ATTORNEYGENERAL v OATILE 2011 2 BLR 209 CA

Citation: 2011 2 BLR 209 CA

Court: Court of Appeal, Lobatse

Case No: Civ App 21 of 2010

Judge: Kirby JP, Ramodibedi, Foxcroft, Howie and Lord Abernethy JJA

Judgement Date: 15 April 2011

Counsel: S Du Toit SC with him I Goodman and B Mosweu for the appellantrnE W F Luke II for the respondent

Flynote

Constitutional law—Contravention of fundamental rights—Redress—'Redress'includes constitutional damages—Constitutional damages are principally compensatory—Single award may include both compensatory element (including aggravated damages if necessary) and vindicatory element—Constitutional damages reserved for extremely serious breaches of human rights, or cases where contempt displayed for constitutional rights—Constitutional damages to be sought only where delictual damages, reviewor alternative constitutional remedy are inadequate—Award of P20 000 for denial of right to be tried within reasonable time, over period of four years—Constitution of Botswana, s 18.

Headnote

The appellant was arrested on a charge of murder on 13 February 1995. On 13 August 1998, the charge was conditionally withdrawn because the single eyewitness was still too young to appreciate the oath and to testify (he wasseven years' old at the time of the incident). The appellant was in custody up until that point. He was recharged in 2004 and released on bail. He was brought to trial in 2007. He admitted killing the deceased but claimed to have done so in self-defence. He was acquitted on 29 August 2007. He was awarded constitutional damages of P100 000 in the High Court for failure to be tried within a reasonable period of time. The Attorney-General appealed against that order on the grounds, first, that the delay was not unreasonable as it had been properly explained; second, that the concept of 'redress' as contained in s 18(1)

of the Constitution of Botswana did not include a claim for constitutionaldamages;
and, third, that the damages awarded were excessive on the facts.

Held: (1) The word 'redress' in s 18(1) of the Constitution of Botswana had to be interpreted to include any appropriate remedy which could be enforced by an order made in terms of s 18(2) of the Constitution of Botswana. That included an order for the payment of damages. Fose v Minister of Safety and Security 1997 (3) SA 786 (C) at p 799 para [19]

applied.

(2) Constitutional damages were principally compensatory in nature. Theyalso vindicated the fundamental right of the plaintiff which has been contravened. A single award could therefore include both compensatory damages (including aggravated damages if necessary) and an additional vindicatory element.

(3) Proper cases for an award of constitutional damages were likely to be rare. They were reserved for cases of extremely serious breaches of human rights, or where contempt had been displayed for constitutional rights.Constitutional damages should be sought only where delictual damages or review, or an alternative constitutional remedy such as a declaration of rights, were inadequate. Fose v Minister of Safety and Security 1997 (3) SA 786 (C) at p 821 para [60] applied; Attorney-General of Trinidad and Tobago v Ramanoop [2005] UKPC 15 at paras [18] and [19] followed; Harrikissoon v Attorney General of Trinidad and Tobago [1980] AC 265 applied.

(4) In the present case, where the respondent was acquitted after anunreasonable delay and no delictual remedy was available, an award of constitutional damages was the only practical or appropriate way of vindicating the his rights. Maharaj v Attorney-General of Trinidad and Tobago (No 2) [1979] AC 385 (PC) at p 398 applied.

(5) Only the four years from 2004 to 2007, during which the respondent was unlawfully denied his right to be tried within a reasonable period of time, couldbe taken into account in assessing the quantum of the court's award.

(6) The respondent was entitled to an enhanced award because of the presence of an aggravating feature, namely, the gross insensitivity of the Director of Public Prosecutions in failing to recharge him until 2004 when the eyewitness turned 12 in 2000, from which date the witness would have been considered capable of testifying in court.

(7) The lower court's award of P100 000 was extravagant and could not be justified. A moderate but meaningful award, in line with country norms and the facts of the case, was one of P20 000. Merson v Cartwright [2005] UKPC 38 (Bahamas) distinguished.

Case Information

Cases referred to:

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

Attorney-General v Mafojane and Others [2000] 2 B.L.R. 74, CA

Attorney-General of Trinidad and Tobago v Ramanoop [2005] UKPC 15; [2006] 1 AC 328; [2006] 1 All ER 464; [2005] 2 WLR 1324; [2005] All ER (D) 407; [2005] ICR 1776; [2005] IRLR 977

Barker v Wingo 407 US 514 (1972); 92 S?Ct 2182; 33 L Ed 2d 101

Beama Publishing (Pty) Ltd and Another v Makati (Civ App 10/08) unreported

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

Ed 619

Bomo (Pty) Ltd v Zakhem Construction Botswana (Pty) Ltd
and Others [1996] B.L.R. 729, CA

Bonham-Carter v Hyde Park Hotel Ltd (1948) 64 TLR 177

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Bosilong
v The Attorney-General and Another [2007] 2 B.L.R. 515

Bothma v Els and Others 2010 (2) SA 622 (CC); 2010
(1) SACR 184 (CC); 2010 (1) BCLR 1 (CC)

Botswana Railways Organisation v Ditshwane [1998]
B.L.R. 68, CA

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

Cape Town Council v Jacobs 1917 AD 615

Carey
v Piphus 435 US 247 (1978); 55 L Ed 2d 252; 98 SCt 1042

Carmichele v Minister of Safety and Security (Centre for
Applied Legal Studies Intervening) 2001 (4) SA 938 (CC) (2002 (1) SACR 79
(CC); 2001 (10) BCLR 995 (CC)

Cassell & Co Ltd v Broome [1972] UKHL 3; [1972]
AC 1027; [1972] 1 All ER 801; [1972] 2 WLR 645

Chicole
v Chatsama and Another [1995] B.L.R. 485, CA

Evins v Shield Insurance Co Ltd 1980 (2) SA 814 (A)

Fose v Minister of Safety and Security 1997 (3) SA
786 (C); 1997 (7) BCLR 851 (CC) pp799 and 821(paras [19] and [60])

Fox, Campbell and Hartley v United Kingdom (1991) 14
EHRR 108 (Article 50)

Gaokibegwe
v Mokokong and Another [2009] 1 B.L.R. 280

Gobudilwe and Another v Shaobuye and Another [1993]
B.L.R. 56

Harrikissoon v Attorney-General of Trinidad and Tobago [1980]
AC 265

In Re Mlambo 1992 (4) SA 144 (ZS); 1992 (2) SACR 245
(ZS); 1991 (2) ZLR 339 (SC)

Isaac v The State [1991] B.L.R. 248

Kebafetotse
v The Attorney-General [2004] 1 B.L.R. 419

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

Kennedy v Ireland [1987] IR 587; [1988] ILRM 472

Kgafela v Maoto [1992] B.L.R. 256, CA

Khan v Khan 1971 (2) SA 499 (RA)

MEC
for the Department of Welfare v Kate 2006 (4) SA 478 (SCA) ; [2006] 2 All
SA 455 (SCA)

Mackin v New Brunswick (Minister of Finance) [2002]
SCC 13; [2002] 1 SCR 405

Maharaj v Attorney-General of Trinidad and Tobago (No
2) [1979] AC 385; [1978] 2 WLR 902; [1978] 2 All ER 670 (PC) at p398

Malope
v Tshegofatso [2002] 2 B.L.R. 266

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

Moatshe and Another v The State [2003] 1 B.L.R. 65

Moatshe v The State; Motshwari and Another v The State
[2004] 1 B.L.R. 1, CA

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

Mongakgotla v The Attorney-General [2010] 1 B.L.R.
13, CA

Morris and Others v The Attorney-General [1996]
B.L.R. 472

Mosaninda v The Attorney-General [1994] B.L.R. 411

Ntwa v State [2001] 2 B.L.R. 212

Oatile v The Attorney-General [2010] 1 B.L.R. 404

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

R (on the application of KB) v Mental Health Review Tribunal [2003] EWHC 193 (Admin); [2004] QB 936; [2003] 2 All ER 209; [2003] 3 WLR 185; [2003] All ER (D) 168

Rabana v The Attorney-General and Another [2003] 1 B.L.R. 330

Raphoto v The Attorney-General (Civ Case 1664/05), unreported

Rookes v Barnard [1964] UKHL 1; [1964] AC 1129; [1964] 1 All ER 367; [1964] 2 WLR 269; [1964] 1 Lloyds Rep 28

Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T)

Rudul Sah v State of Bihar and Another [1983] INSC 87; AIR 1983 SC 1086; 1983 (3) SCR 508

Sanderson v Attorney-General, Eastern Cape 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC)

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

Simpson v Attorney-General [1994] 3 NZLR 667; (1994) 1 HRNZ 42

Sorinyane v Kanye Brigades Development Trust and Another [2008] 2 B.L.R. 5, referred to.

State v Makwekwe 1981 B.L.R. 196

Suratt and Others v The Attorney-General of Trinidad & Tobago [2008] UKPC 38 (Trinidad and Tobago)

Thokwane v The Attorney-General [1998] B.L.R. 221

Thomas v The State [2007] 2 B.L.R. 749, CA

Tlharesegolo v The Attorney-General [2001] 2 B.L.R. 730

Tsuaneng v The State [2003] 2 B.L.R. 60, CA

Zanner v DPP, Johannesburg 2006 (2) SACR 45 (SCA); 2006 (11) BCLR 1327; [2006] 2 All SA 588 (SCA)

APPEAL against award of constitutional damages. The facts are sufficiently stated in the judgment.

S Du Toit SC (with him I Goodman and B Mosweu) for the appellant

E W F Luke II for the respondent

Judgement

KIRBY JP:

The issue to be determined in this appeal is whether or not a person who has been acquitted of a criminal charge a long time after the charge was first laid against him or her can, in appropriate circumstances, claim and be awarded constitutional damages for the denial of his or her right to be tried within areasonable

time.

That right (which is sometimes inaccurately described as the right to a speedy trial) derives from s 10(1) of the Constitution, which provides as follows:

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

2011 (2) BLR p213

KIRBY JP

Also in issue is the interpretation of s 18 of the Constitution, which formed the basis both of the claim and of various aspects of the judgment appealed against. This reads, insofar as it is relevant to the present case, as follows:

'18. (1) Subject to the provisions of subsection (5) of this section, if any person alleges that any of the provisions of sections 3 to 16 (inclusive) of thisConstitution has been, is being or is likely to be contravened in relation to him or her, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction —

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

(b) . . .

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

(3) . . .

(4) . . .

(5) Rules of court making provision with respect to the practice and procedure of the High Court for the purposes of this section may be made by the person or authority for the time being having power to make rules of court with respect to the practice and procedure of that court generally.'

