

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT40/13

In the matter between:

LICINIO LOUREIRO	First Applicant
VENESSA LOUREIRO	Second Applicant
LUCA-FILIPPE LOUREIRO	Third Applicant
JEAN-ENRIQUE LOUREIRO	Fourth Applicant

and

IMVULA QUALITY PROTECTION (PTY) LTD	Respondent
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APPLICANTS' WRITTEN SUBMISSIONS

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OVERVIEW

- 1 Private security service providers play an increasingly important role in South African society. Citizens contract with private security companies to protect themselves, their families, and their property from criminals. Though they are private companies, the nature of the services they provide are public in nature.

This Court has held that:

“The private security industry is a very particular environment. At stake is the safety and security of the public at large. Section 12 of the Constitution guarantees everyone the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources. In a society marred by violent crime, the importance of protecting this right cannot be overstated.”

Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others 2007 (4) SA 395 (CC) at para 37

- 2 Satchwell J held in the ***Probe Security*** matter that:

“This is a business enterprise rendering a security service to members of the public. It employs persons whom it makes available to members of the public to protect or safeguard people or property. These security officers are granted access to private dwellings, industrial premises, retail complexes, vehicles and a host of otherwise private or off-limits areas. The service is rendered for reward. It is without doubt an extremely public undertaking. Indeed the applicant ‘provides a service in the public realm’.”

Probe Security CC v Security Officers Board and Another [1999] JOL 4753 (W)

- 3 The private security industry is extraordinarily large and powerful. Its members far outnumber the combined force of the South African Police Service and the

National Defence Force. This Court has held that:

“The sheer size of the private security industry, as well as the coercive power it wields during the regular conduct of its business, underscores the need for regulation and adherence to appropriate standards.”

Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security And Others 2010 (2) SA 181 (CC) at paras 34-35

4 It is therefore clear that a contract with a security company for the provision of security services is no ordinary private law contract. Security companies perform functions that are vital to the public interest. As a result, the private security industry is highly regulated. The obligations of private security service providers in contract and delict are often the means for giving effect to and protecting the constitutional rights of the persons with whom they contract. Such contracts must be understood against this background.

5 This matter raises the scope and extent of the duties of private security firms, in contract and in delict. The High Court correctly held that the key question is:

“[W]hat can be expected by a family in their home of a security guard staffing a guardhouse at the entrance to the family property.”

High Court judgment at para 1

6 When private security firms breach their duties in contract and delict, the consequence will frequently be breaches of the constitutional rights of their customers. The means by which such customers vindicate those constitutional rights in such circumstances is through their common law causes of action.

7 We submit that the majority judgment of the SCA failed to give sufficient

weight to these considerations in absolving the respondent (“Imvula”) of liability.

FACTUAL BACKGROUND

8 On 25 November 2008, the applicants moved into their new home at 50 Jellicoe Avenue, Melrose, Johannesburg.¹ On 22 January 2009, they were robbed in their home. The robbers gained access to the applicants’ property through the pedestrian gate in the wall next to the driveway.

Security at the applicants’ home

9 The relevant facts with regard to the driveway, as it was at the time of the robbery, are the following:²

9.1 There are two gates at the entrance to the home.

9.2 The main driveway gate is a large reinforced automated gate through which vehicles can enter.

9.3 To the left of the driveway gate is an armoured pedestrian gate.

9.4 The pedestrian gate has a peephole. It is possible for two people standing

¹ Volume 5 of the record at page 378.

² A photograph of the driveway appears at in Volume 2 of the record at page 162.

on either side of the pedestrian gate to hear one another speaking.³

9.5 To the right of the gates is the guardhouse. The window of the guardhouse is made of bulletproof glass.⁴

9.6 From the guardhouse window one has full view of the driveway leading up to the main gate.⁵

9.7 In the driveway, at waist-height (convenient for the driver of a vehicle) there is an intercom speaker attached to a gooseneck that communicates with an intercom phone inside the guardhouse.⁶

10 The first applicant was extremely security conscious. This was because his wife and child (the second and third applicants) had been robbed at gunpoint in their previous home.⁷ As a result of his desire to protect his family from falling victim to crime in this way again, the first applicant took extraordinary measures to secure the applicants' home. They included the following:

10.1 The first applicant arranged with Mr Manny Barboza of Sky Leah Sales to install a comprehensive security system at the applicants' home.⁸

³ Volume 5 of the record at pages 375 - 376, as established during Satchwell J.'s inspection in loco of the applicants' home on 6 May 2011 during the course of the trial held in the South Gauteng High Court.

⁴ Volume 5 of the record at page 372, as established during Satchwell J.'s inspection in loco of the applicants' home on 6 May 2011 during the course of the trial held in the South Gauteng High Court.

⁵ Volume 5 of the record at page 373.

⁶ Volume 5 of the record at page 373.

⁷ Volume 5 of the record at page 378 – 379.

⁸ Volume 4 of the record at page 282.

10.2 The security system included perimeter beams, CCTV, multiple alarm systems, an intercom system and a guard house.⁹

10.3 The house contained a number of safes and concealed safe rooms.¹⁰

10.4 The first applicant engaged the services of Imvula to provide 24 hour armed security at the applicants' home.

The contract with Imvula

11 As part of his efforts to ensure the safety of his family and his home, the first applicant contracted with Imvula to provide 24 hour armed security at the family home. The guarding services were provided in terms of an oral agreement concluded on or about 1 December 2008. The agreement was orally amended on 10 December 2008.¹¹

12 The terms of the agreement included the following:

12.1 The respondent would take all reasonable steps to protect the persons and property of the applicants and/or the first applicant and his family.¹²

12.2 The respondent was not entitled to permit any person to gain access to the applicants' residence other than the first and second applicants and

⁹ Volume 4 of the record at page 282.

¹⁰ Volume 5 of the record at pages 436 to 437.

¹¹ Volume 1 of the record at pages 5 – 8.

¹² Volume 1 of the record at page 6.

their minor sons, unless the respondent had obtained such prior authorisation from the first applicant, alternatively the second applicant, to allow such persons to access the applicants' residence.¹³

12.3 A key to the pedestrian gate, provided at Imvula's request, was to be used solely to allow Imvula employees to enter and exit the property when changing shifts.

13 On 7 December 2008 the guard on duty at the applicants' home admitted the first applicant's brother onto the property without first obtaining permission from the first or second applicant to do so.¹⁴ This was one of a number of incidents in which a guard on duty at the applicants' home had, in breach of the contract, permitted access to a person other than one of the applicants without obtaining permission from the first or second applicant as required by the agreement.¹⁵

14 On 10 December 2008 the first applicant instructed Mr Barboza to partially disable the intercom so that the guards would not be able to open and close the main driveway gate.¹⁶ The first applicant issued this instruction as a direct result of the guards employed by the respondent ignoring his instruction that no person other than one of the applicants was to be permitted access to the

¹³ Volume 1 of the record at page 7.

