IN THE HIGH COURT OF LESOTHO

(Constitutional Jurisdiction)

HELD AT MASERU **CONSTITUTIONAL CASE NO.06 OF 2018**

In the matter between

LEBOHANG 'MEI **APPLICANT**

AND

MR. JUSTICE THAMSANQA NOMNGCONGO NO	**1st RESPONDENT**
HONOURABLE CHIEF JUSTICE OF LESOTHO	**2nd RESPONDENT**
THE REGISTRAR OF THE HIGH COURT	**3rd RESPONDENT**
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**4th RESPONDENT**
THE ATTORNEY GENERAL	**5th RESPONDENT**

Neutral Citation: Lebohang 'Mei v Mr Justice Thamsanqa Nomngcongo NO & 4 Others CC No.6 of 2018 [2021] LSHC 107

JUDGEMENT

Coram: MONAPATHI, MAKARA AND BANYANE JJ

Heard: 21 April 2021

Delivered: 21 October 2021

Summary

Constitutional rights - right to fair trial and right to equal protection of the law - applicant convicted and sentenced by Magistrate Court - challenged both conviction and sentence on review - failure by a Judge to render a reserved judgement until sentence served in full - its effect on fair trial rights and protection of the law - Judicial immunity - whether the omission gives rise to a claim for damages under section 22 of the Constitution.

ANNOTATIONS

Cases cited

Lesotho

1. Ntsihlele Matsoso and 127 Others v Independent Electoral Commission and Others C of A CIV No.57 of 2019
2. Director of Public Prosecutions v Lesupi LAC (2007-2008)403
3. Sole v Cullinan NO and Others LAC (2000-2004) 572
4. Lemena v Potsane LAC (1970-1979) 116
5. Mampeli Marabe v The Ministry of Justice and Others CC 18/20
6. Rathoma v Commissioner of Police C of A(CIV) 11/18
7. Letuka v Minister of Justice and Human Rights and Others CC 10/2010[2014] LSHC 45
8. Otubanjo v Director of Immigration and Another LAC (2005-2006) 336

Trinidad and Tobago

9. Maharaj v Attorney General of Trinidad and Tobago [1978] 2 ALL ER 670(P.C)

South Africa

10. Fose v Minister of safety and security and Others 1997(3) SA 786
11. Bader and Another v Weston and Another 1967(1) SA 134©
12. Telematrix (Pty) Ltd v Advertising Standards Authority SA 2006 (1) SA 461
13. Komape v Minister of Basic Education and Others Case No. 754/2018 and 1015/18 [2019] ZASCA 192(18th December 2019)

14. Pharmaceutical Society of South Africa and Others v Tshabalala – Msimang and Another NO 2005 (3) SA 238 (SCA) 238
15. Poswa v President of the Republic of South Africa and Others (2013/30021) [2014] ZAGPJHC 218 (available in Saflii)

India

16. Anil Rai v the State of Bihar Case No: Appeal(crl) 389 of 1998 (06th August 2001)

Statutes (and Subsidiary legislation)

1.The Constitution of Lesotho 1993

2. The Penal Code Act of 2010

3. The High Court Rules 1980

4. Constitutional Litigation Rules of 2000

BANYANE J

Introduction

[1] This application is concerned with an alleged failure by a Judge of the High Court to deliver judgement in a review of criminal proceedings where the applicant was convicted and sentenced by the Magistrate Court. The judgement in the matter was reserved by the learned Judge and remains undelivered to date. The applicant has filed this constitutional motion claiming that the omission by the judge to render judgement has violated his rights to fair trial and protection of the law as guaranteed by sections 12 and 19 of the Constitution of Lesotho 1993.

[2] The principal issue to be determined is whether "redress" under section 22 of the constitution must be construed to include an award for damages against the state for acts or omissions by judicial officers arising in the performance of their judicial functions when no right to claim damages against a Judge is legally sanctioned in terms of judicial immunity doctrine. It is also necessary to examine what remedies have been available to the applicant for the alleged violation of his constitutional rights. In order to understand the issues, it is necessary to set out the history of events which led to the institution of this application.

Factual background

[3] In the year 2007, the applicant as an accused appeared before the Magistrate Court for the District of Mafeteng on charges of attempted murder and contravention of section 3 of the Sexual Offences Act of 2003. He pleaded not guilty to these charges and the trial proceeded to finality despite several postponements. The defence closed its case on the 22nd September 2010 and the matter was postponed to 21/10/2010 for closing addresses. The record of proceedings reveals that the applicant failed to appear before Court following closure of the defence case. This prompted

issuance of a warrant of arrest against him. He was, upon his arrest on 18/01/2012, remanded in custody. Dissatisfied with his incarceration, he filed certain review proceedings under CRI/APN/REV/100/12 before the High Court and sought his immediate release. He successfully secured his release on the 03rd February 2012 pending sentencing, a day after his conviction on the 02nd February 2012. He was on the 08th February 2012 sentenced to eight (8) years imprisonment on the attempted murder charge.

The present application

[4] The applicant's case before this Court is that subsequent to his sentencing, he filed review proceedings before the High Court challenging his conviction and sentence under CRI/APN/219/2012. This application was on divers occasions postponed, though reasons for such postponements are not disclosed in the applicant's founding affidavit. The matter was ultimately argued on 07th November 2013, so he avers. Judgement was reserved and remains undelivered to date despite his attorney's countless reminders to the Registrar to bring the pendency of the judgement to the attention of the Judge and the Chief Justice. Despite these efforts, the Chief Justice similarly failed to come to his rescue until his release on parole in 2016.

