REPUBLIC OF NAMIBIA **REPORTABLE**

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

In the matter between: Case no: (T) I 2677/2005

PIETER PETRUS VISAGIE **PLAINTIFF**

and

THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA **1ST DEFENDANT**
MRS E H NANDAGO **2ND DEFENDANT**
MAGISTRATE'S COMMISSION **3RD DEFENDANT**
THE ATTORNEY-GENERAL OF NAMIBIA **4TH DEFENDANT**

Neutral citation: *Visagie v The Government of the Republic of Namibia and Others* ((T) I 2677/2005) [2015] NAHCMD 120 (21 April 2017)

Coram: GEIER J *et* UEITELE J *et* MILLER, AJ
Heard: **10 April 2014**
Delivered: **21 April 2017**
Released on: 24 April 2017

Flynote: **Constitutional Law** – Plaintiff is suing the Government of the Republic of Namibia and 4 others for damages – Whether or not the State can and should be held liable for breaches of fundamental rights committed by judicial officers, in the

exercise of their judicial functions – Can the State be held liable for the judicial acts of a magistrate on account of the fact that, while presiding over the case of the plaintiff, the magistrate was exercising the judicial power of the State of the Republic of Namibia – The basic argument that the word "government" is synonymous with the word "state" is a superficial one and in the sense that it seeks to be an overarching provision which applies in each and every instance – Inasmuch as there may be the lingering doubt that Article 78(2) does not in itself declare that the Judiciary, although notionally an organ of state, is an independent organ of state insofar as it concerns the exercise of the judicial functions such doubt is effectively refuted by the provisions of Article 78(3) – Our law is well settled as it holds individual judicial officers delictually liable for damages in suffered in the exercise of their judicial function. That presupposes that the plaintiff establishes the requisite elements upon which he or she pursues his or her claim – The state cannot be held liable given the facts and circumstances placed before me.

Geier J;

Flynote: **Constitutional Law** – On the basis of a stated case the Court was requested to determine three legal questions, namely 1. Whether the State can be held liable for the judicial acts of a magistrate on account of the fact that, while presiding over the case of the plaintiff, the magistrate was exercising the judicial power of the State of the Republic of Namibia? 2. Is the answer to this question affected by the constitutionally entrenched principles of the independence of the judiciary, the rule of law and the separation of powers doctrine? 3. On the assumption that the allegations pleaded by the plaintiff against the Magistrate *in casu* are established, would the Government of the Republic of Namibia and/or the Magistrates Commission and/or the Attorney-General be liable?' The Court answered the first question in the affirmative and questions two and three in the negative.

Summary: The agreed to facts, which for purposes of the adjudication of the abovementioned questions of law to be determined, had been formulated as follows : Plaintiff was arrested during March 1998 and three charges were levelled against the plaintiff: fraud, corruption (section 2 of Ordinance 2 of 1928) and contravention of section 56(e) of Act 7 of 1993 relating to the alleged falsification or fabrication of a passport; Plaintiff appeared from time to time before the second defendant at the

Magistrate's Court at Windhoek from 1998 until 20 March 2003; On 2 August 2000 the State closed its case. In the course of acting as the presiding officer in the Magistrate's Court, the second defendant: a) attempted to intervene to prevent the State from closing its case; b) did not inform the plaintiff, his legal representatives or the prosecutor that the State's case had been closed on a previous occasion; c) was determined to get a conviction against the plaintiff; d) unduly interfered with the State's case; e) denied the plaintiff a fair trial. The said actions or omissions of the second defendant were actuated by *mala fides* and/or fraud, as well as malice and/or improper conduct and/or procedural error and/or the grossest carelessness.'

In regard to the first question the court found that such liability could only vest if the concept of 'State liability' was applicable in Namibia and could also be applied to acts or omissions done in the exercise of judicial powers.

Held: That the State, is a legal persona, with rights and duties, which can sue and be sued, also for constitutional breaches,

Held: That the concept of 'State liability' therefore generally exists and can be applied here in Namibia.

Held: That the legal obligations imposed by Article 5 of the Namibian Constitution which were also imposed on the Judiciary could thus be enforced against a judicial officer, in the limited circumstances where the judicial officer has also lost the shield of immunity, in the manner prescribed by Article 25 of the Constitution.

Held: That Article 25 (4), in addition to the other powers listed in Article 25(3), gives a competent Court the power to also award monetary compensation in respect of any damage suffered by an aggrieved person in consequence of an unlawful denial or violation of such persons fundamental rights or freedoms, where the Court considers such award to be appropriate in the circumstances of a particular case

Held: That on the application of the concept of State liability to the given scenario of the stated case, and keeping in mind that the judicial officer in question, the second defendant here, as a member of the relevant organ of State, (the judiciary), was always duty- bound by the Supreme Law to respect and uphold the Plaintiff's fundamental

rights and freedoms enshrined in Chapter III of the Constitution, which she did not, delictual liability would, in principle, also vest in the State, as 'principal' of the judicial organ of state, in the specific circumstances, where the judicial officer in question, has also lost the shield of judicial immunity.

Held further: That such liability would also entail the general entitlement to claim all such orders as shall be 'necessary and/or appropriate' – but obviously only if considered 'necessary' and/or 'appropriate' by the Court - to secure to the aggrieved party the enjoyment of the rights and freedoms conferred under the provisions of this Constitution, including an interdict and even monetary compensation. Whether or not monetary compensation can be claimed, in addition, would however always be subject to the further pre-condition, namely, that the Court considers the claimed monetary award also 'appropriate', in the circumstances of the particular case.

Held: That the first legal question posed in the stated case therefore had to be answered in the affirmative.

In regard to the second question the court held that the answer given to the first question was not affected by the constitutionally entrenched principles of the independence of the judiciary, the rule of law and the separation of powers doctrine as the Constitution allows for the cause of action contended for in the context of the democratic principles enshrined therein, which principles, at the same time, recognize- and thus do not conflict with the separation of powers doctrine and the rule of law and as in addition, and on the aspect of the independence of the judiciary - and with it on the related aspect of judicial immunity – it had to be of significance that the Supreme Court had not only reaffirmed the general common law position applicable in regard to the independence and immunity of judicial officers but had also found that the common law exception thereto, relating to personal delictual liability of judicial officers, to be in conformity with the Constitution. The Supreme Court had thus, by implication also found, that the common law exception was thus in line and was not affected by the constitutionally entrenched principles of the independence of the judiciary, the rule of law and the separation of powers doctrine.

Held further: that the answer, given to the first question, was in addition not only in accord with the principles of the independence of the judiciary, the Rule of Law and

the separation of powers doctrine, but that it also embraced the important democratic core value of accountability, which was so given recognition at the same time.

Held: That the second question of law to be determined therefore had to be answered in the negative.

On the assumption that the allegations pleaded by the plaintiff against the Magistrate *in casu* are established the Court found that the Government of the Republic of Namibia would not be liable.

In this regard it was held that the plaintiff's claim, as it currently stood, lay against the executive 'Government' and that it would always have been inappropriate to sue and cite the 'Executive Government' in cases involving State liability, as the 'executive organ of the State', should never have been sued, as that organ, can never be held responsible for any act of the Judiciary due to the separation of powers doctrine. It was therefore incorrect to sue and cite the 'Government of the Republic of Namibia', (constitutionally to be understood as the executive organ of the Namibian State).

Held further: As it was State liability that was is relied upon the appropriate first defendant should always have been the State, in its own right, as the 'principal' of the judicial organ of State, as represented by the President, in his capacity as Head of State.

Held: that It followed that the First Defendant, (as things presently stood on the pleadings), would- and could never be liable, even on the assumption that the allegations pleaded, by the Plaintiff against the Second Defendant, would be established.

On the assumption that the allegations pleaded by the plaintiff against the Magistrate *in casu* are established, the Court found that the Magistrates Commission of the Republic of Namibia (the third defendant) would not be liable.

In this regard it was held that although the Third Defendant was essentially the entity responsible for the Second Defendant's appointment, the Commission was, at the

same time, by statutory decree, always prohibited from interfering with the judicial functioning of the Second Defendant.

Held further: That also the principles of vicarious liability, which do not apply to judicial officers, could not be of assistance to the Plaintiff.

Held further: That the aforementioned statutory bar, embodied in the Magistrates Act 2003, applicable to the Third Defendant, simply gives expression to- and upholds the separation of powers doctrine. The Magistrates Commission thus cannot be held accountable for the acts of a magistrate shielded by the doctrine and judicial immunity.

Held: Although State liability may vest, as was found, that was the liability of the State itself and not that of any of the other organs of the State, such as the executive government or that of a creature of statute, like the Third Defendant. The principles on which State liability is founded thus could not sustain a claim against the Third Defendant.

Held: That for these reasons – and even on the assumption that the allegations - as pleaded by the Plaintiff against the Second Defendant *in casu* were established - no liability would vest in the Third Defendant, in principle.

Held also: That this finding did not mean that it would not have been permissible to cite the Third Defendant, as an interested party, by virtue of the fact that it is the entity responsible for the appointment of the Second Defendant in conjunction with the Minister of Justice, and over whom the Third Defendant also has disciplinary jurisdiction in the case of misconduct.

On the assumption that the allegations pleaded by the plaintiff against the Magistrate *in casu* are established, the Court found that the Attorney-General of the Republic of Namibia (the fourth defendant) would not be liable.

In this regard it was held that although the Constitution expressly obliges the Attorney-General to take all action necessary for the protection and upholding of the Constitution, which obligation would thus include the duty to uphold the rule of law, the principles of democracy – and with it the separation of powers doctrine – and where

Article 87 (c) of the Constitution also imposes the duty to protect and uphold the fundamental rights and freedoms enumerated in Chapter III of the Constitution – it always remained questionable how this responsibility could translate itself into legal liability, *vis a vis* the Fourth Defendant, in circumstances where the courts, and here also specifically the Second Defendant, were always entitled to act independently and without interference and where the Second Defendant was always shielded from any outside interference by the doctrine of the separation of powers and judicial immunity and thus also from any interference by the Fourth Defendant? The Fourth Defendant was thus effectively barred from interfering with any of the complained of actions of the Second Defendant.

Held: For similar reasons as those found applicable to the Plaintiff's case against Third Defendant – and even on the assumption that the allegations, as pleaded by the Plaintiff against the Second Defendant *in casu* were established – it was found that no liability would vest in the Fourth Defendant, in principle.

Held further: That this finding did not mean that it would not have always been obligatory to cite the Fourth Defendant, as an interested party, from the outset, by virtue of the fact that it is the Attorney-General of the Republic that the courts have identified, that should be cited as a party in all cases where constitutional issues are at stake.

ORDER

MILLER, AJ (concurring UEITELE J):

1. Question one is answered in the negative.
2. Question two is answered in the affirmative.
3. Question three is answered in the negative.
4. There shall be no order as to costs.

GEIER J (dissenting):

1. The first question of the stated case is to be answered in the affirmative, namely that the State can, on the application of the principle of 'State liability' be held liable for the judicial acts of a magistrate, in the specific limited circumstances where such judicial officer has lost the shield of judicial immunity on account of the fact that, while presiding over the case of the plaintiff, the magistrate was exercising the judicial power of the State of the Republic of Namibia; and

2. The second question of the stated case is answered in the negative in that it is held that the answer to the first question given above is not affected by the constitutionally entrenched principles of the independence of the judiciary, the rule of law and the separation of powers doctrine; and

3. The third question of the stated case is also answered in the negative in that it is held that the Government of the Republic of Namibia and/or the Magistrates Commission and/or the Attorney-General would not be liable, even on the assumption that the allegations pleaded by the plaintiff against the Magistrate *in casu* would be established.

4. There should be no order as to costs.

JUDGMENT

MILLER AJ (concurring UEITELE J):

[1] The events giving rise to the plaintiff's claim in this instance, who is suing the Government of the Republic of Namibia and 4 others for damages, are sketched by him as follows:

a) The plaintiff was arrested during March 1998.

b) Three criminal charges were levelled against him, namely fraud, corruption (section 2 of Ordinance 2 of 1928) and a contravention of section 56(e) of Act 7 of 1993 concerning the falsification or fabrication of a passport.

c) Over the course of the following five years the criminal matter served before the second defendant in her capacity as a magistrate in the Magistrate's Court of Windhoek. During this time the matter was postponed 37 times.

d) On 2 August 2000 and while the plaintiff was unrepresented, the State closed its case. The second defendant would have none of this. From a later appeal judgment of the High Court in Case No CA 41/2003, delivered on 15 June 2005, it appears that this court concluded that the second defendant, was determined to get a conviction against the plaintiff, from the way she questioned the prosecutor's decision to close the State's case, when she asked him:

> " … You closed your case you said. Now you closed your case simply because you cannot trace the witness or you close your case because of what?" … '

As a result of which the prosecutor seemingly succumbed to the pressure from the second defendant, changed tack and applied for a postponement of the matter.

e) At the next appearance the plaintiff was represented by a legal practitioner and the State by a new (third) prosecutor. Neither the legal practitioner nor the prosecutor was aware of the fact that the State had closed its case at the previous hearing and the second respondent did not bother to inform them of this relevant and material fact. At this hearing and despite the fact that the State's case was closed, the prosecutor proceeded to call further witnesses.

f) Five years later and on 20 March 2003 the second defendant convicted the plaintiff and sentenced him to three years imprisonment. After he had already spent more than two years incarcerated, he was released by order of the High Court of Namibia on 15 June 2005.

g) In upholding the plaintiff's appeal and ordering his release on 15 June 2005 the

High Court (Manyarara, AJ *et* Heathcote, AJ) stated:

> 'It seems to me that the only person who was determined to get a conviction in this case was the magistrate. An irregularity occurred and a fair trial was not had by this accused. Six years down the line and eventually he was convicted and sentenced to prison. It is one of the biggest disgraces (and a failure of justice) which I have seen on a record.'

[2] The plaintiff, in his quest to be compensated for the breaches allegedly suffered by him as a result of the aforementioned violations of his constitutional rights and freedoms - not being content in suing the second defendant only, in her personal capacity, on the basis of the common law principles mentioned above - also seeks to recover such damages, jointly and severally, from the Magistrates Commission and the Attorney-General, the third and fourth defendants respectively, and the Namibian State, cited currently as the Government of the Republic of Namibia, as the first defendant.

[3] It is interesting to note that the question whether or not the State can- and should be held liable for breaches of fundamental rights committed by judicial officers, in the exercise of their judicial functions, has given rise to a number of divergent decisions all over the world.[1]

---

[1] This emerges from a comparative report, dated March 2014, prepared by the *Oxford Pro Bono Publico*, programme run by the Law Faculty of the *University of Oxford*, (as part of the *Southern African Judicial Assistance Project* prepared in collaboration with the *Democratic Governance and Rights Unit of the University of Cape Town*) at the request of the Judge President of the Republic of Namibia, made available to the parties and the court, 'for purposes of providing a comparative law analysis of the most relevant jurisdictions which have considered this issue'. The 'key findings' were summarized as follows: 'Africa - Seychelles – no direct case on point; the jurisprudence (predicated upon an express constitutional provision) leans towards precluding damages from being awarded. The privilege of judicial immunity for all acts done in good faith seems to block the liability of the State. - Botswana - no direct case on point; results from two distinct cases indicate two diverging trends, but on balance, it leans towards damages being precluded. - South Africa – a High Court case has suggested that legislation which makes provision for damages could be passed in accordance with the constitution. - Zambia — no direct case on point; only case relates to liability of judges for damages, rather than State liability. – Privy Council - The leading case of *Maharaj* specifically allows for State liability in damages for breaches of rights by the judiciary; however its scope of application has been limited by subsequent cases. - New Zealand - The leading case of *Chapman* has ruled (in a 3-2 split decision) that damages

[4] In order to have this vexed question determined in this jurisdiction the parties have agreed on a statement of written facts, in the form of a special case, for the adjudication of the court.

[5] The agreed to facts, which for purposes of the adjudication of the questions of law to be determined – and - which would thus - for this purpose - have to be regarded as having been established in this instance - were the following:

> '4.1 Plaintiff was arrested during March 1998 and three charges were levelled against the plaintiff: fraud, corruption (section 2 of Ordinance 2 of 1928) and contravention of section 56(e) of Act 7 of 1993 relating to the alleged falsification or fabrication of a passport;
>
> 4.2 Plaintiff appeared from time to time before the second defendant at the Magistrate's Court at Windhoek from 1998 until 20 March 2003;
>
> 4.3 On 2 August 2000 the State closed its case.
>
> 4.4 In the course of acting as the presiding officer in the Magistrate's Court, the second defendant –
>
> a) attempted to intervene to prevent the State from closing its case;
>
> b) did not inform the plaintiff, his legal representatives or the prosecutor that the State's case had been closed on a previous occasion;

---

against the State for judicial breach of rights should not be available, primarily for policy reasons. - United Kingdom - Clear statutory possibility for a claim in damages against the Crown for the breach of human rights by the judges under the Human Rights Act 1998; however, no general common law remedy exists unless the breach is of a very specific nature. - European Court of Human Rights - The leading case of *McFarlane* accepts and allows the possibility of a claim against the State for breaches of rights by judges, at least those caused by judicial delay. - European Union - Liability of Member States in damages for actions of its national judges is accepted in the European Union jurisprudence when the breach is manifest and of a sufficiently serious nature. - United States of America - No general public law action in damages against either the United States or the individual States for the violation by Federal or State officials of rights guaranteed by the United States Constitution. – Canada - Such liability has been accepted in principle, but the threshold is high (more than mere negligence) and the conditions for invocation of this liability have been rare.'

c) was determined to get a conviction against the plaintiff;

d) unduly interfered with the State's case;

e) denied the plaintiff a fair trial.

4.5 The said actions or omissions of the second defendant were actuated by *mala fides* and/or fraud, as well as malice and/or improper conduct and/or procedural error and/or the grossest carelessness.'

[6] The questions, which the parties want to have determined, with reference to these facts, were then formulated by them as follows:

'1. Can the State be held liable for the judicial acts of a magistrate on account of the fact that, while presiding over the case of the plaintiff, the magistrate was exercising the judicial power of the State of the Republic of Namibia?

2. Is the answer to this question affected by the constitutionally entrenched principles of the independence of the judiciary, the rule of law and the separation of powers doctrine?

3. On the assumption that the allegations pleaded by the plaintiff against the Magistrate *in casu* are established, would the first and/or third and/or fourth defendants be liable?'

[7] Given the subject matter of the stated case and given the extended basis on which the relief in this instance was sought, it came as no surprise that counsel for the plaintiff founded their client's case, in the main, on the provisions of the Namibian Constitution, as it should have in any event.

[8] Mr. Tötemeyer SC, who appeared with Mr. Dicks, thus placed reliance, in the first instance, on Articles 7, 8, 11 and 12 of the Constitution in order to prove that the Plaintiff's claim involved the violation of the fundamental rights, as guaranteed by these constitutional provisions, of the plaintiff, by the second defendant.[2] These relates

[2] Article 7 - Protection of Liberty -No persons shall be deprived of personal liberty except according to procedures established by law. - Article 8 - Respect for Human Dignity - (1) The dignity of all persons

only to the relief claimed to the second defendant and as such does not have any bearing on the position of the other defendants.

[9] It was then submitted that in view of the common cause facts, as set out in the statement of facts, the second defendant's *mala fides* had to take as having been established. The court was reminded that it was against this background, that the court was required to pronounce itself on the fundamental questions formulated by the parties.

[10] In written heads of argument the argument on behalf of plaintiff was developed along the following further lines:

'In addressing the above issues the nature of the first defendant entity, the Government of the Republic of Namibia, which is being sued herein for damages for the acts and/or omissions of the second defendant, should be analysed. It is submitted that the answer to the question is to be found in various provisions of the Constitution.

The Namibian State consists of three organs, namely the executive, the judiciary and the legislature. [3] Furthermore, in Articles 5 and 32 of the Constitution "Government" is used synonymously with "State" Government has executive and legislative functions. It is submitted that this is an indication that, in the aforementioned Articles, "Government" is not synonymous with "the executive" but with "the State".

---

shall be inviolable. - (2)(a) In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed. -(b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment. - Article 11 - Arrest and Detention - (1) No persons shall be subject to arbitrary arrest or detention - Article 12 - Fair Trial - (1)(a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society. - (b) A trial referred to in Sub-Article (a) hereof shall take place within a reasonable time, failing which the accused shall be released. … (d) All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them. … '.

[3] Article 1(3) of the Namibian Constitution, as read with the other provisions of Article 1

In these proceedings the Government is sued as representing the State and is in that sense synonymous with the State. The Constitution also refers to the Government in such context, in the sense that it describes it as the collective of all the organs of State.
It is submitted that there accordingly is no room – in the context of this matter – for a suggestion that the Government should be considered to be synonymous with the executive.

The magistrate was clearly part of – and exercising the functions of – the judicial organ of the State and, in that sense, that of the judicial branch of Government.' [4]

[11] Reference was then made to *Maharaj v Attorney-General of Trinidad and Tobago* [5]*,* a case which involved urgent *ex parte* proceedings before the High Court of Trinidad and Tobago for the immediate release of a barrister committed to imprisonment for contempt of court and also for damages for wrongful detention and false imprisonment against the Attorney-General, as representative of the State. The applicant was released forthwith. At the substantive hearing of the motion a third judge dismissed the motion and the applicant served the remaining six days of his prison sentence. A subsequent appeal to the Court of Appeal was dismissed for the reason that the appeal court found that the applicant's rights under section 1(a) of the Constitution and Tobago had not been contravened. The applicant then took the matter to the Privy Council. In a majority judgment [6] delivered by Lord Diplock the Privy Council found that the Crown was not vicariously liable in tort for anything done by Maharaj J while discharging or purporting to discharge any responsibilities of a judicial nature vested in him. The majority of the court found that the claim involved an enquiry into whether the procedure adopted by the judge before committing the appellant to prison for contempt contravened a right, to which the appellant was entitled under section I(a) of the Constitution of Trinidad and Tobago, not to be deprived of his liberty except by due process of law.

[12] Emphasis was placed on the following passages from the judgment of the Privy Council:

---

[4] Compare, *inter alia*, Articles 31(1) and 31(2) of the Namibian Constitution, as well as Article 5.

[5] [1978] 2 All ER at 670

[6] At 672 g

'The redress claimed by the appellant under s 6 was redress from the Crown (now the state) for a contravention of the appellant's constitutional rights by the judicial arm of the state.' [7] ……

'Nevertheless *de facto* rights and freedoms not protected against abrogation or infringement by any legal remedy before the Constitution came into effect are, since that date, given protection which is enforceable *de jure* under s 6(i) …. The order of Maharaj J committing the appellant to prison was made by him in the exercise of the judicial powers of the state; the arrest and detention of the appellant pursuant to the judge's order was effected by the executive arm of the state. So if his detention amounted to a contravention of his rights under s I(a), it was a contravention by the state against which he was entitled to protection.' [8]

'Section 6(1) and (2), which deals with remedies, could not be wider in its terms. While s 3 excludes the application of ss 1 and 2 in relation to any law that was in force in Trinidad and Tobago at the commencement of the constitution it does not exclude the application of s 6 in relation to such law. The right to "apply to the High Court for redress" conferred by s 6(1) is expressed to be "without prejudice to any other action with respect to the same matter which is lawfully available". The clear intention is to create a new remedy whether there was already some other existing remedy or not. Speaking of the corresponding provision of the Constitution of Guyana, which is in substantially identical terms, the Judicial Committee said in *Jaundoo v Attorney-General of Guyana*:

'To "apply to the High Court for redress" was not a term of art at the time the Constitution was made. It was an expression which was first used in the Constitution of 1961 and was not descriptive of any procedure which then existed under Rules of Court for enforcing any legal right. It was a newly created right of access to the High Court to invoke a jurisdiction which was itself newly created'…."[9] (emphasis supplied) …
At page 679 (at j) of the judgment the Privy Council further found that:

"This is not vicarious liability: it is a liability of the state itself. It is not a liability in tort at all: it is a liability in the public law of the state, not of the judge himself, which has been newly created by s 6(1) and (2) of the Constitution."

