

**REPORTABLE**



CASE NO: SA 34/2017

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**PIETER PETRUS VISAGIE**

**Appellant**

and

**GOVERNMENT OF THE REPUBLIC OF NAMIBIA**

**First**

**Respondent**

**E H NANDAGO**

**Second Respondent**

**MAGISTRATES COMMISSION**

**Third Respondent**

**ATTORNEY-GENERAL OF NAMIBIA**

**Fourth Respondent**

**Coram:** SHIVUTE CJ, DAMASEB DCJ and FRANK AJA

**Heard:** 1 November 2018

**Delivered:** 3 December 2018

**Summary:** The appellant was tried and convicted in the Magistrate's Court, Windhoek, by the second respondent after his case had been postponed several times. At some stage during the proceedings in the Magistrate's Court, the State

had closed its case but the magistrate appeared not to accept that, prompting the prosecutor to lead further evidence.

The appellant was then convicted and sentenced to over three years imprisonment. His appeal to the High Court succeeded and the conviction and sentence were set aside and he was released.

The High Court remarked in its judgment on appeal that the manner in which the second respondent conducted the trial was a 'disgrace' and a 'failure of justice' and that it was the magistrate, not the prosecution, who was determined to secure the conviction of the appellant.

The appellant issued summons against the Government of Namibia represented by the Minister of Justice in his official capacity; the magistrate, the Magistrates Commission, and the Attorney-General, seeking compensation against them, jointly and severally, the one paying, the others to be absolved. The cause of action is that the magistrate's conduct of the trial of the appellant was wrongful and unlawful and deprived him of his liberty otherwise than in according with procedures established by law, as contemplated by Art 7 of the Namibian Constitution.

The State respondents pleaded that they were not liable for the conduct of the judicial branch which is guaranteed independence under the Constitution; that judicial officers are not in the employ of the State and that, at common law, the State is immune from suit for the actions of the judicial branch.

After pleadings closed, the parties invited the High Court, by stated case, to determine if the State was liable for the wrongful and unlawful conduct of the second respondent, on the assumption that in the conduct of the trial of the appellant the magistrate acted *mala fide*, maliciously and fraudulently.

The full bench of the High Court was divided.

The majority of two held that the independence of the judiciary and the separation of powers militated against holding the State liable for the conduct of the judicial branch. The majority took the view that as an aggrieved person the appellant had recourse against the second respondent in her personal capacity and that it was not necessary or appropriate to make the State liable for her conduct as the State had no power of control over her performance of the judicial function. The claim was dismissed.

The minority of one held that the existence of a remedy against the individual member of the judiciary was no bar to recognising a remedy in public law against the State. That Art 5 of the Constitution obligates the judiciary to respect and uphold the rights and freedoms guaranteed by the Constitution. That Art 25(3) and (4) of the Constitution empower the court to forge new remedies in public law to give full effect to constitutionally guaranteed rights and freedoms. That recognising State liability for judicial misconduct is necessary to vindicate such rights. The minority therefore resolved the question of State liability in favour of the appellant.

On appeal by the appellant to the Supreme Court, *held* that the existence of a remedy against the actual wrongdoer is an important consideration whether or not to recognise State liability for the actions of the members of the judiciary. *Held* further that recognising a new remedy in public law against the State for such conduct is not necessary and that such liability may undermine the independence of the judiciary and possibly create a greater mischief than not doing so.

Appeal dismissed and no order as to costs.

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### APPEAL JUDGMENT

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DAMASEB DCJ (SHIVUTE CJ and FRANK AJ) concurring:

[1] In this appeal, Mr Visagie (the appellant) asks the court to find that the Namibian Constitution (the Constitution) recognises State liability for the delicts of

judges and magistrates (judicial officers) whilst performing judicial functions. A full bench of the High Court was divided on the matter. Miller AJ with whom Ueitele J (the majority) concurred held that it was not necessary and appropriate to extend liability to the State for the delicts of judicial officers. Geier J (the minority) came to a contrary conclusion on the central issue of State liability.

[2] In the court below, there was an ancillary issue whether the correct state organs and functionaries were cited as defendants, but in the view that I take on the central issue, it is unnecessary to discuss those ancillary issues in great depth. I make brief comments thereon at paras [107] - [109] below.

[3] The appeal lies against the order and judgement of the High Court in so far as the State<sup>1</sup> was absolved of liability for the assumed unlawful and wrongful conduct of a judicial officer which violates an aggrieved person's fundamental rights and freedoms guaranteed by the Bill of Rights contained in Chapter 3 of the Constitution. In the present case, the right not to be deprived of one's personal liberty except according to procedures established by law.<sup>2</sup>

[4] By the extension of liability to the State for the wrongful and unlawful conduct of members of the judicial branch, the appellant seeks to carve out a new remedy based on Art 25(3) and (4) of the Constitution. The remedy is new because under the common law as it stands at the moment, it is not recognised. Article 25(3) and (4) constitute the Court as guardian of the fundamental rights and freedoms contained in the Bill of Rights and empower the Court, in an appropriate

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<sup>1</sup> Art 1(3) of the Constitution states that the 'main organs of the State shall be the Executive, the Legislature and the Judiciary'

<sup>2</sup> The Constitution, Art 7.

case, to award monetary compensation to an aggrieved person in the event of a violation of constitutionally guaranteed rights and freedoms.

#### The common law on liability for the delicts of judicial officers

[5] At common law, a judicial officer is not personally liable if damages are occasioned to another arising from decisions made in good faith and without malice in the performance of judicial functions. A judicial officer is however personally liable for his or her wrongful conduct whilst performing the judicial function if such conduct is proven to be *mala fide*, malicious or fraudulent.<sup>3</sup>

[6] In the limited circumstance where the judicial officer is personally liable, the State is not liable. The latter aspect of the common law rule finds justification in the rationale that there is no employment relationship between a judicial officer and the State as it has no control over the performance of judicial functions.<sup>4</sup> The appellant seeks to persuade the court that the Constitution does not support the common law rule that the State is not liable for the wrongful conduct of the judicial officer in the situation that the common law attributes liability to him or her.

#### Background facts

[7] The appellant was arrested during March 1998 on three charges: fraud, corruption contrary to s 2 of Ordinance 2 of 1928<sup>5</sup> and a contravention of s 56(e) of Act 7 of 1993<sup>6</sup> relating to the alleged falsification or fabrication of a passport. He

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<sup>3</sup> *Gurirab v Government of the Republic of Namibia & others* 2006 (2) NR 485 (SC); *Gurirab v Government of the Republic of Namibia & others* 2002 NR 114 (HC) at 118G-J–119A-H.

<sup>4</sup>Article 78(1) vests judicial power in in the Courts. Art 78(2) decrees that the courts are independent and subject only to the Constitution and the law. Art 78(3) states that no member of Cabinet or the Legislature or any other person shall interfere with judicial officers in exercise of judicial functions.

<sup>5</sup> Prevention of Corruption Ordinance, 1928 (since repealed).

<sup>6</sup> Immigration Control Act, 1993.

appeared repeatedly before magistrates, including the second respondent at the Magistrate's Court at Windhoek, from 1998 until he was sentenced to three years imprisonment on 20 March 2003.

[8] The appellant was however released by an order of the High Court on 15 June 2005. That court referred to the appellant's conviction by the second respondent as 'one of the biggest disgraces (and a failure of justice) which I have seen on record'. According to the High Court judges who released the appellant, the second respondent attempted to intervene to prevent the State from closing its case; did not inform the appellant, his legal representatives or the prosecutor that the State's case had been closed on a previous occasion; unduly interfered with the State's case and thereby denied the appellant a fair trial. (The right to a fair trial was not included in the stated case referred to in para [18] below. The appellant relied exclusively on the alleged irregular deprivation of liberty.)

