LESOTHO

REPORTABLE

IN THE HIGH COURT OF LESOTHO

Held at Maseru

CONSTITUTIONAL CASE NO.18/2020

In the matter between:

'MAMPELI MARABE	**APPLICANT**
And	
THE MASERU MAGISTRATES' COURT (PRESIDED BY HER WORSHIP M.G.P. McPHERSON)	**1ST RESPONDENT**
THE CLERK OF COURT MASERU MAGISTRATES' COURT	**2ND RESPONDENT**
MOKHETHEA MARABE	**3RD RESPONDENT**
THE DIRECTOR OF PUBLIC PROSECUTIONS	**4TH RESPONDENT**
THE MINISTRY OF LAW AND CONSTITUTIONAL AFFAIRS AND HUMAN RIGHTS	**5TH RESPONDENT**
THE SPEAKER OF THE NATIONAL ASSEMBLY	**6TH RESPONDENT**
THE PRESIDENT OF SENATE	**7TH RESPONDENT**
THE ATTORNEY GENERAL	**8TH RESPONDENT**

Neutral Citation: Marabe v. Maseru Magistrates' Court (Presided by Her Worship M.G.P. McPherson) And Others (Constitutional Case No.18/2020) LSHC Cons 51 (07 June 2021)

CORAM:	**S.P. SAKOANE CJ.**
	K.L. MOAHLOLI J.
	P. BANYANE J.
HEARD:	**16 MARCH 2021**
DELIVERED:	**07 JUNE 2021**

SUMMARY

Constitutional law – punishment contempt of court – claim for constitutional damages against a Magistrate – judicial immunity against civil claims – whether claim for constitutional damages sustainable – availability of other remedies to correct wrong punishment for disobedience of court orders – Constitution, 1993 sections 6 (1) (b)-(c); Subordinate Court Act No.9 of 1988 section 73.

ANNOTATIONS:
CASES CITED:

LESOTHO
Lemena v. Potsane And Another LAC (1970-79) 116
Lerotholi Polytechnic And Another v. Lisēnē LAC (2009-2010) 397
Maseru United Football Club v. Lesotho Sports Council & Others (Mthembu & Others) 1981 (2) LLR 527 (H.C)

ENGLAND
McC v. Mullan and others [1984]3 AllER 908 (H.L)

NAMIBIA
Hannah v. Government of the Republic of Namibia 2000 (4) SA 490 (NmLC)
Visagie v. Government of the Republic of Namibia and others (2019)46 BHRC 614 (NmSC)

SOUTH AFRICA
Fakie NO v. CC II Systems (Pty) Ltd 2006 (4) SA 326 (SCA)
Pheko and Others v. Ekurhuleni Metropolitan Municipality (No.2) 2015 (5) SA 600 (CC)

UNITED STATES OF AMERICA
Oppenheimer v. Ashburn 173 Cal. Ct. App. 2d 624 (1959)
Stump v. Sparkman 435 US 349 (1978)

ZIMBABWE

Paradza v. Minister of Justice, Legal and Parliamentary Affairs And Others (68/03) [2003] ZWSC 46 (16 September 2003)

S v. Benatar 1984 (3) SA 588 (ZSC)

STATUTES:

Children's Protection and Welfare Act No.7 of 2011

Constitution of Lesotho, 1993

Penal Code Act No.6 of 2010

Subordinate Courts Act No.9 of 1988

BOOKS:

Geoffrey Robertson QC (2012) *Crimes Against Humanity 4th Edition* (Penguin Books)

J. van Zyl Smit, *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (Bingham Centre for the Rule of Law)

JUDGMENT

SAKOANE CJ:

I. INTRODUCTION

[1] This case turns on the correct procedure and standard of proof in proceedings for contempt *ex facie curiae,* the remedies available to a contemnor who is aggrieved thereby and whether a civil claim for damages against a Magistrate is permissible in law where the wrong procedure is followed in convicting and sentencing a contemnor. The remedies for wrongful conviction and procedural impropriety are well known in law. They are to either appeal against the verdict and sentence or review of the proceedings. These remedies are provided for under sections 119 (1) and 130 of the Constitution of the Kingdom. That is where the matter would rest but for the applicant's claim for constitutional damages against the learned Magistrate who imprisoned her for wilful disobedience of a court order regulating visitation rights of the applicant and her ex-husband in relation to their child.

Relief

[2] The applicant is before us seeking the following prayers:

> "(a) A *declarator* that the **Subordinate Court** has no civil jurisdiction to summarily commit any person to prison over contempt of court committed ***ex facie curiae.***

(b) A *declarator* that Contempt of Court is a criminal offence liable to be adjudicated by (sic) Magistrate upon a formal criminal charge being presented and with all the attendant criminal procedures plus the standard of prove (sic) **"beyond reasonable doubt"**.

(c) That the imprisonment of the Applicant is unconstitutional *inter alia* by reason of usage of a lower standard of prove (sic) i.e. "balance of probabilities" instead of a higher standard of prove (sic) i.e. "beyond reasonable doubt" in violation to her rights to fair trial, liberty and dignity.

