OATILE v THE ATTORNEY-GENERAL 2010 (1) BLR 404 (HC)

Citation: 2010 (1) BLR 404 (HC)

Court: High Court, Lobatse

Case No: Misca 1835 of 2007

Judge: Dingake J

Judgement Date: March 2, 2010

Counsel: E F W Luke II for the appellant. B Mokakangwe for the defendant.

Flynote

Constitutional
law - Fundamental rights and freedoms - Breach - Redress - Constitutional
damages - Violation of right to fair trial within reasonable period C
of time - Delay in prosecution - Plaintiff
brought to trial on charge of murder over 12 years after arrest - State
offering no explanation for delay - Plaintiff awarded constitutional damages of
P100 000 - Constitution of Botswana, ss 10(1), 18(1) and 18(2).

Headnote

The plaintiff claimed constitutional damages for the failure by
the State to D try him within a reasonable period of time. He
alleged that the delay of over 12 years from the date of his arrest to the date
of commencement of his trial violated his right to be tried within a reasonable
period of time, as contained in s 10(1) of the Constitution of Botswana. He was
first arrested and charged with murder in February 1995. The charge was
withdrawn in 1998 but he was recharged in 2004. He was brought to trial in
2007, at the conclusion of which he was acquitted. The defendant offered no
explanation for the delay in the E commencement of the plaintiff's trial.

Held: (1) Whether a particular delay was unreasonable
depended on the circumstances of the case. Relevant factors included the length
of the delay, the crime charged, the availability of witnesses, the efforts
made to prosecute expeditiously and the availability of judges or magistrates. Busi
v The State [1997] B.L.R. 69, CA at p 72E-F applied. F

(2) The withdrawal of the charge did not operate against the
plaintiff. Sejammitlwa and Others v The Attorney-General and Others
[2002] 2 B.L.R. 75, CA and In re Mlambo 1992 (4) SA 144 (ZS) at pp
151A-C and 151J-152A applied.

(3) A period of over 12 years qualified as an inordinate delay in
bringing the plaintiff to trial.

(4) There was no explanation for why the plaintiff was not
brought to trial G subsequent to his release in 1998 or earlier
and the delay was accordingly unreasonable.

(5) The 'redress' to which an applicant was entitled for
violation of his fundamental rights, in terms of s 18(1) of the Constitution of
Botswana, included, where appropriate, an award of constitutional damages. Sekgabetlela
v The Attorney-General and Another (Civ Case 954/07), H unreported at paras [45] and [46] followed; Maharaj

v Attorney-General of Trinidad and Tobago (No 2) [1979] AC 385 (PC) and Fose v Minister of Safety and Security 1997 (3) SA 786 (CC) at p 821 para 60 applied.

(6) In the present case, the nature and circumstances of the breach of the plaintiff's constitutional rights justified his seeking to avail himself of his constitutional remedy. MEC, Department of Welfare, Eastern Cape v Kate 2006 (4) SA 478 (SCA) at p 491 paras 26-27 applied.

(7) In the present case, an appropriate award of constitutional damages was A an amount of P100 000. Merson v Cartwright and Another [2005] UKPC 38 at para 18 applied.

Case Information

Cases referred to:

Attorney-General v Dow [1992] B.L.R. 119, CA (Full Bench)

Attorney-General v Moagi 1982 (2) B.L.R. 124, CA B

Attorney-General of Trinidad and Tobago v Ramanoop [2005] UKPC 15; [2006] 1 AC 328; [2005] 2 WLR 1324; [2006] 1 All ER 464; [2005] All ER (D) 407

Behera v State of Orissa [1993] INSC 154; (1993) SCC (Cr) 527; AIR 1993 SC 1960

Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics 403 C US 388 (1971); 91 SCt 1999; 29 L Ed 2d 619

Bush v Lucas 462 US 367 (1983); 103 SCt 2404; 76 L Ed 2d 648

Busi v The State [1997] B.L.R. 69, CA

Carlson v Green 446 US 14 (1980); 100 SCt 1468; 64 L Ed 2d 15

Davis v Passman 442 US 228 (1979); 99 SCt 2264; 60 L Ed 2d 846

Diau v Botswana Building Society [2003] 2 B.L.R. 409, IC D

Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)

Kelaotswe v The Attorney-General [2006] 1 B.L.R. 229, CA

Kearney v Minister of Justice, Ireland, and the Attorney-General [1986] IR 116

Kodellas v Saskatchewan Human Rights Commission [1989] 5

WWR 1; (1989) 60 DLR (4th) 143 (Sask CA) E

Maharaj v Attorney-General of Trinidad and Tobago (No 2) [1979] AC 385; [1978] 2 WLR 902; [1978] 2 All ER 670 (PC)

MEC, Department of Welfare, Eastern Cape v Kate 2006 (4) SA 478 (SCA)

Memphis Community School District v Stachura 477 US 299 (1986); 106 SCt 2537; 91 L Ed 2d 249 F

Merson v Cartwright and Another [2005] UKPC 38; (2005) 67 WIR 17

Minister of the Interior and Another v Harris and Others 1952 (4) SA 769 (A)

Mlambo, In re 1992 (4) SA 144 (ZS)

Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery G (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae) 2004 (6) SA 40 (SCA)

Mt Healthy City School District Board of Education v Doyle 429 US 274 (1977); 97 SCt 568; 50 L Ed 2d 471; [1977] Tyl 958; 50 L Ed 417; (1977) 45 USLW 4079; [1977] SEC 1981 H

Petrus and Another v The State [1984] B.L.R. 14, CA

R v Schachter [1992] 2 SCR 679; (1992) 10 CRR (2d) 1

Ramanoop v The Attorney-General of Trinidad and Tobago (HCA S-47/01), unreported

Sakal Papers v Union of India [1961] INSC 281; [1962] 3 SCR 842; AIR 1962 SC 305

Schweiker v Chilicky 487 US 412 (1988); 108 SCt 2460; 101 L Ed 2d 370 A

Sechele v The State [2006] 2 B.L.R. 619

Sejammitlwa and Others v The Attorney-General and Others [2002] 2 B.L.R. 75, CA

Sekgabetlela v The Attorney-General and Another (Civ Case 954/07), unreported

Simpson v Attorney-General [1994] 3 NZLR 667 (CA) B

State v Makwekwe 1981 BLR 196

State (Quinn) v Ryan [1965] IR 70

United States v Stanley 483 US 669 (1987); 107 SCt 3054; 97 L Ed 2d 550

Wild and Another v Hoffert NO and Others 1998 (3) SA 695 (CC)

ACTION for constitutional damages. The facts are sufficiently stated in the C judgment.