#### The pleadings

[9] In his combined summons the appellant cited, as the first defendant, 'The Government of the Republic of Namibia, duly constituted as such in terms of the Namibian Constitution herein represented by the Minister of Justice in his nominal capacity as executive head of the Ministry of Justice'. The magistrate who presided in the case and convicted and sentenced the appellant is cited as the second defendant. The third defendant cited is the Magistrates Commission created under the Magistrates Act 3 of 2003 because it is responsible 'for the appointment of Magistrates'. It appears from the record that at some stage the Attorney-General (A-G) was joined as the fourth defendant. There is no reference

to the A-G in the particulars of claim to set out the basis for that office bearer being cited as a defendant. But since the parties approached the matter as if the A-G is a party to the proceedings, I need say nothing further on that.

[10] It is alleged that the second defendant was appointed by either the first or the third defendant to 'exercise the judicial power of the Republic of Namibia and [she] acted in that capacity at all times relevant hereto'. When the second defendant so presided, it is alleged, the appellant 'enjoyed the fundamental right not to be deprived of his personal liberty except according to the procedures established by law'.

[11] The particulars of claim then set out the alleged wrongful and unlawful conduct engaged in by the second defendant<sup>7</sup> which denied the appellant a fair trial as a result of which he was convicted and imprisoned 'for over two (2) years on 20 March 2003 until he was released by order of the High Court of Namibia on 15 June 2005'. It is alleged that the manner of his conviction deprived him of his personal liberty otherwise than by the due process of the law and in conflict with the Constitution.

[12] The particulars of claim also allege that the defendants are liable to the appellant jointly and severally, the one paying, the others to be absolved in the amounts of N\$2 000 000 being damages for *contumelia*, deprivation of freedom and discomfort; and N\$100 000 being costs reasonably expended to approach the High Court to secure his release.

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<sup>7</sup> Fully set out in the parties' stated case, *vide* para [18] below.

[13] Conspicuous by its absence is any allegation in the particulars of claim that the common law position exempting the State from liability for the wrongful and unlawful conduct of members of the judiciary is inconsistent with the Constitution in view of Arts 5<sup>8</sup> and 25<sup>9</sup> of the Constitution.

[14] In her plea, the second defendant denied that she engaged in any wrongful and unlawful conduct as alleged in the particulars of claim.

[15] The plea of the first, third and fourth defendants denies that the Minister of Justice, the Magistrates Commission and the A-G (State defendants/respondents) are liable or responsible for the judicial acts of magistrates. It is specifically pleaded that the State defendants are 'exempted from liability, in terms of the common law and the Namibian Constitution' which 'established certain fundamental principles of the Namibian State: the respect for the independence of the judiciary and the rule of law<sup>10</sup> and the maintenance of the separation of powers'.

[16] The plea further asserts that to remove the exemption by holding the executive branch of the State or the third respondent liable for the acts of judicial officers would undermine the fundamental principles of judicial independence, rule of law and separation of powers and erode the effectiveness of the judiciary. It is denied that the magistrate was in the employ of the first or third defendant and

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<sup>8</sup> Article 5 states that: 'The fundamental rights and freedoms enshrined in [the Bill of Rights] shall be respected and upheld by the Executive, Legislative and . . . and shall be enforceable by the courts'.

<sup>9</sup> The relevant provisions are set out fully at footnote 16 below.

<sup>10</sup> Article 1(1) states that the Republic of Namibia is founded upon the principles of democracy, the rule of law and justice for all.



that, as a magistrate, she was appointed to exercise the judicial power vested in lower courts by Art 78 of the Constitution which also guarantees the independence of the judiciary, subject only to the Constitution and the law and prohibits the State defendants from interfering with judicial officers in the performance of judicial functions.

[17] The plea also alleges that the appellant has an adequate and appropriate remedy under the common law against the magistrate in her personal capacity. It is further denied that the magistrate deprived the appellant a fair trial and that if he was denied such fair trial, his appeal to and release by the High Court cured any irregularity that occurred at his trial. The plea ends as follows:

‘[T]he plaintiff has enjoyed the full protection of the law and its internal mechanisms for correcting judicial errors and is therefore not entitled to any damages. Alternatively the first, third and fourth defendants ask that any damages to be awarded to the plaintiff be apportioned to take into account the fact that the plaintiff’s rights have been vindicated by the appeal court’s judgement dated 15 June 2005’.

#### The stated case

[18] In the court below, the parties chose to have the matter determined by way of a stated case in terms of the old rule 33<sup>11</sup> of the High Court Rules. For that purpose, they agreed that the following presumed facts and/or contentions be taken as established:

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<sup>11</sup> Now rule 63.

- (a) Appellant was arrested during March 1998 and three charges were levelled against the appellant: fraud, corruption (s 2 of Ordinance 2 of 1928) and contravention of s 56(e) of Act 3 of 1993 relating to the alleged falsification or fabrication of a passport;
- (b) Appellant appeared from time to time before the Magistrate at the Magistrate's Court at Windhoek from 1998 until 20 March 2003;
- (c) On 2 August 2000, the State closed its case.
- (d) In the course of acting as the presiding officer in the Magistrate's Court, the Magistrate –
  - (i) Attempted to intervene to prevent the State from closing its case;
  - (ii) Did not inform the appellant, his legal representatives or the prosecutor that the State's case had been closed on a previous occasion;
  - (iii) Was determined to get a conviction against the appellant;
  - (iv) Unduly interfered with the State's case;
  - (v) Denied the appellant a fair trial.
- (e) The said actions or omissions of the Magistrate were actuated by –

- (i) *Mala fides*; and/or
  - (ii) Fraud; and/or
  - (iii) Malice; and/or
  - (iv) Improper; and/or
  - (v) Procedural error; and/or
  - (vi) Grossest carelessness. (Underlined for emphasis<sup>12</sup>)
- (f) As a result of the magistrate's conduct the appellant was sentenced to imprisonment for over two years on 20 March 2003, until he was released by order of the High Court of Namibia on 15 June 2005.
- (g) At all relevant times the appellant enjoyed the fundamental right not to be deprived of his personal liberty, except according to procedures established by law.

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<sup>12</sup> The underlined grounds clearly fall outside what, according to *Gurirab*, would be the threshold to found liability against a judicial officer. In the way those grounds were inserted in the stated case, it clearly is an attempt to impermissibly attribute liability to the State in circumstances where the judicial officer (and therefore the State) would not be liable: *Gurirab* at 4995E-J (SC); *Gurirab v Government of the Republic of Namibia & others* 2002 NR 114 (HC) at 118G-J -119A-H.

- (h) By her conduct the magistrate deprived the appellant of his personal liberty, otherwise than by due process of law and accordingly in conflict with the Namibian Constitution.

[19] It is apparent therefore that, for the purpose of deciding the case before it, the court *a quo* had to assume that the second respondent acted unlawfully and wrongfully during the appellant's trial; and that her conduct was actuated by *mala fides*, malice or fraud.

[20] By their stated case, the parties requested that the court *a quo* determine the following three legal questions:

- (a) Whether the State can be held liable for the judicial acts of a magistrate on account of the fact that, while presiding over the case of the appellant, the Magistrate was exercising the judicial power of the State of the Republic of Namibia?
- (b) Is the answer to this question affected by the constitutionally entrenched principles of the independence of the judiciary, the rule of law and the separation of powers doctrine?
- (c) On the assumption that the allegations pleaded by the appellant against the Magistrate *in casu* are established, would the Government of the Republic of Namibia and/or the Magistrates Commission and/or the Attorney-General be liable?