The Attorney-General, who is the appellant, seeks the setting aside of an award of P100 000 in constitutional damages made by Dingake J on 2 March 2010 [reported as Oatile v The Attorney-General [2010] 1 B.L.R. 404.] in favour of the respondent for the violation of his right to be brought to trial within a reasonable time on a charge of murder, which was first preferred against him on 13 February 1995 and of which he was acquitted on 29 August 2007.

The
case was argued in the High Court on a short statement of agreed facts, which I will reproduce below, but before us counsel for both sides agreed that in determining the appeal, this court should make reference also to the pleadings and other uncontested material in the court file, and also to the judgment of Gaongalelwe J when he acquitted the respondent of the charge of murder.

The
statement of agreed facts

This was signed by both counsel in the court below (Oatile v The Attorney-General at p 406F-407G) and reads as follows:

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

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

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

KIRBY JP

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

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

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

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

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

— Such confession statement was never challenged, no stick was producedin court.

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

'There is one extraordinary feature of this case which is most disturbing. I am of the view that although such has not been raised by either side thecourt would be failing in the execution of its duties if

the matter is not brought to the attention of the appropriate authorities.

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

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

Also agreed were the issues to be resolved at trial. These were:

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

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

Background and proceedings

On 13 February 1995 the respondent was arrested and charged with the murder of his concubine, Mosadiwadutle Mabudi. The charge sheet shows the respondent to have been unemployed, and that the deceased met her death a week earlier at Tshekwane Cattlepost on 7 February 1995.

According to the record of pre-trial proceedings in the magistrate's court, the respondent was held in custody from 13 February 1995 until 13 March 1996,

when he was committed for trial in the High Court. He told the magistrate that he could neither read nor write. Thereafter he remained in custody until 13 August 1998 when the charge against him was withdrawn. Up to that time he had made no application to be released on bail.

On 17 June 2004 the respondent was indicted afresh by the Director of PublicProsecutions on the same charge. He was admitted to bail, and was not re-detained. He was tried before Gaongalelwe J and, on 29 August 2007, he was acquitted of the charge.

At the trial, all the State's evidence was admitted, save for that of the sole independent eyewitness of the events leading to Mosadiwadutle's death, her son Keotshebile Kgwatlheng. Part of the admitted

evidence was the voluntarystatement
made by the respondent and referred to in the agreed facts. This was made on 13 February 1995, and in it the respondent described a quarrel with the deceased, during which (and I quote):

'She took out a log from the door of our hut and it hit me
on the knee and my nose. I grabbed the log from her and hit her on the ribs as well. She fell downand died.'

Also admitted was the report of a postmortem examination
carried out on the body of the deceased. In it the pathologist reported that the cause of death was not ascertainable due to decomposition of the body. There were no fractures of the skull or spine.

The
eyewitness, who was seven years old in February 1995 (and who must therefore have been 19 or 20 when he testified), told the court that the deceased, his mother, was chased by the respondent, who hit her on the back of the neck with a heavy metal rod, causing her to collapse and die. His evidence was discredited in cross-examination.

By the time of the trial, a mogonono stick pointed out by the
respondent andseized
by the police had been lost, as had an album of photographs assembled at the time of the incident.

The respondent made an unsworn statement from the dock,
averring that in striking the admitted blow, he used a mogonono stick and that he acted in self-defence. This, together with the weakness of the State case, earned him his acquittal.

After
giving statutory notice, the respondent filed a writ of summons against the appellant. In his declaration he claimed to have been held in detention from the date of his arrest until June 2007, a period in excess of 12 years. This was wrongful and unlawful in that it was 'a gross violation of (his) fundamental and constitutional right to be tried within a reasonable time.' In consequence he hadsuffered
damages of P1 000 000 arising from his 'loss of freedom of movement and liberty,' and damages of P500 000 arising from 'damage to (his) reputation, good name, and standing in his community,' making a total claim of P1 500 000 together with interest, costs, and further or alternative relief.

On 19 May 2008 the new Rules of the High Court (Cap 04:02)
(Sub Leg) were published, which introduced judicial case management, and the requirement to furnish affidavits to support a declaration or plea in civil proceedings. By that time the respondent had filed his declaration and had replied to a request

for further particulars. He was thus not obliged to file
those affidavits. Theappellant,
however, who filed her plea on 27 February 2009, was so obliged.

The plea was a simple one. It was denied that the respondent's fundamental rights had been contravened, or that he had suffered any damages whatever. He had been in lawful custody from his arrest until the withdrawal of the charge, whereafter he had been at liberty, although he was on bail from his re-indictment in 2004 to his acquittal in 2007.

To her affidavit supporting the plea, State Counsel Boikobo Keaikitse annexed a file copy of a savingram addressed to the police Letlhakeng at the time of the initial withdrawal of the charge, in which the prosecutor expressed the hope that the matter would be reinstated after the witness, who was then nine years old, had matured sufficiently to take the oath. She made no attempt to explain in any other way the delay of 12 years between the respondent's arrest and hisacquittal, saying that she had only been seized of the case in 2007.

In his replication the respondent stood by his initial averments, and added that 'he was prejudiced in having serious charges looming over his head for a period over twelve years; it is agonising to await trial for that period. Furthermore, the social stigma that one faces, the inconvenience and restrictions on liberty isunjustifiable especially to (the respondent) who eventually was acquitted from the charge of murder.' [sic]

After the pleadings were closed, it was agreed by counsel for the parties that the trial should be dispensed with, and instead that the judge should determine the issues between them without evidence, but having regard to the agreed statement of facts reproduced above, and aided by heads of argument filed byboth parties. This he did. No record was availed to the court of the trial of the respondent in the High Court in 2007, nor of the High Court proceedings in which the charge was provisionally withdrawn in 1998.

The case is an unusual one, in that the agreed facts contradicted the pleadings in several respects, and the judge was asked to determine, inter alia, the quantum of damages (if such were found to be payable) on the flimsiest of material, andafter hearing no evidence. That said, it was the choice of the respondent to proceed in that way, and no application was made to the judge to refer the issue of the disputed quantum of damages to trial. No objection has been raised by either side before us to the approach of the judge in proceeding to determine the quantum on the material before him.

The Attorney-General, too, chose to lead no evidence as to the cause of thedelay in re-instituting the murder charge after the passage of so many years, and to offer no explanation, other than to claim that she was waiting for the child witness to grow up. Both parties thus elected to take the risk of leading no evidence, and of relying entirely upon an abbreviated statement of agreed facts. In doing so, each must face any adverse consequences of that decision.

The judgment of Dingake J

In a wide-ranging and thoughtful judgment, in which he considered the jurisprudence of many countries throughout the world, Dingake J held that:

— The period of over 12 years taken to try the respondent constituted a violation of his constitutional right under s 10(1) of the Constitution to be tried within a reasonable time.

KIRBY JP

— The
conditional withdrawal on the murder charge did not halt the running of time in this regard — only a total withdrawal entitling the respondent to an acquittal would have done so.

— The
State tendered no explanation in the agreed facts for the delay, and on the probabilities there was none.

— The
State must be held accountable for constitutional violations.

— A stay
of prosecution may assist an accused who has not been brought to trial for an unreasonable length of time, but such relief will not provide redress to a person who has already been released or acquitted.

— The
word 'redress' in s 18(1) of the Constitution is wide enough to include a claim for constitutional damages.

— The
award of constitutional damages is a public law remedy separateand distinct from delictual remedies, since the law of delict regulates
relationships between private parties.

— Constitutional
damages seek to promote the vindication of fundamental rights.

— The
respondent had not alleged that any private law remedy was available to him, nor had any such entitlement been shown.

— In this
case constitutional damages constituted an appropriate remedy.

— Constitutional
damages seek to compensate the individual whose rights have been infringed, and only exceptionally will punitive or exemplary damages be warranted.

— The
quantum of constitutional damages should be assessed along the lines of delictual damages, and should not be extravagant.

— In the
present case the respondent had suffered restriction of liberty, general inconvenience, anxiety, interference with his employment opportunities or ability to earn a living, and undue stigma.

Damages of P100 000 were awarded.

The
grounds of appeal

There are three main grounds of appeal:

(i) that the delay in prosecuting the respondent was not
unreasonable because a satisfactory reason was advanced for this;

(ii) on a proper interpretation, the concept of 'redress' in section

18(1) of theConstitution does not include a claim for constitutional damages; and

(iii) the quantum of damages was excessive on the facts of the case.

To these was added the additional and alternative ground that:

(iv) It was not appropriate in the circumstances of the case to award constitutional damages because:

(a) the circumstances were not exceptional, and the respondent had other remedies — he could have applied for a permanent stay of prosecution, or for an order to expedite the trial;

(b) the respondent had at his disposal the common law remedies of the actio iniuriarum and the Aquilian action if the facts justified these;

(c) the respondent's rights were not infringed in a gross or intentional manner;

(d) the court below erred in failing to hold that the respondent had notproved any loss or damages; and

(e) the court below incorrectly relied upon foreign precedents which arose in different legal systems and on different facts.

In her heads of argument the appellant raised the further issue that the action should have been dismissed on the ground that it was brought by writ of summonsrather than by constitutional application under s 18, which is mandatory.

I will deal with the legal issues first.

Section 10(1) of the Constitution

The purposes underlying the right to a fair trial within a reasonable time have been held by a full bench of this court (per Tebbutt JP) to be, in headline terms,the prevention of lengthy pretrial incarceration, to minimise the anxiety and concern of the accused while awaiting trial, and to limit the possibility that the defence will be impaired or prejudiced by undue delay. The right is for the public benefit, too, assisting witnesses, protecting the victims of crime, and reassuring the community that serious crimes are promptly investigated and timeously tried. See Sejammitlwa and Others v The Attorney-General and Others [2002] 2 B.L.R. 75, CA (Full Bench) at pp 80-81. The learned Judge President quoted with approval the words of Gubbay CJ in In re Mlambo 1992 (4) SA 144

(ZS) at p 147-148 that:

'. . . the main purpose of the right to be afforded a fair hearing within a reasonable time . . . [is] . . . to minimise the adverse effect on the personcharged flowing from the pending disposition of a still to be determined criminal charge. The right, therefore, recognises that, with the passage of time, subjection to a criminal charge gives rise to restrictions on liberty, inconveniences, social stigma and pressures detrimental to the mental and physical health of the individual. It is a truism that the time awaiting trial must be agonising for accused persons and their immediate family. I believethat there can be no greater frustration for an innocent person charged with an offence than to be denied the opportunity of demonstrating his lack of guilt for an unconscionable time as a result of delay in bringing him to trial.

