

THE REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
[SITTING AS THE 'EQUALITY' COURT]
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: EC 04 / 2021

In the matter between:

XIONG CHANGSEN

Applicant

and

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES

First Respondent

MINISTER OF POLICE

Second Respondent

Coram: Wille, J

Heard: 18 June 2024

Delivered: 10 July 2024

JUDGMENT

WILLE, J:

INTRODUCTION

[1] This opposed application concerned only the limited issue of the jurisdiction of this court in determining the applicant's complaints. In essence, the applicant contends for unfair discrimination in that he was unfairly discriminated against by the criminal justice system on two grounds, namely: (a) that he was discriminated against because he was unable to properly communicate in his language from the time of his arrests until the criminal convictions were returned against him and, (b) that this discrimination also manifested based on his nationality.¹

[2] Firstly, the applicant seeks specific relief that this matter be heard in the "Pretoria High Court" because of the proximity to the headquarters of the relevant respondents cited in his application. Also, he seeks 30 million American dollars in compensation for injury to dignity, lost income and unlawful incarceration. Most importantly, he seeks a judicial review of the two criminal trials concluded against him and the *setting aside* of the two convictions returned against him. Finally, he wants an apology from the respective respondents.²

[3] Upon a reading of the papers, the applicant seems to be contending for a judicial review of his criminal convictions and the sentences imposed upon him. The relief contended for is difficult to understand as the applicant tendered a plea of guilty to the offences upon which he now stands convicted. This occurred in the lower courts, and he was legally represented during these proceedings. During the hearing of this limited issue on the jurisdiction of this court, the applicant's legal representative informed the court that the applicant was, in any event, now pursuing a condonation application and an appeal against his convictions and sentences.³

[4] The applicant's case involves alleged unfair discrimination. The issue is thus whether the protection under this targeted legislation is triggered in cases where the complaints are, in essence, about the alleged violations of his rights to a fair trial in the context of a criminal trial where the applicant enjoyed legal representation.⁴

CONTEXT

[5] The complaints stem from his interactions with the police. The applicant's complaints have their genesis in the allegations that he was arrested twice in 2008

¹ The applicant's first language is Chinese, and he is a Chinese national.

² He seems to have adopted a shotgun approach and filed complaints against a number of regulatory bodies.

³ The applicant contends for procedural irregularities in connection with his convictions.

⁴ The Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000.

and once in 2011. Warning statements were taken from him, and no interpreter was present to advise him of his procedural rights in this connection. One of these warning statements is attached to his papers. In this case, he remained silent and made no statement to the police.⁵

[6] Further, the applicant complains about all the previous legal representatives who acted for him in the two criminal matters forming the subject of his complaints. The papers before me reflect that the applicant pleaded guilty to both these charges. One is for the illegal trading in or illegal possession of elephant ivory, and the other is for stealing or receiving stolen electronic goods.⁶

[7] The applicant avers that he did not voluntarily plead guilty to these offences. This must be considered in the context of his concession that an interpreter was present during this process. The applicant alleges that he was not actively allowed to participate during the court processes that unfolded in the lower courts. The applicant avers that he was racially profiled because of his nationality.⁷

[8] The applicant wants his case to be heard in another province because all the lawyers in this province have failed him, and the entire system of justice in this province has failed him. He also fears reprisals from the locally based police. He threatens international media coverage if he is not vindicated and will resort to telling his story on social media.⁸

[9] The applicant is angry and says he now views all prosecutors, lawyers and judges with suspicion. He fears for his life and safety and that of his family. At the same time, he admits that there was a 'measure of culpability' on his part for purchasing elephant ivory illegally. The applicant in his papers also repeatedly refers to the '*police*' as the first respondent. The first respondent argues that the applicant's arrests and convictions were constitutionally compliant.⁹

THE TARGETED LEGISLATION AND THE CONSTITUTION

[10] The provisions of the targeted legislation that may find application are those dealing with discrimination (as defined), read with certain constitutionally enshrined rights of general application. Discrimination is broadly defined as:

⁵ How this is a violation of his rights to his prejudice is not apparent from the papers presented to me.

