REPORTABLE

CASE NO: SA 2/2013

IN THE SUPREME COURT OF NAMIBIA

In the matter between

PIO MARAPI TEEK	**Appellant**

And

PRESIDENT OF THE REPUBLIC OF NAMIBIA	**First Respondent**
GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**Second Respondent**
MINISTER OF JUSTICE	**Third Respondent**
ATTORNEY-GENERAL	**Fourth Respondent**

Coram:	NGCOBO AJA, ZIYAMBI AJA and GARWE AJA
Heard:	**7 April 2014**
Delivered:	**27 October 2014**

APPEAL JUDGMENT

NGCOBO AJA (ZIYAMBI AJA and GARWE AJA concurring):

Introduction

[1] This is an appeal against a decision of the High Court upholding the respondents' special plea to the appellant's particulars of claim. It arises out of an

action by the appellant, a retired judge of this court, against the respondents: the President of the Republic of Namibia, the Government of the Republic of Namibia, the Minister of Justice and the Attorney-General. In that action, the appellant sued for damages in the amount of N$6 783 455 and other alternative relief, alleging that the respondents are jointly and severally liable in damages for the violation of his right to a fair trial, defamation and a breach of a constitutional duty to facilitate the enforcement of a judgment in South Africa.

[2] These claims arose out of the proceedings and the judgment of this court in an appeal against the acquittal of the appellant on certain criminal charges. The appellant alleged that the appeal judges who heard the appeal committed certain irregularities which violated his right to a fair trial and made certain remarks which were defamatory.

[3] The particulars of claim were met with a special plea and an exception from the respondents who contended that the particulars of claim did not disclose a cause of action. The special plea was contained in a document headed ‘Exception’. The respondents contended, among other things, that the effect of the appellant’s claim based on the violation of the right to a fair trial is to require the High Court to review the decision of the Supreme Court, which the High Court has no jurisdiction to do. They disputed the existence of a constitutional duty to facilitate the enforcement of a judgment of a Namibian court in South Africa and maintained that if one exists, its breach cannot give rise to a claim for delictual damages. In addition, the respondents contended that the words complained of were not

reasonably capable of conveying the defamatory meaning attributed to them by the appellant.

[4] The High Court upheld the special plea based on a lack of jurisdiction and dismissed, in effect, the appellant's action holding that it had no jurisdiction to review the decision of the Supreme Court.[1] The High Court did not consider the other grounds of objection to the particulars of claim but took the view that they were 'affected' by the conclusion that it lacked jurisdiction. However, the High Court dealt separately with the appellant's claim for reinstatement and upheld the exception to this claim on the ground that as the appellant took early retirement prior to the events that gave rise to his claims, he could not claim reinstatement.

[5] To put the issues for consideration in this appeal in context, it is necessary to refer to the background to the litigation as it emerges from the record.

[6] But first it is necessary to dispose of the appellant's application for condonation.

Condonation

[7] The appellant's notice of appeal was filed one day late while the record was filed four days late. The appellant seeks condonation for the late filing of these documents. The respondents are not opposing the application.

[1]The High Court appears not to have made a distinction between the special plea and the exception.

[8] Of course the fact that an application for condonation is not opposed does not mean that it must be granted. The court has a duty to consider whether condonation should in the circumstances of the case be granted. In this regard the court exercises a discretion. That discretion must be exercised in the light of all the relevant factors. These factors include the degree of delay, the reasonableness of the explanation for the delay, the prospects of success, the importance of the case, the interest in the finality of litigation and the need to avoid unnecessary delay in the administration of justice.[2] These factors are interrelated and are not exhaustive.

[9] The period of delay involved in each case is minimal and has a reasonable explanation. The delay has not resulted in any prejudice to the respondents and there has not been any inconvenience to the court. Having regard to the period of delay, the explanation for it and the prospects of success, condonation should be granted.

[10] The appellant is seeking an indulgence for his lateness. The respondents are not opposing the application, and any costs that they may have incurred are probably limited to considering the application. As a result, they did not seek an order for costs. In these circumstances, the interest of justice in this case demands that the costs of the application for condonation must be allowed to lie where they fall.

[11] And now I turn to the background.

[2] *Executive Properties CC and Another v Oshakati Tower (Pty) Ltd and Other* 2013 (1) NR 157 (SC) para 62, citing with approval the decision in *S v Van der Westhuizen* 2009 (2) SACR 350 (SCA) at 353c; *S v Nakale* 2011 (2) NR 599 (SC) para 7.