¹⁴ Volume 5 of the record at page 427 and volume 4 of the record at page 328.

¹⁵ Volume 5 of the record at page 427.

¹⁶ Volume 5 of the record at page 427.

applicants' home without first obtaining the permission from the first or second applicants to do so.

15 The intercom was partially disabled with the effect that the guard was no longer able to open the main driveway gate. Because the intercom had been partially disabled, the guards were unable to enter and exit the property when they changed shifts.¹⁷

16 Mr Green of the respondent informed the first applicant of this issue and requested a key to the pedestrian gate to enable the guards to change shift.¹⁸ The first applicant gave the respondent a key to the pedestrian gate on the condition that it was only to be used for shift changes. He expressly prohibited the respondent and its employees from using the key to open the gate without his prior authorisation.¹⁹

17 The first applicant told the respondent that the pedestrian gate key was to be used only to enable the guard on duty to admit his colleague who was relieving him, and to leave the premises himself.

18 The pedestrian gate was the only point of access to the applicants' home which the guards employed by the respondent were capable of controlling.

¹⁷ Volume 5 of the record at page 431.

¹⁸ Volume 5 of the record at page 431.

¹⁹ Volume 5 of the record at pages 431 and 433.

19 The first applicant was so reluctant to give a key to the respondent that before he agreed to do so he asked whether it was possible for the respondent to change the start and finish times of the shifts of the guards instead, so that a member of the applicants' household could open and close the gate for the guard. The respondent refused this request.²⁰

The robbery

20 On 22 January 2009, Mr Mahlangu was the guard on duty at the applicants' home. That evening, the first and second applicants left their home in the early evening to attend a school function.²¹ The first and second applicants left their children in the care of their domestic workers.²²

21 At approximately 19h47, a white BMW with a flashing blue light on its dashboard pulled onto the main driveway. A man got out of the front seat wearing dark blue clothing, a reflective vest marked "Police" and a cap bearing a logo resembling a police logo.²³

22 The man approached the guardhouse window and briefly showed ("flashed") an identity card in Mr Mahlangu's direction.²⁴ Mr Mahlangu could not and did not

²⁰ Volume 5 of the record at page 431.

²¹ Volume 7 of the record at page 638.

²² Volume 3 of the record at page 268a.

²³ Video footage of the entire incident from the time of the arrival of the robbers to their departure is contained on the disc listed as Exhibit "C" and inserted in Volume 3 of the record at page 264.

²⁴ Volume 6 of the record at page 554.

compare the photograph on the identity card with the man.

- 23 Mr Mahlangu tried to communicate with the man using the intercom. The man did not answer. The man did not attempt to speak into the intercom.
- 24 While Mr Mahlangu remained in the guardhouse he was not in any danger of being harmed as the window in the guardhouse is made of bulletproof glass.
- 25 When Mr Mahlangu attempted to speak to the man using the intercom the man moved away from the guardhouse window and walked towards the pedestrian gate.
- 26 Mr Mahlangu accepted without questioning or need for verification that the man was a member of the South African Police Services.
- 27 Mr Mahlangu left the guardhouse, crossed the driveway and went and opened the pedestrian gate using the pedestrian gate key to ascertain what it was that the man wanted.
- 28 Mr Mahlangu did not attempt to speak to the man before opening the pedestrian gate. Mr Mahlangu did not seek authorisation from any person to open the pedestrian gate to speak with the man.
- 29 When the gate was open, the man pointed a gun at Mr Mahlangu and he and other robbers, who had materialised by this time, forced Mr Mahlangu onto the

applicants' premises at gunpoint.

30 The robbers tied Mr Mahlangu up and accosted and held hostage the staff and children of the first and second applicants. When the first and second applicants returned to their home at approximately 20h55 on the evening of 22 July 2009 they entered through the main driveway gate. The robbers waylaid them in their garage.²⁵

31 The robbers robbed the first to fourth applicants of their belongings. The value of the belongings stolen was in excess of R11 000 000.00.²⁶

THE HIGH COURT JUDGMENT

32 The High Court held, *inter alia*, that:

32.1 The liability of the defendant, whether in contract or in delict, “essentially boils down to the question of negligence.”²⁷ (The High Court did not explain why it found that negligence was a necessary element of the cause of action for breach of contract).

32.2 Both Imvula and Mr Mahlangu were negligent.²⁸

32.3 Imvula's and Mr Mahlangu's negligence was causally connected to the

²⁵ Volume 4 of the record at page 326.

²⁶ Volume 1 of the record at page 12.

²⁷ High Court judgment, para 43, at page 599 of Volume 7 of the record.

²⁸ High Court judgment, paras 64, 66 and 67, at pages 610 and 611 of Volume 7 of the record.

harm which followed, and the respondent was accordingly liable to the applicants in both contract and delict.²⁹

32.4 Invula was liable in contract to the first applicant and in delict to the second to fourth applicants for the loss suffered as a result of the robbery.

THE SCA JUDGMENT

33 The majority of the SCA held as follows:

33.1 The reasonableness of the conduct of Mr Mahlangu was relevant to both the contractual and delictual causes of action.³⁰

33.2 The reasonable person would not have foreseen that opening the pedestrian gate would allow unauthorised persons to enter the property.³¹

33.3 It was not possible for Mr Mahlangu to speak through the armoured gate. Mr Mahlangu was therefore required to open the pedestrian gate in order to communicate with the “policeman”, who was standing on the other side of the gate in the driveway.³² The SCA does not say why it makes this factual finding. It is not consistent with the evidence before the High Court. At the inspection in loco, the High Court established that it was possible for people standing on either side of the pedestrian gate to speak

²⁹ High Court judgment, para 69, page 612 of the record.

³⁰ SCA judgment, para 16, page 645.

³¹ SCA judgment, para 30, page 651.

³² SCA judgment, paras 28 and 34; volume 7, pages 649 and 653 of the record.

to one another.³³ This evidence was never contested. Nor was the High Court's finding on this issue appealed.³⁴

33.4 The Code of Conduct for Security Service Providers, 2003 includes requirements that a security service provider give reasonable assistance and co-operation to members and employees of the Security Services and not hinder the members and employees of the Security Services in the performance of any function which they may lawfully perform. Accordingly it was not wrongful for Mr Mahlangu to open the gate.

33.5 The SCA upheld the appeal and dismissed the applicants' claim, Cloete JA dissenting.

BREACH OF CONTRACT

34 The contract between the first applicant and Imvula included the following three terms:

34.1 First, Imvula would take all reasonable steps to prevent persons gaining unauthorised or unlawful access to the applicants' premises.³⁵

34.2 Second, Imvula and its employees were not to permit any person to gain access to the residence unless they had obtained prior authorisation from

³³ Record, volume 5, page 376, lines 3-9.

³⁴ Notice of appeal, volume 7, pages 614 – 627.

