Constitution to cases which were pending when it came into operation has been considered in

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[4] *S v Zuma and Others* 1995 (4) BCLR 401 (SA).

[5] The offending section casts the onus on an accused in certain circumstances to establish the involuntariness of an extra-curial confession. This was found to be an unwarranted infringement of the right to a fair trial guaranteed by section 25(3) of the Constitution.

numerous cases around the country.[6] It would hardly be an exaggeration to say that the cases produced as many answers as there were judgments. The present case runs true to form. There is manifestly a sharp division of opinion among the members of this Court. On the one hand Kentridge AJ, supported by three colleagues, has concluded that the benefits of chapter 3 do not accrue to an accused whose case was pending on 27 April 1995. On the other hand, my colleague Mahomed J, with the concurrence of a number of justices, has come to the opposite conclusion. Sachs J agrees with them, but for different reasons. Although I have come to the same conclusion as the latter group and subscribe to the order formulated by Mahomed J, my reasoning is somewhat different and ought to be recorded.

[88] If one asks the wrong question, one is likely to come up with the wrong answer. And to my mind, the question in this case is emphatically not: What is the effect of section 241(8) of the Constitution. The correct question is as I have formulated it in the opening paragraph of this judgment.

[89] There is universal consensus that the Constitution ushered in the most fundamental change in the history of our country. It made everything new. The country's national territory (section 1), its national symbols (section 2), its languages (section 3), and its citizenship (section 5) were created anew. The Constitution gave birth to a new legislature (chapter 4), a new executive (chapter 6), and a new judiciary (chapter 7). More significantly, in the present context, it created justiciable fundamental rights and freedoms (chapter 3). Above all, it established a constitutional democracy in which the Constitution itself was to be the supreme law of the land and would "bind all legislative, executive and judicial organs of state" (section 4). It was a fundamental metamorphosis.

[90] The aspect of that metamorphosis with which we are most directly concerned is the recognition of fundamental rights and freedoms in chapter 3. That chapter recognises for every person a comprehensive set of rights and freedoms enforceable in a court of law. It commences with section 7, which imperiously makes the chapter binding on "all legislative and executive organs of state" and applicable to "all law in force ... during the period of operation of this Constitution". In terms of section 251(1) of the Constitution that period of operation commenced on 27 April 1994. It must follow that on that day every person became

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[6] The law reports reflect no less than 18 cases reported up to March 1995. Several further cases did not make their way to the law reports. The gist of these cases is discussed by Kentridge AJ.

entitled to claim the rights and freedoms contained in chapter 3.

[91] But - say the proponents of the opposite point of view - that isn't so. The benefits so unequivocally recognized for all with effect from 27 April 1994 are to be withheld from a certain category. Those accused persons whose trials were pending when the Constitution came into operation, somehow and notwithstanding the unequivocal language of sections 4, 7 and 251(1), are not entitled to share in the bounty. If otherwise qualified, they became citizens of the new South Africa, owe allegiance to its new institutions, pay homage to its symbols and are eligible for office in the executive, legislative and judicial branches of the new state. Nevertheless, they are not entitled to the rights and freedoms conferred by chapter 3. That disentitlement is sought to be founded on the fact that they were accused persons whose cases were pending.

[92] Such a startling proposition surely calls for very convincing support indeed. But the sole justification is found in the vague wording of an obscure subsection of a prosaic transitional provision - namely section 241(8). Although that subsection has been quoted time without number, it is as well to quote it again.

> "All proceedings which immediately before the commencement of this Constitution were pending before any court of law, including any tribunal or reviewing authority established by or under law, exercising jurisdiction in accordance with the law then in force, shall be dealt with as if this Constitution has not been passed: Provided that if an appeal in such proceedings is noted or review proceedings with regard thereto are instituted after such commencement such proceedings shall be brought before the court having jurisdiction under this Constitution."

[93] It is also as well to contextualize that subsection. Section 241 is part and parcel of chapter 15, titled “General and Transitional Provisions”. Save for section 229, which provides for the continuation of existing laws until their repeal, and section 230 (read with schedule 7) which repeals the panoply of Bantustan legislation, the chapter has nothing to do with substantive law. Section 231 keeps the country's international treaties extant and sections 232 and 233 deal with interpretation and definitions. From there up to section 248 the chapter deals *seriatim* with the continuation of a variety of vital state functions. Section 234 provides for the role of members of certain legislatures to come to an end but for the staff of such bodies to remain in office. Then sections 235 to 238 make provision for the incumbents of executive authorities, the civil service, and the Public Service Commission to continue

functioning until replaced by their successors. Section 239 provides for continuity and order in the disposition of state assets and liabilities and section 240 for the continuation of the State Revenue Fund. Then follows section 241, which deals with transitional and continuity arrangements for the judiciary, and section 242 which makes provision for its subsequent rationalization. Sections 243 to 246 make transitional arrangements regarding the Ombudsman, the Auditor General, local government structures, and the pensions of political office bearers. The whole pattern of the chapter is manifestly to ensure orderly continuity of function and authority.