[21] The majority answered the three questions as follows:

- (a) Question one is answered in the negative.
- (b) Question two is answered in the affirmative.
- (c) Question three is answered in the negative.

[22] The minority answered the questions as follows:

- (a) In opposition to the majority, question one is answered in the affirmative.
- (b) In opposition to the majority, question two is answered in the negative.
- (c) In line with the majority, question three is answered in the negative.

#### Differing approaches of the High Court

[23] In order not to add unduly to the length of this judgment, I will state the reasons of the majority and minority in skeleton only. The judgments are now reported *sub nomine Visagie v Government of the Republic of Namibia & others* 2017 (2) NR 488 (HC).

#### The reasoning of the majority

[24] Writing for the majority, Miller AJ concluded that it would not be appropriate to create what is essentially a new remedy in cases where adequate

provision is made by both statutory law and the common law. In reaching this conclusion, Miller AJ argued that the provisions of the Constitution which enforce the separation of powers between organs of State militate against the recognition of State liability for the actions of the judiciary.

The reasoning of the minority

[25] The thrust of Geier J's reasoning is that Art 25(4) of the Constitution gives a competent court the power to award monetary compensation in respect of damages suffered by an aggrieved person for the unlawful deprivation of their fundamental rights and freedoms, if the court considers such an award to be appropriate in the circumstances of the case. The learned judge stated that since a judicial officer is, (a) a member of an organ of the State (the judiciary) and (b) is obligated to respect rights guaranteed by the Constitution, where the judicial officer violates those rights he or she loses immunity from suit and the State, as 'principal' of the judicial organ of the State, also loses immunity and becomes liable. Such liability would include a general entitlement by an aggrieved person to claim all such orders as shall be necessary and or appropriate.

[26] The learned judge considered that to be necessary to secure to the aggrieved person the enjoyment of the rights and freedoms granted under the Constitution. He emphasised that the circumstances of the case will determine whether or not the court will award monetary compensation. The clear implication of the judge's reasoning is that the recognition of State liability would make that possible while not recognising it would exclude that possibility.

[27] Geier J reasoned that the State is a legal person with the capacity to sue and be sued: vicarious liability was not at stake since a judicial officer cannot be said to be an employee of the State. The only relevant issue was direct state liability of the State. Geier J further found that judicial independence and separation of powers were not impermissibly interfered with by the extension of liability to the State for judicial misbehaviour.

Appellant's principal submissions

[28] In support of Geier J's conclusion that State liability exists on the assumed facts, Mr Tötemeyer for the appellant placed reliance on the reasoning of the majority in the Privy Council case of *Maharaj v Attorney-General of Trinidad and Tobago*<sup>13</sup> (*Maharaj* (No 2)), and that of the minority in the New Zealand case of *Attorney-General v Chapman*<sup>14</sup> (*Chapman*).

[29] The departure point in the judgments relied on by the appellant is that the impugned conduct of the judicial branch which violates an aggrieved person's constitutional rights occurs in the exercise of the judicial power of the State. As such, it constitutes a contravention by the State of an aggrieved person's constitutionally guaranteed rights which must be vindicated with a remedy. Being a liability that flows directly from the exercise of a power wielded by the State, a legal person with rights and duties, it can be sued for violating rights protected under the Constitution. Towards that end, Art 25(3) and (4)<sup>15</sup> of the Constitution

<sup>13</sup> (1978) 2 ALL ER 670.

<sup>14</sup> [2011] NZSC.

<sup>15</sup> Article 25(3): 'Subject to the provisions of this Constitution, the Court referred to in Sub-Article (2) hereof shall have the power to make all such orders as shall be necessary and appropriate to secure such applicants the enjoyment of the rights and freedoms conferred on them under the provisions of this Constitution, should the Court come to the conclusion that such rights or freedoms have been unlawfully denied or violated, or that grounds exist for the protection of such

empower the Court to award monetary compensation to persons whose constitutional rights were violated.

[30] The argument goes that an award of damages against the State is appropriate because the liability contended for is aimed at protecting constitutionally guaranteed rights which Art 5 of the Constitution enjoins all organs of State, including the judiciary, to respect and uphold. Since Art 5 makes fundamental rights and freedoms 'enforceable by the Courts', the clear intent is that where they are breached by a functionary performing a power of the State, the State is liable.

[31] It is argued further that since the proposed liability attaching to the State will be restricted to violation of rights protected by the Bill of Rights, and only in respect of *mala fide*, malicious or fraudulent conduct, the fear that such liability will open the litigation floodgates is not justified. On the contrary, the court has the duty to craft necessary and appropriate relief by 'forging new tools' to vindicate a violation of guaranteed rights and freedoms. It is further submitted that to deny a remedy against the State for *mala fide*, malicious and fraudulent conduct of judicial officers, is contrary to the State's obligation to provide effective remedies under domestic law.

[32] Mr Töttemeyer further contended that if recourse is available only against the judicial officer personally, that is not an effective remedy as the judicial officer may be unable to meet a judgment debt in full, whereas an aggrieved person will

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rights or freedoms by interdict. (4) The power of the Court shall include the power to award monetary compensation in respect of any damage suffered by the aggrieved persons in consequence of such unlawful denial or violation of their fundamental rights and freedoms, where it considers such an award to be appropriate in the circumstances of particular cases.'



have their damages fully satisfied if the State is liable because it commands far greater resources.

[33] Anticipating the arguments in opposition to State liability, Mr Töttemeyer argued that the independence of the judiciary is guaranteed under the Constitution and reinforced by this court in *Ex parte Attorney-General in re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General*.<sup>16</sup> Therefore, it would not be permissible under any circumstances for the Executive arm of the State to use the risk of liability arising from the performance of the judicial function to supervise the work of the judiciary. In fact, denying State liability is, it is said, inconsistent with the rule of law.

[34] The fact that the common law imposes personal liability on the judicial officer, the fact that judicial misconduct can be corrected through appeal or review and the possibility of removal for gross misconduct, cannot constitute a bar to State liability because more than one remedy can exist side by side. In any event, it is cold comfort to a person who endured prejudice through, for example, unlawful incarceration to say that corrective action was taken after the aggrieved person had served a substantial period of imprisonment.

[35] As for the proposition that judicial officers may come under pressure in their decision-making because of the heightened interest such claims might generate, Mr Töttemeyer argued that a similar argument was rejected by the very persuasive reasoning in *Chapman* (para 186); that judicial officers are in any event

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<sup>16</sup> 1998 NR 282 (SC) at 302.

already personally liable; that the liability will arise in very rare cases only, and that such pressure is exaggerated because aggrieved persons will more likely sue the State instead of the judicial officer given the prospect of full recovery from the State. Counsel added that recognising such liability enhances accountability to which the judiciary is not immune and will serve as incentive for the State to ensure the appointment of suitable persons as judicial officers.

#### Respondents' principal submissions

[36] Mr Marcus for the respondents cautioned against over reliance on foreign jurisprudence because, according to counsel, recognising State liability on the assumed facts raises important policy issues and must be informed by Namibia's own legal and constitutional context.

[37] Counsel submitted that the inquiry should focus on whether it is necessary and appropriate to hold the State liable on the assumed egregious conduct of the second respondent, if regard is had to the fact that the appellant has a remedy recognised under the common law against the alleged wrongdoer. According to Mr Marcus, the availability of other remedies will be the litmus test for weighing whether the constitutional remedy claimed in terms of Art 25(3) and (4) against the State is necessary and appropriate to vindicate the fundamental rights and freedoms of aggrieved persons. Mr Marcus argued that the court must only fashion a new remedy under Art 25 if the aggrieved person will be remediless without it.