---

[7] At 675 j to 676 a

[8] At 677 j to 678 a

[9] At 678 f-j

[13] It is necessary in the first place to deal with the judgment in the *Maharaj* case relied upon by counsel for the plaintiff and for that matter the position to the extent that it addresses the issues identified in the report earlier referred which this court is asked to deal with.

[14] In that regard, some points need to be addressed. The first is that these decisions when they express themselves on the issue, are decisions of foreign jurisdiction which are not binding upon this court. At best for counsel of the plaintiff they may have some persuasive power but only to the extent to which it is necessary to do so. If a definitive answer to the questions before us cannot be found with reference to the provisions of the Constitution of the Republic of Namibia, they have no persuasive power at all and become one academic value only.

[15] The difficulty I have with the submissions of counsel for the plaintiff is a fundamental one. It seeks to isolate and immunize the provisions of the Constitution from the remainder of the Constitution. In my view the provisions of the Constitution must be read and understood with reference to the Constitution as a whole. The Constitution is not a compilation of separate and loose standing principles and aspirations which are flung together in a single document. To the contrary the Constitution is a composite document which in its totality is aimed at achieving the basic aspirations drafters thereof to give effect to the principles expressed in the preamble of the Constitution read with the provisions of Article 1(1), 1(2) and 1(3) of the Constitution.

[16] The most pertinent one is paragraph 3 of the preamble which reads as follows:

*'Whereas the said rights are most effectively maintained and protected in a democratic society, where the government is responsible to freely elected representatives of the people, operating under a sovereign constitution <u>and a free and independent judiciary;</u>' (*The underlining is mine.)

[17] That provision that needs to be read in context with Article 78 which establishes the Judiciary, defines its power and any limitation or obligation imposed upon it.

[18] The basic argument that the word "government" is synonymous with the word "state" is a superficial one and in the sense that it seeks to be an overarching provision which applies in each and every instance. I agree that in certain confined areas that

may be the case but it remains limited only to those instances which it finds application. In sum and with all due respect to counsel for the plaintiff, the argument stresses superficial similarities and ignore essential differences in the Constitution, when considered in its totality.

[19] In that regard, I am reminded of the remarks made by a former Judge of South Africa, Mr. Justice Holmes, to the effect that if one stresses superficial similarities and ignores essential differences, one would be bound to conclude that a ship is a special kind of bicycle by reminding oneself that both are designed as a means of travel. It is against that backdrop that I proceed to consider the role and function of the Judiciary in the machinery, for want of a both word in creating a democratic state.

[20] I have already referred to the relevant paragraphs of the preamble to the Constitution, in order to place and understand it in context with the relevant provisions of Article 78 of the Constitution which reads as follows:

> *'(1) The judicial power shall be vested in the Courts of Namibia, which shall consist of:*
>
> *(a) a Supreme Court of Namibia;*
> *(b) a High Court of Namibia;*
> *(c) Lower Courts of Namibia.*
>
> *(2) The Courts shall be independent and subject only to this Constitution and the law.*
>
> *(3) No member of the Cabinet or the Legislature or any other person shall interfere with Judges or judicial officers in the exercise of their judicial functions, and all organs of the State shall accord such assistance as the Courts may require to protect their independence, dignity and effectiveness, subject to the terms of this Constitution or any other law. . .'*

[21] Inasmuch as there may be the lingering doubt that Article 78(2) does not in itself declare that the Judiciary, although notionally an organ of state, it is an independent organ of state insofar as it concerns the exercise of the judicial functions such doubt is effectively refuted by the provisions of Article 78(3).

[22] To the extent that further support for this conclusion is correct, I draw attention to the provision firstly in Article 82(1) of the constitution which limits the powers of the president to appoint judges of the Supreme Court and the High Court only upon a recommendation of the Judicial Service Commission that a potential person shall be appointed as a judge or acting judge as the case may be. Standing by itself it is not a definitive answer, but one which resonates with Article 78.

[23] Reference must also be made to the provisions contained in Article 25(1)(a) and (2) of the constitution which deals with the enforcement of fundamental rights and freedoms. Article 25(1) prohibits Parliament or any subordinate legislative authority to pass any law which abridges or abolishes any fundamental rights or freedoms, it also prohibits the executive and the agencies of government to take any action which abolishes or abridges any fundamental rights or freedoms.

[24] Significantly in my view Article 25(1) and (2) does draw a sharp and dividing line between the Judiciary and the other organs of State. The courts are given oversight over the laws passed and actions taken which may abolish or abridge fundamental rights and freedoms. It follows as a matter common logic that it can only do so if it acts independently.

[25] That brings me to the last issue to be considered, which was raised in argument. This relates to Article 25(2), 25(3) and 25(4) of the constitution. Article 25(2) entitles a person who feels that a fundamental right or freedom was infringed or threatened, to approach a competent court for redress.

[26] Article 25(3) empowers the court to make such orders that it considers necessary and appropriate to protect such rights.

[27] Article 25(4) empowers the courts to award monetary compensation for any damages suffered as a result of such infringement of other organs of the state. However the court is empowered to do so only in circumstances where such an award is appropriate.

[28] It will in my view not be appropriate to create what is essentially a new remedy in cases where adequate provision is made by the law itself which includes both statutory law and the Common law.

[29] Our law is well settled as it holds individual judicial officers delictually liable for damages in suffered in the exercise of their judicial function. That presupposes that the plaintiff establishes the requisite elements upon which he or she pursues his or her claim.

[30] This reasoning by its nature is separate and distinct from the view I already expressed as to the independence of the judiciary. The conclusion is however the same. On either basis, the state cannot be held liable given the facts and circumstances placed before us.

[31] For these reasons, I conclude that the first question posed must be answered in the negative.

[32] For the reasons indicated the questions posed are answered as follows:

1. Question one is answered in the negative.
2. Question two is answered in the affirmative.
3. Question three is answered in the negative.

[33] As far as costs are concerned, I do not incline to make any cost order against the plaintiff. The matter is one of constitutional interpretation and one of some importance. In the result, the following orders are issued:

1. The questions posed are answered in the manner set above.
2. There shall be no order as to costs.

K MILLER

Acting Judge

SFI UEITELE

Judge

GEIER J (dissenting):

[1] This judgment was originally intended to be the judgment of the full court. After its completion my brother Miller indicated that he would not be in agreement therewith. He accordingly wrote a separate judgment, the above judgment, with which Ueitele J subsequently concurred. In such circumstances my judgment became the minority judgment.

[2] I have since had the benefit of reading the judgment of my brother and have come to the conclusion that it would serve no purpose to change my now dissenting judgment, in any way, as it is more comprehensive, and as, in my respectful view, it deals with all the issues that required determination, which the majority judgment fails to address. In any event we continue to differ fundamentally on the cardinal issue, ie. in our response to the first two questions posed in the stated case. My reasons on which these differences are based are set out below.

[3] The common law position governing the personal liability of judicial officers in Namibia was succinctly summed up by O'Linn AJA in *Gurirab v Government of the Republic of Namibia*[10] where the learned judge, (Shivute CJ and Chomba AJA concurring), stated:

> ' … the essence of the common law is that delictual liability for damages by a judicial officer requires not only wrongful conduct causing damages, but a wrongful act or acts done mala fide and/or fraudulently by such judicial officer.'[11]

[4] The central issue now underlying this case is whether or not such liability can also attach to the State by virtue of the provisions of the Namibian Constitution which,

---

[10] 2006 (2) NR 485 (SC)

[11] *Gurirab v Government of the Republic of Namibia* at [24]

so it is contended, has forged a new remedy on the basis of which the State can also be held liable for damages for fundamental right breaches committed by a judicial officer?

THE BACKGROUND TO THE LITIGATION

[5] The events giving rise to the plaintiff's claim in this instance, who is suing the Government of the Republic of Namibia and 4 Others for damages, are sketched by him as follows:

a) The plaintiff was arrested during March 1998.

b) Three criminal charges were levelled against him, namely fraud, corruption (section 2 of Ordinance 2 of 1928) and a contravention of section 56(e) of Act 7 of 1993 concerning the falsification or fabrication of a passport.

c) Over the course of the following five years the criminal matter served before the second defendant in her capacity as a magistrate in the Magistrate's Court of Windhoek. During this time the matter was postponed 37 times.

d) On 2 August 2000 and while the plaintiff was unrepresented, the State closed its case. The second defendant would have none of this. From a later appeal judgment of the High Court in Case No CA 41/2003, delivered on 15 June 2005, it appears that this court concluded that the second defendant, was determined to get a conviction against the plaintiff, from the way she questioned the prosecutor's decision to close the State's case, when she asked him:

> " … You closed your case you said. Now you closed your case simply because you cannot trace the witness or you close your case because of what?" … '

as a result of which the prosecutor seemingly succumbed to the pressure from the second defendant, changed tack and applied for a postponement of the matter.

e) At the next appearance the plaintiff was represented by a legal practitioner and the State by a new (third) prosecutor. Neither the legal practitioner nor the prosecutor

was aware of the fact that the State had closed its case at the previous hearing and the second respondent did not bother to inform them of this relevant and material fact. At this hearing and despite the fact that the State's case was closed, the prosecutor proceeded to call further witnesses.

f) Five years later and on 20 March 2003 the second defendant convicted the plaintiff and sentenced him to three years imprisonment. After he had already spent more than two years incarcerated, he was released by order of the High Court of Namibia on 15 June 2005.

g) In upholding the plaintiff's appeal and ordering his release on 15 June 2005 the High Court (Manyarara, AJ *et* Heathcote, AJ) stated:

> 'It seems to me that the only person who was determined to get a conviction in this case was the magistrate. An irregularity occurred and a fair trial was not had by this accused. Six years down the line and eventually he was convicted and sentenced to prison. It is one of the biggest disgraces (and a failure of justice) which I have seen on a record.'

[6] The plaintiff, in his quest to be compensated for the breaches allegedly suffered by him as a result of the aforementioned violations of his constitutional rights and freedoms - not being content in suing the second defendant only, in her personal capacity, on the basis of the common law principles mentioned above - also seeks to recover such damages, jointly and severally, from the Magistrates Commission and the Attorney-General, the third and fourth defendants respectively, and the Namibian State, cited currently as the Government of the Republic of Namibia, as the first defendant.

[7] It is interesting to note that the question whether or not the State can- and should be held liable for breaches of fundamental rights committed by judicial officers, in the exercise of their judicial functions, has given rise to a number of divergent decisions all over the world.[12]

---

[12] This emerges from a comparative report, dated March 2014, prepared by the *Oxford Pro Bono Publico*, programme run by the Law Faculty of the *University of Oxford*, (as part of the *Southern African Judicial Assistance Project* prepared in collaboration with the *Democratic Governance and Rights Unit*

[8] In order to have this vexed question determined in this jurisdiction the parties have agreed on a statement of written facts, in the form of a special case, for the adjudication of the court.

THE SPECIAL CASE – THE AGREED FACTS

[9] The agreed to facts, which for purposes of the adjudication of the questions of law to be determined – and - which would thus - for this purpose - have to be regarded as having been established in this instance - were the following:

> '4.1 Plaintiff was arrested during March 1998 and three charges were levelled against the plaintiff: fraud, corruption (section 2 of Ordinance 2 of 1928) and contravention of section 56(e) of Act 7 of 1993 relating to the alleged falsification or fabrication of a passport;

---

of the University of Cape Town) at the request of the Judge President of the Republic of Namibia, made available to the parties and the court, 'for purposes of providing a comparative law analysis of the most relevant jurisdictions which have considered this issue'. The 'key findings' were summarized as follows: 'Africa - Seychelles – no direct case on point; the jurisprudence (predicated upon an express constitutional provision) leans towards precluding damages from being awarded. The privilege of judicial immunity for all acts done in good faith seems to block the liability of the State. - Botswana - no direct case on point; results from two distinct cases indicate two diverging trends, but on balance, it leans towards damages being precluded. - South Africa – a High Court case has suggested that legislation which makes provision for damages could be passed in accordance with the constitution. - Zambia — no direct case on point; only case relates to liability of judges for damages, rather than State liability. – Privy Council - The leading case of *Maharaj* specifically allows for State liability in damages for breaches of rights by the judiciary; however its scope of application has been limited by subsequent cases. - New Zealand - The leading case of *Chapman* has ruled (in a 3-2 split decision) that damages against the State for judicial breach of rights should not be available, primarily for policy reasons. - United Kingdom - Clear statutory possibility for a claim in damages against the Crown for the breach of human rights by the judges under the Human Rights Act 1998; however, no general common law remedy exists unless the breach is of a very specific nature. - European Court of Human Rights - The leading case of *McFarlane* accepts and allows the possibility of a claim against the State for breaches of rights by judges, at least those caused by judicial delay. - European Union - Liability of Member States in damages for actions of its national judges is accepted in the European Union jurisprudence when the breach is manifest and of a sufficiently serious nature. - United States of America - No general public law action in damages against either the United States or the individual States for the violation by Federal or State officials of rights guaranteed by the United States Constitution. – Canada - Such liability has been accepted in principle, but the threshold is high (more than mere negligence) and the conditions for invocation of this liability have been rare.'

4.2 Plaintiff appeared from time to time before the second defendant at the Magistrate's Court at Windhoek from 1998 until 20 March 2003;

4.3 On 2 August 2000 the State closed its case.

4.4 In the course of acting as the presiding officer in the Magistrate's Court, the second defendant –

a) attempted to intervene to prevent the State from closing its case;

b) did not inform the plaintiff, his legal representatives or the prosecutor that the State's case had been closed on a previous occasion;

c) was determined to get a conviction against the plaintiff;

d) unduly interfered with the State's case;

e) denied the plaintiff a fair trial.

4.5 The said actions or omissions of the second defendant were actuated by *mala fides* and/or fraud, as well as malice and/or improper conduct and/or procedural error and/or the grossest carelessness.'

THE QUESTIONS OF LAW TO BE DETERMINED

[10] The questions, which the parties want to have determined, with reference to these facts, were then formulated by them as follows:

'1. Can the State be held liable for the judicial acts of a magistrate on account of the fact that, while presiding over the case of the plaintiff, the magistrate was exercising the judicial power of the State of the Republic of Namibia?

4. Is the answer to this question affected by the constitutionally entrenched principles of the independence of the judiciary, the rule of law and the separation of powers doctrine?

5. On the assumption that the allegations pleaded by the plaintiff against the Magistrate *in casu* are established, would the first and/or third and/or fourth defendants be liable?'

THE SUBMISSIONS ON BEHALF OF PLAINTIFF

[11] Given the subject matter of the stated case and given the extended basis on which the relief in this instance was sought, it came as no surprise that counsel for the plaintiff founded their client's case, in the main, on the provisions of the Namibian Constitution.

[12] Mr Tötemeyer SC, who appeared with Mr Dicks, thus placed reliance, in the first instance, on Articles 7, 8, 11 and 12 of the Constitution in order to prove that the Plaintiff's claim involved the violation of the fundamental rights, as guaranteed by these constitutional provisions, of the plaintiff, by the second defendant.[13]

[13] It was then submitted that in view of the common cause facts, as set out in the statement of facts, the second defendant's *mala fides* had to taken as having been established. The court was reminded that it was against this background, that the court was required to pronounce itself on the fundamental questions formulated by the parties.

[14] In written heads of argument the argument on behalf of plaintiff was developed along the following further lines:

---

[13] Article 7 - Protection of Liberty -No persons shall be deprived of personal liberty except according to procedures established by law. - Article 8 - Respect for Human Dignity - (1) The dignity of all persons shall be inviolable. - (2)(a) In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed. -(b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment. - Article 11 - Arrest and Detention - (1) No persons shall be subject to arbitrary arrest or detention - Article 12 - Fair Trial - (1)(a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society. - (b) A trial referred to in Sub-Article (a) hereof shall take place within a reasonable time, failing which the accused shall be released. … (d) All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them. … '.

'In addressing the above issues the nature of the first defendant entity, the Government of the Republic of Namibia, which is being sued herein for damages for the acts and/or omissions of the second defendant, should be analysed. It is submitted that the answer to the question is to be found in various provisions of the Constitution.

The Namibian State consists of three organs, namely the executive, the judiciary and the legislature. [14] Furthermore, in Articles 5 and 32 of the Constitution "Government" is used synonymously with "State" Government has executive and legislative functions. It is submitted that this is an indication that, in the aforementioned Articles, "Government" is not synonymous with "the executive" but with "the State".

In these proceedings the Government is sued as representing the State and is in that sense synonymous with the State. The Constitution also refers to the Government in such context, in the sense that it describes it as the collective of all the organs of State.
It is submitted that there accordingly is no room – in the context of this matter – for a suggestion that the Government should be considered to be synonymous with the executive.

The magistrate was clearly part of – and exercising the functions of – the judicial organ of the State and, in that sense, that of the judicial branch of Government.' [15]

[15] Counsel relied extensively on *Maharaj v Attorney-General of Trinidad and Tobago* [16], a case which involved urgent *ex parte* proceedings before the High Court of Trinidad and Tobago for the immediate release of a barrister committed to imprisonment for contempt of court and also for damages for wrongful detention and false imprisonment against the Attorney-General, as representative of the State. The applicant was released forthwith. At the substantive hearing of the motion a third judge dismissed the motion and the applicant served the remaining six days of his prison sentence. A subsequent appeal to the Court of Appeal was dismissed for the reason that the appeal court found that the applicant's rights under section 1(a) of the Constitution and Tobago had not been contravened. The applicant then took the matter to the Privy Council. In a majority judgment [17] delivered by Lord Diplock the Privy Council found that the Crown was not vicariously liable in tort for anything done

[14] Article 1(3) of the Namibian Constitution, as read with the other provisions of Article 1

[15] Compare, *inter alia*, Articles 31(1) and 31(2) of the Namibian Constitution, as well as Article 5.

[16] [1978] 2 All ER at 670

[17] At 672 g

by Maharaj J while discharging or purporting to discharge any responsibilities of a judicial nature vested in him. The majority of the court found that the claim involved an enquiry into whether the procedure adopted by the judge before committing the appellant to prison for contempt contravened a right, to which the appellant was entitled under section I(a) of the Constitution of Trinidad and Tobago, not to be deprived of his liberty except by due process of law.

[16] Emphasis was placed on the following passages from the judgment of the Privy Council:

'The redress claimed by the appellant under s 6 was redress from the Crown (now the state) for a contravention of the appellant's constitutional rights by the judicial arm of the state.' [18] ……

'Nevertheless *de facto* rights and freedoms not protected against abrogation or infringement by any legal remedy before the Constitution came into effect are, since that date, given protection which is enforceable *de jure* under s 6(i) …. The order of Maharaj J committing the appellant to prison was made by him in the exercise of the judicial powers of the state; the arrest and detention of the appellant pursuant to the judge's order was effected by the executive arm of the state. So if his detention amounted to a contravention of his rights under s I(a), it was a contravention by the state against which he was entitled to protection.' [19]

'Section 6(1) and (2), which deals with remedies, could not be wider in its terms. While s 3 excludes the application of ss 1 and 2 in relation to any law that was in force in Trinidad and Tobago at the commencement of the constitution it does not exclude the application of s 6 in relation to such law. The right to "apply to the High Court for redress" conferred by s 6(1) is expressed to be "without prejudice to any other action with respect to the same matter which is lawfully available". The clear intention is to create a new remedy whether there was already some other existing remedy or not. Speaking of the corresponding provision of the Constitution of Guyana, which is in substantially identical terms, the Judicial Committee said in *Jaundoo v Attorney-General of Guyana*:

[18] At 675 j to 676 a

[19] At 677 j to 678 a

'To "apply to the High Court for redress" was not a term of art at the time the Constitution was made. It was an expression which was first used in the Constitution of 1961 and was not descriptive of any procedure which then existed under Rules of Court for enforcing any legal right. It was a newly created right of access to the High Court to invoke a jurisdiction which was itself newly created'…."[20] (emphasis supplied) …
At page 679 (at j) of the judgment the Privy Council further found that:

"This is not vicarious liability: it is a liability of the state itself. It is not a liability in tort at all: it is a liability in the public law of the state, not of the judge himself, which has been newly created by s 6(1) and (2) of the Constitution."

[17] Counsel then went on to point out that sections 6(1) and 6(2) of the Constitution of Trinidad and Tobago, applicable at the time, were for all intents and purposes, similar to Articles 7 and 25(1) of the Namibian Constitution. It was submitted that in Namibia the same principles would apply and that therefore compensation would be available, to somebody such as the plaintiff, in terms of Articles 25(3)[21] and 25(4)[22] of the Namibian Constitution as these articles had 'forged new tools under the Constitution', as had been recognised by the South African Constitutional Court in *Fosé v Minister of Safety and Security*[23]*,* where the court had stated:

'Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values

---

[20] At 678 f-j

[21] (3) Subject to the provisions of this Constitution, the Court referred to in Sub-Article (2) hereof shall have the power to make all such orders as shall be necessary and appropriate to secure such applicants the enjoyment of the rights and freedoms conferred on them under the provisions of this Constitution, should the Court come to the conclusion that such rights or freedoms have been unlawfully denied or violated, or that grounds exist for the protection of such rights or freedoms by interdict.

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

[23] 1997 (3) SA 786 (CC) at par [69]

underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal.'

[18] Counsel for the plaintiff concluded that the question posed under paragraph 3.1 of the stated case had to be answered in the affirmative also for these reasons. At the same time this approach would also provide the answers to paragraphs 3.2 and 3.3 of the statement of facts, so it was contended further.

[19] They added that, in their view, the liability of the State, in this instance, did not, in any manner, compromise the constitutionally entrenched doctrine of the separation of powers as it was plainly the liability of the State which was in issue, arising from the conduct of its judicial organ, which violated the plaintiff's entrenched constitutional rights under Chapter 3 of the Namibian Constitution, (and in circumstances which would also result in personal liability for the second defendant).[24] Likewise the integrity of the constitutionally entrenched principles of the rule of law and the independence of the judiciary were not affected in any way.

[20] The fundamental question, posed in paragraph 3.3 of the stated case had thus to be answered in favour of the plaintiff.

[21] At the hearing of the matter Mr Tötemeyer re-emphasised that the starting point was the Constitution which obliged judicial officers to uphold the fundamental rights and freedoms prescribed therein. The judiciary was comprised of the Lower. High and Supreme Courts.[25] He pointed out, with reference to the *Gurirab* decision that, the common law, as a matter of principle, recognized the personal liability of judicial officers, despite other remedies being available.

[24] As in terms of the common cause facts as set out in the statement of facts, the second defendant's *mala fides* had been established

[25] Article 78

[22] He submitted that the judiciary is an organ of State and that judicial officers were appointed by government. The term 'Government' in this context means 'State', on a proper interpretation, but that 'Government' should not be equated with the Executive. In the event that 'State liability' for certain acts of judicial officers would be recognized this would translate itself into a situation that it would be the 'State' and its funds that would be liable.

[23] He then dealt with the underlying constitutional dispensation: that Article 1(3) identified the 'organs of state'[26], which includes the judiciary, that Article 5 again refers to these 'organs' on which it imposes the duty to respect the fundamental rights and freedoms enshrined in Chapter III, and that the reference to 'government' reveals that such reference was actually intended to be a references to 'the State' and that Article 5 should actually be read to mean that all organs of 'State' and ''all organs of government' shall respect and uphold the enshrined fundamental rights and freedoms of the constitution. He submitted that support for this interpretation was found in Article 32(2) where reference was made to one of the 'executive functions' of the 'executive branch of government'[27] and from which text it thus appeared that it would not make sense to equate 'government' just with the 'executive'. It should be noted that the term 'government' was not defined and that in the absence of a definition the terms 'State' and 'Government' should be used interchangeably with reference to the context in which the term was used. The text employed in Article 5 – ie. ' … and all organs of the government and its agencies… ' revealed that the term 'government' as used in Article 5 could not just simply be confined to mean 'the executive' only.