The right recognises, also, that an unreasonable delay may well impair the ability of the individual to present a full and fair defence to the charge.'

The first question to be considered is when does time begin to run, and whendoes it end, for the purposes of s 10(1)? It is now settled that the word 'charged' in this section is to be broadly construed in accordance with the principles applicable to constitutional interpretation. This question was examined in detail by Tebbut JP in Sejammitlwa's case (supra) at p 83, and he concluded that:

'. . . when a person is ''charged'' is not when he is first arraigned before a court. When a person is ''charged'' may occur at a date prior to the case coming before the court, such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when preliminary investigations were opened.'

That is when time begins to run.

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KIRBY JP

Thereafter the subject is to be afforded a fair hearing within a reasonable time. That time ends when the hearing, that is, the whole trial, is concluded, either by a final abandonment of the charge, or by a conviction or by an acquittal.

The next question is whether or not time ceases to run when a charge is provisionally withdrawn, since the words 'unless the charge is withdrawn' are included in the section. In terms of s 150(4) of the Criminal Procedureand Evidence Act (Cap 08:02) a person who has been called upon to plead to an indictment or summons is generally entitled to demand that he be either acquitted or found guilty. By the proviso to that subsection, however, in a magistrate's court the prosecution may, with the leave of the court and for reasons to be stated on the record, withdraw the charge at any time before theclose of the prosecution case, in which case the accused shall be discharged without prejudice to his being charged again for the same offence. By s 278(3) of the Criminal Procedure and Evidence Act the same proviso applies mutatis mutandis to the withdrawal of an indictment in the High Court by the Director of Public

Prosecutions. See Busi v The State [1997] B.L.R. 69, CA at p 73.

The effect of such a withdrawal has been considered in a number of casesin the context of an application for a permanent stay of prosecution. See Ntwa v The State [2001] 2 B.L.R. 212, Sejammitlwa's case (supra) at p 82; and In re Mlambo (supra) at p 149. In each of these cases it was argued that during the period following withdrawal, and up to the date when the charge or indictment was re-instituted, there was no charge against the accused, so that s 10(1) of the Constitution did not apply. In each the argument was rejected, and it was held that it was necessary to interpret the words 'unless the charge is withdrawn'in s 10(1) in such a way as to give full force and effect to the intention behind s 10, which was to ensure that there was no unreasonable delay between the date when the charge was first notified to or instituted against the subject, and the date when his trial was finally concluded, whatever interruption may have intervened between these two dates. If this was not so, then the protection accorded by the Constitution against unreasonable trial delay could be renderednugatory. The words in s 10(1) were to be construed in the sense of the charge being withdrawn in a manner that unequivocally and finally releases the accused from the threat of prosecution. I agree with this approach, and it applies equally to a case where a subject seeks redress after his acquittal, when he or she has had to wait for an unconscionable period before the trial was finally over.

The question of what is or is not a reasonable time in the context of s 10(1) of the Constitution has also been considered in several judgments of the full bench of the court, such, for example, as Busi (supra) Sejammitlwa (supra), Kelaotswe v The Attorney-General [2006] 1 B.L.R. 229, CA and Thomas v The State [2007] 2 B.L.R. 749, CA. It is settled that what is or is not a reasonable time depends upon all the circumstances in each case, and not on the length of the delay alone.

In deciding this issue foreign precedents do not usually assist. What is a reasonable period in Botswana will not necessarily accord with what is a reasonable time in, say, the United States of America, or in Trinidad and Tobago, where the geography, available resources, and logistics of litigation will be entirely different. In Botswana, as a developing State, human and financial resources are limited in the police service, the Directorate of Public Prosecutions and the Administration of Justice. The geographical area to be covered by the police is vast, and historic backlogs of cases pending in the system are still being

addressed. Those are the general considerations which militate against too shorta period being found to be unreasonable, but the particular circumstances of each case are important too. A case investigated and prosecuted in Gaborone for example, will usually, depending upon its complexity, take less time than one investigated and prosecuted in a remote area such as Tsabong. That is why it is necessary for the prosecution in a constitutional challenge based onunreasonable trial delay, to place before the court details of every circumstance which caused or contributed to the delay. Without a reasonable explanation a long delay will be

presumed to be unreasonable. See Ntwa (supra) at p 219 citing Barker v Wingo 407 US 514 (1972).

In Busi (supra) at p 72, Amissah JP held that:

'. . . regard ought to be had to the fact that what the provision requires is notthat the charges be heard in a specific time but that the hearing should be within a reasonable time. Such time would therefore vary depending on the circumstances of each case. In determining what is a reasonable time, the period taken to bring and to prosecute the charge will be one, but only one of several factors to be taken into account. The nature of the particular criminalact, the charge, the availability of witnesses, the efforts made to prosecute the charge expeditiously, the availability of judges or magistrates will all be factors which would have to be taken into consideration.'

That the length of time taken to complete a trial is not the determining factor is demonstrated by the fact that delays as short as three years have on occasionsbeen held to be unreasonable (as in Ntwa (supra), a theft case), while delays as long as five years have been held not to be unreasonable, each case being examined on its own particular facts. (See Rabana v The Attorney-General and Another [2003] 1 B.L.R. 330). In the private prosecution of Bothma v Els and Others 2010 (2) SA 622 (CC) (an admittedly exceptional case) a delay of 39 years was held not to be unreasonable where the victim's recollection ofchildhood abuse had been suppressed for many years, only to resurface later in life after psychiatric counselling. What is more important than the length of the delay is the reasonableness or otherwise of the explanation given for that delay.

In determining whether or not a delay in bringing an accused person to trial is or is not reasonable, the court is to conduct a balancing exercise. On the one side of the scales are placed the right of the accused to be tried withina reasonable time, and the various adverse effects he may experience if this right is denied. On the other side of the scales are placed the public interest in bringing criminal charges, and particularly those involving serious offences, to trial even if it takes a long time to do so, and the explanation given by the State for any delay. More detailed factors to be placed in the balance depend upon the nature of the remedy sought. Cases to date in this court have concerned, almostexclusively, applications for a permanent stay of prosecution (for example, the cases of Sejammitlwa, Kelaotswe, Thomas, Ntwa and Rabana (supra). In such cases potential trial prejudice is the most important factor. This is expressed in Thomas at p 770 as first, whether the ability of the applicant to conduct his or her defence is compromised by the delay, and second, whether it is still possible in all the circumstances for the applicant to be afforded a fair trial. Trial related

prejudice includes, for example, death or disappearance of witnesses, memory loss due to lapse of time, and misplacing of exhibits.

Where redress is sought after an acquittal, different

considerations apply. The subject's right to a fair trial has been vindicated by his acquittal. On his side of the scales must be placed the other personal adverse effects flowing from anundue delay in bringing him to trial.

Section 18 of the Constitution

At the heart of this case lies the proper construction of s 18 of the Constitution. In construing this section the court will first apply the usual rule of statutory interpretation, which is to give the clause its normal meaning as dictated by the words used, the grammar and the syntax. Then, since this is a constitutionalprovision, it will breathe life into the section by applying, where the wording so allows, the now time-honoured special rules of constitutional construction. These are that expressions granting or defining individual rights and freedoms are to be broadly and generously construed, keeping pace with the times, so as best to realise the full promise of the fundamental rights provisions of theConstitution; expressions tending to limit fundamental rights, on the other hand, are to be narrowly construed. Further, constitutional provisions are not to be considered in isolation, but are to be interpreted in the light of all other relevant provisions of the Constitution so as best to achieve the great purposes of the instrument. See, for example, Petrus and Another v The State [1984] B.L.R. 14, CA (Full Bench) at pp 34 et seq; Attorney-General v Dow [1992] B.L.R. 119, CA (Full Bench) at pp 131 and 132.

To assist in the task of construction, and also in deciding such questions as the nature of constitutional damages, when they should be awarded, and the quantum thereof, we have been referred by counsel for both sides, in their helpful heads of argument, to a large number of foreign cases from many jurisdictions. Reference will be made to some of these, in context, when it is useful to do so,but it is as well to place such cases in perspective from the Botswana point of view.

Of least assistance are precedents from the United States of America, Europe (including the United Kingdom), Canada and other Commonwealth countries such as New Zealand and Australia, with constitutional and statutory provisions different from those in Botswana and often influenced by considerations ofsovereign immunity which are not applicable here. These are helpful only to show general trends and approaches worldwide to the awarding of constitutional damages, but they are less relevant as to detail because the precedents arise from different legal frameworks in countries where local conditions, culture, history, and available human and financial resources are entirely different from those obtaining in Botswana. As a member of the community of nations, Botswanashould be alive to those trends, but is not obliged to swim with the tide. Our courts will be guided in the final analysis by local laws and local conditions.

Of more assistance, but on constitutional issues only marginally so, are decisions from South Africa, with its well developed legal system, and where many of its laws have similar features to those in Botswana. Like Botswana, South Africa is a Roman Dutch common law jurisdiction, and there are certain similarities between the cultural milieu and social circumstances of some communities there and those of our more homogenous society in Botswana.

But that is as far as it goes. In constitutional terms, the countries are far apart.Each has a Bill of Rights, but these are very different, although they have some commonalities. Most important of the differences is that the South African Constitution recognises and protects what have become known as second generation human rights, such as the rights to housing, healthcare, food, water, social security, and a number of others. These socio-economic rights are not at present recognised or protected in the Botswana Constitution. In South Africathey have played an important role in the development of the law relating to constitutional damages. The law of delict in South Africa has also been drawn into the constitutional debate by s 39(2) of the South African Constitution which makes reference to the development of the common law. In Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening) 2001 (4) SA 938 (CC) (a case of delict) it was held by the Constitutional Courtthat the courts in South Africa were under a general duty to develop the common law where it deviated from the spirit of the fundamental rights provisions of the Constitution. In the Botswana Constitution there is no equivalent to s 39, and no constitutional imperative to develop the common law.

Of most assistance are decisions of the Privy Council in appeals originating from Commonwealth countries with post-colonial constitutions similar to theBotswana Constitution. Until the passing of the Judicial Committee (Abolition of Appeals) Act 1973 (Act 19 of 1973), the Judicial Committee of the Privy Council was the apex court of Botswana, and its decisions were binding on all our courts. That Act came into force on 5 October 1973 after which the Court of Appeal was empowered to depart from or overrule earlier Privy Council decisions, which were otherwise binding. Since then, Privy Councildecisions remain helpful, but are of persuasive value only. (See Moatshe and Another v The State [2003] 1 B.L.R. 65 at pp 78-79, where the history of this development is set out). However, even such Privy Council decisions need to be approached with a measure of caution when they relate to non Roman Dutch law jurisdictions, where the law of tort rather than the law of delict prevails, thedoctrine of sovereign immunity often looms large, and where there is a sharp divide between public law remedies and private law remedies.

