CRI/T/111/99

IN THE HIGH COURT OF LESOTHO

In the matter between

Rex vs MASUPHA EPHRAIM SOLE

For the Director of Public Prosecutions:	Mr G. H. Penzhorn, S.C., Mr H.H.T. Woker.
For the Accused:	Mr E. H. Phoofolo.

Before the Hon. Mr Acting Justice B. P. Cullinan on 24th and 25th September, 5th October and 20th December, 2001.

ORDER

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(38) *De Roussy v Nesbitt* (1920) 53 DLR, 514;

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(40) *Letsie & Others v R* 1995 - 1996 LLR -LB 28;

(41) *Dawoodally v Gora* (1924) (2) PH F11 (N);

(42) *R v Albutt and Screen* (1911) 6 Cr App R 55, CCA;

(43) *Pepper v Hart* [1992] 3 WLR 1032, HL;

(44) *Fothergill v Monarch Airlines* [1981] AC 251; HL;

(45) *Black - Clawson International Limited v Papierwerke Waldhof - Aschaffenburg* AG [1975] AC 591, HL;

(46) *Liyanage v R* [1966] 1 All ER 650; [1966] 2 WLR 682; (1967) 1 AC 259, PC;

(47) *Cummings v State of Missouri* (1866) 4 Wall 277;

(48) *Kariapper v Wijesinha and Another* [1967] 3 All ER 485, PC;

(49) *Swissbourgh Diamond Mind (Pty) Ltd and Five Others v The Military Council of Lesotho and Eight Others* 1991 - 1996 (2) LLR 1481

(50) *Calder v Bull* (1789) 3 Dallas USSC 386;

(51) *S v Zuma and Others* 1995 (1) SACR 568 (CC);

(52) *S v Van Der Sandt* 1997 (2) SACR 116, WLD.

THE LEGISLATION

The accused challenges the application of amending legislation. His challenge is two-fold: either the legislation has no application to this trial, or alternatively it is in any event, where he is concerned, unconstitutional. The amending legislation is contained in the Criminal Procedure and Evidence (Amendment) Act 2001 (No 3 of 2001) which amended the Criminal Procedure and Evidence Act, 1981 ("the Code") by repealing and replacing sections 245 to 248 inclusive of the Code. On the 5th of October, 2001, I ruled that the amending legislation was applicable to this trial, inherently holding that it was not unconstitutional: I did so for reasons which now follow. In order to appreciate the submissions of both parties in the matter, it proves necessary to first set out the provisions of sections 245 to 248 before amendment:

"SPECIAL PROVISIONS AS TO BANKERS' BOOK [S]

245 The entries in ledgers, day-books, cash-books and other account books of any bank shall be admissible as prima facie evidence of the matters, transaction[s] and accounts recorded therein, on proof being given by the affidavit in writing of a director, manager or an officer of that bank or by other evidence-

(a) that the ledgers, day-books, cash-books or other account books-

(i) are or have been the ordinary books of that bank;

(ii) are in or come immediately from the custody or control of that bank; and

(b) the entries have been made in the usual and ordinary course of business.

246 (1) Copies of all entries in any ledgers, day-books, cash-books or other account books used by any bank may be proved in any criminal proceedings as evidence of any such entries without production of the originals by means of the affidavit of a person who has examined them, stating the fact of the examination and that the copies sought to be put in evidence are correct except that -

(a) no ledger, day-book, cash-book or other account book of any such bank and no copies of entries therein contained, shall be

adduced or received in evidence under the Act, unless 10 days' notice in writing or such other notice as may [be] ordered by the court or a magistrate holding [a] preparatory examination, containing a copy of the entries proposed to be adduced, and stating the intention to adduce the same in evidence has been given by the party proposing to adduce the same in evidence to the other party; and

(b) the other party is at liberty to inspect the original entries and the accounts of which such entries form a part.

(2) On the application of any party who has received notice pursuant to sub-section (1) the court or a magistrate holding a preparatory examination may order that such party be at liberty to inspect and take copies of any entry in the ledgers, day-books, cash-books or other account books of any bank relating to the matters in question in the criminal proceedings, and such order may be made by the court or magistrate in its or his discretion, either with or without summoning before it or him such bank or other party, and shall be intimated to such bank at least 3 days before the copies are required.

(3) On the application of any party who has received notice the court or a magistrate holding a preparatory examination may order that the entries and copies mentioned in the notice shall not be admissible as evidence of the matters, transactions and documents recorded in the ledgers, day-books, cash-books and other account books.

247 (1) Subject to sub-section (2) no bank shall be compelled to produce the ledgers, day-books, cash-books or other account books, of any criminal proceedings unless the court or the magistrate holding the preparatory examination specially orders that the ledgers, day-books, cash-books or other account books shall be produced.

(2) The police officer of the rank of lieutenant or above may demand the production of bank ledgers, day-books, cash-books or other account books notwithstanding that there are no criminal proceedings pending.

248 Sections 245 to 247 shall not apply to any criminal proceedings to which any bank, whose ledgers, day-books, cash-books or other account books are required to be produced in evidence, is a party."

That was the state of the law when the accused was first charged before the

Subordinate Court on 28th July, 1999. It remained so on 3rd December, 1999, when he was first indicted in the High Court, that is, with eighteen other accused. There were a number of ancillary applications; the Court made some orders for separation of trials. Ultimately the Crown preferred another indictment on the 1st of June 2001, in which it charged only the present accused. The accused pleaded not guilty to all counts on that indictment on the 11th of June, 2001.

Meanwhile the amending Act took effect on 8th March, 2001. The amended sections are based upon and are almost identical with the provisions of sections 236 and 236 A of the Criminal Procedure Act, 1977 of the Republic of South Africa, which provisions were introduced in 1993. I set out hereunder the amended sections 245 to 248:

"SPECIAL PROVISIONS AS TO BANKERS' RECORDS

Proof of entries in accounting records and documentation of banks in Lesotho

"245

(1) In this section -
"document" includes a recording or transcribed computer print-out produced by a mechanical or electronic device and any device by means of which information is recorded or stored; and

"entry" includes any notation in the accounting records of a bank by any means whatsoever.

(2) The entries in the accounting records of a bank in Lesotho, and any document in the possession of the bank which refers to the [said] entries or to any business transaction of that bank, shall be *prima facie* proof at criminal proceedings of the matters, transactions and accounts recorded in the [said] accounting records or document upon the mere production, at the proceedings, of a document purporting to be an affidavit made by any person who in that affidavit alleges-
(a) that he is in the service of the bank in question;
(b) that the [said] accounting records or document [is] or has been the ordinary records or document of the bank;
(c) that the [said] entries have been made in the usual and ordinary course of the

business of the bank or the [said] document has been compiled, printed or obtained in the usual and ordinary bank or the said document has been compiled, printed or obtained in the usual and course of the business of the bank; and

(d) that the [said] accounting records or document is in the custody or under the control of such bank.

(3) Any entry in an accounting record or any document referred to in subsection (2) may be proved at criminal proceedings upon the mere production at the proceedings of a document purporting to be an affidavit made by any person who in that affidavit alleges -

(a) that he is in the service of the bank in question;

(b) that he has examined the entry, accounting record or document in question; and

(c) that a copy of the entry or document set out in the affidavit or in an annexure [thereto] is a correct copy of the [said] entry or document.

(4) Any party at the proceedings against whom evidence is adduced in terms of this section or against whom it is intended to adduce evidence in terms of this section, may, upon the order of the court before which the proceedings are pending, inspect the original of the document or entry in question and any accounting record in which the [said] entry appears or of which the entry forms part, and may make copies of the [said] document or entry, and the court shall, upon the application of that party, adjourn the proceedings for the purpose of the inspection or the making of the [said] copies.

Proof of entries in accounting records and documentation of banks in countries outside Lesotho.

246.

(1) In this section -

"document" includes a recording or transcribed computer print-out produced by any mechanical or electronic device and any device by means of which information is recorded or stored; and

"entry" includes any notation, by any means whatsoever, in the accounting records of a bank contemplated in subsection (2)

(2) The entries in the accounting records of a bank in a foreign state, and any document which is in the possession of the bank which refers to the [said] entries or to any business transaction of the bank, shall be *prima facie* proof at criminal proceedings of the matters, transactions and accounts recorded in

the [said] accounting records or document upon the mere production at the proceedings of a document purporting to be an affidavit made by any person who in that affidavit alleges-

(a) that he is in the service of the bank in question;
(b) that such accounting records or document are or were the ordinary records or document of [the] bank;
(c) that the said entries have been made in the usual and ordinary course of the business of the bank;
(d) that such accounting records are or document is in the custody or under the control of the bank..

(3) Any entry in an accounting record or a document contemplated in sub-section (2) may be proved at criminal proceedings upon the mere production at the proceedings of a document purporting to be an affidavit made by any person who in that affidavit alleges -

(a) that he is in service of the bank in question;
(b) that he has examined the entry, accounting record or document in question; and
(c) that a copy of the entry or document set out in the affidavit or in an annexure [thereto] is a correct copy of the entry or document.
an affidavit is a correct copy of the entry or document.

(4) A document purporting to be an affidavit shall for the purposes of this section have no effect unless it is obtained in terms of an order of a competent court or on the authority of a competent government institution of the state concerned.

(5) The admissibility and evidentiary value of an affidavit contemplated in subsections (2) and (3) shall not be affected by the fact that the form of the oath, confirmation or attestation [thereof] differs from the form of the oath, confirmation or attestation prescribed in Lesotho.

(6) A court before which an affidavit contemplated in sub-sections (2) and (3) is placed may, in order to clarify obscurities in the affidavit, on the request of a party to the proceedings, order that a supplementary affidavit be submitted or that oral evidence be heard and that oral evidence shall only be heard if the court is of the opinion that a party to the proceedings would be materially prejudiced should oral evidence not be heard.

Bank's obligation to produce records and documentation

247.

(1) Subject to subsection (2), no bank in Lesotho shall be compelled to produce, in any criminal proceedings, an accounting record or a document as contemplated in section 245 which is in the possession of the bank, unless the court concerned orders that the accounting record or document be produced.

(2) A police officer of the rank of Senior Inspector or above may demand the production of an accounting record or a document of any bank as referred to in sub-section (1) notwithstanding that there are no criminal proceedings pending, and the police officer shall thereupon be entitled to make and retain copies of the accounting record or documents.

Proceeding to which bank is a party.

248. Sections 245 to 247 shall not apply to any criminal proceedings to which a bank, whose accounting records or documents are required to be produced in evidence, is a party."

The Crown and the defence have filed heads of argument and also supplementary heads. Once again I greatly appreciate the very full argument advanced by both parties involving reference to numerous authorities. The authorities are based upon the common law, and indeed the legislation which emanated from the common law. It is necessary to consider that legislation in order to better appreciate the thrust of the various authorities. Such legislation is to be found in the various interpretation statutes throughout the common law jurisdictions, which were based upon the provisions of section 38 (2) of the Interpretation Act 1889 of England. Such provisions are to be found in section 18 of the Interpretation Act, 1977 of Lesotho, which reads as follows:

"18. Where an Act repeals in whole or in part another Act, the repeal shall not -

(b) revive anything not in force or existing at the time at which the repeal takes effect:

(c) affect the previous operation of the Act so repealed or anything duly done or suffered under the Act so repealed;

(d) affect any right, privilege obligation or liability acquired, accrued or incurred under the Act so repealed;

(e) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against the Act so repealed;

(f) affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment referred to in paragraphs (c) and (d); and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed."

PROCEDURAL LAW

The Crown maintains that the amending legislation in this case is procedural in effect, in respect of which the presumption against retrospectivity does not operate. As to what is procedural, the following opening lines of *Phipson On Evidence* 14 Ed (1990) at p1 are relevant:

> "Law is commonly divided into substantive law, which defines rights, duties and liabilities; and adjective law, which defines the procedure, pleading and proof by which the substantive law is applied in practice.
>
> The rules of *procedure* regulate the general conduct of litigation; the object of *pleading* is to ascertain for the guidance of the parties and the court the material facts in issue in each particular case; *proof* is the establishment of such facts by proper legal means to the satisfaction of the court, and in this sense includes disproof. The first-mentioned term is, however, often used to include the other two."

Mr Penzhorn and Mr Woker in their heads rely upon the following extracts from *Salmond on Jurisprudence* 12 Ed (by Professor P. J. Fitzgerald) 1966 at pp461/462:

> "The law of procedure may be defined as that branch of the law which governs the process of litigation. It is the law of actions - *jus quod ad actiones pertinent* - using the term action in a wide sense to include all legal proceedings, civil or criminal. All the residue is substantive law, and relates, not to the process of litigation, but to its purposes and subject-matter. Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained. The latter regulates the conduct and relations of courts and litigants in respect of the litigation itself; the former determines their conduct and relations in respect of the matters litigated."

and at p462

> "What facts constitute a wrong is determined by the substantive law; *what facts constitute proof of a wrong* is a question of *procedure*. For the first relates to the subject-matter of litigation, the second to the process merely. Whether an offence is punishable by fine or by imprisonment is a question of substantive law, for the existence and measure of criminal liability are matters pertaining to the end and purpose of the administration of justice. But whether an offence is punishable summarily or only on indictment is a question of procedure. Finally, it may be observed that, whereas the abolition of capital punishment would be an alteration of the substantive law, the abolition of imprisonment for debt was merely an alteration in the law of procedure. For punishment is one of the ends of the administration of justice, while imprisonment for debt was merely an instrument for enforcing payment." (Italics added)

THE AUTHORITIES

South Africa and England

In 1878 in the case of *Gardner v Lucas and Ors* (1) the House of Lords considered legislation enacted in 1874, the effect of which was to render valid any deed or instrument lacking formality of execution. The question arose as to whether such legislation was retrospective in effect and rendered valid a lease executed in 1873. The House held that the legislation was not retrospective. Lord Blackburn's oft-quoted opinion reads thus at p603:

> "Now the general rule, not merely of England and Scotland, but, I believe, of every civilized nation, is expressed in the maxim, "*Nova constitutio futuris formam imponere debet non praeteritis*" - *prima facie*, any new law that is made affects future transactions, not past ones. Nevertheless, it is quite clear that the subject-matter of an Act might be such that, though there were not any express words to shew it, it might be retrospective. For instance, I think it is perfectly settled that if the Legislature intended to frame a *new procedure*, that instead of proceeding in this form or that, you should proceed in another and a different way; clearly there bygone transactions are to be sued for and enforced *according to the new form of procedure*. Alterations in the form of procedure are *always retrospective*, unless there is some good reason or other why they should not be. Then, again, I think that where alterations are made *matters of evidence*, certainly upon the reason of the thing, and I think upon the authorities also, those are *retrospective*, whether civil or criminal.
>
> But where the effect would be to *alter a transaction* already entered into, where it

> would be to make that *valid* which was *previously invalid* - to make an instrument which had no effect at all, and from which the party was at liberty to depart as long as he pleased, binding - I think the *prima facie* construction of the Act is that it is *not* to be retrospective, and it would require strong reasons to shew that is not the case." (Italics added)

The *locus classicus* in the matter of retrospectivity in the Republic of South Africa is the case of *Curtis v Johannesburg Municipality* (2) decided in 1906 by Innes CJ and Mason and Smith JJ. That case concerned an enactment which had the effect of prescribing the appellant's claim against the respondent Municipality, in respect of serious injury suffered as a result of the Municipality's alleged negligence. The Court (Smith J *dissentiente)* held that in respect of claims which arose *prior* to the enactment the period of limitation would be reckoned, not from the time when the cause of action arose but from the date of promulgation of the enactment. Innes CJ observed at p311:

> "The general rule is that, in the absence of express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be so interpreted as *not to take away rights actually vested at the time of their promulgation.* The legislature is virtually omnipotent, but the courts will not find that it intended so inequitable a result as the destruction of existing rights unless forced to do so by language so clear as to admit of no other conclusion." (Italics added)

The Municipality maintained that the enactment did not come within that rule, "because it dealt with a matter of procedure, and statutes regulating procedure were, necessarily, retrospective." Innes CJ observed at pp311/312:

> "There can be no doubt that the words of the section deal not with rights but with remedies. They are wide enough to cover causes of action based upon contract as well as upon tort, and in substance they enact that all suits against the council shall be instituted within six months from the time when the cause of action arose, or not at all. The naked right is allowed to remain, but the remedy of enforcing it by action is taken away. It may still be used for purposes of set off, but it cannot be sued upon. The section is in effect a statute of limitations.
>
> It must be taken as settled law that statutes of limitations barring the remedy are portion of the law of procedure."

and at p312

> "Every law regulating legal procedure must, in the absence of express provision to the contrary, necessarily govern, so far as it is applicable, the procedure in every suit which comes to trial after the date of its promulgation. Its prospective operation would not be complete if this were not so, and it must regulate all such procedure even though the cause of action arose before the date of promulgation and *even though the suit may have been then pending*. To the extent to which it does that, *but to no greater extent*, a law dealing with procedure is said to be retrospective. *Whether the expression is an accurate one is open to doubt*, but it is a convenient way of stating the fact that every alteration in procedure *applies to every case subsequently tried, no matter when such case began or when the cause of action arose.*" (Italics added)

The learned Chief Justice considered French, English, Roman and Roman-Dutch law in the matter. As to the latter he observed at p316/317:

> "There is, therefore, considerable weight of Roman-Dutch authority in favour of the view that a statute of limitations, which in terms draws no distinction between debts due before and those which became due after its promulgation, should be held to apply to both classes, but that the period of limitation should be calculated in regard to the former class as from the date of promulgation.
>
> It only remains to inquire whether there is anything in the language of the law under consideration which prevents the application of this rule. The words are wide, and if literally construed they would certainly include actions the causes of which arose more than six months before promulgation; but if the effect of construing a statute literally would be to *take away existing rights*, then the literal construction should not be adopted, unless it is evident beyond doubt that the legislature intended it, or unless any other construction would defeat the evident object of the statute, or would render it meaningless. In the present case, to read the section literally would so impair existing obligations as *virtually to amount to a deprivation of rights*. It should not, therefore, be so read." (Italics added)

Smith J observed at p319:

> "In my opinion.... it does not follow of necessity that because a statute deals with procedure it is to be treated as retrospective in its operation. In the case of every statute, whether with procedure or not, the intention of the legislature has to be ascertained, and no general rule applicable to all statutes can be laid down. Thus Lord BLACKBURN says in *Gardner v Lucas* [1]: "Alterations in the form of procedure are always retrospective unless there is some good reason or other why they should not be;' and VAUGHAN-WILLIAMS, L.J., in *The Ydun* [3] says: "I do not mean to say that legislation in reference to procedure is not in some cases to be treated as not being retrospective. To determine whether it is so or not one must look at the language of

the Act of Parliament."

> In those cases where a statute regulates merely the course of the proceedings in the Court itself it seems to me that, strictly speaking, the effect is not retrospective; it can only operate on proceedings had subsequently to the time when the statute came into force. *No one has a vested right in procedure*, as a learned Judge in an English case remarked; *his only right is to have his action heard according to the course of procedure in force at the time it came into court."* (Italics added)

Mason J observed at pp324/325

> "There is no doubt that the rule is general that statutes with reference to procedure apply to all actions from the date of their operation, even though the actions themselves have arisen in respect of transactions occurring prior to the statute."

The learned Judge referred to a body of academic and judicial authority in the matter and continued at p325:

> "The reasons for the rule are obvious. In the first place it is clear that it would be impossible because a contract was made, for instance, a hundred years ago to apply at this date the procedure of those times. The manner in which an action is to be brought is governed by *the law for the time being in force*; *it is not a vested right* attached to the contract or obligation at the time of its creation. But the rule can only be justified as a general maxim upon the understanding that the parties concerned are able to adopt and to apply to their vested rights the *existing procedure*, and it is that application of the rule which gives rise to the opinion so repeatedly expressed that, properly speaking, provisions relating to procedure are *not retroactive* because they have *no retroactive effect*." (Italics added)

It will be seen that Mason J there speaks of retroactivity, rather than retrospectivity. The learned Judge had earlier, with reference to the general rule, referred to the case of *The Ydun* (3) decided in 1899. A barque of that name, had run aground in Preston port on 13th September 1893. On 5th December 1893, The Public Authorities Protection Act, 1893 was passed, taking effect on 1st January 1894, which reduced the period within which the barque owners might institute a claim from six years to six months. The barque owners instituted their action more than five years after the accident. In the Court of Appeal AL Smith L J (Vaughan Williams and

Romer LL J concurring) held at p245 that although a right of action is not taken away "unless it is so expressed in the Act", nonetheless the amending Act was "an Act dealing with procedure only" and hence applied to all actions, "whether commenced before or after the passing of the Act". Vaughan Williams L J at p246 agreed that the amending Act was retrospective, there being

> "abundant authority that the presumption against a retrospective construction has no application to enactments which effect only the procedure and practice of the Courts".

The issue was decided against the barque owners. In the *Curtis* case (2) Mason J also referred to the case of *R v Chandra Dharma* (4). That was a case where a statutory bar on prosecution within three months was enlarged, before the three months had expired (in respect of the accused), to six months, prosecution being subsequently initiated before the six months had expired. Lord Alverstone C J observed at pp338/339 (KB), p571 (All ER):

> "The rule is clearly established that, apart from any special circumstances appearing on the face of the statute in question, statutes which make alterations in procedure are retrospective. It has been held that a statute shortening the time within which proceedings can be taken is retrospective (*The Ydun* [3]), And it seems to me that it is impossible to give any good reason why a statute extending the time within which proceedings may be taken should not also be held to be retrospective. If the case could have been brought within the principle that unless the language is clear a statute ought not to be construed so as to create new disabilities or obligations, or impose new duties in respect of transactions which were complete at the time when the Act came into force, [Counsel for the prisoner] would have been entitled to succeed; but when *no new disability or obligation had been created* by the statute, but it only alters the time within which proceedings may be taken, it may be held to apply to offences completed before the statute was passed. That is the case here. This statute does not alter the character of the offence, or take away any defence which was formerly open to the prisoner. It is a mere matter of procedure, and according to all the authorities it is therefore retrospective."(Italics added)

Channell J. concurring, additionally observed that "the question would have been entirely different" if the time under the old Act had expired before the new Act

came into operation."

A case often quoted is that of *West v Gwynne* (5) which came before the Court of Appeal in England in 1911. That case concerned legislation which referred to "all leases." The Court (Cozens-Hardy M R, Buckley and Kennedy LL J) construed the legislation to refer to all leases, whether executed before or after the commencement of the Act. Buckley L J observed at pp11/12:

> "During the argument the words "retrospective" and retroactive" have been repeatedly used, and the question has been stated to be whether s.3 of the Conveyancing Act, 1892, is retrospective. To my mind the word retrospective" is inappropriate, and the question is not whether the section is retrospective. Retrospective operation is one matter. *Interference with existing rights is another.* If an Act provides that *as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective.* That is not this case. The question here is whether a certain provision as to the contents of leases is addressed to the case of all leases or only of some, namely, leases executed after the passing of the Act. The question is as to the ambit and scope of the Act, and not as to the date as from which the new law, as enacted by the Act, is to be taken to have been the law." (Italics added)

and at p12:

> "As matter of principle an Act of Parliament is not without sufficient reason taken to be retrospective. There is, so to speak, a presumption that it speaks only as to the future. But there is no like presumption that an Act is not intended to interfere with existing rights. Most Acts of Parliament, in fact, *do interfere with existing rights.*" (Italics added)

I presume that Buckley L J was, in the light of the provisions of section 38 (2) of the Interpretation Act, 1889, there referring to amending legislation which expressed an intention contrary to such provisions. In any event, the dicta of Buckley L J first quoted *supra* were quoted with approval by Schreiner ACJ (van den Heever, Hoexter, Fagan and Steyn JJ A concurring) in the case of *Shewan Tomes & Co v Commissioner of Customs & Excise* (6). The appellant in that case sued the respondent for damages arising out of the seizure and sale in February and October,

1953, respectively, of a consignment of fireworks, imported through Durban Harbour. After such sale, legislation was introduced which had the effect of applying to the claimant a requirement to issue a notice of claim within one month after seizure. Further, such legislation provided that the particular provision "shall be deemed to have come into operation on the 5th day of June 1944" (the date of commencement of the original legislation). Schreiner ACJ at p311 considered the dicta in *Curtis* (2) and *West v Gwynne* (5) and went on to dismiss the appeal, observing at pp311/312:

> "Curtis's case [2] was of the same type as *West v Gwynne* [5], while the present case is one of *true retrospectivity* in the strict sense used by BUCKLEY L.J. Where one is dealing with a case of true retrospectivity it will generally, I apprehend, be *more difficult to draw inferences as to the Legislature's presumed intention not to produce injustice*, since *ex hypothesi* the Legislature is creating a situation in which the conduct of persons *is affected by rules that did not exist at the time of the conduct.*
>
> However that may be, true retrospectivity is no doubt for present purposes to be dealt with on the same general lines as interference with existing rights, and where there is real room for doubt as to the meaning of a provision, the interpretation producing the less harsh results should be favoured. But here the meaning of the section is perfectly clear."

The dicta of Buckley L J in *West v Gwynne* (5) were also quoted with approval by Van Winsen AJP in the case of *Parow Municipality v Joyce and McGregor (Pty) Ltd* (7). In that case the respondent property-owning development company had in 1932 submitted a plan for sub-division of land, for an estate, which included a large number of even, streets and a "recreation ground". The plan was approved. In 1944 the land comprised in the estate was incorporated within the boundaries of the applicant Municipality. Subsequently, section 127 of the Cape Municipal Ordinance, 1951 provided that

> "[t]he ownership of all immovable property to which the inhabitants of the municipality shall have or acquire a common right and of all public streets and the land comprised therein shall vest in the municipality."

Van Winsen AJP granted a declaration that under the definitions contained in the legislation, the recreation ground was a "public street" and that section 127 had vested the recreation ground (without compensation) in the Municipality, that is, from the date of promulgation of the legislation, observing at pp164/165:

> "The mere fact that an area on an approved plan was described as "street" or "recreation ground" would not in itself have had the effect of vesting the ownership thereof in the local authority. Sec. 127 accordingly brought about a change in the law. But as I read the section it only did so as from the date of its promulgation. It does not purport to be retrospective in its operation nor does it, in my view, lend itself to an interpretation that such is its effect.
>
> The section applies to a state of affairs existing at its inception, viz., that a certain area of land shewn upon an approved sub-division plan comprises a public street. The fact that the afore-mentioned requisites for its operation existed antecedent to the time when the section was promulgated does not in itself render it retrospective in its operation. Cf. *R v St Mary, Whitechapel*[8], at p127; *Master Ladies Tailors Organisation v Minister of Labour* [9], at p527; *[In re] A Solicitor's Clerk* [10]. It would, in my view, have been retrospective in its operation if it had sought to provide that as from a date anterior to its promulgation the local authority had become vested with ownership in what were then public streets. But this it does not do. The remarks of BUCKLEY LJ in *West v Gwynne* [5] at p11, quoted with approval by SCHREINER, ACJ in *Shewan Tomes & Co Ltd v Commissioner of Customs & Excise* [6], are apposite in this connection."

Van Vinsen AJP went on at p165 to quote the dicta of Buckley LJ at pp11/12 first quoted above.

The dicta of Lord Alverstone C J and Chanell J in *Chandra Dharma* (4) were referred to by Lord Brightman in delivering the opinion of the Privy Council in the case of *Yew Bon Tew v Kenderaan Bas Mara* (11), decided on appeal from the Federal Court of Malaysia. That case concerned a claim by the first appellant, and an infant suing by the first appellant, for personal injury suffered in a collision between a motor cycle driven by the first appellant (with the infant as pillion passenger) and the respondent's bus. Amending legislation increased the period of limitation applicable,

after the appellant's claim had become statute-barred under the old legislation, that is, a claim which arose on 5th April, 1972 became statute barred 12 months later, the latter period being enlarged by a 1974 Act to one of 36 months. Lord Brightman observed thus at p836:

> "Apart from the provisions of the interpretation statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective *if it takes away or impairs a vested right* acquired under existing laws, *or creates a new obligation*, or *imposes a new duty*, or *attaches a new disability*, in regard to events already past. There is however said to be an exception in the case of a statute which is *purely procedural*, because *no person has a vested right in any particular course of procedure*, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.
>
> But these expressions 'retrospective' and 'procedural', though useful in a particular context, are equivocal and therefore can be misleading. A statute which is retrospective in relation to one aspect of a case (e.g. because it applies to a pre-statute cause of action) may at the same time be prospective in relation to another aspect of the same case (e.g. because it applies only to the post-statute commencement of proceedings to enforce that cause of action); and an Act which is procedural in one sense may in particular circumstances do far more than regulate the course of proceedings, because it may, on one interpretation, revive or destroy the cause of action itself.
>
> Whether a statute is to be construed in a retrospective sense, and if so to what extent, depends on the intention of the legislature as expressed in the wording of the statute, having regard to the normal canons of construction and to the relevant provisions of any interpretation statute." (Italics added)

Lord Brightman went on to observe at p836 that the relevant issue in *The Ydun* (3) "was disposed of in the judgments with remarkable brevity for so important an issue." He observed at p838 that "the Federal Court found of great assistance, as also have their Lordships," the following passage from the judgment of Williams J in the Australian case of *Maxwell v Murphy* (6) at pp 277/278:

> "Statutes of limitation are often classed as procedural statutes. But it would be unwise

> to attribute a prima facie retrospective effect to all statutes of limitation. Two classes of case can be considered. An existing statute of limitation may be altered by enlarging or abridging the time within which proceedings may be instituted. If the time is enlarged whilst a person is still within time under the existing law to institute a cause of action the statute might well be classed as procedural. Similarly if the time is abridged whilst such person is still left with time within which to institute a cause of action the abridgment might again be classed as procedural. But if the time is enlarged when a person is out of time to institute a cause of action so as to enable the action to be brought within the new time or is abridged so as to deprive him of time within which to institute it whilst he still has time to do so, very different considerations could arise. A cause of action which can be enforced is a very different thing to a cause of action the remedy for which is barred by lapse of time. Statutes which enable a person to enforce a cause of action which was then barred or provide a bar to an existing cause of action by abridging the time for its institution *could hardly be described as merely procedural.* They would *affect substantive rights.*" (Italics added)

The Federal Court of Malaysia held that when the appellants' claim had expired, the respondents had acquired an "accrued right" to immunity from claim, which was preserved by the Interpretation Act, 1967. The 1974 Act was not "*retroactive*" and had no application to a cause of action which was barred before the Act came into operation. Lord Brightman at p839 agreed with that conclusion. Additionally he observed at pp839/840:

> "Whether a statute has a retrospective effect cannot in all cases safely be decided by classifying the statute as procedural or substantive. For example, in *The Ydun* the barque might have grounded on 13 May instead of 13 September 1893 and the 1893 Act might have come into force on 5 December 1893 when it received the royal assent, instead of 27 days later. Had those been the facts the Act would, if its procedural character were the true criterion of its effect, have deprived the owners of their ability to pursue their cause of action on the day the Act reached the statute book. A limitation Act which had such a decisive effect on an existing cause of action would not be *'merely* procedural' in any ordinary sense of that expression. Their Lordships assume (without expressing an opinion) that *The Ydun* was, on its facts, correctly decided.
>
> Their Lordships consider that the proper approach to the construction of the 1974 Act is *not to decide what label to apply to it, procedural or otherwise*, but to see whether the statute, if applied retrospectively to a particular type of case, *would impair existing rights and obligations.* The appellants assert that a Limitation Act does not impair

existing rights because the cause of action remains, on the basis that all that is affected is the remedy. There is logic in the distinction on the particular facts of *The Ydun*, because the right to sue remained, for a while, totally unimpaired. But in most cases the loss, *as distinct from curtailment*, of the right to sue is *equivalent to the loss of the cause of action.* The Public Authorities Protection Act 1893 can be regarded as procedural on the facts of *The Ydun*, but a slight alteration to those facts *would have made it substantive.* A Limitation Act may therefore be procedural in the context of one set of facts, but substantive in the context of a different set of facts.