Background

[12] As already pointed out, the appellant's claim arises out of his prosecution on certain criminal charges. At the conclusion of the State's case during 2006, he was acquitted of all the charges and discharged. The State, with leave of this court, appealed to this court against this decision. In a court, constituted by *ad hoc* judges from South Africa, the appellant's acquittal was set aside and the case was remitted to the trial judge to proceed with the trial. For convenience, these appeal proceedings will be referred to as the 'appeal judgment' and the judges of appeal who constituted the court that heard the appeal will be referred to as the 'appeal judges'.

[13] At the conclusion of the trial in the High Court during 2010, the trial judge again found the appellant not guilty and acquitted him of all charges.

[14] In the meantime, during April 2010, the appellant sued the respondents and the appeal judges. The gravamen of his complaint against the appeal judges was that in the course of considering the appeal and the judgment setting aside the decision to discharge him at the conclusion of the State's case, the appeal judges committed certain acts which violated his common law right as well as his constitutional right to a fair trial enshrined in Art 12 of the Constitution. Furthermore, he alleges that they made certain defamatory remarks in violation of

Art 8(1) as read with Art 5 of the Constitution.[3] He alleged that the respondents and the appeal judges were jointly and severally liable to him for damages in the amount of N$6 873 455.

[15] The only complaint against the respondents was that they had breached their constitutional duty to put in place legislation and other processes to facilitate the enforcement of a judgment of a Namibian court against the appeal judges in a foreign country. He claimed that as a consequence of this breach, he had suffered damages in the amount of N$6 873 455. He sought to recover this amount; alternatively, he sought an order directing the respondents to provide him with logistical and financial as well as such other support that is necessary to enable him to enforce a judgment against the appeal judges in South Africa. In the event of his acquittal on criminal charges, he sought an order for reinstatement as a judge of this court and, failing reinstatement, compensation.

[16] In May 2010, the appellant withdrew the action against the appeal judges leaving the respondents as the only defendants in the case. However, the particulars of claim were not amended to remove the references to the claims that had been made against the appeal judges. The effect of the appellant's later amendments was to remove the appeal judges as defendants in the action. However, despite the amendment, the claims that were directed against the appeal judges remained in the particulars of claim. It is the retention of the claims that had

[3] Art 8(1) guarantees the right of all persons to dignity, while Art 5 requires all branches of Government to respect and uphold the fundamental human rights and freedoms enshrined in Chapter 3 of the Constitution.

been made against the appeal judges that led to the confusion that has characterised the pleadings in this litigation.

[17] It is against this background that the issues on appeal must be understood and considered. Of course these issues must be determined in the light of the pleadings, the judgment of the High Court as well as the notice and grounds of appeal.

The pleadings

[18] The pleadings in this case are not a model of clarity. The appellant's particulars of claim embrace two claims; firstly, one based on the conduct of the respondents and secondly, on the conduct of the appeal judges. The second claim has been asserted despite the withdrawal of the action against the appeal judges and the fact that they are no longer parties to these proceedings. As pointed out earlier, the claim based on the conduct of the appeal judges is for the alleged violation of the appellant's right to a fair trial and defamation. The claim based on the conduct of the respondents concerns the alleged breach by the respondents of a constitutional obligation to take steps to facilitate the enforcement of a judgment in a foreign country by putting in place the necessary legislation and processes.

[19] Based on these two claims, the appellant seeks to recover constitutional damages for breach of the constitutional obligation, alternatively, to be provided with logistical and financial support as well as other support to enable him to enforce, in South Africa, a civil judgment yet to be obtained against the appeal

judges. In the event of his acquittal on the criminal charges (this claim was instituted before the finalisation of the criminal trial on remittal), the appellant claims reinstatement into his former position as a judge of this court together with loss of income during the period when he did not serve as a judge of this court.

[20] For each claim the amount of damages claimed is the same, namely, N$6 873 455 which represents loss of remuneration, future loss of income, legal costs and expenses, shock, pain and suffering as well as contumelia.

[21] The particulars of claim are inelegantly formulated; they create the impression that the respondents are also being sued for the alleged delictual wrongs by the appeal judges. The claim for shock, pain and suffering and contumelia, as well as the allegation that the respondents are jointly and severally liable in damages to the appellant, suggests that the respondents are being held vicariously liable for the alleged delictual wrongs committed by the appeal judges. Indeed, as will appear below, the respondents, as well as the High Court construed the particulars of claim as also embracing a claim for damages against the respondents based on a vicarious liability for wrongs allegedly committed by the appeal judges. The particulars of claim conflate two claims, namely, that which lies against the appeal judges and that which lies against the respondents for the alleged breach of a constitutional duty.