⁶ The details of the convictions and sentences needed to be clearly defined in the record.

⁷ He says this is solely because he is of Chinese origin.

⁸ He has uploaded media files for release to "YouTube".

⁹ The second respondent is cited but no relief is contended for against the second respondent.

‘...any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly; (a) imposes burdens, obligations or disadvantages on; or (b) withholds benefits, opportunities or advantages from any person on one or more of the prohibited grounds...’¹⁰

[11] This legislation must be purposively interpreted and read in a constitutional context. It seeks to give effect to the letter and spirit of all our constitutionally enshrined rights. These provide for every person's equal enjoyment of all rights and that no person may be unfairly discriminated against. Further, these rights must be respected, protected, and promoted.¹¹

[12] What is not apparent from the papers before me is an examination and consideration of the rights of persons arrested and detained. I suppose that the applicant has navigated away from this line of enquiry and examination as this goes to whether this matter should be before the criminal courts through judicial review or appeal. Also, it goes to the very root of the complaints by the applicant about damages and why relief was not sought following the civil remedies in the common law of delict. This is the very issue to which I now turn.¹²

CONSIDERATION

THE CAUSE OF ACTION

[13] The allegations by the applicant are, among other things: (a) that he was unlawfully assaulted; (b) that he was never informed of the charges preferred against him; (c) that he was unlawfully detained; (d) that he was forced to make certain admissions against his will and, (e) that he was tried in a language that he did not understand and that the proceedings were not interpreted in a language that he understood.¹³

[14] In addition to several other shields raised by the respondents, they aver that the affidavits supporting the application do not set out any alleged acts of discrimination and thus do not set out a cause of action to justify a finding in support of the relief contended for by the applicant.¹⁴

¹⁰ Section 1 (viii) of Act 4 of 2000.

¹¹ Sections 2 (b) (i) and 6 of Act 4 of 2000 read with section 7 (2) of the Constitution of the Republic of South Africa.

¹² The rights as set out in sections 35(2) and 35(3) of the Constitution of the Republic of South Africa.

¹³ These all seem to be violations of sections 35(2) and 35(3) of the Constitution of the Republic of South Africa.

¹⁴ The allegations made are of a general nature with a lack of specificity.

[15] They say this because neither the first nor the second respondent played any role in the actual court process regarding the *guilty pleas* tendered by the applicant. It remains the case for the first and second respondents that the applicant's founding affidavits do not allege any facts to support the essence of the claims made by the applicant.¹⁵

[16] In summary, it seems to me to be undisputed that the applicant complains that his right to privacy was infringed and that he was assaulted. I say this because this is a positive allegation made by the applicant. Further, he says that he was arbitrarily deprived of his freedom and that his home, property and person were searched without a search warrant. Finally, he was not informed of the charges in enough detail to be able to answer them. These issues must be considered against the canvas of the common cause facts that he was legally represented during this time.¹⁶

[17] Most significantly, the applicant does not allege the prevailing legislation to be *discriminatory*. This is important because a claim for damages under the umbrella of *equality* should not be instituted where an effective remedy exists at common law. The applicant conceded during the argument that his claims for damages in the common law of delict have long since been prescribed due to the effluxion of time¹⁷

[18] Elaborating on the facts, the applicant unnecessarily delayed the launch of civil proceedings against the respondents under the common law of delict. I say this because no factual basis or foundation is set out in the applicant's papers for this court to exercise discretion concerning these inordinate delays on behalf to the benefit of the applicant in these proceedings. However, it must be so that if no explanation is given for the delay, this, as a matter of pure logic, must count heavily against the applicant.¹⁸

[19] The applicant remains steadfast in seeking specific relief that this matter be heard in the "Pretoria High Court" because of the proximity to the headquarters of the relevant respondents cited in his application. Also, he seeks 30 million American Dollars in compensation for injury to dignity, lost income and unlawful incarceration. Most importantly, he seeks a judicial review of the two criminal trials concluded

¹⁵ Neither of the respondents could have played a role in the guilty pleas tendered by the applicant.