In their Lordships' view, an accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is in every sense a *right,* even though it arises under an Act which is *procedural.* It is a right which is not to be taken away by conferring on the statute a retrospective operation, unless such a construction is unavoidable. Their Lordships see no compelling reason for concluding that the respondents acquired no 'right' when the period prescribed by the 1948 Ordinance expired, merely because the 1948 Ordinance and the 1974 Act are procedural in character. The plain purpose of the 1974 Act, read with the 1948 Ordinance, was to give and not to deprive; it was to give to a potential defendant, who was not on 13 June possessed of an accrued limitation defence, a right to plead such a defence at the expiration of the new statutory period. The purpose was not to deprive a potential defendant of a limitation defence which he already possessed. The briefest consideration will expose the injustice of the contrary view. When a period of limitation has expired, a potential defendant should be able to assume that he is no longer at risk from a stale claim. He should be able to part with his papers if they exist and discard any proofs of witnesses which have been taken, discharge his solicitor if he has been retained, and order his affairs on the basis that his potential liability has gone. That is the whole purpose of the limitation defence." (Italics added)

The case of *Euromarine International of Mauren v The Ship Berg* (13) was decided by the Appellate Division (Corbett, Miller, Hoexter and Grosskoff JJ A and Galgut AJA) in 1985. The Court was there faced with legislation enacted in 1983 which provided for the arrest of an "associated ship" in an admiralty action *in rem,* which legislation represented a development of the notion of "sister-ship liability" introduced in England in 1956. The appellant sought the arrest of the ship *Berg* in respect of negligence by the owners of an "associated ship" *Pericles*, arising out of an accident in Durban Harbour on 24th December, 1978. Miller JA (the other members

of the Court concurring) quoted the dicta of the three members of the court in the *Curtis* case (2) observing at p710:

> "Of course, some of the observations made in the judgments in the *Curtis* [2] case were prompted or moulded by a consideration of the nature of the particular enactment with which the case was concerned - it was a statute of limitation of actions which required actions to be brought within six months of the time when the causes of such actions arose. But what is clear from the several judgments is that primarily, in every case, the inquiry must be into the language of the enactment and the purpose and intent of the Legislature which emerges therefrom. This was also the approach of Lord BRIGHTMAN *In Yew Bon Tew v Kenderaan Bas Mara* [11] at 836."

Miller JA went on at p710 to quote the dicta of Lord Brightman in *Yew Bon Tew* (11) at p836 reproduced *supra*. He continued at p712 thus:

> "The contention on behalf of the appellant was, however, that the new provision enabling a claimant to bring an action *in rem* by the arrest of an associated ship instead of the ship in respect of which the maritime claim arose should be taken to have retrospective effect, because it is in essence a provision relating to procedure rather than to substantive or vested rights. Such provision, it was said, in effect provided the legal machinery by which a claim could be enforced. It is true that s3 (6) read with s5 (3) describes a method for recovery of money due to one who has suffered injury or loss for which he has a maritime claim, but it does much more than that; it gives to the claimant a right which he never had before, namely to recover what is due to him from a party who was not responsible for the damage suffered by him. It provides the claimant not only with *a method for recovery* but with *an additional or alternative defendant*. And by that token, it is creative of *new liabilities or obligations* in owners of ships, or the potential thereof, of which such owners, if the claims arose prior to the commencement of the Act, would have been wholly unaware and unsuspecting." (Italics added)

Ultimately Miller JA upheld the majority judgment of Milne JP in the Natal Provincial Division that the relevant provisions did not affect causes of action which arose before the commencement of the Act. Miller JA observed at p713:

> "The argument that the [relevant] provisions.... are procedural and ought therefore to be applied with retrospective effect cannot avail the appellant, for even if, to the limited extent that those provisions describe the method by which maritime claims may be enforced, they might be regarded as procedural, they can by no means be regarded as "*purely procedural*" measures (see the judgment of Lord BRIGHTMAN, quoted above) nor as being *predominantly or substantially* procedural, for their design

was, clearly, *to create substantive rights and obligations* in regard to security for and payment of maritime claims."(Italics added)

In the same year Levy J in the case of *S v Heita and Others* (14) in the Supreme Court of South West Africa (as it was then named) was faced with a Presidential Proclamation which prohibited any court from enquiring into or pronouncing upon the validity of any Act of Parliament. Levy J held that a criminal trial pending before the introduction of the Proclamation was not affected by its provisions. He observed at p316:

"[W]hat makes an amendment 'procedural' so that pending litigation is affected thereby is whether it deals with a new procedure to be followed or *with new rules relating to proof* in respect of such pending litigation.

An amendment to an Act which deprives a party of his right to challenge the validity of legislation in a Court of law does not prescribe a new procedure to be followed or a new set of rules relating to proof. On the contrary, it is the very antithesis thereof. It stops all litigation in respect of a particular matter, irrespective of legal procedure and evidence. Where there is a procedural amendment, the Legislature does not have to make it retrospective in that *all matters, whether they are pending or not, are governed by such an amendment.* When the amendment is not procedural, if pending litigation is to be affected, the amendment must say so in clear terms."(Italics added)

The issue of retrospectivity came before the Appellate Division once more in the case of *Adampol (Pty) Ltd v Administrator, Transvaal* (15). The Court (Joubert, Hoexter, Botha, Vivier and Eksteen JJ A) considered an amending provision which provided for the payment of interest "on any outstanding amount of the compensation payable", in respect of land expropriated, "with effect from a date 60 days from the promulgation of the notice" of expropriation. The particular notice of expropriation was promulgated on 31st December 1980, a claim was submitted on 28th May 1982 and ultimately the amount of compensation was settled and paid on 10th June 1986. Meanwhile the amending legislation had been introduced on 25th September 1985. The respondent maintained that interest was thus only payable from the latter date.

Hoexter JA (Vivier and Eksteen JJ A concurring) held that the wording of the amending legislation was clear and unambiguous, that on 25th September 1985 the compensation ultimately paid was "outstanding" and hence interest was payable with effect from 1st March 1981 to 10th June 1986. Joubert JA concurred, holding that the legislation should be construed prospectively but that nonetheless it had elements of a retrospective nature. Hoexter JA at pp811/812 had occasion to quote the dicta of Buckley LJ in the case of *West v Gwynne* (5) at pp11/12 first quoted *supra*. He then considered the facts of the *Parow* case (7) quoting the dicta of Van Winsen AJP reproduced *supra*, observing at p812:

> "It seems to me, with respect, that in the above-quoted passage Van Winsen AJP correctly stated the criterion to be employed in cases of this sort, and I proceed to apply it to the situation in the instant case."

The learned Judge of Appeal continued at pp812/813:

> "In providing what the law is to be with effect from 25 September 1985, s95 A(1) undoubtedly interfered with the existing rights of the parties to this appeal. Before that date the respondent bore no obligation to pay interest on any outstanding amount of compensation owing to the appellant, and the latter enjoyed no right to claim such interest from the former. That fact, by itself, does not render the operation of s95 A (1) retrospective. Nor, in my opinion, is its operation rendered retrospective by the adventitious circumstances that the interest payable is to be computed from a date which may precede (and which in the instant case does precede) 25 September 1985. In my view that factor is one quite extraneous to the inquiry.
>
> Had s95 A(1) provided for the payment of interest not only on amounts outstanding from the date on which it came into operation, but also on amounts outstanding for any period prior to 25 September 1985 *and which had been paid in full to the expropriatee before that date,* then its provisions would have satisfied the criterion enunciated in *West v Gwynne* [5] and applied in the *Parow Municipality* case [7]. It would then have decreed, *ex post facto,* the payment of interest in respect of transactions wholly past and perfected. However, as already pointed out, the section does no such thing. It provides for the payment of interest only on amounts outstanding on and after 25 September 1985. Section 95 A(1) provides what the law is to be with effect from 25 September 1985. It does not provide that at a past date the law shall be taken to have been that which it was not. Reduced to essentials the contention advanced on behalf of the respondent in the present case (and the same

> may be said of the respondent in the *Parow Municipality* case [7] really comes to this: that prior to the date of the amending enactment he enjoyed a vested and entrenched right that in future *the law governing his obligations would never be amended.* That contention is, I consider, an untenable one." (Latter italics added)

Retrospectivity arose before the Appellate Division once again in the case of *Protea International (Pty) Ltd. v Peat Marwick Mitchell & Co* (16). The appellant's claim was for breach of contract based on the respondent's alleged negligent failure to detect certain irregular transactions. The alleged breach occurred on 10th August 1983, but was only brought to the knowledge of the appellant in March 1984. Summons was served on 23rd October 1986. The question before the Court was whether or not the claim had become prescribed. Joubert JA (Vivier, Milne JJA, Friedman and Nienaber AJJ A concurring) observed at p568:

> "Since a prescribed debt is the correlative of the creditor's contractual right of action, the prescription of the debt necessarily extinguishes the right of action. The extinction of a contractual right of action by prescription is accordingly a matter of substantive law and not a procedural matter."

Under section 11 (d) of the Prescription Act, 1969 the prescriptive period was three years. The Act (section 12) was amended on 7th March 1984 to provide in effect, that a debt was not deemed to be due until the creditor had "knowledge of the identity of the debtor and of the facts from which the debt arises", such knowledge to be deemed to exist where it could be acquired with reasonable cause. The appellant then maintained that the prescriptive period did not commence running until March 1984, service of the summons being effected before the completion of the prescriptive period in March 1987. The respondent maintained that the prescriptive period had commenced running on 10th August 1983, terminating before service of the summons, the legislative amendment being inapplicable to prescription which had already commenced to run before the operative date of 7th March 1984.

In the course of his judgment Joubert JA at p573 considered it "extremely doubtful" whether there is such a principle of Roman-Dutch law" as that relied upon by Innes CJ and Mason J in the *Curtis* case (2), "a matter which does not fall to be decided in this appeal." Ultimately the appeal was dismissed, Joubert JA referred to the approach of the appellant in the matter in the following terms:

> "Apart from the illogicality of such an approach without any legal foundation for ignoring prescription which had already commenced to run before 7 March 1984, the intention of the legislator, in my judgment, is in accordance with the general rule of construction that the amendment to [section]12 (3) is to operate only prospectively (*in futuro*) since a contrary intention is not indicated by any express words. The amendment is intended to operate only prospectively in respect of prescription which commences to run *on or after* 7 March 1984. It was not intended to operate retrospectively (*in praeterito*) in respect of prescription which commenced to run *prior* to 7 March 1984. Such a construction obviates the illogicality of having two commencement dates for prescription."

In the case of *Kruger v President Insurance Co Ltd* (17) Thirion J considered amending legislation concerning motor vehicle insurance, whereunder the period of prescription of a claim was increased while at the same time the right to apply to the Court for leave to increase the period was removed. The question which arose was whether the amending legislation affected claims arising before the effective date of such legislation and which had not become prescribed before that date. Thirion J held that the amending legislation applied to such claims. He observed at p503:

> "Full recognition was given in *Protea International* [16] to the rule against retrospectivity based on the distinction between matters of substantive law and procedural law; a distinction which Dixon CJ described in *Chang Jeeng v Nuffield (Australia) Pty Ltd* [18] (a judgment of the High Court of Australia) at 638 as 'clear enough in principle and well founded in justice' but adding the observation that in some cases
>
> > 'The difficulty has been traceable to the inveterate tendency of English law to regard some matters as evidentiary or procedural which in reality must operate to impair or destroy rights in substance.'

However, strong though the presumption against retrospectivity may be, it is *nothing more than an aid in interpretation* and must yield to the intention of the legislature as it emerges from any particular statute. The answer to the question whether a particular statute has retrospective operation cannot be found by simply determining whether the statute deals with substantive law or matters of procedure. *One has always to ascertain the intention of the legislature.*

The conclusion that a statute was intended to operate with retrospective effect may be more readily arrived at in a case where *vested rights would not be affected* by a retrospective operation and also where the intention of the legislature was clearly to bestow a benefit or to *effect evenhandedness* in the operation of the law." (Italics added)

The judgment of Thirion J was upheld by the Appellate Division in the joint appeal case *Swanepoel v Johannesburg City Council, President Insurance Co Ltd v Kruger* (19). The Supreme Court in the *Swanepoel* case had come to a conclusion different to that in *Kruger* (17). The judgment in that case was not upheld. Hefer JA (Botha and Eksteen JJ A and Nicholas and Olivier AJJ A concurring), observed at p793:

"It must be pointed out at the outset that [the *Swanepoel]* judgment is largely based on the decision of this Court in *Protea International (Pty) Ltd v Peat Marwick Mitchell & Co* [16], and on what is referred to therein at 570B - C as

> 'a general rule of construction ... (that) the operation of a statute is prospective, to apply only after its enactment (*in futuro*), unless the legislator clearly expressed a contrary intention that the operation should be retrospective to apply prior to its enactment (*in praeterito)'.*

However, what required the attention of the Court in that case was an amendment to the Prescription Act 68 of 1969 which affected the date on which prescription commenced in the context of a debt which had become due before the date of the amendment.

The situation in the present cases is entirely different. We are not concerned with the date of commencement of the prescriptive period nor, I may add, with the effect of the amendment on claims which had already become prescribed, nor with any other past event. Our sole concern is the effect of the amendment on claims which although having admittedly arisen before, had not become prescribed on the effective date.

> Viewed in this manner it is difficult to understand the relevance of the so-called rule against retrospectivity."

The learned Judge of Appeal observed at p793 that the amending legislation was "plainly prospective." He continued:

> "But this does not entail that existing rights, simply because they accrued in the past, are not similarly affected; the amendment relates, not to the date of the *accrual* before the effective date, but to the date of the *expiry* of the rights thereafter. The amending statute is not
>
> > 'a retrospective statute because part of the requisites for its action is drawn from time antecedent to its passing'
>
> (per Lord Denman in *R v St Mary, Whitechapel (Inhabitants)* [8] at 814."

Ultimately Hefer JA concluded at p796

> "I find it inconceivable that it could have been contemplated that the old system would, despite its shortcomings, continue to exist side by side with the new one until all claims which arose in the past have been disposed of."

In the case of *Transnet Ltd v Ngcezula* (20) The Appellate Division dealt once more with the issue of retrospectivity. The respondent in that case was seriously injured when a train allegedly pulled away as she was boarding it. The legislation (1981) stipulated that a claim be lodged within three months, against the South African Transport Services ("SATS"). Her attorney filed a claim over six months after the accident. The legislation however provided in (section 64 (3) thereof) that she might nonetheless apply to court for special leave to file a claim out of time. Some three weeks after filing claim, on 1st April 1990, the Legal Succession to the South African Transport Services Act, 1989 was enacted, under which the 1981 legislation was repealed, SATS ceased to exist, its rights and obligations being taken over by the appellant corporation. The 1989 legislation however did not repeat the 1981 provision regarding special leave of the court.

Botha JA delivered a judgment in the Appellate Division, in which Van Heerden, Hefer, Nienaber and Howie JJ A concurred. Botha JA at p546 observed that the doubt expressed by Joubert JA in the *Protea International* case (17) about the correctness of the decision in *Curtis* (2) was related specifically to the principle of Roman-Dutch law formulated by Innes CJ in the passage quoted from his judgment at p316 reproduced *supra*. The learned Judge of Appeal continued at p546:

> "That principle is not directly in issue in this case, as I have already indicated. Nor was it in issue in the *Protea International* case, as was stated by Joubert JA himself (at 573B). However, lest it be thought that I share the doubt, I feel bound to suggest, as my personal opinion, that the view of my learned Colleague might require reconsideration if the need should arise in a future case to examine the Roman-Dutch law principle in question."