4.1 It is against this background that this application was launched. He seeks a declaration to the effect that;

1. the continuing failure by the High Court, in particular the 1st Respondent herein, to deliver judgment for a period of over seven (7) years in CRI/APN/219/2012 is unconstitutional and illegal and in breach of sections 12 and 19 of the Constitution;

2. the continuing failure by the Honourable Chief Justice to ensure that justice is served and that judgment is delivered in CRI/APN/219/2012 is unconstitutional and illegal and in breach of sections 12 and 19 of the Constitution;

3. failure by a Court of law to deliver judgment within three months of the hearing of matter, where no exceptional circumstances exist, is unconstitutional and illegal and in breach of sections 12 and 19 of the Constitution; and

4. An order that constitutional damages in the amount of Ten Million Maloti (M10 000 000.00) be paid to the Applicant as the result of the above infringements of his fundamental rights and loss suffered.

5. Costs of suit on attorney and own client scale.

6. Further and / or alternative relief.

[5] The gist of his complaint before this Court is that the judge's failure to determine his review application within a reasonable time not only infringed his fair trial rights and right to equal protection of the Law but also robbed him of his liberty, thus forcing him to fully serve a sentence which he stood a good chance to have overturned.

[6] As a result of this failure by the justice system, so he avers, he endured "horrible" and squalid prison conditions for seven years. He says the unbearable prison environment which he describes as unhealthy, unhygienic and overpopulated, also negatively affected his health. He says they lived in dirty, filthy and smelly cells and that basic needs such as beds, blankets and food are scanty or inadequate. He adds that during the imprisonment period, he lived in constant fear of being raped or killed. He was on account of all these, depressed and suicidal during this period; and consequently developed medical conditions including diabetes, hypertension, distress and anxiety. He says all these could have been averted had his application been determined within a reasonable time.

[7] He further asserts that the stigma attributable to imprisonment deprived him of his family because his wife and six children deserted him.

He is now a socially excluded person because of his constant fear of being judged by society as a bad person.

[8] He also blames the justice system in various other ways. He says his father died after his release and he could not afford to offer him a decent funeral; that had it not been for his imprisonment, he could have secured proper medical care for him and he could have probably lived longer.

[9] He concludes by saying that having served the sentence, the only practicable form of redress for deprivation of his liberty, right to fair trial and right to equal protection of the Law is monetary compensation in the amount M10 000 000.00, which he considers a fair and reasonable amount as damages for the infringement of his rights because no amount of money can restore the emotional scars attributable to the infringement.

Respondents' case

[10] The respondents resist the applicant's claim on grounds that; a) firstly, the applicant could have sought a writ of mandamus against the judge or lodged a complaint with the Chief Justice or the Judicial Service Commission in time to vindicate his rights, and that he still has other remedies such as *actio injuriarum* for his wounded feelings; b) secondly that the declarator sought under prayers 1 to 3 is academic and serves no practical purpose for the reason that the applicant has since been released from prison, having served his term of imprisonment; c) thirdly that the applicant's claim for constitutional damages is factually and legally unsustainable.

Applicability of Rule 8(10)(C) in constitutional litigation

[11] I must record that the respondents filed no answering affidavit(s) but raised these issues in a notice filed in terms of Rule 8(10) (c) of the High Court Rules of 1980, a procedure which the applicant's counsel vigorously took issue with. He contended that only a limited number of rules in the

High Court Rules may be utilized in constitutional litigation and that the sub-rule under scrutiny does not appear in schedule 1, which contains Rules that may be employed in constitutional litigation according to Rule 24 of the Constitutional litigation Rules of 2000.

[12] According to him, the reason for exclusion of this rule is that constitutional disputes call for determination on their merits and that technicalities in constitutional litigation must be avoided.

[13] He submitted therefore that points of law are not only unallowable in constitutional litigation, but also that it is not open for the respondents to deal with the merits should the preliminary points fail.

[14] Mr Letsika, counter-argued on behalf of the respondents that a party opposing an application is entitled to raise preliminary issues. He referred us to a considerable number of cases in which these points, inclusive of declination of jurisdiction under section 22 (2) and *locus standi,* have been raised and decided. I propose to briefly address the respective arguments.

[15] Rule 11 of constitutional litigation Rules deals with application procedure. Its sub-rule 3 reads;

> 11(3) When relief is claimed against any person, authority or organ of government, and where it is necessary or proper to give any person, authority or government notice of an application referred to under sub-rule (1), the notice of motion shall be addressed to the Registrar, person, authority or organ of government in accordance with Form 2, otherwise the notice shall be addressed to the Registrar and shall be as near as may be in accordance with Form 1…..
>
> 11(4) a person opposing the granting of an order sought in the notice of motion shall-

a) Within the time specified in the notice of motion, notify the applicant and the Registrar, in writing, of his intention to oppose the application;
b) State an address within 25 kilometres of the office of the Registrar at which the respondent will accept notice and service of all documents in the proceedings;
c) Within 10 days of notifying the applicant of his intention to oppose the application, lodge an answering affidavit, if any, together with any relevant documents which may include supporting affidavits.

15.1 It will be observed that sub-rules (a) and (b) of this Rule 11 combined, amount to rule 8(10)(a) of the High Court Rules. I say this because a requirement that the opposing party must '*state the address at which it will accept service of all documents*' under Rule 8(of the High Court Rules) is not an independent sub rule, but part of sub rule (1). The reason for this as I see it, is that this requirement is not an independent procedural step but describes the contents of the notice of intention to oppose. Under Rule 11 of the constitutional Rules, sub-rule 4(b)is prima facie, an additional requirement for a proper notice of intention to oppose filed in terms of sub-rule 4(a).