E F W Luke II for the appellant.

B Mokakangwe for the defendant.

Judgement

DINGAKE J: D

The plaintiff in this matter sued the defendant, the Attorney-General, in her representative capacity for or on behalf of the Botswana Police Force for damages arising out of the failure by the defendant to try him within a reasonable time.

The plaintiff claims P1 500 000 as damages. E

The parties hereto dispensed with the need for a trial, but instead agreed on a statement of facts that underpins the claim.

In terms of the statement of agreed facts filed with this court on 3 December 2009 the parties agreed on the following common cause facts:

' — The plaintiff was charged with the offence of murder contrary to section 202 F of the Penal Code.

— Plaintiff was arrested on the 13th February 1995 until 13th August 1998.

— Plaintiff was discharged and released from custody with the charge against him being withdrawn with liberty to re-prosecute because the witness was G too young to appreciate the nature of an oath or to take a stand as a witness, as contained in annexure "BB" of the Defendant's Plea.

— Plaintiff was recharged in 2004 in terms of section 150(4) of the Criminal Procedure and Evidence Act.

— The plaintiff was only brought to trial in 2007, after a period of 3 years, where H he was not found guilty of the charge.

— The time taken to bring the plaintiff to trial was over 12 years, beginning from the time when he was first charged, which was the date of arrest, when the plaintiff was officially notified that he would be prosecuted. In this case the clock started ticking on the 13th February 1995.

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DINGAKE J

— From 2004 to 2007 when the plaintiff was acquitted, he was not in custody. A

— The plaintiff confessed to having hit the deceased, Mosadiwadutle who as a result fell and died and that it was in self defence, or in retaliation.

— Such confession statement was never challenged, no stick was produced in court. B

— It is agreed that Gaongalelwe J pointed out at paragraphs 12-15 of his judgment that:

"There is one extraordinary feature of this case which is most disturbing. I am of the view that although such has not been raised by either side the C court would be failing in the execution of its duties if the matter is not brought to the attention of the appropriate authorities.

The incident giving rise to the charge occurred in February 1995 which is over twelve (12) years ago now. The man was apprehended within a week from the date of the incident. Despite what I can describe as the court's D inquisitiveness on the issue the learned State counsel was unable to give any explanation on this kind of inordinate delay. At some stage the court intimated that the investigating officer may have to be called to come to shed some light on the cause of such delay.

The man has of late been out on bail but still that does not in the absence of any explanation for delay negate the fact of unbearable prejudice having been E occasioned to him due to anxiety over a period of twelve (12) years.'"

In the statement of agreed facts the parties state that the issues that fall for determination are as follows:

'1. Whether failure by the prosecution to try the plaintiff from the date of arrest in F February 1995, up to the time of his acquittal in August 2007 in spite of the conditional withdrawal of the charge of murder, constituted a violation of the plaintiff's fundamental right to be tried within a reasonable time.

2. If the plaintiff's fundamental rights were violated, what damages is he entitled to, if any?' G

It is manifest from the above formulation of the issues for determination that the Attorney-General, correctly so in my view, does not contest the competency of the remedy of constitutional damages.

I agree that indeed the issues that fall for determination are as stated in the parties' statement of agreed facts. H

I must indicate from the word go that in the history of this republic the question of constitutional damages has never been raised before and is being raised for the first time, as far as I know. It is with this in mind that I approach this task with some kind of trepidation and a heightened sense of constitutional duty.

Section 10(1) of the Constitution of Botswana provides as follows:

DINGAKE J

'10. (1) If any person is charged with a criminal
offence, then, unless the charge A is withdrawn, the
case shall be afforded a fair hearing within a reasonable time by an
independent and impartial court established or recognized by law.'

In essence s 10(1) of the Constitution of the republic enjoins
the State, if it has reasonable cause to believe that an accused person has
committed an B offence and must be charged, to bring him or
her to trial within a reasonable time.

In this case it is common cause that the plaintiff was arrested
on 13 February 1995. He was discharged in 1998 and the charge against him was
withdrawn with liberty to re-prosecute because the witness was too young to
appreciate the nature of an oath or to take the stand as a witness. C

The plaintiff was charged again in 2004 and was brought to trial
only in 2007.

That there was delay is clear from the agreed statements of
facts.

It would also appear from the agreed statement of facts that my
brother Gaongalelwe J expressed his discomfort at the delay in bringing the
accused to trial. D

On the agreed statement of facts the parties do not expressly
attribute the delay to anyone.

It is also clear from the agreed statement of facts that there is
nothing to suggest that the accused person in any way contributed to this
delay. There is also nothing in the agreed statement of facts that explains why
the plaintiff was not brought to trial subsequent to his release in 1998 or
earlier. E

That there was 'inordinate delay' is implicit, if not express
from p 3, para (1) of the parties' agreed statement of facts.

In the absence of any explanation in the statement of agreed
facts why the plaintiff was not brought to trial subsequent to his release in
1998 or earlier, I must of necessity find, on a balance of probabilities, that
there is no reasonable explanation for the delay, as I hereby do, which delay I
therefore F find to have been unreasonable.

The parties agree that the clock started ticking on 13 February
1995 and it follows, in my view, in the absence of any reasonable explanation
why the plaintiff was not brought to trial earlier that the defendant/State
unreasonably delayed bringing him to trial.

What constitutes unreasonable delay is not defined by the
Constitution. G

In terms of our jurisprudence, whether or not there has been
unreasonable delay to bring an accused to trial within reasonable time or not
depends on the circumstances of each case. Amissah JP in the case of Busi v
The State [1997] B.L.R. 69, CA at p 72E-F stated:

'In my
view, regard ought to be had to the fact that what the provision requires is H
not that the charges be heard in a specific
time but that the hearing should be within a reasonable time. Such time would
therefore vary depending on the circumstances of each case. In determining what
is a reasonable time, the period taken to bring and to prosecute the charge

will be one, but only one, of several factors to be taken into account. The nature of the particular criminal act, the charge, the availability of

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witnesses,
the efforts made to prosecute the charge expeditiously, the availability A
of judges or magistrates, will all be factors
which would have to be taken into consideration.'