Botha JA went on at pp546/547 to give reasons for his suggestion. He observed at p549

> "[I]t is advisable, I consider, to emphasise once again that the fundamental and decisive enquiry is always directed at *ascertaining the intention of the Legislature* (see *Adampol's* case *supra* at 809 F -J and *Swanepoel's* case *supra* at 794 A - C). To place the categorisation of the statute as being either one of substantive or one of procedural law in the forefront of the enquiry may lead one astray. *Curtis'* case is no warrant for falling into error in this respect."(Italics added)

Botha JA then referred to the dicta of Miller JA in the *Euromarine* case (13) at 709 I - 710 E quoting in part the dicta at p710 D - E reproduced *supra* and making special reference to the dicta of Lord Brightman in *Yew Bon Tew* (11) at p836 reproduced *supra*. The learned Judge of Appeal continued at pp549/550:

> "[I]t will be convenient to divide [section 64 (3)] into its three main component parts: (i) the claimant must lodge the claim within three months; (ii) the sanction for non-compliance with (i) is that the defendant shall not be liable; (iii) the sanction will be lifted if the claimant applies for and obtains special leave to lodge the claim out of time. Part (i), when considered in isolation, can be said to be procedural in character. But the same can certainly not to be said of part (ii). If the claimant should bring an action after the lapse of three months and the claim has not been lodged, the sanction of part (ii) confers a complete defence on the defendant. Although the defence arises from the failure to comply with what may be termed a procedural requirement, the

> defence itself is not a procedural matter; it is sufficient to ward off the claim and is therefore a matter of substantive law. As to part (iii), while the application for special leave may be regarded as a procedural step, the granting of special leave has more than merely procedural consequences: it not only terminates the suspension of the enforceability of the claim , but also deprives the defendant of the substantive defence of which he could previously have availed himself. And if special leave is refused, the condition upon which the enforceability of the claim was contingent (the granting of such leave) fails, with the consequence that the claim is in effect, and in substance, extinguished."

Botha JA went on at p550 to observe that "the attempt to categorise s 64 (3) as procedural is of no assistance in resolving the problem. The solution must be found elsewhere." He continued at p550:

> "[H]ere we are dealing with the simple repeal, without more, of s64 (3), wiping out the whole structure which has been set up by it. The repealing Act is silent about what the consequences were intended to be. No guidance can be obtained from its wording. What must be done is to examine the position in which the respondent and SATS found themselves immediately before the repeal, and to consider the possible effects of the demise of the structure on the parties, substituting Transnet for SATS (because of the simultaneous transfer of rights and obligations)."

In this respect Botha JA agreed with Counsel for Transnet that the solution to the problem lay in the provisions of section 12 (2) of the Interpretation Act, 1957, which are virtually identical to those of section 18 of the Interpretation Act, 1977, which sections, as indicated earlier, have a common ancestor in section 38 of the Interpretation Act, 1889. Botha JA at pp 551/552 considered the provisions of section 12 (2) and concluded at p552 that "s 12 (2) had the effect of preserving the *status quo* and that the rights of both the claimant and the defendant survived the repeal of s64 (3)". Ultimately Botha JA, on a consideration of the circumstances in which the claimant had not lodged her claim timeously, granted her special leave to lodge her claim in writing with Transnet within 20 days after the date of the Courts judgment.

That decision contrasted, in effect, with the decision of the Appellate Division

in *Minister of Public Works v Haffejee* NO (21). In that case property vesting in the respondent as administrator of an estate was statutorily expropriated by the appellant on 20th April, 1986. At that time the respondent, being dissatisfied with the offer of compensation, might have applied to an *ad hoc* compensation court (or a Division of the Supreme Court where the amount claimed was R100, 000.00 or more) for a determination of the compensation payable. The respondent made such application to a compensation court on 6th August, 1992, claiming R80, 410 compensation. The particular legislation, however, had been amended on 1st May, 1992, abolishing the compensation court and requiring all claims for compensation to be lodged with the Supreme Court, regardless of the amount of the claim.

The Court *a quo* had found for the respondent on the basis that having rejected the appellant's final offer of compensation, prior to 1st May, 1992, he had a vested right to lodge an application in a compensation court. In the Appellate Division, Marais JA (Grosskopf, Smalberger, Vivier and Nienaber JJ A concurring) observed that Counsel for the appellant laid great stress on the procedural nature of the amendments." The learned Judge of Appeal continued at p752:

> "Now although it has often been said that the presumption against statutory retrospectivity does not apply to procedural provisions, the realisation has grown that the distinction between procedural and substantive provisions cannot always be decisive in the context of statutory interpretation."

Marais JA then quoted the dicta of Lord Brightman in the *Yew Bon Tew* case (11) at p836 b - d and 839 d - f reproduced *supra.* He went on to quote the dicta of Innes CJ in the *Curtis* case (2) and in particular the observations thereon of Botha JA in the *Transnet* case (20) at p549 C - D reproduced *supra.* Marais J then observed at p753:

"In other words, it does not follow that once an amending statute is characterised as regulating procedure it will always be interpreted as having retrospective effect. It will depend upon *its impact upon existing substantive rights and obligations*. If those substantiative rights and obligations remain unimpaired and capable of enforcement by the invocation of the newly prescribed procedure, there is no reason to conclude that the new procedure was not intended to apply. *Aliter* if they are not." (Italics added)

Marais JA went on to observe that the relevant amendments were "undoubtedly procedural", their only effect being that a claim for less than R100,000 had to be brought in a different forum, which did not affect the respondent's pre-existing right to compensation. As to claims which had been lodged before 1st May, 1992, the learned Judged of Appeal observed a p754 that

"[t]he disruption, inconvenience, wastage of time and money, and other complications which could attend insistence upon pending and, a *fortiori*, pending part-heard cases being re-instituted before the Supreme Court are so obvious that they require no elaboration and there is no provision in the legislation for the mere transfer of such cases to the Supreme Court. Indeed, it is difficult to envisage how provision could fairly and effectively be made for the transfer of a case which is actually part-heard. These considerations are entirely absent in a case such as the respondent's where proceedings had not been instituted by 1 May 1992."

Marais JA then at p754 referred to

"the sweeping, and to my mind, quite untenable proposition that a litigant has a vested right in the forensic procedures which happen to be in force at the time when his right to claim arose."

He went on to observe at p755:

"As we have already seen, the common law recognizes no vested right in procedure *simpliciter*. See *Curtis's* case [2] at 319. Were it otherwise, no procedural amendment would apply to cases or causes of action arising before their commencement and that is certainly not the law. Most procedural provisions regulating the institution and conduct of litigious proceedings have a cost implication and many have a tactical implication. Yet that has never in the past been regarded as imparting to them a special character taking them out of the realm of purely procedural provisions and subjecting them to the presumption against legislative interference with vested rights. I see no good reason to commence doing so now. *To label procedural provisions instead as conferrers of privileges does nothing, in my*

> *view, to improve their claim to be regarded as anything more than what they truly and essentially are,* namely purely procedural provisions designed to regulate the institution and conduct of litigious proceedings."(Latter italics added)

As for the provisions of section 12 (2) (c) and (e) of the Interpretation Act, Marais JA found that no question of any accrued "right" or "privilege" arose.

The issue of retrospectivity came before the House of Lords in the case of *L'Office Cherifien des Phosphates and Another v Yamashita - Shinnihon Steamship Co Ltd;* The *Boucraa* (22). That case concerned the provisions of section 102 of the Courts and Legal Services Act 1990 which, on 1st January, 1992, amended the Arbitration Act, 1950 by the introduction of a new section 13A, which empowered an arbitrator to dismiss a claim on the ground *inter alia* "that there has been inordinate and inexcusable delay on the part of the claimant". An arbitrator on 13th August 1992, exercising such power, dismissed the respondents' claim initiated on 5th August 1985, on the grounds of the delay prior to 1st January, 1992. That decision was reversed in the High Court and again the Court of Appeal. An appeal to the House of Lords was allowed, the award of the arbitrator being restored. Lord Templeman (in a separate speech), Lord Goff of Chieveley, Lord Jauncey of Tullichettle and Lord Browne - Wilkinson, concurred in the speech delivered by Lord Mustill. Lord Mustill at p30 quoted with approval the following dicta of Staughton L J in *Secretary of State for Social Security v Tunnicliffe* (23) at p724

> "In my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree - *the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.*"(Italics added)

Lord Mustill continued at p30:

"Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute affects, or the extent of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the retrospectivity is *so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say.*" (Italics added)

Lord Mustill went on at p32 to observe:

"My Lords, at this point a strictly orthodox approach to the problem of retrospection would call up a line of authority, ... which applies different rules for ascertaining the retrospective effect of statutes by reference to a distinction between accrued substantive and procedural rights. This distinction is so firmly embedded in the law as to lead easily to an assumption that every right can be characterised uniquely as either substantive or procedural, and that the assignment of particular right to one category rather than the other will automatically yield an answer to the question whether a particular statute can bear upon it retrospectively. If this assumption were correct, it would call up an elaborate discussion, in the light of numerous reported cases, of whether the rights potentially affected by s13A are properly regarded as substantive or procedural. My Lords, I believe that such a discussion would be unprofitable, partly because the distinction just mentioned is misleading, since it leaves out of the account the fact that *some procedural rights are more valuable than some substantive rights*, and partly because I doubt whether it is possible to assign rights such as the present unequivocally to one category rather than another. Thus, whilst *keeping the distinction well in view*, I prefer to look to *the practical value and nature* of the rights presently involved as a step towards an assessment of the unfairness of taking them away after the event." (Italics added)

Ultimately, while Lord Mustill at p33 found the meaning of section 13A "sufficiently clear" and that the section "was intended to bite in full from the outset", having considered the rights of the claimant (respondent) in the matter, he concluded at p33:

"A right which the claimant regards so poorly that he has taken no trouble to enforce it is far removed from those which the courts have been so alert to protect; and in my

> view the presumption that Parliament did not intend to affect it is correspondingly weak."

In particular the learned Law Lord found it "impossible to accept" that Parliament had "reconciled itself to the continuation of arbitral proceedings already irrevocably stamped with a risk of injustice".

In the same year, 1994, there followed the case of *Plewa v Chief Adjudication Officer* (24), again before the House of Lords. In that case the deceased husband of the appellant (the executrix of his estate), had received a retirement pension for a number of years, which contained an amount in respect of his wife, who was in fact in part-time paid employment, which aspect was undisclosed and would have affected the amount paid to Mr Plewa. At the relevant time the legislation provided for a defence, in proceedings for the recovery of an overpayment, of "due care and diligence" to avoid overpayment. When the matter came before the relevant tribunal, new legislation had been introduced which made a third party liable to make repayment on the grounds of misrepresentation or failure to disclose the overpayment, and , in particular, removed the defence of "due care and diligence."

As to the latter aspect, Lord Woolf, with whose speech Lord Templeman, Lord Bridge of Harwich, Lord Lloyd of Berwick and Lord Nolan concurred, observed at p327 that the tribunal had indicated that if the matter had been decided under the old legislation, it "might well have found that Mr Plewa had used *due* care and diligence to avoid overpayment." The tribunal had followed the decision of the Court of Appeal in the *Tunnicliffe* case (23) the facts of which Lord Woolf considered to be "indistinguishable from those relating to Mr Plewa." The Court of Appeal in

Tunnicliffe (23) (Mustill L. J. (as he then was), Staughton and McGowan LL J) held that the tribunal *a quo* was right to apply the new legislation. The Court held that the presumption against retrospectivity "must be weak" (per Mustill LJ) and that "the retrospective effect of [the new legislation] is not so unfair to recipients of benefit, or some of them, as to require greater clarity than Parliament has used .....". Lord Woolf, quoting the first paragraph of the dicta of Lord Brightman in the *Yew Bon Tew* case (11) at p836 reproduced *supra*, considered at p328 that the new legislation introduced an "entirely new obligation to which Lord Brightman's remarks would apply with full effect," which aspect "makes it clear how unfortunate it is that in *Tunnicliffe* [23] the Court of Appeal were not addressed on the possible effect on third parties of the change in machinery..", and again at p329 that

> "When the possible effect on innocent third parties is taken into account ..... it is clear that a considerable degree of unfairness could result from the third party being under an obligation which he would not have been under prior to the coming into force of [the new legislation]."

Again, Lord Woolf at p329 g - h observed:

> "Although the position of the actual payee is obviously not as clear as that of a third party, even in the case of a claimant, I would have been inclined to attach more importance to the possible retrospective unfair effect of [the new legislation] than the Court of Appeal did in *Tunnicliffe* [23]. This is because it removed the defence of due care and diligence. If recipients would not have been under a liability in fact to make a repayment under the former machinery then from the practical point of view they were being placed under a liability which did not previously exist by the change in the law. This is a situation where the presumption against retrospectivity should apply. It is desirable that in this situation legislation should make it clear whether the new provision is to be retrospective or not."

While the decision in *Tunnicliffe* (23) clearly was not approved by the House in *Plewa* (24), nonetheless the dicta of Staughton LJ at p724 (quoted by Lord Mustill in the *Cherifien* case (22) at p30) were quoted by Lord Woolf, with apparent approval, at p329. Ultimately Lord Woolf allowed the appeal of Mrs Plewa, ordering that the

claim be reconsidered under the old legislation, or under both the old and the new legislation if there was also non-disclosure after the effective date of the latter legislation, unless, "[b]earing in mind the period which has elapsed and the fact that the claimant has died it may be thought unnecessary to insist on the matter being reconsidered by the tribunal."

The Supreme Court of Appeal had occasion to refer to the *Tunnicliffe* (23), *Plewa* (24) and *Cherifien* (22) cases, in the case of *National Director of Public Prosecutions SA v Carolus and Oth ers* (25). In that case the Cape of Good Hope High Court made a preservation order in terms of section 38 (Chapter 6) of the Prevention of Organised Crime Act (No121 of 1998) ("the Act") which took effect on 21st January 1999, which order prohibited the first respondent and any other person from dealing with certain properties. That order was subsequently rescinded by the High Court, against which rescission an appeal was lodged. Farlam AJA (as he then was) (Mahomed CJ, Olivier, Zulman JJ A and Melunsky AJA concurring) observed that the provisions of Chapter 5 of the Act, which provided for confiscation orders upon conviction, were retrospective in that sections 12 (3) and 19 (1) referred to unlawful activity "*whether before or after the commencement of this Act*"; again the definitions of "*pattern of criminal gang activity*" and "*pattern of racketeering* activity" contained in section 1, which did not relate to Chapter 6, included conduct before the commencement of the Act. Chapter 6 on the other hand made provision (section 50) for the forfeiture of property which is tainted, because it is linked to the commission of crime, that is, it is proved to be, on a balance of probabilities to be "an instrumentality of an offence" or to be "the proceeds of unlawful activities", even if no one is convicted of using the property or of having been guilty of the particular

unlawful activities. In particular, section 38 provided for the making of a preservation order, upon *ex parte* application by the National Director, where the High Court has "reasonable ground to believe" that the property concerned "is an instrumentality of an offence" or "is the proceeds of unlawful activities."

Farlam AJA turned to the authorities upon retrospectivity. He referred at p311 *inter alia* to the case of *Transnet Ltd (Autonet Division) v Chairman National Transport Commission* (26). He continued at pp311/312 paras [33] to [36]:

> "[33] In the *Transnet Ltd* case [26] at 7B-D, it was pointed out that a distinction is made in the case law between
>
> > ""true" retrospectivity (i.e. where an Act provides that from a past date the new law *shall be deemed to have been in operation) and cases where the question is merely* whether a new statute or an amendment of a statute interferes with or is applicable to existing rights".
>
> Reference was then made to a number of decisions of this Court, starting with *Shewan Tomes and Co Ltd v Commissioner of Customs and Excise* [6] at 311. "True" retrospectivity was described (at 7E) as being "strong" while the adjective "weaker" was applied to retrospectivity in the second sense as it is used in our case law.
>
> [34] In *Benner v Canada (Secretary of State)* [27], a decision of the Supreme Court of Canada, Iacobucci J referred (at 17) to the fact that the terms "retroactivity" and "retrospectivity" can be confusing and he quoted with approval definitions of the two terms given by the well known Canadian writer on the interpretation of statutes, Elmer A Driedger, in an article in (1978) 56 *Canadian Bar Review* 264 at 268-9 as follows"
>
> > "A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences for *the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event."
>
> [35] In terms of this terminology the expression "retroactivity" is used for retrospectivity in the "strong" sense while the expression "retrospectivity" is reserved for what is described as retrospectivity in the "weaker" sense.