(d) That Applicant be awarded **M500,000.00** as Constitutional damages for violation of her fair trial rights, liberty and incidental rights and freedoms.

(e) A *declarator* that section 5 of the **Government Proceedings and Contracts Act** No.4 of 1965 is unconstitutional (sic) in violation of Applicant's right to **"appropriate and effective remedy"**.

(f) That 6th and 7th Respondent (sic) be directed to promulgate the substantive law regulating and limiting the execution and/or attachment of government's property in a manner consistent with the constitution.

(g) That Applicant be granted further and/most **"appropriate and effective relief"** per section 22 (2) (b) of the Constitution as the Court may deem fit.

(h) That Respondents pay costs of this Application."

[3] During oral argument, Mr. *Sehapi* for the applicant, abandoned prayers (e) and (f) thereby effectively withdrawing the attack on the constitutional validity of section 5 of the **Government Proceedings and Contracts Act No.4 of 1965** and releasing the Executive and Parliament from the obligation to repeal and replace it with another law. Thus, the suit was narrowed down to be against the learned Magistrate, the Clerk of Court, the husband of the applicant as well as the Director of Public Prosecutions.

[4] I observe, *en passant*, that the Ministry, instead of the Minister of Justice is cited. I consider it to be improper to cite a Ministry and not its political or administrative head because the Ministry is not a legal *persona* against whom an order would be executable. The political and administrative heads and other executive functionaries of a Ministry are the persons to be sued so that they can be cited for contempt of court if a court order is disobeyed. It is important to make this point because there is a growing trend to cite Ministries in litigation instead of persons with the legal responsibilities to discharge the functions of the Ministries.

II. MERITS

The facts

[5] The facts are a matter of court record, simple and straightforward. The applicant and her husband got divorced in 2018. On 18 September 2019, the learned Magistrate, sitting as a Children's Court in terms of section 133 of the **Children's Protection and Welfare Act No.7 of 2011**, made an order regulating access and custody of their minor child. The order reads as follows:

> "Plaintiff (i.e. applicant) is granted access to her minor child on long weekends and school vacations. They will interchange. The parent who does not live with the child always has access to the said child. They are ordered to communicate about this child and always act in the best interest (sic) of the said child."

[6] On 25 October 2019, the husband appeared before the Children's Court to complain about the applicant's insults to him and the child-minder and further that the applicant does not observe the court order. The court then phoned the applicant who answered that she would avail herself in court on 30 October.

[7] Come 30 October, the husband appeared in court, but the applicant didn't. A decision was made to issue a warrant for her arrest "to come and show cause why she cannot be sentenced for contempt of court." However, the Clerk of Court did not cause the service of the bench warrant but instead took the initiative to again call the applicant who promised to appear before Court on 11 November.

[8] On 11 November, the applicant honoured her promise. The warrant for her arrest was thereby cancelled. The husband aired his complaint about the fact of the applicant failing to bring back the child on a Sunday and only bringing the child on a Monday afternoon and leaving the child without any explanation for her behaviour. The applicant tendered an apology.

[9] Fast forward to 1 October 2020. The husband appeared before court to once more complain that the applicant had refused to bring back the child

when she was supposed to have done so and had also told him that he could only have access if he brought his parents to meet her parents. A second bench warrant was issued to arrest and bring the applicant to court for her to show cause why she could not be committed for contempt.

[10] On 6 October, the applicant was brought before court under arrest. She was "asked to give reasons why she cannot be committed to prison for contempt of court for not bringing the child back until she was on the 3rd week yet she was supposed to have brought her back a week ago". Her answer was that "she did not bring the child back because she liked". The court asked whether she was sure of the answer and she answered by saying "yes, it is not by mistake". The court unhesitatingly ruled that she be committed to prison for seven days to be released upon purging her contempt.

[11] In finding the applicant guilty for contempt, the learned Magistrate reasoned as follows:

> "The court arranged that the parties will interchange with the child fortnightly. This arrangement has been working well for months until plaintiff disrupted it by not bringing back the child until it was a third week. Upon being asked by the court why she did not bring the child at the time agreed, she answers the court that 'she did not bring the child because she liked' with all sarcasm on her face. Even after she was given yet another chance by the court to answer and remember she was in court, she still disrespected the court saying that whatever she said was not by mistake. Plaintiff was called in to show cause why she cannot be committed for contempt of court. Her reply is not satisfactory

to the court. Her sarcastic answers shows (sic) that she does not respect the honourable court. She blatantly defied its order as she is contemptuous."

[12] On 8 October, the applicant appeared in court to purge her contempt. She apologized for the manner in which she had spoken in court. The court forgave her and ordered her release from prison "with immediate effect".

[13] It is on the conspectus of these facts that the applicant comes before us asking that we declare:

13.1 That the Children's Court has no civil jurisdiction to summarily commit her to prison for contempt *ex facie curiae*.