15.2 Indeed, sub-rule 10(c) of Rule 8 (of the High Court Rules) which allows a party to raise a question of law without any answering affidavit, is not part of Rule 11(4) of the Constitutional Litigation Rules.

15.3 I do not propose to express any views on whether it is by design that these Rules make no provision for sole reliance on points of law as authorised by Rule 8(10)(c), suffice it to say that it is not unprecedented to request the Court to decline the section 22(2) jurisdiction in cases undeserving to be heard under this provision.

[16] To the question whether a party relying on points of law is entitled to later file an answering affidavit in the event the points of law are dismissed,

I quote the Court of Appeal decision in **Director of Public Prosecutions v Lesupi LAC (2007-2008)403 at** where….Farlam AP as he then was) had the following to say about raising points in *limine* without filing affidavit on the merits;

> There is considerable doubt whether it is open for a party to adopt such a procedure. In **Bader and Another v Weston and Another 1967(1) SA 134©** it was held at 136 D-H that a respondent who wishes to oppose an application should place his case on the merits before the Court. Having done so it is open to him to take preliminary points, for instance that the application is defective, or it fails to disclose cause of action. The learned Corbett J (later CJ) went on to say that normally it is not proper for a respondent to take a preliminary point without filing affidavits on the merits, although there may be exceptional circumstances in which such a procedure may be permitted. I draw attention to this authority by an imminent Judge because of the tendency by legal practitioners to raise points in *limine* without filing affidavits on the merits …

[17] I must point out at this juncture that this case raises issues of great constitutional importance of whether "redress" under section 22 should be interpreted to include monetary compensation for alleged breach of rights by the Judge. Having regard to the importance of the points raised by Mr Letsika in the impugned notice, it is my considered opinion that the form through which they have been presented should not be decisive on the question whether they ought to be considered or discarded. What matters in my view is their substance or validity. It is for these reasons that the issues raised by Mr Letsika must be considered. The following are submissions made on these points.

The parties' submissions

[18] Mr Letsika on behalf of the respondents, advanced a three-pronged argument. His main contention relates to decline of jurisdiction under Section 22(2) of the Constitution. The second relates to mootness of the

issues raised by the reliefs sought under prayers 1,2,3. The third addresses validity of a claim for constitutional damages. I deal with them in turn.

[19] Regarding the first point, Mr. Letsika on behalf of the respondents contended that the applicant had and still has adequate means of redress under the common law for the alleged contravention of his rights. He divides this into two segments; i.e redress available prior and consequent upon his release from prison. In respect of the former, he contends that it was open to the applicant to either a) seek a writ of mandamus against either the first respondent or the Chief Justice to direct him to deliver judgement; b) invoke extra-curial remedies such as lodging a complaint with the Judicial Service Commission or the Chief Justice to take appropriate action. With regards to means of redress at this time, Mr Letsika is of the view that a claim for damages based on *actio injuriarum* in the High Court exercising its ordinary jurisdiction is still available to the applicant.

[20] He referred us to **Ntsihlele Matsoso and 127 Others v Independent Electoral Commission and Others C of A CIV No.57 of 2019** to buttress his submission that where adequate means of redress are available under any Law, this Court may decline its section 22(2) jurisdiction.

[21] Advocate Letompa, contended on behalf of the applicant that lack of that lack of accountability and delay in delivery of judgements is subversive to equal protection of law entrenched in section 4(1)(o) and 19 of the Constitution. He referred us to the case of **Otubanjo v Director of Immigration and Another LAC (2005-2006) 336** and a host of other decisions in which the importance to expeditious resolution of cases has been emphasised.

[22] He contends that expeditious rendition of judgements is a judge's constitutional mandate and that it ridiculous to argue, as the respondents' attorney does, that the applicant ought to have sought the Court's intervention to compel the Judge to efficiently and effectively carry out his duties. He argued in the alternative that failure by the applicant to have sought a writ of mandamus against either the Judge or the Chief Justice cannot render him remediless.

[23] In relation to the respondents' argument on availability of *actio injuriurum* under the common law, he contended that the state is directly liable for all breaches of rights as a matter of public law. He is of the opinion that the respondents misconstrued the applicant's claim which is not based on delict but on violation of constitutional rights. He submitted on this basis that this claim is properly filed under section 22. He relied on the following passage from **Maharaj v Attorney General of Trinidad and Tobago [1978] 2 ALL ER 670(P.C);**

> "the claim for redress under section 6(1) [which counsel opines is the equivalent of our section 22] for what has been done by a Judge is a claim against the state for what has been done in the excise of judicial power of the state. This is not vicarious liability: it is liability of the state itself. It is not a liability at tort at all. It is liability in public law of the state, not of the Judge, which has been created by section 6(1) and (2) of the Constitution".

Decline of jurisdiction

[24] I proceed to address the question whether this Court may decline to excise its section 22 powers. This provision reads as follows;

24.1 Section 22(1) provides that;

> "Any person who alleges that any of section 4 to 21 (inclusive) of this Constitution has been, is being or 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 to him or her, that person may apply to the High Court for redress.

24.2 Section 22(2) reads;

The High Court shall have original jurisdiction;

a) To hear and determine any application made by any person in pursuance of subsection 1.
b) To determine any question arising in the case of any person which is referred to it in pursuance of subsection (3).
c) and may, make such orders, issue such process and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any provisions of section 4 to 21(inclusive) of this Constitution.

Provided that the High Court may decline to excise its powers under this subsection if it is satisfied that that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."