[22] Far from removing the confusion, the respondents added to the confusion by pleading to all claims in the particulars of claim and raising an exception as well as

a special plea. As pointed out earlier, the document that contains the special plea and the exception is headed ‘Exception’ and its preamble adds to the already existing confusion. It states that ‘the defendants hereby raise a special plea and exception to plaintiff’s amended particulars of claim as amplified by the further particulars, on the basis that this court lacks jurisdiction to review a judgment of the Supreme Court of Namibia, and that they disclose no cause of action against the defendants . . .’.

[23] It does not indicate which aspects of the particulars of claim are the targets of the special plea and which are the targets of the exception. It suggests that the special plea and the exception apply to all claims set out in the particulars of claim. This is left to the reader to determine by perhaps having regard to the nature of the point taken. As if this is not enough, the respondents seek an order dismissing the appellant’s claims ‘alternatively and in the event that defendants’ exception is not upheld, defendants be granted leave to plead’ to the appellant’s claims. No mention is made of the special plea in the prayer.

[24] The respondents construed the appellant’s action as embracing two claims which they referred to as claim 1 and claim 2. Claim 1 is the claim based on the violation of the right to a fair trial and defamation; whereas claim 2 is the claim based on the breach of a constitutional obligation to put in place statutory and other processes for the enforcement of a judgment in a foreign country. While the preamble to the ‘Exception’ appears to suggest that the special plea applies to all claims in the particulars of claim, a careful reading of the ‘Exception’ shows that the

special plea was only confined to the complaint based on the violation of a right to a fair trial.

[25] The respondents contended that the appellant's claim based on a violation of the right to a fair trial in effect requires the High Court to undertake an inquiry into the findings of the Supreme Court and to review the judgment of the Supreme Court. They contended that the High Court has no jurisdiction either to conduct such an inquiry or to review a judgment of another High Court. In the alternative, they contended that the conduct of the appeal judges does not constitute a violation of the right to a fair trial. Furthermore, even if it does, its violation cannot found a claim for damages. In relation to the claim for defamation, they denied that the passages complained of from the judgment of the Supreme Court are defamatory.

[26] In relation to claim 2, that is, the claim based on the alleged violation of a constitutional obligation, the respondents denied that the provisions of the Constitution relied upon create the constitutional obligation contended for. Even if they do, the respondents maintained, such obligation does not give rise to a claim for delictual damages.

[27] It is these pleadings that served before the High Court.

The reasoning of the High Court

[28] The High Court was mindful of the fact that the claim against the respondents is premised on an alleged failure to comply with the alleged constitutional obligation to initiate steps to facilitate the enforcement of a judgment in a foreign country.[4] It nevertheless went on to consider the special plea in relation to the claim based on the violation of the right to a fair trial. It did so, presumably because it took the view that the respondents were being sued and held vicariously liable for the wrongs allegedly committed by the appeal judges.

[29] The High Court's starting point was that the appellant's 'complaint in essence is that the proceedings of the Supreme Court were irregular and this resulted in the breach of his right to a fair trial as contained in Art 12 of the Constitution'.[5] While the High Court accepted that the appellant is not seeking an appeal against or to review the judgment of the Supreme Court, it nevertheless held that 'the effect of these proceedings will result in this court examining the judgment of the Supreme Court to determine the plaintiff's claims against the defendants'.[6] Relying on the provisions of Articles 78 and 81[7] of the Constitution as well as s 17 of the Supreme Court Act 15 of 1990, it held that '[t]his will result in an indirect way in which the High Court reviews the thought process of the judgment of the Supreme Court'.[8] It

[4] Judgment of the High Court para 10.
[5] Judgment of the High Court para 18.
[6] Judgment of the High Court para 24.
[7] Id.
[8] Judgment of the High Court para 25.

concluded that it has no jurisdiction to do so. In the event, the High Court upheld the special plea.

[30] Having made this point, however, which disposed of all the appellant's claims, the High Court went on to consider the claim for reinstatement and held that the exception was good in relation to this aspect of the claim as well. It is not clear how the High Court could have considered this aspect of the claim after it had concluded that it did not have jurisdiction. Apart from this, the respondents did not take this point in the 'Exception' and therefore this was not an issue before the High Court. Indeed in argument before us, Mr Marcus, counsel for the respondents, did not support this aspect of the judgment of the High Court. It follows that the High Court erred in this regard.