13.2 That contempt is a criminal offence to be adjudicated only on the basis of a formal criminal charge instituted by the Director of Public Prosecutions which must be proved beyond a reasonable doubt.

13.3 That absent a charge by the Director, her committal to prison on proof on balance of probabilities violated her rights to fair trial, liberty and dignity.

13.4 That she be awarded constitutional damages of M500,000.00 for the wrongful conviction and imprisonment.

Issues

[14] Three issues arise for determination. The first is whether a Magistrate possesses judicial power to punish disobedience of a civil order. The second is whether, committal for contempt of court can be violative of the constitutional rights to fair trial, liberty and dignity to warrant a claim for damages. The third is whether judicial immunity covers the learned Magistrate.

Contempt law and procedure

[15] The authority of the Judiciary to enforce compliance with its orders by imprisonment is inherent from its constitutional role as the guardian of the Constitution underpinned by the rule of law. Disobedience of orders of the courts strike at the very heart of the rule of law and engenders self-help and lawlessness. Hence the Constitution grants power to the courts to punish any private actor or state-actor adjudged guilty of disobeying a court order and to secure compliance with legal obligations. The jurisdiction to so act is provided for in Section 6 (1) (b)-(c) of the Constitution which reads as follows:

"**Right to personal liberty**

6(1) Every person shall be entitled to personal liberty, that is to say, he shall not be arrested or detained save as may be authorised by law in any of the following cases, that is to say -

(a) .....

(b) in execution of the order of the court punishing him for contempt of that court or of a tribunal;

(c) in execution of the order of a court made to secure the fulfilment of any obligation imposed on him by law".

[16] Because wilful disobedience of, or non-compliance with, court orders undermines the authority, dignity and effectiveness of courts, judicial officers have authority to initiate contempt proceedings *mero motu*. When acting *mero motu*, there are no hard and fast rules save that there be observance of the rules of natural justice, that is to say, sufficient time should be afforded between the date of service of the order and the date of appearance to allow the person called to reply to prepare his case, seek legal advice and be legally represented if he so wishes: **Maseru United Football Club v. Lesotho Sports Council & Others (Mthembu & Others)** 1981 (2) LLR 527 (H.C).

[17] A recent exposition of the law of contempt of court is made by the Constitutional Court of South Africa in **Pheko and Others v. Ekurhuleni Metropolitan Municipality (No.2)** 2015 (5) SA 600 (CC). I, with respect, adopt the exposition and beg leave to quote from the relevant paragraphs:

"[28] Contempt of court is understood as the commission of any act or statement that displays disrespect for the authority of the court or its officers acting in an official capacity. This includes acts of contumacy in both senses: wilful disobedience and resistance to lawful court orders. This case deals with the latter, a failure or refusal to comply with an order of court. Wilful disobedience of an order made in civil proceedings is both contemptuous and a criminal offence. The object of contempt proceedings is to impose a penalty that will vindicate the court's honour, consequent upon the disregard of its previous order, as well as to compel performance in accordance with the previous order.

[29] The courts' treatment of contempt has been developed over the years. Under the common law, there are different classifications of contempt: civil and criminal, *in facie curiae* (before a court) or *ex facie curiae* (outside of a court). The forms of contempt that concern us here, namely those occurring outside of the court, could be brought before court in proceedings initiated by parties, public prosecutors or the court acting of its own accord (*mero motu*).

[30] The term civil contempt is a form of contempt outside of the court, and is used to refer to contempt by disobeying a court order. Civil contempt is a crime, and if all of the elements of criminal contempt are satisfied, civil contempt can be prosecuted in criminal proceedings, which characteristically lead to committal. Committal for civil contempt can, however, also be ordered in civil proceedings for punitive or coercive reasons. Civil contempt proceedings are typically brought by a disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour. However, under the discretion of the presiding officer, when contempt occurs a court may initiate contempt proceedings *mero motu*.

[31] Coercive contempt orders call for compliance with the original order that has been breached as well as the terms of the subsequent contempt order. A contemnor may avoid the imposition of a sentence by complying with a coercive order. By contrast, punitive orders aim to punish the contemnor by imposing a sentence which is unavoidable. At its origin the crime being denounced is the crime of disrespecting the court, and ultimately the rule of law.

[32] The pre-constitutional dispensation dictated that in all cases, when determining contempt in relation to a court order requiring a person or legal entity before it to do or not to do something (*ad factum praestandum*), the following elements need to be established on a balance of probabilities:

(a) the order must exist;

(b) the order must have been duly served on, or brought to the notice of, the alleged contemnor;

(c) there must have been non-compliance with the order; and

(d) the non-compliance must have been wilful or *mala fide*.

.....

[35] After surveying the remaining case law, international sources and the arguments of either side, *Fakie* **[Fakie NO v. CCII Systems (Pty) Ltd** 2006 (4) SA 326 (SCA)]concluded that this standard for a finding of contempt where committal is the sanction is not in keeping with constitutional values and that the standard should rather be beyond a reasonable doubt. Despite the fact that it is acknowledged that this mechanism (especially when employed by civil litigants) retains its civil character, the possibility of imprisonment requires the importation of protections.