[24] In response to a question by my brother Ueitele who put to Mr Tötemeyer how this could be if the three organs of State would continue to be independent of each other, given the separation of powers in a democratic State, counsel clarified that it was not the intention to hold the executive, ie. one branch of the State liable, but if there would be liability that this would be the 'overarching liability of the State'.

---

[26] The main organs of the State shall be the Executive, the Legislature and the Judiciary.

[27] 32(2) 'In accordance with the responsibility of the executive branch of Government to the legislative branch, the President and the Cabinet shall each year during the consideration of the official budget attend Parliament. During such session the President shall address Parliament on the state of the nation and on the future policies of the Government, shall report on the policies of the previous year and shall be available to respond to questions.'

[25] Counsel was then questioned on whether or not the plaintiff should not have cited the President of the Republic, in his capacity as head of state, as the main defendant?

[26] In response it was explained that it was the 'Government of the Republic of Namibia' which had been cited as the first defendant in this action as the Constitution was not clear on the issue in that it appeared that certain articles equated the concept 'government' with 'the State' and in others with 'the executive branch of the State'. It was however beyond doubt that it was the purse of the State that was sued, ie the State finances that were administered by the government minister who administered the State Revenue Fund.

[27] Mr Tötemeyer conceded, as he put it, that what was in issue at the end of the day was 'State liability'.

[28] He argued further that a 'constitutional cause of action' had been 'forged' with the advent of the Namibian Constitution, in terms of which a new tool had been crafted in 1990. He thus contended that just like with other breaches of a Charter, which would attract State liability, also breaches of the Constitution by the judiciary should attract State liability as they should be regarded as acts of State. This was contemplated in Article 25(2) of the Constitution, which article also contemplates remedies against the State, should there be a breach of a Charter right by the State.

[29] In so far as the qualification, contained in Article 25(4) was concerned, which seemed to limit the courts ability to award monetary compensation to those cases which the court would consider as 'appropriate in particular circumstances' he submitted that those circumstances should be confined to those instances recognized by the common law, ie. those what would have been actuated by fraud and or *mala fides*, for instance.

[30] Mr Tötemeyer then turned to address certain aspects, which were militating against the recognition of State liability for judicial charter breaches, and which would, if I understood his argument correctly, also impact on whether or not an award for

damages would be 'appropriate in the particular circumstances of a matter', such as the 'chilling effect argument' or the 'floodgates argument'.

[31] In regard to the 'possible chilling effect' that the recognition of the remedy contended for might create, he pointed out that this factor would not apply in the Namibian context where personal liability for certain judicial misconduct was already recognized in terms of the existing common law and where the additional facet of State liability would not really exacerbate this situation.

[32] In answer to a question by my brother Miller, whether or not it was not all a matter of policy Mr Tötemeyer's response was that this could not be as the remedy was provided for in the Constitution, which provision then indicated that policy issues could no longer come into play.

[33] When questioned on the issue of whether or not, in the broader context of the question before the court, judicial independence could be threatened, his response was that to say so would amount to speculation and that there would, in any event be no such conflict as the Constitution had provided for a right and that for a breach of a right there should be a remedy. In any event the courts would be subject to the law and the Constitution in terms of Article 78(2) of the Constitution.

[34] In continuing to address the question of whether or not there was a risk of interference with the independence of the judiciary as the question of accountability was linked to the aspect of control, he pointed out that judicial officers would not be under the control of the State. He also argued that protection against unwarranted interference was in place. He urged the court to follow and adopt the conditions for invoking liability as applied by the European Court of Justice (ECJ) in *Köhler v Austria*[28], which included three conditions, *firstly*, an infringement of rights, *secondly*, a 'sufficiently serious breach and *thirdly*, a direct causal link. He added two further factors, namely *fourthly*, that the judiciary be regarded as part of the State for these purposes and *fifthly*, that the matter should not be *res judicata*.

[28] [2003] ALL ER (D) 73

[35] He rounded off his argument by submitting that the approach followed in *Maharaj's* case, which did not stand isolated, commended itself, if regard was had to the research paper[29] and that the court should thus follow that precedent.

SUPPLEMENTARY SUBMISSIONS ON BEHALF OF PLAINTIFF

[36] At the conclusion of oral argument the Court invited the parties to amplify their arguments by way of supplementary heads. The purpose of this request was to afford the parties the opportunity to clarify or underscore oral argument (in order to strengthen or reiterate specific points), particularly in relation to certain aspects which had been raised during oral argument, but which had not been dealt with in the heads.

AD THE CITATION OF THE FIRST DEFENDANT

[37] One of the issues which arose during the course of oral argument was whether or not the first defendant had been cited correctly in paragraph 2 of the amended particulars of claim from which it appeared that the plaintiff had instituted this action against, amongst others, the Government of the Republic of Namibia "*duly constituted as such in terms of the Namibian Constitution*" (as the first defendant). It was also pleaded that 'the first defendant is duly represented in the proceedings by the Minister of Justice'.

[38] It was in support of this mode of citation submitted on the plaintiff's behalf that – for purposes of the current proceedings – the manner in which the first defendant had been cited - was synonymous with a citation of 'the State'. At the very least (and as an alternative), it was submitted that 'the Government' could (and does) represent 'the State' in these proceedings. For these reasons the citation of the first defendant (as per paragraph 2 of the amended particulars of claim) was not objectionable in any manner in order to vest 'State liability' in this case.

[39] These submissions were in turn supported by a contended for correct interpretation to be accorded to various Articles of the Namibian Constitution, which interpretation would demonstrate that the term "*Government*" could be used as a synonym for the concept of 'the State', which interpretation, in turn, would be in tandem

[29] See footnote 3

with some of the comparative authorities from other jurisdictions, which contained pronouncements which would inform this enquiry. The contended for interpretation was in any event also supported by the provisions of the Crown Liabilities Act, No. 1 of 1910.

THE INTERPRETATIONAL ARGUMENT

[40] As far as the provisions of the Namibian Constitution were concerned counsel again submitted that the term "*Government*" was used synonymously with the term "*State*" in a number of Articles of the Namibian Constitution (and not synonymously with the term "*Executive*"). In that regard it was argued that:

'In order to interpret the constitutional provisions that follow, it should be considered that conventional canons of statutory interpretation – as well as conventional interpretational presumptions – remain valid as canons of constitutional interpretation (See: Lourens du Plessis, Re-Interpretation of Statutes, pp. 147 – 148 and the authorities there referred to). In that regard:

> Although the interpretation of a Constitution – specifically as far as a fundamental rights or freedoms provision is concerned – requires a generous and purposive construction (in order to give full recognition and effect to those rights and freedoms), this does not mean that the general principles no longer apply or have been jettisoned. Respect must still be given to the language of the Constitution and the tradition and usages which have given meaning to the language used in the Constitution, it being a legal instrument. Those, it is submitted, would include the established rules of interpretation. *A fortiori*, it is submitted, this principle would apply in interpreting provisions which do not directly relate to the interpretation of a particular constitutional fundamental right or freedom. The interpretational issue under consideration falls in this latter category;[30]

The aforesaid presumptions would include that the principle of interpretation that words or language is not used unnecessarily (each word should be given a meaning) [See: Steyn, Die Uitleg van Wette, 5th Ed., p. 17; *Attorney-General, Transvaal v Additional Magistrate for*

[30] Compare: *Nyamakazi v President of Bophutatswana*, 1992 (4) SA 540 (BGD), *inter alia*, at 556 H – I and the authorities there referred to, *Mwandingi v Minister of Defence, Namibia*, 1991 (1) SA 851 (NmHC), 858 G – H and the authorities there referred to, *S v Nassar*, 1995 (2) SA 82 (NmHC), 92 G – H and the authorities there referred to;

Johannesburg, 1924 AD 421, p. 436); the *expressio unius* -rule (i.e. that the inclusion of the one exclude the other) [Steyn, *supra*, p. 50 and the authorities there referred to]; the presumption against tautology or superfluity (Steyn, *supra*, p. 17 and the authorities there referred to); the legislative presumption that the legislature does not intend absurd or anomalous results (Du Plessis, *supra*, p. 162 – 164 and the authorities there referred to) [See also: *De Ville: Constitutional and Statutory Interpretation, 95 – 96* and the authorities there referred to].

More specifically and with reference to Article 5 of the Constitution it was submitted that to interpret a reference to "*Government*" as it appears in Article 5 as being a reference to the "*Executive*", would offend against the presumptions that language is not used unnecessarily, as well as that against tautology and superfluity as the Executive has already been referred to by name in Article 5 of the Constitution. Indeed an interpretation that the Government there referred to constitutes a reference to the State as a collective (including the Executive the legislature and judiciary [and was inserted to make it clear that all the agents of the State should respect and upheld the Constitution], is the most plausible interpretation, also if reference is had to the manner in which the term "*Government*" has been used in other provisions of the Constitution]). It is submitted that this is reinforced by the reference to "*all organs of the Government*", which should be read to be synonymous with all organs of the State.'

[41] Articles 32(1)[31] and 32(2)[32] of the Constitution, according to counsel, were further examples of provisions in which reference was made to the "*Government*" and from which references it was quite apparent that the references to the term "*Government*" there could not be equated with a reference to the "*Executive*" and also that the only plausible interpretation would be that the reference to the term "*Government*" should be read to refer to the "*State*". Accordingly it was argued that the

[31] (1) As the Head of State, the President shall uphold, protect and defend the Constitution as the Supreme Law, and shall perform with dignity and leadership all acts necessary, expedient, reasonable and incidental to the discharge of the executive functions of the Government, subject to the overriding terms of this Constitution and the laws of Namibia, which he or she is constitutionally obliged to protect, to administer and to execute.

[32] '(2) In accordance with the responsibility of the executive branch of Government to the legislative branch, the President and the Cabinet shall each year during the consideration of the official budget attend Parliament. During such session the President shall address Parliament on the state of the nation and on the future policies of the Government, shall report on the policies of the previous year and shall be available to respond to questions.'

term "*Government*", referred to in Article 32(2), can for instance never be interpreted to refer to the "*Executive*" as this would give rise to an untenable and absurd interpretation with the result that Article 32(2) would then state that the *'executive'* has an *'executive branch'* and that the *'executive'* has a responsibility to the *'executive'* and that such interpretation would then give Article 32 (2) a plainly absurd meaning, namely that it would then be read as stating that '*the executive'* has 'a *legislative branch'* (and that the '*legislature'* is a branch of *'the executive'*).

[42] It was thus submitted that it would follow that where the "*Government*" is referred to in the Constitution, the concept – in numerous instances – is used as a synonym for 'the State' and that to simply, in colloquial terms, equate the term "*government*" with the "*executive*" would lose sight of the different meanings the term could have and of the fact that the word *"Government"* certainly, in terms of a number of the constitutional provisions, is used as a synonym for the "*State*". This argument was reinforced by the fact that the Constitution, in many instances, where it intends to refer to the "*Executive*", does so by referring to it as such (in which instances the term *"Government"* is also not used). [Compare, *inter alia*: Article 1(3); Article 5; Article 25(1) and 25(1)(a); Article 27(2); Article 32(1) and (2); Article 40(k); Article 63(f)].

THE ARGUMENT RELATING TO THE CITATION OF THE FIRST RESPONDENT BASED ON FOREIGN JURISPRUDENCE

[43] Here counsel for the plaintiff again referred to *Maharaj*, *supra,* at *p. 675 J – 676 A*, were the argument was rejected that the Attorney-General was not the proper respondent to be cited in proceedings where redress is sought from the Crown (i.e. the State) with reference to the relevant legislation ie. the *State Liability and Proceedings Act 1966 of Trinidad and Tobago*. According to counsel a similar situation pertains in Namibia where, in terms of the *Crown Liabilities Act*, No. 1 of 1910, it would be permissible to cite the Government or a Minister when redress is sought from the State.

[44] Reliance was then placed on *Attorney-General v Chapman*[33]*,* (a judgment of the Supreme Court of New Zealand), where also the Crown's liability for breaches committed by the "*judicial arm of government*" was considered. It was there recognised

[33] 2011 [NZSC 110]

that the term "*State*" is used "*sometimes interchangeably with 'the government' or 'the Crown'*". It was held that in New Zealand "*the Crown means 'the government of New Zealand or 'the State'"* and that "*the Crown extends to all three branches of the government of New Zealand*" [paragraph 14 of that judgment].

[45] Argument on this point was then rounded off as follows:

'It is therefore apparent from *Chapman* that the terms "*the Crown*", "*the Government*" and "*State*" are synonyms which can be used interchangeably. Reference is also made to *paragraphs 6, 8, 78, 82 and 88* of the *Chapman* judgment. In *paragraph 88* it was confirmed that the Bill of Rights Act in New Zealand, in a constitutional context, uses the terms "*the Crown*" or "*the Government*" or "*the State*" interchangeably and that these all refer to all three branches of Government. It is submitted that this is comparable with the provisions of the Namibian Constitution which, as shown, also uses (at least in certain instances) the terms "*the State*" and "*the Government*" interchangeably and as being synonymous.'

THE ARGUMENT BASED ON THE CROWN LIABILITIES ACT

[46] Here it was submitted that the correctness of citing the Government (or a Minister of State) as the correct defendant in instances which involved State liability, was reinforced by the provisions of the Crown Liabilities Act, 1910. That Act was extended to Namibia by section 1(1)(b) of the Railways Management Proclamation Act, No. 20 of 1920. It is settled law that this extension is of general application (i.e. binding on the State in general and not only on its administration of the railways).[34]

[47] This aspect was addressed in the supplementary heads of argument as the Court, during the hearing, had referred counsel to the Act, posing the questions whether that statute, in the context of the matter, might not give direction as to who should have been sued and whether or not it had been appropriate to cite the responsible Minister. In response the Act was quoted in full in the plaintiff's supplementary heads for purposes of amplifying oral argument on it. For ease of reference the full text of the Act is reproduced herein again:

"**CROWN LIABILITIES ACT, No. 1 of 1910**.

[34] See : *Minister of Defence v Mwandinghi* 1993 NR 63 (SC) at p 77 C – F and the authorities there referred to

Act to impose liabilities upon the Crown in respect of acts of its Servants.

(Signed by the Governor-General in English.)

(Assented to 20th December, 1910.)

[Date of commencement – 30th December, 1910.]

1. **Repeal of Laws**. – The laws mentioned in the Schedule to this Act shall be and are hereby repealed to the extent set out in the fourth column of that Schedule.

2. **Claims against the Crown Cognizable in any Competent Court**. – Any claim against His Majesty in His Government of the Union which would, if that claim had arisen against a subject, be the ground of an action in any competent court, shall be cognizable by any such court, whether the claim arises or has arisen out of any contract lawfully entered into on behalf of the Crown or out of any wrong committed by any servant of the Crown acting in his capacity and within the scope of his authority as such servant:

Provided that nothing herein contained shall be construed as affecting the provisions of any law which limits the liability of the Crown or the Government or any department thereof in respect of any act or omission of its servants or which prescribes specified periods within which a claim shall be made in respect of any such liability or imposes conditions on the institution of any action.

3. **Proceedings to be taken against the Minister of Department Concerned**. – In any action or other proceedings which are instituted by virtue of section *two*, the plaintiff, the applicant, or the petitioner (as the case may be) may make the Minister of the department concerned a nominal defendant or respondent.

4. **No Execution or Attachment to be issued but Nominal Defendant or Respondent Authorized to Pay the Sum Awarded**. – No execution or attachment or process in the nature thereof shall be issued against the defendant or respondent in any such action or proceedings aforesaid or against any property of His Majesty, but the nominal defendant or respondent may cause to be paid out of the Consolidated Revenue Fund, or, if the action or proceedings be instituted against the Minister of Railways and Harbours, out of the Railway and Harbours Fund, such sum of money as may, by a judgment or order of the court, be awarded to the plaintiff, the applicant, or the petitioner (as the case may be).

5. **Title of Act**. – This Act may be cited for all purposes as the Crown Liabilities Act, 1910.'

[48] On the strength of Section 2 of the Crown Liabilities Act and the reference in it to "*Any claim*", it was now submitted that the section, and the types of claims the section was encompassing, was not limited by the words "*whether the claim arises …out of any contract…or out of any wrong*".[35] Section 2 therefore did not only apply to contractual claims or delictual claims (where the principles of vicarious liability may be applicable), but also in respect of any claim that may be made against 'the State'.

[49] Counsel pointed out that in addition it appeared that in terms of section 3 of the Crown Liabilities Act, a plaintiff may even make the Minister concerned a nominal defendant. That, however, was not compulsory as proceedings which are instituted by virtue of section 2 of that Act may also be brought against the "*Government*" or "*His Majesty the King in His Government of the Union of South Africa*".[36]

[50] In conclusion counsel thus contended:

' … that the plaintiff, in all circumstances, was entitled to cite the Government of Namibia as a defendant as constituting the State for the purposes of these proceedings (alternatively representing the State in a nominal capacity). It was also correct, or at least permissible, to cite the Minister concerned (as was also done in this instance). The fact that it may be so that it may also have been correct to cite the President of the Republic of Namibia in his capacity as Head of State, does not – in terms of the provisions of the Crown Liabilities Act and the abovementioned authorities – detract from the principle that the plaintiff was also entitled to cite the Government or the Minister for that purpose … ',

and that this conclusion was reinforced by Section 4 of the said Act which:

' … also demonstrates that it was appropriate to have cited the Government or the Minister (as either being or representing the State). Any award for damages in favour of the plaintiff would be paid out of the "*Central Revenue Fund*" (i.e. its present equivalent being the "*State Revenue Fund*" in terms of Article 25(1) of the Namibian Constitution and the State Finance Act, 1991), same being State funds which fall under the control of "*the Government*

[35] See: *S.A.R & H v Edwards* 1930 AD 3, p. 9; *S.A.R & H v Smith's Coasters (Pty) Ltd* 1938 AD 113 p. 122 – 123

[36] See: *Marais v Government of the Union of South Africa*, 1911 (TPD) 127, p. 132, *Reynolds v Union Government*, 1918 G.W.L 6

of Namibia" or its Ministers of State and who are, in terms of section 4, authorised to pay such sum of money in terms of a judgment or order of the Court in favour of the plaintiff. This, it is submitted, reinforces the correctness of having cited such parties as nominal defendants as they would be able to give effect to such an order in terms of section 4.'

PLAINTIFF'S FURTHER SUBMISSIONS ON THE ISSUE AS TO WHETHER OR NOT THE REMEDY CONTENDED FOR WAS "*APPROPRIATE*" (AS CONTEMPLATED BY ARTICLE 25 (3) OF THE CONSTITUTION OR "*NECESSARY OR APPROPRIATE*" AS CONTEMPLATED BY ARTICLE 25 (3)

[51] The further submissions on this central aspect where formulated as follows:

'In considering whether it is "*appropriate*" [as contemplated by Article 25 (4)] or "*necessary or appropriate*" [as contemplated by Article 25 (3)], a purposive interpretation should be given to the aforementioned enshrined rights under Chapter 3 of the Constitution. Full recognition and effect to those enshrined rights and freedoms should thus be given. In the context of this matter, it would mean full recognition of the right to obtain monetary compensation against the State for breach of the fundamental rights and freedoms which it is required to uphold in terms of Article 5 of the Namibian Constitution. The State, in terms of Article 1 read with Article 5, obviously includes the judiciary.[37]

An interpretation such as the aforegoing, would give recognition to the qualifying and central position of Chapter 3 (being the "*bill-of-rights*" of Namibia) and the overriding set of values and norms contained therein and would emphasize the position of the Court as the guardian of those norms.[38]

The aforesaid purposive approach in interpreting a bill-of-rights is also the norm in other jurisdictions. In that regard:

"The *locus classicus* of the purposive approach to bill-of-rights interpretation is the Canadian Supreme Court case of *R V Big M Drug Mart Ltd*:

'In *Hunter v Southam Inc*. …this court expressed the view that the proper approach to the definition of rights and freedoms guaranteed by the Charter was a purposive one.

---

[37] Compare: *Ex Parte Attorney-General in re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General*, 1998 NR 282 (SC), 291 B – D, See also: *Government of the Republic of Namibia and Another v Cultura 2000 and Another*, 1993 NR 328 (SC);*S v Van Wyk*, 1992 (SACR) 147 (NmS), 173 A

[38] *Ex Parte* AG, *supra*, 291 H – I

> The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language used to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the Charter's protection."[39]

A presumption further exists that remedial provisions / statutes should be liberally construed. In *Looysen v Simmer & Jack Mines Ltd and Another*[40], a case relating to section 43 of the Workmen's Compensation Act Schreiner JA remarked that –

' … sec. 43 is clearly intended to extend, or define extensively, the field in which the employer is to be liable to pay increased compensation, by describing more widely the class of persons for whose negligence the employer is to be held responsible. In this respect the 1941 Act ensured that the apparent severity, from the workman's point of view, of the 1934 Act should be relaxed or interpreted as relaxed, in the direction of the Common Law liability of the employer. Although this might operate to the disadvantage of the employer the provision was certainly aimed at making the legal position more equitable, or at least clarifying it so as to avoid some apparently harsh results. It seems to me, therefore, that use may properly be made of LORD KENYON's statement in *Turtle v Hartwell*, 6 T.R. 426 at p. 429 that

'In expounding remedial laws, it is a settled rule of construction to extend the remedy as far as the words will admit'.

The generous interpretation of the Constitution the Court has adopted in interpreting the Bill of Rights, can most probably be traced to its 'remedial' nature."[41]

The contention that State liability for damages *in casu* is neither "*necessary*" or "*appropriate*", because a remedy is available against the wrongdoer personally by way of a common law damages claim based in delict, negates the aforesaid constitutional remedy

---

[39] Quoted with approval in *S v Zuma and Others,* 1995(2) SA 642 (CC)

[40] 1952(4) SA 547 (A)

[41] See also: *S v Zuma*, *supra*, paras [14] to [15], *S v Makwanyane and Another*, 1995(3) SA 391 (CC), para [9], *S v Mhlungu and Others*, 1995(3) SA 867 (CC), para [8]

provided for against the State in Article 25(4) (and the required purposive interpretation of the aforementioned provisions): Almost invariably there would always be an individual wrongdoer, who – in the case of State Liability – could also be held liable in delict. If the proposition were to be accepted that the existence of such a claim would exclude State Liability for damages in terms of Article 25 of the Constitution, it would, in virtually all cases, defeat a claim for damages against the State based on Article 25 (4). This would render Article 25 (4) without content or purpose (and the remedy referred to therein academic and meaningless) in cases where constitutional damages are sought against the State under Article 25 (4).
It is submitted that the following dictum in *Maharaj*'s case, *supra*, at *678 G* is apposite (especially given the purposive interpretation that should be given to Article 25):

"The clear intention is to create a new remedy whether there was already some existing remedy or not."

It is accordingly submitted that the matter should be approached from the perspective that State liability for damages was created by Article 25(4) as a matter of principle. In that context, the remedy advocated for in the current proceedings is pre-eminently required, particularly as it is now settled that State liability for acts of judicial officers is not vicarious liability (see: *Maharaj*'s case, *supra*) and can therefore not be claimed in delict from the State on that basis. Vicarious liability can (and should) – as a constitutional imperative – exist given the required absence of control over an independent judiciary [Compare: Article 78 of the Constitution]. It is submitted that the terms "*necessary and appropriate*" or "*appropriate*" as used in Article 25(3) and (4) respectively, relate to the question as to whether or not damages should be awarded in the circumstances of a particular case (and on a premise that State liability in matters such as the one *in casu* exists as a matter of principle).'

[52] Also in regard to the appropriateness of the remedy counsel for the plaintiff availed themselves of the opportunity to address a concern raised by my brother Miller in regard to the perceived possibility that the State might seek to impose (or exercise) control over the judiciary, should the State be held liable for damages due to acts performed by the judiciary. This was an aspect which was then extensively debated during oral argument.