[94] That, then, is the light in which section 241 is to be read. Quite logically it commences in subsection (1) with continuity of the judiciary. This is done by the simple stratagem of deeming the existing courts to be the new courts constituted in terms of the Constitution.[7] It is followed by three provisos and two substantive subsections which were inserted later.[8] The amendments were aimed at the orderly winding down of appellate tribunals that had been created in the former TBVC territories. Subsection (2), linking up with subsection (1), then deems the erstwhile Supreme Court judges to have been appointed under the Constitution. We therefore have continuity of courts and of their judges. Subsection (3) then keeps all other judicial officers in their posts, subsection (4) does the same for attorneys-general, while subsections (5) and (6) maintain their salaries and pensions. Judges, magistrates and attorneys-general of the old regime having been kept in office, subsection (7) requires them to take a fresh oath of office. By-passing subsection (8) for the moment, we see that subsections (9) and (10) are also concerned with continuity. Subsection (9) allows pending legal proceedings against a government body to be continued against any successor while subsection (10) keeps in operation for the time being all pre-existing laws relating to the jurisdiction, procedures, powers, establishment and functioning of courts of law and judicial officers.

[95] Viewed in that matrix, subsection (8) of section 241, despite the equivocal nature of its wording, should hold no terrors. It

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[7] This was sensible because chapter 7, titled "The Judicial Authority and the Administration of Justice", commences with the following provision:

> "96.(1) The judicial authority of the Republic shall vest in the courts established by this Constitution and any other law."

[8] By section 15 of the Constitution of the Republic of South Africa Third Amendment Act, No. 13 of 1994.

has nothing to do with the substantive law to be applied by courts. It nowhere mentions law, substantive or otherwise. It talks of "proceedings", i.e. court cases, and seeks to organize their orderly and continued disposition. More specifically, it is concerned with proceedings which are "pending" when the Constitution comes into operation, i.e. when the old courts die and the new courts are born. With regard to such cases, part heard or still awaiting their initial hearing, the same question arises: Who deals with them now that the old courts have gone? All the subsection says is that, notwithstanding the judicial metamorphosis, all cases that were pending before the old courts are to be dealt with by those courts as if they had not been reborn. The subsection does not purport to relate to the law to be applied by any court, it merely designates the court which will deal with the case. The subsection is concerned with the administrative channelling, handling and hierarchical disposition of cases that were on the rolls of courts of the old South Africa. That is what the phrase "any court of law ... exercising jurisdiction in accordance with the law then in force" denotes. In other words, a proceeding "pending before any court" is to be "dealt with as if [the] Constitution had not been passed". In the context, I suggest, there can be little doubt that the subsection simply and only means that the tribunal having jurisdiction under the old order has to deal with a pending case. Completely logically, the proviso then says that an appeal or review from such new court (wearing its old robes) has to be brought to the new superior tribunal designated by the Constitution.

[96] There is no overlap between subsection (8) and any of the other subsections of section 241. Subsection (8) deals with pending cases only, says by whom they are to be heard and it alone deals with that topic. More importantly, though, there is no overlap between section 241(8) and any provision in chapters 2 or 3 of the Constitution. There is no tension between them. Sections 4, 7 and 251(1) confer rights on the individual and prescribe when they accrue. Section 241(8) merely prescribes which courts are to dispose of those cases that had not been concluded when the new Constitution came into operation.

[97] Even assuming that there may be some tension between sections 4, 7 and 251(1) on the one hand and section 241(8) on the other, the tension should be resolved in light of the qualitative distinction between them. They deal with clearly distinct matters of fundamental constitutionalism and recognition of rights. They operate at a wholly different level than does section 241(8). The "international culture of constitutional jurisprudence which has developed to give to constitutional

interpretation a purposive and generous focus",[9] is applicable to chapters 2 and 3. It has no place in the interpretation of section 241(8). The former are concerned with the broad brush-strokes of the constitutional canvas. Peer at them too closely and you lose focus, thus missing the picture. The latter has a narrow, technical and brief purpose and scope. To understand and correctly apply it require close reading, not a generous perspective.

[98] The ultimate conclusion to which I come is therefore, that no accused person whose case was pending on 27 April 1994 is precluded from sharing in the benefits bestowed by the new Constitution. Such an accused is entitled to claim any one or more of the rights conferred by chapter 3 and the presiding officer is obliged to entertain such claim. In particular the accused in such a case against whom a confession had already been admitted under section 217(1)(b)(ii) of Act 51 of 1971 is entitled to have its admissibility reconsidered without the application of that subsection by the court whether the decision to admit was made before or after 27 April 1995. In terms of section 98(6)(a) of the Constitution[10] an order invalidating an act of Parliament dating from the previous era does not automatically invalidate anything done under such old act before the declaration of invalidity. However this Court is empowered to order otherwise if it is "in the interests of justice and good government" to do so. In *S v Zuma and Others*,[11] we exercised that power and effectively banned the use of section 217(1)(b)(ii) of the Criminal Procedure Act, 1977 in all uncompleted cases which had commenced on or after 27 April 1994. In my view a corresponding order should be made extending the prohibition to all criminal trials, whenever they commenced. In effect, I therefore endorse the views expressed by Eloff JP in

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[9] If I may quote the vivid description of Mahomed J in paragraph 8 of his judgment.