[36] These protections are mandated by the Constitution. However in importing them we must be cognisant of the context of contempt proceedings: respondent in contempt proceedings, *Fakie* said, is not an 'accused person' as envisioned by section 35 of the Constitution, and the protections afforded to a contemnor should not supersede the capacity of a non-state litigant who may not have the administrative might to establish motive. Therefore, the presumption rightly exists that when the first three elements of the test for contempt have been established, *mala fides* and willfulness are presumed unless the contemnor is able to lead evidence sufficient to create reasonable doubt as to their existence. Should the contemnor prove unsuccessful in discharging this evidential burden, contempt will be established.

[37] However, where a court finds a recalcitrant litigant to be possessed of malice on balance, civil contempt remedies other than committal may still be employed. These include any remedy that would ensure compliance such as declaratory relief, a mandamus demanding the contemnor to behave in a particular manner, a fine and any further order that would have the effect of coercing compliance.

.....

[42] While courts do not countenance disobedience of judicial authority, it needs to be stressed that contempt of court does not consist of mere disobedience of a court, but of the contumacious disrespect for judicial authority. On whether this Court should

> make a civil contempt order against the Municipality, it is necessary to consider whether, on a balance of probabilities, the Municipality's non-compliance was born of willfulness and *mala fides*.
>
> .....
>
> [47] When a court order is disobeyed, not only the person named or party to the suit but all those who, with the knowledge of the order, aid and abet the disobedience or wilfully are party to the disobedience are liable. The reason or extending the ambit of contempt proceedings in this manner is to prevent any attempt to defeat and obstruct the due process of justice and safeguard its administration. Differently put, the purpose is to ensure that no one may, with impunity, wilfully get in the way of, or otherwise interfere with, the due course of justice or bring the administration of justice into disrepute."

[18] Every Magistrate's Court is a Children's Court. As such, disobedience or neglect to comply with its orders is a criminal offence for which it has jurisdiction to punish in terms of section 73 of the **Subordinate Courts Act No.9 1988.** The section reads as follows:

> "A person who wilfully disobeys or neglects to comply with any order of a subordinate court is guilty of a contempt of court and shall, upon conviction, be liable to fine of M500 or, in default of payment, to imprisonment for a period of 6 months or to such imprisonment without the option of a fine".

[19] This section creates a statutory offence which a Magistrate can deal with at the instance of a judgment creditor without the necessity of intervention by the Director of Public Prosecutions: **S v. Benatar** 1984 (3) SA 588 (ZSC).

[20] I have underscored the words "any order" in the section to indicate their breadth in the coverage of the specie of orders whose disobedience or neglect to comply with constitute contempt of court. Thus, punishment for contempt applies both to orders *ad factum praestandum* (i.e. orders to do or not to do something) and orders *ad pecuniam solvendam* (i.e. orders for the payment of money): **Lerotholi Polytechnic And Another v. Lisēnē** LAC (2009-2010) 397 paras [8] and [11].

[21] The rationale outlined in *Fakie* and *Pheko* (supra) for punishing wilful non-compliance with an order made in civil proceedings on the criminal standard of proof beyond reasonable doubt has been adopted by the Court of Appeal in **Lerotholi Polytechnic** (supra). At para [12] Scott JA said the following:

> "...It was also pointed out that in the hands of a private party, 'the application for committal for contempt is a peculiar amalgam, for it is a civil proceeding that invokes a criminal sanction or its threat (para 8).' The court, therefore, concluded that while the respondent was not 'an accused person', the applicant was nonetheless obliged to prove the requisites for contempt (a wilful and *mala fide* non-compliance) beyond reasonable doubt. This meant in effect that once the applicant had proved the order, service or notice, and non-compliance, the respondent bore the evidential burden of establishing a reasonable doubt as to whether the non-compliance was wilful and *mala fide*: (para 42)."

[22] It follows that if the court fails to follow the proper procedure or applies the wrong standard of proof resulting in a wrongful conviction and punishment for contempt of court, the aggrieved contemnor has the right

of review or to appeal to the High Court under sections 119 (1) and 130 of the Constitution respectively. In my respectful opinion, these appellate and review procedures are constitutional avenues for adequate redress to set right whatever goes wrong during contempt proceedings.

[23] These review and appellate procedures do not serve as alternative, parallel or substitute jurisdiction for the section 22 jurisdiction to remedy extra-curial violations of Chapter II fundamental rights and freedoms by private persons or executive and administrative functionaries. The section 22 jurisdiction could not have been created to remedy wrongs done at the seat of justice because errors committed in the exercise of judicial power are not of the type of actions which can be said that they contravene sections 4 to 21 of the Constitution as to invite the intervention of this Court under section 22. This proposition of law is portentous for judicial immunity.

