IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED	
_____	_____
DATE	**SIGNATURE**

CASE NUMBER: A102/17

DATE: 14 February 2019

THE MINISTER OF HOME AFFAIRS Appellant

V

MUKHTAR AHMED First Respondent

TASLEEM AKHTAR Second Respondent

ABDUR RAHMAN AHMED Third Respondent

ABDULLAH AHMED Fourth Respondent

JUDGMENT

MABUSE J: (Fabricius J and Teffo J, concurring)

[1] On 29 January 2019 I requested my brother, Fabricius J, to write the following email to the parties:

"In the light of the application that was dismissed by Kgomo J on 4 September 2012, whether Collis AJ had any jurisdiction to hear part B of the same application.

(Vide page 358 of the judgment of Mngqibisa-Thusi)."

We were unanimous in our view, that that issue was of paramount importance and furthermore that the parties had to be given an opportunity to address us on that point.

[2] In Court all Counsel, Adv Nazeer Cassim (SC) ("Mr Cassim"), who appeared for the appellant, Attorney Zehir Omar ("Mr Omar"), who appeared for the respondent, and Adv PW Springveldt, who appeared for the 2nd, 3rd and 4th respondents, confirmed that they had received the said email and that they were ready to argue the point although Mr Omar complained about being sent such an email a day before the appeal would be heard. The importance of that point will become apparent later in the judgment.

[3] This matter came before us as an appeal by the appellant, the Minister of Home Affairs ("the Minister"), against the orders contained in paragraphs 2 and 3 of the order given by Mngqibisa-Thusi J on 1 November 2016. The appellant sought an order that the appeal should be upheld and the said order should be replaced by an order in the following terms:

"The plaintiffs' claims against the first defendant are dismissed with costs."

[4] Paragraphs 2 and 3 of the order given by Mngqibisa-Thusi on 1 November 2016 read as follows:

"2. The first defendant is ordered to:

2.1 pay the first and second plaintiffs an amount of R350,000.00 each as damages;

2.2 pay the third and fourth plaintiffs an amount of R50,000.00 each as damages;

2.3 pay interest on the said amounts at the rate of 15.5% per annum from the date of this order;

3. The first defendant is ordered to pay the costs of the action."

[5] In order to fully understand the matter, it is of the utmost importance to set out the history of the involvement of the respondents, especially the first and second respondents. This history will be set out as it appears in the cases that were heard by Levinsohn J in KZN; Kgomo J in the Gauteng Local Division and more importantly by Collis AJ in the Gauteng Local Division and lastly by Mngqibisa-Thusi in the Gauteng Division, all of which involved the first respondent and others

[6] It is equally of paramount importance to observe that the plaintiff's entire cause of action is founded on the judgment, in particular the order of Collis AJ in case number 31902/2012, which was handed down on 5 February 2013. As a prelude in that judgment, Collis AJ had given the following order:

"6.1 The decision by the Respondent to place the names of the First and Second Applicants on a "V" list or any list prohibiting their re-entry into the Republic to be invalid and unlawful;

6.2 The Respondent, its department officials, employees and agents to forthwith remove the names of the First and Second Applicants from a "V" list, alternatively from any list or memorandum that conveys that the Applicants must be refused entry into the Republic;

6.3 it is declared the Respondent's prevention of the First and Second Applicants entering the Republic constituted a violation to the First and Second Applicants constitutional rights as set out in Section 10 (Human Dignity), Section 12 (Freedom and Security of person), and Section 21 (Freedom of movement and residence) of Act 108 of 1996;

6.4 the respondent is ordered to pay the Applicants costs of suit for the proceedings in respect of part B of the Notice of Motion."

THE MATTER BEFORE LEVINSOHN J

[7] This matter was registered by the registrar, Durban Coast and Local Division, under case number 4153/2006. The applicant in that matter was the same Mukthar Ahmed, the first respondent, in this appeal. The respondent in that case was the Minister of Home Affairs, the current appellant.