> [36] It appears clearly from the many cases on the point, both in our law and in overseas jurisdictions, that the basis of the presumption against retrospectivity (in the strong and weak senses) is what Stevens J described, when giving the opinion of the United States Supreme Court in *Landgraf v USI Film Products et al* [28] at 265 as *"elementary considerations of fairness [which] dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly."* (Italics added)

Counsel for the appellant in the *Carolus* case (25), Mr Seligson S.C., submitted that Chapter 6 of the Act involved retrospectivity in the "weak" sense, and while the Act provided drastic remedies, in order to assist the State to combat an intolerable large increase, in organised crime, its main objective was to prevent criminals from benefitting from the proceeds of crime and to discourage the use of property for criminal purposes; Chapter 6, he submitted, operated independently of the other Chapters, so that Chapter 5 was not relevant to the interpretation of Chapter 6; while the provisions of Chapter 6 were not purely procedural, the distinction between procedural and substantive provisions was not helpful in that case. In particular, Mr Seligson submitted that the provisions of Chapter 6 did not impair any vested rights, as there could be no right to property acquired unlawfully, and accordingly Parliament would not have considered it unfair to provide a forfeiture mechanism designed to strip criminals of the proceeds of unlawful activities, even those which had taken place before the commencement of the Act. Indeed, he submitted, the property forfeited under Chapter 6 could have been realised under a confiscation order under Chapter 5, if the respondents had been convicted, so no unfairness arose.

Mr Seligson referred to the dicta of Staughton LJ in the *Tunnicliffe* case (23) at p724 reproduced *supra* and those of Lord Mustill in the *Cherifien* case (22) at p30 reproduced *supra*. He also referred to two American cases, namely, *USA v Certain*

Funds Located at the Hong Kong and Shanghai Banking Corporation et al (29) and *USA v Four Tracts of Property on the Waters of Leiper's Creek* (30), to which I shall return. Farlam AJA at p316 considered that the provisions of Chapter 6,as much as Chapter 5 involved an enquiry into the past. The fact therefore that the legislature, in sections 12 (3) and 19 (1) and in the definitions (in Chapter 1) of "pattern of criminal gang activity" and "pattern of racketeering activity", found it necessary to state expressly that offences committed before the Act came into operation could be taken into consideration, was a "strong indication ... that it did not intend the provisions of Chapter 6 to be applied retrospectively. The omission in Chapter 6 of the phrase "whether before or after the commencement of this Act" was "the most formidable obstacle to the acceptance of the contentions advanced on behalf of the appellant". The learned Judge of Appeal observed further on at p317, para. [58]:

> "[58] If Mr Seligson was correct in submitting that chapter 6 is retrospective it would create a cause of action to justify the seizure of property, which cause of action did not exist before the commencement of the Act. In my view such a result would be lead to an unfair result: it is unlikely that that could have been intended by Parliament."

Farlam AJA found support for that conclusion in the case of *Plewa* (24) and in particular in the dicta of Lord Woolf therein at 329 g - h, reproduced *supra*. Thereafter Farlam AJA concluded at p317, paras [60] and [61]:

> "[60] In my view the *cumulative* effect of the unfairness, the legal culture leaning against retrospectivity where there is unfairness, the fact that Parliament refrained from repeating the "*whether before or after the commencement of this Act*" phrase used in sections 12 (3) and 19 (1) and the fact that conduct before the commencement of the Act is specifically referred to in the definitions of "pattern of criminal gang activity" and "pattern of racketeering activity" leads me to the conclusion that on a proper interpretation of the Act chapter 6 was not intended to be retrospective.
>
> [61] The two American cases cited by Mr *Seligson* do not assist at all because the factors enumerated in the previous paragraph were not applicable in those cases."(Italics added)

In the result the appeal was dismissed.

United States of America:

As to the two American cases, in the *Hong Kong* case (29) the United States Government sought the forfeiture of assets valued at US $ 1.5 to 3 million located in Hong Kong, alleged to be the proceeds of a conspiracy to smuggle heroin into the United States and to "launder" the proceeds thereof. The Government commenced action in September 1991 in a Federal District Court. The claimants filed their claim and answer in October, 1991, without challenging the jurisdiction of the court. This they did in April 1992, claiming want of jurisdiction over a *res* located outside the United States. In October 1992 the legislation conferring jurisdiction on Federal Courts over civil forfeiture proceedings was amended to provide District Courts with *in rem* jurisdiction over a *res* located in a foreign country. The Federal District Court (Eastern District of New York) held, on one aspect, that the legislation did not apply *retroactively* and dismissed the Government's action. That decision was reversed on appeal to the United States Court of Appeals for the Second Circuit (Winter and Gabranes Circuit JJ and Motley District J). Gabranes, Circuit J in delivering the judgment of the Court observed at p24 that

> "[the amended legislation] ... is not a forfeiture statute *per se* : it is a procedural statute. The *Landgraf* Court [28] itself noted that procedural rules "may often be applied in suits arising before their enactment without raising concerns about retroactivity," *Landgraf,* [28] at 1502. There are "diminished reliance interests in matters of procedure ...because rules of procedure regulate secondary rather than primary conduct." *Id.* (Citations omitted). The secondary conduct here is the court's power – its jurisdiction– over the *res* located overseas. Quintessentially procedural, jurisdiction statutes have often been accorded retroactive application. The supreme Court has "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Id.* at 1501. "Application of a new jurisdiction rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.' Present

> law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'"

Earlier Gabranes J had observed that the Court in *Landgraf* (28) had held that a court should not apply a statute to conduct that took place before its enactment if a

> "new provision attaches new legal consequences to events completed before its enactment" (*ibid.* At p1499)

and

> "would impair rights a party possessed when he acted, increase a party's liability for past conduct or impose new duties with respect to transactions already completed" (*ibid.* At p1505)

Gabranes J went on to conclude at p24

> "We conclude that [the amended legislation] if applied in this case, would not take away any rights possessed by a party, increase liability, or attach new legal consequences to past conduct. The claimants *never had any right* to property resulting from illegal gains, and their alleged drug smuggling and money laundering have always carried criminal penalties. One of the legal consequences of drug smuggling or money laundering is that the resulting illegal proceeds are subject to forfeiture to the government..... The mere fact that people who commit crimes within the jurisdiction of the United States manage to secrete proceeds of those crimes out of the country does not mean that they enjoy any greater rights to those proceeds. Accordingly, it cannot be said that [the new legislation] ever created any new legal consequences or impaired any existing rights..."(Italics added)

In the *Leiper's Creek* case (30) the claimant purchased property with the proceeds of drug-trafficking activity in the early 1970s, as a result of which he was imprisoned on two consecutive sentences, each of five years' imprisonment. He buried the ill-gotten money before being imprisoned, dug it up when released, and thereafter purchased the property at Leiper's Creek in 1989. The Government instituted forfeiture proceedings in 1992. It relied upon forfeiture provisions amended in 1978 to cover *inter alia* the proceeds of drug-trafficking. The claimant maintained that the property represented the proceeds of drug-trafficking activity in the early 1970s, prior to the amendment to the legislation. As to that aspect, the United States

Court of Appeals for the Sixth Circuit (Kennedy, Daughtrey and Clay Circ. JJ) held at p9 that the money was still hidden and had not then been converted to "proceeds" when the legislation was amended, so that "there simply is no retroactivity question raised by the facts in this case." Furthermore, relying on the decision in the *Hong Kong* case (27), the court held at p9 that

> "it is obvious that [the claimant] never had a right to the proceeds of his illegal behavior ... therefore forfeiture of the defendant property as "proceeds" could not impair any vested rights."

Canada

There are a number of Canadian cases which are of assistance. The first of those is *Howard Smith Paper Mills Ltd et al. v The Queen* (31), decided in 1957. There the Supreme Court of Canada considered new legislation which provided that a document (even an "inter-office memorandum") found in possession of an accused, or on premises used or occupied by him, or in possession of an agent, were admissible in evidence as *prima facie* evidence of anything recorded therein as having been "done, said or agreed upon" by the accused, or by the agent with the accused's authority. The Court held that the legislation was applicable to events which had occurred before its commencement. Cartwright J in particular, who wrote the second of two main judgments, quoting at p466 the opening lines of *Phipson on Evidence* (9th Ed) at p1 (see 14 Ed at p1 reproduced *supra*), relied heavily on the dicta of Lord Blackburn in *Gardner v Lucas* (1) at p603 reproduced *supra*. The learned Judge went on to say at p476:

> "While [the new legislation] makes a revolutionary change in the law of evidence, it creates no offence, it takes away no defence, it does not render criminal any course of conduct which was not already so declared before its enactment, it does not alter the character or legal effect of any transaction already entered into; *it deals with a matter of evidence only and*, in my opinion, the learned Trial Judge was right in holding that it applied to the trial of the charge before him."(Italics added)

The Ontario Court of Appeal dealt with the issue of retrospectivity in 1975 in the case of *R v Le Sarge* (32). The accused was convicted of the theft of a tractor, and a trailer containing a large quantity of alcohol. The theft occurred on 8th August 1973. As a result of information received on 10th August, the police conducted a "wire-tapping" exercise, which led to their finding the accused, and another, in possession of the alcohol, on 12th August 1973. On 30th June 1974 legislation was introduced which amended the Criminal Code and prohibited wire-tapping. The headnote to the judgment indicates that the accused's trial, before a County Court Judge, "was held after that date". Inasmuch as the accused was found in possession of a large consignment, 1224 cases, of stolen alcohol, valued at Can $60,000, I cannot but imagine that he was forthwith arrested and charged therewith, that is, on 12th August 1973. It is safe to assume therefore that his trial was pending when the new legislation took effect. Houlden JA (Jessup and Martin JJA concurring) observed at p395 that authority indicated that the wire-tapping, when conducted, was not unlawful. The learned Judge of Appeal observed at pp395/396 that it is a well established principle that "a statute which deals with matters of procedure *only* is ordinarily to be given a retrospective application." The amending legislation however did not deal with procedural matters only: it created three new substantive offences and the section in question was, as Houlden JA observed, "so inextricably bound up with the substantive provisions ... that, in my opinion, it cannot be given a retrospective operation". Houlden JA continued at p396:

> "Furthermore, as the Act was not in force at the relevant time, it would have been impossible for the police to have complied with provisions of s.178.16. The fact that an Act imposes new duties in respect of past transactions with which it is impossible to comply, is an important consideration in determining whether or not a retrospective application should be given to a statute."

To the same effect was the decision in *R v Irwin* (33) decided in the same Court in 1976, where the Court (Kelly, Dubin and Howland JJA) considered the applicability of the provisions of the Criminal Code, amended on 30th June 1974, to a trial which commenced on 4th July 1974 in respect of a transaction in June 1973. The Crown's case depended entirely on the evidence of a closed circuit video recording and an audio recording from a wireless microphone. The amendment to the Criminal Code rendered such evidence inadmissible, whereupon the trial Judge had dismissed the charge. In delivering the judgment of the Court of Appeal, Dubin JA followed the decision in *LeSarge* (32), and set aside the acquittal, ordering a new trial, holding that the admissibility of the video and audio evidence was "still to be determined by the rules of evidence which governed its admissibility" prior to the amendment to the Criminal Code.

The same question arose in the prominent case of *R v Ali* (34) decided by the Supreme Court of Canada in 1979. In that case the accused was charged with driving whilst under the influence of alcohol. He was subjected to a breathalyzer test based on one sample of breath, in accordance with the prevailing legislation. A certificate from a qualified technician, which indicated that, arising out of such test, the accused's blood revealed a proportion of alcohol in excess of the statutory limit, was presented at the accused's trial and he was duly convicted. Meanwhile the legislation had been amended, that is, before the date of the offence, which amendment, however, took effect shortly after the date of the offence and the breathalyzer test, but before the date of the information and the trial. The amendment to the legislation provided that not less than two samples of breath be received in a breathalyzer test.

The Magistrate held that the amended legislation had no retrospective effect and convicted the accused, but stated a case to the Supreme Court of Newfoundland, the appeal thereon being dismissed. The Newfoundland Court of Appeal quashed the conviction, however, against which decision the Crown appealed to the Supreme Court of Canada. By a majority (of five to two members) the Supreme Court allowed the appeal and restored the conviction. Pratte J, who delivered the majority judgment, observed at p52:

> "It is not in dispute that the rule as to the retrospective operation of procedural statutes is not absolute; it is only a guide that is intended to assist in the determination of the true intent of Parliament which is the main objective of statutory construction."

As to the amending legislation in question, the learned Supreme Court Judge observed at pp55/56:

> "This amendment clearly related to substantive law; it gave police officers the right to demand more than one sample of breath so as to enable a proper analysis to be made and made it an offence for a suspect to refuse to give more than one sample of breath; before the amendment, only one suitable sample of breath could be demanded; thus, a person could, without committing an offence, refuse to give more than one sample. This amendment by its very nature may only apply prospectively; the requirement that the samples of breath be taken "forthwith" or within a prescribed time frame makes it a physical impossibility to give any retrospective effect to the new [legislation]."

and further on at p56.

> "[I]t is apparent that the new [legislation] cannot in fact operate retrospectively. When only one sample of breath has been taken because only one was required and could be demanded at the time, the law cannot make it possible for two samples to have been taken. The retrospective operation of the new [legislation] which has been adopted by the Court of Appeal would effectively result in neither the new nor the old section being operative during the period when the new [legislation] is supposedly intended to operate retrospectively. This can hardly have been the result that was intended by Parliament."

Pratte J went on at pp57/58 to consider the provisions of section 35 of the

Interpretation Act, and in particular paragraphs (b) and (e) thereof, which are virtually identical to those of section 18 of the Interpretation Act, 1977 of Lesotho. As to paragraph (b) Pratte J concluded at p58 that the breathalyzer certificate in question

> "would certainly be "affected" if because of the repeal of the section under which it was validly given it were deprived of all evidentiary value and would thus cease to have any usefulness at all. Section 36 (b) is precisely intended to prevent such an undesirable result."

In the case of *Wildman v The Queen* (35) the accused was convicted of first degree murder of his eight year-old stepdaughter. His wife did not give evidence at the trial, either for the Crown or the defence. The trial Judge erred in excluding a material statement over the telephone by the wife, or someone purporting to be her, shortly after the disappearance of the deceased and before the discovery of her body, on the ground that it offended the hearsay rule. The Supreme Court of Canada allowed the appeal on this ground and ordered a new trial. That raised the issue of whether or not the accused's wife might give evidence. An amendment had been effected to section 4 (by the addition of sub-section (3.1)) of the Canada Evidence Act, that is *after* the date of the commission of the offence. The effect of the amendment was (apparently as an exception to the general rule), in the case of prescribed offences, where the complainant or victim was under the age of fourteen years, to render a spouse "a *competent* and *compellable* witness for the prosecution without the consent of the person charged." Lamer J (as he then was), who delivered the judgment of the seven-member Court, having quoted section 4 (3.1), observed at p657:

> "The new trial will governed by that section. Indeed, S. 36(d) of the Interpretation Act, R.S.C. 1970, c. 1-23, states that:
>
> > 36. Where an enactment (in this section called the "former enactment") is repealed and another enactment (in this section called the "new enactment") is substituted therefor,
> >
> > .....

> (d) the procedure established by the new enactment shall be followed as far as it can be adapted thereto in the recovery or enforcement of penalties and forfeitures incurred, and in the enforcement of rights, existing or accruing under the former enactment or in a proceeding in relation to matters that have happened before the repeal;"

In this respect, see also the similar provisions of section 44 (d) of the federal Interpretation Act of Canada, reproduced at p544 of *Driedger on the Construction of Statutes* (3 Ed, by Professor Ruth Sullivan). Indeed, section 44 (c) reads:

> "(c) every proceeding taken under the former enactment shall be taken up and *continued under and in conformity with the new enactment* in so far as it may be done consistently with the new enactment." (Italics added)

I appreciate, of course, that those are foreign statutory provisions inapplicable to these proceedings. In this respect, however, Lamer J in *Wildman* (35), after quoting section 36 (d) *supra* continued thus:

> "This is an enactment of the common law rule that there is *no vested right in procedure* along with a limitation to the effect that the following of the new procedure must be feasible: see *R v Ali* [34]. Therefore, *a new procedure applies to pending suits* without breaching the "rule of interpretation to the effect that statutes ought, if possible, to be interpreted so as to respect vested rights". See E.A. Driedger, *The Retrospective Operation of Statutes* (1953), Legal Essays in Honour of Arthur Moxon, University of Toronto Press, p.5 *et seq.* Section 36(d) of the Interpretation Act uses procedure in a wide sense and that expression includes the rules of evidence."