Having regard to the statement of agreed facts that essentially admits that the plaintiff, who was charged and/or arrested in 1995, was brought to trial only in B 2007, it becomes clear therefore that all in all it took about 12 years to bring the plaintiff to trial. This was a patent violation of the plaintiff's right to be brought to trial within a reasonable time.

There is nothing on record to suggest that the judges and/or witnesses were for some reason unavailable. More significantly the defendant is breathtakingly silent on what efforts it took to prosecute the charges expeditiously. C

In the case of Sechele v The State [2006] 2 B.L.R. 619 the court held that it is unacceptable for a person to be kept in custody awaiting trial for four years. The court further observed that a period of four years was a severe prison term, which cannot be undone, in the event the accused was acquitted.

This court has long made it clear that to have a serious charge of murder D hanging over one's head is no small matter.

In State v Makwekwe 1981 BLR 196 at p 198 Corduff J said the following about the oppressive nature of the delay in bringing the accused to trial:

'It is no
small matter for a man to live for years with a serious charge hanging over E
his head. It inflicts mental suffering and
must of necessity interfere with his freedom of movement, employment opportunities and his social life.'

Section 10(1) of the Constitution of Botswana has been the subject of litigation in several cases, the leading case being Sejammitlwa and Others v The Attorney-General and Others [2002] 2 B.L.R. 75, CA. F

The crux of the jurisprudence on s 10(1) is that whenever an accused person is believed to have committed an offence and the prosecutorial authorities consider it necessary to bring him to trial, he/she must be tried within a reasonable time.

The Directorate of Public Prosecutions (DPP) must appreciate that it will be G held legally accountable for non-compliance with the provisions of s 10(1) and where appropriate be sanctioned for non-compliance. It appears to me that a system of justice that fails to sanction constitutional violations by the prosecution would merely be a system of prosecuting people and not one of administering justice.

The DPP exercises tremendous power over disposition of criminal matters H that invariably touches on the liberties of

those that stand accused. It must therefore conduct its work with requisite constitutional sensitivity and diligence. Prosecutors should not pursue conviction for the sake of it. They must at all times seek a just and fair trial. They are to be perceived as ministers of justice in search of the truth. The legitimacy of their power lies on this ideal. The DPP's only client is the State and thus, by extension, the public interest. It follows therefore that the role of a prosecutor excludes

any notion of winning or losing - his function is a matter of public duty. It is A precisely because the prosecutor exercises a public function that he/she must at all times act fairly and dispassionately. This ideal is tarnished by prosecutors who fail to bring accused persons to trial within a reasonable time and proffer no cogent reasons for so doing.

The court is acutely conscious of the possible resource constraints at the DPP and the pressure of heavy case loads, but this cannot be a good reason B to override constitutional stipulations. Our courts have often stayed prosecution where an accused was not brought to trial within a reasonable time, but this has often provided little comfort for those persons whose right to a fair trial has been breached and already released or acquitted. This category of people may bring a civil suit against the State.

An efficient administration of justice should not tolerate unjustified delays in C prosecuting offenders. Once an arrest has been effected or a charge laid the prosecution must act with due diligence to bring the accused to trial.

In terms of the authority of Sejammitlwa (supra) the clock starts ticking from the period of arrest, in this case 13 February 1995. (See also In re Mlambo 1992 (4) SA 144 (ZS).) D

In terms of the authority of Sejammitlwa and Mlambo (supra) the withdrawal of a charge cannot operate against the plaintiff. In other words, the withdrawal of a charge by the State cannot be an expedient means of stopping the clock from ticking and thereby avoiding the charge of bringing the accused person to trial within a reasonable time.

In Mlambo at p 151A-C Gubbay CJ opined as follows: E

'Can the State stop the clock by resorting to the expedient of withdrawing the charge before plea, as it is permitted to do under s 297(3) of the Criminal Procedure and Evidence Act, only to reinstate the same charge, or a charge based on the identical information, when in a position to commence with the trial? In my opinion, F the type of withdrawal envisaged in s 18(2) of the Constitution is an irrevocable one - a withdrawal after plea by the Attorney-General in terms of s 13 of the Criminal Procedure and Evidence Act, thereby entitling the accused to a verdict of acquittal in respect of that charge. In other words, the withdrawal must be one in which no hearing of the charge can ever arise. To adopt any other construction G would be to emasculate the protection the Constitution intends to afford.'

The judge continued at p 151J-152A to observe that:

'It necessarily follows, in my view, that the withdrawal of the charges against the applicant on 23 August 1987 did not interrupt the time frame, which commenced H

to run either upon the applicant's arrest on 3
October 1986 or with his first remand by the magistrate a few days later, and
that the date of service of the summons is not to be taken as the critical
moment when the clock started to tick against the State. In sum, the correct
approach in this matter is to evaluate the reasonableness of the overall lapse
of time.'

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DINGAKE J

It seems to me that the right to trial within a reasonable time
entrenched in A s 10(1) of the Constitution of Botswana seeks
to render the criminal justice system more coherent and fair by mitigating the
tension between the presumption of innocence and the adverse consequences
attendant upon a delayed trial.

In my respectful view the inordinate delay to bring an accused to
trial not only B negatives the concept of fair trial but also
occasions mental anguish to the accused in addition to being a vicious assault
on his/her dignity.

Section 10(1) also acknowledges that the right to be tried within
a reasonable time is not a slogan but a concrete right.

In determining whether s 10(1) has been infringed the court of
necessity C undertakes a balancing exercise in which the
conduct of both the prosecution and the accused are weighed against each other
in order to determine whether there has been unreasonable delay, a phrase or
concept that of necessity imports some value judgment.

The determination whether there has been an unreasonable delay in
bringing the accused to trial, although it admits of value judgement, is not an
arbitrary D one. It is a conclusion that must be reached
after examining a number of factors including the following: the length of the
delay, the reasons the State assigns for the delay, and the prejudice the
accused has suffered or is likely to suffer.