[53] In further support of the submissions already made on this issue during the hearing of the matter – and with reference to *Ex Parte A-G's case, supra*, the further written argument ran as follows:

'a) *Ex Parte A-G, supra*, concerned the interpretation of Article 87(a) of the Constitution, which provides that the Attorney-General is "*(a) to exercise the final responsibility for the office of the Prosecutor-General*" (at *285 G*);

b) In *Ex Parte A-G*'s case, *supra*, the Court held that "*responsibility*" should be equated with being "*answerable*" or "*accountable*" (at *290 B*);

c) After a thorough consideration of all relevant constitutional principles of interpretation and comparative authorities, the Court came to the conclusion that, although "*responsibility*" for the office of the Prosecutor-General would entail financial responsibility (or for that matter, and on the above analogy, financial accountability) for that office by the Attorney-General (as well as a duty to account for its activities to the President and other organs of the State), that would not detract from the independence of the office of the Prosecutor-General (See: *Ex Parte A-G*'s case, *supra*, generally at *290 – 232* and the conclusion reached at *302*);

d) By necessary implication the argument raised by counsel for the Attorney-General (at *287 H – J*), namely that "*…it is not possible to be responsible without exercising powers*", was rejected;

e) It was accordingly held that the accountability envisaged by Article 87(a) does not detract from the independence of the office of the Prosecutor-General and the exercise of the powers and functions of the Prosecutor-General as contained in Article 88 of the Constitution;

f) The analogy of *Ex Parte A-G*'s case, *supra*, lies therein that, although the State would financially be accountable (in the circumstances contented for) for acts of judicial officers by way of payment of compensation in respect of damages suffered, this would not translate into control of the judiciary by the State. Financial accountability is, constitutionally speaking, not dependent on control being exercised and should be divorced therefrom. Article 78 of the Constitution, which entrenches judicial independence, reinforces this principle.'

THE EXTENT OF CONSTITUTIONAL DAMAGES

[54] A further issue which arose during oral argument was the extent of any damages that would or could be claimable in terms of Article 25 (4).

[55] On behalf of Plaintiff it was contended that the scope and extent of such damages where broader than the extent of the damages claimable in terms of an ordinary common law claim for damages against the wrongdoer personally. In the latter case the damages are limited to damages which may be claimed in delict which

would, for instance, exclude punitive damages. By contra-distinction, constitutional damages claimed in terms of Article 25 would include punitive damages.[42] This, so it was argued, constituted yet a further reason for the recognition of the claim for damages *in casu*.

ON THE AGREED TO PURVIEW OF THE STATED CASE

[56] Here the proposition that was advanced on behalf of the plaintiff was that the liability of the State for judicial acts should be limited to instances where *mala fides* or fraud can be shown (i.e. that the same limitation which applies to a claim against the judicial officer in his personal capacity would also apply to the claim against the State). [Compare: *Gurirab's case, 2006 (2) NR 485 (SC)*] That submission was premised on the comparative authorities which regard instances giving rise to State liability as "*very rare event*"(s) where there was "*a failure to observe one of the fundamental rules of natural justice*" (*Maharaj*'s case, *679 h*), and which aspect was also recognised by Anderson J in *Chapman's* case as "*a rare event*" and a liability which "*is narrow in scope and will be rare in occurence*" (See: *paras [218] and [220]*). Whether this limitation, proposed in argument, would be correct (or for that matter might also be incorrect to the extent that liability may even arise in a broader category of cases, which, for instance, would involve all breaches of the fair trial provisions embodied in Article 12), it was submitted that the *mala fide* conduct to be assumed in this case – coupled with the content of the stated case (paragraph 4.4 thereof), which rendered it common cause that there was a flagrant breach of the principles underlying a fair trial – would, in all circumstances, constitute a breach of, *inter alia*, Article 12 rights. On that basis it was submitted further that the Court would be correct to hold that – based on the stated case and the *mala fide* conduct to be assumed – the State would be liable for damages in terms of Article 25(4), in the given circumstances.

[57] It should be mentioned here that leave was sought to present argument which would suggest liability on a broader basis other than that based on the agreed

[42] Compare: *Fose v Minister of Safety and Security,* 1997 (3) SA 786 (CC), as referred to in paragraph 28 of the plaintiff's original heads of argument, (*paras [23] and [61]*), See also: *M and Another v Minister of Police*, 2013 (5) SA GNP, pp.627 – 628, *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici curiae)*, 2004(6) SA 40 (SCA), para [42]

limitation (i.e. on *mala fide* conduct) contended for. Such leave was refused by the defendants' legal representatives. The plaintiff's counsel were therefore precluded from advancing argument on this broader issue and thus had to continue to confine their submissions to the assumed case of *mala fide* conduct.

[58] Plaintiff's counsel then rounded off their supplementary heads and additional arguments with two quotes:

' … the first from *Comparative Constitutional Law* (2nd Ed. revised 2008) by Dr Burga das Basu, the Honourable Mr Justice BP Banerjee – retired - and Prof. B M Gandhi), in which the learned authors, at page 85, and with reference to Article 32 of the Indian Constitution, appositely comment:

> "(a) The assumption that even when the fundamental right of an individual is affected by a judicial decision, the only remedy of the aggrieved party is by way of appeal ignores the patent fact that Art. 32 is an overriding and additional constitutional remedy which takes no account of appeal or other remedies, even though appeal to the Supreme Court has been separately provided for. The right to move the Supreme Court for the enforcement of a fundamental right is *guaranteed* by Art. 32."[43]

And the second from *Chapman's* case, at *para [224,]* where Anderson J stated:

"[224] It is the solemn and ineluctable duty of the judicial and the executive branches of government, often exemplified, to protect judicial independence. The proposition that judicial independence might be or might seem to be compromised, if in certain extraordinary circumstances the Crown might be held liable for judicial acts, rests on assumptions of potential or seeming timidity on the part of judges and constitutional delinquency on the part

---

[43] Article 32 of the Indian Constitution provides:

"(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus, mandamus,* prohibition, *quo warranto and certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by Cls. (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under Cl. (2).

(4) The right guaranteed by this Article shall not be suspended except as otherwise provided for by this Constitution."

of the executive. The timidity is apprehended, not because judges could be personally liable, which they cannot be, but because it might be thought that a judge could possibly be influenced in making a decision by a wish not to upset the government or out of anxiety for his or her reputation. Having for more than 40 years seen judges in action and having been a judge for more than 24 years, I have no such apprehension. The best way of maintaining confidence in the judiciary is for it to emphasise the rights affirmed by the Bill of Rights Act. As to possible delinquency on the part of the executive, I take the view that the more the rule of law and the rights affirmed by the Bill of Rights Act are proclaimed, protected and vindicated, the lesser the risk of unconstitutional conduct by any branch of government." …

[59] Finally counsel appealed to the court to contribute to the maintenance and protection of the "*moral authority*" referred by Kriegler J in *S v Mamabolo (E TV and Others Intervening)*[44] through the recognition of the remedy contended for.[45]

THE SUBMISSIONS ON BEHALF OF FIRST, THIRD AND FOURTH DEFENDANTS

THE MAIN HEADS OF ARGUMENT

[60] Counsel for the defendants understood the stated case to be based on the plaintiff's contention that the State, which the plaintiff says is synonymous with the Government[46], should be held liable in damages for the (assumed) egregious misconduct of a judicial officer. This liability, according to the plaintiff, flows from the provisions of sub-articles 25(3) and 25(4) of the Constitution. These are the subsections which constitute the Court as the guardian of constitutional rights and freedoms and which would empower the Court, in appropriate circumstances, to award monetary compensation where there has been an unlawful denial or violation of those

---

[44] 2001 (3) SA 409 (CC)

[45] '[108] In our constitutional order the Judiciary is an independent pillar of State, Constitutionally mandated to exercise the judicial authority of the State fearlessly and impartially. Under the doctrine of separation of powers it stands on an equal footing with the executive and the legislative pillars of State; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the Judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of State and, ultimately, as the watchdog over the Constitution and its Bill of Rights – even against the State.;

[46] See Plaintiff's Principal Heads of Argument, paras 17-20

rights and freedoms. The circumstances of this particular case are deemed to be that the second defendant, a magistrate, acted irregularly in the course of presiding over the trial of the plaintiff on a criminal charge. The irregular conduct is to be taken as having been actuated by one or other motive or reason.[47] For present purposes, however, the plaintiff has limited his case to *mala fides*.[48] This limitation means that this Court need only consider the position which would arise when a judicial officer goes beyond the common law judicial indemnity.[49]

[61] According to defendants' counsel the three questions, posed in the stated case, raise two fundamental issues, namely:

(i) whether the State is liable on the single ground that whilst presiding over the case, the magistrate was exercising the judicial power of the State of the Republic of Namibia; and

(ii) whether either the Government of Namibia, or the Magistrate's Commission, or the Attorney General, or a combination of them, is accordingly liable.[50]

[62] On behalf of the defendants, Mr Kuper SC, who appeared with Mr Markus, contended that –

(i) none of them incur liability in the circumstances postulated – the first defendant is not to be taken as synonymous with the State, nor is it (or the State) the guarantor for the conduct of judicial officers and no basis at all has been alleged or suggested as to why the third or fourth defendants should incur liability; and

---

[47] See subparagraph 4.5 of the Stated Case

[48] See Plaintiff's Principal Heads of Argument, para 14

[49] As to the common law judicial indemnity, and importantly, its rationale, see *Gurirab v Government of the Republic of Namibia & Others*, 2006(2) NR 485 (SC) at p. 492 and *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority*, 2006(1) SA 461 (SCA).

[50] It appears that the plaintiff limits its argument to the supposed liability of the first respondent. See Plaintiff's Principal Heads of Argument, paras 17-20.

(ii) there are compelling reasons why the suggested cause of action subverts public policy, and the fundamental principles governing the separation of powers and would, in any event, be entirely unnecessary.

[63] On analysis it appeared to defendants counsel that the plaintiff, by way of a semantic exercise, was attempting to use the terms "Government" and "State" interchangeably; and that it was contended that the concept "Government" meant, in context, "the collective of all the organs of State", and that the concept in this context should not be understood to mean the "executive". As the magistrate, in the circumstances –*"was clearly part of – and (was) exercising the functions of –the judicial organ of the State and, in that sense, that of the judicial branch of Government"* [51] the plaintiff's justification for taking action against the first respondent was based on the view that the first respondent should be seen *as the collective of all the organs of State,*[52] of which the Judiciary is but a branch.

[64] On behalf of the defendants it was then forcefully submitted that this argument was fundamentally flawed as:

'1. In the first place, the Articles of the Constitution cited, to justify the semantic argument, do nothing of the sort;[53]

2. Article 1(3) simply identifies the main organs of the State as consisting of the Executive, the Legislature, and the Judiciary;

3. Article 5 requires that fundamental rights and freedom to be respected and upheld by those three organs of State and, in addition, by all organs of the Government and its agencies;

4. Articles 31(1) and 31(2) relate to the office of the President and certain immunities conferred upon him;

5. Article 32 requires the President to perform certain duties as Head of State and deals further with the responsibilities owed by the executive branch of Government to the legislative branch of Government, as well as other duties and powers to be exercised by the President;

---

[51] See Plaintiff's Principal Heads of Argument, para 20

[52] See Plaintiff's Principal Heads of Argument, para 18

[53] i.e., Articles 1(3); 5; 31(1); 31(2) and 32

6. None of these Articles conflate the Judiciary with Government, or establish the Government as "the collective of all the organs of State";

7. The plaintiff's reading of these Articles is subversive of the fundamental precepts of the separation of powers. There is no such collective. The concept is being used here in order to suggest that the Judiciary is to be seen simply as a branch of Government for whose acts the Government is answerable. The Government, in this case, is not a notional "collective of all the organs of State" – it is the first defendant, and the Judiciary is not a branch of the first defendant;

8. The Judiciary is of itself the repository of judicial power and the independence of the Courts is subject only to the Constitution and to the law[54]. That institutional independence[55] is not amenable to a categorisation of the Judiciary as a branch of a collective or as imposing legal obligations of indemnification on the Government;

9. In the last analysis, the plaintiff has simply sought to dress up the discredited argument of vicarious liability in 'new semantic clothes'.'

[65] It was further argued that there simply was no need for the proposed cause of action as Namibia already has a comprehensive and elaborate structure to deal with the cases and with the consequences of serious judicial misconduct. That structure, which includes both constitutional and common law components provides:

'(i) for the correction of irregular judgments or orders by appeal and review;

(ii) for the removal of judicial officers from office in the event of serious misconduct;

(iii) for personal delictual liability on the part of the offending judicial officer where *mala fides* are involved.'

[66] This submission was based on what the Court had noted in *Gurirab*'s case, where it had been said:

---

[54]Articles 78(1) and (2)

[55]See: *Mostert v The Minister of Justice*, 2003 (NR) 11 (SC) at pages 30-32 and *Hannah v Government of the Republic of Namibia*, 2000 (NR) 46 (LC) at pages 50-53.

'At any event, apart from review, appeal and an action for damages for *mala fide* and/or fraudulent action, a judge or magistrate may be subject to disciplinary action, even suspension and/or dismissal for misconduct provided for by the Constitution and acts of Parliament.'

[67] It thus appeared that judicial misconduct could be dealt with immediately and effectively and that judicial officers would be answerable in damages for deliberate wrongdoing in the same way as anyone else. In those circumstances, there could be no justification for seeking to carve out an additional cause of action directed not at the wrongdoer but at the present defendants, none of whom are themselves wrongdoers, or complicit in the wrongdoing and who were not guarantors in any way for the actions of the wrongdoer. The analysis of the relevant Articles of the Constitution undertaken by the Court in the *Gurirab* case therefore remained relevant even though, in this instance, the Court was required to assume *mala fides* on the part of the judicial officer.

[68] It was pointed out that the Court in G*urirab* had listed the safeguards built into the law, through which accountability of the judiciary is achieved, which include the review and appeal of judgments, action for damages for mala fide and/or fraudulent action, disciplinary action against a judicial officer, which can include suspension or dismissal [56] and that the Court with regard to article 5[57] had said:

'This article provides that the fundamental rights and freedoms shall, inter alia, be respected and upheld by the Judiciary. The Judiciary does this by giving judgments and should any Court give a wrong judgment, such judgment can be reviewed or appealed against to a higher Court and in this manner the Courts respect and uphold the fundamental rights and freedoms.' …

and that the court had gone on to state with reference to article 25 (1) and (2)[58] :

---

[56] *Gurirab* at page 495

[57] 'The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed.'

[58] ''Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom . . . .'

"Aggrieved persons can approach a competent Court to enforce or protect such a right or freedom. Once again this provision of the Constitution provides that a competent Court acts as adjudicator to protect such a right or freedom. Article 25(2) says nothing about holding the judicial officer liable for damages in delict for acts or omissions in the course of his/her judicial function. That is why subart (1) of art 25 clearly provides that:

'Save insofar as it may be authorised to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid provided that. . . .'

'The action which is prohibited in subart (1) of this article, is that of Parliament or any subordinate legislative authority or the Executive or the agencies of Government, not the Courts and its judicial officers acting in the course of their judicial functions.' …

and where the Court with regard to sub-article (3)[59] and (4)[60] had concluded:

'It is obvious that orders which are 'necessary and appropriate' in terms of subart (3) or 'appropriate' in terms of subart (4), cannot ever be 'necessary' and/or 'appropriate', when applied to judicial officers, acting in the course of their judicial functions, when they did not act in a mala fide and/or in a fraudulent manner.'

[69] As the Court in this instance was only required to consider the position as if *mala fides* were present, a delictual action would in any event lie against the wrongdoer rendering it neither necessary nor desirable nor appropriate to extend the presumed liability to 'the Government'.

---

[59] 'Subject to the provisions of this Constitution, the Court referred to in sub-article (2) hereof shall have the power to make all such orders as shall be necessary and appropriate to secure such applicants' enjoyment of the rights and freedoms conferred on them under the provisions of this Constitution, should the Court come to the conclusion that such rights or freedoms have been unlawfully denied or violated, or that grounds exist for the protection of such rights or freedoms by interdict.'

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

[70] In deciding whether or not to create a cause of action against 'Government' for *mala fide* acts of judicial officers, the Court should bear in mind the consequences which would flow. Not every litigant making use of this dispensation would be *bona fide* or, indeed, rational in asserting improper conduct. One should anticipate that many unmeritorious cases would be pursued, particularly given the attraction of a 'Government defendant' with deep (taxpayer) pockets. The results would be undesirable because such litigation, even the threat of such litigation, would undermine the administration of the law and it would involve the 'Government' joining forces in the litigation with the judicial officer which situation, on its own, would give rise to difficulties. These aspects were also identified as significant grounds for concern by the New Zealand Appeal Court in the matter of *Attorney General v Chapman*, [2011] NZSC 110 in which the Court said:

'[185] If the executive government became liable in damages for judicial breaches of rights, it is likely that members of the public engaged in or observing litigation would become concerned that the prospect of future litigation to this end might distract the judge from acting in an entirely independent way. They would see the right of action as exposing a judge to pressure, by indirect means, to act in a way that minimises the risk of claims based on government liability. There is a risk that public confidence in the effective administration of the law will be eroded.

[186] If such claims are permitted, judges will be pressed by the defendant government to be witnesses in proceedings brought as a result of their actions. The Law Commission rightly recognised that it was undesirable for judges to have to give evidence concerning their conduct. We agree with the Solicitor-General that such a prospect would also in itself give rise to a perception that judges may come under pressure in their decision-making if they believe they may be questioned concerning it at a later stage. It could well also impact on the willingness of qualified lawyers to accept appointment. In this area public perceptions of the independence of the judiciary are important. As Woodhouse J put this point in *Nakhla*:

> "It lies in the right of men and women to feel that when discharging his judicial responsibilities a judge will have no more reason to be affected by fear than he will allow himself to be subjected to influences of favour."

[190] Allowing such claims to proceed would be detrimental in other respects to the effective exercise of judicial function. As the defendant to such a claim, the executive

government would be required to defend actions brought in relation to judicial conduct. This will involve judges necessarily co-operating with the state in the defence of such actions. To an outside observer, the executive government will appear to be defending the judge and the judge will be helping the government. Making the Attorney-General, a member of the executive government, financially responsible for judicial actions would imply that judges were acting on behalf of the executive government when exercising judicial functions. The perceptions associated with all of this would be damaging to judicial independence. Constitutionally the government may not interfere with judicial process without breaching conventions. If, however, the executive becomes liable to compensate for judges' constitutionally wrongful acts, that is likely to bring political pressures, direct and indirect, for accountability of the judges to the executive and what the Law Commission called —corresponding Crown powers of control‖. Such a consequence would be highly detrimental to independence of the judiciary and its effective functioning.'

[71] Counsel then submitted that the plaintiff makes much of the decision of the Privy Council in the *Maharaj* case[61], which, he contends, should be applied in the same way to the interpretation of the Namibian Constitution. What this reliance in their view however failed to take into account were 'the significant differences between the statutory regime then prevailing in Trinidad and Tobago and that now prevailing in Namibia, such as the feature that no appeal lay against the impugned judgment at the time; moreover, the finding of the Court in *Maharaj* was not that the Government was liable because the judicial officer was exercising the judicial power of the State but rather that the executive arm of the State had detained the appellant unlawfully and that this constituted a contravention.' Moreover, the *Maharaj* judgment was a controversial one, so the argument ran further and it was pointed out that subsequent decisions had either qualified or limited its effect or else declined to follow it altogether. Its obvious weaknesses were immediately exposed by the masterful minority judgment of Lord Hailsham of Marylebone.

[72] The court was also referred to *Kemmy v Ireland and the Attorney General* [62], where the Court had rejected an argument for direct liability of the State for judicial error. The Court said:

---

[61] (1978) 2 ALL ER 670

[62]

'Apart from that line of reasoning, it is my view that in any event the immunity which the law confers on the judiciary personally in such situations applies also for the benefit of the State when an attempt is made to make it directly liable for the wrong of the judge in such circumstances. I am of the view that many of the reasons which support personal judicial immunity – the promotion of judicial independence, the desirability of finality in litigation, the existence of an appeal and other remedies as well as the public interest – can also support the argument for State immunity in cases such as those before this Court. *Indeed it is my view that not to extend the immunity to the State in the present circumstances would represent an indirect and collateral assault on judicial immunity itself.*

Accordingly to make the State liable in such situation would indirectly inhibit the judge in the exercise of his judicial functions and this, in turn, would undermine the independence as guaranteed by the Constitution. It would introduce an unrelated collateral consideration into the judge's thinking which could prevent him from determining the issue in a free and unfettered manner, as it might for example encourage the other organs of government to monitor the conduct of the judges in this regard, thereby resulting in "chilling effect".

[73] It was pointed out that the Appeal Court in *Attorney-General v Chapman*[63] had declined to follow the *Maharaj* line of cases and those cases in New Zealand which had been influenced by its approach and that the strength of the judgments in the *Kemmy*- and *Chapman's* cases lay in their appreciation of the policy issues and the policy ramifications inextricably involved in the analysis of questions of this sort. Those judgments, so it was argued, contained important insights which are sorely lacking in the judgment of the majority in the *Maharaj* case. Accordingly – and returning to the case at hand – much was to be said for refusing to allow the sought cause of action and almost nothing was to be said in its favour as *'the contemplated cause of action carries with it the real prospect of undermining the independence of the Judiciary, more particularly by conflating it with the executive; it ignores the comprehensive structure enshrined in the Constitution and in the common law for dealing with aberrant judicial officers and it creates the prospect of oppressive and vexatious litigation in which the Government and the individual judicial officers are forced into an undesirable and unattractive alliance. It is not a cause of action that will foster a healthy constitutional dispensation, nor is it necessary for one.'*

63 *[2009] IEHC 178, at paragraphs 159ff*

[74] Accordingly it was suggested that the answers to the questions posed in the stated case should be as follows:

'Question 3.1: Can the State be held liable for the judicial acts of a magistrate on account of the fact that, while presiding over the case of the plaintiff, the magistrate was exercising the judicial power of the State of the Republic of Namibia?
Answer: No.
Question 3.2: Is the answer to this question affected by the constitutionally entrenched principles of the independence of the judiciary, the rule of law and the separation of powers doctrine?
Answer: Yes
Question 3.3: On the assumption that the allegations pleaded by the plaintiff against the Magistrate *in casu* are established, would the first and/or third and/or fourth defendants be liable?
Answer: No.'

[75] Based on the answers given to questions 1, 2 and 3 defendants' counsel then asked that the claim of plaintiff against first, third and fourth defendants be dismissed with costs, as not having exhibited a cause of action against them.

THE SUPPLEMENTARY SUBMISSIONS ON BEHALF OF THE DEFENDANTS

[76] These were confined in the main to the question whether it had been appropriate to have cited the Government of the Republic of Namibia as the first defendant herein and, more particularly, in the light of the first question posed in the stated case, whether the citation of 'the *Government'* could be regarded as equivalent to a citation of 'the *State'* or whether the former can act in these proceedings as some sort of proxy for the latter. I will revert to these submissions below.

[77] The important aspect of the appropriateness of the remedy which the plaintiff was proposing was also revisited. On this score the submissions already made in this regard were bolstered by placing emphasis on the following further aspects. It was now submitted:

(i) ‘ that the Court will need to be persuaded that such a damages claim would also be necessary and appropriate;

(ii) that in assessing the suggested remedy, the Court should differentiate between a remedy which was intended to carry with it a public law benefit or whether it was limited to private gain;

(iii) that it appeared that the damages claimed from the first, third and fourth defendants were intended to compensate the plaintiff and that, therefore, the claimed damages were identical in nature and purpose to those which were claimable from the actual wrongdoer, the second defendant in this instance;

(iv) that there was no good reason why a constitutional remedy should be granted where the private law already contained adequate recourse. If the Magistrate had acted fraudulently or *male fide* (as here alleged), a civil remedy in delict was already available to the plaintiff. There would be no constitutional virtue in permitting the plaintiff to claim against ‘the *State’* simply because ‘the *State’* has deep pockets. A constitutional remedy is not intended to provide a windfall;

(v) that by making the *State* liable, in these circumstances, would only suggest to the public that there must be some kind of vicarious link between the *Judiciary* and the *State,* i.e., that the *Judiciary* is not independent;

(vi) that there was every reason to believe that if such a constitutional remedy would be granted, it would create undesirable consequences because the *Executive* would appear as a co-defendant with the impugned judicial officer and where they would prepare their defences, in tandem, (a most undesirable relationship) and further that the Executive would be tempted to commence to monitor the conduct of the *Judiciary* (particularly that of Magistrates) in order to avoid or escape financial liability;

(vii) In short, no constructive purpose would be served by the grant of the sought remedy.’