³⁵ Pleaded at paragraph 6.5.1 of the particulars of claim, vol 1, page 6 of the record; and paragraph 6.7, vol 1 page 7 of the record.

the first or second applicant.³⁶

34.3 Third, Invula was not permitted to use the key to the pedestrian gate except to enable the guard on duty to admit his colleague who was relieving him and to leave the premises when the shift changed.³⁷ Any other use of the key to the pedestrian gate was not permitted.

35 While the first term expressly imposed a condition of reasonableness on the conduct required of Invula, the second and third did not. They required strict compliance. They could be breached even in the absence of fault on the part of Invula and its employees. We therefore refer to them as “the strict liability terms”.

36 Invula was not required only to comply with the strict liability terms to the extent that it was reasonable it to do so. It was required to comply at all times, even where it might be reasonable not to.

37 That this was the parties’ intention is clear from the evidence:

37.1 Invula’s employees had on several occasions breached the strict liability terms by admitting visitors to the property without obtaining prior authorisation. The final straw was when they opened the gate for the applicant’s brother on 7 December 2008. The applicant described his

³⁶ Paragraph 6.8, Vol 1, page 7 of the record.

³⁷ Cloete judgment in the SCA, para 40, volume 7, page 656 of the record.

response to this incident as follows:

*“I was quite surprised to find my brother at the front door, so and it was very upsetting. I said how did you get in...and he says the security guards opened the gate. I thought no, you know I told these guys not to open the gate for nobody ... because obviously it leads to other things you know, and my ruling was that and I said you do not open the door for nobody and they kept opening the gate and I was upset.”*³⁸

37.2 As a result, the first applicant arranged to have the intercom disconnected from the main gate so that the employees of Imvula would not be able to open the gate.³⁹

37.3 When Imvula’s Mr Green asked for a key to allow the guards to change shifts, the first applicant objected. His evidence on this point is as follows:

*“He says well, we are having a problem here, it is that my staff needs to get in and get out and I said can you not change the shift change from 08:00 to 20:00, no it is from 06:00 to 18:00 and this is how I operate. I said look, I have got a problem giving you the key because I do not want nobody in my property, I do not want you guys to open the door for nobody because we have had an incident of you guys opening the doors for people and you know, I am being surprised by family members that you opened the door for and it is an issue for me. I said to him, I will give you the key, the shift key under one condition, under one condition, it is only for shift change and nothing else and Mr Green can verify that I did say that. I said this key is only for shift change and nothing else. So when you leave you close and give the key to the next person and that is it.”*⁴⁰

37.4 Two days after the robbery, the first applicant had a further conversation

³⁸ Volume 5, page 427 of the record.

³⁹ Volume 5, page 427 of the record.

⁴⁰ Volume 5, page 431-432 of the record.

with Mr Green, related as follows in his evidence:

*“My instructions were to you when you came to see me when you came asked me for that key and you promised, you know, when I said to you this key is only for shift change, what happened after that? You, that man, allowed the criminals...to put my family at risk, my kids especially when I was not at home...”*⁴¹

37.5 The first applicant confirmed this under cross examination:

*“...when I had that meeting with Mr Green I said the key is given for shift change and only shift change.”*⁴²

38 This evidence was not disputed. Mr Green did not give evidence on behalf of Imvula. Nor did Imvula provide any explanation of his failure to give evidence. The failure of Imvula to lead Mr Green’s evidence or provide an explanation as to why he was unavailable to give evidence justifies an adverse inference against Imvula on this issue.

Galante v Dickinson 1950 (2) SA 460 (A) at 465

39 The following principles apply to the determination of the meaning of contractual terms:

39.1 Within the limits laid down by the law, the parties to a contract are at liberty to determine the nature and extent of their obligations. In ***Joubert v Enslin***, Innes CJ held:

“The golden rule applicable to the interpretation of all contracts is to ascertain and to follow the intention of the parties; and, if the contract itself, or any evidence admissible under the circumstances,

⁴¹ Volume 5, page 433 of the record.

⁴² Volume 6, page 466 – 467 of the record.

affords a definite indication of the meaning of the contracting parties, then it seems to me that a Court should always give effect to that meaning.”

Joubert v Enslin 1910 AD 6 at 37-38

39.2 This principle has been repeatedly confirmed.

West Rand Estates Ltd v New Zealand Insurance Co Ltd 1925 AD 245 at 261

Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd and Others 1980 (1) SA 796 (A) at 803H – 804A

39.3 When interpreting the meaning of a contract, it is vital to consider the nature, purpose and context of the contract.

PG Bison Ltd and others v Master of the High Court, Grahamstown and Another 2000 (1) SA 859 (SCA) at para 7

40 Having regard to these principles, it is clear that the proper meaning to be given to the strict liability terms is that they did not include fault as a requirement of breach:

40.1 The only evidence on the strict liability terms unequivocally demonstrated that the intention of the parties was not to require fault for their breach.

40.2 The nature and purpose of the contract was to establish an impermeable wall of security at the Loureiro’s home that could not be breached without the permission of the first or second applicant.

40.3 The contract was concluded in the context of the applicants' previous experiences with crime, and their overriding desire to ensure that their new home was wholly secure.

40.4 It is therefore clear that the first applicant did not want the guard employed by Imvula to make decisions about what was reasonable and what was not when it came to admitting people to the property. He wanted to locate the sole discretion to grant access to his property, whatever the circumstances, in himself and the second applicant and not in the guard. These were the express terms of the contract with Imvula.

41 Mr Mahlangu opened the gate in order to speak with the man dressed as a police officer to find out what he wanted. He did so without seeking permission from anybody in the main house. In his evidence he explained his reason for opening the gate as follows:

*“Actually there are many things that can make me to open the gate for the police. One reason that I can mention, the first reason maybe they want something, information from me, so I could open the gate for them so that they can talk to me, maybe I can help there and there maybe where my help is, if there is any need for me to give them help, so that can be a first reason. So on that situation the very same, on the same night I did open.”*⁴³

42 Given that the contract strictly required Imvula and its employees not to allow anyone onto the premises without permission, and not to open the pedestrian gate for any purpose other than to change shifts, Mr Mahlangu's conduct in

⁴³ Volume 6 pages 498 – 499 of the record.

opening the pedestrian gate in order to speak to a man that he believed to be a police officer was a breach of the contract. Even on his own understanding of what he was doing at the time, Mr Mahlangu opened the pedestrian gate for a purpose not permitted by the contract. This was a breach of the strict liability terms of the contract. Whether he behaved reasonably in doing so is irrelevant. Moreover, it is undisputed that Mr Mahlangu could have communicated with the bogus policeman without opening the pedestrian gate.

43 The majority of the SCA held that this was not a breach of contract, because Mr Mahlangu's conduct was reasonable in the circumstances.