In Botswana the law of delict applies. Delictual actions against the government and state agents are permitted by the State Proceedings (Actions by or against Government or Public Officers) Act (Cap 10:01) without restriction, and are frequently brought. The line between public law actions and private law actions has become blurred, and the distinction between the two is of less significance.In this case the action was against the State and no issue was taken with that. It may be that constitutional suits under s 18 could lie also against individuals and other bodies as well. That is not a question that needs to be considered here. It is unnecessary for present purposes to classify, as Dingake J attempted to do, a suit for constitutional damages either as a remedy in public law or as one in private law. The better view seems to be that it is neither. It is an action in its own right.

As regards the doctrine of sovereign immunity, this is also of less significance in Botswana, in view of the State Proceedings (Action by or against Government or Public Officers) Act, than in some other Commonwealth jurisdictions. That the State in Botswana is fully bound by the Constitution is, in my judgment, self-evident. It is the Constitution which created the Republic, laid down the rules of our democracy, and entrenched the protection of fundamental rights.

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It
established and regulates all three arms of government — the executive, the legislature and the judiciary. To suggest that the doctrine of sovereign immunity could somehow, on historic grounds, exempt the government from compliance with any part of the Constitution is unthinkable. It would be a recipe for anarchy. It is not necessary in Botswana, as it has been in, for example, New Zealand, Grenada and Canada, to fashion constitutional public law remedies in order tohold
the State liable under the Constitution for torts from liability for which it would otherwise have been exempted.

Section 18 is one of the 19 sections comprising Chapter II of the Constitution, which is headed 'Protection of Fundamental Rights and Freedoms of the Individual'. These sections are among the entrenched sections of the Constitution, which require a special vote of two thirds of the National Assemblyfor
their amendment. That is a measure of their importance in the constitutional framework. All are to be read in the context of s 3, which provides that:

'3. Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his or her race, place of origin, political opinions, colour, creed or sex, but subject torespect for the rights and freedoms of others and for the public interest to each and all of the following, namely —

(a) life, liberty, security of the person, and
the protection of the law;

(b) freedom of conscience, of expression and of assembly and association; and

(c) protection for the privacy of his or her home and other property and fromdeprivation of property without compensation,

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individualdoes not prejudice the rights and freedoms of others or the public interest.'

This clause establishes the primacy of individual fundamental rights but recognises the imperative that the enjoyment of these rights and freedoms is to be tempered with respect for the rights and freedoms of others, and also, importantly, for the public interest.

To secure those rights, s 18 provides a mechanism for their enforcement.Subsection
18(1) is the governing provision of the section. In terms of this:

'. . . if any person alleges that any of the provisions of sections 3 to 16 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him or her, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the HighCourt for redress.'

Subsection (2) is consequent upon subsection (1) and provides the means of enforcement. Under it:

'(2) The High Court shall have original jurisdiction —

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

(b) . . .

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

The purposes of s 18 of the Constitution are therefore threefold: first, to guarantee to every individual in Botswana the right of direct access to theHigh Court to seek redress for any actual or anticipated breach of his or her fundamental rights; second, to guarantee his or her right to a remedy to redress such breach or threat; and third, to secure that no other law can undermine those rights, since the Constitution is the supreme law, and takes precedence over all other laws. See Moatshe and Another (supra) at 88.

The questions now before us are whether the word 'redress' in the context ofthe whole section should be interpreted to include damages, and if so can there be constitutional damages in addition to the delictual damages already available under the common law? If constitutional damages can be awarded, what is the nature of those damages, and how should their quantum be determined?

These are vexed questions, and in the constitutions of a number of countries with similar enforcement sections referring to 'redress', special provisions havebeen added to clear up any possible doubt. Some have a section specifying in plain terms that compensation may be awarded to individuals whose rights or freedoms have been denied or violated (see, for example, Malawi, s 46(4), and Namibia, Article 25(4)). Some forbid absolutely relief under the Constitution where adequate means of redress are available under any other law (for example, Sierra Leone, s 28(2);Barbados, s 24(2); Jamaica, s 25(2); and Mauritius, s 17(2)). Others give the court a discretion to decline to award constitutional relief where an adequate alternative remedy is available (such as Fiji, s 41(4); Saint Kitts and Nevis, s 18(2); and The Gambia, s 37(5)). Finally, there are those which have clauses in pari materia to Botswana's s 18, and which contain no such additions. Examples of these are Belize (s 20), Kenya (s 84), and Trinidad and Tobago (s 14). In the South African Constitution, too,damages are not mentioned in the enforcement provision (s 38), but the court is empowered to grant 'appropriate relief, which may include a declaration of rights'.

The meaning of 'redress' in s 18(1)

In its context s 18(1) refers to the protection of
individual rights, as set outin
s 3 and expanded upon in the ensuing Chapter II provisions. Relief under the section is generally referred to as 'redress', and is available to any person who alleges that any of his or her fundamental rights under the Chapter 'has been, is being or is likely to be' undermined or denied. The proper meaning to be placed on the word 'redress' depends upon whether the right in questionhas been breached, whether it is being breached or whether it is likely to be breached. The New Shorter Oxford English Dictionary (1993) defines 'redress' as '1. Reparation of or compensation for a wrong or consequent loss; 2. Remedy for or relief from some trouble; assistance, aid, help.' So a person whose right has been infringed, may seek reparation or compensation for the infringement. If his right is being infringed, he may ask the High Court for relief from that infringement; and if his right is likely to be infringed, he may move the court

for
assistance to prevent that infringement from happening. In each of those cases a declaration of his rights or that the infringement is unlawful may provide a measure of redress, but that will not always be enough. For a person whose right has been infringed, compensation may be required; in the other two cases a mandamus or an interdict may be appropriate. By the rules of constitutional interpretation the word 'redress' is to be given a wide meaning, so as best toattain the purpose of the Constitution, which is to provide full redress for a very wide range of ills.

It is important to note that the jurisdiction given to the
High Court is an original jurisdiction separate and distinct from its normal jurisdiction. Its normal jurisdiction is conferred by s 95(1) of the Constitution, which provides that:

'There shall
be for Botswana a High Court which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.' (my emphasis)

So by s 95(1) the High Court exercises jurisdiction under
any law, includingthe
common law, for the purpose of adjudicating on common law and statutory claims. Additional jurisdiction and powers have been conferred on the court by s 18 of the Constitution. In terms of this separate and distinct jurisdiction the High Court is empowered to hear and determine applications for redress from persons who have suffered, who are suffering, or who anticipate breaches of their fundamental rights and freedoms. The court is given wide powers insuch applications, and 'may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of section 3 to 16 (inclusive) of this Constitution.' The words 'may' and 'as it may consider appropriate' show this to be a very wide discretion, which is to be exercised judicially, as is the case with all discretions exercised by the court. (See Kelaotswe (supra) at p 233).

This
is, as far as I am aware, the first case where a claim for damages for breach

of a constitutional right has come before this court, but such a claim has been foreshadowed in a number of the court's earlier decisions. Those cases have involved claims for a permanent stay of prosecution, but in each the judge has made it clear that this is not the only remedy available where there has been an unreasonable delay in bringing an accused person to trial. In Sejammitlwa G (supra) at p 88; Tebbutt JP, speaking for the full court, said that:

'Section 18(2) of the Constitution confers wide powers on the court to make such orders as it may consider appropriate in enforcing any of the provisions of s 3 to 16 of the Constitution, which will, of course, (include s 10(1). It is now settled law that the powers include, in appropriate situations, the powerto order the permanent stay of a prosecution, the effect of which would be the equivalent of an acquittal and discharge. (See Busi v The State supra). This is not the only competent verdict which can be returned by the court. The court can, for example, order that the trial should be continued without delay, as happened in the Ntwa case, or the appellants can seek damages for the delay.'

He repeated words to similar effect in Kealotswe (supra) (also a full bench decision) at p 234, and quoted with approval the words of Kriegler J in Sanderson

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v Attorney-General, Eastern Cape 1998 (2) SA 38 (CC) at p 58 para [39], whichare apposite to the present case, namely:

'Ordinarily, and particularly where the prejudice alleged is not trial-related, there is a range of ''appropriate'' remedies less radical than barring the prosecution. These would include a mandamus requiring the prosecution to commence the case, a refusal to grant the prosecution a remand, or damagesafter an acquittal arising out of the prejudice suffered by the accused.'

And see also Thomas (supra) at p 767.

The meaning of the word 'redress' in s 14 of the Constitution of Trinidad and Tobago, which is identical in all material respects to our s 18, was considered by the Privy Council in Maharaj v Attorney General of Trinidad and Tobago (No2) [1978] 2 All ER 670 (PC) at p 679, where Lord Diplock stated:

'What then was the nature of the ''redress'' to which the appellant was entitled? Not being a term of legal art it must be understood as bearing its ordinary meaning, which in the Shorter Oxford English Dictionary is given as: ''Reparation of, satisfaction or compensation for, a wrong sustained or theloss resulting from this''.'

He went on to add, pertinently, that:

'. . . by the time the case reached the Court of Appeal he [the appellant] had long ago served his seven days and had been released. The contravention wasin the past; the only practicable form of redress was monetary compensation.'

In Fose v Minister of Safety and Security 1997 (3) SA
786 (CC), Ackermann J considered the meaning of the words 'appropriate relief',
which appear in a parallel context in the South African Constitution, and held
at p 821 para [60].

'. . . there is no reason in principle why "appropriate
relief" should not includean award of damages where such an
award is necessary to protect and enforce chap 3 rights . . . When it would be
appropriate to do so, and what the measure of damages should be will depend on
the circumstances of each case and the particular right which has been
infringed.'

The appellant argues that the word 'redress' in s 18(1)
should be restrictivelyinterpreted,
so as to exclude damages, because subs (2) permits only orders to enforce or to
secure the enforcement of fundamental rights. That argument cannot, in my
judgment, prevail. It would run against the rule of generous interpretation
applicable to constitutions, and would effectively block any remedy for a
person whose rights had already been infringed save for the sometimes hollow
satisfaction of a declaration that he had been in the right. Thatwould not give proper
effect to the intention of the Constitution that redress in the fullest sense
of the word must be available.