[25] The key considerations for invocation of section 22 jurisdiction as they appear from a myriad of authorities on the interpretation accorded to this provision are whether; a) a person complains of a violation of human rights entrenched in sections 4-21; b) notwithstanding the fact that there is/are lawfully available action(s) to vindicate such right(s), the person may prima facie apply to the High Court under this provision for redress; c) the proviso under subsection 2 however gives the Court ample power and discretion to decline to excise its powers under this provision.

[26] Before declining to hear a matter pursuant to this proviso, the Court must be satisfied that adequate means of redress for the contravention alleged are available. **Sole v Cullinan NO and Others LAC (2000-2004) 572 at 594. See also Matsoso Ntsihlele v IEC** (supra). This proviso, as I understand is intended to guard against misuse of the constitutional litigation.

[27] I turn now to the facts of the present matter to consider whether the applicant's claim deserves to be entertained under this provision.

[28] The applicant's claim as stated earlier is that; as a result of the judge's failure to render judgement, his rights to fair trial and equal protection of the law have been infringed. It is on the basis of this assertion that he seeks a declaration under prayers 1 to 3. The claim for constitutional damages under prayer 4 is, in my view, ancillary and consequential upon granting the declaratory orders to the effect that his rights have been violated. He asserts that having served the sentence despite his disgruntlement about it and having been subjected to grisly prison conditions for 7 years when he could probably have been released earlier had the judgement been delivered, he is entitled to monetary compensation.

[29] The question that must be answered is whether the means of redress for the alleged violation are or have been available to the applicant. To put it differently, whether there exists a lawful action for the alleged contravention.

29.1 Before determining whether there exists a lawful action for the alleged contravention, I should first point out the deficiencies in the applicant's case formulation, which have a bearing on the determination of the issues before this Court.

[30] Whilst it is common ground that the applicant was charged, convicted and sentenced by the Mafeteng Magistrates' Court as depicted on the record of proceedings filed, this Court has not been favoured with the copy of the review application under scrutiny nor the correspondence to the registrar of this Court inquiring about delivery of the judgement. This, despite the fact that the applicant's case as distillable from his founding affidavit is predicated upon the alleged failure by the judge to pronounce judgement

and the Chief Justice's failure despite several reminders, to come to his rescue. Furthermore, the applicant has not enlightened us about the grounds for review [regard being had to the fact that the applicant was legally represented in the criminal trial]. Equally important is the issue whether the matter was in fact argued in November 2013. This would perhaps be demonstrated by the actual set of heads of argument, or the actual correspondence to the Registrar of the High Court inquiring about the date for delivery of the judgement. He thus relies on his *ipse dixit* in this regard and proffers no explanation for his failure to annex the copies of the application and letters addressed to the Registrar. He has instead attached the notice of motion and its accompanying founding affidavit in CRI/APN/100/2012, which preceded his sentencing. Regrettably, this offers no assistance nor support the applicant's averments in the founding affidavit. This means the evidence supplied is inconclusive that the delay complained of is wholly attributable to the Judge concerned.

[31] I say this because the correspondence attached to this claim only depicts the delay occasioned by his attorney in the prosecution of the review application i.e a letter penned by the Law society's secretary responding to a grievance lodged by the applicant. This correspondence reveals that on the 28th February 2013, he (the applicant) lodged a written complaint to the Law Society about failure of his attorney, Mr. Maieane to pursue his matter. To this grievance, the Law Society through its secretary responded on the 25th March 2013. This letter reads [in relevant parts];

> On the 15th April 2013(sic), we met with Advocate Thethe (your counsel) and Ms Nthabiseng Sebaki at our offices at the High Court.
>
> On that day, advocate Thethe explained in detail, the position regarding your case. She explained that your case is not proceeding due to several reasons related to presiding officers (Magistrates and High Court Judges).
>
> Be that as it may, your case will proceed on the 13th June 2013. On the given date, your counsel <u>will apply for bail on your behalf and your appeal be heard</u>" (underlining mine)

[32] It is implicit in these paragraphs that the applicant's legal representative was to apply for bail pending review in June 2013. It however remains unclear whether he did apply for bail, and if he did, the outcome of the application.

[33] Regard being had to the importance of issues raised by this application; one would have thought that an explanation from the judge concerned would be furnished. Regrettably, we are not favoured with the 1st respondent' reaction to the allegations in the applicant's founding affidavit perhaps enlightening us on difficulties, if any, that hindered the delivery of judgement. Whether this was attributable to workload or other factors, we have not been apprised. I will therefore proceed from the footing that the allegations in the founding affidavit are correct.

[34] I proceed now to consider the validity Mr Letsika's contentions on availability of remedies under the common law, in particular a claim for damages based on *actio injuriarum.*

Common Law remedies and the Doctrine of Judicial Immunity

[35] He contends that *actio injuriarum* would adequately vindicate the applicant's rights having foregone other means of redress that have been available i.e a writ of mandamus, lodging of a complaint with either the Chief Justice or the Judicial Services Commission.

[36] Whilst it is true that in our law of delict, *actio injuriaum* provides a remedy for wrongs to personality, such as harm to the reputation, Mr. Letsika's submissions fell short of addressing the question whether firstly, withholding of a judgement amounts to an actionable wrong, secondly; against whom such an action lies; against the Judge personally or whether the state is vicariously liable for the omission of the Judge.

[37] The applicant's counsel did not similarly address this issue. I endeavour to highlight the pertinence of these aspects in the determination of the issue whether an action for damages is lawfully available at common law for the alleged contravention of rights.