[8] In that case, which was heard by Levinsohn J, on 20 May 2018, the applicant had launched motion proceedings on 30 April 2008 in which he had sought relief in two parts. In part A he had sought

an interdict restraining the respondent from deporting him and an order that he be released forthwith from custody. In part B of his notice of motion he had prayed for an order declaring his arrest and incarceration to be unlawful. Secondly, he had sought a declarator to the effect that his constitutional rights had been violated.

[9] Having read the papers and having listened to *viva voce* evidence tendered on one side by the applicant and on the other side by one Langa, an officer of the Department of Home Affairs, and having listened to Mr Omar, who appeared for the applicant, and a certain Mr CM Nqala, who appeared for the respondent on the instructions of the State Attorney KZN, Levinsohn J made the following order:

"[1] It is hereby declared that the applicant is forthwith entitled to his immediate release from detention.

[2] It is hereby declared that the applicant is entitled to exercise the right of review which is set forth in sections 8 and 34 respectively of the Immigration Act, number 13 of 2002. Such review proceedings are to be prosecuted by the applicant within ten days from the date of this order.

[3] Pending the said review the respondent or any of her servants or agents are interdicted and restrained from deporting or causing the applicant to be deported from the Republic of South Africa.

[4] The applicant is directed to lodge with the registrar of this Court security in an amount of R10,000.00.

[5] The applicant is directed to report to the charge office at Isipingo Police Station each Monday between the hours of 8am and 5pm.

[6] The respondent is directed to pay the cost of this application."

[10] In paragraph [17] of his judgment, Levinsohn J had recorded that:

"[17] Langa essentially confirmed the version set forth in his affidavit. He said that he had determined that the applicant was an illegal immigrant and decided that he ought to be deported. According to Langa he completed a document headed "Notification of Deportation" (page 82 of the papers). The document informs the applicant that he is an illegal foreigner and that he needs to be deported. It sets out that he has certain rights, inter alia, to appeal the decision of the Director-General within thirty days and that he may have his detention confirmed by a warrant of Court."

[11] In paragraph [19] the judgment recorded that:

"[19] On 6 April 2008 Langa presented the applicant with yet another document which essentially recorded that the applicant had not exercised his right of review and accordingly he had forfeited his rights to request the Minister to review the Department's decision."

It is for that reason that Levinsohn J made the order contained in paragraph 2 supra of this order on 20 May 2008. He stated the following, *inter alia*, in paragraph [27] of his reasons for the judgment:

"[27] I therefore took the view that the applicant ought to exhaust all his appeal remedies."

[12] Quite clearly the applicant had been informed that he was an illegal foreigner. He had furthermore been informed in writing that he could have that determination by the Director-General reviewed and set aside by the Minister. The judgment was silent with regard to Part B of the application. The applicant did not on his part pursue Part B of the said application.

THE REVIEW

[13] On 27 May 2008 Mr Omar submitted his review documents to the Minister of Home Affairs undercover of a letter of the same date. The said letter stated, *inter alia*, as follows:

"We act on behalf of Mukthar Ahmed. In terms of the court order handed down by the learned Judge Levinsohn in the High Court – Durban on 20 May 2008, our client hereby submits his review for your consideration. The court order referred to herein is attached hereto marked "F"."

The papers in connection with the review were delivered to the Office of the Minister where they were received by "Ministry DHA: Maria Dithebe 012-8108087 – 28/05/2008." The review documents did not put the Minister on terms. No period was indicated within which the Minister had to respond, nor was a date given by which the Minister had to respond.

[14] Upon consideration of the documents submitted to him by Mr Omar, the Minister was obliged to review the determination of the Department of Home Affairs or the Director-General and to decide whether to set it aside or confirm it. Up to the date hereof the Minister has done neither of the two. Mr Omar conceded, during the hearing of the appeal, that he did not have the results of the review. He did not have the decision of the Minister. Accordingly the decision of the Director-General declaring Mukthar Ahmed an illegal immigrant has neither been reviewed and set aside nor confirmed.