[38] According to Mr Marcus, the majority in the court below was correct to conclude that the range of remedies available under the law will adequately assist an aggrieved person in vindicating any violation by a judicial officer of constitutionally guaranteed rights and freedoms. Those are: the fact that the judicial officer is personally liable for his or her *mala fide*, malicious and fraudulent conduct which causes harm; the fact that damage-causing conduct can be corrected through appeal or review, and the fact that the implicated judicial officer is subject to removal from office for conduct which meets the test for removal. Because a person whose constitutional rights and freedoms have been violated by the judicial branch is not without recourse under the existing law, there is no justification for carving out an additional cause of action directed at the State which is not a wrongdoer or guarantor of the conduct of judicial officers.

[39] Mr Marcus submitted further that recognising State liability for the wrongful and unlawful conduct of judicial officers would undermine the constitutionally entrenched principles of the independence of the judiciary, the rule of law and separation of powers.

[40] Counsel highlighted the potentially harmful consequences of recognising State liability on the assumed facts and in that regard placed reliance on the majority's reasoning in *Chapman*. He cautioned that the attractiveness of the State as a defendant will invite unmeritorious claims and pointed to the great mischief that will flow from that. The first is the potential to undermine public confidence in the administration of justice in circumstances where the Government and the judicial officer (as co-defendants) form an identity of interest which will compel

them to cooperate in defeating the claim brought against the judicial officer. The second mischief is that the State will, by meeting a successful claim, be indemnifying a judicial officer from the consequences of his or her *mala fide*, malicious or fraudulent conduct.

[41] Mr Marcus relied for the propositions he makes in support of the majority in the court below on dicta principally from *Kemmy v Ireland and the Attorney-General*<sup>17</sup> and the majority in *Chapman*. I discuss these cases below.

### Comparative jurisprudence

*Trinidad and Tobago (T&T) (The Privy Council of the United Kingdom): Maharaj v Attorney General for Trinidad and Tobago (No 2) UKPC [1979] AC 385 (Maharaj (No 2)).*

[42] Judge Maharaj committed a barrister to prison for seven days for contempt of court because the barrister had called his behaviour ‘unjudicial’ in open court. The Privy Council later found that the barrister’s committal to prison was unlawful since the judge had failed to specify the nature of the contempt charge against the barrister contrary to what the law required.

[43] The issue that fell for determination was whether there had been a contravention of the barrister’s constitutional rights<sup>18</sup>, and whether the word ‘redress’ in s 6(1) of the T&T Constitution could include monetary compensation from the State. Section 6(1) of the T&T Constitution provides as follows:

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<sup>17</sup> [2009] IEHC 178.

<sup>18</sup> Right to liberty under s 1 of the T&T Constitution and the right not to be deprived thereof except by due process of law.

‘For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of the foregoing sections or section of this Constitution has been, is being, or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress’.<sup>19</sup> (Underlined for emphasis.)

Section 2 states:

‘the High Court shall have original jurisdiction – (a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; and (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) thereof, and may make such orders, issues such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said foregoing sections or section to the protection of which the person concerned is entitled.’

[44] The court held (4-1, with Lord Hailsham of Marylebone dissenting) that State liability was appropriate on the facts of the case. Lord Diplock delivered the judgment of the majority. He held that s 6(1) and (2) of the T&T Constitution were so broad in their terms to allow monetary compensation for the violation of guaranteed constitutional rights by the judicial branch. As regards the issue of the legal nexus, Lord Diplock found that: ‘this is not vicarious liability; it is a liability of the State itself. It is not a liability in tort at all; it is a liability in the public law of the State, not of the Judge himself’.

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<sup>19</sup> Since the argument made on behalf of the appellant is that this provision is similar to Namibia’s Art 25, I must point out that our Art 25(3) does not contain language similar to the underlined words in para [43] and foot note 18 above. It was that language that Lord Diplock relied on for the conclusion that constitutional damages were intended in addition to any other remedies available to the aggrieved person.

[45] Lord Diplock reasoned that fears about compromising judicial independence were 'exaggerated' and not based on empirical evidence. The majority in *Maharaj* (No 2) found in favour of State liability against the following backdrop.

- (a) When the barrister's conviction for contempt occurred, there was no right of appeal to the Court of Appeal from an order of a judge of the High Court committing a person for contempt of court.
- (b) The relevant provision of the T&T Constitution gave a right to the aggrieved person to apply to the High Court for redress without prejudice to any other action with respect to the same matter which is lawfully available. Lord Diplock took the view (at 678) that the 'clear intention is to create a new remedy whether there was already some other existing remedy or not'. Based on that the majority concluded that the Constitution of T&T recognised State liability for monetary compensation to a person whose liberty was deprived by the judicial branch without due process of law.
- (c) The contravention was in the past (the aggrieved barrister having already served his sentence) and monetary compensation against the State was the only practicable form of redress. The appeal process became ineffective because of the passage of time.

[46] According to Lord Diplock (at 679-80):

'It is only errors in procedure that are capable of constituting infringements of the rights protected by s(1)(a), and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice.'

And that the 'resulting' breach:

'is likely to result, in a person being deprived of life, liberty, security of the person or enjoyment of property.'

[47] It is clear from *Maharaj* (No 2) that when State liability applies, the implicated judicial officer is not the main target of the litigation. In *Maharaj* (No 2), although cited, the judge was never served and no relief was sought against him<sup>20</sup>.

*New Zealand: Attorney-General v Chapman* [2011] NZSC 110

[48] After trial by jury, Mr Chapman was sentenced to six years imprisonment for sexual offences against a nine-year-old child. He appealed against his convictions but legal aid was denied and his appeal was dismissed without an oral hearing. At the request of the jury, the trial judge had replayed the video of the complainant's evidence without also presenting the version of Mr Chapman to the jury. The procedures which had been applied to Mr Chapman's appeal were later deemed unlawful by the Privy Council. On the rehearing, the appeal was allowed and the convictions quashed.

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<sup>20</sup> Per Lord Diplock, pp 673 and 679 and per Lord Hailsham, pp 618 and 687.

[49] What the Court had to decide was whether New Zealand domestic law prevents damages being awarded if the breach of constitutional rights is caused by judicial action.

[50] The court held (3-2, with Elias CJ and Anderson J dissenting) that the State could not incur public law liability for the acts of its judicial officers.

[51] Justices of Appeal McGrath and William Young (the majority) found that no State liability could arise in the circumstances. The majority accepted that State liability for the wrongful and unlawful conduct of judges cannot be based on vicarious liability: para 175. The majority rejected State liability for judicial misconduct for the following main reasons:

- (i) the desirability of achieving finality;
- (ii) the promotion of judicial independence; and
- (iii) the availability of existing remedies for breach of a constitutionally guaranteed rights, including through the appellate process.

A. *The importance of finality*

[52] The majority prayed in aid the rationale that underpins the personal immunity of judges.<sup>21</sup> The fear that aggrieved litigants will seek to relitigate their

<sup>21</sup> Eloquenty captured by Fisher J in *Harvey v Derrick* (NZLR 37, 1997) at 337 as follows: 'A powerful case should be demanded before allowing aggrieved litigants to relitigate their cases by suing their presiding Judges. Compared with other public officials, Judges are peculiarly exposed to the emotional, to the aggrieved, and to the litigious. A Judge's daily diet is to make choices which are momentous and emotive for the parties concerned . . . If only a minuscule proportion



cases by suing their presiding officers – the so-called collateral challenge. According to the majority the law discourages relitigation by aggrieved parties of issues determined by the courts, other than by appeal overview. They held:

‘If civil actions against the government [State] could be maintained on the ground that the Judge breached the plaintiff’s rights, collateral challenges would plainly be brought... and would in the words of Fisher J in his dissent in *Harrey v Dernick* (NZLC R 37, 1997) at 337:

“For those disappointed with the original result . . . be a heaven-sent opportunity to re-try the case before another tribunal.”