43.1 The SCA held that reasonableness was relevant to the contractual claim because the applicants had pleaded the terms of the contract in that way. It is correct that paragraph 6.7 of the particulars of claim⁴⁴ requires Invula to take all reasonable steps to ensure that there would be no unlawful access to the property. But this ignores paragraph 6.8, which pleaded that Invula was not entitled to admit any person unless defendant obtained prior authorisation from first or second applicants, with no qualification of reasonableness. The contract required compliance with both terms. Only the first is qualified by reasonableness.

43.2 The contract was also clear on the permissible uses of the key to the pedestrian gate: it was only to be used for the purpose of a shift change.

⁴⁴ Volume 1 of the record at page 7.

This requirement was not qualified by a condition of reasonableness.

44 Though the SCA judgment is not clear on this score, we submit that it can only be understood in one of two ways:

44.1 First, the SCA may have read a reasonableness qualification into the strict liability terms of the contract, holding that, properly interpreted, the contract between the first applicant and Imvula required only reasonable conduct. If so, the SCA erred in disregarding the clear language of the strict liability terms, as well as the uncontroverted evidence of the first applicant about the intention of the parties in concluding the contract. Its interpretation of the contract has the consequence that the applicants are deprived of their contractual cause of action through which to vindicate their constitutional rights.

44.2 Second, if the basis of the SCA judgment is that reasonableness is in general a defence to claims for breach of contract in the private security context, regardless of whether this was the intention of the parties in concluding the contract, the approach of the SCA is impermissible.

45 Fault is not a necessary element of a cause of action for breach of contract. Fault is only relevant if the contract, properly interpreted, requires fault as an element of breach. In general, therefore, lack of fault is not a defence to a claim based on breach of contract:

45.1 The SCA has repeatedly held that fault is not a requirement for a claim for damages for breach of contract.

***King Sabata Dalindyebo Municipality v Landmark Mthatha (Pty) Ltd and another* [2013] 3 All SA 251 (SCA) at para 19**
***Administrator, Natal v Edouard* 1990 (3) SA 581 (A) at 597E–F**
***Scoin Trading (Pty) Ltd v Bernstein* NO 2011 (2) SA 118 (SCA) para 20**

45.2 The SCA has held that:

“[C]ontractual damages do not depend on fault. All that the creditor is required to prove is that the debtor is in mora. It is not necessary to prove any fault on the part of the debtor.”

***Scoin Trading* at para 20**

45.3 The SCA addressed the role of fault in our law of contract at length in the ***Thoroughbred Breeders*** case, in the context of the question whether the Apportionment of Damages Act 34 of 1956 applies to a claim for breach of contract. The SCA has held that it does not, inter alia because negligence is not entailed in breach of contract:

“What is more, there is a clear distinction between a contractually imposed obligation to take care in discharging a stated obligation and a contractually imposed obligation to perform a stated obligation, failure to perform which will constitute a breach of contract whether or not the breach was in fact due to lack of care.”

***Thoroughbred Breeders’ Association v Pricewaterhouse* 2001 (4) SA 551 (SCA) at para 8**

“If it be suggested that fault is always involved in a breach of contract and therefore contracts are covered by the Act the

suggestion would be wrong. Contracts may be breached in circumstances where no fault can be identified.”

***Id* at para 103**

45.4 Parties are accordingly entitled to bind themselves to strict liability in their contracts if they so choose.

46 To the extent that it introduces lack of fault as a defence to claims for breach of contract against security service providers, the majority judgment of the SCA precludes parties from contracting for a higher standard than reasonable conduct in the private security industry sector. It has done so either in general or in the particular circumstances of this case because of its strained interpretation of the terms of the contract between the first applicant and Imvula.

47 The introduction of such a defence in respect of contracts in the private security sphere precludes those who contract with private security service providers from determining the terms of their own contracts. It prevents parties from contracting for a higher standard of conduct than reasonableness.

48 There are good reasons of constitutional principle for allowing people to contract as they choose, and for the courts to give effect to their intentions in when they contract:

48.1 Cameron JA, as he then was, put the point as follows in ***Brisley v***

Drotsky:

“[T]he Constitution’s values of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perceptive restraint. One of the reasons, as Davis J has pointed out, is that contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity:

‘If we look at the law simply from the point of view of the persons on whom its duties are imposed, and reduce all other aspects of it to the status of more or less elaborate conditions in which duties fall on them, we treat as something merely subordinate, elements which are at least as characteristic of law and as valuable to society as duty. Rules conferring private powers must, if they are to be understood, be looked at from the point of view of those who exercise them. They appear then as an additional element introduced by the law into social life over and above that of coercive control. This is so because possession of these legal powers makes of the private citizen, who, if there were no such rules, would be a mere duty-bearer, a private legislator. He is made competent to determine the course of the law within the sphere of his contracts, trusts, wills, and other structures of rights and duties which he is enabled to build.’

The Constitution requires that its values be employed to achieve a careful balance between the unacceptable excesses of contractual ‘freedom’, and securing a framework within which the ability to contract enhances rather than diminishes our self-respect and dignity.”

Brisley v Drotsky 2002 (4) SA 1 (SCA) at para 94, references omitted

48.2 This approach was followed by the SCA in *Napier*:

“[T]he Constitution requires us to employ its values to achieve a balance that strikes down the unacceptable excesses of ‘freedom of contract’, while seeking to permit individuals the dignity and autonomy of regulating their own lives. This is not to envisage an implausible contractual nirvana. It is to respect the complexity of the value system the Constitution creates. It is also to recognise that intruding on apparently voluntarily concluded arrangements is a step

that judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties' individual arrangements."

Napier v Barkhuizen 2006 (4) SA 1 (SCA) at para 13

48.3 This Court confirmed the approach of the SCA, holding that the Constitution underpins the maxim that parties must comply with the contractual obligations they have freely undertaken:

"[P]ublic policy, as informed by the Constitution, requires, in general, that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim pacta sunt servanda which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity."

Barkhuizen v Napier 2007 (5) SA 323 (CC) at para 57

49 Far from requiring the introduction of a defence of reasonableness, or its application in this particular matter, the private security industry is a sphere in which contracting parties should, for constitutional reasons, be permitted to contract for a higher standard than reasonableness. There is even more reason to respect the terms of a contract where its purpose is to protect against possible breaches of constitutional rights, including the rights to security, privacy, and property. This is for the following reasons:

49.1 The customer of a security firm who wishes to contract for a higher standard of conduct than reasonableness may have good reason for doing

so. As in this matter, such a person may have had previous encounters with dangerous crime that motivate them to attempt to establish an impermeable barrier around their home. If they wish to do so by contracting in terms of strict liability in order to ensure that their security firm complies with their instructions, and the security firm agrees to contract on these terms, there is no reason for a court to refuse to enforce the terms of the contract as agreed.