[10] Subsection 98(6)(a) reads as follows:

> "(6) Unless the Constitutional Court in the interests of justice and good government orders otherwise, and save to the extent that it so orders, the declaration of invalidity of a law or a provision thereof-
>
> (a) existing at the commencement of this Constitution, shall not invalidate anything done or permitted in terms thereof before the coming into effect of such declaration of invalidity."

[11] *Supra* note 4.

Jurgens v Editor, Sunday Times Newspaper, and Another:[12]

> "... section 241(1) legitimates all courts of law existing at the time when the Constitution came into force. Section 241(10) provides that all measures which regulate the functions of courts of law shall continue to remain in force until amended or repealed. Neither of these subsections deal with the situation where proceedings have already commenced before a Court which has been legitimised and which is to continue to function in terms of existing legislative measures in terms of section 241(0). The purpose of the first part of section 241(8) is then to provide for the continuation of proceedings which were pending on 27 April 1994. The procedure then to be followed is that prescribed by laws in force up to 27 April 1994, even though the new Constitution may establish principles inconsistent with the old procedure.
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> "It is in my view significant that section 241 hardly deals with substantive law; procedure and jurisdictional matters, and the status and function of Judges and judicial officers are in general dealt with. In that setting section 241(8) has to be seen and interpreted."

I think the learned judge, in saying that the section "hardly" dealt with substantive law, was resorting to understatement.

[99] I have not dealt with the debate concerning interpretive presumptions regarding retroactivity and retrospectivity in the case of statutory amendments. To my mind the adoption of a Constitution which operates as a supreme law does not fall to be interpreted along such lines. It is not a case of one statute repealing, amending or replacing one or more others. What we are concerned with here is a supreme statute being superimposed on the whole of the existing legal landscape, bathing the whole of it in its beneficent light. In the true sense of the words, it is not retroactive nor retrospective. What it does mean, though, is that the moment when the judicial officer has to deal with a claim under chapter 3 he or she has to ask whether such right exists. Moreover, if the particular right or claim had already been disposed of in an interlocutory order made before the Constitution came into operation, such ruling would have to reconsidered thereafter. If, in the instant case, the prosecution had tendered the confessions and they had been admitted under the authority of section 217(1)(b)(ii) prior to 27 April 1994, the presiding judge would have had to reverse such ruling if a claim for such reversal were made after that date but prior to verdict.

[100] To sum up:

1. I agree with Kentridge AJ (paragraphs 49-58 of his

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[12] 1995 (1) BCLR 97 at 102H-103B (W).

judgment) that the referral in the instant case was not legally competent.

2. I also agree with his view (paragraphs 59-61 of his judgment) that the possible effect of section 241(8) of the Constitution is of such public importance that we ought to consider and determine the issue.

3. I disagree with the conclusion regarding the interpretation of section 241(8) reached by Kentridge AJ and agree with that of Mahomed and Sachs JJ, although for different reasons.

4. The essence of my deviation from the reasoning of Mahomed J is that I ascribe a more mundane function to section 241(8) than he does. I agree with him that the creation of the new courts, despite - and possibly to an extent because of - the Phoenix-like emergence of the old judiciary in new feathers, gave rise to the risk of a gap being perceived between the old and the new. However, as I see it, that risk is fully met by subsections (1) to (3) and (10) of section 241. Subsection (8) serves merely to designate the fora to deal with pending cases.

5. I agree with Sachs J that different parts of the Constitution need to be read with different spectacles. I do not agree with him, however, that section 241(8) is to be contrasted with or evaluated against chapter 3. On my interpretation they have entirely different fields of application. They are not in conflict; on the contrary, they supplement one another, each in its own field.

6. I share with Mahomed and Sachs JJ a profound disbelief that the framers of the Constitution could conceivably have purported to give, with one hand, the fundamental rights and freedoms to all, only, surreptitiously with the other, to withhold its benefits from the many thousands of persons whose criminal cases must have been pending on 27 April 1994.[13]

[101] I therefore agree with the order formulated by Mahomed J.

[102] **SACHS J:** I share with Mahomed J a disbelief that the framers of the Constitution intended a reading of section 241(8) which would produce the anomalous and unjust results to which he refers. I agree with his conclusion and with the order he proposes. I arrive there by a different route, however, and because the issue of how to interpret our Constitution is one of

[13] The various criminal courts in the country deal with more than 2,5 million cases each year. It can safely be postulated that the number of cases that were pending when the Constitution came into operation ran to tens of thousands.

general importance, I will set out my reasons in some detail.