. . .

The possibility that unjustified suits could increase should not be entirely dismissed from consideration.’

[53] The majority wrote at para 182 that:

‘[T]his is perhaps the strongest reason for the law to provide personal immunity for Judges and, if it is to be effective in achieving finality, an institutional immunity is also necessary, protecting the [State] or anyone else from the bringing of collateral action for breach of rights in the course of the judicial process involved, so that public confidence in the fair and effective administration of justice can be retained.’

[54] According to the majority, finality of the judicial process promotes the public interest in enabling the judiciary to discharge its constitutional duty to maintain the fair and effective administration of justice.

*B. The need to promote and protect judicial independence*

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brought actions against Judges, the effect upon the legal and judicial life would be significant. The original case would usually need to be traversed again before it would be possible to assess the propriety of the Judge’s conduct and its consequences . . . For those disappointed with the original result it would be a heaven-sent opportunity to re-try the case before another tribunal.’

[55] According to the majority, if the State became a defendant on account of the judiciary's breach of constitutionally guaranteed rights, the Government will press judicial officers to be witnesses in proceedings; and to cooperate with the Executive to ward off claims against the National Fiscus. When that happens, to an outside observer, the Executive will appear to be defending the judge and the judge will be helping the Executive.

[56] State liability would potentially undermine judicial independence, if political pressures, direct or indirect, could be brought to make judicial officers accountable to the Executive.

[57] The majority argued that it would be unwise to assume that claims in relation to judicial conduct would be rare and that it would be speculative to assume that there will be no impact on behaviour, either of the judicial branch or the functionaries of the State who must defend such claims.

*C. Existence of appellate and review remedies*

[58] With specific reference to New Zealand's legal system, the majority argued that the existence of legal processes which enable an aggrieved person to have judicial decisions corrected is an important consideration against State liability. Those include: appeal and review; civil proceedings against judicial officers for actions not taken in the exercise of their judicial functions; criminal prosecution in respect of the corrupt exercise of judicial functions, and removal for serious judicial misbehaviour.

[59] Elias CJ (Anderson J concurring) penned a powerful dissent, arguing that the majority based their findings on conjecture and not empirical fact in expressing the fear that extending liability to the State for judicial misconduct would undermine the independence of the judiciary. According to the Chief Justice, the best way of maintaining confidence in the judiciary is to hold the State liable for the judicial branch's breach of the Bill of Rights Act.

*Ireland: Kemmy v Ireland and the Attorney General* [2009] IEHC 178

[60] Mr Kemmy was convicted of rape and sexual assault and sentenced to three years imprisonment. After Mr Kemmy had already served his sentence, his conviction was quashed by the Criminal Court of Appeal on the ground that the way the trial was conducted was 'unfair and did render the trial unfair'. This was primarily because the trial judge had excluded Mr Kemmy's evidence when summarising the evidence for the jury's benefit.

[61] Mr Kemmy claimed damages against the State for infringement of his constitutional right to a fair trial. He also claimed for negligence, or breach of duty, by agents of the State. He further sought a declaration that any common law rule which purports to grant judicial officers immunity is unconstitutional insofar as it denies the plaintiff his right to seek damages against the State. The defendants, for their part, claimed that, absent any primary liability of the judge, the State could not be vicariously liable to Mr Kemmy for the actions of the judge.

[62] Like in *Maharaj* (No 2), in *Kemmy* the implicated judge was not sued personally. McMahon J recognised in *Kemmy* that the basis on which State liability

was sought to be established is that the judge failed to accord the aggrieved person a 'fair trial'; and that such liability would not arise if what the judge was accused of was committing an error of law.

[63] McMahon J rejected State liability for the judicial branch's violation of constitutional rights on several grounds:

- (i) Because the judiciary is independent and not subject to direction and control of the other organs of the State, the State was not vicariously liable for the wrongful and unlawful conduct of members of the judicial branch;
- (ii) The Irish legal system did not support such liability because the guarantee of the independence of the judiciary means that the administration of justice can only be exercised by the judicial branch without interference or control of the other organs. The judge does not receive his or her power or authority from the State but from the people and is free from interference by the other branches. According to McMahon J at p 15/19:

'The only limit or control on the Judge is to be found in the Constitution itself or in the law. For these reasons too, it would be difficult to consider the Judge to be part of the State 'enterprise', since his only function is to administer justice as mandated by the people.'

- (iii) Mr Kemmy failed to allege or to show how the State failed him. The State had enacted legislation providing for an appellate jurisdiction to correct judicial errors; and there is legislative provision for the review of a trial if new evidence comes to light. As the learned judge stated (at p 16/19):

'The truth is that the State cannot "in" or "by its laws" do much more than it has done, because of the constitutional independence guaranteed to the judiciary and because of the theory of separation of powers. The plaintiff has not shown . . . what more the State could lawfully do to secure more fully his right in the circumstances of this case.'

The learned judge continued:

'The State cannot guarantee that no error will ever occur in the judicial process. The Judges it appoints are human and inevitably will make mistakes. In these circumstances, it is incumbent on the State to provide for a corrective mechanism to address these errors.'

Crucially, he adds:

'[The] right to a 'fair trial' should more properly be referred to as an obligation on the State to provide a fair legal system within which the plaintiff's trial can take place. The legal system as a whole must be examined before deciding whether someone's right to liberty or to a fair trial has been breached.'

- (iv) When the judge exercises judicial authority, she is acting in an independent manner. She is not a servant of the State; and not even

acting on behalf of the State. She is not doing the State's business but is acting at the behest of the people with the mission to administer justice.

#### Joint liability and contribution at common law

[64] In his particulars of claim the appellant seeks an order of joint and several liability against the defendants, the 'one paying, the others to be absolved'. In that regard, it is important to bear in mind the implications of State liability as stated in the reasoning of the majority in *Maharaj (No 2)*. Lord Diplock makes clear that it is primary liability that is attributable to the State directly and not that of the judicial officer. In other words, the State's liability is independent of that of the judicial officer. Since there is no employment relationship, it is also not vicarious liability.

[65] Our common law recognises two types of wrongdoer: joint or concurrent.<sup>22</sup> The former are persons who commit a delict jointly in pursuance of a concerted effort or in furtherance of a common design.<sup>23</sup> Concurrent wrongdoers on the other hand are persons whose independent wrongful and unlawful conduct combined to produce the harmful consequence.<sup>24</sup> In both instances, the wrongdoers are jointly and severally liable for the harm caused.<sup>25</sup> No right of contribution exists as between joint wrongdoers<sup>26</sup> although in respect of concurrent wrongdoers such a right is recognised.<sup>27</sup>

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<sup>22</sup> *Naude and Du Plessis v Mercier* 1917 AD 32; *McKenzie v Van der Merwe* 1917 AD 41.

<sup>23</sup> *Gray v Poutsna* 1914 TPD 203.

<sup>24</sup> *Union Government (Minister of Railways) v Lee* 1927 AD 202 at 226-227.

