REPORTABLE

Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

In the matter between:

Case No. A238/09

CHRISTOPHER CLAASSEN Appellant

and

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT First Respondent
RENE GERBER Second Respondent

JUDGMENT DELIVERED ON 8th DECEMBER 2009

BINNS-WARD J:

[1] The result of this case illustrates the role of legal policy in the determination of wrongfulness in delictual claims made in terms of the Aquilian action.

[2] The matter before us is an appeal against the judgment of the civil court magistrate at Oudtshoorn dismissing an action instituted by the appellant, as plaintiff, against the Minister of Justice and Constitutional Development, as first defendant, and the criminal court magistrate before whom the appellant had been brought on a warrant of arrest issued as a consequence of his failure to appear at a remand hearing. The civil magistrate was cited as second defendant in the action.

[3] The appellant claimed damages arising out of what he alleged had been his unlawful detention as a consequence of the order made by the second defendant. The action, which was framed in delict, was brought under the Lex Aquilia. It was not framed as a claim for unlawful imprisonment or deprivation of liberty under the *actio injuriarum*.

[4] The fundamental allegation in the appellant's particulars of claim was that the magistrate had, in breach of his duty in law towards the appellant, intentionally and maliciously, alternatively negligently, failed to carry out his functions with the necessary professional skill, care and application. The claim therefore falls to be distinguished from those delictual claims arising from harm

directly caused by the defendant to the claimant's person or property and in which the defendant's conduct is regarded as *prima facie* wrongful.

[5] The action was brought against the magistrate in his personal capacity, and against the Minister on the basis of the latter's alleged vicarious liability for the wrongdoings of the magistrate. In the latter regard, the appellant cited the Minister in the particulars of claim as being the person 'under whose control, supervision and guidelines all magistrates function'[1].

[6] The court *a quo* found that the criminal court magistrate had not been joined in the action as a consequence of the failure by the appellant to serve the summons on him. Although the appellant initially intended to appeal against this finding, the point was abandoned in the heads of argument filed by the appellant's attorney, advisedly so in my view.

[7] The factual background to the claim was as follows: The appellant had been on remand on his own recognisances pending his trial, together with a number of co-accused, on charges of theft

[1] My translation of the allegation: 'onder wie se beheer, toesig en riglyne alle Landroste funksioneer'.

and malicious injury to property. Having been initially brought before the court in custody, he had thereafter been remanded out of custody on warning. In this regard he had been warned at a remand hearing held on 25 April 2005 to be present in court again on 5 May 2005 (see s 72(1) of the Criminal Procedure Act 51 of 1977). The reason for his non-appearance was that he had encountered unforeseen difficulties with the transport he had arranged to bring him from Cape Town to Oudtshoorn on the appointed date. He had attended at a police station in Cape Town to explain his problem and had made an affidavit there recording the relevant facts. It was his intention to produce this affidavit in support of his explanation for his non-appearance when he next came before the criminal court magistrate.

[8] On his return to Oudtshoorn a few days later the appellant did not initiate an appearance before the magistrate, as he might have been advised to do. He instead thought it in order to await the next scheduled remand hearing in the matter, the date of which he had ascertained from one of his co-accused. As a result of the execution of the warrant for his arrest issued in his absence on

5 May 2005, the appellant was brought before the magistrate on what is colloquially referred to as ‘a warrant appearance’.

[9] At the warrant appearance, the criminal court magistrate did not enquire into the appellant’s reason for not appearing in court on 5 May 2005. The magistrate instead summarily remanded the appellant in custody until the next date to which the appellant’s co-accused in the pending criminal trial had been warned or remanded to appear. The magistrate did advise the appellant of his rights to obtain legal representation and to apply for bail, but he gave the appellant no opportunity to hand in the affidavit of explanation that the appellant had specially deposed to a few days earlier in Cape Town. According to the appellant’s evidence he had been brusquely ordered by the magistrate to stand down when he had tried to present the affidavit.