[103] Almost all discussion on the subject has been dominated by the idea that the issue is how to construe section 241(8). In my view, this is an incorrect starting point which leads to a false journey. The real question is not what meaning to give to that provision on its own, but how to interpret it in relation to the enjoyment of Fundamental Rights as set out in Chapter 3. This means that not one but two sets of provisions must be interpreted, not consecutively and independently, but simultaneously and in terms of their inter-relationship.

[104] I have had the advantage of reading lucid judgments by Kentridge AJ and Mahomed J, each persuasively presented within its interpretive framework. The caveats that each introduces, result in outcomes that are not all that far apart. Unfortunately, I am unable to concur unreservedly in either judgment.

[105] My disagreement with Kentridge AJ's judgment is that even if it bases itself on the most natural and spontaneous reading of the section, it gives far too little weight to the overall design and purpose of the Constitution, producing results which the framers could never have intended. My difference with the judgment of Mahomed J, on the other hand, stems from the feeling that it unnecessarily strips section 241(8) of its more obvious meaning, when the overall intent of the framers, as manifested by the Constitution as a whole, can most satisfactorily be acknowledged by accepting the 'first sight' reading proposed by Kentridge AJ, but cutting back its full application in order to accommodate the equally clear and peremptory provisions of Chapter 3.

[106] My approach is accordingly similar in spirit and outcome to that of Mahomed J, but different in methodology. Instead of seeing Chapter 3 as a contextual aid to the interpretation of section 241(8), I regard it as an equal part of the text to be interpreted. In my view, the issue is how to reconcile the two sets of provisions when they collide with each other, not how to interpret each on its own.

[107] The cases come before us in terms of Chapter 3, not section 241(8). In practical terms, the issue is never how to construe section 241(8) as an independent clause, but how to apply it as a provision which qualifies another section of the Constitution. This means that the two sets of provisions must be read together as part of the total constitutional scheme, not separately as

autonomous, free standing-clauses.[14] If there is overlap and collision of material between the two provisions, the essential purposes of each must be discerned and weighed, so that an appropriate resolution based on balance between the two can be achieved. This involves a species of interactive proportionality. It moves the nature of the enquiry from the so-called plain meaning of words looked at on their own, or even in context, to the interactive purposes of different provisions, read together.[15]

[108] Discord and dissonance have their role to play in law as in music. To be justified, however, they should not be accidental, but intended, not unfortunate but purposeful. A textual construction which harmonizes different provisions within the overall design of the Constitution is generally to be preferred to one which, however coherent within its own terms, produces disharmony. There are indeed many provisions in the Constitution where it is clear that, for reasons of inclusivity, compromise and smooth transition, special arrangements were made and particular textures were introduced, not all of them obviously consistent with the broad general principles of the Constitution. These would include the so-called sunset clauses and provisions introduced on behalf of special interest groups. For the purposes of the present discussion, it is not necessary to identify them. In each case, the wording and the purpose go together: the provisions were inserted to deal with special cases and special situations, and to go back on them would be to undermine finely honed texts of exceptional import to particular sections of the community. In these cases, any departure from the text produced by reference to other sections of the Constitution, and any consequent strained interpretation or cutting down or extension of words, would require very strong and compelling contextual justification indeed.

[109] Section 241(8) is of a totally different order. Its function is to be functional. It is not there to protect any particular interest, or to develop any constitutional principle, or even nuance. It is as technical and dry a provision as one can get; far from being one of the letters of the constitutional alphabet, it is at most a dot on the 'i' or a cross on the 't'. The reason why so many judges have resorted to so many strained

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[14] See Cachalia et al Fundamental Rights in the New Constitution Juta 1994 Chapter 1 especially at p5.

[15] See Du Plessis and Corder, Understanding South Africa's Transitional Bill of Rights, Juta 1994 Chapter 3.

interpretations of its text[16] is that they simply cannot credit that such a puny provision should be able to annihilate the powerful provisions that make up the heart of the constitution. Section 241(8) David takes on Chapter 3 Goliath, but this time it is Goliath who is the righteous one. Incredulity, if constitutionally and not subjectively based, should be a strong factor in the process of interpretive choice. It credits the framers with firmness of purpose and frailty of means, rather than frailty of purpose and firmness of means.

[110] The rights enshrined in Chapter 3, on the other hand, are deeply entrenched, not only in relation to Parliament, but in respect of the rest of the Constitution. In my view, the strength of the Chapter 3 rights and the intensity of the values they promote are central to the whole constitutional scheme, and are fundamental to our role as defenders of the constitution. They link up directly with the oath we recently took to 'uphold and protect the Constitution of the Republic and the fundamental rights entrenched therein and in so doing administer justice to all persons alike' [Schedule 3]. Only the most compelling language would justify a departure from such a clear responsibility. The meaning of these words could not be plainer. Even on the literalist extreme of the literalist/purposive continuum, one is bound to ask what happens when two sets of plain meaning come into conflict with each other, that of Chapter 3 on the one hand, and that of section 241(8), on the other?