<sup>25</sup> *Toerin v Duncan* 1932 OPD 180; *Naude supra* 38-40 in case of joint wrongdoers, and in the case of concurrent wrongdoers: *Union Government supra* at 226-227.

<sup>26</sup> *Allen v Allen* 1951 (3) SA 320 (A) 327.

<sup>27</sup> *Hughes v Tvl Associated Hide and Skin Merchants (Pty) Ltd* 1955 (2) SA 176 (TPD) at 170-180.

[66] When the issue of contribution was raised by the court during oral argument on appeal, Mr Töttemeyer submitted that if State liability is recognised for the delictual conduct of a judicial officer, it would not follow that the State would have a right of contribution against the judicial officer whose conduct led to the State being held liable. The relationship therefore seems more akin to that of joint wrong-doers at common law who have no right of contribution against each other. The significance of this will become apparent when I discuss the undesirable implications State liability has for the independence of the judiciary.

#### Discussion

##### *Every contention for and against State liability must receive equal consideration*

[67] On behalf of the appellant it was submitted that the fears about interference with the judiciary if State liability is recognised, are speculative and exaggerated. The same sentiment was expressed in *Maharaj* (No 2) and in *Chapman*. We do not share that approach. In our context, each and every contention in support of and against State liability must be accorded equal consideration.

[68] Had the matter gone to trial, we must assume, each party would have led evidence to support the allegations made in their pleadings, including leading evidence of experts to buttress their versions. By choice the parties opted to have the dispute adjudicated by stated case. It is therefore inappropriate in our context to say that a particular contention is speculative and not supported by empirical evidence.

*Lessons from foreign jurisprudence*

[69] A careful study of the cases from the jurisdictions surveyed makes plain that immunity from suit, be it for the judicial branch or the State, is informed by public policy considerations<sup>28</sup>. In *Kemmy McMahon J* wisely cautions against slavish reliance on foreign jurisprudence in determining the issue of State liability. That exercise must be guided, principally, by the country's constitutional and statutory architecture.

[70] That the absence of a right of appeal and a consequent right to apply for bail pending finalisation of the appeal was critical to the ratio of the majority in *Maharaj (No 2)*, was recognised in later decisions of the Privy Council<sup>29</sup>. For example, Browne L J observed as follows in *Independent Publishing Company*:

‘In deciding whether someone's section 4(a) ‘right not to be deprived [of their liberty] except by due process of law’ has been violated, it is the legal system as a whole which must be looked at, not merely one part of it’.<sup>30</sup>

[71] In *Maharaj (No 2)* and *Chapman*, the debate concerned possible liability of the State in respect of aberrant judicial conduct which, in Namibia, will never attract liability even for the judicial officer, unless the common law is changed. The common law position has been validated in *Gurirab*.

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<sup>28</sup> *Kemmy*, p 8/19 and *Chapman* paras 97 and 204.

<sup>29</sup> *Independent Publishing Co Limited & Anor v Attorney-General of Trinidad and Tobago & Anor* [2004] UKPC 26, paras 87-89.

<sup>30</sup> *Ibid.*



[72] It was recognised by the majority in *Maharaj* (No 2) at p 673 that the judge's failure to observe the claimant's right to a fair trial could have been 'inadvertent'. Now, that kind of wrongdoing by a judicial officer cannot ever found liability in Namibia as *Gurirab* demonstrates.

[73] The approach of the majority in *Maharaj* (No 2) was relied on by the minority in *Chapman*. Elias CJ<sup>31</sup> for the minority in *Chapman* (para 93), accurately captures what was at issue. The learned Chief Justice wrote:

'In *Maharaj*, the damages remedy was appropriate because correction on appeal (except through special petition of the Privy Council) was not available within the legal system of Trinidad and Tobago. In respect of the appellants subject to the *Taito* procedures (eg Mr Chapman), rights of appeal and fundamental natural justice were held by the Privy Council to have been effectively denied by the judicially-adopted processes followed.'

[74] Significantly, in *Chapman* the minority (on which great reliance is placed by Mr Tötemeyer for the appellant) was prepared to base State liability on a set of facts which in Namibia would never found liability for the judicial branch's violation of guaranteed constitutional rights. That is so because Mr Chapman's cause of action for State liability arose because what was previously an accepted and legitimate criminal process was found in a later judgment of a superior court to be unconstitutional<sup>32</sup>. It was common ground between the parties that Mr Chapman's appeal against his conviction and sentence (later reversed on appeal and founding his claim for constitutional damages against the State) was denied because of the then existing statutory scheme.

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<sup>31</sup> *Chapman*, para 93.

<sup>32</sup> *R v Taito* [2003] UKPC 15, [2003] 3 NZLR 577.

[75] It is important therefore to properly understand the basis on which State liability was contended for in *Chapman* to fully appreciate why the majority rejected it, and why the minority's approach does not resonate with Namibia's constitutional scheme. I can do no better than repeat the words of Elias CJ in *Chapman* para 15:

'On the basis determined by the Privy Council in *R v Taito*<sup>33</sup>, it seems well arguable that Mervyn Chapman was denied both the rights to appeal and the right to the observance of the principles of natural justice when the Court of Appeal in October 2000, in accordance with its then practice in criminal appeals, refused him legal aid and, in consequence, dismissed on an *ex parte* basis his appeal against convictions on four offences of sexual violation and indecencies.'

[76] The approach of the minority in *Chapman* therefore cannot be persuasive authority in Namibia because of its preparedness to discard the long-standing common law immunity of judges 'the scope of which may indeed require reconsideration for conformity with the New Zealand Bill of Rights Act in a case where it is put in issue'.<sup>34</sup> That, of course, does not accord with *Gurirab*.

[77] In *Gurirab*, the actions of the magistrate resulting in the loss of liberty of an accused, who subsequently sued the magistrate in the High Court<sup>35</sup> for damages in delict, were described in acerbic terms by Maritz J. The trial judge described the manner in which the magistrate exercised his judicial discretion which deprived the accused his liberty as 'unjustified' and caused the accused 'substantial injury' giving the accused 'clear cause' to be aggrieved. Maritz J went on to describe the

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<sup>33</sup> [2003] UK PC 15, [2003] 3 NZLR 577.

<sup>34</sup> Per Elias CJ, para 13.

<sup>35</sup> *Gurirab v Government of the Republic of Namibia & others* (2002) (HC) *supra*.

magistrate's performance of his judicial function as 'ill-considered' and not reflecting 'favourably' on his 'competence as a judicial officer'. But all that was not actionable because the conduct of the magistrate was not shown to be *mala fide*. The conclusion of the trial judge was approved by this court on appeal and represents the law in Namibia: *Gurirab* (SC) at 499E-J.

[78] It is apparent that our foundational departure point that action taken in good faith by a judicial officer cannot constitute unlawful and wrongful harm, would be heresy to the majority in *Maharaj* (No 2) and the minority in *Chapman*. At least as far as the majority in *Maharaj* (No 2) and the minority in *Chapman* are concerned, the underlying policy considerations are very different to Namibia's. The pronouncements in those judgments must therefore be approached with care.

[79] The foreign jurisprudence is distinguishable in another important respect. *Mala fides*, fraud and malice constitute a perversion of justice. Those are vices that are unrelated to the judicial function. It is the acceptance that the perversion of justice is not in the furtherance of the judicial function that the common law assigned personal liability to the aberrant judicial officer and not to the State. It amounts to a deliberate abuse of the exalted judicial office for unlawful ends which would not have been in the contemplation of the State when it appointed the now rogue judicial officer.