Lamer J then quoted from *Phipson On Evidence,* 13 Ed at p1 (see 14 Ed at p1 reproduced *supra*), and continued at pp657/658:

> "Some rules of evidence must nevertheless be excluded for they are not merely procedural, they create rights and not merely expectations and, as such, are not only adjectival but of a substantive nature. Such has been found to be the case for rules or laws creating presumptions arising out of certain facts: see, for example, as regards the presumption of advancement in questions of ownership of property as between husband and wife, *Bingeman v McLaughlin (Bingeman)* [36]..... Such is also the case of the lawyer-client privilege resulting from a person's right to the confidentiality of his lawyer, irrespective of whether there is litigation ..... The courts, for obvious

> reasons of logic, have not excluded under new laws, for want of certain new prerequisites to its admissibility, evidence which had complied with the prerequisites of the previous. *R v Ali,* [34], is an illustration of this approach, using the proviso "as far as it can be adapted thereto" of s.36(d) of the Interpretation Act..... But such is not the case as regards a spouse's incompetence to testify.
>
> Spouses *do not have a substantive right* to the confidentiality as to what either was seen doing by the other or to the confidentiality of what was to the other communicated by either.
>
> The incompetence and uncompellability of s.4 of the Canada Evidence Act is *not the result of a substantive right* to confidentiality and is *merely procedural.*
>
> If a new trial ensues, Mrs Wildman will be a competent and compellable witness for the prosecution without the consent of the accused."(Italics added)

The issue of retrospectivity came before the Supreme Court of Canada once again in 1988 in the case of *Angus v Sun Alliance Insurance Co* (37). The facts of that case were that the respondent was seriously injured in a motor vehicle accident, where the vehicle was owned by her father but driven by her husband. She filed action, in the Supreme Court of Ontario, for damages against her husband (whom she subsequently divorced) and her father. At the time of the accident legislation provided that spouses could not sue one another in tort; insurance legislation provided further that an insurer was not liable for bodily injury or death of a daughter, son, wife or husband, the father's insurance policy containing a clause absolving the insurer from third party liability in similar terms. After the accident, but before the suit was commenced, all of such legislation was repealed. In response to the action, the appellant insurers sought a determination as to whether the new legislation operated retrospectively and also an order that the statement of claim disclosed no reasonable cause of action against the husband, the father or the insurers. The Supreme Court of Ontario (Galligan J)determined that the new legislation was retrospective in effect and that the defences, previously available to the defendants were not now available. On

appeal, the Court of Appeal for Ontario upheld Galligan J, adding further that in any event the divorce had caused the defences to fall away, an aspect which, on appeal, the Supreme Court of Canada rejected and which need not concern us.

La Forest J delivered the judgment of the five-member Bench of the Supreme Court. At pp 260 and 262 he referred to, as "unexceptionable", *inter alia* the following statement of Galligan J:

> "[N]o legislation is to be construed as being retrospective in operation so far as substantive rights and obligations are concerned unless the statute clearly provides or such retrospective operation is required by clear implication. A procedural enactment, however, is prima facie to be given a retrospective interpretation unless it would prejudice a substantial right of a party."

La Forest J himself observed at p262

> "There is a presumption that statutes do not operate with retrospective effect. "Procedural" provisions, however, are not subject to the presumption. To the contrary, they are presumed to operate retrospectively ..... The distinction between substantive and procedural provisions, however, is far from clear."

and at pp265/266,

> "A provision is substantive or procedural for the purposes of retrospective application not according to whether or not it is based upon a legal fiction, but according to whether or not it affects substantive rights. P. - A. Cote, in *The Interpretation of Legislation in Canada* (1984), has this to say at p137:
>
> > "In dealing with questions of temporal application of statutes, the term "procedural" has an important connotation: to determine if the provision will be applied immediately [i.e. to pending cases] "the question to be considered is not simply whether the enactment is one affecting procedure but whether it affects procedure only and does not affect substantial rights of the parties." (Quoting *DeRoussy v Nesbitt* [38] at 516)".
>
> In the present case, it is difficult to see how procedure is being affected at all. The provision in question *provides a complete defence* to an action. Whatever may be the reasons for this, and whether one agrees or disagrees with them, the provision of a

complete defence to an action, just as much as the creation of a cause of action itself, is a *substantive* matter.

Even if one assumes that the provision in question is procedural in some sense, the judicially created presumptions regarding the retrospective effect of procedural rules were not devised with this sort of distinction in mind. Normally, rules of procedure do not affect the content or existence of an action or defence (or right, obligation, or whatever else is the subject of the (legislation), but only the manner of its enforcement or use. P. St. J. Langan, *Maxwell on Statutory Interpretation* (12th ed. 1969), at p222, puts the matter this way:

> "The presumption against retrospective construction has no application to enactments which affect only the procedure and practice of the courts. *No person has a vested right* in any course of procedure, but only the right of prosecution or defence in the manner prescribed *for the time being*, by or for the court in which he sues, and if an Act of Parliament alters that mode of procedure, he can only proceed *according to that altered mode*." (Italics added)

Alteration of a "mode" of procedure in the conduct of a defence is a very different thing from the removal of the defence entirely. The latter is in essence an interference with a vested right."

at again at p267

"Galligan J also maintained that James Angus had no "right to injure" his wife and was, therefore, not being deprived of anything. The reality seems to me to be quite otherwise. A retroactive application of s.7 would clearly *deprive him of a complete defence* to the action.

It is not necessary here to untangle the complex distinctions between substantive and procedural legislative provisions. The provision in this case is clearly substantive. In any case, whether the provision is deemed to be substantive or procedural, it is not one to which a presumption of retrospectivity can be applied. This would amount to a serious deprivation of an *acquired right* of the husband, and it should not lightly be assumed that this was the intention of legislature."(Italics added)

Lamer CJC had occasion to deal once again with retrospectivity in the case of *R v E. (A.W.)* (39). In that case the respondent had been convicted of a sexual offence on the uncorroborated sworn evidence of his minor stepson aged 13 years. ("J.E."). The alleged incidents took place in 1983 and the trial took place in 1990, in which the

trial Judge relied upon amendments to the law of evidence in 1988. The conviction was set aside by the Alberta Court of Appeal. It was restored by the majority (four to three members) of the Supreme Court of Canada, on the basis that the Court of Appeal should not have considered an unsolicited letter by the trial Judge to that Court; the minority considered that nonetheless the letter disclosed an error of law which might have affected the verdict (Lamer CJC at p483 and Sopinka J at p486). The Court of Appeal had also allowed the appeal on the ground that the trial Judge had applied the amended legislation. In his dissenting judgment Lamer CJC dealt with that issue thus at pp485/486:

> "Prior to its repeal in 1988 .... s.586 of the 1970 *Criminal Code* required corroboration before the unsworn evidence of a child complainant could be adduced. Those same amendments to the *criminal Code* removed the requirement at common law that any *uncorroborated* evidence by the complainant be accompanied by a caution from the trial judge. In the present case, the trial judge accepted the uncorroborated evidence of J.E. based on the law in force at the time of trial, and was, I find, correct in so doing. *It is the law of evidence at the time of trial* that *prevails*. Indeed, this court has held that the enactment of a new law with respect to *evidentiary* questions may validly have retrospective application: see *R v Wildman* [35]." (Italics added)

The judgment of Lamer CJC indicates at p483 that he considered that, in all the circumstances of the case, the trial Judge "could at least have suggested to the jury to proceed with caution," and again that "while the charge to the jury appears sound on its own," when read together with the Judge's letter "it becomes clear that the trial Judge misdirected himself in his charge to the jury." The particular legislation is not before me. It seems to me nevertheless that in the dicta reproduced above Lamer CJC was saying that the trial Judge was entitled, under the legislation as amended, to rely on the uncorroborated evidence of a child, but he was nonetheless of the view, in all the circumstances of the case, that a caution to the jury was indicated. Be that as it may, for our purposes, there can be no doubt as to the effect of the learned Chief

Justice's statement of general principle as to the applicable law of evidence.

THE TEXTBOOKS

As to the textbooks, in the matter there is much to consider in *Maxwell on The Interpretation of Statutes* 12 Ed (P. St J . Langan) (1985) at pp 215/227, *Craies on Statute Law* 7 ED (S. G. G. Edgar) (1978) at pp387/406, *Interpretation of Statutes* (Dr Gail-Maryse Cockram) 3 Ed (1990) at pp124/131 and *Interpretation of Statutes* (Professor George E. Devenish) (1996) at pp186/194. The following passage, adopted by Devenish *op. cit.* at pp193/194, is to be found in Cockram *op. cit.* at pp129/130, where the learned author, speaking of "[r]etrospectivity in respect of procedure," observes:

> "Strictly speaking, the position is that the enactment, on coming into effect, applies to all matters which come before the courts. As such, the enactment is prospective in its operation. Its prospectivity, however, appears to have a retrospective aspect in that the new procedure will apply in the adjudication of acts or events which occurred *prior to the amendment of the law*. In this sense retrospectivity is only apparent and not real. And it is in this sense that it is correct to say that no presumption against retrospectivity of procedural statutes exists.
>
> Where, however a procedural statute has the effect of depriving a person of a *remedy* or of a *defence*, by, for example, extending a period of prescription which has already expired prior to the coming into effect of the enactment, then it is retrospective in the true sense of the word, and will be subject to the usual presumption. So it appears that retrospective operation may only be given to a statute involving procedural changes to the law where the change *does not impose disabilities or new burdens* on an individual."(Italics added)

Mr Phoofolo has referred me to a particular passage at p549 of *Driedger op. cit.* The passage must be considered in context. The learned author observes at pp543/544 that procedural legislation is "presumed to apply *immediately* to on-going proceedings including *those commenced* but not completed before its coming into force". Indeed,

Professor Sullivan observes that such presumption is "partially codified in Canadian Interpretation Acts", quoting in part the provisions of section 44 of the federal Interpretation Act, observing that

> "[a]lthough the application of new substantive law is delayed and restricted by the survival of repealed law, the application of new procedural law is not. It applies *immediately* and generally to all facts in so far as it can be adapted to give full effect to the surviving substantive law."(Italics added)

Professor Sullivan defines procedural law as "law that governs *the methods by which facts are proven* and legal consequences are established in any type of proceeding" and observes at p545:

> "Whether a provision is procedural must be determined in the circumstances of each case. A provision may be procedural as applied to one set of facts but substantive as applied to another. To be considered procedural in the circumstances of a case, a provision must be exclusively procedural; that is, its application to the facts in question must not interfere with any *substantive rights* or *liabilities* of the parties or produce other *unjust* results. This point is emphasized repeatedly in the cases."(Italics added)

Professor Sullivan goes on at pp545/546 to consider the *Angus case* (37), observing that "the important thing is not the label but the effect," in this respect quoting the dicta of Lord Brightman in the *Yew Bon Tew* case (11) at p839 at f reproduced *supra*. As to limitation of actions, the learned author observes at p546 that

> "where the effect of applying the new provision is either to *extinguish* an action that was still viable when the provision came into force, or to *revive* an action that was barred, more than time is at stake. In such a case, the provision affects the *substantive rights* of the parties and cannot be considered purely procedural."(Italics added)

Again, there is reference to Lord Brightman's dicta at pp839/840 l to a, reproduced *supra*. The particular passage in *Driedger* to which Mr Phoofolo makes reference is at p549. It reads thus:

> "*Presumption against retroactivity applies to procedural law.* Where a provision is found to be purely procedural, it is given *immediate* and general effect. It is *not* given *retroactive* effect. The presumption against the *retroactive* application of legislation applies to procedural provisions as it does to all legislation, without exception. Thus, any attempt to apply a procedural provision to a stage in a proceeding that was *completed* before the provision came into force would be refused, subject to a legislative direction to the contrary.
>
> The presumption against the *retroactive* application of legislation explains why courts have refused to apply new rules governing the way evidence is *gathered* to pending actions. Where evidence is obtained through means that are lawful at the time, an accused usually is not allowed to rely on subsequently enacted changes to render this evidence inadmissible."

First of all, the passage refers to "retroactivity" rather than "retrospectivity" and clearly retroactivity (enacting the law to be, in the past, that which it was not) can only be legislated in express terms. Secondly, as to the second paragraph above, the second sentence thereof is explanatory or rather demonstrative of the first. The learned author proceeds immediately thereafter to give the example of the case of *R v Ali* (34), of which case, having recited the facts thereof, Professor Sullivan observes at pp 549/550:

> "To apply the new provisions to this trial would have given them a *retroactive* rather than an immediate application. They would have governed a stage of the proceedings, namely the taking of a breath sample, that had been *completed* long before the new legislation came into force." (Italics added)

Considering that the learned author was speaking of the presumption against *retroactivity,* I respectfully observe that "new rules governing the way evidence is *gathered"* are simply inapplicable where such evidence has already been lawfully gathered in accordance with the terms of existing legislation.

COMPARISON OF NEW AND OLD LEGISLATION

The accused's objections are launched at sections 245 and 246 in the new

legislation. It will be seen that the old sections 245/248 referred to a "bank", which was construed by van den Heever AJA (as she then was) (Browde and Leon JJ A concurring) in the case of *Letsie and Others v R* (40) at pp47/48 to include a foreign bank. The new legislation statutorily confirms that interpretation, inasmuch as it specifically caters in section 246 for a foreign bank.

The New Sections 245 and 246: "Purporting to be ...."

As to sections 245 and 246, Mr Phoofolo submits that the first objection, is to the use of the expression, "purporting to be", that is, indicating that it is sufficient if a document purports to be an affidavit, whereas the old legislation required the production of an affidavit as such. As indicated earlier, the new legislation is almost a verbatim copy of sections 236 and 236 A of the Criminal Procedure Act of South Africa, 1977, the present-day provisions of which sections were introduced in 1993, in which the expression "purporting to be" is used. Furthermore, the expression is used seven times in section 223 of the Code (and see also section 212 of the Criminal Procedure Act, 1977), which deals with the admission of evidence by affidavit, including sub-section (6) thereof which even refers to a reply by a deponent to interrogatories as a reply "purporting to be a reply from such [deponent]."

It is clear that when a Court receives an affidavit, the document is best described as a document "purporting to be an affidavit". The document no more than purports that the oath was taken by one, in the presence of another who purports to be a commissioner for oaths. The presumption of regularity applies and, unless there is evidence to the contrary, what purports to be an affidavit is accepted as such by the Court. In brief, I consider that the expression, "purporting to be an affidavit,"

correctly describes the document, rather than the previous description of the "affidavit", and stresses the point that, quite obviously, the document will be rejected by the Court should it transpire that it is not an affidavit (see e.g. *Dawoodally v Gora* (41)).

Old Section 246 (1)

As to the old section 246 (1) (excluding paras (a) and (b)), it will be seen that, compared to the new sections 245 (3) and 246 (3), it imposed a lesser duty upon the Crown: the old provisions required an affidavit from "a person" (any person) who had examined the originals, whereas the new provisions require that such examination be conducted by one "in the service of the bank": see *R v Albutt and Screen* (42).

Old Section 246 (1) (a) and (b)

Mr Phoofolo points to the fact that paragraphs (a) and (b) of the old section 246 (1) have not been repeated. Firstly, he submits, the requirement of 10 days notice has been taken away. I have to say that in the circumstances of this present trial, that aspect is somewhat unrealistic. Mr Penzhorn confirms that, under the "open docket" principle, the relevant documentation was supplied to the accused many months ago. In any event, under the said principle, the authorities indicate that such documentation should be forwarded upon indictment. The "open docket" principle is based on an ethos of transparency, connoting not alone disclosure but also due notice. The right to disclosure has not been taken away - it is supplied by the common law. There can be no doubt that the question of the *quantum* of the notice is "purely procedural", but in any event, in the light of the "open docket" principle, must be equitably administered by the Court.

Mr Phoofolo points to the fact that under paragraph (b) an accused was *at liberty* to inspect the originals. It seems to me that paragraph (b) was related to paragraph (a) and an accused would therefore only have been *at liberty* to inspect the originals, when, under paragraph (a), they were produced by the prosecution, which eventuality would have been most unlikely. If that were not the case, why then was it necessary under sub-section (2) for a court to order that an accused "be *at liberty* to inspect the originals, as well as to take copies, that is, if he was already at liberty to inspect under sub-section (1) paragraph (b). In brief under the old legislation, if the Crown obtained possession of the originals, then the accused was "at liberty to inspect" (and no doubt, under the "open docket" principle, to copy), whereas, if the originals remained in the custody of the bank then, a court order was required for the purpose of both inspection and copying. Further, where it was necessary to produce the originals at the trial, a court order under section 247 was necessary, which provision is repeated, in respect of a local bank, under the new section 247.