[15] What followed after Mr Omar had received no response from the Minister of Home Affairs is somewhat confusing. It would appear though, this is not very clear, that Mr Omar approached the court in Durban and asked for the following order:

"1. Directing that the appellant is no longer required to report to the charge office at Isipingo Police Station every Monday between the hours of 8am and 5pm;

2. The registrar is directed to release security in the amount of R10,000.00 lodged by the applicant in accordance with the order of the Honourable Justice Levinsohn DJP dated 20 May 2008;

3. The respondent is directed to pay the costs of this application."

[16] There is in the file a letter from Browne Brodie Attorneys of Durban dated 23 February 2009. This letter states, *inter alia*, the following:

"We confirm that the above matter was heard on 19 February 2008 (it should be 2009). To follow is a copy of the draft order for your records."

It is important to point out that a copy of the relevant court order is not available. For this reason the court doubted the authenticity of the court order referred to in the preceding paragraph, as will be shown in Kgomo J's judgment.

THE APPLICATION BEFORE KGOMO J

[17] On 28 August 2012 under case number 31902/12 Mukthar Ahmed, as the first applicant, Tasleem Akhtar, the second applicant, and Zafa Mehdi, as the third applicant, launched motion proceedings in the South Gauteng High Court, Johannesburg, against the Minister of Home Affairs, as the first respondent, and the Director-General Department of Home Affairs, as the second respondent. In the said application proceedings the applicants sought the following relief:

"1. Condoning the applicant's non-compliance with the rules relating to form, time and service.

2. Directing the respondent to take all the necessary steps to ensure that the first and second applicants are allowed re-entry into the Republic of South Africa ("the Republic").

3. Permitting the applicants to remain in the Republic until the finalisation of part B of the proceedings herein.

4. That costs of Part A of these proceedings be reserved for adjudication at the proceedings in part B.

5. Further and/or alternative relief."

[18] In part B of the same motion proceedings that served before Kgomo J the applicants had sought the following order:

"Part B

BE PLEASED TO TAKE notice that application will be made to the above Honourable Court on a date to be accorded by the Registrar for an order in the following terms:

(a) Declaring that a decision by the Respondent to place the names of the 1st and 2nd Applicants on a "V" list or any list prohibiting their re-entry into the Republic to be invalid and unlawful.

(b) Declaring that the prevention of the 1st and 2nd Applicants from entering the Republic constitutes a violation to the 1st and 2nd Applicants' constitutional rights as set out in Section 10 (Human Dignity), Section 12 (Freedom and security of the person), and Section 21 (Freedom of movement and residence) of Act 108 of 1996.

(c) Ordering the Respondent, its department's officials, employees and agents to forthwith remove the names of the 1st and 2nd Applicants from any "V" list, alternatively any other list or memoranda that conveys that the Applicants must be refused entry into the Republic.

(d) Cost of suit in the proceedings in Part A and Part B.

(e) Further and/or alternative relief."

[19] These motion proceedings were heard by Kgomo J on an urgent basis on 28 August 2012. On 4 September 2012 Kgomo J handed down his written judgment. The order of the said judgment reads as follows:

"Part A of this application is dismissed with costs."

Before the said judge had made the said order he had observed, quite importantly, in paragraph [58] of his judgment that:

"[58] In the circumstances of this application it is my considered view and finding that the applicants have not made out a case for the granting of prayers sought in Part A of the notice of motion. The application, therefore, is as far as Part A is concerned, stands to be dismissed with costs."

[20] The whole relief in Part A that the applicants sought was dismissed. That relief included even the relief that the applicants sought in paragraph 3 of the notice of motion. At the pain of repetition the relief that the applicants sought in paragraph 3 was the following:

"3. Permitting the applicants to remain in the Republic until the finalisation of Part B of the proceedings hereunder."

Paragraph 3 was never postponed *sine die*. All the relief sought in Part A was refused.