Judicial immunity

[24] The aforegoing discourse brings me to the issue of if and when judicial immunity against civil claims avails Magistrates for negligent and wrongful exercise of judicial power.

[25] Section 118 vests judicial power in the courts of the Kingdom irrespective of their rank in the judicial hierarchy. In the exercise of such power, courts

are independent, free and must be free from interference but subject only to the Constitution and other law. Section 6 (1) (b)-(c) empowers courts to punish for contempt. The legal propositions from these two sections are clear:

25.1 Judicial power is exercised independently and freely.

25.2 The independence and freedom to exercise judicial power is subject only to the Constitution and the law.

25.3 Punishment for contempt of court is a constituent part of judicial power.

[26] Judicial immunity *ratione materiae* covers actions done in the exercise of judicial power. The question is whether litigant can sue a judicial officer for a wrongful exercise of judicial power. The current jurisprudence on judicial immunity against civil claims for wrongful exercise of judicial power is that judicial immunity applies on a qualified basis for subordinate judicial officers such as Magistrates and on an unqualified or absolute basis for judges of superior courts. In **Lemena v. Potsane And Another** LAC (1970-79) 116 Smit JA enunciated judicial immunity as follows (at p.118G-H):

> "Provided the person acted in a *bona fide* manner the fact that he was negligent would not result in losing the protection of this section [on judicial immunity for officers of Central and Local Courts]. But if it did, then first respondent would still not be liable for any negligence. As an officer of the court he acted in a *quasi*-judicial capacity, in ordering the sale of the car. The common law is quite clear that a person acting in a judicial or quasi-judicial capacity as first respondent did in this matter, is not liable for negligence, in the absence of malice or improper motive."

[27] Accordingly, judicial immunity does not avail a judicial officer if, in the exercise of judicial power, is actuated by malice or improper motive. Thus stated, the judicial officer would be abusing judicial power and for that reason, an action for damages would lie.

[28] The rationale for the common law rule of qualified immunity has in recent times been expatiated on by the Supreme Court of Namibia in **Visagie v. Government of the Republic of Namibia and others** (2019) 46 BHRC 614 to be:

> "[79] ... *Mala fides*, fraud and malice constitute a perversion of justice. Those are vices that are unrelated to the judicial function. It is the acceptance that the perversion of justice is not in the furtherance of the judicial function that the common law assigned personal liability to the aberrant judicial officer and not to the State. It amounts to a deliberate abuse of the exalted judicial office for unlawful ends which would not have been in the contemplation of the State when it appointed the now rogue judicial officer.
>
> [80] For example, taking a bribe to benefit one litigant to the prejudice of another. Or using the judicial office to settle a score with an opponent: if a magistrate harbours a grudge against a neighbor who is unaware of it, when she comes before him on a traffic citation, and the magistrate chooses out of improper motives not to recuse himself, and sentences the neighbor to a term of imprisonment as a vengeance where ordinarily a fine is imposed, what is the public policy justification for extending liability to the State?"

[29] In its historical evolution and development by judges, the common law rule of qualified immunity operates against judicial officers in subordinate courts of limited jurisdiction and not judges of superior courts of unlimited jurisdiction. Judges of superior courts of unlimited jurisdiction have unqualified or absolute immunity. In England, where the common law rule of qualified immunity originates, it has been discarded by the judges but continues to operate legislatively. In his speech in **McC v. Mullan and others** [1984] 3 All ER 908 (H.L) at 916 a-g, Lord Bride gave the following reasons for discarding the rule:

> "... It is, of course, clear that the holder of any judicial office who acts in bad faith, doing what he knows he has no power to do, is liable in damages. If the Lord Chief Justice himself, on the acquittal of a defendant charged before him with a criminal offence were to say, 'That is a perverse verdict,' and thereupon proceed to pass a sentence of imprisonment, he could be sued for trespass. But, as Lord Esher MR said in *Anderson v Gorrie* [1895] I QB 668 at 670:
>
> > '...the question arises whether there can be an action against a judge of a Court of Record for doing something within his jurisdiction, but doing it maliciously and contrary to good faith. By the common law of England, it is the law that no such action will lie.'
>
> The principle underlying this rule is clear. If one judge in a thousand acts dishonestly within his jurisdiction to the detriment of a party before him, it is less harmful to the health of society to leave that party without a remedy than that nine hundred and ninety-nine honest judges should be harassed by vexatious litigation alleging malice in the exercise of their proper jurisdiction.
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> If the old common law rule was different in relation to justices of the peace, I suspect the different rule has its origins in society's view of the justice, reflected in Shakespeare's plays, as an ignorant buffoon. How long this view persisted and how long there was any justification for it, I am not a good enough legal or social historian to say. But it clearly has no application whatever in today's world either to stipendiary magistrates or to lay benches. The former are competent professional judges, the latter citizens from all walks of life, chosen for their

> intelligence and integrity, required to undergo some training before they sit, and advised by legally qualified clerks. They give unstinting voluntary service to the community and conduct the major part of the criminal business of the courts. Without them the system of criminal justice in this country would grind to a halt. In these circumstances, it would seem to me a ludicrous anachronism that, whilst a judge sued for an act within his jurisdiction alleged to have been done maliciously is entitled to have the proceedings dismissed in limine, a magistrate, in the like case, should have to go to trial to defend himself against the accusation of malice. It follows that, in my opinion, the old common law 'action on the case as for a tort' against justices acting within their jurisdiction maliciously and without reasonable and probable cause no longer lies."