[38] I should start by stating the obvious that Judges in a constitutional democracy are accountable for diligent discharge of their duties and must in this regard strive to expeditiously finalize legal proceedings and deliver judgements, as stated in **Otubanjo** *(supra)* and many other decisions of our Court of Appeal. Sight must, however, not be lost of the common law doctrine of judicial immunity in terms of which a person acting in a judicial or quasi-judicial capacity is not liable for damages in the absence of malice or improper motive, even if he was negligent in the discharge of his/her judicial functions. **Lemena v Potsane LAC (1970-1979) 116 at 119.**

38.1 A judicial officer will not even be criminally responsible for anything done or omitted to be done by him or her in good faith in the exercise of his or her judicial functions. However, acts of dishonesty and criminality are unlawful and can attract both civil and criminal liability. **DPP v Lesupi (supra) para 16**. See also section 21 of the **Penal Code Act 2010**. This protection given to judicial officers is designed to ensure that they carry out their judicial duties fearlessly. See also **Matthews v Young 1922 A.D 492.**

38.2 In **Telematrix (Pty) Ltd v Advertising Standards Authority SA 2006(1) SA 461 @ 469**, the Court stated that;

> "… There is obviously a duty, even a legal duty on a Judicial Officer to adjudicate cases correctly and not to err negligently. That does not mean that a Judicial Officer who fails in the duty, because of negligence, acted wrongfully. Put in direct terms, Can it be unlawful, in the sense that the wronged party is entitled to monetary compensation, for an incorrect judgement given negligently by a Judicial Officer, whether in exercising a

discretion or making a value judgement, assessing the facts or in finding, interpreting or applying the appropriate legal principles? Public or legal policy considerations require that there should be no liability i.e that the potential defendant should be afforded immunity against damages claim, even from 3rd parties affected by the judgement.

[39] More recently, this Court in **Mampeli Marabe v The Ministry of Justice and Others CC 18/20,** relied on this doctrine in dismissing a similar claim for constitutional damages. The underlying facts of the matter are that a Magistrate had committed the applicant therein to prison for contempt committed in the face of Court. The applicant was sentenced to 7 days in prison. Neither the review nor appeal procedure were invoked to challenge the sentence. The applicant subsequently approached this court seeking declaratory orders and constitutional damages.

39.1 Notably, a similar argument was raised that the Court ought to decline jurisdiction under section 22(2) on account of availability of adequate means of redress under the common law.

39.2 In dismissing the applicant's claim, the learned Chief Justice, writing for the Court first examined the issue of sustainability or legal validity of a claim for damages in relation to acts done by a judicial officer at the seat of justice.

39.3 After surveying authorities on judicial immunity, he rejected the qualified immunity and held instead that Judicial Officers (be it judges or magistrates) are absolutely immune from suits of damages in respect of judicial acts. More about the decision later.

[40] The respondents' counsel referred us to no authority to the effect that an omission by a judge to deliver a judgement amounts an actionable wrong. In addition to the case of **Lemena v Potsane** (supra), where a

Court President was sued for negligence in authorising a sale in execution of one of the parties' vehicle, the following are some of the cases from which guidance may be derived for the determination of this issue.

[41] In **Rathoma v Commissioner of Police C of A (CIV) 11/18**, the appellant was a police officer. He was charged, convicted and sentenced to 2 years imprisonment in the Magistrate's Court. Like the applicant in the instant matter, he applied for review of the criminal proceedings immediately after his sentence and judgement thereon was reserved. He served sentence while awaiting a decision of the review application. When the judgement was delivered some 2 years and seven months after he served his sentence, the conviction and sentence were set aside and trial de novo was ordered. Subsequent to the review order, he successfully applied for permanent stay of prosecution, and resultantly reinstated in his employment. He later filed a claim for payment of salary arrears over a period spent in prison and payment of M 200 000.00 "for being in prison". The latter claim was however withdrawn for absence of factual basis. The claim for salary arrears was dismissed by the High Court.

41.1 The Court of Appeal in dismissing the appeal held as follows at para 21;

> "In casu the appellant was incarcerated following the due process of the law. He was charged with bribery and tried, convicted and sentenced by a competent Court. He served a prison sentence as a result if this. Whilst he deserves sympathy arising from the long delay in finalising his review application, sight cannot be lost of the fact that he was not acquitted of the offence charged. On review, the conviction and sentence were set aside on the basis of some irregularity that occurred during the trial and it was ordered that he should be tried afresh. It was then that he applied for permanent stay of prosecution and was successful. Notably he was not absolved of the offence, but it was recognised that trial in those circumstances would amount to a travesty of justice."

[42] In **Letuka v Minister of Justice and Human Rights and Others CC 10/2010[2014] LSHC 45**, the accused person was convicted of attempted murder and robbery and two other charges and sentenced to seven (7) years imprisonment. On the day of his sentencing, he noted an appeal and also applied for bail pending appeal hearing (though refused). He was however unable to prosecute the appeal due to absence of the record of the impugned proceedings. The appeal was not prosecuted until he fully served his sentence. During the period of his imprisonment and after his release, he pursued the hearing of his appeal because he had lost his job as a result of the conviction, sentence as well as the resultant imprisonment.

42.1 In a constitutional case later filed, the applicant contended that he had a constitutional right to appeal against both conviction and sentence. The Court after surveying similarly worded constitutions held that an accused person is entitled as of right to appeal to the High Court in terms of section 130 of the constitution (see also **Marabe**) (supra).

42.2 Mosito AJ (as he then was) held that refusal to provide a copy of judgement infringed an accused person's right to a fair trial within a reasonable time within the context of section 12(3) and that failure by the magistrate to perform his duty amounts to a denial of an accused's right to prosecute his appeal. The Court further stated that it is a violation of the principles of the rule of law for one to serve a sentence when they have lodged an appeal against it.