[21] The implication of Kgomo J's order was that the applicants could not remain in the country, if they were inside; that they may not enter the country, if they were outside; that they may not proceed with Part B of their application because it had been dismissed. The other avenue left for them would have been to note an appeal against the judgment and the order of Kgomo J. It also means that they remained illegal foreigners according to the determination of the Director- General. Before Kgomo J appeared Mr Omar, for the applicants. In paragraph [31] and [32] of his judgment Kgomo J has made the following observations and stated as follows:

"[31] There is no indication on file whether the above draft order ever served before court as it has no date stamp. My enquiry from counsel for the applicants concerning this aspect was met with a response that he (counsel) cannot take this matter any further, which in my view means he cannot say that for certain such an order was ever granted by the court.

[32] In any event, even if such a draft order was ever made an order of court, same did not extend to issues of citizenship, refugee and citizenship statuses. The review application envisaged in Case no: 4153/2006 remains pending.

In paragraphs 41, 42 43 he now stated as follows:

"[41] According to the respondents' record the second applicant is presently an illegal foreigner, which fact was discovered and documented during or on 23 February 2009 because she did not comply with the conditions of her visa in 2007 as well as that she obtained her permit to be in South Africa through misrepresentation or through an illegal foreigner or prohibited person, whose status to be or to remain in South Africa is null and void.

[42] Similarly, the first applicant's sojourn or entry into South Africa is prohibited because of the Department's discovery during 2008 that he had entered into a marriage of convenience with a South African citizen, one Ms Natalie Nagadu, through which he, through such misrepresentation obtained South African citizenship which resulted in the revocation of his South African citizenship and concomitant requisite status.

[43] The relationship between the respondents and especially the first applicant is chequered and littered with litigation. When I look at the status of the first of the Durban and Coast Local Division cases, the review part thereof has not yet been finalised. As such, it is still pending. On the other hand, if the contradictory version presented by the applicants that the letter written by Zehir Omar Attorneys dated 27 May 2008 represents the review process contemplated in Levinsohn J's judgment of 20 May 2008, then the applicant would have re-confirmed the unreliability of their version as evidenced by the document which they alleged was proof of a review process launched in the Durban and Coast Local Division of the High Court."

THE PROCEEDINGS BEFORE COLLIS AJ

[22] That on 31 October 2012, again with the assistance of Mr Omar, the following applicants Mukthar Ahmed as the first applicant, Tasleen Akhtar Ahmed, as the second applicant, and Zafa Mehdi as the third applicant launched on an urgent basis motion proceedings against the Minister of Home Affairs as the respondent. The applicants called the motion proceeding Part "B" of the proceedings that commenced before Kgomo J. This matter served before Collis AJ. In its application the said applicant sought the following relief:

"In the present application the applicants pursued an application seeking the following relief:

Part A thereof for an order in the following terms:

1. *condoning the applicants non-compliance with the rules relating to forms and **** service;*
2. *directing the respondents to take all the necessary steps to ensure that the first and second applicants are allowed re-entry into the Republic of South Africa;*

3. *permitting the applicants to remain in the Republic until the finalisation of Part B of the proceedings;*
4. *that the cost of part A of these proceedings are reserved for adjudication the proceedings of part B; and,*
5. *further and/or alternative relief."*

In Part B of those proceedings the applicants sought the following order:

"1. Declaring that the decision by the Respondent to place the names of the first and second applicants on the "V" list or any list prohibiting their re-entry into the Republic to be invalid and unlawful;

2. Declaring that the prevention of the first and second applicants from entering into the Republic constitutes a violation to the first and second applicants constitutional rights as set out in Section 10 (Human Dignity), Section 12 (Freedom and Security of persons), and Section 21 (Freedom of movement and residence) of the Constitution of the Republic of South Africa, Act 108 of 1996 (as amended);

3. Ordering the Respondent, its departments, officials, employees and agents, to forthwith remove the names of the first and second applicants from any "V" list, alternatively other list on memorandum that conveys that the applicants must be refused entry into the Republic;

4. Costs of suit in respect of both Part A and Part B, and;

5. Further and/or alternative relief."

It is as clear as crystal from the record of the appeal that at the trial in the Court *a quo* the respondents, through Mr Omar, regarded the proceedings before Collis AJ as Part B or as a continuation of the motion proceedings that were heard and dismissed by Kgomo J.