49.2 The facts of this case demonstrate the point: the first applicant wished to establish a barrier to his home that was impermeable without his or his wife's permission. He thus made it an express term of his contract with Invula that the only conditions on which any person was to be allowed to access the property was with such permission; and the only permissible reason for the guard to use the key to open the pedestrian gate was to change shifts. He contracted in these terms in order to protect the security, privacy, and property of his family. He rightly recognised that Invula's employees' willingness to open the gate or pedestrian door placed these interests at risk. Invula, through its employee Mr Mahlangu, breached the strict terms of the contract. The consequence of the breach was significant harm to the applicants' security, privacy and property.

49.3 We submit that it is for the security company to decide whether it will accept a contractual term that requires it to do something, regardless of

whether or not it would be reasonable to do so. Where it accepts a strict liability term it is responsible for ensuring that its employees comply. In this matter, there is no evidence that Imvula's guards were ever told by Mr Green about the strict liability terms, or the conditions on which the key for the pedestrian gate was handed over.

49.4 A security company that enters into a contract including a strict liability term is in breach if it or its employee fails to comply with the term. It does not matter whether it or its employee was at fault. There is nothing unfair or objectionable about this. Security firms are capable of assessing the risk entailed by the agreements they enter. Such companies will, presumably, price that risk into the contract.

50 The SCA's interpretation of the contract as requiring only reasonable steps to prevent persons from accessing the applicants' home is accordingly inconsistent with the pleadings and the evidence; and it has deprived the applicants of their common law causes of action, which are their only means of vindication of their constitutional rights in these circumstances. We submit that the SCA erred in this regard.

51 The majority judgment of the SCA also held that the contract in this matter must be interpreted to provide for a tacit term that excludes the police from the

group of people who are not allowed access to the premises.⁴⁵ Even if this is accepted, such an interpretation does not aid Imvula. There is no legal requirement that the contract must be interpreted to prevent barring access to persons who appear to be police officers, who have failed to adequately identify themselves as such, and who are not lawfully entitled to enter the premises. Moreover, the interpretation relied on by the SCA does not go to whether opening the gate was a breach – only whether admitting the officers was a breach. What is in issue in this matter is whether Mr Mahlangu breached the contract by opening the gate for a purpose not permitted by the contract – the purpose of communicating with someone who appears to be a police officer rather than the purpose of changing shifts. It is undisputed that Mr Mahlangu could have communicated with the officer without opening the pedestrian gate.

52 Accordingly, we submit that the SCA erred in dismissing the applicant's contractual claim against Imvula.

NEGLIGENCE

53 The majority of the SCA dismissed the plaintiff's claim and held that neither the security guard nor Imvula had been negligent. We respectfully submit that it erred in this regard. We submit that both the respondent and Mr Mahlangu were negligent, and their negligence was the direct cause of the harm suffered

⁴⁵ SCA judgment, para 18, Volume 7, page 646 of the record.

by the applicants.

54 The test for negligence is well known. It is that the reasonable person in the position of the defendant would have foreseen the reasonable possibility that his conduct might cause harm to another and would take reasonable steps to guard against such harm; and the defendant failed to take such steps.

***Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-G**

55 We submit that the application of this test to the facts of this matter yields the conclusion that both Invula and Mr Mahlangu were negligent.

56 Invula was negligent in that:

56.1 Invula did not train Mr Mahlangu in how to identify a police officer⁴⁶ or the circumstances in which a police officer is lawfully entitled to enter onto a property.⁴⁷ In his assessment of the “identity card” flashed at him by the robber, Mr Mahlangu relied on his personal knowledge of what such cards looked like, which he happened to have because one of his brothers happens to be a police officer, and not on any training provided by Invula.⁴⁸

56.2 Invula provided Mr Mahlangu with no instructions concerning his

⁴⁶ Volume 6, page 554, lines 2-7 of the record.

⁴⁷ Volume 6, page 552, lines 7-10; page 553, line 25 of the record.

⁴⁸ Volume 6, page 497 of the record.

posting at the plaintiffs' home.⁴⁹

56.3 Invula did not tell Mr Mahlangu that he was strictly precluded from admitting anyone to the property without authorisation from the occupants of the house. Nor did it tell him that the only permissible use of the key to the pedestrian gate was to change shifts.

56.4 Invula failed to provide Mr Mahlangu with any means of contacting his supervisor. Mr Mahlangu was reliant on his own cell phone. If he did not have airtime on his cell phone, he would send a free "please call me" message to his supervisor who would call him back.⁵⁰

57 The High Court summarised its findings on the failure of Invula to adequately train and prepare Mr Mahlangu for his job as follows:

*"Mr Mahlangu's evidence was that no directions were given to him concerning his posting at 50 Jellicoe Avenue. For instance, he was not told why he had no control over opening and closing the main gate; he was not told that the single key given to the defendant company for the pedestrian gate was to be used only to enable shift changes of security guards; he was not clearly instructed that no-one could enter the property without authorisation from the occupants of the house or staff; he was not instructed to check the operation of the intercom at the beginning of every shift."*⁵¹

58 The High Court held that the reasonable security company would have

⁴⁹ Volume 6, page 510, lines 16 – 20 of the record.

⁵⁰ Volume 6, page 548, lines 10-25; page 550, lines 12-19 of the record.

⁵¹ High Court judgment, para 48, Volume 7, page 604 of the record.

reasonably foreseen and taken steps to address.⁵²

58.1 The possibility of unlawful intruders attempting to gain access to a property using disguise and guile;

58.2 That the only point of entry over which its employee had control was the pedestrian gate;

58.3 That the only means of communication from the guardhouse was the intercom, which therefore had to be regularly checked;

58.4 That clear instructions should be given to its employee;

58.5 That the employee in the guardhouse might need a means of communication to contact a supervisor for guidance or backup.

59 Imvula failed to take measures to address any of these issues, and were accordingly in breach of contract⁵³ and their duty of care to the applicants.

60 The majority of the SCA does not address the respects in which Imvula was negligent. It does not say why Imvula's failure to train its employees in the identification of police officers or to provide clear instructions as to the permissible use of the key to the pedestrian gate did not constitute negligence.

The majority of the SCA focused on the High Court's criticism of Mr

⁵² High Court judgment para 64, Volume 7, page 610 of the record.

⁵³ One of the terms of the contract provided that "the defendant would ensure that the security guards deployed at the plaintiffs' premises were suitably trained and competent to perform the obligations of the defendant at the plaintiffs' premises in terms of the guarding services agreement." Paragraph 6.10, vol 1, page 7 of the record.

Mahlangu, holding that it was unjustified, because Mr Mahlangu could not be faulted for believing that the person who alighted from the vehicle was a police officer.⁵⁴ We submit that the SCA erred in disregarding Imvula's failure to adequately prepare and support Mr Mahlangu for the circumstances in which he found himself. The SCA correctly held that Mr Mahlangu was also a victim of the robbery; but it failed to identify Imvula's lack of training and support as the cause of the robbers gaining access to the property.