[10] The Criminal Procedure Act contains provisions dealing pertinently with what may happen if an accused person who is on remand on warning fails to appear. Section 72(2)(a) of the Act provides:

> ‘An accused who is released under subsection (1) (a) and who fails to appear or, as the case may be, to remain in attendance at the proceedings in accordance with a

> warning under that paragraph, or who fails to comply with a condition imposed under subsection (1) (a), shall be guilty of an offence and liable to the punishment prescribed under subsection (4).'

Section 72(4) provides insofar as currently relevant:

> 'The court may, if satisfied that an accused referred to in subsection (2) (a) ….. was duly warned in terms of paragraph (a) ….. and that such accused …. has failed to comply with such warning or to comply with a condition imposed, issue a warrant for his arrest, and may, when he is brought before the court, in a summary manner enquire into his failure and, unless such accused or such person satisfies the court that his failure was not due to fault on his part, sentence him to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.'[2]

[11] The provisions of s 72(4) (and also s 170(2)) of the Criminal Procedure Act provide for a form of summary trial for a statutory offence akin to the common law crime of contempt of court. A decision to incarcerate an accused person after an enquiry in terms of s 72(4) amounts to a decision to punish the non-appearer by way of a sentence of imprisonment. If, in addition, it is thought that a person who is on remand out of custody on warning should be imprisoned pending trial, the procedures provided for in s 68 (which pertain to cancellation of bail) must be followed *mutatis mutandis*. See s 72A of the Criminal Procedure Act.

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[2] In *S v Singo* 2002 (2) SACR 160; 2002 (4) SA 858 (CC), the Constitutional Court ordered that s 72(4) should be read as if the words 'there is a reasonable possibility that' were inserted between the word 'that' and the words 'his failure' in the second last line of the subsection as set out above.)

[12] The importance of punctilious compliance with the procedural requirements bearing on any sanctioned deprivation of liberty cannot be over-emphasised. In *S v Coetzee* 1997 (3) SA 527; 1997 (4) BCLR 437; 1997 (1) SACR 379 (CC) at para. [159], O'Regan J identified two relevant aspects of freedom: 'the first is concerned particularly with the reasons for which the state may deprive someone of freedom[3]; and the second is concerned with the manner whereby a person is deprived of freedom[4] [the procedural component]. . . . [O]ur Constitution recognises that both aspects are important in a democracy: the state may not deprive its citizens of liberty for reasons that are not acceptable, nor, when it deprives its citizens of freedom for acceptable reasons, may it do so in a manner which is procedurally unfair.'[5]

[13] As mentioned, in the current case the criminal court magistrate did not hold an enquiry in terms of s 72(4), nor did he cancel the appellant's release on warning in the manner provided

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[3] An aspect described by Langa CJ in *Zealand v Minister for Justice and Constitutional Development and Another* 2008 (6) BCLR 601; 2008 (2) SACR 1; 2008 (4) SA 458 (CC), at para [33] as 'the substantive component'.

[4] Langa CJ labelled this 'the procedural component': *Zealand*, supra, at para. [33].

[5] Subsequently quoted with approval in *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para [18] and in *Zealand* supra, at para. [33]. In *Zealand*, at para [43], Langa CJ stated 'the right not to be deprived of freedom arbitrarily or without just cause contained in section 12(1)(a) of the Constitution… requires not only that every encroachment on physical freedom be carried out in a procedurally fair manner, but also that it be substantively justified by acceptable reasons'.

for in terms of **s** 72A read with s 68(1) and (2) of the Criminal Procedure Act. It is clear therefore that the magistrate acted contrary to the relevant provisions of the Act in ordering the appellant to be held in detention in the manner in which he did. In doing so he acted in disregard of both the substantive and the procedural requirements for the exercise of any power he might have had to curtail the appellant's right to personal freedom.[6] The disregard for the substantive requirement manifested in the committal having been directed without reference to any evidence which might have afforded good reason in law to cancel the appellant's release on warning, or to imprison him in terms of s 72(4) of the Criminal Procedure Act. The disregard for the procedural requirement was demonstrated by the magistrate's omission to comply with any of the procedures in terms of s 72 or s 72A, which he was bound by the Act to follow if the appellant was to be lawfully committed to prison. The magistrate thereby breached the constitutional principle of legality in at least two respects; by failing to comply with the relevant provisions of the Criminal Procedure Act and - in breach of the obligation imposed on the judiciary in terms of s 8(1) of the Constitution - by infringing

[6] See footnotes 3 and 4, above.

the appellant's right in terms of s 12(1)(a) of the Bill of Rights not to be deprived of his freedom arbitrarily or without just cause.