[23] As indicated above it was on the basis of the said order that the respondents in this appeal issued action proceedings against the appellant for payment of money. Those proceedings served before Mngqibisa-Thusi J. In her written judgment handed down during November 2016 the said judge, made the order set out in paragraph [2] *supra*.

[24] Once Kgomo J had dismissed Part A of the notice of motion and with it paragraph 3 thereof, Part B could not be heard. In our considered view, this means that Collis AJ should not have heard the proceedings before her as Kgomo had pronounced that they were dismissed. Accordingly, Collis AJ had no *locus standi* or jurisdiction to entertain Part B of the application that was heard and dismissed before Kgomo J. Mr Cassim, counsel for the appellant, put it differently. He stated in his heads of argument that on a proper reading of the judgment of Kgomo J, the learned Judge gave a final judgment. According to him litigation should not be endless. He submitted finally that on the requirement of good faith, which permits of no same things being demanded more than once, that the proceedings before Collis AJ were an abuse. We agree with him for the following reasons. The parties before Kgomo J and Collis AJ were the same and so was the cause of action and in substance the relief that the applicants in those matters sought.

[25] Mr Omar argued that the provisions of section 19 of **the Superior Courts Act** are clear. Relying on the provisions of section 19, as he read them from his prepared notes, he argued that an Appeal Court may only decide issues that are subject matter of an appeal. He developed his argument and stated that this Court will be violating the provisions of the section 19 relied on if it ventured into an appeal of the order of Judge Collis in circumstances where Collis's order had not been a subject of an appeal.

[26] For the following reasons we disagree with him. In the first place, section 19 of the **Superior Courts Act** does not support Mr Omar's argument. Secondly, it is clear that, notwithstanding the order of Kgomo J, Mr Omar regarded the order of Collis AJ sacrosanct unless it is set aside. The High Court derives its powers from legislation, common law and inherent jurisdiction. Its powers are therefore not limited by the provisions of section 19 on which Mr Omar sought to rely on or by any legislation. It retains its powers even when it deals with appeals. This inherent jurisdiction "*should be seen as those (unwritten) powers, ancillary to its common law and statutory powers, without which the Court would be unable to act in accordance with justice and good reason".* See in this regard **The Inherent Jurisdiction of the Supreme Court by Jerold Taitz, pages 8 to 9**. In this

respect we are fortified by the remarks of Sir Jack Jacob in his article on **Practice and Procedure in Halsbury's Laws of England, Volume 37 (4th Edition) at paragraph 14** that:

"... the inherent jurisdiction of the Court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of the law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them."

This passage was cited with approval by the Court of Appeal of Manitoba in **Montreal Trust Co v Churchill Forest Industries (Manitoba) Ltd (1971) 21 DLR (3rd) 75 at 81.** One of the cases in which the Court exercised its inherent jurisdiction to avoid injustice to the parties is **Leibowitz and Others v Schwartz and Others 1974 (2) SA 661 T at 662 DC** where the Court had the following to say:

"The Court has inherent powers to grant relief where an instance upon exact compliance with a rule of court would result in substantial injustice to one of the parties.

The Court must, in my view, similarly, have power to grant relief where it is concerned not with a rule of court but with a rule of practice even in a case it seems to me with great respect where the rule of practice has been declared by the appellate division."

[27] Finally, in **Toubie v S [2012] 4 ALLSA 290 (SCA)** the Court endorsed the inherent powers of the SCA, and so of the superior courts, when it stated the following:

"The intention is for a Court of Appeal to dispense justice. An appeal court cannot close its eyes to a patent injustice simply because the injustice is not a subject of appeal."

Accordingly, the argument by Mr Omar about the powers of the Superior Courts in terms of his interpretation of s 19 of the **Superior Courts Act** is too narrow. His argument about his sacrosanct and inviolability of Collis AJ's judgment is also flawed. We therefore conclude that this court has inherent jurisdiction to look at the judgment of Collis AJ in order to establish whether she had

jurisdiction to entertain the proceedings placed before her as Part B of the proceedings that were dealt with by Kgomo J.