RESOLUTION: QUESTION 1 - Can the State be held liable for the judicial acts of a magistrate on account of the fact that, while presiding over the case of the

plaintiff, the magistrate was exercising the judicial power of the State of the Republic of Namibia?

BACKGROUND CONSIDERATIONS

[78] When considering what answer should be given to the main question posed in the stated case of the parties it seems apposite that the parties' submissions should, in the first place, be considered against the constitutional dispensation created by the Namibian Constitution, which dispensation surely must form the backdrop into which any decision thereon made, should fit. Here it should be kept in mind that it has also emerged from the international case comparison/analysys, provided to this court through the *Oxford Pro Bono Publico* research paper, that the answer to the posed question differs from country to country and that it is ultimately determined with reference to each specific constitutional and statutory dispensation applicable in a particular country.

[79] Inadvertently the submissions made on behalf of the defendants on the question of whether or not the plaintiff's citation of the first defendant as '*Government'* in the particulars of claim could be regarded as equivalent to a citation of the '*State',* or whether the former could act, in these proceedings, as some sort of proxy, for the latter, already provided the governing case law setting against which the first question is then also to be determined. It is further beyond doubt that the relief sought by the plaintiff is really aimed at the *'State'*. In this regard it would have been noted that Mr Tötemeyer had conceded that it would have been (more) correct to cite *'the President of the Republic of Namibia in his capacity as Head of State'* as the first defendant herein.

[80] Defendants' counsel have argued that the Namibian Supreme Court has over the years, in a number of cases, analysed the structure of the Namibian State and that the court has, in its decisions, already delineated the boundaries between the executive and judicial branches of the Namibian State. These parameters are accordingly fixed not only by the applicable constitutional provisions but also through the judicial pronouncements of the highest court of this country.

[81] Co-incidentally, as indicated above, this appears in my view also from certain extracts from Counsel's written argument on how the Namibian Constitution clearly differentiates between the '*State'* and the '*Government',* which argument ran as follows:

'In our submission, the Namibian Constitution clearly differentiates between the *State* and the *Government* and that submissions to the contrary are misconceived.

In terms of Art 1(3) the State is made up of three organs: the executive, the legislature and the judiciary.

Art 5 deals with the protection of fundamental rights and freedoms. It states that the rights must be respected by the State (executive, legislature and judiciary) and all organs and agencies of government. This article provides a clear indication that the State and the Government are not synonymous.

If the State is not the Government, then the question arises what is the government? Iain Currie et al[64] provide the following description of the government:

"The most prominent agency of the state is the government. The state's power is formally invested in the government and it is the government that speaks on behalf of the state. The government is so conspicuous an institution that it is often incorrectly regarded as being identical with the state. The state comprises many institutions other than the government and, in practice, the government is often not the most influential power-holder in a particular state. One of the most important rivals to the government is the administration: the body of bureaucrats and officials which runs the state. In few modern state is the state system fully cohesive and co-ordinated; its different parts provide competing centres of power and influence. For example, both the judiciary and the government are part of the state, but the judiciary is relatively independent of the government…"

Art 27, which deals with the position of the President, as Head of State and as Head of Government, provides a further indication that the State and the Government are distinct concepts.

Art 27(2) gives an indication what government entails: it is the arm in which the executive power of the State vests. It is that organ of *State* which is headed by the President and his Cabinet.

---

[64]I Currie et al *The New Constitutional & Administrative Law* 2001 (Reprinted 2004) Page 5

The Supreme Court[65] recently considered the role exercised by Cabinet and observed:

'[30] The Constitution thus establishes that the executive power vests in cabinet and one aspect of this authority, as set out in art 40(a), is the power to direct, co-ordinate and supervise the activities of parastatal enterprises. Namcor is a parastatal enterprise and, subject to the provisions of its constituting statute, thus falls within the mandate of cabinet specified in art 40(a). The words 'direct, coordinate and supervise' are broad in scope and suggestive of a general executive power to issue policy directives pertaining to fiscal, economic, social and other similar considerations; to co-ordinate the way in which government departments, ministries and parastatals function and to ensure, by executive supervision, that they work effectively both collectively and individually. Understanding the words in this way is consistent with the overall principle that the executive power of government resides in the cabinet.'

Thus strictly speaking, the term 'executive' is reserved for the President and his Cabinet. Conventionally the term is however not used in that way. The term is often used to refer to the entire executive branch of government, which includes the public administration (government officials and bureaucrats). The latter's task is to administrate and implement the laws.[66] When used in this way, 'executive' is a synonym for 'government',[67] but Government is never a synonym for State.'

[82] Defedants' counsel went on to submit that ' … neither the broader nor the narrower concept of *Government* is ever broad enough to include the *Judiciary …*' .

[83] On what the Namibian Courts have stated in regard to the delineation of the boundaries between the executive and judicial branch of the State, in order to ensure the institutional independence of the judiciary, the following was highlighted by them:

'The first case was *Mostert v Minister of Justice* (*Mostert1*).[68] In this case, a magistrate challenged the decision of the Permanent Secretary, taken in terms of section 23(2) of the Public Service Act, to transfer him to Oshakati. The section empowered the Permanent

[65] *Minister of Mines and Energy and Others v Petroneft International Ltd and Others* 2012 (2) NR 781 (SC) at [30]

[66] *President of the Republic of South Africa and Others v South African Rugby Union and Others* 2000 (1) SA 1 CC para 138

[67] I Currie et al Page 228

[68] *Mostert v The Minister of Justice* 2003 NR 11 (SC)

Secretary to transfer “staff members”. As staff members, magistrates were, in terms of section 2 of the Public Service Act, required to execute Government policy and directives. The Supreme Court said that, there are clear provisions in the Constitution stating that magistrates are part of the judiciary, whose independence is guaranteed by the Constitution. These include arts 12(1)(a)[69], 78(1)[70] and 83[71] of the Constitution.[72]

The Supreme Court also considered section 9 and 10 of Act 32 of 1944 (as amended), which in the Court’s view created the real problem: Section 9 of the amendment to Act 32 of 1944 gave the Minister of Justice the power, to appoint magistrates subject to the provisions of the Public Service Act. The Court found the provisions which placed magistrate within the civil service unconstitutional and said:

‘In my opinion it is necessary to finally cut the string whereby magistrates are regarded as civil servants, and that will only be possible once new legislation completely removes them from the provisions of the Public Service Act.’ **[73]**

With regard to section 23(2) the Court said:

‘The effect of all this is that the Permanent Secretary could, in my opinion, not act and transfer magistrates in I terms of the provisions of s 23(2) of the Public Service Act. Whatever the position was before Independence, once the new Constitution guaranteed the independence of the judiciary, which included the magistrates, they were no longer 'staff

---

[69] ‘In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: Provided that such Court or Tribunal may exclude the press and/or public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.'

[70] The judicial power shall be vested in the Courts of Namibia, which shall consist of:

(a) a Supreme Court of Namibia;

(b) a High Court of Namibia;

(c) Lower Courts of Namibia.

(2) The Courts shall be independent and subject only to this Constitution and the law.'

[71] (1) Lower Courts shall be established by Act of Parliament and shall have the jurisdiction and adopt the procedures prescribed by such Act and regulations made thereunder.

(2) Lower Courts shall be presided over by magistrates or other judicial officers appointed in accordance with procedures prescribed by Act of Parliament.'

[72] *Mostert* at page 32

[73] Mostert at page 34

members' who could be dealt with in terms of that Act.' [74]

The Court accordingly declared that section 23(2) was not applicable to magistrates, and also declared section 9 and 10 of the Magistrates' Courts Act 32 of 1944 unconstitutional.

Following *Mostert 1*, the *Magistrates Act* 3 of 2003 was passed. The Act created a Commission that is tasked to ensure that appointments, transfers and disciplinary actions against magistrates are taken lawfully.[75]

The newly established Commission made a decision to transfer the magistrate (Mostert) to Oshakati, which the magistrate did not accept. He attacked the composition of the Commission asserting that the Commission was not independent but one that was controlled by the Minister of Justice (*Mostert 2*).[76]

This Court, in *Mostert 2* after a detailed analysis of the Magistrates Act found that, by placing the magistracy outside the Public Service, reasserting the independence of the magistracy in very unequivocal language in many of its provisions, and having regard to the composition of the Commission, the Act did create an independent Commission and did not negate an independent magistracy in Namibia.[77]

The next case was *Alexander v Minister of Justice and Others* [78]. In that case the applicant challenged, amongst others, a decision by the Magistrates' Commission to appoint the Chief: Lower Courts, to conduct an extradition inquiry in terms of section 12 of the Extradition Act 11 of 1996 in relation to him. The section requires a magistrate to hold an extradition inquiry. With regard to this challenge the Court said:

'[47] It follows that, in my judgment, the Chief: Lower Courts is a member of the public service within the meaning of the Public Service Act, and so the Chief: Lower Courts cannot at the same time be a part of the magistracy without offending the Namibian Constitution. I have come to this irrefragable conclusion based on Namibia's constitutional ambience. In this regard it must be remembered that the concept of independence of the judiciary stands on two inseparable pillars, namely individual independence and institutional independence. Individual independence means the complete liberty of individual judges and magistrates to

---

[74] Mostert at page 34

[75] Section 3 of the Act

[76] *Mostert and Another v Magistrates' Commission and Another* 2005 NR 491 (HC) page 494

[77] *Mostert and Another v Magistrates' Commission and Another* at page 509

[78] 2009 (2) NR 712 (HC)

hear and decide the cases that come before them. (Provincial Court Judges *Assn (Manitoba) v Manitoba (Minister of Justice))* (1977) 46 (CRR 2nd) 1 (SCC) approving *The Queen in Right of Canada v Beauregard* (1986) 26 CRR 59 ([1986] 2 SCR); *Van Rooyen* supra.) This facet of judicial independence has found expression in art 78(3) of the Namibian Constitution. Institutional independence of the judiciary, on the other hand, reflects a deeper commitment to the separation of powers between and among the legislative, executive and judicial organs of State (Provincial Court Judges Assn supra at 47; *Mostert and Another v The Magistrates' Commission and Another* 2005 NR 491 (HC)). The doctrine of separation of powers is also a part of Namibia's constitutional make-up, as I have said above; and in *Mostert (HC)* supra at 501H, this court observed tersely that 'institutional independence of the judiciary is not subject to any limitation'.

[48] In sum, I find that the Chief: Lower Courts is a staff member of the Ministry of Justice, and the situation violates institutional judicial independence which inheres in the principle of separation of powers, and therefore it is unconstitutional.

[49] Any lingering doubt as to the fact that the Chief: Lower Courts is not a magistrate within the meaning of the Magistrates Act, as was held by this court in *Mostert (HC)* supra, must now be put to rest if regard is also had to the above analyses and conclusions and the reasons therefor.

[50] For all the above reasons, I have come to the only reasonable conclusion that the applicant has made a case for the grant of the declaration sought in 2.1, and so I exercise my discretion …'. [79]

The last case that considered the interplay between the judiciary and the executive in performing their constitutional functions is *Minister of Justice v Magistrates' Commission and Another* [80]. The case concerned a refusal by the Minister to act on a recommendation by the Magistrates' Commission that a magistrate be dismissed on account of misconduct. The Commission's position was that, once it made a recommendation to the Minister that a magistrate be dismissed the Minister was obliged to implement such a recommendation. The Minister on the other hand contended that she was entitled to re-consider the charges against the magistrate before agreeing to dismiss her.[81] The Court was thus tasked to determine the

[79] Page 728-9

[80] 2012 (2) NR 743 (SC)

[81] Paras 16-17

proper demarcation of the roles, powers, responsibilities and functions of the Minister and the Commission.[82] In paragraph 22 of its judgment the Supreme Court said:

'[22] Namibia is a constitutional democracy that upholds the doctrine of separation of powers[83] the rule of law[84] and the independence of the judiciary.[85] These principles presuppose a culture of mutual respect between the executive, the legislature and the judiciary. Given the relationship between the judiciary and the minister, she would be especially expected to accord such assistance as the judiciary might require to protect its independence, dignity and effectiveness.[86] It follows that the importance of treading carefully when dealing with the respective roles, powers and functions of the arms of the State, particularly insofar as they relate to and interact with one another cannot be over-emphasised. In this case, the commission is not the judiciary but it is charged with specific functions in relation to the magistracy, an important part of the judiciary, to enhance and maintain its independence and effectiveness. The role and functions allocated to the minister by the Constitution and any other law, particularly insofar as they have a bearing on the independence, dignity and effectiveness of the judiciary must accordingly be strictly complied with. Likewise, the functions and role of the commission, insofar as they have a bearing on the judiciary's independence, dignity and effectiveness, must not be compromised.' (emphasis added)

The Supreme Court after an analysis of the provisions of the Act concluded that the power to dismiss a magistrate had been removed from the Minister by the legislature and resided now with the Commission. The Court said that this was in tune with the constitutional ideal of judicial independence. The Minister was accordingly not required to "concur" or otherwise with the Commission's recommendation.[87]

[84] In conclusion it was submitted that the various judicial interpretations on the structure of the Namibian State, as moulded by the Constitution, demonstrated that the courts have categorically insisted on maintaining and safeguarding the institutional

---

[82] Para 19

[83] See art 1(3) of the Constitution.

[84] See art 1.

[85] See art 78(2).

[86] Article 78(3) of the Constitution states: 'No member of the Cabinet or the Legislature or any other person shall interfere with Judges or judicial officers in the exercise of their judicial functions, and all organs of State shall accord such assistance as the Courts may require to protect their independence, dignity and effectiveness, subject to this Constitution or any other law.'

[87] Para 29

independence of the judiciary. Importantly it was suggested that this approach reflects a deep commitment to the doctrine of the separation of powers that should be maintained between the different organs of State, 'where each organ operates within its constitutionally ordained realm, and assists the other in fulfilling its constitutional mandate.'

[85] I believe that these concluding submissions constitute 'fair comment' on the various judicial pronouncements referred to and ultimately on the constitutional structure created by Namibia's Supreme Law. It therefore cannot be remiss to continue to apply this *'deep commitment to the doctrine of separation of powers that should be maintained between the different organs of State, where each organ operates within its constitutionally ordained realm, and assists the other in fulfilling its constitutional mandate*,' when the merits if this case are now determined, which I am obliged to follow in any event also as a judge sitting in a lower court. .

[86] It is obvious that these pronouncements have set the tone- and constitute the applicable setting to this case. They already foreshadow the impact that 'the doctrine of the separation of powers', – which - as far as the judiciary is concerned – also includes the principle of 'judicial immunity' – must have - on the determination of the questions, posed by the stated case, in this instance.

[87] No background picture would be complete without taking into account also:

a) that Namibia is a sovereign, secular, democratic and unitary State founded on the principles of democracy, the rule of law and justice for all;[88]

b) that the main organs of the Namibian State are the Executive, the Legislature and the Judiciary;[89]

c) that all Judicial power is vested in the Courts of Namibia;[90]

---

[88] See Article 1(1) of the Constitution

[89] See : Article 1(3) of the Constitution

[90] See : Article 78(1) of the Constitution

d) that the Courts of Namibia are to be independent and subject only to the Constitution and the law;[91]

e) that the concept of the 'independence of the courts' and thus 'judicial independence' includes the notions of 'institutional- and 'individual independence';[92]

f) that the 'institutional independence of the Courts' is not subject to 'any limitation',[93]

g) but that 'the 'individual independence' of the Courts – and thus the 'individual independence of judicial officers' – is subject to the Constitution and the law;[94]

h) that 'judicial officers' have complete liberty to hear and decide the cases that come before them;[95]

i) that 'judicial officers', when exercising these functions, are generally not accountable for acts done by them in that capacity, as they are shielded by the doctrine of 'judicial immunity';

j) this 'immunity' - extended at common law to judicial officers - is not absolute as it is subject to the exception that a judicial officer can personally be held liable in delict, for damages, if the wrongful conduct causing damages was also done *mala fide* and/or fraudulently;[96]

NO VICARIOUS LIABILITY

---

[91] See : Article 78(2) of the Constitution

[92] *Alexander v Minister of Justice* op cit at [47]

[93] See also *Alexander v Minister of Justice* op cit at [47]

[94] See : Article 78(2) of the Constitution

[95] See also *Alexander v Minister of Justice* op cit at [47]

[96] See : *Gurirab v Government of the Republic of Namibia* op cit at [24]

[88] At this stage - and for purposes of the resolution of the stated case it will also be necessary to clarify – categorically - and in so far this may still be necessary - that the above cited authorities - on the independence of the judiciary - in my view - clearly leave no room for the notion that the State can be held vicariously liable for the wrongful acts of judicial officers. A judge simply is not an employee of the State.[97]

---

[97] See also: *Hannah v Government of the Republic of Namibia* 2000 NR 46 (LC) where Ngoepe AJ, as he then was said this: 'Can there be an employee/employer relationship under those circumstances? In considering this vexed question, it is important to focus on the true nature of a Judge's function; viz the exercise of judicial functions. When, for example, issues such as control, supervision, accountability etc are considered, it must be with reference to judicial functions and not to peripheral activities. The essence of judicial function is to 'administer justice to all, in accordance with the laws of the Republic of Namibia' (art 80(2) read with Schedule 2 to the Constitution). That is what the oath of office dictates. A Judge does not therefore exercise his/her judicial functions in accordance with the wishes or directives of the supposed employer, but in accordance with his/her oath of office. Again, this state of affairs is not reconcilable with an employee/employer relationship. Once such wishes and directives are translated into an Act of Parliament, the Judge is really only paying heed to such Act, which he/she then applies in accordance with his/her own interpretation and understanding thereof. He/she may give a judgment which the State does not like; indeed, he/she cannot be held accountable to the State in respect of his/her judgment.

In *Union of India v Pratibha Bonnerjea* [1996] AIR SC 690 the dispute was about whether or not a Judge of the High Court who was drawing pension could be said to be a person holding a pensionable post under the Union State. The real issue was subsequently formulated by the Court as follows:

'The question to be considered is whether under the Constitution there is, strictly speaking, a relationship of master and servant between the government and a High Court Judge?'(At 695 para 5.)

I find the decision relevant and instructive and, for that reason, quote liberally from it (at 696): D

'Independence and impartiality are the two basic attributes essential for a proper discharge of judicial functions. A Judge of a High Court is, therefore, required to discharge his duties consistently with the conscience of the Constitution and the laws and according to the dictates of his own conscience and he is not expected to take orders from anyone. Since a substantial volume of litigation involves government interest, he is required to decide matters involving government interest day in and day out. He has to decide such cases independently and impartially without in any manner being influenced by the fact that the government is a litigant before him. In order to preserve his independence his salary is specified in the Second Schedule, vide art 221 of the Constitution. He, therefore, belongs to the third organ of the State which is independent of the other two organs, the Executive and the Legislature. It is, therefore, plain that a person belonging to the judicial wing of the State can never be subordinate to the other two wings of the State. A Judge of the High Court, therefore, occupies a unique position under the Constitution. He would not be able to discharge his duty without fear or favour, affection or ill-will, unless he is totally independent of the Executive, which he would not be if he is regarded as a government servant. He is clearly a holder of a constitutional office and is able to function independently and impartially because he is not a government servant and does not take orders from anyone.'

The learned Judge went on (at 696) to point out that the procedure for the appointment of Judges was different from that of other civil servants:

'That is because the Constitution-makers were conscious that the notion of judicial independence must not be diluted. If the relationship between the government and the High Court Judge is of master and servant it would run counter to the constitutional creed of independence for the obvious reason that the servant would have to carry out the directives of the master. Since a High Court Judge has to decide cases brought by or against the government day in and day out, he would not be able to function without fear of favour if he has to carry out the instructions or directives of his master. The whole concept of judicial independence and separation of Judiciary from the Executive would crumbel (sic) to the ground if such a relationship is conceded, High Court Judges would not be true to their oath if such a relationship is accepted.'

I find the reasoning in the above judgment very persuasive. It is noteworthy that the constitutional position of a Judge in India is to a large extent the same as that of a Judge in this country: at least as regards appointment, security of tenure and A judicial independence.' …. (at p50H to 52A)

and :

'I do not agree with the contention that a Judge can still be regarded as an employee of the State even

[89] Accordingly the contended for liability – and thus any affirmative answer to the first question posed in the stated case – can in my view only be achieved through the adoption of the concept of 'State liability'. Can this concept however be recognized in Namibia in view of the constitutional guarantee relating to the independence of the judiciary and the qualified personal immunity, which judicial officers enjoy from civil suit? After all this is what was recognized in *Maharaj* where Lord Diplock, writing for the majority, put it as follows:

'The claim for redress … for what has been done by a judge is a claim against the state for what has been done in the exercise of the judicial power of the state. This is not vicarious liability; it is a liability of the state itself. It is not a liability in tort at all; it is a liability in the public law of the state, not of the judge himself … '.[98]

IS THERE STATE LIABILITY?

[90] In order to thus establish, in principle, whether or not the Namibian State can be held liable for anything, it would, in the first instance, be useful to analyse the juristic nature of that 'entity'.

[91] Here it is instructive how Mr Justice Mc Mahon went about this task in *Kemmy's* case[99] when he analysed the juristic nature of the Irish State in the context of Irish law. He did so as follows:

'The State is a legal person separate and distinct from its citizens, in a similar way that a company is a legal entity separate and distinct from its shareholders. It may sue and be sued

though he/she gets no orders or instructions from the State. Firstly, as I have already said, it is not only a question of the absence of supervision and control, but also prohibition of any interference with a Judge in the execution of his/her judicial functions; secondly, it would be difficult to reconcile an employee/ employer relationship with judicial independence. The confidence of citizens in the Judiciary would be seriously undermined, particularly in matters in which the State is one of the litigants - a daily occurrence. It has also been submitted, in support of the applicant's case, that Judges are controlled by the State as to the times when they have to work; as to the place where they have to work; as to when to take vacations; as to (obligatory?) pension and medical contribution; as to deductions for income tax on a PAYE basis etc. I doubt the correctness of some of these assertions. In any event, they are peripheral as opposed to being germane to a Judge's function, the real nature of which I have already described above: they do not go far in helping determine the nature of the relationship between the parties. If they do carry any weight at all, they do not outweigh the factors discussed earlier which militate against the argument that a Judge falls within the definition of an employee. They only serve to indicate that a Judge's position is sui generis…. '.(at p 52 I to 53 A)

[98] *Maharaj* at 399

[99] *Kemmy v Ireland & Anor* [2009] IEHC 178

as a juristic person and and it has the capacity to hold property. (*Commissioner of Public Works v. Kavanagh* [1962] I.R. 216).

Although the term "the State" is not expressly defined in the Constitution it is created by the Constitution and its characteristics can be discerned therefrom. …

"The State" is an abstract concept but it exercises its powers and discharges its duties and obligations through its three constitutional organs, namely its legislative, executive and judicial organs. Article 6.2 of the Constitution provides that the State's powers are "exercisable only by or on the authority of the organs of State established by this Constitution". Referring to Article 6 of the Constitution, Finlay C.J. stated in *Crotty v An Taoiseach* [1987] 1 I.R. 713 at p772 that:

"The separation of powers between the legislature, the executive and the judiciary set out in Article 6 of the Constitution, is fundamental to all its provisions… It involves for each of the three constitutional organs concerned not only rights but duties also; not only areas activity and function, but boundaries to them as well."