[111] The introduction of fundamental rights and constitutionalism in South Africa represented more than merely entrenching and extending existing common law rights, such as might happen if Britain adopted a Bill of Rights. The Constitution introduces democracy and equality for the first time in South Africa. It acknowledges a past of intense suffering and injustice, and promises a future of reconciliation and reconstruction. It embodies compromise in the form a Government of National Unity, and orderly reconstruction of the constitutional order in terms of the two-phase process of constitution-making which it provides for. It is a momentous document, intensely value-laden. To treat it with the dispassionate attention one might give to a tax law would be to violate its spirit as set out in unmistakably plain language. It would be as repugnant to the spirit, design and purpose of the Constitution as a purely technical, positivist and value-free approach to the post-Nazi

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[16] The different 'plain meanings' are summarised in Kentridge AJ's judgment.

Constitution in Germany would have been.[17]

[112] The Preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretive value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicate its fundamental purposes.[18] (See too the concluding passages)[19] This is not a case of making the Constitution mean what we like,[20] but of making it mean what the framers wanted it to mean; we gather their intention not from our subjective wishes, but from looking at the document as a whole.[21]

[113] One way of dealing with the two sets of mutually contradictory provisions would be to apply a variant of the presumption to the effect that general provisions do not trump, override or derogate from specific ones. [*Generalia specialibus non derogant* - general provisions do not derogate from special provisions]. This is normally applied when a new statute containing general words is applied to an old statute with specific provisions that are not expressly repealed.[22] In the leading English case of *The Vera Cruz* Lord Selborne said:

> "Now if anything is certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so."[23]

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17 Davis, Chaskalson and de Waal in Rights and Constitutionalism ed van Wyk, Dugard, de Villiers and Davis, Juta 1994 at p85.

18 c/f Manfred Nowak, U.N. Covenant on Civil and Political Rights - CCPR Commentary, Engel Verlag, Kehl 1993, intro XXII p2.

19 The last unnumbered passages of the Constitution, specifically given full constitutional weight [see Section 232(4)]. Variously referred to as: Postcript, Afterword, Afteramble, Postamble and Epilogue.

20 See the cautionary remarks of Kentridge AJ in *S v Zuma and Others* BCLR 4041 (SA)

21 This is the approach argued for in all the many commentaries on the new Constitution. It is not necessary to cite them all.

22 See Cross, Statutory Interpretation, Butterworths 1987 2nd ed p77-8.

23 (1884) 10 App cas 59 at 68.

[114] A later provision in the same document is not the same as a later Act in separate legislative form, yet the principle of the relative intensity of general and of special words could well be relevant, with preference being given to the specific ones. The technical difficulty would be to decide which was general and which specific: Chapter 3 has a specific ambit but is of general application; section 241(8) is said to have unlimited ambit, but has only specific application. Perhaps the answer would be to allow what was specific from each to survive, namely, the specific ambit of Chapter 3 to co-exist with the specific application of section 241(8). Although I would regard the result as satisfactory, the means are artificial and if employed in other cases could lead to serious constitutional deformation.

[115] In any event, a question mark has to be placed over the usefulness of common law presumptions in interpreting the Constitution. As Wilson J pointed out in a notable dissent,[24] 'such presumptions can be inconsistent with the purposive approach to Charter interpretation which focuses on the broad purposes for which the rights were designed and not on mechanical rules which have traditionally been employed in interpreting detailed provisions of ordinary statutes in order to discern legislative intent'. Sir Rupert Cross suggests that even in relation to ordinary statutes, the increasing use of a purposive approach makes the role of presumptions 'necessarily less important than in the days of more literal interpretation'.[25]

[116] The preferred approach, as I have indicated, is not to search for what is general and what is specific, but rather to seek out the essential purposes and interest to be served by the two competing sets of provisions, and then, using a species of proportionality, balance them against each other. The objective is to achieve appropriate weight for each and preserve as much as possible of both. To extend the analogy, there are no trumps, but there are cards of higher and lower value.

[117] Another way of dealing with the tension between Chapter 3 and section 241(8) would be to regard Chapter 3 as part of the context in which section 241(8) is to be construed, and, applying a purposive approach to interpretation, cut back the wide meaning of the section so as to avoid anomalies and

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[24] *Thomson Newspapers v Canada* 67 DLR (4th) 161 at p192.

[25] At p189-90.

incongruities which the framers could never have intended. A well-known South African example of where 'the true intention' of the legislature, as determined by the context, was used to cut down the wide language of a provision is *R v Venter*.[26] The text under consideration in that case provided that *'any person entering [the Transvaal] shall be guilty of an offence ..... if he has been convicted elsewhere .... of .... theft'.* The court held that the words 'any person' could not be given their ordinary full meaning, since this would result in Transvaal residents returning to the colony being guilty of an offence, when the context of the statute made it clear that the mischief aimed at was the influx of criminals from abroad. Innes CJ said that *'the court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect to the true intention of the legislature'*.[27] Both Innes CJ and Solomon J explain that their decision in that particular case to depart from the plain meaning of the statute is not based on absurdity but on identification of the mischief aimed at, and the need to avoid repugnancy to the intention of the legislature.