The above factors are not by any means exhaustive. I have already
held that the delay in bringing the plaintiff to trial was unreasonable and
therefore a violation of s 10(1) of the Constitution. I now turn to the relief
sought. E

Relief sought

In this case the plaintiff seeks a specific public law
constitutional damages remedy, separate and distinct from any common law remedy
that he may be entitled to. F

In essence the competency or otherwise of the relief sought by
the plaintiff turns on a proper construction of s 18(1) of the Constitution, as
read with s 18(2) thereof, which entitles any person who alleges that any of
the provisions of ss 3-16 (inclusive) of the Constitution have been infringed
to approach this court for redress.

Section 18(1) of the Constitution of Botswana provides as
follows: G

'18. (1)
Subject to the provisions of subsection (5) of this section, if any person
alleges that any of the provisions of sections 3 to 16 (inclusive) of this
Constitution has been, is being or is likely to be contravened in relation to

him or her, 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.' H

Section 18(2), which must be read with s 18(1), provides as follows:

'(2) 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; or

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(b) to determine any question arising in the case of any person which is referred A to it in pursuance of subsection (3) of this section,

and may make such orders, issue such writs and give such direction as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 16 (inclusive) of this Constitution.'

The question that arises, having regard to the aforesaid s 18(1), is what is B meant by 'redress'? More sharply, does 'redress' as used in the above section contemplate the award of 'constitutional damages'?

It is important to note that the word 'redress' is not defined.

It is also noteworthy that the word 'redress' is not qualified.

In my respectful view and having regard to the well-known canons of C constitutional interpretation, such as affording a constitutional provision a generous and liberal interpretation, the word 'redress' is sufficiently wide, or sufficiently elastic, to include a right to constitutional damages. (See Attorney-General v Moagi 1982 (2) B.L.R. 124, CA; Petrus and Another v The State [1984] B.L.R. 14, CA; Attorney-General v Dow [1992] B.L.R. 119, CA (Full Bench); Diau v Botswana Building Society [2003] 2 B.L.R. 409, IC.) D

In my view s 18(1) gives the High Court the power to pronounce the legal consequences of contravention and the range of possible remedies is not circumscribed.

It is my view therefore that in construing the provisions of s 18(1) I must refrain from seeking to infuse into the said section restrictions that are not expressly mandated or those that cannot be necessarily implied. E

In the case of Diau v Botswana Building Society (supra) at p 436 the court expressed similar sentiments as above when it cited the dictum of Mudholkar J in Sakal Papers v Union of India AIR 1962 SC 305 at p 311:

'It must be borne in mind that the Constitution must be interpreted in a broad F way and not in a narrow and pedantic sense. Certain rights have been enshrined in our Constitution as fundamental and, therefore, while considering the nature and content of those rights the Court

must not be too astute to interpret the language of the Constitution in so literal a sense as to whittle them down. On the other hand the Court must interpret the Constitution in a manner which would enable the citizen to enjoy the rights guaranteed by it in the fullest measure subject, of course, to G permissible
restrictions.' (my emphasis)

In the case of Sekgabetlela v The Attorney-General and Another (Civ Case 954/07), unreported I accepted in principle that constitutional damages as a relief separate and distinct from remedies available under private law is competent. H

In Sekgabetlela (supra) the court stated as follows at paras 45 and 46:

'This court
considers Mr Boko's invitation attractive, but untenable. It is attractive because a violation of a constitutional right must of necessity find a remedy in one form or another, including a remedy in the form of compensation in monetary terms. (See Fose v Minister of Safety and

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Security 1997 (3) SA 786 (CC).) A

I
unequivocally associate myself with the view expressed in the aforementioned case to the effect that violation of constitutional rights must attract a remedy in order to achieve the ends of the Constitution.'

Having regard to the aforesaid authorities, it is my view that s 18(1), in B providing that an aggrieved person may approach the High Court and apply for 'redress', contemplates that the court may issue any appropriate relief and there is no reason, having regard to modern jurisprudence and the wording of s 18(1) and (2) of the Constitution itself, why constitutional damages should not be granted where it has been shown that such damages are due and appropriate. Suffice to say that each case will turn on its own circumstances. C

I imagine that there may well be some situations where the common law or the remedies obtained under the common law may be regarded as sufficient or broad enough to provide all relief that would be appropriate for breach of constitutional rights.

It appears to me that where the court finds the common-law remedies D inadequate, it must fashion appropriate remedies or develop the common law to provide a remedy in damages for breach of fundamental rights and freedoms of individuals.

The above approach is critical for the purpose of protecting all individuals who may be aggrieved, especially the disadvantaged people, who are the most frequent victims of non-compliance with the constitutional injunction to be E brought to trial within reasonable time - a phenomenon that I regret to say is becoming endemic in our jurisdiction.

In some situations appropriate relief may be a declaration of rights, interdict or such other relief which the court may consider appropriate.

Put differently, novel actions or suits may require novel remedies on F case-by-case basis. What this means is that

any inevitable overlap between common-law remedies and constitutional remedies may be resolved by judicial discretion on case-by-case basis.

The above observation is consistent with the provisions of s 18(2).

Section 18(2) supports the view that a restrictive interpretation of s 18(1) relating to the meaning of 'redress' is impermissible in that the court is G authorised, in giving effect to s 18(1) to 'make such orders, issue such writs and give such direction as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 16 (inclusive) of this Constitution'.

In Maharaj v Attorney-General of Trinidad and Tobago (No 2) [1979] AC 385 (PC) it was made abundantly clear that the notion of constitutional damages H is one that lies squarely in the realm of public law and goes beyond that which is available in terms of the common law.

Briefly, the facts in Maharaj were that the appellant, a member of the bar of Trinidad and Tobago, had been wrongly committed for contempt of court in breach of his constitutional right not to be deprived of liberty without due process of law. He approached the High Court to claim redress for contravention of his right, protected by s 1(a) of the

Constitution of Trinidad and Tobago, not to be deprived of his liberty save by A due process of law.