[14] The evidence of the second defendant in the court *a quo* suggests that he was aware of the relevant provisions of the Criminal Procedure Act, as one would indeed have expected in the case of a magistrate with as many years' experience in the position. The magistrate testified that he understood that he was vested with a discretion whether or not to hold an enquiry as contemplated by the relevant provision. The basis for that understanding of the provision was the use in the sub-section of the word 'may', rather than 'must', which made the magistrate believe that the provision was permissive, not peremptory.

[15] That explanation is inherently implausible in the context of the magistrate's conduct. If one interprets the provision as the magistrate would have it,[7] one has then to ask oneself on what basis did the magistrate then derive the power to put an accused who had been released on warning into custody. Having regard to

[7] In *S v Singo* supra, at para. [9], the Constitutional Court indeed held that the effect of the word 'may' was that the court may, but need not, undertake [the] enquiry'. It is clear however, that if the court does not undertake the enquiry, the basis for committing an accused or a witness in default of appearance to prison in terms of s 72(4) cannot arise. The cancelation of an accused's release on warning can competently occur only if the requirements of s 72A are satisfied.

the fundamental primacy of the right of personal liberty – a right now formally entrenched in terms of s 12 of the Constitution, but which had already for centuries before the advent of the constitutional era been one of the salient hallmarks of mainstream systems of law, including our own common law - it is of great concern that an experienced judicial officer would not have asked himself this question.[8] The magistrate nevertheless appears not to have asked himself the obvious question. If he had, he would not have found an answer that could justify his action.

[16] This aspect of the case, particularly in the context of the appellant's description of the magistrate's demeanour at the warrant of arrest hearing on 11 May 2005, could arguably have justified an inference that the magistrate had acted *mala fide* or maliciously, as indeed was contended before us by the appellant's attorney. Another aspect of the magistrate's evidence has, however, persuaded me that that was probably not the case. It seems that the magistrate was concerned that the administration

[8] In *Zealand*, supra, at para. [25], Langa CJ, speaking about the fundamental nature in law of the right to personal liberty, said '*This is not something new in our law. It has long been firmly established in our common law that every interference with physical liberty is prima facie unlawful.*' In the current case, of course, the second defendant in the court *a quo* was not directly involved in the interference with the appellant's physical liberty, as would be the arresting police officer or the officers of the Correctional Services department; his involvement was indirect in that the arrest and detention concerned were the consequences of his (at least ostensibly) judicial acts.

of justice was being frustrated by the fact that in a multi-accused matter hardly a remand appearance had gone by without one or other of the accused failing to attend court. With the interests of justice in mind the magistrate appears to have determined in his own mind at some or other stage that any accused who thereafter failed to appear should be remanded in custody unless that accused applied for and was granted bail. For the reasons that are apparent from the outline of the applicable provisions of the Criminal Procedure Act set out earlier the magistrate was badly misdirected, but I accept that he was not *mala fide*. The considerations that apparently motivated the magistrate were not in themselves *ex hypothesi* unreasonable; ironically they were of the very sort of considerations that persuaded the Constitutional Court, in *Singo*, not to strike down s 72(4) as being inconsistent with s 35 of the Constitution.[9]

[17] There is no doubt that the criminal court magistrate acted negligently. His conduct fell short of that expected from the reasonable person in his position; he should have been aware that

[9] See *S v Singo* supra, at para.s [33] and [41].

it might cause the plaintiff damage and he failed to act reasonably in failing to avoid such harm occurring.