[118] It is true that, as Dr L.C. Steyn points out[28] the *Venter* principle was subsequently watered down by most South African judges by restricting its operation to what was called a small class of extreme cases. Yet, as Dr Steyn observes, the judgments were not all one way, and the Roman Dutch Authorities strongly supported the approach adopted in *Venter* (he quotes Donellus as saying that *" Die wil behoort nie die woorde te dien nie, maar die woorde die wil. By die sake, gevalle, tye en persone wat nie deur die bedoeling van die wet gedek word nie, hou die wet ook op, en daar en tot die mate maak die woorde geen reg uit nie, hoe seer ook die algemene woorde hulle almal omvat"*).[29]

[119] The issue now is not whether the *Venter* principle should be more widely applied in relation to the interpretation of statutes, but whether the approach it adopts should be given appropriate scope in relation to the construction of the Constitution. In

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[26] 1907 TS 910.

[27] At p915.

[28] Die Uitleg van Wette, Chapter 11, 5th Edition p22 to 55. The whole chapter is devoted to 'afwyking van letterlike uitleg'.

[29] At p25. See too p55.

my view, it should. By emphasising the way in which context can modify the plain meaning of words, it conforms to overwhelming international practice.[30]

[120] It also corresponds to what academic commentators in South Africa have long been arguing for, as part of their general critique of legal positivism.[31]

[121] Finally, it would contradict as a premature lamentation, the prediction of commentators on the new Constitution that South African Courts are likely to continue to manifest 'an almost slavish adherence to Anglocentric legal traditions and concepts'.[32]

[122] Whatever Anglocentric legal tradition might be, contemporary Anglo-centrism would in fact support rather than undermine a context-based, purposive approach. Membership of the European Union has had its effect on English judges. Lord Denning explained the approach of European judges in the following terms:

> "[They] adopt a method which they call in English by strange words - at any rate they were strange to me - the 'schematic and teleological'

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[30] Summaries of the approach to interpretation in Canada, Germany and India are given in the chapter by Davis, Chaskalson and de Waal in Rights and Constitutionalism, ed van Wyk, Dugard, de Villiers and Davis, Juta 1994; for the approach generally in Europe, see Lord Denning's summary set out below; for interpretation of treaties, see Art. 31 of the Vienna Convention on the Law of Treaties and commentary by Nowak op cit.

[31] See, generally, Devenish, Interpretation of Statutes, Juta 1993, where the courts are urged to adopt a value-coherent theory of interpretation involving interpretation that is not merely technical, but rational and just - Professor Devenish informs us that the oath we recently swore can be construed as 'a cogent legislative injunction for a teleological methodology'; and also Mureinik (1986) 103 SALJ 615. Special attention should be paid to the pioneering, thoughtful and well-researched studies by DV Cowen published in 1976 TSAR 131 and 1980 (43) THRHR 374], and the path-breaking critiques by Professor Dugard in Human Rights and the South African Legal Order, Princeton University 1973 p369 and 381.

[32] Davis et al op cit p11; see too du Plessis and Corder, Understanding South Africa's Transitional Bill of Rights 1994 p65 - they criticise the fact that language is elevated to the foremost structural element of a legislative text and other elements are reckoned with only when language fails; Cachalia et al, Fundamental Rights in the New Constitution 1994 p5, where it is emphasized that a constitution cannot be read clause by clause, nor can any clause be interpreted without an understanding of the framework of the instrument. Their main point is the need to distinguish between grammatical exegesis and constitutional analysis.

> method of interpretation. It is not really so alarming as it sounds. All it means is that the judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose which lies behind it. When they come upon a situation which is to their minds within the spirit - but not the letter - of the legislation, they solve the problem by looking at the design and purpose of the legislature - at the effect it was sought to achieve. They then interpret the legislation so as to produce the desired effect. This means they fill in gaps, quite unashamedly, without hesitation. They ask simply: what is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation. They lay down the law accordingly."[33]

[123] Cross quotes Lord Wilberforce as denying 'the tired old myth' that English judges are more literalist and narrow than continental courts, and goes on to say that at least nowadays, judges in England adopt a purposive approach to statutory interpretation, rather than a narrow literal one.[34] "Of course", the book observes "a literal approach need not be a particularly narrow one - an unrestrictive construction of general words may be excessively literal and insufficiently purposive, but the usual charge under this head is one of narrow literalism".