In any event, under the new legislation, were it the case that the Crown proposed to adduce originals, and the copies thereof were challenged, I cannot but see that under the "open docket" principle, the accused would be "at liberty" to inspect and copy the originals. Where the originals remained in the custody of the bank, then under the new section 245 (4) the accused may still, as before, approach the court in the matter and secure an order for inspection of the originals and the taking of copies thereof. Indeed the new section 245 (4) provides that the court may adjourn for such purpose.

Old Section 246 (3)

The circumstances under which a court might have made an order under this subsection do not spring readily to mind; unless it is that the comparison of originals and copies might have revealed discrepancies, or indeed that the account was other than that of the person stated. In any event, the very use of the words, "purporting to be," in the new legislation, and indeed the words, "*prima facie* proof", indicate that the hands of the court are never tied and the accused is always free to invoke the court's powers in the matter. In brief I cannot see that the old section 246 (3) added to the Court's powers, nor that its repeal has detracted therefrom.

New Section 246

Sub-section (4)

It will be seen that here the protective measures (as far as an accused is concerned) are reinforced, that is, that an affidavit from a foreign bank is of no effect unless it is obtained in terms of an order of a foreign court or government institution.

Sub-section (5)

I consider this measure to be nothing more than a matter of form.

Sub-section (6)

This is a new provision, and the accused can have no objection thereto. The Court may order that a supplementary affidavit be submitted, or indeed that the deponent be called to give oral evidence. I have little doubt that under the old legislation the Court, if needs be, could have resorted to oral evidence (see the reference to "other evidence" in section 245). The new legislation makes clear statutory provision in the matter, however, and additionally confers the power to call

for a supplementary affidavit.

Inspection and Copying: Foreign Banks

Mr Phoofolo submits that there is no power in the new legislation for an accused to inspect the original documents in a foreign bank. As indicated above, I do not consider that under the old legislation an accused had such power, even in respect of a local bank, except upon court order. In the case of *Letsie* (38) van den Heever AJA, speaking of the old section 247, observed at p48:

> "But the accused is only to be *at liberty* to inspect. If he does not wish to do so, the question whether the particular bank would permit him to do so or not is irrelevant..... The fact that section 247 has no extra-territorial validity is accordingly no ground for limiting the word bank in sections 245 and 246 to mean by necessary implication "bank in Lesotho."

For that matter I do not see that the old section 246 (2) had any extra-territorial validity either, which aspect is supported by the fact that the new section 245 (2) (and hence sub-section (4)) and the new section 247 (1) (and hence subsection (2)) specifically refer to a "bank in Lesotho."

Bank Documentation

The main change effected by the new legislation is that, in keeping with the 1993 legislation introduced in South Africa, (and see that of 1979 in England), the reference to "ledgers, day-books, cash-books and other accounts books" has disappeared. Instead, in view of the fact that the terminology, originating in the Bankers' Books Evidence Act 1879 of England, has for many years now, become largely anachronistic, the new legislation takes cognizance of the computerization of accounts. In the formalized system of book-keeping 122 years ago, it could safely be

assumed that all transactions of a bank would be recorded in some form or other of an "account book", so that the old terminology was sufficiently wide, that being the *intention* of the legislature, to cover all relevant transactions. With the disappearance of the old-style of book-keeping, and the introduction of computerisation, there was clearly a need for amendment, in order to *preserve* the intention of the legislature in the matter. I cannot, however, see that the present accused enjoyed any vested right in the matter: any "document" or "entry" (as respectively defined in the new legislation) in the possession of a bank could always have been produced, before the advent of the new legislation, by means of *subpoena* and *viva voce* evidence. The fact that it now can be produced by affidavit, constituting *prima facie* evidence, is no more than a procedural measure dealing with the manner of proof.

THE INTENTION OF THE LEGISLATURE

Ultimately it is the intention of the Legislature which must be divined. In this respect Mr Phoofolo submits that for a number of years now in England, the Courts have had recourse to Hansard in the matter of statutory interpretation. He refers to the case of *Pepper v Hart* (43) and see also the case of *Fothergill v Monarch Airlines* (44). There is a learned discussion in Devenish *op. cit.* on the subject at 122/127. In conclusion Professor Devenish quotes the observation of Pierre-Andre Cote (*Interpretation of Legislation in Canada,* 1984 at p347) where he observed of the general exclusionary rule, that,

> "[a]ll things considered there is much to be said for defining the rule as 'cautionary rather than mandatory'".

Mr Phoofolo then refers to two extracts taken from the Second Reading to the Criminal Procedure and Evidence (Amendment) Bill, 2000, the precursor to Act No.3

of 2001. The first extract, a translation of which has been supplied by Mr Phoofolo, represents portion of a contribution to the debate made by one Hon. Member of Parliament:

> "The issue is, now that we have this type of a Bill, it is not necessary that after it has been passed as law, or maybe it ought to be stated here that it should operate retrospectively, so that even those *who stole two, three years ago, should fall within this* Bill *so that we may charge them.* I consider it important that this Bill be retrospective, it should operate retrospectively if this is permissible so that those *who stole in the past should fall within its ambit,* so that they may be dealt with according to the law after investigations concerning them have been completed. I do not know whether this is possible, but if it is not possible many will have escaped and gone with those monies with impunity."(Italics added)

Mr Phoofolo has also supplied the Court with a translation of an extract from the Hon. Attorney-General's speech at pp19/20 of Hansard. I thought it best, however, for contextual purposes, to secure the translation of an additional extract (at pp18/19), which has been provided by Mr Mathinya Sesioana, an Assessor of this Court and former Chief Interpreter thereof. The two extracts combined read thus:-

> This C. P. & E. Act talks about ledgers, old things that have become obsolete. So, this Bill talks about matters pertaining to the banks' records which are made by entries which are about the transcribed computer print-outs and these are mechanically and also electronically done, for all these to be done they must be contained in the Bill so they can be admitted in court. These matters also came to our attention through some cases that were before the High Court and the Court of Appeal e.g. the case of *Moitsupeli Letsie & 2 others v Rex* 1995/6 Lesotho Law Reports in which the Court of Appeal said from its reading of this C. P. & E. Act it gives a restrictive reading when it comes to the bankers books. Under these circumstances you find that when it interprets these words or matters, many times the cases could not be established on prima facie evidence.
>
> The other case that was before the Court of Appeal was that of the *Commissioner of Police v Standard Bank of Lesotho Limited and Another.* It is not in the Law Reports. It also shows that because of the restrictive interpretation of that Law which was out-dated the courts would find it difficult to accept certain evidence. But when this Bill has been passed that evidence will be acceptable through affidavits made by a person working in the bank and is entitled to make such an affidavit.

> This Bill does not forbid the accused from asking for such an affidavit to go and get originals from the bank so that he can know what his case is all about. In this manner this Bill will help about the evidence that will be placed before courts for them to administer justice.
>
> To continue and in response to one member who said that their Bill has delayed and ought to operate retrospectively. Unfortunately under the criminal laws you are only *found guilty under an existing law*. It is not permitted that when we pass the law now, *we go back in the past* and say that 10 years ago you committed a wrongful act, and *now that this Bill has been passed, you will have to be arrested.* In other words, then, members please accept that the "*principle of Retrospectivity" does not apply under this criminal law Bill.* However since this is the manner in which government cures these defects, we should hasten up things without waiting for the penal code to arrive. Among the things that could happen, should happen under this Bill, so that thieves, particularly "white collar" and "Blue collar Criminals" should be arrested. I say this because you will find that usually only small people are arrested, but now we would want to arrest these white collar people who are stealing from the nation, and that is the "purpose behind this particular amendment." I support the Minister." (Italics added)

In view of the prescriptive period of 20 years, enacted by section 22 of the Code, it is difficult to ascertain the exact nature of the Hon. Member's query, particularly where he used the italicized words, "*so that we may charge them*". This apparently indicates that the Hon. Member was seemingly of the opinion that the Bill proposed the creation of an offence, and he wished the Bill to have *retroactive* effect.

It seems to me therefore, that in his reply the Hon. Attorney-General was there addressing the aspect of the presumption against *retroactivity*, rather than retrospectivity, and was explaining to the Hon. Members the constitutional principle that you cannot be "*found guilty*", or for that matter "*arrested*", in respect of an act or omission which did not at the time it took place constitute an offence. Thereafter it seems to me that the emphasis was upon the necessity to enact the provisions of the Bill so as to deal with "white-collar" crime.

In brief, I do not see that there is any assistance to be found in Hansard in the matter: the debate does not deal with the specific point in question, and the difficulty of applying the Parliamentary debate to the issue before the Court serves only to illustrate the basis of the general exclusionary rule in the matter, highlighted in the discussion in Devenish *ibid.*, and indeed by the following observation of Lord Reid in the case of *Black-Clawson International Limited v Papierwerke Waldhof - Aschaffenburg AG* at p613:

> "We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said."

In the present case, that meaning cannot be gleaned with any, degree of certainty, from Hansard, but can only be determined by application of the canons of construction developed in the authorities considered *supra*.

SUMMARY

The new legislation introduces new rules of evidence. *Prima facie* it is therefore procedural in nature. As to whether or not substantive rights are affected, the accused has no vested right or privilege in any rules of evidence. I cannot see that any defence or remedy available to the accused or, under section 18 (c) of the Interpretation Act, 1977, any "right, privilege, obligation or liability acquired, accrued or incurred", has been affected. That being the case, as Marais JA observed in the *Haffejee* case (21) at p756, of the virtually identical provisions of section 12 (2) (c) and (e) of the Interpretation Act, 1957, of South Africa,

> "once s12 (2) (c) is found to be inapplicable, no succour for the [accused] can be found in s12 (2) (e). That is because the latter provision can operate only when a 'right, privilege, obligation or liability' within the meaning of the former provision has been found to exist. Here so such right or privilege existed."

For that matter, I cannot see that any unfairness arises. Indeed, it seems to me that the observations in *Driedger op. cit.* at p549 are apposite: speaking of the dicta of Lamer CJC in the case of *R v E. (A.W.)* (39) at pp485/486 reproduced *supra*, concluding with the dictum that "[i]t is the law of evidence at the time of the trial that prevails", Professor Sullivan observes:

> "The interest an accused might have in preventing relevant and reliable evidence from being admitted is not something the courts are prepared to protect. In so far as new legislation promotes the fair and efficient administration of justice, as it is presumed to do, its immediate application to pending actions is not unfair to the accused."

Those observations apply *a fortiori* to the present case: there being no question of substantive rights being affected and no unfairness involved, the new legislation can only be regarded as purely procedural in character.

CONSTITUTIONALITY OF NEW PROVISIONS

As I indicated at the outset, Mr Phoofolo challenges the constitutionality of the new legislation. This he does on two grounds.

Motivation for the Legislation

Mr Phoofolo submits that the new legislation is directed at the accused, and draws an analogy with the case of *Liyanage v R* (46). The point is basically jurisprudential rather than constitutional, although the right to equality before the law under section 19 of the Constitution may equally be invoked. The aspect of generality has undefined limits. The textbooks contain learned discourses thereon. It suffices for our purposes to quote a very old but succinct authority, that is, Sir Frederick Pollock's work *A First Book of Jurisprudence* 4 Ed (1918) at pp37/38:

> '[T]he rule of justice is a rule for citizens as such. It cannot be a rule merely for the individual: as the medieval glossators put it, there cannot be one law for Peter and

> another for John. Not that every rule must or can apply to all citizens; there are divers rules for divers conditions and classes of men. An unmarried man is not under the duties of a husband, nor a trader under those of a soldier. But every rule must at least have regard to a class of members of the State, and be binding upon or in respect of that class as determined by some definite position in the community. This will hold however small the class may be, and even if it consists for the time being of only one individual, as is the case with offices held by only one person at a time..... But these rules are not lacking in quality of generality, for in every case they apply not to the individual person as such, but to the holder of the office for the time being."

The following is contained in *Salmond on Jurisprudence* 10 Ed (Dr Glanville Williams) at p39:

> "Now it is clear that "a law", in the sense of and of the legislature, may be particular in the fullest sense of the word. A Divorce Act, for example, is none the less a statute and none the less a law because it applies only to a particular couple and lays down no rule of conduct even for them. It is not so obvious that "law", in the sense of the legal system, may be particular. A private Divorce Act is a law, but the passing of such an Act is not commonly thought of as changing the law of England. The law of England declares that divorces may be granted (1) by Act of Parliament; (2) by judicial decree. When a private Divorce Act is passed or a divorce decree is pronounced, this is an application of the law of England but not (it may be said) a change in it. The Act or the decree operates in the law but is not itself *part* of the law. Similarly it may be said that the former Acts of Attainder, whereby particular persons were sentenced to death or otherwise penalised, though "a law" (*sensu concreto*), did not create "law" (*sensu obstracto*) any more than does the sentence of a criminal court."

The learned author was there, of course, (no later than 1947) speaking in jurisprudential terms, and a bill of attainder or of pains and penalties is otherwise unconstitutional (see *Cummings v State of Missouri* (47) at p323, *Kariapper v Wijesinka and Anor* (48) at p488/492 and see Article 1 section 9 (3) of the Constitution of the United States of America). In any event, in the *Kariapper* case (48), the Privy Council found at p492 that an Act of the Parliament of Ceylon (as then named), which *inter alia* declared the appellant's seat in Parliament vacant (and those of five others named with him in the Schedule to the Act), was not an Act of attainder

or a Bill of pains and penalties but was "legislative in character". The facts of *Kariapper* (48), of course, were in sharp contrast to those of *Liyanage* (46), also decided by the Privy Council some eighteen months earlier in 1965 in respect of two Acts of the same Parliament. It proves convenient to repeat an account of the case found in the case of *Swissbourgh Diamond Mines v Military Council* (49) at pp1621/22, to which Mr Phoofolo refers:

> "Two Acts were passed by Parliament, subsequent to an abortive *coup d'etat* involving thirty alleged conspirators, including the eleven appellants, all of whom were detained. The Acts had retrospective effect. They legalised *ex post facto* the detention of the appellants and others, created a new offence to coincide with the circumstances of the abortive *coup d'etat,* provided for a minimum punishment of 10 years' "rigorous" imprisonment and mandatory forfeiture of all property, empowered the Minister of Justice to direct a trial by three Judges without Jury, such Judges to be nominated by the Minister, provided for the appointment of two more Judges to the Supreme Court, removed the restriction upon confessions made by an accused to, or in the custody of, a police officer, placed upon the accused the burden of proof as to involuntariness of a confession, and provided that no appeal would lie against conviction. Further, the legislation provided in effect that it would "cease to be operative after the conclusion of all legal proceedings connected with or incidental to any offence against the State committed on or about Jan. 27, 1962", the date of the abortive *coup d'etat*, or one year after the commencement of the legislation, whichever was later.
>
> The provision as to the nomination of the Judges by the Minister was repealed after the three Judges nominated, upon preliminary objection, held that the statutory power of nomination and the exercise thereof were unconstitutional, as being an interference with or in derogation of the judicial power. The repealing legislation provided for nomination by the Chief Justice.
>
> Upon a fresh nomination of Judges the appellants were tried with thirteen other accused (who were acquitted). Each of the appellants was convicted of three offences of a seditious nature and was sentenced to ten years' rigorous imprisonment and forfeiture of all his property."

The Judicial Committee (Lord MacDermott, Lord Morris of Borth-y-Gest, Lord Guest, Lord Pearce and Lord Pearson) advised that the appeal should be allowed and the convictions quashed. Lord Pearce delivered the judgment of the Judicial

Committee. He observed thus at pp659/660:

"Counsel for the appellants succinctly summarises his attack on the Acts in question as follows. The first Act was wholly bad in that it was a special direction to the judiciary as to the trial of particular prisoners who were identifiable (in view of the White Paper) and charged with particular offences on a particular occasion. The pith and substance of both Acts was a legislative plan *ex post facto* to secure the conviction and enhance the punishment of those particular individuals. It legalised their imprisonment while they were awaiting trial. It made admissible their statements inadmissibly obtained during that period. It altered the fundamental law of evidence so as to facilitate their conviction. And finally it altered *ex post facto* the punishment to be imposed on them.