42.3 On this basis, the Court refused to order a re-trial of the applicant, quashed the conviction and sentence on grounds that he had already served his sentence despite his attempt to have it overturned.

[43] From these two decisions, although the issue under the scrutiny did not arise for determination, it is doubtable in my view, that a claim for damages lies against Judicial Officers be it a Judge or Magistrate or the state for their omissions.

[44] Furthermore, the decision in **Rathoma** (supra), which is to a great extent factually similar to the present matter does not suggest that an applicant would be entitled to damages even if the criminal proceedings giving rise to his imprisonment have successfully been reviewed.

[45] It is for these reasons that I am not persuaded that an action for damages under the common law is available in respect of the Judge's omission under scrutiny. It follows in my view that this Court ought not decline its jurisdiction under section 22.

[46] I turn now to consider whether a right to damages accrue to the applicant directly under section 22. To put it differently, whether the novel claim of constitutional damages is contemplated as one of the means of redress for the alleged breach of his rights.

Constitutional damages

[47] The applicant's basis for this claim is that he excised his constitutional right to review. That this right was rendered hollow by the Judge's failure to deliver judgement in the matter because he has since served the sentence in full. He feels aggrieved that the justice system failed him when he had a good case. The failure inflicted on him emotional and psychological wounds. He thus seeks the monetary compensation for his damaged body and soul.

47.1 He referred us to the case of **Fose v Minister of safety and security 1997(3) SA 786** to submit that such an award is intended to compensate persons who have suffered loss as a result of breach of their rights. He

also cited **MEC for Department of Welfare v Kate 2006(4) SA 478** where the Court dealt with a delay on the part of the Department in considering an application for a social grant.

47.2 He strongly contends that this case demonstrates the state's complete disregard of its constitutional obligations and its failure to uphold individual's rights entrenched in the constitution. Further that it presents an opportunity to frown at the laxity displayed by some Judicial Officers in executing their core functions to protect and uphold rights.

[48] Mr Letsika's contention as stated earlier is that a claim for constitutional damages is not contemplated under section 22, alternatively that, even if it is, no liability for this claim has been established by the pleaded facts.

[49] The issue whether a claim for damages arising from judicial acts or omissions is available was considered by this Court in the matter of **Mampeli Marabe** (supra) as stated earlier. The Court held (at para 23) that the section 22 jurisdiction could not have been created to remedy the exercise of judicial power; that errors committed at the seat of justice are not the type of actions which can be said to contravene sections 4 to 21 of the Constitution so as to invite intervention of the Court under section 22.

[50] I should point out that the reasoning of the Honourable Chief Justice is to a great extent identical to the views expressed by Lord Hailsham in a strong dissenting judgement in **Maharaj v Attorney General of Trinidad and Tobago [1978] 2 ALL ER 670 (PC)**. It will be recalled that the applicant relies on this case to submit that the state is liable in damages for judicial acts of the Judge.

[51] It is appropriate to then consider the judgement in Maharaj. That case concerned a barrister wrongly committed to prison for seven days for

contempt of court by order of the High Court (per Maharaj J). He successfully appealed the conviction and sentence, and consequently claimed monetary compensation on the basis of section 1(a)of the constitution of Trinidad and Tobago (then in force) which read;

> ”1 it is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights;
>
> a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law”’.

51.1 The majority judgement, per Lord Diplock held that whether the impugned order amounted to a contravention depended on whether it was lawful. It held that due process of Law was not followed in committing the Barrister to prison, thus the order was unlawful and amounted to a contravention of section 1(a). In other parts of the judgement, he remarked that;

> …In the second place, no change is involved in the rule that a judge cannot be made personally liable for what he has done when acting or purporting to act in a judicial capacity. The claim for redress under section 6(1) for what has been done by a Judge, is a claim against the state for what has been done in the excise of judicial power of the state. This is not vicarious liability: it is liability of the state itself. It is not a liability at tort at all. It is liability in public law of the state, not of the Judge, which has been created by section 6(1) and (2) of the constitution. [N.B section 6 is substantially similar to our section 22]
>
> Finally,… their Lordships would say something about the measure of monetary compensation recoverable under section 6 where contravention of the claimant’s constitutional rights consists of deprivation of liberty otherwise than by due process of the law. The claim for monetary compensation is not a claim in private law of damages for the tort of false imprisonment, under which the

damages recoverable are not large and would include damages for loss of reputation. It is a claim in public law for compensation for deprivation of liberty alone. Such compensation would include any loss of earnings consequent in the imprisonment and recompense for the inconvenience and distress suffered by the appellant during his incarceration because the appellant has stated that he does not intend to claim what in a case of tort would be called exemplary or punitive damages. This makes it unnecessary to express any view as to whether money compensation by way of redress under section 6 (1) has ever include an exemplary or punitive award.