The court held, inter alia, that s 6 of the Constitution of Trinidad and Tobago was intended to create a new remedy for the contravention of constitutional rights without reference to existing remedies and that the word 'redress' in its context bore its ordinary meaning of reparation or compensation, including monetary compensation. B

The relevant provision of the Constitution of Trinidad and Tobago is similar to s 18(1) of the Constitution of Botswana to the extent that an aggrieved party who alleges that his constitutional rights have been violated is permitted to apply to the High Court for 'redress'.

Section 6(1) of the Constitution of Trinidad and Tobago provided that: C

'For the removal of doubt 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.' D

After a thorough consideration of all arguments in favour of and against the competency of constitutional damages the court held that constitutional damages are available, and the appeal was upheld.

The court in the course of its judgment noted that although the claim was not a claim in private law for damages for tort, but was a claim in public law for E compensation, such compensation, should be measured, inter alia, in terms of the deprivation of liberty, inconvenience and distress suffered during detention.

In the Attorney-General of Trinidad and Tobago v Ramanoop [2005] UKPC 15 it was held that a monetary award under s 14 (a subsequent reformulation of s 6 of the Constitution of Trinidad and Tobago) was not confined to an F award of compensatory damages. At paras 17-19 the court stated as follows:

'17. Their Lordships view the matter as follows. Section 14 recognises and affirms the court's power to award remedies for contravention of chapter I rights and freedoms. This jurisdiction is an integral part of the protection chapter I of the G Constitution confers on the citizens of Trinidad and Tobago. It is an essential element in the protection intended to be afforded by the Constitution against misuse of state power. Section 14 presupposes that, by exercise of this jurisdiction, the court will be able to afford the wronged citizen effective relief in respect of the state's violation of a constitutional H right. This jurisdiction is separate from and additional to ("without prejudice to") all other remedial jurisdiction of the court.

18. When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the

person wronged has suffered damage, the court may award him A compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law. B

19. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to C reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, D where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award.'

Section 14 referred to above is materially similar to s 18(1) and (2) of the E Constitution of Botswana. It provides as follows:

'(1) For the removal of doubt it is hereby declared that if any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with F respect to the same

matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion.

(2) The High Court shall have original jurisdiction -

(a) to hear and determine any application made by any person in pursuance of subsection (1); and

(b) to determine any question arising in the case of any person which is G referred to it in pursuance of subsection (4), and may, subject to subsection (3), make such orders, issue 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 this Chapter to the protection of which the person concerned is entitled.' H

The courts in the United States of America, Ireland and India have recognised the public law nature of the remedy of the infringement of a constitutional right.

In the United States of America in Memphis Community School District v Stachura 477 US 299 (1986) the plaintiff sued for violation of the right to

academic freedom as a teacher. The court confirmed that where a plaintiff A seeks damages for violation of a constitutional right the level of damages is determined according to principles derived from common law.

The court also noted that it is very important for a court to always keep in mind that damages based on the 'value' of the constitutional rights were an 'unwieldy tool' for ensuring compliance with the Constitution.

In the case of Bivens v Six Unknown Named Agents of Federal Bureau of B Narcotics 403 US 388 (1971) at pp 389-90, 409, the petitioner's complaint was that the agents of the Federal Bureau of Narcotics without warrant or probable cause entered the petitioner's apartment and arrested him for an alleged narcotics violation. It would appear that the petitioner was arrested in front of his family. His apartment was searched and he was also subjected to a visual strip search. C

The Supreme Court held that it had the power to fashion a damages remedy directly under the Constitution for the invasion of Bivens constitutional rights protected by the Fourth Amendment despite the fact that the Fourth Amendment made no express provision for the remedy in damages. The court concluded that the 'injuries consequent' to an illegal search provide the D basis for an 'independent claim both necessary and sufficient to make out a cause of action'.

In Bivens Brennan J emphasised the independent nature of the constitutional damages remedy to protect the Fourth Amendment rights, holding that the Fourth Amendment rights were an independent limitation upon the exercise of federal power.

The Bivens case broke new ground. It opened the door for the recognition of E a full complement of constitutional damages claims.

In Carlson v Green 446 US 14 (1980) at 28, 28 n 1 the plaintiff sued on behalf of her deceased son's estate alleging that her son had died as a result of personal injuries because the defendant's prison officials violated his Eighth Amendment rights by failing to give him proper medical attention. She claimed compensatory and punitive damages and the court held that the plaintiff could F avail herself of the type of action referred to earlier in the Bivens case. (See also Fose v Minister of Safety and Security (supra) at p 807.

The American jurisprudence on constitutional damages may be described as inconsistent and perhaps even confusing. It seems to me, having read a number of cases on constitutional damages, following Bivens, that the post-Bivens jurisprudence is characterised by an attempt by the courts to G limit, define and structure the boundaries of constitutional damages. It should always be recalled that the action of constitutional damages in American jurisprudence is linked to a statutory cause of action under 42 USC 1983, which in turn arises out of s 1 of the Civil Rights Act of 1871.

Although the Bivens decision appears to have led to an increase in claims for constitutional damages, success has been quite rare. This may have been H due (at least in part) to the court's introduction of requirements of demonstrable harm and fault and the 'but for' test in determining causation. (See Mt Healthy City School District Board of Education v Doyle 429 US 274 (1977); Thomas A Eaton 'Causation in Constitutional Torts' 67 Iowa L Rev 433 (1982).)

The inconsistency in the post-Bivens jurisprudence is manifest from a

number of judgments handed down by the Supreme Court. For instance, the A Supreme Court held that the implied antidiscrimination of the Fifth Amendment (Davis v Passman 442 US 228 (1979)) and the cruel and unusual punishments prohibition of the Eighth Amendment (Carlson v Green (supra) would sustain damages actions. But in United States v Stanley 483 US 669 (1987) the justices determined that a former serviceman could not B assert a constitutional damages claim against the armed forces for being involuntarily subjected to LSD testing in apparent violation of the due process clause of the Fifth Amendment. And other decisions have disapproved free speech (Bush v Lucas 462 US 367 (1983)) and procedural due process (Schweiker v Chilicky 487 US 412 (1988)) claims lodged against federal officials. (See Walter E Dellinger (1972) 'Of Rights and Remedies: The C Constitution as a Sword'. Harvard Law Review 85: 1532-64; Alfred Hill (1969) 'Constitutional Remedies'. Columbia Law Review 69: 1009-1161; Thomas W Merrill (1985) 'The Common Law Powers of Federal Courts'. University of Chicago Law Review 52: 1-72; and Gene R Nichol (1989) 'Bivens, Chilicky and Constitutional Damages Claims'. Virginia Law Review 75: 1117-1154.)