[28] We are unanimous in our view that Collis AJ had no jurisdiction to hear what was considered to be Part B of the application that had served before, and was dismissed by, Kgomo J on 4 September 2012. The law regards the proceedings before Collis AJ as invalid and upon prove of invalidity the order made by Collis AJ may be disregarded. In 1883 Connor CJ had the following to say in **GW Willis v LB Cauvin 4 NLR 97 at 98-99:**

"The general rule seems to be that a judgment, without jurisdiction in the Judge pronouncing it, is ineffectual and null."

The law as set out in **Willis v LB Cauvin** *supra* was cited with approval in **Lewis & Marks v Middel 1904 TS 291,** where Mason J, with whom Innes CJ and Bristowe J concurred, held at page 303 that:

It was maintained that the only remedy was to appeal against the decision of the Land Commission; but we think that the authorities are quite clear that where legal proceedings are initiated against a party, and he is not cited to appear, they are null and void; and upon proof of invalidity the decision may be disregarded, in the same way as a decision given without jurisdiction, without the necessity of a formal order setting it aside (Voet, 2, 4, 14; and 66; 49, 8, 1, and 3; Groenewegen, ad Cod. 2; 41; 7, 54; Willis v Cauvin, 4 N.L.R. 98; Rex v Stockwell, [1903] T.S. 177; Barnett & Co. v Burnester & Co., [1903] T.H 30)."

In **Sliom v Wallach's Printing and Publishing Co Ltd 1925 TPD 650** Curlewis JP with Krause J concurring had the following to say at 656:

"The action, therefore, of the respondent company in applying for judgment, apparently by default, against the individual partner Sliom, the appellant in the present case, was an illegal and wrongful act. A judgment was thereby obtained against a person who had not been legally cited before the Court, and the effect of that judgment is that it is a nullity; it is invalid and of no effect. In the case of Lewis & Marks v Middel, to which Mr Murray has referred us, and also in an earlier case where

the Roman-Dutch authorities were examined, it was laid down on the authority of ***Voet*** *that a judgment given against a person who had not been duly cited before the Court is of no effect whatsoever. It is a nullity and can be disregarded. It seems to me that is the position here. A judgment was obtained against the individual Sliom personally, whereas he had never been cited personally and individually to appear before the Court. Therefore, that judgment was wrongly obtained against him, and that judgment, in my opinion, was a nullity as far as he was concerned."*

Finally, the law as set out in Lewis & Marks v Middel was followed by the Appellate Division in **S v Absalom 1989 (3) SA 154 (A) at 164**, where the Court stated that:

"Dit volg dus dat die Volle Hof myns insiens geen bevoegdheid gehad het om die appél aan te hoor nie. Die gevolg, meen ek, was, soos voorspel deur Strydom R, dat die Volle Hof se uitspraak 'n nietigheid was. Sien, benewens die bronne, aangehaal deur Strydom R, Voet Commentarius ad Pandectus 49.8.1 en 3; Groenewegen De Legibus Abrogatis, Ad Cod 7.64; Lewis & Marks v Middel 1904 (TS) 291 op303; Sliom v Wallach's Printing and Publishing Co Ltd 1925 TPD 650 op 656 en Trade Fairs and Promotions (Pty) Ltd v Thomson and Another 1984 (4) SA 177 (W) op 183 D-E. Soos blyk uit hierdie bronne, het die uitspraak van 'n hof wat nie regsbevoegdheid het nie, geen regskrag nie, en kan dit eenvoudig geïgnoreer word. Groenwegen (loc cit) sê weldra dit gaan oor die nietigheid van 'n uitspraak van die Hooggeregshof, die Princeps se hulp ingeroep moet word, maar hierdie reël geld nie meer by ons nie."

[29] We are therefore strongly of the view that the order of Collis AJ was an order given without jurisdiction. It is therefore an invalid order that may be disregarded without the necessity of a formal order setting it aside. The respondents were therefore not justified and entitled to rely on it for their action proceedings against the appellant in this matter. We found several other material problems with the respondent's action as it served before Justice Mngqibisa-Thusi. The first of these material problems relates to the pleadings.