[18] The question which falls to be considered is whether a remedy in damages should be extended in a case in which a person is detained unlawfully as a consequence of the negligently made order by a magistrate acting outside the authority of the law. Damages under the Aquilian action follow only if the harm suffered was the consequence of the negligent and wrongful act or omission of the defendant. Negligence is a separate element from wrongfulness. Whether or not an act or omission in negligent breach of a statutory duty or procedure should be characterised as wrongful (or 'actionable'[10]) for delictual purposes is question of legal policy. Cf. e.g. *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) at para.s [10]-[12]; *Minister of Safety & Security v Van Duivenboden* 2002 (6) SA 431 (SCA) ([2002] 3 All SA 741) at para.s [12]-[16]; *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA) (2001 (8)

[10] See Andrew Paizes '*Making Sense of Wrongfulness*' 2008 SALJ 371 at 381, where the learned author suggests that wrongfulness for delictual purposes might be better understood if a distinction were to be borne in mind between wrongfulness 'in its purer sense' and 'legal actionability, which concerns the distinct question of whether it is appropriate to impose liability in respect of conduct that was wrongful (assuming, always, that fault has also been established)'.

BCLR 779) at para. [12]; and *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597A – B.

[19] The issue of wrongfulness in the context of an Aquilian action was the central question in analogous circumstances in *Zealand v Minister for Justice and Constitutional Development and Another* 2008 (6) BCLR 601; 2008 (2) SACR 1; 2008 (4) SA 458 (CC).[11] In that matter the applicant had sued under the Aquilian action for damages arising out of his continued detention as a sentenced prisoner for some years because of the negligent failure by the registrar of a High Court to issue a release warrant after the High Court had given a judgment on appeal setting aside the applicant's conviction and sentence. The only question which the Constitutional Court had to decide in *Zealand* was whether the breach of the plaintiff's rights under s 12(1)(a) of the Bill of Rights was sufficient, in the circumstances of the case, to render the applicant's detention unlawful for the purposes of a delictual claim for damages against the Minister in the latter's capacity as the registrar's employer.

[11] I consider the circumstances to be analogous because both cases arose out of the unlawful detention of a person as a consequence of the negligent discharge of their respective functions by functionaries at court level within the criminal justice system.

[20] In considering the question the Constitutional Court was astute to the principles that have led the courts in several matters to recognise that private law damages are not always the most appropriate method to enforce constitutional rights[12] and that a public law obligation does not automatically give rise to a legal duty for the purposes of the law of delict.[13] The legally most appropriate remedy for a breach of public law rights is often to be found in public law, rather than private law.[14]

[21] The Court held, however, that there was 'no reason why an unjustifiable breach of s 12(1)(a) of the Constitution should not be sufficient to establish unlawfulness for the purposes of the applicant's delictual action of unlawful or wrongful detention'. In arriving at the conclusion that a private law remedy in damages should be available for an infringement of a citizen's right, in terms of s 12(1) of the Constitution, not to be detained arbitrarily and without just cause, the Court also had regard to the fact that South

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[12] See *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) (2005 (4) BCLR 301) at para. [80].

[13] Ibid at para. [81].

[14] Some of the more important recent authorities which illustrate this are conveniently collected by reference in *City of Cape Town, v Helderberg Park Development (Pty) Ltd* 2008 (6) SA 12 (SCA) at para. [8].

Africa bears an international obligation in this regard in terms of article 9(5) of the ICCPR[15]…'.[16]

[22] However, the registrar was not a judicial officer. Historically, judges (and others exercising adjudicative functions) have been held immune against actions for damages arising out of the discharge of their judicial functions. The reason for judicial immunity is founded in legal policy. See *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) ([2006] 1 All SA 6) at para.s [17] - [19]. An exception from this immunity has been granted only when the judge's conduct was malicious or in bad faith.