[80] For example, taking a bribe to benefit one litigant to the prejudice of another. Or using the judicial office to settle a score with an opponent: if a magistrate harbours a grudge against a neighbour who is unaware of it when she

comes before him on a traffic citation, and the magistrate chooses out of improper motives not to recuse himself, and sentences the neighbour to a term of imprisonment as a vengeance where ordinarily a fine is imposed, what is the public policy justification for extending liability to the State?

[81] It remains an open question whether the majority in *Maharaj* (No 2) and the minority in *Chapman* would have approached the issue differently faced with the hypothetical situations I have cited. In the light of that, it is unsafe to follow the reasoning of the majority in *Maharaj* (No 2) and the minority in *Chapman*.

[82] In para [43] and foot note 19 above, I set out the respect in which the T&T Constitution providing for constitutional relief is different from Namibia's Art 25(3). It is therefore not correct, as submitted by Mr Töttemeyer for the appellant, that s 6(1) of the T&T Constitution is on all fours with Namibia's Art 25(3).

[83] As comparisons go, *Kemmy* is much closer to the Namibian position. As recognised by MacMahon J in *Kemmy*, in Ireland, there is personal liability against a judicial officer who acts with malice and fraud. In *Kemmy* MacMahon J chose not to follow *Maharaj* (No 2) and found the reasoning of the minority in *Chapman* to be out of kilter with Ireland's constitutional ethos. The learned judge therefore rejected State liability for the kind of conduct which came close to malice in that the judge acted in a manner calculated to prejudice the accused, resulting in a conviction and incarceration.

Recognising State liability: Adverse implications for the independence of the judiciary

[84] The countervailing argument against creating a new constitutional remedy against the State is that it will lead to an erosion of the independence of the judiciary which is anchored on other important constitutional values of separation of powers and the rule of law.

[85] The importance of the independence of the judiciary has been described in the following terms by the Judicial Office for Scotland:

‘In order for decisions of the judiciary to be respected and obeyed, the judiciary must be impartial. To be impartial, the judiciary must be independent. To be independent the judiciary must be free from interference, influence or pressure. For that, it must be separate from the other branches of the State or any other body.

The principle of the separation of powers of the State requires that the judiciary, whether viewed as an entity or in its individual membership, must be, and seen to be, independent of the executive and legislative branches of government.’<sup>36</sup>

[86] The unmistakable implication of joint liability of the State and the judicial officer for the latter’s alleged violation of constitutionally guaranteed rights and freedoms is that the two will have a common interest to resist the claim. They will most likely cooperate in the preparation of the case and develop joint legal strategy. If the claimant has a very good case against the judicial officer, the marshalling of resources between the judicial officer and the State can have dire consequences for the claimant. It will be the claimant’s resources pitted against

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<sup>36</sup> [www.scotland-.org.uk](http://www.scotland-.org.uk)

the State's enormous resources. If, because of that, a judicial officer survives the suit, would it be far-fetched to think he or she owes a debt of gratitude to the Government of the day? How could reasonable members of the public not form the view that such a judge would be favourably disposed to the Government in disputes involving it?

[87] The force of Mr Marcus' argument regarding the potential mischief to be created by extending State liability for the unlawful and wrongful conduct of judicial officers is reinforced by two important considerations. The first is the appellant's concession that such liability will encourage claims against the State instead of the individual judicial officer accused of wrongdoing. The second consideration is that since the State and the judicial officer are not joint or concurrent wrongdoers, the State would at common law not have a right of contribution against the judicial officer. It would in the latter respect be indemnifying rogue judicial officers who pervert the cause of justice.

[88] In the event the claim is defeated, the judge returns to his or her office and presides in matters which involve the State. As was accepted during oral argument, it is possible for the State to settle such a claim and still have no recourse against the rogue judicial officer. A more untenable situation is hardly imaginable.

Existing remedies are not irrelevant when assessing whether to find liability against the State in public law

[89] When everything is considered, the true reason for the liability sought against the State is the appellant's concern that he might not recover from the second respondent, and that if liability extends to the State, he is guaranteed full recovery of the sizeable amount of N\$2 100 000 he claims in damages.

[90] The question arises, as suggested by Mr Marcus, what is the constitutional virtue of permitting a claim against the State for the primary reason that it has deep pockets? Should, as Mr Marcus put it, a constitutional remedy against the State be granted in order to provide a windfall? In other words, using already scarce public resources to pay a claimant who has a pre-existing remedy under the law of the land, against the person who is the actual wrongdoer.

[91] We have to be satisfied that the benefit of forging a new remedy outweighs the mischief that will be created by not doing so. The issue is therefore largely one of public policy.

[92] In the jurisdictions where the constitutional remedy of compensation against the State was recognised for the conduct of the judicial branch, it was against the backdrop of the absence of any remedy for the violation of the rights and freedoms of an aggrieved person. In *Chapman*, Elias CJ accepted (para 50) that an existing tort (delict) under the standard civil process may provide effective remedy. According to the Chief Justice:

. . . effective remedy will in some cases be able to be achieved within the legal process in which the breach occurred . . . In many cases where there

has been a breach of fair trial rights, correction on appeal within the same proceeding will be effective remedy.'

[93] Elias CJ also accepted that a direct remedy in public law only becomes an option if an existing remedy and the available remedial options are ineffective: *Chapman* para 51. Mr Visagie must satisfy us that the existing diet of remedies under Namibian law is ineffective to vindicate deprivation of his right to liberty.

Appellant's justification for State liability considered

[94] The appellant's argument is that the chilling effect on judge's independence by the extension of liability to the State is not a good one because it is settled that judicial officers cannot be interfered with by any organ of State. And that delinquency by a state actor should not be presumed. The same considerations must apply in assessing whether or not State liability should exist. The State which has no control over the performance of the judicial function, is entitled to assume that judicial officers will not pervert justice by acting *mala fide*, maliciously and fraudulently and that if they do, that is outside the scope of the judicial function for which it cannot be held liable.

[95] The further justification for the extension of liability to the State is that the state appoints judges to perform the judicial function. In other words, had the judge not been placed in that position, he or she would not have perverted justice. Therefore, if a judge perverts justice, it is in furtherance of the judicial function. That logic explains the suggestion that State liability will compel the State to be more circumspect about who it appoints as judicial officers.



[96] There are obvious problems with that reasoning. The first is that the State has a constitutionally ordained obligation to provide for a judiciary to adjudicate disputes, which include disputes involving the State. It must in that process follow procedures which require transparency. It must also ensure that those appointed have security of tenure and are only removed for misconduct that meets the legally stipulated test. It is prohibited from interfering with those who administer justice.

[97] The judiciary's independence, buttressed by the prohibition of interference, is without equal under the Constitution<sup>37</sup>; and for good reason. It is the only way in which the public can have confidence in the independence and impartiality of the courts. Every effort is made in that way to insulate the judicial function from interference or even the appearance of it.

[98] The liability sought to be assigned to the State disturbs that carefully choreographed balance. It creates a situation where, if a judge is sued, an identity of interest is created between him or her and the State and they become co-defendants in warding off a claim. The State then is called upon to cooperate with the judicial officer in resisting a claim of perversion of justice allegedly committed by him or her. The only causal link being the fact of it having performed the constitutional obligation to appoint the judge.

[99] I am in respectful agreement with the following dictum of McMahon J in *Kemmy* which negates the case for the recognition of the State's primary liability for the wrongful and unlawful actions of the judicial branch:

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<sup>37</sup> The only other institution given similar treatment under the Constitution is the Ombudsman: Art 89(2) and (3).

'While in one sense, it may be appropriate to describe the judiciary as an organ of the government in the broad constitutional representation of the State, in another sense, when exercising its jurisdiction, the Judiciary is truly decoupled from the State.