In their lordships' view that cogent summary fairly described the effect of the Acts. As has been indicated already, *legislation ad hominem which is thus directed to the course of particular proceedings may not always amount to an interference with the functions of the judiciary.* But in the present case their lordships have no doubt that there was such interference; that [it] was not only the likely but the intended effect of the impugned enactments; and that it is fatal to their validity." (Italics added)

Lord Pearce went on at p660 to observe:

"One might fairly apply to these Acts the words of CHASE, J., in the Supreme Court of the United States in *Calder v Bull* [50]: These acts were legislative judgments; and an exercise of judicial power."

BLACKSTONE in his COMMENTARIES, Vol. 1 (4th Edn.) P.44, wrote:

> "Therefore a particular act of the legislature to confiscate the goods of Titius, or to attaint him of high treason, does not enter into the idea of a municipal law: for the operation of this act is spent upon Titius only and has no relation to the community in general: it is rather a sentence than a law."

Earlier, however, Lord Pearce had observed at p659:

"It goes without saying that the legislature *may legislate, for the generality of its subjects,* by the creation of crimes and penalties or by *enacting rules relating to evidence.* But the Acts of 1962 had no such general intention. They were clearly aimed at particular known individuals who had been named in a White Paper and were in prison awaiting their fate. The fact that the learned Judges declined to convict some of the prisoners is not to the point. That the alterations in the law were *not intended for the generality of the citizens* or designed as any improvement of the general law, is shown by the fact that the effect of those alterations was to be limited to the participants in the January coup and that after these had been dealt with by the judges, the law should revert to its normal state.

> Such a lack of generality, however, in criminal legislation need not, of itself, involve the judicial function, and their lordships *are not prepared to hold that every enactment in this field which can be described as ad hominem and ex post facto must inevitably usurp or infringe the judicial power.* Nor do they find it necessary to attempt the *almost impossible task of tracing where the line is to be drawn* between what will and what will not constitute such an interference. Each case must be decided in the light of its own facts and circumstances, including the true purpose of the legislation, the situation to which it was directed, the existence (where several enactments are impugned) of a common design, and the extent to which the legislation affects, by way of direction or restriction, the discretion or judgment of the judiciary in specific proceedings." (Italics added)

Mr Phoofolo bases his submission on the short history of the new legislation. He points to the fact that the Court delivered a ruling in this trial, involving the Crown and *inter alios* the then third accused in these proceedings, in which the Court held that the terminology, "ledgers, day-books, cash-books and other account books" could not be given any extended meaning. Where therefore the Crown sought, under the old section 247 (1), the production by three local banks of various documents to a police officer, the Court ruled this could only be done, not by an order under section 247 (1), but by a *subpoena duces tecum*. Mr Phoofolo submits that the new legislation was enacted as a direct result of the said ruling. I observe that the Court's ruling followed the interpretation placed upon the old legislation by the Court of Appeal in the *Letsie* case (40), decided on 2nd June 1996. Indeed, reference is made to that decision in Hansard (and also to this Court's ruling *sub nom.*, *The Commissioner of the Lesotho Mounted Police Services & Anor v Standard Bank Lesotho Ltd & Ors),* as a motivation for the introduction of the new legislation. But even if the sole motivation for the change was the decision of the Court of Appeal, as it affected this present trial, it cannot be gainsaid that the main thrust of the amendment was long overdue, having been effected in South Africa and England some eight and twenty-two years ago

respectively, namely the modernisation of a 122 year-old dichotomy.

Lord Pearce observed in *Liyanage* (46) at p659,

> "their Lordship's are not prepared to hold that every enactment in this field which can be described as *ad hominem* and ex post facto must inevitably usurp or infringe the judicial power."

and again at p660,

> "legislation *ad hominem* which is thus *directed to* the *course of particular proceedings* may not always amount to an interference with the functions of the judiciary." (Italics added)

In this respect, I have to say that any comparison of the new legislation in this case with that introduced in the *Liyanage* (46) case, is unrealistic in the extreme. Nowhere is there any mention of the accused's name, or indirect reference to him, in Hansard or in any *travaux preparatoires*. Even if it was the case that the legislature wished to ensure that these present proceedings, then pending, should be affected by the new legislation, *as well as future cases*, the pervading generality of the new provisions is apparent. In brief, I cannot see how the new legislation can even be described as *ad hominem*.

Accused's Right to Cross-examination: The Presumption of Innocence

Finally, Mr Phoofolo challenges the constitutionality of the new legislation, and indeed of the old provisions, on an entirely different ground. He submits that the introduction of evidence by way of affidavit, rather than *viva voce*, conflicts with the accused's right under section 12 (2) (e) of the Constitution, that is, to "be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the Court." He also submits that the fact that such affidavit

evidence constitutes *prima facie* evidence, conflicts with the presumption of innocence.

Those submissions can be equally applied to the very full provisions of section 223 of the Code, to which I made earlier reference, providing for the introduction of evidence by way of affidavit, that is, as "*prima facie* proof" of the contents thereof. Those provisions find their origin in section 268 of the Criminal Procedure and Evidence Act, 1917 of South Africa, as amended in 1926 and 1935, and as reproduced in section 218 of the Criminal Procedure and Evidence Proclamation No.59 of 1938 of Lesotho. As for the provisions of sections 245 and 246 (1) of the Code before amendment, providing for the introduction of *prima facie* evidence by way of affidavit, they find their *fons et origo* not alone in the 1917 Act but also, as indicated, in the Bankers' Books Evidence Act of 1879 of England. We are dealing then with provisions of relative antiquity.

There are a number of examples in the statute books where certificates, much less affidavits, are admissible as *prima facie* evidence of their contents. An obvious example is that of a birth or death certificate, which under section 13 of the Registration of Births and Deaths Act, 1973, constitutes "*prima facie* evidence in all courts of the dates and facts therein stated." Again, under section 35 (3) of the Marriage Act, 1974 a marriage certificate "shall, in the absence of evidence to the contrary, be legal proof of the due solemnization of the marriage." Indeed, under section 223 (7) of the Code a "written report" (much less an affidavit) by a "duly qualified medical practitioner" as to, say, the injuries suffered by a deceased and his opinion as to the cause of death, is "*prima facie* evidence of the facts recorded in it."

It was my experience that such a certificate sufficed in the vast majority of e.g. homicide trials, and it was only in the exceptional case that it proved necessary to call the medical practitioner to give *viva voce* evidence.

The provisions of section 268 of the 1917 Act were re-enacted in section 239 of the Criminal Procedure Act, 1955 and ultimately section 212 of the Criminal Procedure Act, 1977 of South Africa. Indeed under section 212 A, introduced in 1993, the provisions of subsections (1), (2) and (3) of section 212 were applied to proof of certain facts by an affidavit from a person in a foreign country. In any event, there is indirect reference by the Constitutional Court to section 212 to be found in the case of *S v Zuma and Others* (51), wherein the Court declared section 217 (1) (b) (ii) of the Criminal Procedure Act 1977, (which was not adopted in section 228 of the Code in 1981 and which placed a reverse onus upon an accused in the matter of the voluntariness of a confession) to be invalid. Kentridge AJ with whom the other members of the Court concurred, observed at p591 para [41]:

> "[41] It is important, I believe, to emphasise what this judgment does not decide. It does not decide that all statutory provisions which create presumptions in criminal cases are invalid. This Court recognises the pressing social need for the effective prosecution of crime, and that in some cases the prosecution may require reasonable presumptions to assist it in this task. Presumptions are of different types. Some are no more than evidential presumptions, which give certain prosecution evidence the status of *prima facie* proof, *requiring the accused to do no more than produce credible evidence which casts doubt on the prima facie proof.* See, for example the presumptions in s212 of the Criminal Procedure Act. This judgment does not relate to such presumptions. Nor does it seek to invalidate every legal presumption reversing the onus of proof. Some may be justifiable as being rational in themselves, requiring an accused person to prove only facts to which he or she has easy access, and which it would be unreasonable to expect the prosecution to disprove."

The provisions of section 212 fell squarely for consideration by a Full Court of the Witwatersrand Local Division in the case of *S v Van Der Sandt* (52). That was a

review case where the accused had been convicted of drunken driving, based on the certificate of a forensic analyst, produced under section 212 (4) (which permitted the production of a certificate in lieu of an affidavit), who also gave *viva voce* evidence. The court held that the contents of the certificate were insufficient to support the conviction, but that the defect had been remedied by the evidence of the forensic analyst, and confirmed the conviction. Van Dijkhorst J (Mynhardt and Du Plessis JJ concurring) observed at p132

> "It was argued by Mr Van Eeden [for the accused at the request of the Court] that s212 (4) and for that matter the whole of s 212 is unconstitutional as it curtails the right of cross-examination, which right, so it was argued, is an immutable component of a fair trial.
>
> In passing it may be mentioned that s212 has been referred to but neither approved or frowned upon in the Constitutional Court in *S v Zuma and Others* [51] at 591.
>
> This point is therefore *res nova.* It is, however, not a valid one. A fair trial is in essence a proper ventilation of the dispute before an unbiased competent tribunal. Dictates of fairness do not a *priori* prescribe that evidence be presented only in a certain manner. That contention *puts paid to all documentary evidence* and evidence of tape-recordings, videos and the production of objects. Evidence can be tendered in any form, if it is relevant it is normally admissible. Its cogency can be debated. In my view the mere fact that evidence is tendered in the form of an affidavit or certificate does not *per se* render the proceedings unfair. The answer to that question lies in the nature of the evidence.
>
> It is clear that the evidence allowed by s 212 is generally of a *formal non-contentious nature*, often peripheral to the real issues. Mostly it would not be contested and only rarely probed by over-zealous angling counsel. In these circumstances a provision that it may be adduced by affidavit is not only meaningful, it is essential to the proper administration of justice.
>
> Even if this curtailment of the right to cross-examination is seen as a limitation of the right to a fair trial (which in my view it is not) then it is a proper limitation in terms of s36 (1) of the Constitution." (Italics added)

The reference there is to the following provisions

> "36 (1) The rights in the Bill of Rights may be limited only in terms of law of general

application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose."

There are no such provisions in Chapter II of the Constitution of Lesotho. Nonetheless section 12 (1) thereof requires "a fair hearing". In this respect Van Dijkhorst J considered that the particular curtailment of the right to cross-examination was not a limitation of the right to a fair trial. He continued thus at p132:

"One should not overlook s212 (12) in terms of which the court may call such deponent to testify *viva voce*. A court which refuses a fair request by the accused to do so will put the outcome of the trial at risk.

Counsel countered these considerations by arguing that in the case of s212 (4) the evidence is often, as in the present case, not of a formal nature and that the accused's right to cross-examine may not be subjected to the discretion of the court as is done in s212 (12). Counsel emphasised that the fact of blood alcohol content is in a charge under s122 (2) of the Road Traffic Act 29 of 1989 not a peripheral matter or one of the *facta probantia,* it is the *factum probandum*. It stands at the centre of the charge. That is so, but I fail to see how a trial can be regarded as unfair in which the accused, upon being presented (in advance upon request, as is now practice) with the affidavit or certificate, may either request that the deponent be subpoenaed under s212 (12) or do it himself. The debility that one may not cross-examine one's own witness will not apply in the former case and should not apply in the latter. It remains a State witness."

and again at p135

"A fair trial entails that the State should present its evidence in such a way that the accused (or if he is ignorant his legal representatives or experts) will understand it to enable him to contradict it should he so wish. It follows that a mere statement that an expert used an unnamed unexplained process and so established a fact falls short of what is required for a fair trial.

As the intention with the enactment of s212 of the Criminal Procedure Act was to avoid undue wastage of mainly official manpower by court attendances for the purpose of *frequently undisputed* evidence on matters *nearly always incontrovertible*,

> there is no reason to read into s 212(4) a component that relieves the State of the duty to prove by documentary means that which it would otherwise do by *viva voce* evidence."(Italics added)

(See *Constitutional Criminal Procedure* by Professor Nico Steytler at pp353/354 and *Cross-Examination in South African Law* by Dr J P Pretorius at pp363/364, to which Mr Penzhorn and Mr Woker refer). Those observations apply equally to section 223 (in particular 223(4)) of the Code. In my view they also apply *a fortiori* to sections 245 and 246. As Van Dikhorst J observed, "it is clear that the evidence allowed by [section 223 of the Code] is *generally* of a formal non-contentious nature, often peripheral to the real issues." That may not necessarily be said of section 223 (4) where, as the facts of *Van Der Sandt* (52) fully illustrate, the contents of the forensic analyst's affidavit or certificate may be extremely complicated and require elucidation. I do not see that such considerations arise in the interpretation of a bank account or bank record, which must generally be regarded as being "of a formal non-contentious nature". As learned Counsel observed in *Van Der Sandt* (52), the contents of the analyst's certificate was not peripheral, but constituted the *factum probandum* in the State's case. That might well be the situation where the provisions of sections 245 and 246 are utilised by the Crown. Nonetheless, the contents of a bank record are, generally speaking, hardly a matter for contest. In an apparent endorsement of the practicality of bankers' books evidential provisions,, van den Heever AJA in the case of *Letsie* (40) observed at pp38/39:

> "Section 245.....sets out prerequisites to proof by affidavit of hearsay upon hearsay evidence of facts that would, were direct evidence .... required, be virtually impossible to prove: the teller who received a cheque among hundreds if not thousands of others, would be required to testify that on a specific day a specific person handed a cheque (or cash) to him for deposit into that client's account. It provides for common sense safeguards against unreliable hearsay, based on the assumption that in the ordinary course of a bank's business mistakes in recording transactions in which both a bank

> and its clients have a vital interest, are correctly recorded and accepted by both parties as being correct - scil. since statements and returned cheques are sent to clients who can therefore control the correctness of the records kept by the bank and copied by a responsible person in the employ of the bank."

It seems to me therefore that such records, constituting hearsay, lend themselves to production by way of affidavit by a bank official, who can only give direct evidence as to the existence of such records. Indeed, it is difficult to appreciate the basis of any proposed cross-examination, when any evidence by the official as to the contents of the records, would no doubt constitute hearsay. In any event, the new legislation provides for the inspection of originals in a local bank. While there is no express provision for the Court to order a supplementary affidavit or oral evidence in the case of a local bank, I cannot see that the Court's hands would be tied in the matter, in an appropriate case. Such provision is expressly made in the case of a foreign bank. Under the new section 246 (6), the issue in my judgment is not a matter for the court's *discretion*: the underlying *rationale* is one of fairness to the particular party, e.g. the accused. As I see it, the Court is *obliged* to order oral evidence if satisfied that the accused would otherwise be materially prejudiced.

As to the provision that the annexures to a banker's affidavit constitute *prima facie* evidence, such provision, casts no more than an evidential burden upon an accused, as indicated by Kentridge AJ in *Zuma* (51) *supra*. The very probative value of the contents of the affidavit is undermined by the provision for a supplementary affidavit, or oral evidence, where necessary, indicating the necessity for the court's satisfaction in the matter, that is, on a *prima facie* basis. It must be remembered again that the legislation deals with evidence "of a formal non-contentious nature" which is "frequently undisputed .... on matters nearly always incontrovertible." Even so, the

Crown's burden is never discharged, at the end of a trial, with a *prima facie* case. As Van Dijkhorst J observed at p135, "there is no reason to read into [the legislation] a component that relieves the State of the duty to prove by documentary means that which it would otherwise do by *viva voce* evidence," and again (at p133), "[t]he [legislation] does not contain any indication that the requirements of proof of trustworthiness and correctness have ..... been jettisoned." Even though an evidential burden may be placed upon the accused (the failure to discharge which does *not necessarily* result in a conclusive case), the "golden thread" remains intact, the Crown's burden never shifts, the presumption of innocence remains in place.

I cannot then see that the new legislation impinges upon the fairness of the trial. I hold that it is not unconstitutional. I hold further, for all the reasons earlier stated, that such legislation is applicable to the conduct of this trial.

Delivered This 20th Day of December, 2001.

B. P. CULLINAN
ACTING JUDGE