¹⁶ Various experienced legal practitioners represented the applicant during his criminal proceedings.

¹⁷ A constitutional damages claim is not permissible simply because a claim in delict was not pursued timeously.

¹⁸ Hoexter and Penfold (Eds) Administrative Law in South Africa, (Third Edition, 2021) at page 735.

against him and the *setting aside* of the two convictions returned against him. Finally, he wants an apology from the respective respondents.¹⁹

[20] The respondents seek refuge in the legislation that deals with the constitutional rights of arrested and detained persons. Further, they say that the complaints by the applicant are more than adequately protected by extant legislation dealing with our criminal procedure that falls to be followed during criminal trials in our criminal courts. Also, the applicant is a citizen of our country.²⁰

[21] Thus, any claim that the applicant may have had for damages, including *constitutional or equality* damages, became prescribed after the lapse of three years. They say it matters not how this application has been dressed up, as this does not change the initial and only cause of action.²¹

[22] As a matter of law, I must agree with the respondents' arguments in this connection. I say this because it needs to be clarified (there is a deafening silence from the applicant in this regard) why the applicant did not institute a claim for damages in delict and pursue a judicial review and or appeal in connection with his criminal convictions and sentences.²²

[23] I also say this because it is trite that this species of equality relief may not be claimed where a clear and compelling alternative remedy was readily available to the applicant. This relief is being claimed to camouflage the actual cause of action. The applicant does not explain, engage with or contextualize the inordinate delays in instituting a claim in delict for damages against the respondents. Also, the applicant has now, for the first time during the argument, advanced that he intends to seek condonation and appeal against the convictions and sentences imposed upon him by the lower criminal courts.²³

THE RELIEF

[24] The relief sought is in the form of a declarator. This is because of the possible consequences that flow should the relief be granted. An application for a declarator requires a two-stage approach. The court must satisfy itself that an applicant is a person who has an existing, future, or contingent right or obligation.

¹⁹ This "apology" relief is indeed catered for in the targeted legislation.

²⁰ See the definition of "nationality" referenced earlier.

²¹ The words used do not change the cause of action.

²² This could only be because the applicants sought to circumvent the Prescription Act, 68 of 1969.

²³ The delays seem to be wished away because of the constitutional nature of the declarator sought by the applicants.

Then, if so, the court must decide whether the case is appropriate for exercising the discretion conferred upon it. Furthermore, the court may decline to grant declaratory relief if it regards the question raised as hypothetical, abstract, or academic. In this context, our apex court has held that a hypothetical interest is an interest that is expressly claimed but is neither real nor genuine.²⁴

[25] A declaratory order is a discretionary remedy, and the discretion to grant a declaratory order should not be exercised where the question raised is academic, abstract, or hypothetical. Put another way, where the questions raised in a matter are wholly academic, a court should decline to grant a declaratory order.²⁵

[26] Indeed, there are rare cases where our courts have entertained applications, the effect of which may be moot. In these applications, the interests of justice have demanded that the matter be heard, notwithstanding that it is moot. Some of the factors that may determine the interests of justice include the following: (a) whether any order a court may make will have some practical effect either on the parties or on others; (b) the nature and extent of the practical effect that any possible order might have either on the parties or on others; (c) the importance of the issue; (d) the complexity of the issue; (e) the fullness or otherwise of the arguments advanced, and (f) if the decision would resolve disputes between different courts.²⁶

[27] I needed more persuasion to understand how a declarator would advance the matter or have any practical effect on the litigation. I say this primarily because the academic nature of the relief sought by the declarator becomes apparent considering the following: (a) any claim for damages, constitutional or otherwise, has prescribed due to the effluxion of time, and (b) the applicants have failed to give the required statutory notice to institute their claims against the respondents.²⁷

PRESCRIPTION

[28] Further, it was argued that the applicant could not be granted condonation for the late filing of his application in these circumstances, even if he had applied for condonation. He did not. As a matter of pure logic, this must be so because if a debt becomes extinguished by prescription, condonation cannot generally be

²⁴ Giant Concerts CC v Rinaldo Investments (Pty) Ltd & others 2013 (3) BCLR 251 (CC) at para 51.