[124] The general approach adopted by Cross is to urge the judges to function in an unapologetically purposive fashion and not be afraid to acknowledge that they can and do 'rectify' the text when the words used in a particular formulation defeat or go against the general purpose of the statute. He argues strongly in favour of a contextual approach and quotes with approval the observation by Viscount Simonds that " .... words, and particularly general words, cannot be read in isolation; their colour and content are derived from their context".[35]

[125] A purposive and mischief-orientated reading as against a purely literal one, always involves a degree of strain on the language. In the present case, the strain comes not so much from a counter-literal attempt to deal with inherent ambiguity of words on their own, or from the need to cut back the meaning of open-ended words, but from the tension of counter-posing the broad words of limited application in section 241(8) with the narrower words of wide application in Chapter 3. More concretely, it is

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[33] James Buchanan & co Ltd v Babco Forwarding & Shipping (UK) Ltd (1977) 2 WLR 107 at 112; c/f the comment by F.A.R. Bennion, Statutory Interpretation 2nd ed, Butterworths, London 1984 p659 ff.

[34] Rupert Cross, op cit p189-90.

[35] *A-G v Prince Ernest Augustus of Hanover* [1957] AC 436 AT 461.

established by the need to weigh the interest and purpose of section 241(8) read on its own, as against the intent and purpose of Chapter 3. I accordingly do not apply the *Venter* principle as such, but rather what I consider to be the modern and appropriate judicial technique of proportionality.

[126] I realise that the approach I am suggesting is relatively new in South Africa, and involves a utilization of proportionality that is a little different from its normal employment in other countries. Yet I find it particularly helpful in dealing with cases such as the present.

[127] We are a new court, established in a new way, to deal with a new Constitution. We should not rush to lay down sweeping and inflexible rules governing our mode of analysis. We need to develop an appropriately South African way of dealing with our Constitution, one that starts with the Constitution itself, acknowledges the way it came into being, its language, spirit, style and inner logic, the interests it protects and the painful experiences it guards against, its place in the evolution of our country, our society and our legal system, and its existence as part of a global development of constitutionalism and human rights.

[128] It is a matter of public record that the approach of acknowledging problems and seeking consensual solutions based on a fair balance of interests, played a major role in the elaboration of the text of the Constitution; there seems to me no objection in principle to applying this approach to its intra-textual interpretation as well. Although the two endeavours are quite different in nature, both are based on the notion of using a balanced approach to deal with competing interests, so that there are no outright winners and losers.[36]

[129] I might add that I regard the question of interpretation to be one to which there can never be an absolute and definitive answer and that, in particular, the search of where to locate ourselves on the literal/purposive continuum or how to balance out competing provisions, will always take the form of a principled judicial dialogue, in the first place between members of this court, then between our court and other courts, the legal profession, law schools, Parliament, and, indirectly, with the public at large.

[130] The objective of my approach in the present case is to preserve the essential functional core of section 241(8), while causing

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[36] c/f Dugard op cit p381.

the minimum disturbance to the fundamental rights entrenched in Chapter 3. In other words, instead of mechanically applying section 241(8) and then lamenting, ignoring or minimizing the injustices which follow, the court gives effect to the gravamen of the section, but construes it in such a way as best to harmonize with Chapter 3 and so avoid needless incongruity and eliminate unnecessary postponement of enjoyment of fundamental rights.

[131] From its wording and in the context of transitional arrangements, section 241(8) makes eminent sense as a stop-gap measure designed to prevent undue uncertainty about the continuity of ongoing court business. It simultaneously serves to establish the legitimacy of the judicial order and to deal with cases that have already started in a manner which minimises disruption. It also functions to remove unfair prejudice in relation to people who had already instituted proceedings to vindicate their rights under the law as it stood. It obviates the necessity of having to start trials all over again from the beginning, insofar as the courts will continue to have jurisdiction in each case. It means not only that what has already transpired need not be repeated, but that the validity of what was done before 27 April 1994 will be judged by the pre-April 27 law.

[132] These are worthwhile and uncontroversial objectives totally consistent with the goal set out in the Preamble to provide for the restructuring and continued governance of South Africa. Furthermore, the provision would, in my view, confirm that proceedings already initiated before April 27 to secure then-existing rights, would not be nullified. None of the above is problematic - in simple lay language, what was, was. (In this respect I agree fully with both Kentridge AJ and Mahomed J on the question of the non-retroactivity of Chapter 3.)

[133] A straightforward reading of the section, accordingly, convinces me that the basic objective of the framers of the Constitution was to provide jurisdictional continuity and prevent operational chaos. In order to do so, they employed, with minor modifications, a well-worn formula used extensively in statutes that gave new rights and imposed new liabilities. The use of an off-the-shelf formula strengthens my view that the matter was not specifically adverted to with full awareness of and intention to achieve the drastic and incongruous results which will be referred to below. Rather, as far as court business was concerned, the objective was a functional one and a functional clause was introduced to achieve it. The reference to pending proceedings should be interpreted in a functional way, in the light of, and not in opposition to Chapter 3.