61 We submit that Mr Mahlangu was also negligent in that:

61.1 He accepted without questioning or consideration that the intruders were members of the South Africa Police Services.⁵⁵

61.2 He did not contact the main house to ask the staff whether they had contacted the SAPS and if so, what assistance they required.⁵⁶

61.3 He did not attempt to speak with the man through the peephole of the gate before opening the gate to find out what the man wanted.⁵⁷

62 The High Court held that the reasonable security guard would have:⁵⁸

62.1 Ensured that he had sight of the identity card presented;

⁵⁴ SCA judgment at paras 20-23, Volume 7 of the record at pages 647 – 648.

⁵⁵ High Court judgment, para 52, Volume 7 of the record at page 605.

⁵⁶ High Court judgment, para 52(e), Volume 7 of the record at page 606.

⁵⁷ High Court judgment, para 52(f), page 606 of the record; Mahlangu evidence, Volume 6 of the record at page 559, lines 10-20

⁵⁸ High Court judgment paras 65 – 66, Volume 7 of the record at page 611

62.2 Attempted to communicate with the man dressed as a police officer before opening the pedestrian gate;

62.3 Enquired from the man dressed as a police officer which station the police had come from, which address they wanted, and for what purpose; and

62.4 Attempted to contact the main house to determine whether the SAPS had been called and for what purpose.

63 In opening the pedestrian gate without taking any of these measures, Mr Mahlangu failed to take reasonable steps to prevent the anticipated harm from occurring.

WRONGFULNESS

64 The SCA held that the applicants failed to show that the conduct of Mr Mahlangu was wrongful. This is because the Code of Conduct for Security Service Providers, 2003 (“Code of Conduct”) imposes obligations on security service providers to co-operate with members of the State security services.⁵⁹

65 It is true that security service providers are subject to these obligations. However, we submit that the dissent of Cloete JA on this issue is correct.⁶⁰ The

⁵⁹ SCA judgment, para 33, Volume 7 of the record at page 652.

⁶⁰ SCA judgment, paras 52 – 53, Volume 7 of the record at pages 661 – 662.

obligations contained in the Code of Conduct do not justify Mr Mahlangu's conduct. The Code of Conduct obliges a security service provider to assist actual members of the security services in the performance of their lawful functions. It does not require them to comply with any instruction by a person who appears to be a member of the Security Services, with no regard to whether they are lawfully entitled to perform that function. Conduct cannot be justified by a duty to assist a policeman to perform his or her lawful duties in circumstances where, whatever else happened, no policeman was assisted and there was no question of any lawful duty.

66 As Cloete JA held, the criterion of wrongfulness in the delictual context is not a question about the subjective state of mind of the defendant. Wrongfulness and fault are entirely separate concepts, and the presence of one does not indicate the presence of the other.

***Minister of Safety & Security v Van Duivenboden* 2002 6 SA 431 (SCA) at para 12**

Mr Mahlangu's beliefs, reasonable or not, about the identity of the man dressed as a police officer are therefore irrelevant.

67 The question, for the purpose of assessing wrongfulness, is not whether Imvula was negligent, but whether it is reasonable in the circumstances to impose liability on the defendant for the harm that results. This Court has held that:

"In the more recent past our courts have come to recognise, however, that in the context of the law of delict:

- (a) *the criterion of wrongfulness ultimately depends on a judicial determination of whether – assuming all the other elements of delictual liability to be present – it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and*
- (b) *that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms.*

Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct, but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.”

Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae) 2011 (3) SA 274 (CC) at para 122

- 68 Cloete JA correctly held that public policy justifies holding Invula liable for its employee’s negligence. One reason is that it is highly desirable to ensure that private security companies properly train and prepare their employees to protect customers. One purpose of the public policy aspect of delictual liability is to create incentives for persons and companies to conduct themselves in such a way that avoids causing harm to others. That purpose is served by holding that security companies who fail to provide adequate training and support for their employees are liable.
- 69 If security companies are liable for their failure to properly train their employees; failure to provide a job description and instructions; and failure to ensure communication between guard and supervisor, they will have reason to ensure that they take these steps.

70 Since private security companies are in a position to affect important constitutional rights, whether our law of delict, correctly interpreted and applied, gives them these incentives is a matter of public import beyond the interest of the applicants in being compensated for the harms they have suffered. It is a question with implications for any person who contracts with private security firms, and it has consequences for the extent to which those firms will have reason to take all due care to ensure that their employees are adequately trained and equipped to protect their customers.

71 In cases such as this one, where due to the failure of a private security company to adequately train and equip its employees to protect its customers, the constitutional rights of those customers are breached, this liability ensures that the customer is compensated and that the harm falls in the right place: on the party whose negligence and breach of its duties of care caused the breaches.

72 Public policy considerations of this kind are the basis of vicarious liability. Vicarious liability arises when an employee commits a delict in the course of his or her employment. The SCA has said the following about this rule:

“The reason for the rule is often stated to be public policy. See for example, Salmond and Heuston on the Law of Torts 19 ed, 507. And an underlying reason for that policy has been held in Feldman (Pty) Ltd v Mall 1945 AD 733, in a passage at 741, to be the consideration that because an employer’s work is done ‘by the hand’ of an employee, the employer creates a risk of harm to others should the employee prove to be negligent, inefficient or untrustworthy. The employer is therefore under a duty to ensure that no injury befalls others as a result of the employee’s improper or negligent conduct

‘in carrying on his work’. (Of course ‘the work’ referred to in that passage is either that of the employer or the employee. It makes no difference. If the employee’s wrong is done within the course of the employment it will be also within the course of the employer’s business.)”

Ess Kay Electronics Pte Ltd and another v First National Bank of Southern Africa Ltd 2001 (1) SA 1214 (A) para 8

73 We submit that the application of these principles to this matter yields the conclusion that it is reasonable to hold Invula liable for the harm that resulted from its omissions and the conduct of Mr Mahlangu.

LEAVE TO APPEAL

A constitutional issue

74 This matter raises important questions about the extent to which the law of delict and contract give effect to the following constitutional rights:

74.1 The right to privacy enshrined in section 14 of the Bill of Rights;

74.2 The right to freedom and security of the person enshrined in section 12 of the Bill of Rights; and

74.3 The right to property enshrined in section 25 of the Bill of Rights.

75 This Court has held that common law causes of action may constitute appropriate relief for the purpose of vindicating constitutional rights.

75.1 In *Mankayi*, Khampepe J held:

“Delictual remedies protecting constitutional rights may thus constitute appropriate relief for purposes of section 38 of the Constitution.”

Mankayi v Anglo Gold Ashanti Limited 2011 (3) SA 237 (CC) at para 17

75.2 In the ***Law Society*** matter, Moseneke DCJ held that a delictual action for damages in the context of road accidents is the appropriate method for vindicating constitutional rights:

“[T]he common law provides a claimant with a delictual remedy to recover from a wrongdoer damages arising from bodily injury or the death of a breadwinner caused by the unlawful and negligent driving of a motor vehicle. The delictual remedy vindicates the right to bodily integrity. The question is whether the common law delictual remedy also protects and enforces, in the language of section 12(1)(c) of the Constitution, the right to the security of the person which includes the entitlement to be free from all forms of violence from either public or private sources.