²⁵ JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others 1996 (12) BCLR 1599 (CC).

²⁶ The applicant has the judicial review and appeal mechanisms at his disposal.

²⁷ Section 3 (1) and 3 (2) of the Legal Proceedings Against Certain Organs of State Act, 40 of 2002.

granted. No purpose would be served by granting condonation regarding a debt that no longer exists and cannot be enforced. The purpose cannot be to revive debts already euthanized and prescribed due to the effluxion of time.²⁸

[29] The issue for consideration is whether a claim for constitutional damages constitutes a debt. In this case, the alleged violation of constitutional rights would entail the commission of a delict if proven. The word '*debt*' should be given its ordinary grammatical meaning, which is, among other things:

*'...a liability or obligation to pay or render something - the condition of being obligated...'*²⁹

[30] The applicant's claims are for compensation sounding in money and must be included in the meaning of the word *debt*. Also, it would not be legally permissible to escape the legislative provisions of prescription by merely formulating a claim under the umbrella of constitutional damages when the claim has all the features of a claim in the law of delict sounding in money.³⁰

[31] The definition of a debt includes explicitly a claim for any liability for which an organ of the state is liable for payment of damages. The applicants' shield to this is that prescription does not apply as the damages sought against the respondents do not amount to a debt that would be prescribed. The argument is that this is not an obligation to pay money, deliver goods, or render services.³¹

[32] The claim by the applicant is undoubtedly, by its very nature, a claim for constitutional damages. Our apex court has decided on what comprises a *debt* in circumstances such as these, and it has even been confirmed that a claim to transfer immovable property in the name of another amounts to debt.³²

THE NATURE OF THE DAMAGES CLAIMED

[33] The rights the applicant seeks to protect are adequately provided for in delict and through criminal procedure. The common law and our existing legislation are powerful vindications of those constitutional rights. This must be so because our

²⁸ Premier of the Western Cape Provincial Government v BL [2012] 1 All SA 465 (SCA), at paras 4 and 15.

²⁹ Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd 1981 (3) SA 340 (A) at 344E-G.

³⁰ No distinguishing features of the cause of action contended for were advanced by the applicants.

³¹ The applicants attempt in some way to rely on section 39 (2) of the Constitution of the Republic of South Africa, 1996.

³² Ethekewini Municipality v Mounthaven (Pty) Ltd 2019 (4) SA 394 (CC) at para 93.

constitution is primary, while its influence is *indirect* because it is perceived through its effects on the legislation and the common law.³³

[34] Thus, the applicant seeks to label his claims as damages and prefer them as *equality* court claims. The applicant does so to circumvent the effect of prescription and time-bars on his claims. The applicant's case is that his damages claim is appropriate for his relief. However, as I understand our jurisprudence, considering all alternatives, it must be the most appropriate relief.³⁴

[35] Put another way, the common law of delict is broad enough to offer appropriate relief for breach of those constitutional rights contended for by the applicant. Where the common law gives effect to constitutional rights and offers remedies for their protection, the proper course is to use the common law to enforce those rights.³⁵

[36] Thus, in this case, the applicant's difficulty is not that the law of delict is insufficiently protective but rather that the statutory law on prescription and our criminal law legislation precludes his claim in delict. But even if prescription did not apply to his claims, it would not be just and equitable for the applicant's failures to support an argument that constitutional damages are the most appropriate relief in the circumstances.³⁶

[37] This is so because our courts have repeatedly confirmed that constitutional damages would only be awarded where the existing law, including the development of the common law, is inadequate to vindicate a violation of or threat against a citizen's rights. It must be so that constitutional damages do not constitute an alternative means of appropriate relief where a claim in delict could more than have adequately compensated the applicant and where that relief itself is an extraordinarily effective and powerful vindication of any constitutional rights that may be in question.³⁷

[38] Put another way, where a common law remedy exists, a claimant must first have recourse to that remedy as a matter of pure logic. I say this because, in most cases, our common law is broad enough to provide all the appropriate remedies for a

³³ Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others 2023 (4) SA 325 (CC) at para 233.