[134] There is nothing stated expressly or necessarily implied in the

text, save the open-endedness of the language used, to indicate that the framers intended that this provision should lead to:

a denial of fundamental rights after April 27;

dislocation between the judicial power [to impose certain punishments] and the executive power [to carry them out];

making the fundamental rights of accused persons dependent on fortuitous factors of no constitutional merit in themselves, relating to when the trial became a pending one; and

requiring courts to engage in trivial, time-consuming and at times elusive enquiries into such fortuitous factors before deciding on whether to acknowledge fundamental rights or not in the particular case.

[135] On the interpretation which I propose, none of these problems arise and none of these time-wasting enquiries should be necessary. That is not merely a consequence of the purposive and proportionate interpretation but an element of it.

[136] Even if the cases are relatively few, that is, they only potentially affect some tens of thousands of people, and in practice only relate to a few dozen people who have actually raised constitutional points, the impact can be quite severe. It could affect whether or not to impose the death sentence, corporal punishment and imprisonment for civil debt. It could involve a court convicting someone even though it had a reasonable doubt as to his or her guilt, and causing substantial injustice by denying counsel to an indigent person.

[137] Mahomed J has dealt trenchantly with these incongruities and injustices. I merely add that these are not hypothetical cases conjured up for the purposes of a classroom debate or a late night television programme. Each and every one of the above issues has come before this court. In each case we have been haunted - unnecessarily on my version - by section 241(8). In each case, the rights of an accused person in a profound way stood to be affected. In my view, the potential damage goes further. The narrow literal view [with its broad implications] of section 241(8) that divines its purpose from its words alone and effectively excludes the rest of the Constitution, underplays the symbolical importance that a decisive break with the past has for millions of people, and flattens the resonance for the public at large of the promise implicit in and the hope inspired by Chapter 3.

Conclusion

[138] There are circumstances of transition where a certain measure of incongruity and even injustice is inevitable. In the present case, however, the incongruity flows not from the nature of the process itself, as contemplated by the framers, but from the mode of interpretation, as adopted by sections of the judiciary.

[139] If one applies a strict literal test of section 241(8) on its own, and if one believes as Lord Halsbury did a century ago, that the lawmaker is an ideal person who never makes a mistake,[37] then one might have no option but to accept that the framers actually intended the above consequences, in the sense of deliberately casting the linguistic net as wide as possible so as to cover all these situations.

[140] Even accepting the less idealized vision which I am sure the framers of today would have of themselves, there could, of course, be circumstances where the only correct interpretation would be that section 241(8) must be taken to override Chapter 3. These circumstances would include the situation where it is clear from the language and the context that the framers consciously adverted to and accepted such a necessity. If this drastic consequence was manifestly the inevitable price of avoiding judicial disruption, then I could accept that the framers contemplated it, made their calculation and, if the expression is not too undignified, bit the constitutional bullet.

[141] Yet it seems to me that there is no intrinsic reason why the functional objectives of avoiding unnecessary disruption to court proceedings cannot be harmonized with the fundamental rights of Chapter 3 and with the protective jurisdiction given to this court in Chapter 7. Put another way, there is no reason why the mischief of disruption to the administration of justice should not be countered without producing the counter-mischief of nullification of the principles that lie at the heart of the constitution.

[142] In reality, the language of section 241(8) is open-ended rather than compelling on this score. If the framers had intended a Constitution which in effect bit off its own leg, they would have developed a text that left no doubt of such a drastic intention.

[143] The issue in the present case cannot be reduced to one of deciding which interpretation gives rise to the greater or lesser number of anomalies. Rather, we must discern which

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[37] *Income Tax Special Purposes Commissioner v Pemsel* (1891) AC 531 at 549

produces anomalies most at variance with the character and design of the Constitution. In this respect, functional difficulties will count for far less than what I might call 'fundamental rights' anomalies. Practical problems can always be dealt with in a practical way. Rights are of a different order, and it is our duty to uphold them wherever possible.

[144] The approach I adopt therefore purposefully applies a restrictive interpretation to the further reaches of section 241(8) so as to: balance it against the specific rights guaranteed in Chapter 3; avoid incongruous results to which the framers had not adverted and which they could not reasonably be thought to have intended; obviate consequences that are not necessary for the achievement of the objective the provision was intended to serve; and express rather than go against the intent of the Constitution looked at as a whole. In relation to Chapter 3, my interpretation also involves a limitation, namely, to its reach in time, in the sense that it is not applied retrospectively to undermine the validity of proceedings up to 27 April 1994, or to negate rights which had already accrued at that date.

[145] More specifically, I find that a proper interpretation of section 241(8) in its constitutional context requires that the phrase 'shall be dealt with' must be construed as if it stated 'subject to the provisions of Chapter 3' and not as if it stated 'notwithstanding the provisions of Chapter 3'.

[146] In this way, the two sets of provisions are harmonized, and, if I might put it that way, David and Goliath refrain from mortal strife.

SACHS J

CASE NO	:	CCT/25/94
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