In *Byrne v. Ireland* [1972] 1 I.R. 241, the Supreme Court held that the State could be sued for damages in tort and rejected the argument that the State had inherited the Crown's common law immunity from liability. As Budd J. at p. 297 put it "the State was not above the law of the Constitution but was subject to it"'. The court observed that since the Constitution expressly provided for immunity for specific organs of the State in specific circumstances, this strongly implied that the Constitution did not intend to confer other immunities. Walsh J. held at p. 264 as follows:-

"The State must act through its organs but it remains vicariously liable for the failures of these organs in the discharge of the obligations, save where expressly excluded by the Constitution. In support of this it is to be noted that an express immunity from suit is conferred on the President by Article 13, s. 8, subs. 1, and that a limited immunity from suit for members of the Oireachtas is contained in Article 15, s. 13, and that restrictions upon suit in certain cases are necessarily inferred from the provisions of Article 28, s. 3, of the Constitution.'

I have no difficulty in accepting these statements as accurate expressions of the law subject to one proviso. Because of the express recognition in the Constitution itself that the judiciary is independent in the exercise of its judicial functions and is subject only to the Constitution itself and the law, the position of the judiciary, as the judicial organ of the State is different from the other organs that is, the executive and the legislature. In relation to

the liability of the judiciary, and the liability of the State for the wrongs of judges, following from its constitutional independence, I am of the view first, that the State is not vicariously liable for the wrongs of the judges in exercising their judicial functions and second, that the judges have immunity from suit in respect of failures in the discharge of their functions. I will return to these Issues later in this judgment where I will expand on my reasons for reaching these conclusions.

It is also clear, as the plaintiffs point out, that as well as the State being vicariously liable for the torts of some of its subordinates, the State itself may be primarily and directly liable in damages in other types of actions not prand for breach of constitutional obligations. Although the Constitution has not prescribed any particular remedies for a breach of a constitutional duty or right, the Supreme Court held in *Meskell v. Coras lompair Eireann* [1973] I.R. 121, that the plaintiff could get damages for the defendant's interference with his constitutional rights. Giving the unanimous judgment of the court, Walsh J. held at. Pp. 132 – 133:

'It has been said on a number of occasions in this Court, and most notably in the decision in *Byrne v. Ireland* [1972] 1 I.R. 241, that a right guaranteed by the Constitution or granted by the Constitution can be protected by action or enforced by action even though such action may not fit into any of the ordinary forms of action in either common law or equity and that the constitutional right carries within it its own right to a remedy or for the enforcement of it. Therefore, if a person has suffered damage by virtue of a breach of a constitutional right or the infringement of a constitutional right, that person is entitled to seek redress against the person or persons who have infringed that right."

That the State can be sued directly for constitutional failures, can be seen from *Kennedy v. Ireland* [1987] I.R. 587 and *Redmond v. Minister for the Environment* (2) [2006] 3 I.R. 1. In *Kennedy*, the plaintiffs sued the State for the unlawful tapping of their telephones. Damages were awarded against the State for the executive's breach of the plaintiff's constitutional right to privacy. …

In *Redmond*, damages were awarded against the State for breach by the legislative organ of the State of a citizen's constitutional right. …

It is important to note that in these two cases liability was not imposed on the State on vicarious liability principles bu was directly and primarily imposed on the State itself acting through its constitutional organs. Furthermore, it is clear from these cases and from other cases (see Hanrahan v. 'Merck, Sharp & Dohme Limited [1988] I.LR.M. 629 and W. v. Ireland

(2) [1997] 2 I.R. 141), that an action for breach of a constitutional right is not a mere tort, it is a wrong that may defy classification in the traditional categories of wrong and is to be distinguished from instances of tortious liability for which the State may be liable vicariously for the wrongs of its employees.

Finally, where it has been held in this jurisdiction that the State might be liable directly for the Acts of one of its organs, Budd J. in *An Blascaod Mor Teoranta v. Commissioners of Public Works in Ireland & Ors* (4) [2000] 3 I.R. 565, rejected the idea that liability should be strict where the right affected was a constitutional right. …

In support of its argument that the State can be sued as a juristic person in its own right, the plaintiff also to the numerous cases where Ireland has been sued successfully for breaches of the law of the European Union. The State's liability in these cases, however, can be properly explained by the specific constitutional amendments. … I am satisfied, however, that from the authorities already cited, the State in appropriate circumstances can be sued directly for breaches of constitutional rights unconnected with any community law. Although it would seem, therefore, that the State may be liable directly for its actions through its executive and legislative branches, such liability is restricted in the manner described.'

[92] If one then follows this line of reasoning in order to establish whether or not the Namibian State is a legal person, separate and distinct from its citizens, the point of departure must surely be the general classification, into which our law divides the concept 'persons', and which Prof PQR Boberg has so aptly set out when he described the general underlying position as follows:

'Every human being is a person in law, but not every person is a human being. The law is at liberty to confer legal personality upon any entity that it sees fit, thereby enabling it to acquire rights and duties on its own account. There are therefore two classes of persons in law: natural persons and artificial or juristic persons." The former category consists of human beings; the latter is made up of those entities or associations of persons which, having fulfilled certain requirements, are allowed by the law to have rights and duties apart from the individuals who compose them or direct their affairs. The most common example of a juristic person is the ordinary commercial trading company, …'. …

Within the limitations inherent in the concept, juristic legal personality is as effective as natural legal personality. … .[100]

---

[100] *'The Law of Persons and the Family' (1st Ed)* at p3 - 4

[93] It only needs common sense to accept, that a 'State' is not- and cannot be a natural person. Is it therefore a juristic person?

[94] An artificial or juristic person is usually created by statute, (enabling acts), which confer on it 'rights and duties' apart from its members.[101]

[95] The Namibian State was created by the Namibian Constitution.[102] The Constitution is the Supreme Law of this country.[103] So much is clear. All power - and therefore also all State power - shall vest in the people of Namibia – the 'members' of the State - who shall exercise their sovereignty (power) through the democratic institutions of the State.[104] These institutions (the main organs of State) are the Executive, the Legislature and the Judiciary.[105] The respective individuals, manning these institutions (organs), then conduct the business of the State in accordance with the roles assigned to them by the Constitution.[106]

[96] A closer examination of the various Articles contained in the referred to Chapters of the Constitution then reveals that all organs of the State also have certain rights and duties. For example:

a) The executive has the right and duty to exercise the executive power of the Republic through the President and Cabinet (and through ministries) in the manner prescribed [107] and also through regional and local authorities and also, in a more limited sense, traditional authorities;

---

[101] See : Voet3.4.2 , *Webb & Co Ltd v Northern Rifles; Hobson & Sons v Northern Rifles* 1908 TS 462 at 465; See also generally for instance: *Basic Company Law* by Prof RC Beuthin at p6, or *Wille's Principles of South African Law* 7th Ed by JTR Gibson at p155

[102] See Article 1(1)

[103] See Article 1(6)

[104] See Article 1(2)

[105] See Article 1(3)

[106] See generally : Chapters V and VI as to the powers and functions of the Executive, see also Chapters XI and XII to XVII; Chapters VII and VIII –, as to the powers and functions of the Legislature and Chapter IX as to the powers and functions of the Judiciary;

[107] See generally Chapter VI and for instance Articles 27(2) and (3) as read with Articles 32 and 40

b) The legislative power of the Republic is exercised through the National Assembly and the National Council, which bodies have the rights and duties set out in Articles 44,45,63, 74 and 75;

c) The judicial power of the Republic is exercised through the Supreme- High- and Lower Courts, which courts have the rights and duties set out in Articles 78, 79, 80, 81 and 83.

[97] More specifically Article 5 of the Constitution[108], imposes on the abovementioned organs of State the further express obligation to uphold and respect the fundamental rights and freedoms enshrined in Chapter 5 of the Constitution.

[98] It so appears – and it can thus be said - that the Namibian State was created by the Constitution, a statute, through which the power of its citizens was vested in- and is exercised through the organs of State, which organs have constitutionally prescribed roles, rights and duties. Accordingly it follows that, when the Namibian State was founded in 1990, it was also constituted a legal person, separate and distinct from its citizens, with rights and duties, in a similar way that a company is created by statute, as a juristic entity, separate and distinct from its shareholders.

[99] It does not take much to conclude further that if the State, through the acts or omissions, of those persons that man- and conduct the business of its constitutional organs, has breached any of its legal duties, such as those imposed by the common law or statute - and also more pertinently – those imposed by the Supreme Law - such as the obligations imposed by Article 5 - such breach should, in principle, and generally, be able to found legal liability and the right to sue the State for any such breach. *'Ubi ius, ibi remedium'* !

[100] Further corroboration for this conclusion is obtained from the pronouncements, relating to State liability, as made by the Supreme Court in *Minister of Defence v*

[108] 'The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed.'

Mwandinghi [109], where the Court considered an appeal against a decision from the High Court granting an order substituting the appellant, as defendant, in an action instituted by the respondent against the Minister of Defence of the Republic of South Africa for damages for assault, which entailed the consideration of the aspect of the delictual liability of the State of Namibia for delicts committed by servants of the Government of South Africa prior to the independence of Namibia with reference to Article 140 and in particular Article 140(3), of Constitution of the Republic of Namibia and in which the Supreme Court confirmed that the successor Government of Namibia would inherit liability for anything done by its predecessor Government under the laws existing prior to independence, unless such laws had been repealed by an Act of Parliament of the successor Government. As no such laws had been repealed the State of Namibia became therefore liable for the delicts committed by the South African Government in Namibia prior to the independence of Namibia. [110]

---

[109] 1993 NR 63 (SC) (1992 (2) SA 355

[110] See *Minister of Defence v Mwandinghi* at p73 to 74 where the court stated: 'There is no doubt that art 140 must be interpreted in the light of other provisions in the Constitution, including art 145. But sight must not be lost of the clear meaning of the words used in art 140.

While counsel were agreed on the effect of art 140 with respect to the assumption of obligations created by the predecessor State through an acceptance thereof by the successor State, Mr Maritz argued that in public international law even a successor State does not take over the liabilities of a predecessor State for delicts committed by the latter. He submitted that there was no obligation in international law by which one State is held liable for delicts committed by servants of another State.

Mr Maritz drew our attention to a passage in *Brierly The Law of Nations* 6th ed at 160-1 in which the case of Robert E Brown is discussed. There an Anglo-American Tribunal considered the liability of an annexing State for the wrongful acts of the annexed State before annexation. In the ;aniaRobert E Brown Claim (1923) 6 RIAA 120 the Government of President Kruger had dismissed the Chief Justice of the South African Republic and reduced the Courts to a state of dependence on the Government. Great Britain annexed the Republic. The Tribunal found that Robert E Brown, an American citizen, had suffered a denial of justice in connection with certain gold running claims. The United States preferred Brown's claim against Great Britain as the successor to the South African Republic. The Tribunal held that the liability under international law for the torts of the defunct State does not pass to a State acquiring territory by conquest and the successor State was under no obligation to take steps to right a wrong committed by its predecessor. In the; aniaHawaiian Claims (1925) 6 RIAA 157 the Tribunal followed the same principle. In that case there was a voluntary coalition between the Hawaiian Republic and the United States. The Tribunal declined to hold the United States liable for the wrongful imprisonment of British subjects by the Hawaiian Republic.

Brierly states that

`(o)n the basis of these precedents many writers declared that it was a general rule that liability for a tort is automatically extinguished if the wrongdoer State ceases to exist'.

But no such rule has consistently been followed. The Permanent Court of Arbitration doubted the existence of any such general rule in the Lighthouse Arbitration between France and Greece 1956 ILR at 81--93.

O'Connell says in his book International Law vol 1 2nd ed at 267:

'A legal hiatus was alleged to exist between the expulsion of the one sovereignty and the extension of the other. Hence, it was concluded, the successor State is not obliged to take upon itself the juridical consequences of its predecessor's acts. The negative theory, as this reaction may be called, has little to commend it. It aggravates the legal crisis occasioned by the change of sovereignty, and is inherently anarchic. Because the analogy between the life and death of States and the life and death of human beings breaks down it by no means follows that the successor State is altogether legally irresponsible with respect to the rights and obligations of its predecessor relating to the acquired

[101] Also from this finding it can be concluded that the State is an entity against which rights and obligations can be enforced. The same is obviously true for the converse. All this is in any event in the experience in the courts.

[102] Accepting thus that the State, in principle, is a legal persona, with rights and duties, which can sue and be sued, also for constitutional breaches, I also find consequentially that the concept of 'State liability' generally exists in this jurisdiction – and can be applied – also here in Namibia.

CAN 'STATE LIABILITY' VEST IF THE COMPLAINED OF ACT OR OMMISSION HAS BEEN DONE IN THE EXERCISE OF JUDICIAL POWERS?

[103] With reference to the underlying issues of this case, it now has to be determined whether or not such right can vest if the organ of State involved is the judiciary, in the limited circumstances of the stated case, serving before the court?

[104] In the quest to answer this question the point of departure must be the acceptance of the position that judicial officers are generally immune from suit.[111] In *Chapman* it was fittingly said:

'Judicial immunity is common law doctrine … , its scope remains a matter of common law.'[112] It serves not the private interests of judges but the public interest in protecting their impartiality in judging by removing threats which could undermine it. The immunity is not absolute. Indeed, as Richardson J has noted, absolute immunity would be destructive of the public interest because it would undermine judicial responsibility", as well as giving "no weight at all to the public policy goals of tort and public law liability" [113]

territory.'

In Namibia art 140(3) confirms and puts beyond doubt the continuity of succession and its consequences.'

[111] See *Gurirab* at [25] to [31]

[112] *Fray v Blackburn* (1863) 3 B & S 576, 122 ER (KB) and *Sirros v Moore* [1975] QB 118 (CA). See the reliance in these judgments in the judgment of Henry J in *Gazley v Lord Cooke of Thorndon* [1999] 2 NZLR 668 (CA) at 679

[113] *Chapman* op cit at [54]

[105] I have no quarrel with these general observations, which are also apposite to this country, where judicial immunity is not absolute at common law.

[106] Similar sentiments where expressed in *Gurirab*, where the Supreme Court not only confirmed that the legal position, in Namibia, in regard to the common law, on the issue of judicial immunity, is the same as in South Africa, and where the learned Judges of Appeal further reasoned - in the context of deciding the question whether or not the provisions of the Namibian Constitution in fact changed the common law principles in regard to the delictual liability of Judges and/or magistrates - that:

'It is obvious that orders which are 'necessary and appropriate' in terms of subart (3) or 'appropriate' in terms of subart (4), cannot ever be 'necessary' and/or 'appropriate', when applied to judicial officers, acting in the course of their judicial functions, when they did not act in a mala fide and/or in a fraudulent manner.

If the common law requirement of mala fide and/or fraudulent actions or omissions, is removed, then judicial officers will be under siege, because almost every judicial officer will be sued for damages in delict, by whoever is the losing party. Such a situation will destroy the independence of the Judiciary and will be disastrous for and destructive of the administration of justice. (The *Telematrix* case supra[114].) It could never have been contemplated by the writers of the Namibian Constitution.

Furthermore, it seems to me as elementary common sense, that whenever it is claimed that the Namibian Constitution is 'in conflict' with the common law, such constitutional provisions must unequivocally stand in conflict to the common law in respect of the alleged conflict. There is no such conflict visible.

---

[114] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) ([2006] 1 All SA 6) where Harms JA, said at para [19] at 471C: 'The decisive policy underlying the immunity of the judiciary is the protection of its independence to enable it to adjudicate fearlessly. Litigants (like those depending on an administrative process) are not "entitled to a perfect process, free from innocent (ie non mala fide) errors": The threat of an action for damages would "unduly hamper the expeditious consideration and disposal" of litigation. In each and every case there is at least one disgruntled litigant. Although damages and the plaintiff are foreseeable, and although damages are not indeterminate in any particular case, the "floodgate" argument (with all its holes) does find application.'

I have no doubt at all that the Namibian Constitution is not in conflict with the common law on this issue. The constitutional point raised by counsel for the plaintiff should therefore be rejected.' [115]

[107] Accepting therefore that the general underlying position in Namibia was cemented thus by the Supreme Court I also believe that it is apt, at this point, to again call to mind that judicial immunity constitutes an exception to the important principle of accountability that generally prevails in rule of law jurisdictions. In this regard the leaned Chief Justice in *Chapman* emphasised:

'Because immunities conflict with other important rule of law values, they are always regarded with suspicion. In *Darker v Chief Constable of the West Midlands Police*[116] the House of Lords affirmed that the public policy that those who suffer wrongs should have a remedy required existing immunities to be strictly confined. Lord Cooke, in his concurring judgment, described immunity as "in principle inconsistent with the rule of law"

… but in a few, strictly limited, categories of cases it has to be granted for practical reasons, it is granted grudgingly, the standard formulation of the test for inclusion of a case in any of the categories being Sir Thaddeus McCarthy P's proposition in *Rees v Sinclair* [1974] 1 NZLR 180, 187, 'The protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice …". Many other authorities contain language to similar effect. …'.

[108] In addition I also now pause to draw attention to Lord Hailsham's more than logical and principled- and therefore (to me) appealing reasoning[117] on the topic, as made in the minority judgment delivered in *Maharaj* (No 2), where the learned Law Lord stated:

"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 … was not vicarious, but some sort of primary liability. But I find this equally difficult to understand. It was argued that the state consisted three branches, judicial, executive and legislative, and that as one of these branches, the judicial, had in the instant

[115] *Gurirab* at p 496 I - H

[116] [2001] 1 AC 345 (HL)

[117] Made in the context of the 'third point' of his dissenting judgment

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)…. 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 the section which begins innocently enough with the anodyne words "for the removal of doubts it is hereby declared…." [118]

[109] As attractive as this general line of reasoning however might be, especially to the Defendants' cases, it surely must be distinguished from the circumstances and basic premise of the present case where the parties are agreed that the wrongdoer, in this instance the Second Defendant, in terms of the agreed facts of the stated case, has indeed attracted personal liability onto herself.

[110] Put more pertinently: ' … can it still seem 'a strange and unnatural way of saying that the when the presiding officer in the Magistrate's Court, the second defendant – attempted to intervene to prevent the State from closing its case; did not inform the plaintiff, his legal representatives or the prosecutor that the State's case had been closed on a previous occasion; was determined to get a conviction against the plaintiff; unduly interfered with the State's case and thus denied the plaintiff a fair trial – and further - where the listed acts or omissions of the second defendant were actuated by *mala fides* and/or fraud, as well as malice and/or improper conduct and/or procedural error and/or the grossest carelessness, 'that the state could/should never become liable, as a principal, in circumstances where the magistrate has attracted personal liability onto herself and her act is a delict? The answer to this question must surely be in the negative.

[111] Does this aspect then push the plaintiff's case over the edge? And does the adoption of the principle of State liability mean that such liability should- or could be carried through in circumstances where the judicial officer has lost the shield of personal immunity, ie. in a situation in which it can no longer be argued that 'it would be strange' that state liability would vest where the judicial officer would personally be immune? And can the State thus, by virtue of Articles 5 and 25, as was contended,

[118] At 409

become responsible for damages where a member of one of the State's organs, the judicial, has, as in the instant agreed case, contravened the Plaintiff's constitutional rights in such a manner that removes from her the shield of immunity?

[112] The answer to these questions must in my view indeed be found in the referred to articles as submitted by Plaintiff's counsel.

[113] In the first instance it must be clear that Article 5 imposes legal obligations. Those obligations – ie. the obligations imposed by Chapter III of the Constitution – are without question also imposed on the judiciary. These obligations are then enforceable by- and in the Courts in the manner prescribed by the Constitution.[119]

[114] The 'enforcement provisions' are provided for in Article 25.

[115] Article 25(1) can loosely be described as the 'prohibitory provision', intended to prevent Parliament or any subordinate legislative authority from making any law which abolishes or abridges the fundamental rights and freedoms conferred by Chapter III. At the same time it decrees that the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by Chapter III.[120]

[116] Article 25(2), the 'access provision', guarantees to aggrieved persons, who claim that a fundamental right or freedom guaranteed by the Constitution has been infringed or threatened, the right to approach a competent court, for purposes of enforcing or protecting such right or freedom.[121]

[117] Article 25(3), the 'empowering provision', gives a competent Court[122] the power to make all such orders as shall be necessary and appropriate to secure such applicants the enjoyment of the rights and freedoms conferred on them under the provisions of this Constitution, should the Court come to the conclusion that such rights

[119] See Article 5

[120] See more specifically Article 25(1)

[121] See more specifically Article 25(2)

[122] See Articles 79(2) and 80(2)

or freedoms have been unlawfully denied or violated, or that grounds exist for the protection of such rights or freedoms by interdict.[123]

[118] Article 25(4), the 'additional relief provision', gives a competent Court[124] the power to also award monetary compensation in respect of any damage suffered by the aggrieved persons in consequence of such unlawful denial or violation of their fundamental rights and freedoms, where the Court considers such an award to be appropriate in the circumstances of a particular case.[125]

[119] On the agreed facts of the stated case the Plaintiff is to be regarded as an aggrieved person who claims that certain fundamental rights or freedoms, guaranteed by the Constitution, have been infringed. As such he is given the right, through the 'access provision' to approach a competent Court for purposes of enforcing- or protecting such rights or freedoms. Through the 'empowering provision', this court, as a competent Court, as envisaged by Article 80(2), is empowered to make all such orders as shall be necessary and appropriate to secure to the Plaintiff the enjoyment of the rights and freedoms conferred on him under the provisions of the Constitution. On the facts of the stated case the Court must also come to the conclusion that such rights or freedoms have been unlawfully denied or violated. On the agreed facts it is no longer necessary to secure to the Plaintiff the enjoyment of the rights and freedoms conferred on him under the provisions of the Constitution. He has already been relieved from having to face further criminal prosecution. In terms of the 'additional relief provision' contained in the Constitution a competent Court can also award monetary compensation in respect of any damage suffered by the aggrieved person in consequence of such unlawful denial or violation of his fundamental rights and freedoms, where the Court considers such an award to be appropriate in the circumstances of a particular case.

[120] It so becomes clear that the Plaintiff - in addition to the relief already granted to him in the criminal court, when two Judges of the of the High Court upheld the plaintiff's appeal and ordered his release on 15 June 2005 - has the further right, in principle and in addition, to claim- and be awarded monetary compensation in respect of any

---

[123] See more specifically Article 25(3)

[124] See footnote 111 above

[125] See more specifically Article 25(4)

damage suffered by him in consequence of any unlawful denial or violation of his fundamental rights and freedoms, a given in this case.

[121] All a competent Court, faced with such a claim, has to then do is to determine, whether or not, any such claimed monetary award, would also be appropriate, in the circumstances of the particular case.

[122] It is at this juncture that it becomes necessary to once again consider and recall the general underlying position, as affirmed by the Supreme Court, in *Gurirab* where O'Linn AJA, (Shivute CJ and Chomba AJA concurring), stated categorically that:

> 'It is obvious that orders which are 'necessary and appropriate' in terms of subart (3) or 'appropriate' in terms of subart (4), cannot ever be 'necessary' and/or 'appropriate', when applied to judicial officers, acting in the course of their judicial functions, when they did not act in a mala fide and/or in a fraudulent manner … '

[123] I respectfully agree. Also for this reason it becomes clear that it could never be 'necessary and/or appropriate' to vest the State with any liability for the conduct of judicial officers, shielded by immunity, in circumstances where no personal delictual liability would lie against the individual wrongdoer in terms of Articles 25(3) and (4).

[124] At the same time it appears, on closer scrutiny, that the learned Judges of the Supreme Court insinuated also that 'mala fide and/or fraudulent conduct' might found an order that may be considered 'necessary and appropriate' in terms of subart (3) or 'appropriate' in terms of subart (4)', when applied to a judicial officer, acting in the course of his or her judicial functions, when such officer has acted in a 'mala fide and/or fraudulent manner' … '.

[125] If one then returns to- and applies the concept of State liability, to the given scenario, and if one further keeps in mind that the judicial officer in question, the second defendant here, as a member of the relevant organ of State, (the judiciary), was always duty- bound by the Supreme Law to respect and uphold the Plaintiff's fundamental rights and freedoms enshrined in Chapter III of the Constitution, which she did not, I can see no reason why, in principle, liability cannot vest in the State, as 'principal', in the specific circumstances, where the judicial officer in question, has lost

the shield of judicial immunity. Such liability would also entail the general entitlement to claim all such orders as shall be 'necessary and/or appropriate' – but obviously only if considered 'necessary' and/or 'appropriate' by the Court - to secure the enjoyment of the rights and freedoms conferred under the provisions of this Constitution, including an interdict and even monetary compensation. Whether or not monetary compensation can be claimed, in addition, will of course always be subject to the further pre-condition, namely, that the Court considers the claimed monetary award also 'appropriate', in the circumstances of the particular case.