Put bluntly it could be said without fear of contradiction that the Bivens D promise has remained largely unfulfilled.

The view I take is that transplanting the American jurisprudence, lock, stock and barrel, with its requirements of demonstrable harm and demonstrably fault, is not advisable, given that such restrictions cannot be implied from the provisions of s 18(1) and (2) of the Constitution of Botswana. The other E reason for not doing so lies in the difference

in the statutory and constitutional foundation of constitutional damages between the two countries.

The courts in Ireland have held that their guardianship of the Constitution requires that in protecting fundamental rights they may in an appropriate case order constitutional damages and that where State organs have breached F individual fundamental rights the State shall not be entitled to invoke the defence of sovereign immunity to defeat the protection of constitutional rights by the courts (see State (Quinn) v Ryan [1965] IR 70; Kearney v Minister of Justice, Ireland, and the Attorney-General [1986] IR 116).

In the Indian case of Behera v State of Orissa AIR 1993 SC 1960 at p 1969 it G was also held that the defence of State immunity was inapplicable when it came to enforcement of fundamental rights.

In Fose (supra) the court recognised that, in principle, there is no reason why appropriate relief should not include an award of damages where such award is necessary. In the course of its judgment the court (per Ackermann J) stated as follows at p 826 para 69: H

'... I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a

country where so few have the means to enforce their rights through the courts, A it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve this goal.'

Earlier, the learned judge said the following at p 821 para 60: B

'... [I]t seems to me that there is no reason in principle why "appropriate relief" should not include an award of damages, where such an award is necessary to protect and enforce chap 3 rights. Such awards are made to compensate persons who have suffered loss as a result of the breach of a statutory right if, on a proper C construction of the statute in question, it was the Legislature's intention that such damages should be payable, and it would be strange if damages could not be claimed for, at least, loss occasioned by the breach of a right vested in the claimant by the supreme law. When it would be appropriate to do so, and what the measure of damages should be will depend on the circumstances of each case and the particular right which has been infringed.' D

The courts in South Africa have on a number of occasions awarded damages for constitutional breach. (See Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre,

Amici E Curiae) 2004 (6) SA 40 (SCA).)

In the Canadian case of R v Schachter [1992] 2 SCR 679 the court indicated in clear terms that courts should not be precluded from rendering judgments with direct budgetary consequences for the state, as long as those consequences are appropriate. F

Schachter broke new ground on the reach of the judiciary in vindicating fundamental human rights and freedoms.

Maharaj (supra) confirms in clear terms that a claim for constitutional damages is competent and that a claim in public law for deprivation of constitutional rights should not be confused with the claim in private law for damages for tort. (See also Fose v Minister of Safety and Security 1997 (3) SA 786 (CC); Simpson v Attorney-General [1994] 3 NZLR 667 (CA).) G

In my respectful view the primary purpose of delict is to regulate relationships between private parties, whilst s 18 of the Constitution of Botswana aims at giving concrete effect to Chapter II (ss 3-16 inclusive) of the Constitution and to protect against intrusion by the State or any person. H

The purpose of delictual remedy therefore is to provide compensation for harm caused to a private party by the wrongful action of another.

The remedy of constitutional damages, on the other hand, seeks to promote the vindication of the fundamental rights as entrenched in the Constitution.

It is my considered view therefore that the mere fact that an aggrieved

party may have a claim in delict, over an unconstitutional conduct, does not A limit the right of a litigant to approach the court for constitutional damages.

The court in the case of Attorney-General of Trinidad and Tobago v Ramanoop (supra) took a similar view when it stated as follows at para 26:

'That said, their Lordships hasten to add that the need for the courts to be vigilant in preventing abuse of constitutional proceedings is not intended to deter citizens from B seeking constitutional redress where, acting in good faith, they believe the circumstances of their case contain a feature which renders it appropriate for them to seek such redress rather than rely simply on alternative remedies available to them. Frivolous, vexatious or contrived invocations of the facility of constitutional redress are to be repelled. But "bona fide resort to rights under the Constitution C ought not to be discouraged": Lord Steyn in Ahnee v Director of Public Prosecutions [1999] 2 AC 294, 307, and see Lord Cooke of Thorndon in Observer Publications Ltd v Matthew (2001) 58 WIR 188, 206.'

I fully associate myself with the above sentiments by their Lordships. This D claim is a bona fide claim to vindicate

constitutional rights and cannot be said to be frivolous or vexatious.

In MEC, Department of Welfare, Eastern Cape v Kate 2006
(4) SA 478 (SCA) the court, in rejecting the argument that the appellant should have availed herself of delictual remedies, stated as follows at p 491 paras 26-7:

'Counsel
for the appellant submitted that Kate has delictual remedies that are E sufficiently restorative of any loss that was
caused to her by the failure of the administration to perform its constitutional duties and that, in those circumstances, a remedy of constitutional damages is not required, a submission foreshadowed in the following observation by Ackermann J in Fose:

"The
South African common law of delict is flexible and, under s 35(3) of the F interim Constitution, should be developed by
the Courts with 'due regard to the spirit, purport and objects' of ch 3. In many cases, the common law will be broad enough to provide all the relief that would be 'appropriate' for a breach of constitutional rights. That will, of course, depend on the circumstances of each particular case."