In a constitutional sense, the State merely provides the scaffolding for judicial activity. The State is no longer involved once the Judge begins his work. The State may be liable for failing to erect the appropriate scaffolding, but once this is up, and the Judge goes about his business, the only liability that arises is that of the Judge.'

[100] The view taken by Geier J in the court below (supported on appeal by the appellant) is that it is necessary to extend liability to the State in order to vindicate the rights guaranteed by the Bill of Rights. That is a difficult argument to sustain when the State is not the actual wrongdoer and the appellant concedes that there is no vicarious link between the State and the judicial officer. I agree with Mr Marcus that recognising State liability for the wrongful and unlawful conduct of a judicial officer will only serve to create in the public's mind the perception that there is some vicarious link between the judicial officer and the arm of the State that controls the public purse.

[101] The proposition that a remedy against the State promotes accountability and is a rejection of immunity, is inconsistent with the autonomy of the judicial officer over whom the State has no power of control in the performance of judicial functions.

[102] State liability is further sought to be justified on the basis that the State created the inherent risk which gives rise to the judicial officer's wrongdoing. But that premise is equally not reconcilable with the constitutionally entrenched prohibition against interference with or control over the performance of the judicial function.

*Independence of the judiciary takes precedence*

[103] The State is an abstract concept. As an institution, it is run by political functionaries who make up the Government of the day. On a practical level, political functionaries must see to it that any judgment given against the State is satisfied. In terms of Art 27(1) of the Constitution, the President of the Republic is the Head of State and of Government. The executive power of the Republic vests in the President and the Cabinet.

[104] Article 127(5) of the Constitution states that no body or person other than the Government shall have the power to withdraw monies from the State Revenue Fund. The judiciary has no power to withdraw funds from the State Revenue Fund. In other words, monies to be paid as damages to a successful litigant will have to be authorised by the Executive who, as we have seen, may not be able to recover it from the judicial officer concerned.

[105] Where there is an increase in such claims as foreshadowed on behalf of the appellant, there is real likelihood of conflict between the judiciary and the executive branch regarding how the defence of such claims is to be handled; more so if there is no agreement on how the claims should be approached.

[106] More ominously, if the Government is debarred from seeking a contribution from the aberrant judicial officer, does the judicial officer not owe an even greater debt of gratitude to the Government of the day for assisting him or her to ward off a claim which could have ruined him or her financially and probably end his or her career?

### Disposal

*Who should be the proper defendant in action claiming damages against the State?*

[107] During oral argument on appeal, some confusion arose about what constitutes the 'State' for the purpose of State liability.

[108] On behalf of the appellant, Mr Töttemeyer suggested that the proper defendant when the State is sued for the conduct of the judicial branch, will be the judiciary of which judicial officers are members, to the exclusion of the other two branches of the State. There is no hint of that in the summons which cited the Government of Namibia as first defendant. Nothing really turns on that for present purposes, but it would be safe to assume that the State is that conglomerate as defined in Art 1(3) of the Constitution: in other words, the three organs of the State of which the President of the Republic is the public face.

[109] Seen in that light, the Head of State could be cited in a nominal capacity either alone or with the A-G who is the principal legal advisor to the President and

the Government<sup>38</sup> and is required under the Constitution to 'take all action necessary for the protection and upholding of the Constitution'<sup>39</sup>. A similar approach was taken by the *Chapman* majority para 116.

*Available remedies are sufficient and effective*

[110] The damages claimed by the appellant against the State organs as compensation are identical in nature and purpose to that which is claimable from the alleged actual wrongdoer.

[111] The claim is, in part, based in delict against second respondent and, against the third and other respondents, in the Constitution. Mr Töttemeyer for the appellant accepted that, in addition to the cause of action based in delict, the appellant would be entitled, as he has done in his particulars of claim, to also seek constitutional damages against the second respondent based on Art 25(3) and (4) - on the assumption that the latter course of action would entitle him to damages over and above what he would get in damages if he proceeded only in delict.

[112] Mr Töttemeyer argued with great force that the fact that there is an existing remedy against the second respondent should not preclude the forging of a new one in order to allow the appellant as an aggrieved person the greatest possible amplitude in the vindication of his constitutionally guaranteed rights.

[113] But as Mr Marcus for the respondents correctly retorted, when there is an existing remedy under the ordinary law, the court must be satisfied of the merits of

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<sup>38</sup> Article 87(b).

<sup>39</sup> Article 87(c).

recognising a new remedy against the State under the Constitution, especially if doing so poses a risk of undermining a foundational value of the Constitution—that of an impartial and independent judiciary subject only to the Constitution and the law.

[114] The most compelling argument in favour of extending liability to the State is that the latter is a more reliable defendant for full and certain recovery than an individual judicial officer. Absent that justification, I do not see what other compelling reason there is to extend liability, for there is an existing recognised right of recourse against an individual judicial officer. I do not think that an effective remedy equates to full satisfaction of the loss that has been suffered. No authority has been cited in support of such a proposition.

[115] In addition to the cause of action both in delict and under the Constitution against a rogue judicial officer, in the criminal context, the Namibian legal system affords an aggrieved person such as the appellant a whole range of remedies to deal with a deprivation of the right to liberty otherwise than according to procedures established by law.

[116] A person convicted by a magistrate has the right of appeal to the High Court and, ultimately, to the Supreme Court.<sup>40</sup> In the exercise of that right he or she can apply to be admitted to bail pending the appeal.<sup>41</sup> If he or she is unable to

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<sup>40</sup> Criminal Procedure Act 51 of 1977 (CPA). From Lower Courts to High Court: ss 309 and 311; from Superior Courts to Supreme Court: s 315.

<sup>41</sup> *Ibid*, Chapter 9. A refusal of bail is also appealable.

afford legal representation, government funded legal aid is available.<sup>42</sup> There is also provision in our law for automatic review from certain decisions of the Magistrate Courts to the High Court.<sup>43</sup> The Supreme Court of Namibia is also invested with an extra-ordinary jurisdiction to review proceedings of tribunals below it if there has been an irregularity.<sup>44</sup>

[117] The conclusion I come to is that it is not necessary to extend liability to the State for the *mala fide*, malicious or fraudulent conduct of a judicial officer. Doing so may create a far worse mischief than not extending it. The majority in the court below was therefore correct in answering the first and second questions posed in the stated case in the negative and affirmative respectively. The appeal therefore fails.

### Costs

[118] This court has consistently applied the rule that where a party approaches court to raise a serious constitutional issue and is not frivolous or vexatious in doing so, it should not be condemned in costs in the event it fails against a State party. The issue raised in this case is of great importance to the development of Namibia's constitutional jurisprudence. It will therefore be inappropriate to order costs against the appellant who, after all, is assisted *pro bono* by the Legal Assistance Centre – a public interest law Centre which provides free legal services to the public.

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<sup>42</sup> Legal Aid Act 29 of 1990. A refusal to grant legal aid was successfully challenged in the courts: *Government of the Republic of Namibia & others v Mwilima & others* 2002 NR 235 (SC).

<sup>43</sup> CPA, ss 302-306.

<sup>44</sup> Supreme Court Act 15 of 199, s 16.

The order

[119] I therefore propose the following order:

1. The appeal is dismissed.
2. There shall be no order as to costs.

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**DAMASEB DCJ**

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**SHIVUTE CJ**

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**FRANK AJA**



## APPEARANCES

APPELLANT: R Töttemeyer, with him G Dicks  
Instructed by Legal Assistance Centre

RESPONDENTS: N Marcus  
Instructed by Government Attorney