SACHS J ABRIDGED JUDGMENT (CONCURRING)

S v Mhlungu and Others

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 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. 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.

[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 interpretations of its text 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 Constitution in Germany would have been.

[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. (See too the concluding passages). This is not a case of making the Constitution mean what we like, 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.

[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. 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."

[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, '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'.

[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 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*. 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'.* 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 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"*).

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

[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.

[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'.

[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' 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."

[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. "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".

[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 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.

[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 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, 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 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.