The
question that submissions raises is not so much whether the remedy that is G now proposed is an appropriate one to remedy
Kate's loss, but rather whether a constitutional remedy should be granted at all. No doubt, the infusion of constitutional normative values into delictual principles itself plays a role in protecting constitutional rights, albeit indirectly. And, no doubt, delictual principles are capable of being extended to encompass State liability for the breach of H constitutional
obligations. But the relief that is permitted by s 38 of the Constitution is not a remedy of last resort, to be looked to only when there is no alternative - and indirect - means of asserting and vindicating constitutional rights. While that possibility is a consideration to be borne in mind in determining whether to grant or to withhold a direct s 38 remedy, it is by no means decisive, for there will be cases in which the

direct
assertion and vindication of constitutional rights are required. Where that is A so, the further question is what form of
remedy would be appropriate to remedy the breach. In my view, the breach in the present case warrants being vindicated directly, for two reasons in particular. First, I see no reason why a direct breach of a substantive constitutional right (as opposed to merely a deviation from a constitutionally normative standard) should be remedied indirectly. Secondly, the B endemic breach of the rights that are now in issue justifies - indeed, it calls out for - the clear assertion of their independent existence.'

I must state that I share the view articulated above. In this
ease the nature of the breach and the circumstances thereof justified the plaintiff's approach of C vindicating his rights directly by seeking
monetary compensation for violation of his rights guaranteed by s 10(1) of the Constitution.

The Court of Appeal in Kelaotswe v The Attorney-General
[2006] 1 B.L.R. 229, CA, after referring to Fose (supra), seems to acknowledge that stay of prosecution is but one of the remedies an accused who

complains of violation of s 10(1) of the Constitution can ask for. (See also Wild and Another v D Hoffert NO and Others 1998 (3) SA 695 (CC).)

The net effect of a majority, if not all, of the decisions referred to above is that it now appears almost universally accepted that damages are available as a remedy for infringement of fundamental rights and freedoms entrenched in the Constitution. E

Having held that constitutional damages as a relief are mandated by the Constitution, more complicated questions arise: on what principles are damages to be assessed? Are punitive damages available? Are damages to include injured feelings or damage to reputation?

Punitive damages have been a matter of jurisprudential controversy. (See Fose v Minister of Safety and Security (supra).) F

I do not consider it necessary to join such controversy; suffice to say that speaking for myself the objective of the court in effecting an appropriate remedy to a constitutional infringement, including constitutional damages, must be to vindicate the Constitution and deter its further infringement.

In Merson v Cartwright and Another [2005] UKPC 38 at para 18, the court noted, inter alia, in relation to a vindicatory award that: G

'The purpose of a vindicatory award is not a punitive purpose. It is not to teach the executive not to misbehave. The purpose is to vindicate the right of the complainant, whether a citizen or a visitor, to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression. The sum appropriate H to be awarded to achieve this purpose will depend upon the nature of the particular infringement and the circumstances relating to that infringement.... In some cases a suitable declaration may suffice to vindicate the right; in other cases an award of damages, including substantial damages, may seem to be necessary.'

It is my considered view that whilst deterrence and exemplary damages

should not be ruled out in principle, the real focus should be compensating A the individual whose rights have been infringed.

It seems to me that where a public authority has exhibited conduct that can be properly regarded as reckless or has shown callous disregard of an individual's fundamental human rights, punitive damages may be granted.

In a leading Canadian case, Kodellas v Saskatchewan Human Rights B Commission [1989] 5 WWR 1 (Sask CA), the Court of Appeal held that the focus on remedies in the context of human rights ought to be on aiding the victim and not punishing the offender.

As I have indicated above, there may well be exceptional cases where, having regard to the nature and circumstances of the violation of the

constitution, punitive/exemplary damages may be warranted.

In Ramanoop v The Attorney-General of Trinidad and Tobago (HCA S-47/01), C unreported, the court, when commenting about exemplary damages, stated as follows at para 10:

'10. According to the Irish report on Aggravated, Exemplary and Restitutionary Damages, LRC 60-2000 (2000) IELRC 1 (1st August, 2000), D

"1.01
The aim of exemplary damages is two-fold: to punish the defendant and to deter both the defendant and others from engaging in conduct that is extremely malicious or socially harmful, in Lord Devlin's own words 'to teach a wrongdoer that tort does not pay' Rookes v Barnard [1964] AC 1129. An exemplary damages award may also be intended to vindicate the rights of E the plaintiff, or, as Lord Devlin stated in Rookes v Barnard, to vindicate the strength of the law. It has the additional, incidental effect of providing compensation and satisfaction to the plaintiff. In the context of the Constitution, the particular purpose of exemplary damages is to vindicate and defend individual constitutional rights, to punish the defendant's disregard of them and to deter their breach.... F

1.06
It is also important to consider the role of exemplary damages in deterring highly reprehensible conduct, including violations of constitutional rights. In a case where there has been a serious breach of constitutional rights, which the court considers warrants exemplary damages, there is a G public interest in calculating an award that will effectively deter such a breach in the future.'"

The court, in rejecting the argument that exemplary damages should not be awarded because they come out of the public purse, remarked at para 11 that:

'The argument that such exemplary damages come out of the public purse and H therefore is a means of allocating scarce public funds by the judiciary without the sanction of the legislature with respect, misses the mark as it does not foresee the longer term benefit set out herein which will accrue to the society as a whole.'

The High Court as a guardian of the Constitution needs to be vigilant

against constitutional violations and by its pronouncements make it clear A that the Constitution is not 'just a piece of paper' to be disregarded without consequence. In that way the courts will enhance the faith and public confidence in the sacred nature of the Constitution.

In my respectful view it is the sacred duty of this court to ensure that for every violation there must be a remedy - not just a remedy, but an effective remedy. B

Our jurisprudence on the remedies occasioned by breach of s 10(1) has often been a 'one-way traffic', resulting at best with stay of prosecution

only.

That may not be adequate in all cases.

In some cases, such as this one, compensation in monetary terms
is appropriate. C

It is incumbent upon this court to address the gap between rights
and remedies.

A government which through its officers acts unconstitutionally
must in some way undo the violation by compensating the victim.

We who have taken the oath of high office as judges of the
republic must effect the promise of the Constitution and close the gap between
rights and D remedies and avoid perpetuating the
jurisprudence of deficiency as far as effective remedies for constitutional
violations may be concerned.

In today's constitutional landscape damages in monetary terms is
nil and that may well suggest that the societal loss in under-enforced
constitutional rights is great.

It would, jurisprudentially speaking, be a dark day in the
history of this E republic, for this court, the guardian of the
Constitution, to say to any aggrieved party, 'yes your right has been breached,
but we can't do anything about it', which in effect amounts to saying that
having a right entrenched in the Constitution is the same as having no such
right. That would be absurd in the extreme.