51.2 In the descending judgement, Lord Hailsham reasoned as follows;

I am of course, not to be understood as suggesting that a notice of motion under section 6 was inappropriate procedure in so far as it claims a declaration. It was in fact an alternative to the appeal to the privy council. It was not as beneficial to the appellant as the appeal to the privy council ultimately proved, as the privy council has jurisdiction to declare (as the High Court probably would not have had) not merely that the appellant had been deprived of due process, but that he was actually innocent of the charge. I am simply saying that, on the view I take, the expression "redress" in subsection (1) of section 6, and the expression "enforcement" in subsection (2), although capable of embracing damages where damages are available as part of the legal consequences of the contravention, do not confer and are not in the context capable of being construed so as to confer, a right of damages where they have not hitherto been available, in this case against the State for the judicial errors of a Judge. This, in my view, must be so even though the Judge has acted as the committing Judge was held to have done in the instant case. Such a right of damages has never existed either against the Judge or against the State and is not, in my opinion, conferred by section 6. (my underlining)

51.3 His comments to which I am also attracted are these;

> I must add that I find it difficult to accommodate within the concepts of the law a type of liability for damages for the wrong of another when the wrongdoer himself is under no liability at all and the wrong itself is not a tort or delict. It was strenuously argued for the appellant that the liability of the State in the instant case was not vicarious, but some sort of primary liability. But I find this equally difficult to understand. It was argued that the State consisted of three branches, judicial, executive and legislative, and as one of these branches, the judicial, had in the instant case contravened the appellant's constitutional rights, the State became, by virtue of section 6 responsible in damages for the action of its judicial branch. This seems a strange and unnatural way of saying that the Judge had committed to prison the appellant who was innocent and had done so without due process of law and that someone other than the Judge must pay for it (in this case the taxpayer). I could understand a view which said that because he had done so the State was vicariously liable for this wrongdoing, even though I would have thought it unarguable (even apart from the express terms of the Crown Liability and Proceedings Act, 1996) that the Judge acting judicially is a servant. What I do not understand is that the State is liable as a principal even though the Judge attracts no liability to himself and his act is not a tort. To reach this conclusion is indeed to write a good deal into a section which begins innocently enough with the anodyne words "for the removal of doubts it is hereby declared".

[52] I have extensively quoted the reasoning in the descending judgement for I find it persuasive on the proper interpretation to be accorded to our section 22. Section 22 should not be construed so as to confer a right to damages where no such a right is available as a result of the breach complained of. It does not create a new type of relief where none exists. what is does is to set out a procedure through which a person whose rights (entrenched in sections 4-21) have been, are being or likely to be contravened, can seek redress under this provision apart from and independent of any action lawfully available to that person.

[53] With greatest deference to the majority judgement, the views expressed by Lord Hailsham commends themselves as being preferable to those expressed by the majority judgement. I therefore entirely agree with the Chief Justice in **Marabe** that section 22 creates no new type of action for damages in respect of an act or omission by a judicial officer (in our case the judge) arising from the performance of judicial functions.

[54] There is one more reason why the majority judgement lends no support to the applicant's claim for damages. It is this. We must bear in mind that in the instant matter, we are dealing with a person who served sentence issued by a court at the conclusion of a trial on the charges which he faced. This factor distinguishes this matter from Maharaj where the barrister's imprisonment was declared to be unlawful and thus unconstitutional because due process had not been followed and the barrister absolved of the charges. The applicant herein, like in **Rathoma**, has not been deprived of his liberty in a manner unauthorised by law, but after due process had been followed. Furthermore, he has not been absolved of the charges.

[55] The conclusion reached under para 53 above is by no means suggesting that judges' failure to diligently perform their constitutional duties in administering justice is without consequences. Litigants are entitled to judgements as soon as reasonably possible and Judges have a duty to promptly pronounce same in cases before them. Failure to do so undermines fundamental rights under section 19 as earlier stated.

[56] South African decisions cited by the applicant are also worthy of comment. It will be observed that none have awarded constitutional damages as solatium for breach of a right or under circumstances similar to the present matter. These cases dealt with situations where remedies in consequence of the breach are available at common law. They do not

similarly advance the applicant's case as they were not dealing with omissions by judicial officers.

56.1 In **Fose v Minister of Safety and Security**, the plaintiff claimed constitutional damages against the state as a result of a series of assaults alleged to have been perpetrated by members of the South African police force acting within the scope of their employment with the defendant. The claim was denied. In holding that there is no room for an award in constitutional damages where common law remedies adequately address a given grievance, Ackermann J, after extensive comparative analysis of foreign caselaw reasoned that constitutional damages are punitive and often times are not deterrent or preventative of human rights violations.

56.2 This approach was adopted in **Komape v Minister of Basic Education and Others Case No. 754/2018 and 1015/18 [2019] ZASCA 192(18th December 2019),** where Leach JA made the following compelling remarks;

> "63 Depending upon the facts and circumstances of any particular case, the approach in awarding constitutional damages to mark displeasure may well be justified in theory, but there are practical considerations as well. The social and political circumstances in Canada, New Zealand, Ireland and other jurisdictions abroad are quite unlike those which pertain in this country. Here there is a chronic shortage of what would in foreign jurisdictions be regarded as basic infrastructure; and here the public purse could be far better utilised for the benefit of many than in paying a handful to persons a substantial sum over and above the damages they have sustained and for which they have been compensated…"

[57] For the reasons advanced under the preceding paragraphs, I am unconvinced that even if the applicant's right to review has been rendered nugatory by the delay/failure to deliver judgement, the claim for the so-

called constitutional damages would succeed. The decision in **Marabe** should therefore not be departed from.

[58] I should not be understood to be saying that the law does not protect individuals against unethical transgressions. There are remedial measures aimed at improving efficiency of the justice system and protection of fundamental rights. Below are examples of measures adopted in other jurisdictions to address the issue of delayed or withheld judgements under circumstances almost similar to the these obtaining in the instant matter.

[59] In **Poswa v President of the Republic of South and Others (2013/30021) [2014] ZAGPJHC 218** (available in Saflii), the Court held that delivery of judgements constitutes one of the core functions of a Judge. Referring to section 34 of their Constitution which provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, an independent and impartial tribunal or forum, it held that the right to have the dispute resolved before a court involves the right to have judgement pronounced upon such dispute. And that without the latter, the entrenched rights would be meaningless and ineffective.

