

THE DIFFERENCE BETWEEN RETROACTIVE AND RETROSPECTIVE LEGISLATION

***EFFECT AND CONSEQUENCES IN
LIGHT OF THE IMMINENT
AMENDMENTS TO THE PENSION
FUNDS ACT, ACT 24 OF 1956***

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DIFFERENCE BETWEEN THE TWO TERMS

- ❑ Two different concepts:
- ❑ **RETROACTIVE** > retrospectivity in the strong sense.
- ❑ **RETROSPECTIVE** > retrospectivity in the weak sense.

DIFFERENCE BETWEEN THE TWO TERMS

- ❑ ***Cape Town Municipality v F Robb & Co Ltd* 1966 (4) SA 345 (C) at 350F-351D per Corbett J.**
- ❑ Terms “retrospective” and “retroactive” often used in a loose sense and despite the logic of the distinction between the two terms there is a tendency on the part of the courts and the text-book writers to merge these principles in their application to a particular statute.

DIFFERENCE BETWEEN THE TWO TERMS (cont)

- ❑ ***S v Mhlungu 1995 (3) SA 867 (CC) per Kentridge AJ***
- ❑ *“First, there is a strong presumption that new legislation is not intended to be retroactive.*
- ❑ ***By retroactive legislation is meant legislation which invalidates what was previously valid, or vice versa, ie which affects transactions completed before the new statute came into operation. It is legislation which enacts that 'as at a past date the law shall be taken to have been that which it was not'.***

DIFFERENCE BETWEEN THE TWO TERMS (cont)

- ❑ *There is also a presumption against reading legislation as being retrospective in the sense that, while it takes effect only from its date of commencement, it impairs existing rights and obligations, eg by invalidating current contracts or impairing existing property rights.”*
- ❑ Presumption against both retroactive and retrospective legislation

DIFFERENCE BETWEEN TWO TERMS (cont)

- ❑ ***National Director of Public Prosecutions v Carolus and others, 2000 (1) SA 1127 (SCA) para 34 -35 per Farlam AJA***
- ❑ *“A retroactive statute ... operates as of a time prior to its enactment. ... operates backwards. A retroactive statute changes the law from what it was;*
- ❑ *A retrospective statute ...operates for the future only. prospective, but it imposes new results in respect of a past event. ... looks backwards ... attaches new consequences for the future to an event that took place before the statute was enacted. ... changes the law from what it otherwise would be with respect to a prior event”*

DIFFERENCE BETWEEN THE TWO TERMS (cont)

- ❑ *Bareki No and Another v Gencor 2006(1) SA 432 (T) De Villiers J*
- ❑ Test for retroactivity:
 - ❑ legislation invalidates what was previously valid and vice versa;
 - ❑ affects transactions which were already completed before it came into operation; and
 - ❑ it enacts that as at a past date the law shall be taken to be that which it was not.

DIFFERENCE BETWEEN THE TWO TERMS cont)

- ❑ *Bareki No and Another v Gencor 2006(1) SA 432 (T)*
- ❑ Test for retrospectivity:
 - ❑ The legislation is prospective but it imposes new results with regard to past events;
 - ❑ It attaches new consequences for the future to an event which took place before the legislation was enacted; or
 - ❑ It creates a new obligation or imposes a new duty in regard to events already past.

BASIS & RATIONALE FOR PRESUMPTION

- ❑ Mokgoro J in *President of the Republic of South Africa and Another v Hugo* [1997 \(4\) SA 1 \(CC\)](#) at para [102]:

“The need for accessibility, precision and general application flow from **the concept of the rule of law**. A person should be able to know of the law, and be able to conform his or her conduct according to the law.”

- ❑ Basis of the presumption is elementary considerations of fairness (which) dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.

BASIS & RATIONALE FOR PRESUMPTION (cont)

- Farlam AJA in *National Director of Public Prosecutions v Carolus and Others* 2000 (1) SA 1127 (SCA) at 1139C - D.)

“the legal culture leaning against retrospectivity where there is unfairness”.

RETROSPECTIVITY AND INTERFERENCE WITH VESTED RIGHTS

- ❑ *Adampol (Pty) Ltd v Administrator, Transval*, Joubert JA and Hoexter JA
- ❑ Two different concepts. Inappropriate to confuse them.
- ❑ Question of interference with vested rights is a matter separate from the issue of retrospective operation.

RETROSPECTIVITY AND INTERFERENCE WITH VESTED RIGHTS (cont)

- ❑ Joubert JA suggested that a statute that applies prospectively but tends to interfere with vested rights be designated as “mixed prospective statute” rather than retrospective statute.
- ❑ ***Boe Bank Limited v Tshwane Metropolitan Municipality, 2005 (4) SA 336 (SCA)*** at p344 para 14 per Brand JA.

RETROSPECTIVITY AND INTERFERENCE WITH VESTED RIGHTS (cont)

- ❑ Not objectionable to mix them, often lead to same result. ***National Iranian Tanker Co v MV Pericles GC1995 1 SA 475 (A) at 483H-J Corbett CJ:***

“... A statute is retrospective in its effect if it takes away or impairs a vested right acquired under existing laws or creates a new obligation or imposes a new duty or attaches a new disability in regard to events already past. (This definition appears to merge two canons of interpretation: the presumption against retrospectivity and the presumption against interference with vested rights. This, however, is not of great moment, as both canons lead in the same direction:

See also: Cape Town Municipality v F Robb & Co Ltd [1966 \(4\) SA 345 \(C\)](#) at 350F-351D.)