[126] This analysis also makes the point that were, for instance, remedies of appeal and review are available or have already been successfully initiated or have been concluded, such as those granted to the Plaintiff, on appeal, in this instance, it would probably not be necessary and appropriate to sue the State in addition for an order that would secure the aggrieved person the enjoyment of the rights and freedoms conferred under the Constitution, where such relief has already been obtained. It is also doubtful whether possible collateral disciplinary action against the judicial officer in question would really impact much on this question. All this however would not mean that monetary compensation cannot also be claimed, if deemed appropriate.

[127] On the other hand and if the State could – in addition - to other available remedies be sued also – in order to secure to an aggrieved person the enjoyment of the rights and freedoms conferred on him or her under the provisions of the Constitution, should the Court come to the conclusion that such rights or freedoms have been unlawfully denied or violated, this would not be unusual, as in law it is not unknown that a particular claim can be based on various- and also alternative causes of action against different parties at the same time.

[128] The first question of law to be determined must therefore be answered in the affirmative.

[129] Given the findings made above it would appear that the Constitution has indeed 'carve(d) out a special remedy' and has also 'forge(d) new tools' as was argued by Mr Tötemeyer, as the Constitution has indeed supplied 'the required tools', (existing and

new), in this regard in that it provides for 'general'[126], 'special'[127] and 'additional'[128] remedies.

[130] The related question whether or not an 'appropriate 'monetary award', in addition to 'compensatory' damages, can also have a 'penal' or 'punitive' or 'exemplary' damages component, does, in my view, not have to be decided in the purview of this case as this would be a question that will be better determined, on a case by case basis, by a Court in the context of hearing a claim for monetary compensation in terms of Article 25(4).

RESOLUTION QUESTION 2: IS THE ANSWER TO THE FIRST QUESTION AFFECTED BY THE CONSTITUTIONALLY ENTRENCHED PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY, THE RULE OF LAW AND THE SEPERATION OF POWERS DOCTRINE?

[131] It will already have been noted from what has been set out above that the Constitution, in terms of which the Republic of Namibia was established as a sovereign, secular, democratic and unitary State, expressly states that the Namibian State was founded upon the principles of democracy, the rule of law and justice for all.[129] It will also have been noted how some of the relevant provisions of the Constitution have in the past been interpreted by the Supreme Court, from which interpretations it appears that the Namibian Supreme Court has uncompromisingly upheld the principles of democracy, (and with it the principle of the separation of powers), and the rule of law.[130] These so-called 'constitutionally entrenched principles' can thus not be ignored and have to be applied. But what is their impact, if any, on the findings already made above?

[132] It will also have been noted that the doctrine of judicial immunity, founded in common law, is based essentially on policy considerations which are, in principle, inconsistent, with the rule of law where the doctrine is regarded as an exception

---

[126] A competent Court shall has the power to make all such orders as shall be necessary and appropriate to secure the applicants the enjoyment of the rights and freedoms conferred on them under the provisions of this Constitution

[127] A competent Court can protect such rights or freedoms by interdict

[128] The power of a comptent Court shall include the power to award monetary compensation

[129] See Article 1(1)

[130] See [81] above

thereto.[131]

[133] The practical advantages and the reasons for the exception have nevertheless been recognised in most jurisdictions world-wide, where its principles have been respected and applied almost universally for good and understandable reasons.[132]

[134] Mr Kuper has strongly relied on these important underlying policy considerations on which the doctrine of judicial immunity is justifiably founded, which he enlisted to support the defendants' quest to persuade this court that the contended for remedy should be refused. He urged the court to consider the consequences of- and find that the sought constitutional remedy is neither 'necessary nor appropriate' as:

'a) Namibia already has a comprehensive and elaborate structure to deal with the cases and with the consequences of serious judicial misconduct. That such structure includes both constitutional and common law components which provide: for the correction of irregular judgments or orders by way of appeal and review; for the removal of judicial officers from office in the event of serious misconduct; for personal delictual liability on the part of the offending judicial officer where *mala fides* are involved';

b) not every litigant would be *bona fide* or, indeed, rational in asserting improper conduct and that one should anticipate that many unmeritorious cases would be pursued, particularly given the attraction of a Government defendant with deep (taxpayer) pockets. The results would be undesirable because such litigation, even the threat of such litigation, would undermine the administration of the law and would involve the Government joining forces in the litigation with the judicial officer, which itself gives rise to difficulties;

c) there would be a likelihood that members of the public engaged in or observing litigation would become concerned that the prospect of future litigation to this end might distract the judge from acting in an entirely independent way, that a judge would for such reason be exposed to pressure, by indirect means, to act in a way that would minimise the risk of claims based on government liability and that there would thus be a risk that public

[131] See for instance *Chapman* at [57] and [58]

[132] See for instance the Comparative Study by the Oxford Pro Bono Publico programme referred to above

confidence in the effective administration of the law might be eroded;[133]

d) judges will be pressed by the defendant government to be witnesses in proceedings brought as a result of their actions. It was undesirable for judges to have to give evidence concerning their conduct. Such a prospect would also in itself give rise to a perception that judges may come under pressure in their decision-making if they believe they may be questioned concerning it at a later stage. It could well also impact on the willingness of qualified lawyers to accept appointment. In this area public perceptions of the independence of the judiciary are important;[134]

e) the allowing of such claims to proceed would be detrimental in other respects to the effective exercise of judicial function. The defendant to such a claim, the executive government would be required to defend actions brought in relation to judicial conduct. This will involve judges necessarily co-operating with the state in the defence of such actions. To an outside observer, the executive government will appear to be defending the judge and the judge will be helping the government. Making the executive government, financially responsible for judicial actions would imply that judges were acting on behalf of the executive government when exercising judicial functions. The perceptions associated with all of this would be damaging to judicial independence. Constitutionally the government may not interfere with judicial process without breaching conventions. If, however, the executive becomes liable to compensate for judges' constitutionally wrongful acts, that is likely to bring political pressures, direct and indirect, for accountability of the judges to the executive and corresponding State powers of controlll. Such a consequence would be highly detrimental to independence of the judiciary and its effective functioning;'[135]

f) to make the State liable in such situation would indirectly inhibit the judge in the exercise of his judicial functions and this, in turn, would undermine the independence as guaranteed by the Constitution. It would introduce an unrelated collateral consideration into the judge's thinking which could prevent him from determining the issue in a free unfettered manner. It might for example encourage the other organs of government to monitor the conduct of the judges in this regard, thereby resulting in "chilling effect"**;**

g) much is to be said for refusing to allow the sought cause of action and almost nothing is to be said in its favour as 'the contemplated cause of action carries with it the real prospect of undermining the independence of the Judiciary, more particularly by conflating it with the

---

[133] See *Chapman* op cit at [185]

[134] See *Chapman* op cit at [186]

[135] See *Chapman* op cit at [190]

executive; it ignores the comprehensive structure enshrined in the Constitution and in the common law for dealing with aberrant judicial officers and it creates the prospect of oppressive and vexatious litigation in which the Government and the individual judicial officers are forced into an undesirable and unattractive alliance. It is not a cause of action that will foster a healthy constitutional dispensation, nor is it necessary for one;'

h) the Court should differentiate between a remedy which is intended to carry with it a public law benefit or whether it is limited to private gain;

i) it appears in this instance that the damages are intended to compensate the plaintiff and that, therefore, the damages are identical in nature and purpose to that which are claimable from the actual wrongdoer;

j) there is no good reason why a constitutional remedy should be granted where the private law contains adequate recourse. If the Magistrate acted fraudulently or *male fide* (as here alleged), a civil remedy in delict is available to the plaintiff. There is no constitutional virtue in permitting the plaintiff to claim against the *State* simply because the *State* has deep pockets. A constitutional remedy is not intended to provide a windfall;

k) that there is every reason to believe that if such a constitutional remedy is granted, it will create undesirable consequences because the *Executive* will appear as a co-defendant with the impugned judicial officer and they will prepare their defences in tandem (a most undesirable relationship) and further the Executive will be tempted to commence to monitor the conduct of the *Judiciary* (particularly Magistrates) in order to avoid or escape financial liability;

l) no constructive purpose will be served by the grant of this remedy.'

[135] It is without doubt that all these grounds and considerations, as powerful and as valid as they are, are also debatable and can form the subject matter of differing opinion.

[136] This point was for instance made on behalf of the plaintiff with reference to the *Ex parte Attorney-General : In re The Constitutional Relationship between the A-G & the Prosecutor-General* case, on the strength of which it was argued that accountability *per se*, would- and should not detract from the independence of the judicial office or that financial accountability would not just simply translate itself into

control of the judiciary by the executive as these notions are not incompatible with each other as the *Ex parte Attorney-General* case did show.[136]

[137] Decisive for the determination of this question however is that the relied upon grounds are essentially based on policy considerations and the common law. But policy considerations and the common law surely cannot prevail over the Supreme Law.[137] It would have been for the framers of the Constitution to have given greater recognition to these policy considerations if that had been the intention. This they did not do when the Constitution was adopted in its current form on 9 February 1990 and when it came into operation subsequently on the date of Independence. The Constitution, as it presently stands, allows for the cause of action contended for in the context of the democratic principles enshrined therein, which principles, at the same time, recognize- and thus do not conflict with the separation of powers doctrine and the rule of law.

[138] In addition, and on the aspect of the independence of the judiciary - and with it on the related aspect of judicial immunity – it must be of significance that the Supreme Court has not only reaffirmed the general common law position in regard to judicial immunity[138] but has also found the common law exception thereto, relating to personal delictual liability of judicial officers, to be in conformity with the Constitution.[139] The Supreme Court has thus, by implication, at the same time found, that the said common law and its exception were also in line and were not affected by the constitutionally entrenched principles of the independence of the judiciary, the rule of law and the separation of powers doctrine. In such circumstances it must be concluded that the answer given to the first question above – is also in tune with the findings of the Supreme Court, made in regard to the common law position.

---

[136] *Ex parte Attorney-General : In re The Constitutional Relationship between the A-G & the Prosecutor-General* 1998 NR 282 (SC) ([1995] 3 LRC 507; 1995 (8) BCLR 1070) at 302A

[137] See Article 66 (1) which provides 'Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.' See also for instance : *Myburgh v Commercial Bank of Namibia* 2000 NR 255 (SC) at p261

[138] Compare *Gurirab* at [25]

[139] Compare *Gurirab* at [31]

[139] In addition I believe that the answer, given to the first question, is not only in accord with the principles of the independence of the judiciary, the Rule of Law and the separation of powers doctrine, but the answer also embraces the important democratic core value of accountability, which permeates through these principles, and which core value is so given recognition at the same time.

[140] Lastly it is apposite to again call to mind that immunity is, in principle, inconsistent, with the rule of law and in respect of which Lord Cooke has observed that the law:

‘ … has granted it for practical reasons … and … ‘The protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice …”.

[141] The conclusion so arrived at above is thus in line also with the quoted sentiments expressed by Lord Cooke. The second question of law to be determined must therefore be answered in the negative.

RESOLUTION: QUESTION 3: ON THE ASSUMPTION THAT THE ALLEGATIONS PLEADED BY THE PLAINTIFF AGAINST THE MAGISTRATE IN CASU ARE ESTABLSIHED, WOULD THE FIRST AND/OR THIRD AND/OR FOURTH DEFENDANTS BE LIABLE?

AD THE LIABILITY OF THE FIRST DEFENDANT – THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA

[142] The First Defendant was cited as:

‘THE GOVERNIMENT OF THE REPUBLIC OF NAMIBIA, duly constituted as such in terms of the Namibian Constitution herein represented by The Minister of Justice in his nominal capacity as executive head of the Ministry of Justice, being the responsible Ministry for the Magistrate in the Magistrate’s Courts/Civil Court of Namibia, c/o GOVERNIMENT ATTORNEY, 2ND FLOOR SANLAM BUILDING, INDEPENDENCE AVENUE, WINDHOEK, REPUBLIC OF NAIMIBIA.’

[143] This citation triggered extensive written arguments as the quoted extracts from

the parties' heads of argument already show.

[144] It then became clear during oral argument at the latest that the Plaintiff had always intended to sue the Namibian 'State' as opposed to the 'Government', meaning the Executive organ of State, save in so far as any claim, that might have to be satisfied ultimately, would actually have to be footed by the treasury.

[145] In this regard it was thus common cause that the President of the Republic, in his nominal capacity as Head of State, should have been sued, and an appropriate citation to that effect would have been the correct way to go about such business, in circumstances, and where, at the end of the day, the real cause of action relied upon, would always have been based on State liability.

[146] For purposes of resolving this dispute it is in the first instance helpful to obtain some initial guidance from a recently reported decision of the Namibian Supreme Court, where the learned Chief Justice, in the *Municipal Council of Windhoek v Telecom Namibia Ltd*[140] case, emphasised:

> '[43] It is well established in law that the meaning of 'the State' in legislation has no fixed meaning. The interpretation of the term depends on the specific piece of legislation being considered. In *Holeni v Land and Agricultural Development Bank of South Africa* [141], Navsa JA in para 11 observes that:
>
> > 'Its precise meaning always depends on the context within which it is used. Courts have consistently refused to accord it any inherent characteristics and have relied, in any particular case, on practical considerations to determine its scope. In a plethora of legislation, no consistency in meaning has been maintained.'[142]

[147] I will accordingly start the interpretational exercise demanded in this case by keeping this *dictum* in mind in the task of ascertaining the meaning of the term 'the Government' as used in the Namibian Constitution?

---

[140] 2015 (3) NR 629 (SC)

[141] (266/08) [2009] ZASCA 9

[142] *Municipal Council of Windhoek v Telecom Namibia Ltd* at [43]

[148] In this regard it will also to have be noted that what has already been done in this case is to assign some meaning to the concept 'State', as used in the context of the Namibian Constitution. This judgment has also considered some of the inherent characteristic of the Namibian State. From the underlying analysis it has already appeared that the Constitution has established the Namibian State as a legal person, separate and distinct from its citizens, with rights and duties, in a similar way that a company is created by statute as a juristic entity, separate and distinct from its shareholders. The 'State', just like a juristic person, acts and conducts its business through the natural persons that man its three branches, the constitutional organs, of which the Executive is but one.

[149] Surely this is then also the background and context against which any interpretational exercise is to occur – and from which setting it must be clear that the basic structure, that was created by the Constitution, was a 'democratic State', with its distinct main organs, being the Executive, the Legislature and the Judiciary. Therefore and if the framers of the Constitution would not have intended to assign a uniform meaning to the word 'Government' this would *prima facie* be inconsistent with the interpretational presumption to the effect that the Legislature - (here the framers of the Constitution) did not intend absurd or anomalous results.

[150] In this regard it is further relevant to note that the parties were at least agreed on one meaning that could be assigned to the word 'Government', as often used in the Constitution, where it is used in the sense that it refers to- and is to be interpreted, without difficulty, to refer to the 'executive organ of the State' as opposed to the separate and distinct entity of the 'principal' of that organ, the 'State' itself.

[151] Can it then be said, against this background, that when the word 'Government' is used in the Constitution, it is also to be assigned the contended for further interchangeable meaning?

[152] It should be called to mind that the submissions on behalf of Plaintiff in support of this meaning, argued:

'a) that to interpret a reference to "*Government*" as it appears in Article 5 as being a reference to the "*Executive*", would offend against the presumptions that language is not used

unnecessarily, as well as that against tautology and superfluity as the Executive has already been referred to by name in Article 5 of the Constitution;

b) that an interpretation that the Government there referred to constitutes a reference to the State as a collective (including the Executive the legislature and judiciary [and was inserted to make it clear that all the agents of the State should respect and upheld the Constitution], is the most plausible interpretation, also if reference is had to the manner in which the term "*Government*" has been used in other provisions of the Constitution]) and were it was submitted that this is reinforced by the reference to "*all organs of the Government*", which should be read to be synonymous with all organs of the State';

c) that Articles 32(1)[143] and 32(2)[144] of the Constitution, were further examples of provisions where reference is made to the "*Government*" and from which reference it would be apparent that the references to the "*Government*" cannot be equated with a reference to the "*Executive*" and also that the only plausible interpretation would be that the reference to the term "*Government*" should be read to refer to the "*State*". As the term "*Government*", referred to in Article 32(2), can for instance never be interpreted to refer to the "*Executive*" as this would give rise to the untenable and absurd interpretation with the result that Article 32(2) would then state that the executive has an executive branch and that the executive has a responsibility to the executive as such interpretation would give Article 32 (2) a plainly absurd meaning, namely that it should then be read as stating the executive has a legislative branch (and in fact that the legislature is a branch of the executive);

d) that it follows that where "*Government*" is referred to in the Constitution, it – in numerous instances – is used as a synonym for the State and that to simply, in colloquial terms, equate the term "*government*" with the "*executive*" would loose sight of the different meanings the term could have and of the fact that the word *"Government"* certainly, in terms of a number of the constitutional provisions, is used as a synonym for the "*State*" and

---

[143] (1) As the Head of State, the President shall uphold, protect and defend the Constitution as the Supreme Law, and shall perform with dignity and leadership all acts necessary, expedient, reasonable and incidental to the discharge of the executive functions of the Government, subject to the overriding terms of this Constitution and the laws of Namibia, which he or she is constitutionally obliged to protect, to administer and to execute.

[144] '(2) In accordance with the responsibility of the executive branch of Government to the legislative branch, the President and the Cabinet shall each year during the consideration of the official budget attend Parliament. During such session the President shall address Parliament on the state of the nation and on the future policies of the Government, shall report on the policies of the previous year and shall be available to respond to questions.'

e) that this argument was reinforced by the fact that the Constitution, in many instances where it intends to refer to the "*Executive*", does so by referring to it as such (and does not refer to the *"Government"*). [Compare, *inter alia*: Article 1(3); Article 5; Article 25(1) and 25(1)(a); Article 27(2); Article 32(1) and (2); Article 40(k); Article 63(f)].'

[153] On behalf of the Defendants, in supplementary heads of argument, the counter-argument ran as follows:

'a) the Namibian Constitution clearly differentiates between the *State* and the *Government* and that submissions to the contrary are misconceived;

b) In terms of Art 1(3) the State is made up of three organs: the executive, the legislature and the judiciary;

c) Art 5 deals with the protection of fundamental rights and freedoms. It states that these rights must be respected by the State (executive, legislature and judiciary) and all organs and agencies of government. This article provides a clear indication that the State and the Government are not synonymous;

d) If the State is not the Government, then the question arises what is the government?

e) Iain Currie et al[145] provide the following description of the government:

> *"The most prominent agency of the state is the government. The state's power is formally invested in the government and it is the government that speaks on behalf of the state. The government is so conspicuous an institution that it is often incorrectly regarded as being identical with the state. The state comprises many institutions other than the government and, in practice, the government is often not the most influential power-holder in a particular state. One of the most important rivals to the government is the administration: the body of bureaucrats and officials which runs the state. In few modern states is the state system fully cohesive and co-ordinated; its different parts provide competing centres of power and influence. For example, both the judiciary and the government are part of the state, but the judiciary is relatively independent of the government…"*

f) Art 27, which deals with the position of the President, as Head of State and as Head

[145]I Currie et al The New Constitutional & Administrative Law 2001 (Reprinted 2004) Page 5

of Government, provides a further indication that the State and the Government are distinct concepts;

g) Art 27(2) gives an indication what government entails: it is the arm in which the executive power of the State vests. It is that organ of *State* which is headed by the President and his Cabinet;

h) The Supreme Court[146] recently considered the role exercised by Cabinet and observed;

i) The Constitution thus establishes that the executive power vests in Cabinet and one aspect of this authority, as set out in Article 40(a), is the power to direct, co-ordinate and supervise the activities of para-statal enterprises. Namcor is a para-statal enterprise and, subject to the provisions of its constituting statute, thus falls within the mandate of Cabinet specified in Article 40(a). The words "direct, co-ordinate and supervise" are broad in scope and suggestive of a general executive power to issue policy directives pertaining to fiscal, economic, social and other similar considerations; to co-ordinate the way in which government departments, Ministries and para-statals function and to ensure, by executive supervision, that they work effectively both collectively and individually. Understanding the words in this way is consistent with the overall principle that the executive power of Government resides in the Cabinet.

j) Thus strictly speaking, the term 'executive' is reserved for the President and his Cabinet. Conventionally the term is however not used in that way. The term is often used to refer to the entire executive branch of government, which includes the public administration (government officials and bureaucrats). The latter's task is to administrate and implement the laws.[147] When used in this way, 'executive' is a synonym for 'government',[148] but *Government* is never a synonym for *State.*

k) The plaintiff points to Articles 5 and 32 of the Constitution and argues that these Articles show that *Government* is used synonymously with *State* or that this is the only plausible interpretation of the wording of these Articles. However, the thrust of the argument does not demonstrate any such connection. The submission in regard to Article 5 simply points to the

---

[146] *Minister of Mines and Energy and Others v Petroneft International Ltd and Others* 2012 (2) NR 781 (SC) para 30

[147] *President of the Republic of South Africa and Others v South African Rugby Union and Others* 2000 (1) SA 1 CC para 138

[148] I Currie et al Page 228

fact that there is both a reference to the *Executive* as well as to *all organs of the Government and its agencies* and hence, it is said, the reference to *Government* cannot be a reference to the *Executive*. None of this is relevant to the supposed equivalence between *State* and *Government* but even on its own terms, the submission is bad. The reference to *all organs of the Government and its agencies* is not intended to convey that the *Executive*, *Legislative* and *Judiciary* are part of *Government* (that would be an absurdity since the *Judiciary* could never be part of the *Government)*. The purpose of the listing of each entity is to ensure that all the organs of *State* and all those who exercise public powers and all those who discharge administrative or other functions under the Constitution are liable to protect the fundamental rights and freedoms enshrined in this Chapter.

l) Again, in relation to Article 32, the plaintiff's argument has to do with drawing a distinction between the *Government* and the *Executive*. This, again, is not helpful to the real debate. But, again, in any event, all these Articles demonstrate that the President and the Cabinet lead the Executive Branch of *Government* and that this is to be distinguished from the Legislative Branch. Where the Constitution distinguishes, in context, between the Executive Branch of *Government* and *Government*, it does so simply in order to distinguish between the State President and the Cabinet (who collectively lead the *Executive Government*) and the broader range of commissions, public bodies, parastatal enterprises and security organs whose function it is to regulate, plan the economy, engage in commercial activities on behalf of the *Government* and like activity;

m) However, neither the broader nor the narrower concept of *Government* is ever broad enough to include the *Judiciary* nor is it ever possible to talk of the *Government* as if it were the State;

n) The nature of the President's functions powers and duties provides further support the argument that the State and the Government under the Constitution are distinct;

o) The functions of the President differ when he acts as Head of State and when he acts as Head of Government;

p) The functions of the President as Head of State involve Namibia's relations with other states or concern matters of general national interest. Some of these functions are referred to in Art 32. They include: the accreditation of ambassadors, negotiate and sign international agreements, confer honours to citizens and friends of Namibia pardon or reprieve offenders, declare martial law and appoint judges.[149]

---

[149] *President of the Republic of South Africa and Others v South African Rugby Union and Others* 2000 (1) SA 1 CC para 144-5

q) As Head of the executive branch of government the President establishes government departments and ministries, appoints and dismisses ministers, signs and promulgates Proclamations and initiates laws for submission to and consideration by Parliament;

r) Because Art 32 deals with the different functions of the President, as Head of State and as Head of the executive government the contention by plaintiff that *Government* in Art 32(1) and Art 32(2) refers to the *State* is simply wrong;

s) Far from according with the established principles of interpretation, the exercise undertaken by the plaintiff offends against the golden rule of interpretation. Words cannot be given meanings which they do not bear and one cannot read a reference to one of the three separate and distinct organs of *State* as being a reference to them all;

t) The plaintiff argues that the meaning, for which it contends, is reinforced when one looks at the distinction between *Executive* and *Government* which is said to be repeated in other Articles. Again, the argument does not address the critical point in the present debate but, again, it is misstated even in its own terms. Art 40(k), referred to in plaintiff's heads, is an example, where the Constitution views the 'public administration' as part of the 'executive'. The Article simply states that, members of Cabinet (executive) can issue instructions and directives to facilitate the implementation and administration of laws administered by the executive. It does not advance the plaintiff's case.'