³⁴ Residents, Industry House and Others v Minister of Police and Others 2023 (3) SA 329 (CC) at para 118.

³⁵ Fose v Minister of Safety and Security 1997 (3) SA 786 (CC).

³⁶ The applicant's claim in delict has prescribed and is excluded and he has the rights of judicial review and appeal at his door.

³⁷ Fose v Minister of Safety and Security, 1997 (3) SA 786 (CC).

constitutional right violation. An award for constitutional damages is not available where there is no evidence to prove that such damages would serve as a significant deterrent against an individual or systemic repetition of the infringement in question.³⁸

[39] Most significantly, in support of the declaratory relief sought by the applicant, he contends for violating his rights as an arrested and detained person. There is nothing systemic or discriminatory about his alleged claims. Also, his claims do not morph into facts. The respondents deny these allegations. The allegations made by the applicant are general and lack specificity.³⁹

[40] I say this because the papers before me needed to contain the facts supporting the conclusions the applicant desires the court to draw. Thus, it is difficult, if not impossible, to discern (let alone decide) from the material before me how the actions or omissions by the respondents amounted to discrimination and, thus, a trammelling of the applicant's constitutional rights.⁴⁰

JURISDICTION OF THE EQUALITY COURT

[41] I must conduct an enquiry in the prescribed manner and determine whether unfair discrimination, hate speech, or harassment has occurred, as alleged. Further, I must remember that the court's character is that the proceedings are meant to be expeditious. The remedies are to be corrective, restorative, and deterrent in nature.⁴¹

[42] In addition, I must consider and be mindful of the existence of systemic discrimination and inequalities concerning race, gender, and disability in all spheres of life and the need to take measures to eliminate them from our society. These are all issues that I must consider when dealing with the problem of determining jurisdiction. Also, I must be mindful of this targeted legislation's objects and guiding principles. Finally, I must adopt an approach focusing on substance rather than form.⁴²

[43] In addition, absent a direct challenge to this legislation, I must assume that this targeted legislation is not constitutionally inconsistent and claims must be

³⁸ Fose v Minister of Safety and Security 1997 (3) SA 786 (CC).

³⁹ This allegation is not borne out by the papers and is in any event disputed.

⁴⁰ These disputes could not be resolved on motion.

⁴¹ Section 21 (1) and section 4 (1) of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000

⁴² I must interpret the provisions of this legislation to give effect to the Constitution of the Republic of South Africa, 1996.

decided within its margins. Thus, it is not legally permissible to treat this targeted legislation and the provisions in our constitution as interchangeable. They are not.⁴³

[44] The applicant sought no relief against the second respondent, and the first and second respondents are referred to interchangeably. By elaboration and for clarity, the relief claimed in the various parts of the application is not discrete as they rest on a finding of alleged unfair discrimination concerning the same conduct. What is vital in this case is that the definition of *nationality* does not include rights and obligations usually associated with citizenship.⁴⁴

[45] Most importantly, the applicant would be unlikely to prove a likelihood of recurrence of the alleged unfair discrimination to warrant the relief contended for. If the applicant cannot sustain a case for damages in delict and seeks no consequential relief (other than through a judicial review or an appeal), it would be difficult to discern how an order from this court could assist the applicant's cause. I say this because this court is not obliged to declare the respondents' conduct constitutionally invalid (even if it was) as it may be appropriate and necessary to dispose of the question using subsidiary law.⁴⁵

[46] In this case, no parallel proceedings are pending in the high court. When the court determines a matter following the equality legislation (with no parallel proceedings pending), it cannot also sit as an ordinary high court.⁴⁶

[47] I say this, among other things, because no pending proceedings can be conveniently consolidated. In summary, the applicant's only complaint that may attract the jurisdiction of this court is the allegation that he was unfairly discriminated against based on race, ethnicity, and language. The applicant still needs to set up an evidential basis for these averments. It must be so that allegations that lack specificity do not equate to establishing a *prima facie* case against the respondents. Thus, the alleged acts of unfair discrimination do not attract this court's jurisdiction.⁴⁷

STATUTORY NOTICES

[48] This specific legislation, as referenced above, provides in summary, among other things, that no legal proceedings for the recovery of a debt may be instituted

⁴³ September v Subramoney [2019] ZAEQC 4; [2019] 4 All SA 927 (WCC).