[23] The relevant principles are discussed in some detail in *Telematrix*, supra; and also in *May v Udwin* 1981 (1) SA 1 (A), especially at pp.14- 19; and *Moeketsi v Minister van Justisie en 'n Ander* 1988 (4) SA 707 (T). (The same or very similar public policy considerations inform the existence of - in certain respects even wider - judicial immunity against civil and criminal liability for

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[15] The International Covenant on Civil and Political Rights, which South Africa ratified on 10 March 1999 - see *Zealand*, supra, at para. [30], footnote 19

[16] *Zealand*, supra, at para.s [52] and [53].

judicial acts in, for example, England,[17] Australia[18] and in the United States of America.[19]) In *Moeketsi* it was held that a regional magistrate who had unreasonably and perversely committed a policeman to be detained in the cells pending the rising of the court was immune from liability in a damages claim instituted subsequently by policeman. This was because it had not been proven that the magistrate had acted maliciously. In that case, however, the court did find that the magistrate had acted within his powers under s 178 of the Criminal Procedure Act.

[24] In the face of the finding already made that the magistrate in the current act did not act maliciously, three questions remain for consideration. The first is whether judicial immunity applies in a situation in which the magistrate exercised powers that he did not have, that to say in a sense outside his jurisdiction. The second and third questions are to some extent bound up with each other; they raise the issues whether the fact that the unlawful committal

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[17] See e.g *Re McC (A Minor)* [1985] AC 528 (HL), also reported as *McC v Mullan and Others* [1984] 3 All ER 908 (HL). As apparent from the judgment, judicial officers in the lower courts in England did not enjoy the immunity afforded by the common law to judges of the superior courts. This differentiation was abolished only comparatively recently upon the enactment of the Courts and Legal Services Act, 1990 (1990 c. 41) (see s 108 thereof, which substituted ss 44 and 45 of The Justices of the Peace Act, 1979).

[18] See *Fingleton v R* [2005] HCA 34; (2005) 216 ALR 474.

[19] See *Mireles v. Waco*, 502 US 9 (1991). In the United States judicial immunity is subject to a 'two prong' test: the court must have had 'subject matter jurisdiction' and the act must have been a 'judicial act'.

of the appellant to prison in breach of his fundamental rights in terms of s 12 of the Bill of Rights, or the fact that South Africa has adopted the International Covenant on Civil and Political Rights which provides, in article 9(5), that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation should affect the judicial immunity that would otherwise have protected the magistrate from delictual liability.

[25] Unfortunately, these questions were only hinted at, rather than pertinently argued by the parties' legal representatives at the hearing of the appeal.

[26] It was unnecessary in its consideration of judicial immunity in the context of a damages claim founded in the extended Aquilian action for pure economic loss against an adjudicative authority for the court to consider any of these issues in the most recent review of judicial immunity undertaken in the *Telematrix* case, supra, to which Mr *Dlwati*, who appeared for the Minister, did refer us.

[27] Harms JA (as he then was) did, however, remark in passing at para. [18] of *Telematrix*, with reference to certain dicta in the judgments given in *R v Kumalo and Others* 1952 (1) SA 381 (A),

that 'a wrong assumption of jurisdiction does not differ in kind from any other wrong [judicial] decision'.[20] I am inclined, with respect, to agree with this statement as a general proposition. In the context of the facts of the current case it seems to me that to take the approach that in dealing with a matter that was properly before him as a consequence of the execution of the lawfully issued warrant for the arrest of the appellant the magistrate should forfeit judicial immunity simply because he dealt with the case ineptly, without proper regard to the constraints on his powers in terms of the applicable statute, and thereby exceeded his jurisdiction, would be to materially undermine the very basis for relative judicial immunity against delictual liability as established in our legal system. Applying the parlance of United States jurisprudence in like situations, the magistrate had 'subject matter jurisdiction'[21] and

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[20] In *Madonsela v Minister of Justice* 2009 JDR 0897 (GNP) (a judgment dated 28 August 2009) Makgoka AJ raised 'exceeding of a discretionary power' as possibly constituting grounds, along with bad faith or 'improper motive', for allowing damages against a magistrate for the negligent performance of a judicial function. In doing so, the learned acting judge did not, however, say anything in motivation of his mooted expansion of the traditional basis for allowing an exception to judicial immunity against delictual claims. Implementing Makgoka AJ's suggestion would be to go against modern trends in other jurisdictions. In *Re McC*, supra, it was held that the magistrates, who had subject matter jurisdiction, had nevertheless acted outside their jurisdiction in committing a minor to prison without complying with a statutory condition precedent, namely advising the minor of his right to apply for legal aid. The magistrates were accordingly found liable in damages because they did not enjoy common law judicial immunity. (Cf. also *R v Manchester City Magistrates' Court ex parte Davies* [1989] QB 631) A High Court judge would not have been liable in equivalent circumstances. As mentioned in footnote 17, full judicial immunity was subsequently extended to magistrates in England by legislation introduced in 1990.