I hold that the word 'redress' in s 18(1) must be
interpreted to include any appropriate remedy which can be enforced by an order
made in terms of s 18(2). This includes an order for the payment of damages. I
endorse the finding in Fose's case (supra) at p 799 para [19] that:

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'Depending on
the circumstances of each particular case the relief may be a declaration of
rights, an interdict, a mandamus, or such other relief as may be
required to ensure that the rights enshrined in the Constitution are protected
and enforced. If it is necessary to do so, the courts may even have to fashion
new remedies to secure the protection and enforcement of these all importantrights.'

The word 'redress' and the powers granted to the court under
s 18 are both wide enough to validate those sentiments, and in Botswana new
remedies have already been fashioned under the section. These are those of the
permanent stay of prosecution (see Sejammitlwa (supra)) and the so-named
'constitutionalexemption'
which may be called in aid when a statutory minimum sentence is grossly
disproportionate in a particular case (see Moatshe and Another (supra)
at p 88; and Moatshe v The State; Motshwari v The State [2004] 1 B.L.R.
1, CA at p 14.)

The nature of constitutional damages

That
damages may be awarded for breaches of constitutional or fundamental rights in
appropriate cases as a distinct remedy from tortious or delictual damages has
now been accepted in many jurisdictions, though often for different reasons and
in different forms. Examples are:

— the
United States of America, per Bivens v Six Unknown Named Agents of Federal
Bureau of Narcotics 403 US 388 (1971).

— the
United Kingdom, see, for example R (on the application of KB) v Mental
Health Review Tribunal [2004] QB 936.

— South
Africa, per Fose (supra).

— Ireland,
per Kennedy v Ireland [1987] IR 587.

— New
Zealand, per Simpson v Attorney-General, [1994] 3 NZLR 667.

— India,
per Rudul Sah v State of Bihar and Another 1983 (3) SCR 508.

— Canada,
per Mackin v New Brunswick (Minister of Finance) 2002 SCC 13.

— Trinidad
and Tobago, per Maharaj (supra).

It is not necessary for present purposes to canvass the
details of developments in each of these jurisdictions, which are set out in
the main judgment in Foseand also by Dingake J in the court below, but the common
questions which have arisen, and which need to be addressed in this case, too,
are the following:

(a) whether
constitutional damages should be compensatory, vindicatory, exemplary or
punitive, or a combination of these; and

(b) how
to avoid double compensation when there is an overlap, as oftenhappens, between breaches of the Constitution and torts or delictual
wrongs.

Generally, damages are awarded under the law of delict to
compensate the injured party for the patrimonial loss he has suffered (in an
Aquilian action) or to compensate him for his non-patrimonial loss, or injury
to his personality (in the actio iniuriarum). The first is to recover proven
financial loss wrongfully caused; the second to recover compensation for
intentional injury to the claimant's physical or mental integrity, his
reputation, dignity, feelings, privacy

or identity. (Visser and Potgieter, Law of Damages
(2nd ed Juta & Co CapeTown)
at pp 45 and 94). These damages are all compensatory in nature.

Exemplary or punitive damages (the terms are often used interchangeably) are (or have been) awarded where there has been particularly egregious behaviour on the part of the offender, to make an example of him or to punish him. Such damages are additional to the damages required to compensate the plaintiff. See Khan v Khan 1971 (2) SA 499 (RA) at p 500 , Gobudilwe and Another v Shaobuye and Another [1993] B.L.R. 56. These damages often overlap with, or are confused with, aggravated damages.

The distinction between exemplary or punitive damages and aggravated damages is made by Lord Devlin in Rookes v Barnard [1964] AC 1129 (HL) at p 1221, as follows:

'The object of damages generally is to compensate, whereas the object of exemplary damages is to punish and deter. Aggravated damages fall under the compensatory principle, and are awarded where the injury to the plaintiff has been aggravated by the way in which the defendant has behaved.'

The modern view, with which I concur, is that in most cases it is possibleto accommodate full damages within the compensatory principle, with judicial disapproval for particularly bad behaviour being expressed by an award of aggravated damages for the more serious assault on the plaintiff's dignity caused by such behaviour. So the greater the assault on the plaintiff's dignity, the higher the sum of damages which will be required to compensate him.

Punitive damages are now seldom awarded, and they were described byAckermann J in Fose at p 827 as 'an historic anomaly which fails to observe the distinctive functions of the civil and criminal law and which sanctions the imposition of a penalty without any of the safeguards afforded in a criminal prosecution.' This court has also stressed that the purpose of damages, even in defamation cases, where punitive damages were historically awarded on occasion, is properly to compensate the defamed person for the injuria he hassuffered. It is not to punish the defamer. See Beama Publishing (Pty) Ltd and Another v Makati (Civ App 10/08), unreported where Foxcroft JA held that 'the emphasis should be on compensation, not making an example of (the defendant).'

There are compelling reasons, too, why the award of punitive damages against the State, which is almost always the defendant in claims for constitutionalredress, is not appropriate. The State is an amorphous body made up of large numbers of politicians, administrators and civil servants. It will not feel the sting of punitive awards, which will be borne instead by the taxpayer. Abuse of state power is, in the final analysis, attributable to individuals, who may be disciplined administratively for this. A government guilty of abuse of poweris liable, in a democracy, to be punished by the electorate at the polls and not by the courts. Further, scarce state resources are better used in fulfilling social imperatives than in paying windfall sums in punitive damages to individuals who have done nothing to earn these. (Fose (supra) at p 827; Rookes v Barnard (supra) at p 1230; and Cassell & Co Ltd v Broome [1972] AC 1027 at p 1087).

So, subject to what appears below, it is not right to describe damages awarded under s 18 of the Constitution either as punitive or as exemplary. I agree with

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Ackermann
J (Fose (supra) at p 821) that damages awarded for breaches of
fundamental rights should be referred to simply as constitutional damages
without categorising them further, and that they are principally compensatory
in nature.

But, as Dingake J found, the true purpose of granting
redress under s 18(2) is to vindicate the fundamental right of the plaintiff
which has been contravened.This
the court may do in a number of ways, of which the award of damages is one.
Constitutional damages are thus both compensatory and vindicatory in nature.
This is made clear in Attorney-General of Trinidad and Tobago v Ramanoop
[2005] UKPC 15 at paras [18] and [19], where it was held in the Privy Council
that:

'[18] When
exercising this constitutional jurisdiction the court is concerned to uphold,
or vindicate, the constitutional right which has been contravened. A declaration
by the court will articulate the fact of the violation, but in most cases more
will be required than words. If the person wronged has suffered damage, the
court may award him compensation. Thecomparable
common law measure of damages will often be a useful guide in assessing the
amount of this compensation. But this measure is no more than a guide because
the award of compensation under section 14 is discretionary and, moreover, the
violation of the constitutional right will not always be co-terminous with the
cause of action at law.

[19] An award of compensation will go some distance towards
vindicatingthe infringed constitutional right. How far it goes will
depend on the circumstances, but in principle it may well not suffice. The fact
that the right violated was a constitutional right adds an extra dimension to
the wrong. An additional award, not necessarily of substantial size, may be
needed to reflect the sense of public outrage, emphasise the importance of the
constitutional right and the gravity of the breach, and deter furtherbreaches. All these elements have a place in this additional award.
'Redress' in section 14 is apt to encompass such an award if the court
considers it is required having regard to all the circumstances.'

The court goes on to say that punishment is not the object
of such an award, and that descriptions such as punitive damages or exemplary
damages are betteravoided.
This seems to me to be a sensible approach to the section, equally applicable
in Botswana, and it explains the use of the words 'vindicatory damages' in the
constitutional sense. So although a single award will normally be made, this
may include both compensatory damages (including aggravated damages if
necessary), and an additional vindicatory element.

When should constitutional damages be awarded?

It
must be emphasised that it is not in every case that an additional award will
be appropriate. In Ramanoop's case (supra) the judge said that 'the
proceedings relate to some quite appalling misbehaviour by a police officer',
and the award is to reflect 'public outrage'. So it is for extremely serious
breaches of constitutional rights or where contempt has been displayed for
constitutional rights that such an award may be proper. Many daily mishaps and minor
delictual wrongs may constitute technical breaches of a person's fundamental
rights, which are very

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wide-ranging, and it should not be thought that the bringing of a s 18 applicationentitles the plaintiff as of right to any constitutional dividend for those. Proper cases for such an award are likely to be rare (See Maharaj (2) (supra) at p 399).

Because the jurisdiction is additional to and in no way prejudices or replaces existing common law remedies, a constitutional application is not a substitute for an action in delict, although there may be some overlapping. Any duplication of compensation or parallel litigation is to be avoided. I will consider theappropriate procedure to be adopted when both delictual and constitutional damages arise from the same incident or course of conduct in due course, when the procedural point belatedly raised by the appellant is addressed.

It was reaffirmed in Ramanoop (supra) at p 337 that in terms of the section the court has a full discretion either to grant or to decline constitutional relief. As laid down in Harrikissoon v Attorney-General of Trinidad and Tobago [1980]AC 265, applications for constitutional relief should not be used as a substitute (or as a procedural short cut) for actions in delict, or for review proceedings. Lord Diplock held that:

'. . . where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some featurewhich makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process.'

There are at least two circumstances in my judgment, which might constitute aspecial feature of the sort contemplated. There may be others. The first is where an infringement of the plaintiff's fundamental rights has caused him patrimonial or personal damages, and no action lies at common law or by statute by which he can seek redress. Thus in Maharaj (supra) the wrongful imprisonment of the plaintiff by a judge for contempt of court was shielded by judicial immunity from founding a common law action for damages. Under the Constitution ofTrinidad and Tobago, however, there was no shield, and an application was made against the State under the requisite section for damages. The present case is an example of this category, where it is conceded that no delictual action is available to address the breach of rights, but damages are claimed to have been suffered.

The second possibility is where, as in Ramanoop's case (supra), theunconstitutional behaviour complained of was so outrageous or contemptuous as to warrant an award additional to what would normally suffice to compensate a claimant.

There will also be many cases where an award of damages will not be required to vindicate the plaintiff's rights, and where an alternative constitutional remedy will achieve that purpose, such as a declaration that the infringementwas

unlawful, together with an order for costs. This was so in Suratt and Others v The Attorney-General of Trinidad and Tobago [2008] UKPC 38 (Trinidad and Tobago), and has been the outcome of several cases dealing with the right to be tried within a reasonable time brought to the European Court of Human Rights. See, for example, Fox, Campbell and Hartley v United Kingdom (1991) 14 EHRR 108 (Article 50) para 11. Where, following an unreasonable delay,

an accused person is convicted, relief for this constitutional infringement will usually be accorded in the sentencing process, by the imposition of a reduced sentence. This is what happened in State v Makwekwe 1981 B.L.R. 196 at p 198, and see Ntwa (supra) at p 222.