59.1 The case concerned a Judge of the High Court. He delayed in delivering several judgements for periods in excess of twelve months after he heard the cases. In certain instances, the delays extended to two-and six-years. Litigants and or their attorneys lodged written complaints against him for the delays. The complaints were addressed to the head of the Court (the Judge President) of the division. He approached the Judge for explanations regarding the delays in rendering judgements, but eventually when satisfactory responses were not forthcoming, he escalated these complaints to the Judicial Service Commission. The Commission invoked the machinery in their law for impeachment.

[60] Our constitution too, is clear under section 121(3) that a Judge may be removed from office for inability to perform functions of his office, whether arising from infirmity of body or mind or any other cause, or for misbehaviour, in terms of the procedure set out under that provision. The machinery under this provision would only be invoked if the delays are brought to the attention of the Chief Justice and having considered the nature of the complaints, deems it prudent to have a Judge removed.

[61] Harms JA in **Pharmaceutical Society of South Africa and Others v Tshabalala – Msimang and Another NNO 2005 (3) SA 238 (SCA) 260H-262 ©** addressed the issue of delays as follows;

> "There are some who believe that requests for "hurried justice" should not only be used with judicial displeasure and castigation, but the severest censure and that any demand for quick rendition of reserved judgement is tantamount to interference with the independence of judicial officer and disrespect for the Judge concerned. They are seriously mistaken on both counts. First the parties are entitled to enquire about the progress of their cases and, if they do not receive an answer or if the answer unsatisfactory, they are entitled to complain. The judicial cloak is not an impregnable shield providing immunity against criticism or reproach. Delays are frustrating and disillusioning and create the impression that Judges are imperious. Secondly, it is judicial delay rather than complaints about it that is a threat to judicial independence because delays destroy the public's confidence in the Judiciary."

[62] In India too, failure by judicial officers to deliver judgements while parties are languishing in jail has been condemned. In **Anil Rai v the State of Bihar Case No: Appeal (crl) 389 of 1998 (06th August 2001),** judgement on appeal was delivered two years after conclusion of argument. The Supreme Court of India extensively addressed the issues of delay in pronouncement of judgements by the High Court after conclusion of arguments. It resultantly issued guidelines on effective measures that could be evolved in order to slash down the interval between conclusion of

argument and delivery of judgement. The Court remarked as follows in reaching its conclusion in this regard;

> …A quarter of a century has elapsed thereafter, but the situation, instead of improving has only worsened. We understand that many cases remain in the area of judgement reserved for long periods. It is heartening that most of the Judges of the High Courts are discharging their duties by expeditiously pronouncing judgements. It is disheartening that a handful of few are unmindful of their obligation and the oath of office they have solemnly taken as they cause such inordinate delay in pronouncing judgement. It is in the above background after bestowing deep thoughts with a sense of commitment, that we have decided to chalk out some remedial measures to be mentioned in this judgement as instructions.

62.1 The remedial measures include issuance of appropriate administrative directions by the Chief Justice to registries and court officers on filing of case returns reflecting dates of hearing and dates on which judgement had been reserved, how and when attention must be drawn to the respective Judges on outstanding judgements etc.

[63] I must indicate that, these were made against the background that no provision in their law (as is the case in this jurisdiction) prescribes the time within which judgement must be delivered after close of argument. These guidelines were therefore intended to operate until such time as parliament would enact measures to deal with this problem.

The declaratory orders

[64] The last question to be answered is whether the declaratory orders ought to be granted. I think not. On the basis of the conclusion reached on unsustainability of constitutional damages, these orders would not in the circumstances serve any useful purpose. I wish to adopt the remarks of Leach JA in **Komape v Minister of Basic Education and Others (supra)** to the effect that a declarator is most appropriate where it will serve a useful purpose in clarifying or settling legal disputes and to hopefully

prevent new ones from arising. That where conduct is constitutionally invalid, there would be no purpose for any pronouncement to that effect. In the present case, the effect of delayed or withheld justice has been emphasised in a host of decisions by the Court of Appeal. The problem of delayed judgements would not therefore be overcome by a declaratory order. It is in my view open to the Chief Justice on his administrative side to make strides to curb delays by perhaps issuing directives intended to improve efficiency of justice. Delays in delivery of judgement can also be curbed through legislative intervention fixing time frames for delivery of same.

Conclusion

[65] From the foregoing discussion, the applicant's case must be dismissed. While it is undeniable that it is incumbent upon all judicial officers to promptly solve cases before them as soon as reasonably practicable; failure to do so, does not however give a right of damages to litigants as earlier stated, but the law affords protection of rights in various other ways, which avenues the applicant forewent. One other remedy which he also was clearly aware of, apart from the complaints procedure, was to seek his release on bail during the pendency of the review hearing in order to protect / vindicate his right to liberty at an earlier stage, which he opines he could have enjoyed had the review application been determined within a reasonable time. It will be recalled that the Law society's response to the applicant's grievance suggests that this was to be made in June 2013. He has therefore failed to establish that he did not have an opportunity throughout the period of his incarceration to so apply or that he applied for bail but denied same. He cannot therefore complain that the law afforded him no protection when he failed to enforce his rights or to secure liberty during the pendency of the hearing and rendition of judgement.

Order

[66] In the result, the following order is made;

The application is dismissed with no order as to costs.

P. BANYANE
JUDGE

I agree

T. MONAPATHI
JUDGE

I agree

E.F.M. MAKARA
JUDGE

For Applicant: Advocate Letompa

For Respondents: Mr Letsika