...

It seems clear that in an appropriate case a private law delictual remedy may serve to protect and enforce a constitutionally entrenched fundamental right. Thus a claimant seeking ‘appropriate relief’ to which it is entitled, may properly resort to a common-law remedy in order to vindicate a constitutional right. It seems obvious that the delictual remedy resorted to must be capable of protecting and enforcing the constitutional right breached.”

Law Society Of South Africa And Others V Minister For Transport And Another 2011 (1) SA 400 (CC) at paras 72 and 74

76 We submit that in this matter, the applicants’ common law contractual and delictual rights similarly constitute the appropriate means of vindicating their constitutional rights to security, privacy, and property.

77 The majority judgment of the SCA absolved Imvula of liability for the harm

suffered as a result of its conduct. The SCA failed to give sufficient weight to the following consequences of Mr Mahlangu's and Imvula's negligence and breach of contract:

77.1 Armed intruders breached the privacy of the applicants' home. They threatened the applicants and held them hostage. This Court has held that the right to the privacy of one's home flows from the value placed on human dignity by the Constitution.

Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others 2009 (1) SA 1 (CC) at para 76

We submit that such breaches must therefore be viewed with the utmost seriousness by the courts.

77.2 The intruders threatened the physical and psychological security of the applicants. Section 12(1)(c) of the Constitution provides that everyone has the right to be free from all forms of violence from either public or private sources. This Court has held that the right is engaged whenever there is an immediate threat to life or physical security deriving from any source, and that the Constitution recognises that serious threats to the security of the person may arise from private sources.

Law Society Of South Africa And Others V Minister For Transport And Another 2011 (1) SA 400 (CC) at para 58

S v Baloyi (Minister of Justice and Another Intervening) 2000 (2) SA 425 (CC) at para 11

Freedom from fear is one of the fundamental rights identified in

international law, and which section 12 of our Constitution seeks to enforce.

S v Baloyi (Minister of Justice and Another Intervening) 2000 (2) SA 425 (CC) at para 13

The invasion of the applicants' home by armed intruders constituted a breach of their rights under section 12(1)(c) and international law.

77.3 The applicants suffered patrimonial loss as a result of the robbery. The right to property enshrined in section 25 of the Constitution is fundamental. Section 25(1) clearly prohibits arbitrary deprivation of property. Such deprivation, where it results from the negligence or breach of contract of a private party, should found a cause of action against that party.

78 Imvula did not breach these constitutional rights directly. The robbers committed the breaches. But it was only due to Imvula's and Mr Mahlangu's negligence and breach of contract that they were able to do so. We submit that holding Imvula liable for its conduct would be an appropriate and necessary vindication of the applicants' constitutional rights.

The Constitution Seventeenth amendment

79 Alternatively, to the extent that this Court finds that the matter does not raise a constitutional issue, we submit that the presence of a constitutional issue is no longer a jurisdictional requirement for this Court to grant leave to appeal.

80 The Constitution Seventeenth Amendment Act of 2012 was brought into force on 23 August 2013. It amends section 167(3) of the Constitution, which now provides:

- “(3) *The Constitutional Court—*
- (a) *is the highest court of the Republic; and*
 - (b) *may decide—*
 - (i) *constitutional matters; and*
 - (ii) *any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and*
 - (c) *makes the final decision whether a matter is within its jurisdiction.”*

81 The amendment has expanded this Court’s jurisdiction. In addition to constitutional matters, this Court now has jurisdiction over any matter in which this Court grants leave to appeal on the basis that the matter raises an arguable point of law of general public importance that ought to be considered by this Court.

82 We submit that, to the extent that this Court finds that this matter does not raise a constitutional issue, it clearly raises an arguable point of law of general public importance – namely, the extent and nature of a private security service provider’s obligations in delict and in contract to its customers.

83 It may be submitted that the Constitution Seventeenth Amendment does not apply to this matter, because that would be to apply the amendment

retrospectively. The SCA handed down its judgment, and this Court set down the application for leave to appeal, before the coming into effect of the Constitution Seventeenth Amendment.

84 We submit that the application of this Court’s expanded jurisdiction to matters already in progress does not offend against the presumption against retrospectivity.

85 A retrospective statute imposes new results in respect of past events. As this Court has explained:

“[There is a] fine distinction between the broad concept of retrospectivity and the distinctive notion of retroactivity. A retrospective provision operates for the future only but imposes new results in respect of past events. A retroactive provision operates as of a time prior to the enactment of the provision itself and changes the law applicable with effect from a past date.”

Du Toit v Minister for Safety and Security and Another 2009 (12) BCLR 1171 (CC) at para 33

86 The Constitution Seventeenth Amendment, if applied to cases already in progress and causes of action that have already arisen, would be retrospective, not retroactive. It would not change the substantive law applicable with effect from a past date, but would impose new results for the future only (and only in respect of this Court’s jurisdiction).

87 In assessing whether it is permissible to interpret a statute to have retrospective effect, the primary question is whether the statute affects substantive rights. This Court has held that:

*“According to our common law, provisions of a statute do not, unless the contrary is stipulated, have retrospective effect. They do not affect vested rights or obligations. However, provisions that regulate procedural rather than substantive matters ordinarily have immediate effect on all disputes even if they arose prior to the enactment of the legislation. In *Curtis v Johannesburg Municipality* 1906 TS 308 at 312 Innes CJ held that:*

‘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.’”

***Fredericks and Others v MEC for Education and Training, Eastern Cape, and Others* 2002 (2) SA 693 (CC) at para 16, emphasis added**

See also *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* 2007 (3) SA 210 (CC) at para 34

88 In *Haffejee*, the Appellate Division (“AD”) addressed the question of retrospectivity in the context of a change to jurisdiction. In that matter, the Minister of Public Works expropriated a property from a deceased estate and offered the estate a sum of money in compensation. The estate lodged an application for compensation in a different amount in the compensation court.

***Minister of Public Works v Haffejee* NO 1996 (3) SA 745 (A) at 749D-E**

88.1 An amendment to the relevant legislation, which took effect on 1 May

1992 (after the expropriation but before the application for compensation), abolished the compensation court. The AD held that the question was:

“whether an application could be initiated in a compensation court on or after 1 May 1992 in respect of a claim for compensation which had arisen before that date.”

***Id* at 751A**

88.2 The question in *Haffejee* was accordingly the reverse of that in issue in this matter: whether a court which is abolished from a certain date retains jurisdiction to hear causes of action that arose before its abolition, even in circumstances where the proceedings only commenced after the abolition of the court.