[30] Commenting on the need for repeal of those statutes that retain the common law rule, Lord Templeman said (at p.929 c-d):

> "This appeal demonstrates that the time is ripe for the legislature to reconsider the liability of a magistrate and the rights of a defendant if an unlawful sentence results in imprisonment. There is no liability on a judge of the High Court acting as such and no right for a defendant to damages for an unlawful sentence imposed by a High Court judge; harm may be prevented or cut short by bail and an appeal procedure which results in the sentence being quashed."

[31] I do not discern any cogent reason for retention of this common law rule of qualified immunity for magistrates and other subordinate judicial officers. Section 118 confers judicial power on all courts irrespective of their position in the judicial hierarchy and obliges the Government to accord them assistance they require to protect their independence, dignity and effectiveness subject to the Constitution or any other law. Although the Constitution is silent on the availability of judicial immunity, there is, in my respectful view, no warrant for judicial immunity to operate on a

qualified basis in respect of courts subordinate to the High Court. After all, judges and magistrates perform the same constitutional function of administering justice, albeit at different levels and with diverse jurisdictions. If a litigant cannot sue a judge for anything done at the seat of justice, whether within or without jurisdiction, why should it be different for a magistrate or a tribunal exercising judicial power? The common law rule of qualified immunity enunciated in *Lemena* is, in my respectful view, not in sync with the constitutional value of equal protection of the law. It accords unequal protection to judicial officers.

[32] It is unlike section 21 of the **Penal Code** which provides for judicial immunity from criminal prosecution for judges and other judicial officers alike. The section provides that:

> "**Judicial immunity**
> 21. Except as expressly provided by this Code, a judicial officer is not 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, although the act done is in excess of his or her judicial authority or although he or she is bound to do the act omitted to be done."

[33] There are no further express exceptions and qualifications provided for anywhere else in the **Penal Code**. There is nothing to suggest that the exercise or omission in the exercise of judicial power in bad faith is a criminal offence. This is of no surprise because the exercise or omission to exercise judicial power in bad faith are subject to correction by review

or appeal. It is inconceivable that the Director of Public Prosecutions, who is an executive officer, would disavow invocation of review and appellate procedures in favour of criminal prosecution. That said however, judicial immunity does not avail a judicial officer to commit an act of dishonesty or criminality:

> "32.17 The most straightforward case is that of judges who commit acts of dishonesty or criminality, for example by accepting a bribe. Setting aside their decisions would be a wholly inadequate response as it is not unlikely that such judges would persist in their behaviour, which is the antithesis of independence and impartiality but is often hard to detect. Even if a judge is not enmeshed in wrongdoing of this magnitude, other forms of misconduct may also damage public trust in the judiciary which is essential to its ability to uphold the rule of law in the long run. An example might be blatant expressions of prejudice that are considered reprehensible in society, albeit not so severe as to incur criminal liability.": J. van Zyl Smit, (2015) *The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice* (Bingham Centre for the Rule of Law) p.87; **Paradza v. Minister of Justice, Legal and Parliamentary Affairs And Others** (68/03) [2003] ZWSC 46 (16 September 2003).

[34] In the United States of America, the Supreme Court has held that unqualified immunity operates in all suits brought against judges even if the exercise of judicial power is done maliciously or corruptly and deprives a person of his civil rights guaranteed by the **Civil Rights Act of 1871** (42 USCS§1983). If civil claims were to be maintained against a judge because a losing party sees fit to allege that the acts of the judge were done with partiality, malice or corruptly, the protection of judicial independence would be entirely swept away. Hence, the law provides litigants with the

extra-judicial remedy to lay complaints before the appointing authority for investigation and impeachment: **Stump v. Sparkman** 435 US 349 (1978).

[35] Qualified immunity is also out of kilter with principles of international law in which unqualified immunity has gained ground. Judicial immunity is accepted by various international bodies as an organizing principle for the protection for judicial officers:

35.1 The African Commission's **Principles and Guidelines on the Rights to a Fair Trial and Legal Assistance Africa (2003)** provides in para 4 (n) that:

> "Judicial officers shall not be:
> 1. liable in civil and criminal proceedings for improper acts or omissions in the exercise of their judicial functions;"

35.2 **The United Nations Basic Principles on the Independence of the Judiciary (1985)** states in principle 16 that:

> "Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions."