THE PLEADINGS

[30] It is clear that plaintiffs' claim is based on the *actio iniuriarum* and it is also clear that the Judge a quo regarded it as such (Judgment p. 360). This is a form of delict, and obviously the relevant elements thereof need to be pleaded and proven. These elements are conveniently set out in **Amler's Precedence of Pleadings, 8TH Edition by L. Harms, Lexis-Nexis at 205**. At the very least, the particular plaintiff must allege and prove wrongfulness as well as *animus iniuriandi*. It is clear that facts must be pleaded which would lead to a reasonable inference of *animus iniuriandi*. The test is an objective one.

See: **Jackson v SA National Institute for Crime Prevention 1976 (3) SA 1 (A).**

It is also clear that there is a distinction in the Law of Delict between the elements of wrongfulness and fault or blameworthiness. In addition, there must obviously be a causal connection between the conduct complained of, and the plaintiffs' harm.

See: **McCarthy v Sunset Beach Trading 300 2012 (6) SA 551 GNP at 559 par. 12**, where the relevant authorities are referred to. The whole topic is also dealt with in great detail in **Neethling-Potgieter-Visser, Law of Delict 7TH Edition, Lexis-Nexis at 36** and further.

[31] Plaintiffs' particulars of claim however, have not pleaded the necessary elements of the delict relied on. In par. 11 of the particulars of claim, it was stated that on 18 August 2013, first and second plaintiffs were refused entry into the Republic and were informed that they had been placed on a so-called "V" list, which accorded that they were prohibited persons. Following allegation is then made: "This listing was incorrect". In par. 14 of the particulars of claim, the same allegation as to "incorrect" listing was repeated and it was then concluded that this constituted an infringement of plaintiffs' various constitutional rights. In par. 15 however, it is then pleaded that these infringements were caused by the "intentional alternatively negligent conduct of first defendant's employees", who conducted themselves in the following manner: "They wrongly placed an endorsement on first respondent's traveller's record system describing the first plaintiff as prohibited person and the second plaintiff as an illegal foreigner". Again it was pleaded that this endorsement was "wrong". In par. 16 of the particulars of claim, it was in addition pleaded

that the defendants as the Immigration Authority South Africa owed a "duty of care" to the plaintiffs as residents in the Republic. In that context, it was pleaded that defendants failed to exercise the standard of care of a reasonable immigration authority.

[32] It is immediately obvious that plaintiffs in the main relied on the fact that the Immigration Authorities made an error by placing the plaintiffs' names on the so-called "V" list. This was done intentionally, but erroneously according to the particulars of claim. No details of the negligent conduct in this regard were pleaded and no facts relating to the alleged "duty of care" were pleaded. See in this context the discussion about the role of the "duty of care" vis-à-vis the "legal duty" in the decision of **McCarthy** *supra*. Reliance on a "duty of care" is obviously misplaced and it is not pleaded on which facts a legal duty arose.

[33] It is clear from defendant's plea that issues relating to *animus iniuriandi*, negligence and wrongfulness in general, were put in issue. This was also emphasized by the defendant's Counsel at the time, as clearly appears from the record. (See pages 169, 170 and 186). Despite these issues being plainly before the Court, the Judge in the Court a quo had disallowed any cross-examination on the essential elements of the delict relied upon. The learned Judge was plainly of the view that the judgment of Collis AJ was sufficient to have established a cause of action.

[34] In my view, the elements of the delict relied upon were not properly pleaded, remained an issue before a Court, and were ultimately not proven in any event. This would include the question of causation and damages. It is abundantly clear that the respondents, as well as the Court, regarded the judgment of Collis AJ as being sufficient to have established a cause of action, the only outstanding aspect then being the question of quantum. In my view, this is plainly wrong, and quite apart from any other argument, would be a sufficient reason to uphold the appeal.

[35] Lastly, it also appears from the evidence of the first respondent himself, that he only regarded the relevant endorsement as being "wrong". His evidence also does not support a cause of action based in delict, and in particular, on the *actio iniuriarum*.