[21] The English generally refer to the concept as 'jurisdiction of the cause' (arising from Coke CJ's use of the expression in the *Marshalsea Case* (1612) 10 Co Rep 68b at 76a; 77ER

his acts in connection therewith, fundamentally misdirected though they might have been, were nevertheless 'judicial acts'.[22] [23] I would therefore answer the first question identified in paragraph [24], above, affirmatively.

[28] Turning to the second and third questions identified in paragraph [24], the only difference between the registrar's exposure to delictual liability in *Zealand* and that of the criminal court magistrate in the current matter is the doctrine of judicial immunity. Do the aforementioned considerations to which the Constitutional Court had regard in *Zealand* in holding that the registrar's negligent omission to issue a release warrant was wrongful for the purpose of the claimant's Aquilian action against the registrar's employer[24] demonstrate that the common law doctrine of judicial immunity to some extent deviates from the spirit, purport and objects of the Bill of Rights; more particularly by

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1027 at 1038 – See *Re McC (A Minor)* supra (fn. 17), at 912h – 913b of the All England report).

[22] See the reference to *Mireles v. Waco*, 502 US 9 (1991) in footnote 19, above.

[23] This analysis is to some extent supported by the judgments of van den Heever JA and Schreiner JA in *R v Kumalo and Others*, supra. Van den Heever JA's approach in favour of extending immunity to the chief who imposed corporal punishment on the complainant for contempt of the chief's judicial civil jurisdiction appears to have been informed by the fact that the chief had what the learned judge of appeal regarded as 'subject matter jurisdiction' and Schreiner JA considered that immunity should not be extended because the chief's participation in the physical administration of the punishment took the unlawful action outside the ambit of a judicial act.

[24] See paragraph [21], above.

exempting the judicial officer from liability in delictual damages for infringement of the appellant's basic right of human liberty? If the answer is yes, the Constitutional Court has held that it is implicit in s 39(2), read with s 173, of the Constitution that the courts are under a general obligation to develop the common law so as to remove the deviation. See *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) (2002 (1) SACR 79; 2001 (10) BCLR 995) at para. [39].

[29] The *Zealand* matter did not entail any question related to judicial immunity, but the Court's conclusion that the registrar's negligent omission was unlawful, in the sense of being an actionable wrong in delict, did illustrate the importance of giving appropriate weight both to the founding value of accountability, as well as the principle that the law should lend effectiveness to everyone's fundamental rights under the Constitution, when determining legal policy about delictual liability for public law violations of constitutional rights. The pertinent considerations to be weighed in the exercise were seminally described in general terms in *van Duivenboden*, supra, at para.s [21]-[22]; subsequently

approved by the Constitutional Court in *Rail Commuters Action Group*, supra, at para.s [73]-[81]. An important criterion in the relevant determination is the availability of other modes of complying with the concept of accountability and other means of achieving the effective fulfilment of the affected fundamental rights, all judged against broader societal requirements, for example the limits on the ability of the *fiscus* to sustain a liability in delictual damages '[i]n a country where there is a great demand generally on scarce resources, where the government has various constitutionally prescribed commitments which have substantial economic implications and where there are "multifarious demands on the public purse and the machinery of government that flow from the urgent need for economic and social reform"'[25]

[30] The constitutional value of accountability can be satisfied in the circumstances of cases like the current without any need to further qualify the ambit of common law judicial immunity. The Chief Justice of Australia (Gleeson CJ) recently elucidated the proposition in *Fingleton v R* [2005] HCA 34; (2005) 216 ALR 474 at para.s 38 -39 (footnotes omitted):

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[25] *Fose v Minister of Justice* 1997 (3) SA 786 (CC); (1997 (7) BCLR 851) at para. [72].