35.3 **The Burghouse Principles on the Independence of the International Judiciary** provides in principle 5.1. that:
"Judges shall enjoy immunities equivalent to full diplomatic immunities, and in particular shall enjoy immunities from all claims arising from the exercise of their judicial function."

[36] There is, therefore, international consensus that judicial officers must, regardless of their rank in the judicial hierarchy, be protected from civil claims and criminal prosecutions for improper acts and omissions in the

exercise of judicial power. The threat of civil claims and criminal prosecutions should not be allowed to hang over the heads of judicial officers like swords of Damocles. As succinctly put by the California Court of Appeal in **Oppenheimer v. Ashburn** 173 Cal. Ct. App. 2d 624 (1959):

> "[7] ... The process of judgment cannot be objective if it is weighted so that when rendered one way the judge is immune and, in the opposite way, subject to suit. Objectivity is not a quality that can be strained and baited; it cannot be subjected to a rewarded immunity if exercised to grant a writ and to a five thousand dollar penalty if a writ 'after a proper application' is refused. Independence of judgment cannot truly survive the impediment of reward and punishment. The judge who must choose between a decision that leads to safety and one that may mean personal monetary loss is not a free judge.
>
> History tells that tragedy marks the loss of an independent judiciary. The subservient judge is the sad servant of totalitarianism. Correlatively, democracy demands and ultimately survives by the judge who cannot be controlled."

[37] Absolute judicial immunity, equalizes the protection and enjoyment of judicial independence for judges of superior courts and other judicial officers of subordinate courts. The appropriate redress for a litigant for acts of a "rogue judicial officer who perverts the cause of justice" is to lay a complaint with the appointing authority for appropriate action. If the complaint warrants an investigation, a tribunal can be appointed to ascertain the facts and recommend appropriate disciplinary sanction or removal from office. This constitutes a complete answer to dealing with problematic judicial officers who pervert the cause of justice.

[38] However, it must be acknowledged that investigating such a complaint is without some difficulties as observed by *Geoffrey Robertson* QC:

> "The real problem is that there is no way to detect whether a judge, or a court of judges, has made a perverse decision in order to curry favour with a government other than by close and expert analysis of the decision itself. This is easier when the intellectual dishonesty involves bending rules of law, but is more difficult to uncover if it has involved twisting the facts that the judge had to 'find' by believing or disbelieving witnesses. In other words, the bias of a good bad judge is very difficult to detect.
>
> What can be done to detect the judicial lickspittle, when the pro-government pressure under which he or she has buckled is secret, or psychological, or generated by ambition or hope for post-retirement reward? The first step, namely analysing for perverse judgments in favour of the executive, must obviously depend upon their accessibility, and many even at appeal level are not officially reported. Publicity, as Jeremy Bentham pointed out, is a precondition of justice: 'it keeps the judge, whilst trying, under trial'. The IBA, in conjunction with the UN and interested foundations, could help by fostering the electronic availability of judgments. It should be a duty on states to ensure that all final judgments are publicly reported, or at least available to the public if requested – a matter essential to checking judicial independence but overlooked both by the IBA minimum standards and by the UN principles. Secret or 'in chamber' judgments can be a vehicle for criminality: these were used by the corrupt Malaysian judges recently exposed as having conspired with lawyers to favour their clients. A right of public access to unreported judgments is the first step in identifying judges who are actually or intellectually corrupt.
>
> Then, expert analysis of the suspect judgment is essential if perversity is to be exposed. The UN Rapporteur on Judicial Independence should undertake research into the quality of the jurisprudence of courts suspected of truckling to governments. A great deal of aid money is spent on judicial training, and indeed on judicial networking, but very little on assessing judicial performance and identifying cases where facts have been ignored or twisted, or rules of law misstated or bent, to reach politically convenient conclusions.": Crimes Against Humanity 4th ed (Penguin) pp 162-163

State Liability?

[39] The question of vicarious liability for the Crown for wrongful and harmful decisions by judicial officers has been answered in a way I consider satisfactory: A judge or magistrate is not a servant of the Government. There is no master-servant relationship between a judicial officer and the Crown. The doctrine of vicarious liability is inapplicable because in administering justices, judges and magistrates do not act on orders or instructions from the Crown nor are they subject to the Crown's supervision and control: **Hannah v. Government of the Republic of Namibia** 2000 (4) SA 490 (NmLC); **Visagie** (supra).

III. DISCUSSION

[40] The applicant's counsel advances the following propositions:

40.1 A Magistrate's Court does not have jurisdiction to punish any disobedience of its orders except upon a prosecution by the Director of Public Prosecutions.

40.2 Imprisonment for contempt *ex facie curiae* without a formal charge by the Director is unlawful.

40.3 Absent prosecution by the Director, the applicant's right to liberty was unlawfully taken away by her being imprisoned.

40.4 Constitutional damages are in order as the only appropriate and effective relief for wrongful conviction and imprisonment.

[41] Per contra, Crown counsel advances the following propositions:

41.1 "Civil contempt" proceedings can be instituted by a private litigant or judgment creditor. It is a civil proceeding that invokes a criminal sanction.