[154] If one considers the above-quoted conflicting submissions it would seem that those, made on behalf of the Defendants, have to prevail as those submissions:

a) are in harmony with the provisions of Article 27, which assign two positions to the President, the one, as 'Head of State' and the other, as 'Head of the Executive Government';

b) correspond with the provisions of Art 27(2), which is indicative in which organ of State the executive power vests. It can only be that organ of State which is headed by the President in his capacity as 'Head of Government'; This conclusion is underscored by the nature of the President's functions, powers and duties, which differ when the President acts as 'Head of State' or when he acts as 'Head of

Government';[150]

c) show that the reference to *all organs of the Government and its agencies* in Article 5 is not intended to convey that the *Executive*, *Legislative* and *Judiciary* are part of *Government* as that would result in an absurdity since the *Judiciary* could never be part of the *Government* particularly in circumstances where the Constitution, in clear and unambiguous terms, determines, which entities are to be considered as the separate and distinct main organs of the democratic State. The legislative intention, (if that term can be used), behind the listing of the various entities referred to in Article 5 surely was to achieve a most important goal, namely to make the ambit of the article as comprehensive as possible so as to ensure that the 'main' organs of *State,* (ie the executive, legislative and judiciary), as well as all those other entities of the executive organ of State (ie, those of the executive government) and its agencies, ie. all those who exercise public executive powers and all those who discharge administrative or other functions under the Constitution[151] would, without doubt, also become liable to protect the fundamental rights and freedoms enshrined in Chapter III;

d) demonstrate, as far as Article 32 is concerned, that the President and the Cabinet lead the 'Executive branch of *Government'* and that this is to be distinguished from the 'Legislative Branch' in respect of which it also delineates and assigns certain distinct responsibilities to each.

[155] Generally speaking I believe that it would thus be correct to uphold the submission that 'where the Constitution distinguishes, in context, between the

---

[150] For example it appears that some of the functions of the President as Head of State involve Namibia's relations with other states or concern matters of general national interest. Some of these functions are listed in Articles 32(3)(b), (d) or (e) for instance. They include: the accreditation of ambassadors, negotiate and sign international agreements, confer honours to citizens and friends of Namibia pardon or reprieve offenders, declare martial law and appoint judges. As Head of the executive branch of government the President establishes government departments and ministries, appoints and dismisses ministers, signs and promulgates Proclamations and initiates laws for submission to and consideration by Parliament; see Articles 32 (3)(g), (i) or 32(5) for instance.

[151] ie which would also include: 'the broader range of commissions, public bodies, parastatal enterprises and security organs whose function it is to regulate, plan the economy, engage in commercial activities on behalf of the *Government* and like activity'.

'Executive Branch of *Government'* and '*Government'*, it does so simply in order to distinguish between the President and the Cabinet (who collectively lead the '*Executive Government'*) and the broader range of commissions, public bodies, parastatal enterprises and security organs whose functions are to regulate, plan the economy, engage in commercial activities on behalf of the *(executive branch of)* '*Government'* and like activity'.

[156] Finally it must be concluded that although the term 'Executive' is 'technically speaking' reserved for the President and his Cabinet, it also refers to the entire 'Executive branch of government', which includes the public administration institutions manned by government officials and bureaucrats, whose task is to administrate and implement the laws made by the legislative.[152] When used in this way, 'Executive' is indeed a synonym for 'Government',[153] but '*Government',* should constitutionally speaking, never be a synonym for '*State'.* It is also without doubt that neither the broader nor the narrower concept of '*Government'* can ever be broad enough to include the *Judiciary,* (a separate and distinct organ of State), and that in the context and the democratic structures established by the Constitution it would be technically incorrect to refer to the 'Executive Organ' as if it were the 'State';

[157] Ultimately this interpretation is not only in harmony with the approach formulated in *Holeni*,[154] as endorsed by the Namibian Supreme Court, but one which would also fit practically into the quoted analysis of the concept of 'government'[155], which interpretation, in turn, also factually accords with the inherent characteristics of the Namibian State, as created by the Constitution.

[158] Applying these findings then to the first part of the third question posed by the stated case it must be concluded that it was incorrect to sue and cite the 'Government of the Republic of Namibia', (to be understood as the executive organ of the Namibian State,) when the real intended first defendant to be sued would- and should always have been 'the State' itself, as represented by the President, as Head of State. It was

---

[152] President of the Republic of South Africa and Others v South African Rugby Union and Others 2000 (1) SA 1 CC para 138

[153]I Currie et al Page 228

[154] Referred to above in *Municipal Council of Windhoek v Telecom Namibia Ltd op cit* at [43]

[155] As analysed by the learned author *Currie et al* at p 228 and as quoted above in para [150] (e)

thus correctly submitted on behalf of defendants that 'a consideration of the plaintiff's claim formulation would leave no doubt that formally, and substantively, the claim, as it presently stands, lies against the executive 'Government', something that was obviously never intended.

[159] In addition, and given this self-proclaimed intention, it would also always have been inappropriate to sue the 'Executive Government', as the 'executive organ of the State', surely, should never have been sued as that organ can never be held responsible for any act of the Judiciary due to the separation of powers doctrine. State liability is what was- and is relied upon. It thus follows that the appropriate first defendant should always have been the State, in its own right, as the 'principal' of the judicial organ of State. It follows that the First Defendant, as things presently stand on the pleadings, would- and could never be liable, even on the assumption that the allegations pleaded, by the Plaintiff against the Second Defendant, would be established.

THE ASPECT OF THE CROWN LIABILITIES ACT

[160] Do the provisions of the Crown Liabilities Act then rescue the Plaintiff's citation of the First Defendant?

[161] On behalf of the Plaintiff it was submitted that on the strength of Section 2 of the Crown Liabilities Act and the reference in it to "*Any claim*", that the section, and the types of claims the section was encompassing, was not limited by the words "*whether the claim arises …out of any contract…or out of any wrong*".[156] Section 2 therefore did not only apply to contractual claims or delictual claims (where the principles of vicarious liability may be applicable), but also in respect of any claim that might be made against the State. Counsel pointed out that in addition it appeared that in terms of section 3 of the Crown Liabilities Act, a plaintiff may even make the Minister concerned a nominal defendant. That, however, was not compulsory as proceedings which are instituted by virtue of section 2 of that Act may also be brought against the

[156] See: *S.A.R & H v Edwards* 1930 AD 3, p. 9; *S.A.R & H v Smith's Coasters (Pty) Ltd* 1938 AD 113 p. 122 – 123

"*Government*" or "*His Majesty the King in His Government of the Union of South Africa*".[157]

[162] Counsel thus contended:

' … that the plaintiff, in all circumstances, was entitled to cite the Government of Namibia as a defendant as constituting the State for the purposes of these proceedings (alternatively as representing the State in a nominal capacity). It was also correct, or at least permissible, to cite the Minister concerned (as was also done in this instance). The fact that it may be so that it may also have been correct to cite the President of the Republic of Namibia in his capacity as Head of State, does not – in terms of the provisions of the Crown Liabilities Act and the abovementioned authorities – detract from the principle that the plaintiff was also entitled to cite the Government or the Minister for that purpose … ',

[163] The counter- argument pointed out that:

'The reference to that Act, which dates back more than a century, is largely unhelpful. The reason is that at the time that the legislation was passed, the critical organs of State consisted of the Crown and its Executive Government. The Executive Government had evolved from certain prerogatives of the Crown and there was never a clear distinction between the sovereign rights of the Crown and the functions of the Executive Government. That source of confusion is not carried over to the present Constitution.

In any event, so the argument ran further, if one would have regard to that Act, it does not assist the plaintiff. The long title of the Act is instructive. The purpose of the Act is 'to impose liabilities upon the Crown in respect of acts of its Servants'. The term 'crown' refers to the 'executive government' and not to the State as defined in Art 1(3) of the Constitution. The history of the Act supports this. Baxter[158] with regard to the history of the Act states:

"Until 1934 the 'Executive Government' of the Union was formally vested in 'the King', and was administered 'by His Majesty in person or by the Governor-General as his representative'. Thus it was appropriate to equate the 'Executive Government' with the 'Crown', and therefore important to have a 'Crown Liabilities Act'.

---

[157] See: *Marais v Government of the Union of South Africa*, 1911 (TPD) 127, p. 132, *Reynolds v Union Government*, 1918 G.W.L 6

[158] The State and Other Basic Terms in Public Law (1982) 99 SALJ 212 page 228

[164] If one then accepts the background history to the Crown Liabilities Act of 1910, as sketched by the learned author Baxter, as being correct, one must also accept that that the term 'crown', as used in the act, refers to the 'executive government', as was submitted on behalf of Defendants, and not to 'the State' as defined in Art 1(3) of the Constitution. This then places the Act in its correct context, and this factor alone demonstrates decisively that the act cannot be of assistance to the Plaintiff in the special circumstances of this case. The history and purpose of the act as expressed in its long title, as well as the context, point to the conclusion that the Crown Liabilities Act was enacted for- and can be utilised for any claim against the executive organ of the State *whether the claim arises …out of any contract…or out of any wrong …* but not in circumstances where the liability in question is the liability of the State itself as the 'principal' of its main constitutional organs, a legal position that was not even contemplated at the time of its enactment in 1910.

[165] Also on this basis it needs to be concluded that the Crown Liabilities Act No1 of 1910 does not rescue the Plaintiff's citation of the First Defendant and also that the Plaintiff, in the circumstances, was not even entitled to cite the Minister of Justice for the self-proclaimed purpose, save in so far as that the Minister should obviously have been cited nominally in so far as he or she may have an interest in the subject matter of the litigation by reason of the fact that he or she has appointed the Second Defendant by virtue of the power to appoint magistrates, which vests in the Minister Justice by virtue of section 13 of the Magistrates Act 2 of 2003, as was also not done here.[159]

AD THE LIABILITY OF THE THIRD DEFENDANT – THE MAGISTRATE'S COMMISSION

[166] The Third Defendant was cited as:

[159] Compare the citation of the First Defendant in which it was pleaded that the Government of the Republic of Namibia was represented by *' … the Minister of Justice in his nominal capacity as executive head of the Ministry of Justice, being the responsible Ministry for the Magistrate in the Magistrate's Courts/Civil Court of Namibia …'.*

'The MAGISTRATE'S COMMISSION who is cited herein and established in terms of Section 2 of the Magistrate's Act No.3 of 2003 and both responsible in that position for the appointment of Magistrate's for the Republic of Namibia c/o the Government Attorney …. '.

[167] It was then pleaded that:

'At all material times second defendant was appointed by first defendant, alternatively third defendant, as a Magistrate of Windhoek to exercise the judicial power of the State of the Republic of Namibia and the second defendant acted in that capacity at all times relevant hereto.'

[168] The particulars of claim, as amended, then go on to sketch the complained of conduct, as perpetrated by the second defendant against the plaintiff. No further allegations, on which the alleged liability of the Third Defendant was claimed, were pleaded.

[169] From the introductory paragraph to the prayers in the amended particulars of claim it however appears that the Plaintiff also claims compensation from the Third Defendant, together with the other Defendants, jointly and severally, the one paying the other to be absolved.

[170] It so becomes clear that the pleaded cause of action against the Third Defendant - and thus the claimed liability for damages - is based essentially on the singular allegation that the Third Defendant was the responsible entity for the appointment of Magistrate's for the Republic of Namibia and thus for the appointment of the Second Defendant.

[171] What is more is that the Third Defendant is an entity established by the Magistrates Act 3 of 2003.[160]

[160] See Section 2 : 'There is established a commission, to be known as the Magistrates Commission, with the powers and duties conferred or imposed on the Commission by or under this Act or any other law.'

[172] It is indeed essentially the entity that, in conjunction with the Minister of Justice, is responsible for the Second Defendant's appointment.[161]

[173] Its powers and duties are apparent from section 4 which section prescribes the Commissions functions:

> '(1) The Commission must-
>
> (a) prepare estimates of the expenditure of the Commission and the magistracy for inclusion in the annual or additional budget of the Ministry of Justice;
>
> (b) compile or amend, after consultation with the association, a Code of Conduct to be complied with by magistrates;
>
> (c) receive and investigate, in the prescribed manner but subject to subsection (4), complaints from members of the public on alleged improper conduct of magistrates or alleged maladministration of justice in the lower courts;
>
> (d) receive and investigate, in the prescribed manner, complaints and grievances of magistrates;
>
> (e) carry out or cause to be carried out disciplinary investigations into alleged misconduct of magistrates;
>
> (f) make recommendations to the Minister with regard to-
>
> (i) the suitability of candidates for appointment as magistrates;
>
> (ii) the minimum standard of qualification required for the purposes of section 14;
>
> (iii) the conditions of service of magistrates, including their remuneration and retirement benefits;

[161] See Section 13(1) (1) The Minister, on the recommendation of the Commission, but subject to subsection (2), either on a permanent basis or on fixed-term contract of employment, may appoint as many magistrates as there are posts on the permanent establishment of the magistracy or in temporary posts additional to the permanent establishment.

(iv) the dismissal and retirement of magistrates; and

(v) any matter referred to in section 3(e); and

(g) perform any other function entrusted to the Commission by or under this Act or any other law.

(2) The Commission-

(a) may, in the prescribed manner, promote magistrates according to their performance to higher grades;

(b) may, subject to this Act, transfer magistrates when it is necessary in the interests of the administration of justice so to do.

(c) may recognise one professional association of magistrates when the Commission is satisfied with the constitution of the association and its representation and objectives.

(3) A committee may, subject to the directions and control of the Commission, perform any of the duties referred to in subsection (1)(a), (b) or (e).

(4) Nothing in subsection (1)(c) contained is to be construed as empowering the Commission to interfere with the judicial independence or the judicial functioning of a magistrate.'

[174] It so appears importantly, but not surprisingly, from the statute that the Commission may not interfere with the judicial independence or the judicial functioning of a magistrate.[162] Accordingly – and although the Third Defendant was essentially the entity responsible for the Second Defendant's appointment, as was pleaded, it was, at the same time, by statutory decree, always prohibited from interfering with the judicial functioning of the Second Defendant. Also the principles of vicarious liability, which do not apply to judicial officers, for the reasons already mentioned above, cannot be of assistance to the Plaintiff. How, in such circumstances the claimed liability can lie, is simply not understood.

[162] Section 4(4)

[175] In a democratic state, which applies and upholds the separation of powers doctrine, also the other main organs of State, (ie. the Executive and the Legislature), may not interfere with the independence or the functioning of the Judiciary. The aforementioned statutory bar, embodied in the Magistrates Act 2003, applicable to the Third Defendant, simply gives expression to- and applies this doctrine. For these reasons the said organs of State - and by that same token - the Third Defendant – a creature of statute – can thus not be held accountable for the acts of a magistrate also shielded by judicial immunity. This would otherwise result in the impermissible scenario discussed above, where the State, or here the Commission, would potentially be liable, but the wrongdoer would not. In the exceptional case where the shield of immunity has however been lost, State liability may vest, as found above. But that is the liability of the State itself and not that of any of the other organs of the State, such as the executive government or that of a creature of statute, like the Third Defendant. The principles on which State liability is founded, surely, cannot sustain a claim against the Third Defendant.

[176] For these reasons – and even on the assumption that the allegations, as pleaded by the Plaintiff against the Second Defendant *in casu* were established - I hold that no liability would vest in the Third Defendant, in principle. This does not mean of course that it would not have been permissible to cite the Third Defendant, as an interested party, by virtue of the fact that it is the entity responsible for the appointment of the Second Defendant in conjunction with the Minister of Justice,[163] and over whom the Third Defendant also has disciplinary jurisdiction in the case of misconduct.[164]

AD THE LIABILITY OF THE FOURTH DEFENDANT – THE ATTORNEY-GENERAL

[177] The Fourth Defendant is the Attorney-General of the Republic.

[178] The Fourth Defendant belatedly became a party to these proceedings by virtue of a joinder application. The application was brought on behalf of the Plaintiff by the Legal Assistance Centre some four years after the institution of these proceedings and only after the then Defendants had raised an exception to the original claim

[163] See Section 13

[164] See Part V of the Magistrates Act 2003 – Sections 24 to 26

formulation. As a consequence of this exception a notice to amend his particulars of claim was delivered on behalf of Plaintiff, which triggered an objection. Plaintiff thereafter applied for leave to amend. As the sought amendment 'might', as it was flippantly put on behalf of Plaintiff, raise 'a constitutional issue', it was eventually considered prudent to join the Attorney-General, as a Fourth Defendant to these proceedings. The joinder application was not opposed and was thus granted on 12 June 2009 by Manyayara AJ in the following terms:

'IT IS ORDERED: 1. That the Attorney-General of Namibia in her capacity as such is hereby joined as the Fourth Defendant in the action between the parties under Case No I 2677/05 ("the main action"). …'.

[179] The office of the Attorney-General is created by Article 86 of the Constitution:

'Article 86 The Attorney-General

There shall be an Attorney-General appointed by the President in accordance with the provisions of Article 32(3)(i)(cc) hereof.

Article 87 Powers and Functions of the Attorney-General

The powers and functions of the Attorney-General shall be:

(a) to exercise the final responsibility for the office of the Prosecutor-General;

(b) to be the principal legal adviser to the President and Government;

(c) to take all action necessary for the protection and upholding of the Constitution;

(d) to perform all such functions and duties as may be assigned to the Attorney-General by Act of Parliament.'

[180] In the first place it appears from Article 86 that the Constitution assigns to the Attorney-General the role of principal legal adviser to the President and the Government.[165] Normally – and as a general rule – (which general rule must therefore also be the point of departure to the determination of the legal question posed) - a

[165] Article 87(b)

legal adviser does not *per se* attract delictual legal liability to third parties for the advice given to his or her client.[166]

[181] In the second instance, and more importantly, it appears that the Constitution expressly obliges the incumbent of that office to take all action necessary for the protection and upholding of the Constitution.[167] This obligation would thus include the duty to uphold the rule of law, the principles of democracy – and with it the separation of powers doctrine.[168] It also imposes the duty to protect and uphold the fundamental rights and freedoms enumerated in Chapter III of the Constitution.[169]

[182] While Article 87 (c) clearly imposes the said legal duties it must immediately be said that it seems questionable how this responsibility can translate itself into legal liability, *vis a vis* the Fourth Defendant, in circumstances where the courts, and here also specifically the Second Defendant, were always entitled to act independently and without interference and where the Second Defendant was always shielded from any outside interference by the doctrine of the separation of powers and judicial immunity and thus also from any interference by the Fourth Defendant? The Fourth Defendant was thus effectively barred from interfering with any of the complained of actions of the Second Defendant.

[183] For similar reasons as those found applicable to the Plaintiff's case against Third Defendant – and even on the assumption that the allegations, as pleaded by the Plaintiff against the Second Defendant *in casu* were established - I hold that no liability would vest in the Fourth Defendant, in principle. This of course does not mean that it would not have been obligatory to cite the Fourth Defendant, as an interested party, from the outset, by virtue of the fact that it is the Attorney-General of the Republic that the courts have identified, that should be cited as a party in all cases where constitutional issues are at stake.[170]

---

[166] See generally : Lawyers' Professional Liability' by Prof JR Midgley , 1st Ed 1992 on the liability of lawyers to non-clients at pages 90 to 94

[167] See Article 87(c)

[168] See Articles 1 and 3

[169] See Article 5

[170] Compare for instance : *Kavendjaa v Kaunozondunge NO and Others* 2005 NR 450 (HC) at 465,and *Kalipi v Hochobeb and Anothe*r 2014 (1) NR 90 (HC) at [24}, see also *Minister of Home Affairs v Majiedt*

[184] In any event it is not understood why this question was formulated as one that has to be resolved by the Court in this instance, as neither the original- nor the amended particulars of claim of the plaintiff contain any allegations on which any liability of the Fourth Defendant was based or can be founded.

[185] Even the 'amended particulars of claim', which are dated 7 July 2011, - and which were thus delivered some 2 years after the joinder of the Fourth Defendant as a party - remain clearly excipiable – in regard to any claim purportedly made against the Fourth Defendant, as a closer examination of the amended particulars of claim reveals. Over and above the above- quoted order, which superimposed the Fourth Defendant on the existing claim formulation, merely in her capacity as such, the particulars of claim then only go on to sketch the complained of conduct, as perpetrated by the second defendant against the plaintiff and where thus not a single further allegation, on which the alleged liability of the Fourth Defendant was founded, was pleaded.

[186] This conclusion is reinforced by the introductory paragraph to the prayers in the amended particulars of claim were the Plaintiff nevertheless – ie. without any pleaded foundation - also claims compensation from all the 'Defendants' - and thus also from the Fourth Defendant - jointly and severally, the one paying the other to be absolved.

[187] No cause of action is thus made out against the Fourth Defendant on the pleadings. Also on this basis it must be concluded - and even on the assumption that the allegations, as pleaded by the Plaintiff against the Second Defendant *in casu* were established – that no liability would vest in the Fourth Defendant, in principle, and in any event on the pleadings, as they presently stand.

COSTS

[188] It appears from paragraph [34] of the judgment of my brother Miller, in which Ueitele J concurred, that he considered that it would be appropriate not to make any

---

and Others 2007 (2) NR 475 (SC) (2008 (5) SA 543) in paras 7 – 11.

order as to costs as *'the matter was one of constitutional interpretation and of some importance'*.

[189] There are indeed circumstances in which a court will not order an unsuccessful litigant, who has sought constitutional relief, to pay costs.[171] Given the majority judgment in this matter the plaintiff is to be regarded as the unsuccessful party in this case, and as such, he would, on the application of the ordinary rule, have become liable to pay the legal costs of the defendants. A departure from the ordinary rule is however permitted where the litigants have conducted their litigation, being constitutional litigation, in a reasonably proper manner. I believe that the parties in this instance have done so when they agreed to have the cardinal issues, underlying the plaintiff's case, determined by way of a special case.

[190] I therefore agree that there should be no order as to costs.

RESULT:

[191] To sum up then: In my judgment:

a) The first question of the stated case is to be answered in the affirmative, namely that the State can, on the application of the principle of 'State liability' be held liable for the judicial acts of a magistrate, in the specific limited circumstances where such judicial officer has lost the shield of judicial immunity on account of the fact that, while presiding over the case of the plaintiff, the magistrate was exercising the judicial power of the State of the Republic of Namibia; and

b) The second question of the stated case is answered in the negative in that it is held that the answer to the first question given above is not affected by the constitutionally entrenched principles of the independence of the judiciary, the rule of law and the separation of powers doctrine; and

c) The third question of the stated case is also answered in the negative in that it is held that the Government of the Republic of Namibia and/or the Magistrates

[171] See for instance : *Standard Bank Namibia Ltd and Others v Maletzky and Others* 2015 (3) NR 753 (SC) at [56] and footnote 67 referring in turn to *Minister of Home Affairs v Majiedt and Others* 2007 (2) NR 475 (SC) (2008 (5) SA 543) para 53

Commission and/or the Attorney-General would not be liable, even on the assumption that the allegations pleaded by the plaintiff against the Magistrate *in casu* would be established.

d) There should be no order as to costs.

H GEIER

Judge

APPEARANCES

PLAINTIFF:	R Tötemeyer SC (with him G Dicks) Instructed by Legal Assistance Centre, Windhoek
DEFENDANT:	M D Kuper SC (with him N Marcus) Instructed by Government Attorney, Windhoek