As long ago as 1952 the courts were alive to the gap between
rights and F remedies.

In Minister of the Interior and Another v Harris and Others
1952 (4) SA 769 (A) at pp 780H-781B Centlivres CJ said the following:

'... [I]n
other words the individual concerned whose right was guaranteed by the
Constitution would be left in the position of possessing a right which would be
of G no value whatsoever. To call the rights
entrenched in the Constitution constitutional guarantees and at the same time
to deny to the holders of those rights any remedy in law would be to reduce the
safeguards enshrined in sec. 152 to nothing. There can to my mind be no doubt
that the authors of the Constitution intended that those rights should be
enforceable by the Courts of Law. They would never have intended H
to confer a right without a remedy. The remedy
is, indeed, part and parcel of the right.'

In the New Zealand case of Simpson v Attorney-General
(supra) the court accepted the notion of constitutional damages and referred to
Maharaj (supra) with approval.

DINGAKE J

In Simpson Cook P, in affirming the public law nature of
the remedy of A constitutional damages, said the following:

'The (Maharaj)
analysis has procedural consequences of practical importance. As Casey J points
out, the question of the appropriate remedy, among the range available, for a

particular case clearly does not lend itself to determination by a jury. B
It is naturally the responsibility of a Judge.
Further, it seems to me that monetary compensation of breach of the Bill of Rights is not "pecuniary damages" within the meaning of the Judicature Act 1908, s 19A.'

With respect to the content of the remedy and how possibly overlapping remedies may be dealt with, Cook P stated as follows: C

'As to the level of compensation, on which again there is much international case law, I think that it would be premature at this stage to say more than that, in addition to any physical damage, intangible harm such as distress and injured feelings may be compensated for; the gravity of the breach and the need to emphasise the importance of the affirmed rights and to deter breaches are also D proper considerations; but extravagant awards are to be avoided. If damages are awarded on causes of action not based on the Bill of Rights, they must be allowed for in any award of compensation under the Bill of Rights so that there will be no double recovery. A legitimate alternate approach, having the advantage of simplicity, would be to make a global award under the Bill of Rights and nominal or concurrent E awards on any other successful causes of action.'

In Merson (supra) Ms Merson was awarded $8 160 by way of special damages, $90 000 damages for assault, battery and false imprisonment, $90 000 for malicious prosecution and $100 000 for violation of her constitutional rights. In the course of its judgment the court stated as follows with respect F to an award of $100 000 damages for violation of constitutional rights:

'On the extreme facts of this case we would regard an award of $100,000 by way of vindicatory damages as high but within the bracket of discretion available to the judge.' G

To my mind, in assessing constitutional damages the court may use the analogy of delict when dealing with injured feelings, distress and mental anguish. (See J M Burchell, J J Gauntlett, M M Corbett and D P Honey The Quantum of Damages in Bodily and Fatal Injury Cases (Juta Cape Town) Vol 1 at p 4.)

The above appears to me to be a sound analogy. H

I will adopt that analogy in determining the constitutional damages that are appropriate.

I must also indicate that the authorities I find most persuasive are those from Trinidad and Tobago, if only for the reason that s 14 of the Constitution of Trinidad and Tobago (formerly s 6) is similar to s 18(1) and (2) of our Constitution. I therefore accept that the amount to be

awarded is within the discretion of the judge. This much is clear from the use A of the word 'may' in s 18(2) of the Constitution. Such discretion is not arbitrary and must be exercised judicially.

I must also emphasise the following contextual considerations:

1. That there is no precedent in this
jurisdiction on appropriate quantum for cases such as this one. In other words,
this is virgin territory. B

2. That my research - and, I suspect, that
of learned counsel involved in this case - did not yield many cases on the
issue of appropriate damages in cases of this nature.

3. I have been guided broadly by the
authority of Merson (supra). I have taken into account in particular
that although the court considered $100 000 on the high side, it was not
overturned because it was C considered to be within the discretion of the
court. I have taken into account the time value for money, that $100 000 in
2003 would in all likelihood be more in 2010.

My experience is that an assessment of quantum imports some
element of value judgment. It is an imprecise science, with the result that two
courts may not necessarily come to the same amount of damages in any given
case. D

In my view fairness and objectivity in assessing damages are
critical. It is my considered view that awards must not be too conservative or
extravagant.

They must be fair.

They must find support in common sense and legal precedents. E

They must not be insensitive to human suffering.

In exercising its discretion to award damages for breach of s
10(1) of the Constitution the court has also taken into account a number of
factors as appears below.

In computing the appropriate damages, I have considered that the
plaintiff has had a charge of murder hanging over his head for 12 years or
thereabouts F and that it is no small measure to have a
charge of murder hanging over one's head for that long.

It follows from the statement of agreed facts that, as a result
of the delay in bringing the plaintiff to trial as decreed by the Constitution,
the plaintiff suffered: (a) restriction of his liberty resulting from
pre-trial detention; (b) general inconvenience arising out of
restriction of liberty; (c) inevitable anxiety; G (d) interference with his employment
opportunities or ability to earn a living.

It is also axiomatic in my view that in consequence of the charge
the plaintiff suffered undue stigma, which must have been exacerbated by the
inordinate delay in bringing him to trial within a reasonable time.

I have also taken into account that the State had not proffered
any reasonable H explanation why the plaintiff was not brought
to trial within a reasonable time as decreed by the Constitution.

More significantly, I have taken into account that the plaintiff
has not availed himself of any private-law remedy which he may be entitled to,
nor has it been demonstrated that the plaintiff had any other alternative
remedy, nor that the remedy of constitutional damages was not appropriate.

DINGAKE J

I also take it to be axiomatic that having a serious charge of murder hanging A over one's head results in mental distress and anguish, which must be compensated, in monetary terms.

I have also taken into account the importance of the right protected by s 10(1) of the Constitution and that the violation was quite grave.

In the result it is ordered that: B

(a) The defendant must pay the amount of P100 000 as constitutional damages for violation of the plaintiff's right to be brought to trial within a reasonable time.

(b) The defendant to pay costs of suit.

Judgment for the plaintiff.