Where an acquittal has followed an unreasonable delay, however, as in this case, monetary compensation under the constitution may well be the onlyappropriate or practical way of vindicating the plaintiff's rights. See Maharaj (2) (supra) at p 398 where Lord Diplock held that:

'The contravention (a seven day prison term) was in the past; the only practical form of redress was monetary compensation.'

Section 18(5) and procedure

In terms of s 18(5) of the Constitution, rules of court may be made governing s 18(1) proceedings. These the Chief Justice has made, in Order 70 of the Rules of the High Court (Cap 04:02) (Sub Leg). They require that an application for redress in terms of s 18(1) is to be brought by notice of motion, with supportingaffidavits.
That was not done in this case. Instead, the respondent proceeded by writ of summons, claiming damages of P1 500 000. No issue was made of this throughout the case, nor in the initial grounds of appeal. In her supplementary heads of argument, however, the Attorney-General has raised the matter, and argues that the 'error' in proceeding by writ of summons without leave or condonation is a ground for dismissing the claim.

The respondent argues that that is not so, and I agree with him, for a number of reasons.

Firstly, it is unfair and legally improper to entertain belated submissions of this nature, which were neither raised in the court below, nor in the appellant's grounds of appeal. See Botswana Railways Organisation v Ditshwane [1998] B.L.R. 68, CA at p 71, Bomo (Pty) Ltd v Zakhem Construction Botswana (Pty) Ltd [1996] B.L.R. 729, CA at p 732, Attorney-General v Mafojane and Others [2000] 2 B.L.R. 74, CA at p 81.

Secondly, even where the Rules require, as in this case, that proceedings be commenced by application on notice of motion (such, also as review proceedings under Order 61 of the Rules of the High Court), non-compliance does not per se avoid any such proceedings which have been

brought by summons (see Order 5rule
2(1)). There will be cases where the use of the summons procedure should be condoned because the anticipated disputes of fact are such that there is no prospect of the case being determined on affidavits alone. (See Sorinyane v Kanye Brigades Development Trust and Another [2008] 2 B.L.R. 5 at pp 9 to 11 and the cases cited therein). In certain classes of case, such as matrimonialcauses
and illiquid claims for damages, it has been held that motion proceedings are not permissible at all in the ordinary course. See Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1161. Here the claim is for constitutional damages, which are disputed. That they would be disputed was clear all along, since the statutory demand issued to the Attorney-General elicited no satisfaction. It is appropriate in such cases for the court to allow a departure from the rules and to permit or require such a claim, which may also include prayers for delictual damages, too, to be commenced on a writ

of summons. It is well settled that the court has inherent
jurisdiction to allowdepartures
from the rules for good reason when it is in the interests of justice to do so. This is certainly a case in which such a procedure would have been encouraged had an application for leave or condonation been made and I hold that there is no merit in the belated procedural point raised.

I should add, for future guidance, that although s 18 of the
Constitution creates a distinct cause of action based on the breach of
fundamental constitutionalrights
and a special procedure for claiming redress, it does not follow that separate proceedings must be instituted to claim constitutional damages, when common law damages under the law of delict also arise from the same incident or conduct. Rather, unless there are exceptional and compelling reasons not to do so, the 'once and for all rule' is to be applied. This holds that in claims for compensation or satisfaction arising out of a breach of contract, delict orother cause, the plaintiff must claim once for all damages already sustained or expected in future insofar as they are based on a single cause of action. This is a sensible rule grounded on the English law and the Roman Dutch common law and it has been consistently applied in appropriate circumstances in South Africa. See PQR Boberg The Law of Delict (Juta & Co Ltd Cape Town 1984) at p 476, Visser and Potgieter (op cit) at p 135, Cape Town Council v Jacobs 1917AD 615, Evins
v Shield Insurance Co Ltd 1980 (2) SA 814 (A). It guards against duplication of damages, possible conflicting decisions by different courts on the same facts, and the expense of multiple proceedings. It is proper that the rule should be applied in Botswana, too, especially as limited resources and the long distances travelled in many cases by parties to the seat of the court make it desirable to ventilate all claims arising from a particular incident or course ofconduct
in a single action, where this is possible.

So, in an appropriate case where different categories of
damages are claimed for a breach of constitutional rights, these should be set out in the particulars of claim under their respective heads of damage, as was done, for example, in Merson v Cartwright [2005] UKPC 38 (Bahamas),

where damages invarying
amounts were claimed and granted under the several heads of medical expenses; assault and battery; false imprisonment; malicious prosecution; and contravention of constitutional rights. This accords with rule 15 of Order 20 of the Rules of the High Court, which provides that a plaintiff suing for damages shall set them out in such manner as will enable a defendant reasonably to assess the quantum thereof.

The quantum of constitutional damages

The approach of the courts to awards of damages generally, and in particular to awards against the State will depend on the socio-economic circumstances and on the conditions prevailing in the country in question. That is why comparisons in financial terms with awards in other countries are unhelpful in the absenceof
detailed evidence of exchange rates, the value of money, household incomes and other comparative data in those countries.

Botswana is, as I have said, a developing country with a large land mass and a far-flung population. Income in rural areas is generally low. We have a history of moderation in distribution of the limited resources available for the benefit of the nation, and generally the spirit of 'botho' prevails — that is, mutual respect and compassion for the young, the elderly, women, and the

disadvantaged.
Successive democratically elected governments have shown consistent respect for the rule of law and for the Constitution. In such a setting extravagant awards of damages either against the government or against others are not generally appropriate, although there may be exceptions, depending upon the circumstances, and where government agencies or officials have wrongfully infringed the rights of others, appropriate damages have been awarded. I willgive some comparative examples in due course, for the purposes of this case, but it is fair to say that delictual damages awarded by the courts in Botswana have generally been moderate but meaningful. There is no reason why that should not be the case where constitutional damages are awarded as well.

Since this is the first such case in Botswana reference to the approach in otherjurisdictions may be of assistance, though actual sums awarded are unlikely to be relevant.

In England, pursuant to the United Kingdom's obligations as a member of the European Union, the Human Rights Act was enacted in 1998 to domesticate the European Convention on Human Rights. This authorised the award of damages to afford 'just satisfaction' to persons whose fundamental rights had beeninfringed.
Lord Woolf CJ proposed a number of principles to govern the award of such damages, which were quoted in R (on the application of KB) (supra) at p 948 and have largely been adopted by the English courts. These relate to an analogous process and generally advocate the use of alternative remedies first, and that where an award of damages is necessary, this should be modest. What Lord Woolf did say, however, which is of particular relevance to this case, isthat an award should be restricted to compensation for the excess of what is unlawful over what is

lawful in each case. He said:

'In a complaint of a failure under Article 6 to provide a public hearing within a reasonable time, the compensation will be limited so that it only applies to the period which exceeds what is reasonable.'

That makes good sense and should, in my judgment, apply equally in Botswana and to this case.

In South Africa damages have been awarded primarily for the breach of socio-economic constitutional rights (for example, Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae) (2004) 6 SA 40 (SCA) and MEC Department of Welfare, Eastern Cape v Kate 2006 (4) SA 478 (SCA). In the Modderfontein case the matter was remitted for assessment of damages, while in Kate's case, where the plaintiff was deprived for a long time of her constitutional right to social security payments,a modest award, equivalent to lost interest, was made. In Fose (supra) where a claim was made for exemplary constitutional damages for assault by torture, the court held that damages in a delictual action would sufficiently vindicate the plaintiff's case, and declined to award separate constitutional damages.

In New Zealand it was held in Simpson (supra) at p 678 that:

'As to the level of compensation . . . in addition to any physical damage, intangible harm such as distress and injured feelings may be compensated

for; the gravity of the breach and the need to emphasise the importance ofthe affirmed rights and to deter breaches are also proper considerations, but extravagant awards are to be avoided.'

That, too, is a sensible approach.

What is common to all the foreign cases cited to us is that full evidence was led by the plaintiff in each case to establish his or her loss, where patrimonial,or to lay a proper basis for an award for hurt feelings, pain and suffering, or stress, where these were relied upon for a value-based judgment. This accords with the usual onus placed upon a plaintiff claiming damages to prove his or her damages. See, for example, Carey v Piphus 435 US 247 (1978); Bonham-Carter v Hyde Park Hotel Ltd (1948) 64 TLR 177 at p 178.

Turning to the Botswana cases, the nearest parallels are to be found in actionsbrought claiming damages for wrongful arrest and malicious prosecution. As was held in Merson v Cartwright (supra) where the claim was for constitutional damages based

upon outrageous and humiliating treatment of the plaintiff by the Bahamian police:

'The comparable common law measure of damages will often be a usefulguide in assessing the amount of compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary, and moreover, the violation of the constitutional right will not always be co-terminous with the cause of action of law.'

(Section 14 of the Constitution of the Bahamas is similar to our s 18). Butthese comparatives will only be of limited assistance, since the cause of action in this case does not resemble either wrongful arrest or malicious prosecution. Nor does it involve outrageous physical or other invasions of the complainant's person or personality, as has been the case in most suits for constitutional damages. Its facts are peculiar to this case alone.

For unlawful arrest, damages have generally been modest. Examples areMorris and Others v The Attorney-General [1996] B.L.R. 472 (P4 000 for unlawful arrest and 24 hour detention on wildlife related charges); Mosaninda v The Attorney-General [1994] B.L.R. 411 (P5 000 awarded for wrongful arrest and detention for two days — plaintiff humiliated and disgraced by being led about in leg irons); Tlharesegolo v The Attorney-General [2001] 2 B.L.R. 730 (P7 500 awarded for wrongful arrest and detention for 221/2 hours — policemanmolested, publicly humiliated and detained); Raphoto v The Attorney-General (Civ Case 1664/04), unreported (P10 000 awarded to plaintiff roughly handled by police and detained for four hours); Kebafetotse v The Attorney-General [2004] 1 B.L.R. 419 (P4 000 awarded for high handed arrest and detention for 46 hours with no reasonable grounds for suspicion); and Mongakgotla v The Attorney-General [2010] 1 B.L.R. 13, CA (P5 000 awarded by Foxcroft JA forunlawful arrest and detention for 16 hours).