[36] The **Bill of Rights in the Constitution of the Republic of South Africa Act 108 of 1996** protects fundamental rights relating to human dignity, freedom and security and freedom of movement and

residence. The same rights also enjoy the protection of the *actio injuriarum*. It was argued by Mr Cassim, Counsel for the appellant that therefore, a claim based on the violation of the said rights must not be based on the constitutional rights but instead should be based on common law rights. We agree with him. In this regard he found support in the case of **Khumalo and Others v Holomisa 2002 (5) SA 401 (CC) paras. 27, 28 and 45**. In conclusion he referred us to paragraph 45 of the same authority in which it is stated as follows:

"In the circumstances, the applicants have not shown that the common law as currently developed is inconsistent with the provisions of the Constitution and their appeal must fail."

[37] It is therefore not possible in law to base a delictual claim on the provisions of the **Constitution**. There is, in our law, no delictual claim arising from the **Constitution**. This is our law as ably demonstrated by the following excerpt from **LAWSA page 90 paragraph 61**:

"Infringements of rights entrenched in chapter two do not per se entitle a person to sue in delict, or result in successful delictual claims. To found a claim for compensation the fundamental right must (a) be recognised as a subjective right, or create a legal duty in delict, and (b) the infringement of that right or breach of that duty must violate a societal norm. In Jooste v Botha 2002 BCLR 187 T or 2002 SA 199 (T) the Court was asked to recognise, on the strength of section 28 of the Constitution, that a child has a delictual right to parental love, attention and affection. However, the court declined to extend the law of delict to such instances, partly because such right was never recognised at common law, but also because of social policy. Nonetheless, the case illustrates that, as part of the wrongfulness inquiry, the Bill of Rights operates at two levels: in some instances its provisions may serve to establish or confirm the existence of a subjective right but, more often, it will serve as one of the factors determining society's norm. In the latter instance, policy decisions and value judgments are to be enriched by constitutional norms."

See in this regard **Carmichele v Minister of Safety and Security 2001 10 BCLR 995 (CC)**.

[38] We now conclude that when the matter came before Mngqibisa-Thusi J the Court should have found, as we now do, that the respondents had not pleaded their case properly and should have dismissed their action.

[39] Lastly, we unfortunately have to address another topic: during the trial, both legal representatives lost control of their emotions, if not minds, at a certain level. They repeatedly insulted each other with reference to their race and religion as well. This cannot be tolerated, nor condoned. They showed no respect for each other, and also, no respect for the Court. The learned Judge a quo showed the greatest restraint however. Nevertheless, we deem it important to say that she would have been justified to postpone the proceedings and to have ordered the particular Counsel and Attorney to pay the wasted costs personally.

Insults in Court are not to be tolerated, no matter what the subject-matter at hand is. There is no room for abuse or insults in Court proceedings, be it verbally, or in affidavits. The legal representatives also showed no respect for the constitutional rights they purported to defend: i.e. the right to dignity, as an example.

[40] We did not deem it necessary to deal with other grounds of appeal. The issues raised above are sufficient to enable us to arrive at a conclusion which is that:

1. The appeal is upheld with costs.
2. The order of the trial court is hereby set aside and in its place is substituted the following:

   "The plaintiffs' claims are dismissed with costs."

PM MABUSE
JUDGE OF THE HIGH COURT

HJ FABRICIUS

JUDGE OF THE HIGH COURT

MJ TEFFO
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Appellant:	*Adv NA Cassim (SC)*
(NOT THE COUNSEL AT THE HEARING A QUO WHO WAS BOFILATOS SC)	
	Adv S Freese
(NOT THE COUNSEL AT THE HEARING A QUO WHO WAS BOFILATOS SC)	
Instructed by:	*The State Attorney*
Counsel for the first respondent:	*Mr Z Omar*
Counsel for the second, third and fourth respondents:	*Adv PW Springveldt*
Instructed by:	*Zehir Omar Attorneys*
	c/o Friedland Hart Solomon & Nicolson
Date Heard:	*30 January 2019*
Date of Judgment:	*14 February 2019*