⁴⁴ See the definition of "nationality" in section 1(1) of Act 4 of 2000.

⁴⁵ J T Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others 1997 (3) SA 514 (CC) at para 15.

⁴⁶ Manong and Associates (Pty) Ltd v Department of Roads and Transport, Eastern Cape and Another 2009 (6) SA 589 (SCA).

⁴⁷ Also, the pending criminal appeal or review processes cannot be consolidated with this application.

against an organ of state unless the creditor has given the organ of state a notice in writing of the intention to institute the legal proceedings in question. The organ of state may consent in writing to the institution of these legal proceedings without the notice and may consent if the notice has been received but still needs to comply with the relevant specific legislative requirements.⁴⁸

[49] The obligatory prior notice must also comply with strictly imposed time limits. If these time limits and other legislative requirements are not adhered to, the party in default may seek condonation for non-compliance.⁴⁹

[50] The applicant failed to comply with these mandatory notices, and his claim for damages is stillborn. This is because the respondents have not consented in writing to the institution of the legal proceedings without such notice having been given by the applicant.⁵⁰

[51] In summary, the relevant portion of this legislation provides that no legal proceedings for the recovery of a debt may be instituted against an organ of the state unless the creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question or the organ of state in question has consented in writing to the institution of those legal proceedings without such notice. This notice must be given within six months from the date the debt became due and be served on the organ of the state. This notice also must comply with specific informative requirements.⁵¹

[52] It seems that on the papers presented before me, the applicant has not adequately engaged with or given a judicially acceptable reason why he did not comply with this legislation and the reason why they did not provide this statutory notice, which would have been a relatively simple exercise by their legal representatives. There is simply no explanation whatsoever on the papers.⁵²

CONCLUSION AND COSTS

[53] Cases of this nature should not attract any orders regarding costs. Also, the matter was determined on the limited issue of jurisdiction. Emphasis must be placed on this application's constitutional character because these proceedings essentially

⁴⁸ Section 3 (1) and 3 (2) of the Legal Proceedings Against Certain Organs of State Act, 40 of 2002.

⁴⁹ Section 1 of the Legal Proceedings Against Certain Organs of State Act, 40 of 2002.

⁵⁰ The applicants were obliged to give the respondents written notice within six months from when the debt became due.

⁵¹ This notice was not given to the respondents in any form, and no consent was granted at the instance of the respondents.

⁵² No reasons were advanced why this statutory notice was not given to the respondents.

sought to vindicate fundamental rights in connection with alleged unlawful actions by the respondents. The following legal principles, which are found in our jurisprudence, apply when dealing with matters that truly have constitutional ingredients. The principles dictate whether the matter has a constitutional ingredient if there is a genuine, non-frivolous challenge to the constitutionality of a law or conduct by the state. If so, it is appropriate that the state bear the costs if the challenge is good, but if not, the losing non-state litigant should be shielded from the costs and consequences of failure.⁵³

[54] Concerning costs, the court always retains the discretion to make an order that seems just and equitable, considering the position of the party against whom any such cost order is levied. Several factors must be considered when a cost award is issued in such circumstances. The applicants' cause of action should have been in the common law of delict. However, I am not satisfied that any cost order should be granted without further evidence. In my view, a contextual approach must, of necessity, be adopted.⁵⁴

ORDER

[55] The following order is issued:

1. The application is dismissed.
2. There shall be no order as to costs.

E D WILLE
(CAPE TOWN)

⁵³ Biowatch Trust v Registrar Genetic Resources 2009 (6) SA 232 (CC).

⁵⁴ A holistic approach must be adopted with a view to assess the different positions adopted by the parties.