For malicious prosecution, the damages have been higher, but the circumstances more serious — Thokwane v The Attorney-General [1998) BLR 221 (P150 000 awarded, plaintiff wrongly accused of murder, imprisoned for 8 months and never brought to trial). Bosilong v The Attorney-General and Another [2007] 2 B.L.R. 515 (P150 000 awarded to senior policeman maliciously prosecuted

for obtaining by false pretences, suspended on half pay for a lengthy period; unable to keep up maintenance payments, and convicted for this; developed ulcers and contemplated suicide); Gaokibegwe v Mokokong and Another [2009] 1 B.L.R. 280 (P20 000 awarded to a farmer maliciously prosecuted for stock theft; publicly humiliated at kgotla, then case withdrawn as statements in policedocket showed him to be innocent).

In general, delictual damages in Botswana have not been substantial. Even in defamation cases, where damages are often higher, the Court of Appeal has cautioned against extravagant awards. See Kgafela v Maoto [1992] B.L.R. 256, CA at p 269, where Schreiner JA held that:

'. . . there is much to be said for the view that
defamation actions should not beencouraged by the award of
unnecessarily large amounts by way of damages . . .'

Judicial discretion

In
arriving at his decision on the merits and on quantum, Dingake J had to
exercise his discretion on the material before him. It was for him to perform
the balancing exercise in deciding whether the delay in bringing the respondent
to trial was unreasonable; it was for him to decide whether an award of damages,
rather than some other remedy, was appropriate; and it was for him to decide
the proper sum to award. Each of those discretions was to be exercised
judicially.

It
is trite that an appeal court will not generally disturb the exercise of a
judicial discretion unless the judge has acted on wrong principles,
misapprehended the relevant facts, or made a clearly wrong decision. See Chicole
v Chatsama and Another [1995] B.L.R. 485, CA at p 494. There are, however,
two categories of discretion — the first is where this relates to matters
having a character so essentially for determination by the court of first
instance that it would ordinarilybe inappropriate for the Court of Appeal to substitute the
exercise of its own discretion for that of the court below. In such a case the
court will only interfere on the limited grounds referred to. The second
category is

'. . . where the Court of Appeal is in as good as a
position as the court below to exercise the discretion in question. In such
event, the function of the court onappeal is
to hear all argument addressed to it on the existing record, and to re-examine
the decision of the court of first instance. If, considered in the light of all
relevant factors, the court on appeal finds the exercise of discretion by the
court below to have been appropriate, the appeal must fail. If the exercise of
the discretion is found to have been inappropriate, the court on appeal must
substitute its own discretion for that of the court below.

(Per
Tebbutt JP in Kelaotswe (supra) at p 233).

This case certainly falls within the latter category, as it
was decided on an agreed statement of facts supported by a very limited record,
both of which are before this court, which has heard full argument. That means
that the court is at large on all issues and will examine the facts and
arguments afresh to decide on the appropriateness of Dingake J's decisions and
award, and, if necessary it will vary these.

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Reasonableness of the delay

It is common cause that 'the clock started ticking' on 13
February 1995, the date of the respondent's arrest, and that it stopped on 29
August 2007, the date of his acquittal — a delay of some days in excess of 12

years and six months. This is far too long for any trial, even if the charge be murder, unless compelling reasons for the delay are present.

It is not correct that the State offered no explanation at all for the delay intrying the respondent, as the judge found in the court a quo. In his judgment he remarked at p 409C that 'the defendant is breathtakingly silent on what efforts it took to prosecute the charges expeditiously'. In fact, some reasons were advanced, although their adequacy or inadequacy is open to debate. It was argued that the initial period, which the respondent spent in custodybefore the charge was withdrawn, was lawful and in accordance with the norm in murder cases. The period between his arrest and his committal for trial by the magistrate, that is, the investigation and assessment period, was just over one year (13 February 1995 until 13 March 1996). Having regard to usual resource constraints in the Botswana Police Service and the Attorney-General's Chambers, that period was not in my view, unreasonable. After committal heremained in custody until 13 August 1998 when the charge was withdrawn, a further period of two and a half years. While this is unfortunate, delays of up to three years in the adjudication of murder cases before the High Court were at that time by no means unusual, and still occur in certain instances, as is apparent from the appeals which routinely come before this court.

There is no suggestion from the respondent that the prosecution was malicious,nor that that period of imprisonment was in any way unlawful, despite his subsequent acquittal. No application for bail was made at the time. Counsel for the respondent conceded that despite deficiencies in the post mortem report, and potential defences adverted to in the respondent's statement, there remained a prima facie case upon which the State was justified in proceeding. There isno suggestion that the prosecution was aware ahead of the trial that its young witness could not distinguish between the truth and lies. It follows that the pre-trial incarceration of the respondent has not been shown to be either unlawful or unreasonable.

As to the period from 13 August 1998 until 17 June 2004, when the respondent was indicted afresh, the only explanation proffered by the State is that given forthe withdrawal, namely that the key witness had to reach a state of maturity sufficient for him to take the stand as a witness.

The procedure for dealing with young witnesses is to be found in s 221 of the Criminal Procedure and Evidence Act (Cap 08:02). This provides that a prospective witness who is too young to understand the nature of the oath,may still be allowed to testify if he or she properly understands the difference between truth and falsehood, and that it is wicked to tell lies, provided that such a young person is admonished by the court to tell the truth.

In Botswana, children as old as 9 years of age have been found to be unable to distinguish between telling the truth and telling lies. (See Isaac v The State [1991] B.L.R. 248). On the other hand, in Tsuaneng v The State [2003] 2 B.L.R. 60, CA a 12 year old who did not understand the nature of the oath, but was able

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to
distinguish between truth and falsehood, was properly admonished to tell the truth, and duly testified.

I have some doubts as to the usefulness of waiting until a child grows up before allowing him or her to testify, but no issue has been raised in this regard by the respondent. I accept that the decision to provisionally withdraw the charge was a rational and lawful decision taken by the appellant in good faith.There has been no suggestion to the contrary. Assuming that in the ordinary course a child would understand the difference between and the significance of telling the truth and telling lies by at most the age of 12 years, although in some cases it may be at an earlier age, then the State's explanation for its delay in proceeding would be at least marginally reasonable up to the year in which its witness turned 12, that is the year 2000.

For the delay from 2000 until 17 June 2004, however, the State has proffered no reason whatever, nor is there any evidence of an assessment at any stage of the witness's maturity. Certainly, there must be a reason for the delay. It may be an understandable one, such as lack of manpower and overwork; or it may be that the case was overlooked by mistake; or it may be that the case layunattended through sheer indifference; or, in a worst case scenario, the delay might have been deliberate. The appellant has chosen to provide no explanation at all for the delay, nor even to express its concern or regret therefor. Rather it avers that there should be little sympathy for the respondent since he had 'confessed' to the crime. In fact, that was not the case. For that four year period at least the judge in the court a quo was justified in holding that there was nogood reason for the delay, which was accordingly unreasonable. He was correct also in holding that the organs of State, including the Directorate of Public Prosecutions, are bound to display a degree of constitutional sensitivity in their treatment of persons who, though accused of crimes, remain innocent in law unless and until they are convicted after the due trial process. This is particularly so in the case of poor and disadvantaged litigants who have no ready access to legal assistance.

As for the final leg of the respondent's long wait for his trial to be concluded, neither side has placed before the court the record of proceedings in the High Court murder trial. It is not proper to speculate on the reasons why a further three years elapsed from the lodging of the fresh indictment until the trial was concluded in August 2007. There is no evidence as to when the trial commenced,whether there were postponements and the reasons for these, or whether delays were caused by backlogs or an overloaded court diary. So, while a long time was taken to conclude the case, it is not possible to find in respect of that period that there was an unreasonable delay. Many murder trials have taken a similar time to be concluded. It is common cause that during the whole of that time the respondent was out on bail.

To perform the balancing exercise in this case is not an onerous task. The delay is so long that it will be difficult for the State to dislodge the presumption that it is unreasonable. For the purpose of this exercise (though not for the purpose of computing damages) the whole 12 year period is to be considered.

On the one side, it is self-evident that the public interest requires that cases of murder be fully investigated and that the perpetrators be brought to justice, however long it takes, because the right to life is an important constitutional right, too. This is particularly so in the case of an apparent femicide, because

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such cases, involving violence against women, are disturbingly prevalent. Theinterests of society, of the victims of crime, and of the bereaved need to be accommodated. The decision of the Director of Public Prosecutions to proceed with the trial, even after a long delay, for which she bore the blame, was the correct one in the circumstances. She had to take the risk, in the public interest, that an action might lie against the government for damages caused by the unreasonable delay in the event of an acquittal.

There was also no trial-related prejudice to the respondent in this case. On the contrary, it is argued with some force that the delay worked to his advantage, since exhibits to be used against him went missing, and the key witness, testifying after more than twelve years, gave unreliable evidence. For these problems the State has only itself to blame, but the respondent's right to a fair trial was vindicated by his acquittal. This was not a case of mistakenidentity, where the wrong person was brought to trial. Violence against a woman had taken place, and the only issue was whether the blow was inflicted in self-defence, which possibility the State was unable to exclude.

On the other hand, the constitutional rights of an accused person who is yet to be tried must be fully respected. A long delay in his trial can only be countenanced for constitutionally acceptable reasons. Here the respondentendured pre-trial incarceration for over three years, and after that had to wait a further nine years before he was acquitted. The State was responsible for the delay and no acceptable explanation has been given for a substantial period of that delay which will have caused additional anxiety to the respondent over and above that which he would have suffered had he been tried expeditiously. After that long delay he was found not guilty and acquitted.

The appellant has also argued that the respondent failed to assert his own rights in time. He failed both after the withdrawal of the charge, and after its re-institution, to make any application either for the expedition of his trial or for a permanent stay of prosecution, though both remedies were potentially available to him, since the period covered over nine years. In my judgment no blame can be laid at his door for this, as the remedies are unusual, and he was poor,illiterate and unrepresented.

In all the circumstances, the scales tip decisively in favour of the respondent on this aspect. I therefore confirm the finding of Dingake J that the delay was unreasonable, and find that the respondent was deprived of his right to be tried within a reasonable time. The first ground of appeal must thus fail.

Since this is a case where an acquittal had already followed the unreasonabledelay, and no delictual remedy was available, it was also a proper case for the granting of constitutional redress. Further, the only practical redress in this case was in the form of compensation, so an award of constitutional damages was proper.