> ’38. This immunity from civil liability is conferred by the common law, not as a perquisite of judicial office for the private advantage of judges, but for the protection of judicial independence in the public interest. It is the right of citizens that there be available for the resolution of civil disputes between citizen and citizen, or between citizen and government, and for the administration of criminal justice, an independent judiciary whose members can be assumed with confidence to exercise authority without fear or favour. As O'Connor J, speaking for the Supreme Court of the United States, said in *Forrester v White*, that Court on a number of occasions has "emphasized that the nature of the adjudicative function requires a judge frequently to disappoint some of the most intense and ungovernable desires that people can have." She said that "[i]f judges were personally liable for erroneous decisions, the resulting avalanche of suits ... would provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits."
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> 39. This does not mean that judges are unaccountable. Judges are required, subject to closely confined exceptions, to work in public, and to give reasons for their decisions. Their decisions routinely are subject to appellate review, which also is conducted openly. The ultimate sanction for judicial misconduct is removal from office upon an address of Parliament. However, the public interest in maintaining the independence of the judiciary requires security, not only against the possibility of interference and influence by governments, but also against retaliation by persons or interests disappointed or displeased by judicial decisions.’

[31] The aspects of judicial accountability identified by the Australian chief justice in *Fingleton* are all present in similar form in the South African context. The availability of a sanction for judicial misconduct in the current matter is afforded in terms of the relevant provisions of the Magistrates Act 90 of 1993 (as amended). The public interest in the maintenance of the independence of the judiciary is as much apparent in the South African constitutional

context as it is in other jurisdictions where the doctrine of judicial immunity applies. Most importantly, the doctrine of judicial immunity is consonant with the provisions of the Constitution, most notably s 165, which entrench the principle of judicial independence with the attendant promotion of the ability of the judiciary to administer the law without fear, favour or prejudice.[26]

[32] Section 12 of the Constitution entrenches the right of personal liberty. It does not, by itself, afford a right of compensation to a person whose right of personal liberty has been infringed. As our law currently stands, compensation for an infringement of that right can be obtained only by way of one of the delictual actions. Accordingly denying the appellant a claim for damages against the criminal court magistrate does not entail a limitation of his fundamental right to liberty; nor does such denial

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[26] In *Fingleton*, supra, at para. 190, Gummow and Heydon JJ gave the following apposite description of the legal policy consideration centrally in issue in a case like this: '*From the early days of our legal system, it has been recognised that such an immunity will sometimes expel other legal values that are also precious. Yet so important is judicial independence, that the immunity necessary for it to survive is afforded by statute and the common law and possibly, in Australia, as an implication in the Constitution itself. It is afforded notwithstanding that it will occasionally derogate, within its defined applications, from the criminal and civil responsibility of all persons equally before the law.*' and (at para. 188) '*Judicial independence from external pressure from litigants and others is one of the legal immunities that can be fully justified. It is supported by reference not only to legal authority but also to legal principle and policy, including considerations of the protection of human rights and fundamental freedoms and the functions of the judiciary in securing those ends. Such immunity is an essential precondition to the rule of law. The independence of judicial officers comes at a price. It is a price that our society has long been prepared to pay. That price is the immunity provided by law.*'

denote that the extent of judicial immunity that exists under the common law offends against the spirit, purport and objects of the Bill of Rights. Even if one were to test the matter by notionally thinking away the absolute quality of judicial immunity the fact that the magistrate's negligent act or omission resulted in an infringement of the appellant's constitutional right would be only a factor (albeit an important one) to be weighed in the balance in determining whether the magistrate's conduct was wrongful in the delictual sense. However, the considerations mentioned earlier, which have led the courts here and elsewhere - and in some cases certain legislatures[27] - to affirm that the doctrine of judicial immunity has an important legal role in the public interest would, when weighed in the balance, compel the conclusion that it would be inappropriate as a matter of legal policy to characterise the magistrate's conduct as wrongful in the sense required for the appellant's claim to have succeeded (i.e. as 'actionable').