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EXAMPLE OF RETROACTIVE LEGISLATION

- ❑ **Retrospectivity: Proposed section 40B.**
- ❑ The definitions in section 1(1) of “actuarial surplus”, “augment”, “contingency reserve account”, “contribution holiday”, “defined benefit category of a fund”, “employer surplus account”, “fund return”, “member surplus account”, “minimum individual reserve”, “surplus apportionment date” and sections 14A, 14B, 15B, 15C, 15E, 15F and 15K are deemed to have come into operation on 7 December 2001, for funds whose surplus schemes have not been approved by the registrar:
- ❑ Provided that in the case of funds whose schemes have been submitted but not yet approved on the effective date of this amendment, the registrar must inform such funds of the instances where their schemes do not comply with this amendment and grant such funds a reasonable period of time to review and resubmit their schemes.”

EXAMPLE OF RETROSPECTIVE LEGISLATION (cont)

- ❑ Minimum benefit provisions in the surplus legislation.
 - ❑ ***Bareki No and Another 2006(1) SA 432 (T) De Villiers J***
 - ❑ The legislation is prospective but it imposes new results with regard to past events;
 - ❑ It attaches new consequences for the future to an event which took place before the legislation was enacted; or
 - ❑ It creates a new obligation or imposes a new duty in regard to events already past.
- ❑ Sanlam judgment; issue there was retrospectivity in the weak sense re 15B(5)(a) ad 15B(6).
- ❑ Court held they were not retrospective.

WHEN & HOW THE PRESUMPTION APPLIES

- ❑ Intention of legislature paramount.
- ❑ In every case, the inquiry must be into the language of the enactment and the purpose and intent of the Legislature which emerges therefrom. ***Euromarine International of Mauren v The Ship Berg and Others* 1986 (2) SA 700 (A) at F 709I-710E.**
- ❑ If ordinary grammatical meaning of the words is apparent, and produces no obvious absurdity, repugnance or inconsistency, inquiry ends there.
- ❑ Thirion J in ***Kruger v President Insurance Co Ltd, 1994 (2) SA 495 (D)***, at **p503.**

“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.”

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WHEN & HOW THE PRESUMPTION APPLIES (cont)

- ❑ Unless contrary appears either expressly or by necessary implication, it is a presumption of our law that the legislature intends to regulate future matters only. ***Transnet Ltd v Ngcezula 1995 (3) SA 538 (A).***
- ❑ Pre-repeal business must generally speaking be dealt with, unless a contrary legislative intention is apparent, as if no repeal had been enacted. ***Chairman, Board on Tariffs & Trade v Volkswagen of SA (Pty) Ltd 2001 (2) SA 372 (SCA) p380***
- ❑ Where intention is clear, determine extend and scope.
- ❑ Where provision is expressly stated to be retrospective, accepted rule that, in the absence of contrary intention appearing from the statute, it is not treated as affecting completed transactions and matters which are the subject of pending litigation.

WHEN & HOW THE PRESUMPTION APPLIES (cont)

- ❑ ***Bellairs v Hodnett and Another* 1978 (1) SA 1109 (A) at 1148F-G; see also *Woerman and schutte NNO v Masondo and others* 2002 (1) SA 811 (SCA) at p819**
 - ❑ Rule that no interference with vested rights, unless intention clear.
 - ❑ Pending transactions in terms of old law, unless intention clear
 - ❑ Completed transactions not affected, unless intention clear

PRESUMPTION IN FAVOR OF RETROSPECTIVITY

- ❑ Clarification where there is doubt, i.e, where a subsequent law is merely explanatory or confirmatory; Devenish (interpretation by Legislature).
- ❑ Where a statute deals with procedural matters; and
- ❑ Where an enactment benefits the subject.
- ❑ Williamson J in ***Ex parte Christodolides* 1959 3 SA 838 (T) 841A**

“First of all, a Statute which deals with a topic or subject which has been a matter of some doubt and which is intended to clarify and settle that doubt does operate retrospectively. Secondly, a Statute which is intended to operate for the benefit of a subject is also so interpreted”

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PRESUMPTION IN FAVOR OF RETROSPECTIVITY (cont)

- ❑ Contrast with *Van Der Merwe v Mutual & Federal Insurance Co Ltd 1997 (1) SA 78 (C)* p82

“retrospectivity will not be afforded to a law merely because it confers 'special favours'.”

BEST APPROACH

- ❑ ***Bareki No and Another v Gencor Ltd and Others.***
- ❑ De Villiers J proceeded by first looking at whether the statute in question was retrospective in the true sense in order to determine whether the presumption against retrospectivity applies in that case.
- ❑ Having decided that the legislation is not retrospective in the real sense, he then proceeded to consider whether the legislation in question was retrospective in the weak sense and applied the presumption against retrospectivity with regard to the unfairness of the legislation in question.

PENDING OR APPROVED SCHEMES

- General:
 - Safe unless Act specific on retrospectivity and extent thereof.
- New section 40B:
 - Specific, therefore only approved schemes are safe.
 - Pending schemes unsafe.

PENDING AND APPROVED VALUATIONS

- ❑ General:
 - ❑ Safe unless legislation is specific.
 - ❑ Where there is doubt, apply presumption.

CONCLUSION

- Intention of legislature paramount.
- Where there is doubt, presumption.
- Where intention is clear, determine extent.
- Where presumption applies:
 - Completed transactions safe.
 - Pending transactions safe.
 - Vested rights safe.