The quantum of damages

Turning to the question of quantum, Dingake J awarded damages of P100 000 in the exercise of his judicial discretion. In doing so, he rightly considered the analogy of delict in addressing damages for mental

anguish; that no common law remedy was available for the wrong the respondent had suffered, nor any other constitutional remedy than damages; and the conduct of the State. In addition, however, he relied on further factors which are open to criticism. He was guided

broadly
by the authority of Merson v Cartwright on quantum, and he found that it followed from the statement of agreed facts that (the respondent) suffered restriction on his liberty by pre-trial detention, general inconvenience from restriction of his liberty, inevitable anxiety, interference with his employment or ability to earn a living, and stigma exacerbated by not bringing him to trial within a reasonable time. He added that the respondent had a charge of murderhanging
over his head for 12 years, which is no small matter.

The appellant argues that the award was excessive, and that
in arriving at this the court below misconceived the facts and wrongly applied the law. In particular it is argued that it was wrong to take into account pre-trial detention, which was lawful, general inconvenience from loss of liberty, when he was free, and loss of employment opportunities, when he was working.

It
is trite that in an action for damages the plaintiff bears the onus of proving his damages. This onus appears not to have been considered by the Judge, who relied solely on the agreement of facts in assessing damages as well. The respondent led no evidence of his own feelings, his marital status, his background, his employment or lack thereof, or of the effect of the long delay on himself or his family, if he has one. It is not for the court to speculate on theseissues.
We have before us, as had Dingake J, the charge sheet, the record of the pre-committal proceedings from 1995 to 1996, the statement of agreed facts, and the judgment of Gaongalelwe J in the criminal trial. That is all.

As at the year 1995, the charge sheet, prepared by the
State, shows that the respondent was unemployed, and he is on record as telling the magistrate in 1996 that he could not then read or write. He was in custody until 1998. As tohis
educational progress, if any, since 1995, nothing is known, and as to how he fared in life between 1998 and the date of his acquittal in August 2007, the court is equally in the dark, as was Dingake J. His indictment, dated June 2004 shows him to have been 41 years of age at that date.

An attempt was made by both parties to improperly introduce
contestedfactual
matter through the back door. In the case of the appellant, this was in her grounds of appeal, where she stated that 'his employment opportunities were never adversely affected to the extent that he was actually working at all material times.' This statement must be discounted as there was no evidence as to whether he was or was not employed. In the case of the respondent, his counsel made a number of allegations of fact in his heads of argument whichwere completely unsupported by evidence. These included references to his age, which differed with what appeared in the indictment; that he suffered social stigma in his

village; that he was unable to work and provide for his family, which 'went through lean days'; and that 'by the time when the accused person was acquitted, he could not walk properly; he suffered from back-ache as a result of being incarcerated for quite a number of years in one place.' Ishall discount these statements as well, the latter of which is also untrue, since the agreed facts record that the respondent was freed in 1998 and remained at liberty until his acquittal in 2007. To the extent that Dingake J found that the long delay affected the respondent's employment status and opportunities in arriving at an appropriate award, he was in error. This did not follow from the agreed statement of facts at all.

Also to be placed in the balance is the conduct of the respondent, through his counsel, in making vastly exaggerated claims in his pleadings, some of which,

by the time the statement of agreed facts was generated, he was compelled toabandon.
In his particulars of claim he alleged that he was held in custody for twelve years. This was not true. His pre-trial period of imprisonment lasted from 1995 until 1998, a period of something over three years. He claimed P1 000 000 for 'loss of freedom of movement and liberty' arising from unlawful imprisonment for that period, but it was later conceded that his pre-trial incarceration was for a shorter period and was not unlawful. He alsoclaimed P500 000 for damage to his reputation, good name and standing in the community. No evidence was led as to his good name or standing. It is only in his replication that he first raised the issue of prejudice, agony, inconvenience and social stigma arising from having 'serious charges looming over (his) head' for a period of over 12 years. In that replication he persisted in the claim that he was imprisoned for over 12 years. This was an unsubstantiated claim based ona wrong premise. Since he was acting on legal advice I do not place too much emphasis on this conduct, but, that notwithstanding, his lawyer could only have been instructed by him on the length of his incarceration. The practice must again be deprecated of counsel raising the expectations of poor and ignorant clients by kite flying — that is, by claiming vastly inflated sums in damages, which have no prospect of realisation, in the hope of increasing the award. SeeMalope v Tshegofatso [2002] B.L.R. 266.

Undue weight was, in my view, placed upon the opinion expressed by Gaongalelwe J on the effects of unreasonable delay in bringing persons charged with a serious offence, in this case murder, to trial. His remarks were included in and made up quite a large part of the agreed 'statement of fact' on which thecase was argued. The only fact was that the judge made those remarks, as an expression of judicial sympathy for the respondent and of disapproval of the conduct of the State. They could not provide evidence of the actual distress suffered by the respondent. Only he could testify to that, and he failed to do so.

In some cases the courts have taken a strict approach to the failure of a complainant to lead evidence on distress caused by a denial of fundamentalrights.
In Carey v Piphus (supra) at p 1042, where students had been unconstitutionally suspended from school, the Supreme Court justices found at p 1042, where students had been unconstitutionally suspended from school, the Supreme Court justices found at pp 263--264 as follows:

'Finally, we see no particular difficulty in producing evidence that mentaland emotional distress actually was caused by the denial of procedural due process itself. Distress is a personal injury familiar to the law, customarily proved by showing the nature and circumstances of the wrong and its effect on the plaintiff. In sum, then, although mental and emotional distress caused by the denial of procedural due process itself, is compensable under s 1983, we hold that neither the likelihood of such injury nor the difficulty of provingit is so great as to justify awarding compensatory damages without proof that such injury actually was caused.'

The respondent argues that in this case the 'agony' caused by having a charge of murder looming over one's head for so long is self-evident, and certainly Gaongalelwe J agreed with that, as did Dingake J. In Makwekwe's case (supra at p 198 Corduff J found that 'It is no small matter for a man to live for years

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with a serious charge hanging over his head', and Gaongalelwe J remarked that the respondent must have suffered 'unbearable prejudice . . . due to anxiety over a period of 12 years'. There can be no doubt that in every case it will be stressful to face a charge of murder, where the ultimate penalty may be imposed. The degree to which that affects the individual will depend on his character and antecedents. A hardened criminal, for example, may feel little stress, whilea sensitive first offender would be seriously affected emotionally. With no evidence from the respondent or his family as to the distress he suffered or as to the effect of the charge on him, it cannot be held that he suffered any more distress than the general distress experienced by ordinary person of similar status and circumstances to his when faced with such a charge. And for the purposes of this case, he can only be compensated for any additional or prolonged anxietyhe suffered during the four extra years during which he was unlawfully denied his right to be tried within a reasonable time, not for the whole 12 years, as incorrectly found by Dingake J. He cannot be compensated for the anxiety usually felt by an accused person who is tried within a reasonable time, even on a charge of murder. That said the denial of his fundamental rights for an unnecessary four years does represent a serious assault on his dignity.

It also does not follow that the respondent suffered 'exacerbated' social stigma due to the delay, although it may be accepted that he suffered some social stigma, and that this probably endured for a longer overall period than would otherwise have been the case, before he was acquitted; and he did not, contrary to what the judge found, suffer any additional restrictions on his liberty duringthis four year period, because he was free of restrictions and able to conduct his life in any manner he chose. But he was fully aware, because it had been so stated in court in his presence at the time of the withdrawal of the charge, that his trial was still to come, when the key witness, whose whereabouts were well known, was old enough to testify. For the additional anxiety which he endured on that account he is entitled to compensation.

He
is also entitled to an enhanced award because of the presence of an aggravating feature, though not one of the type alluded to in Ramanoop's case (supra). That feature is the gross insensitivity shown by the Director of Public Prosecutions in allowing him, through negligence or otherwise, to remain in this state of anxiety for an extra four years after the State witness was already old enough to testify. The measure of enhancement will be modest because this casedid
not involve, as in Merson v Cartwright and Ramanoop (supra), outrageous physical assault or treatment of the respondent, nor did it involve behaviour deliberately contemptuous of the Constitution. In making this finding, I in no way impugn, as has been said, the decision of the DPP to finally continue with the prosecution. I take into account, however, that the insensitivity shown by the State continued to the end, as at no time throughout the case was any concern orregret
whatever expressed for the plight of the respondent.

I am also aware of the remarks of Maya JA in Zanner v DPP, Johannesburg 2006 (2) SACR 45 (SCA), where a charge of murder was withdrawn, only to be re-instituted 10 years later, when the plaintiff committed another offence. There, in an application for a permanent stay of prosecution, at p 52C, para [16] the judge found that:

'After the charge was withdrawn against him in January 1994 nothing

happened in connection with the case until April 2004. Issues of restrictedfreedom, stress, anxiety, or social ostracism do not therefore arise. The focus is solely on whether he has suffered significant trial related prejudice.'

The present case is different. Here the respondent was made aware from the outset that his case was still pending. There was no question of trial related prejudice, as he was acquitted.

Weighing up the factors both for and against the award of more substantialconstitutional
damages, I am satisfied that the award of P100 000 made by Dingake J was, in all the circumstances, an extravagant one, based in part on wrong premises, which cannot be justified. In making it he relied too heavily on what transpired in Merson v Cartwright (supra), which related to completely different factual circumstances, and which arose in a different jurisdiction, withdifferent
socio-economic conditions and a different currency; and he relied upon the whole 12 year period of delay, rather than the four year period for which damages were payable. In my judgment a moderate but meaningful award, in line with country norms and the facts of the case, is one of P20 000, which I would substitute. The appeal must therefore succeed to that extent.

As to the question of costs, a proper approach in cases of this nature, whereimportant
constitutional issues have been raised, and particularly so in the case of a poor litigant, has been laid down in the Constitutional Court of South Africa

in the case of Bothma v Els (supra) at pp 658-659. There the court held that, as is well known, the general principle is that in litigation between private parties costs will ordinarily follow the result. In exceptional cases, no order for costs may be made on the grounds that the pursuit of public interest litigation could beunduly
chilled by an adverse costs order. It went on to hold that in constitutional litigation between the State and private parties, that consideration is normally decisive. The general rule in such cases is that successful private parties should receive their costs, while unsuccessful private parties should not be ordered to pay the costs of the State. I endorse those sentiments as being appropriate too in Botswana. The rule applies in this case because it is the first of its kind. Thatwill
not necessarily be so in future actions for constitutional damages.

In result I make the following order:

(1) The
appeal succeeds to the extent that the award of P100 000 in damages is set aside, and for it is substituted an award of P20 000.

(2) There
is no order as to the costs of this appeal.

Ramodibedi, Foxcroft, Howie and Lord Abernethy JJA
concurred.

Appeal
succeeds in part;
quantum of damages varied.