88.3 The AD pointed out that a distinction between procedural and substantive amendments is often drawn in this context:

*“[A]lthough 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. Thus, in *Yew Bon Tew v Kenderaan Bas Mara* [1982] 3 All ER 833 (PC) at 836b-d Lord Brightman said:*

‘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 (eg 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 (eg 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.’’’’

***Id* at 752B – E**

88.4 The dispositive factor, however, is not whether the amendment is properly construed as procedural, but whether it will impact on substantive rights and obligations:

“[I]t 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 substantive 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.”

***Id* at 753B**

Confirmed by this Court in *Veldman v Director of Public Prosecutions, Witwatersrand Local Division 2007 (3) SA 210 (CC)* at para 28

88.5 The AD held that the abolition of the compensation court was “*undoubtedly procedural*”. Its only effect was that after the commencement of the amendments, an application for compensation was to be initiated in a forum different from the compensation court. This had no impact on the substantive rights of any of the parties:

“Furthermore, should the amendments be given retrospective effect it will entail nothing more than the application of a new procedure to the respondent's pre-existing right to compensation; the only difference being that, as from 1 May 1992, the respondent had to enforce that right to compensation in the Natal Provincial Division instead of a compensation court. There would be no adverse impairment of any pre-existing substantive right to compensation.”

Id at 753E

88.6 The AD also rejected the argument that matters pending in the compensation courts were excluded from the affect of the amendment.

Id at 754

88.7 It was accordingly permissible for the amendments to apply with retrospective effect.

89 Similarly in this matter, the expansion of this Court’s jurisdiction has no impact on any substantive rights. It merely changes the final forum of appeal in respect of the applicants’ pre-existing cause of action. There can accordingly be no objection to its application to this matter.

90 The primary rationale for the presumption against retrospectivity is that the law should be capable of being known with a reasonable degree of certainty so that people have the ability to rely on the law and plan their actions in the knowledge of the legal consequences that will result.

91 We submit that the expansion of this Court’s jurisdiction does not offend against these principles, since it does not interfere with substantive rights. No party has a vested or substantive right to have their case decided by any

particular tribunal. Nor would any party have varied their conduct on the basis of whether this Court would have jurisdiction to hear an appeal in the absence of a constitutional issue.

92 Moreover, foreign law experience does not suggest that retrospective statutes are necessarily inconsistent with the rule of law.

92.1 Although Article 1, Section 9, Clause 3 of the United States Constitution provides that “*no ... ex post facto law shall be passed*”, this prohibition has generally been held to apply only to a law which imposes criminal punishment.

Tribe 'American Constitutional Law' 2nd Ed (1988) 632-641

92.2 In a civil context, the US Supreme Court treats retrospectivity and retroactivity as constitutionally unobjectionable, and has held that:

“The strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by legitimate legislative purpose and by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.”

***Finch and Benefit Guarantee Corporation v Gray* 467 US 717 at 729**

93 Similarly, the position in Canada has been summarised by **Hogg** **Constitutional Law of Canada** as follows at para 48.8:

“Apart from Section 11(g) [of the Canadian Charter, which applies to criminal offences] Canadian constitutional law contains no prohibition on retroactive (or ex post facto) laws. There is a presumption of statutory interpretation that a statute should not be given retroactive effect, but if the retroactive effect is clearly expressed, then there is no room for interpretation and the statute is effective according to its terms. Retroactive statutes are in fact common. For example, a taxation law is often made retroactive to budget night, when the law was publically proposed; otherwise, there would often be room for avoidance action by taxpayers during the hiatus between the budget and the enactment of the law. Another common example is a retroactive statute to change the law as it has been declared to be in a judicial decision: a law that has been interpreted in an unexpected way, or has been held to be invalid on remediable grounds, may be amended or invalidated retrospectively to restore the legal position to what it was believed to be before the judicial decision. The power to enact retroactive laws, if exercised with appropriate restraint, is a proper tool of modern government.”

(emphasis added)

93.1 This passage was cited with apparent approval in ***Robertson and another v City of Cape Town and another* 2004 (5) SA 412 (C) at para 134.**

94 The position in Europe is much the same, as the Court of Appeal of England and Wales has made clear:

“There is no general principle under the European Charter of Human Rights that changes in civil law should not operate retrospectively.”

***Heil v Rankin* [2000] 3 All ER 138 (CA)**

95 We submit that there can accordingly be no objection to the application of this Court’s jurisdiction to cases already in process. The point is illustrated by the following examples:

95.1 Where a new tribunal is created for the purpose of hearing causes of action that arose before the establishment of the new tribunal, there can be no objection, provided the new tribunal applies the substantive law as it was when the conduct occurred. For example, if a specialised tribunal is established to hear competition matters that, prior to the establishment of the specialised tribunal, would have been heard in the High Court, it would not be objectionable to allow that tribunal to try competition matters that arose prior to its establishment.

95.2 The creation of this Court is a further example. Before the coming into effect of the 1993 Constitution, there was no court with appellate jurisdiction higher than that of the Supreme Court of Appeal. When this Court was established, it did not decline to hear appeals in matters that had commenced prior to its existence and prior to the conferral of its constitutional appellate jurisdiction. In the *Makwanyane* case, for example, the facts giving rise to the conviction and sentencing of the appellants pre-dated the existence of this Court. The criminal trials of the appellants were concluded, and the appellants had been convicted and sentenced before the coming into effect of the 1993 Constitution.

***S v Makwanyane and Another* 1995 (6) BCLR 665 (CC) at para 3**

Yet this Court's exercise of its jurisdiction over the matter was not considered to be a breach of the presumption against retrospectivity. Nor could it have been, since it did not constitute an interference with vested

or substantial rights.

96 We submit that the conferral of jurisdiction in respect of causes of action that have already arisen do not fall foul of the presumption against retrospectivity because people do not make decisions about their conduct based on procedural rules applied by courts. Nor do they make decisions based on whether this Court would have ultimate appellate jurisdiction over their matter, because other courts would have had jurisdiction to try those causes of action in any event. The expanded jurisdiction therefore does not fall within the rationale for the presumption against retrospectivity.

97 We accordingly submit that this Court has jurisdiction to hear this appeal on the basis of its expanded jurisdiction under the Constitution Seventeenth Amendment Act, 2012.

Interests of justice

98 The applicant has strong prospects of success in this matter. The majority judgment of the SCA is open to question on numerous grounds, as set out above. The applicants have good prospects of success. Moreover, the effect of the judgment of the SCA is to deprive the applicants of their common law causes of action by which to vindicate the breaches of their constitutional rights.

99 We submit that the interests of justice therefore favour granting leave to appeal.

CONCLUSION

100 For all of the above reasons, the applicants seek an order:

100.1 Granting leave to appeal; and

100.2 Upholding the appeal against the judgment of the SCA, with costs.

GILBERT MARCUS SC

NICK FERREIRA

Chambers, Sandton

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