41.2 A Magistrate's Court has jurisdiction under section 73 of the **Subordinate Courts Order, 1988** to punish by imprisonment disobedience of its orders.

41.3 Constitutional damages are not the kind of redress provided for under section 22 of the Constitution.

41.4 The applicant had adequate means of redress to institute review of the proceedings in the High Court. For this reason, this Court should decline jurisdiction.

[42] As earlier said, section 6 (1) (b) of the Constitution grants overarching jurisdiction on every court of law to enforce compliance with its orders and to punish any disobedience. Section 73 of the **Subordinate Courts Order, 1988** grants jurisdiction on Children's Courts to do just that. The learned Magistrate need not have waited for the Director of Public Prosecutions to institute a criminal charge before assuming jurisdiction at the instance of the complaint by the applicant's ex-husband. This puts to bed the contention that the learned Magistrate did not have jurisdiction to act on the complaint of the ex-husband and to punish the applicant by imprisonment for disobeying her court order.

[43] The procedure followed by the learned Magistrate was correct and lawful. The applicant was brought to court under arrest. She was made aware of what her ex-husband was complaining about and afforded an opportunity to explain her conduct. She said she disobeyed the order because she enjoyed doing that. Thus, she confessed her guilt to wilful disobedience of the court order. What doubt existed as to her guilt? Nothing. Hers was contumacious disrespect for judicial authority beyond reasonable doubt.

[44] In the circumstances, the contention that the applicant's liberty was taken away summarily without the requisite standard of proof is completely unsound, meritless and an invitation by this Court to glorify utterly

contemptuous behavior. This cannot be countenanced. The applicant's liberty was taken away fairly, procedurally and lawfully. She was not subjected to any indignity. The learned Magistrate should be commended and not condemned for upholding the dignity and effectiveness of her court.

[45] If the applicant felt aggrieved by the order of the learned Magistrate, it was open for her to appeal to this court in its ordinary section 130 jurisdiction. She could even have applied for bail pending appeal or review in order to regain her liberty before the expiration of the seven days imprisonment. In my judgment, the applicant chose to forgo the appeal and review routes because she is only interested in monetary compensation. That is where her claim founders on the rock of judicial immunity.

[46] The judiciary runs a self-correcting system. Trial courts are amenable to correction and reversal by appellate courts. There is no alternative avenue, and there should not be, for disgruntled litigants to institute civil claims against judicial officers for errors of procedural and substantive law committed on the bench. Judicial officers must be protected. Correction through appellate and review procedures constitute the necessary hygiene for the administration of justice.

V. DISPOSITION

[47] The applicant was properly held accountable and punished for enjoying disobedience of a court. This is the constitutional and statutory process for courts without which there is no judicial system worth the name. The applicant cries foul and seeks compensation on the ground that her constitutional freedom to liberty was wrongly taken away by a court. But the Constitution sanctions the taking away of the liberty of persons like her who disobey court orders. Errors made during the processing of holding contemnors accountable cannot found a civil claim for damages against a Magistrate.

[48] It follows that the claim for constitutional damages is itself misguided and misconceived. Judicial officers are immune from civil suits for performing their constitutional duty of protecting the dignity and effectiveness of their courts.

Costs

[49] The applicant has dragged her ex-husband into these proceedings for no just cause. She confessed her guilt before the learned Magistrate albeit with some arrogance. The ex-husband felt compelled to oppose the matter because the claim for constitutional damages is also against him. He is the only respondent cited and sued in a personal capacity. The rest of the

respondents are before court in their official capacities. They are not out of pocket because the Crown will pick up the tab.

[50] The applicant's case has been torpedoed on a point raised by the court which the respondents had not relied on in the pleadings. All parties proceeded on the wrong footing that the court should decline jurisdiction because there existed other adequate means of redress available to the applicant. But being seized with a civil claim for breach of constitutional freedom, the court was duty bound to first grapple with the sustainability of the claim in law before deciding whether to decline jurisdiction because of availability of alternative adequate means of redress. It would not be right to decline jurisdiction without first interrogating the sustainability of the claim in law. Declining jurisdiction and referring the matter be dealt with as an ordinary claim for compensation for damages would have been an exercise in futility because no similar remedies are available against judicial officers.

[51] The legal position regarding the procedure and standard of proof in contempt proceedings has always been clear. Therefore, it was unnecessary for the applicant to come to court to get clarity. The prayer for the declarator is uncalled for.

Order

[52] In the result, the following order is made:

1. The application is dismissed.
2. The applicant must pay costs of the 2nd respondent.
3. The rest of the respondents are to pay their own costs.

S.P. SAKOANE
CHIEF JUSTICE

I concur:

K.L. MOAHLOLI
JUDGE

I concur:

P. BANYANE
JUDGE

For the applicant: F. Sehapi

For 1st, 2nd, 4th, 5th, 6th, 7th And 8th respondents: M. Sekati

For 3rd respondent: L. Lefikanyana