[33] The provisions of article 9 of the International Covenant on Civil and Political Rights ('the ICCPR'), to which regard was had by the Constitutional Court in *Zealand*, are equivalent in all respects

[27] See footnote 17, above, and para. [33], below.

currently relevant to those of article 5 of the European Convention on Human Rights. In addition to the provision in both documents of a right to compensation, both prescribe that a deprivation of personal liberty shall be lawful only in limited circumstances and always subject to the deprivation occurring 'only in accordance with a procedure prescribed by law'.[28]

[34] The English Human Rights Act 1998 ('the HRA'), which was enacted to give effectiveness to the obligations undertaken by the United Kingdom as a result of that country having become a party to the ECHR, acknowledges the necessity to address the incompatibility of the doctrine of judicial immunity under the common law with the right to compensation afforded under the Treaty to a person who has been detained, even by judicial order, other than 'in accordance with a procedure prescribed by law'.

[35] Section 9(3) of the HRA excludes liability in damages 'in respect of a judicial act done in good faith …otherwise than to compensate a person to the extent required by article 5(5) of the Convention'. In terms of s 9(4) of the HRA any damages claimed in terms of article 5(5) of the ECHR fall to be paid by the Crown

[28] See article 5(1) of the ECHR and article 9(1) of the ICCPR.

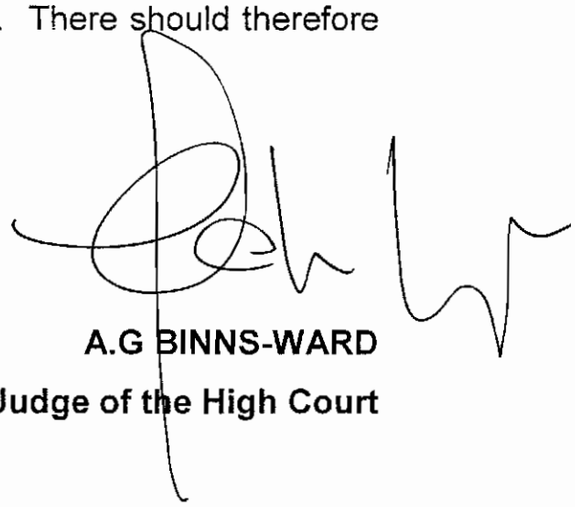
and fall to be awarded in proceedings in which the Minister of State responsible for the court concerned or a person or government department nominated by the latter is joined as a party.

[36] The ICCPR is not a self-executing legal instrument in the sense that this country's formal adoption of its provisions did not, without more, amend our established domestic law. It seems to me that the current case illustrates the need, if unqualified effect is to be given to article 9(5) of the ICCPR, for South Africa to enact legislation of broadly similar effect to that contained in s 9 of the HRA. (This approach is consistent with the observation in *Carmichele* supra, at para. [36] that the legislature, not the judiciary, should be the major engine for law reform, most particularly, in my view, when additional charges on the exchequer are entailed.)

[37] In the light of the conclusion reached on the magistrate's immunity from liability, the issue of the alleged vicarious liability of the Minister for the acts of the criminal court magistrate therefore does not arise for determination.

[38] It remains only to record that both parties required condonation. The appellant needed condonation because the appeal was not prosecuted timeously in accordance with the rules. In particular, the record was filed out of time. The Minister needed condonation because his counsel[29] failed to deliver his heads of argument timeously. In certain respects the explanations given for the defaults were unsatisfactory in both applications for condonation. We however acceded to hear and determine the appeal because of the importance of the issue involved.

[39] In my view the appeal must be dismissed. In view of the peculiar circumstances of the case it would be inappropriate to make a costs order against the appellant. There should therefore be no order as to costs.



A.G BINNS-WARD
Judge of the High Court

[29] Different counsel from the person who drew the heads of argument appeared for the Minister at the hearing of the appeal.

I agree. The appeal is dismissed, with no order as to costs.

E. MOOSA

Judge of the High Court