[31] The High Court went further; it held that the special plea must be upheld in respect of all claims because '[t]he foundation or stepping stone of the plaintiff's claim . . . is the appeal judgment'.[9] In the light of its conclusion, it deemed it unnecessary to consider the remaining grounds of attack advanced by the respondents 'as each one of them may depend on the appeal judgment and is affected by what [it has held]'. [10]

[9] Judgment of the High Court para 27.
[10] Id.

Issues raised in the notice of appeal

[32] There are two main points taken by the appellant in the notice of appeal. Firstly, that the High Court erred in failing to distinguish between the case against the appeal judges, which was not before it, and one against the respondents, which was before it. The appellant, who represented himself in this court as well as in the court below, contended that the 'essence of the appellant's case' before the High Court was 'whether the respondents have a positive legal duty to assist and/or facilitate appellant's prosecution/enforcement/execution of a domestic judgment/order in a . . . foreign country/land in a matter involving peregrine judges'. Secondly, he contended that the High Court erred in finding that it did not have jurisdiction to inquire into the findings of the Supreme Court. There are other points taken in the notice of appeal which are related to these two main points.

[33] As the High Court correctly observed, and as argued by the appellant, the appellant's claim is founded on the alleged breach by the respondents of their respective constitutional obligations to protect his constitutional rights by taking steps to facilitate the enforcement of a judgment in a foreign country. The appellant contended that this duty required the respondents to put in place statutory mechanisms and other processes to ensure that any judgment obtained against such foreign judges can be enforced in a foreign country like the Republic of South Africa. The appellant's constitutional anchor for this obligation is Art 32(5)*(b)* in

relation to the President[11], Art 40(b) in relation to both the President and Minister of Justice[12] and Art 87(b) and (c) in relation to the Attorney-General.[13]

The issues presented on appeal

[34] The central question that the High Court had to decide was whether the respondents had a constitutional obligation to initiate legislation and put in place measures for the enforcement of a judgment of a Namibian court. If such an obligation exists, the High Court had to consider two further questions. Firstly, whether the respondents were in breach of such duty. Secondly, if they were in breach of such a duty, whether that breach of that duty gives rise to a claim for delictual damages? Both the appellant and Mr Marcus accepted that these were the questions that the High Court had to decide.

[35] The High Court did not consider these questions because it took the view that it lacked jurisdiction to consider the appellant's claim of a violation of the right to a fair trial, and that its decision affected all other claims by the appellant because '[t]he foundation or stepping stone of the plaintiff's claim . . . is the appeal

[11]'(5) Subject to the provisions of this Constitution dealing with the signing of any laws passed by Parliament and the promulgation and publication of such laws in the Gazette, the President shall have the power to:
(a) . . .
(b) initiate, in so far as he or she considers it necessary and expedient, laws for submission to and consideration by the National Assembly.'
[12]The members of the Cabinet shall have the following functions:
(a) . . .
(b) to initiate bills for submission to the National Assembly;'
[13]The powers and functions of the Attorney-General shall be:
(a) . . .
(b) to be the prinicipal legal adviser to the President and Government;
(c) to take all action necessary for the protection and upholding of the Constitution;'.

judgment'.[14] In this manner, the High Court disposed of the central question it had to decide without considering the merits of the constitutional question. This too was common cause on appeal.

[36] In the light of the approach of the High Court to the issues before it, two questions fall to be determined in this appeal. Firstly, should this court now decide the merits of the constitutional question or should this question be referred back to the High Court for it to consider the merits of the constitutional question? Secondly, whether the decision of the High Court that it lacked jurisdiction to consider the appellant's claims precludes the High Court from considering the constitutional obligation question.

[37] These questions are dealt with in turn.

Should the constitutional question be referred back to the High Court?

[38] Mr Marcus initially contended that this court should not refer the matter back to the High Court but it should decide the constitutional obligation question. In urging this contention, he submitted that referring this question to the High Court would be an exercise in futility because the claim based on a constitutional obligation is premature. The appellant must first obtain a judgment in his favour, and only then can he claim the enforcement of the constitutional obligation contended for. In addition, he submitted that the issue was argued in the High Court but conceded that the High Court did not decide the merits of the question.

[14] Judgment of the High Court para 27.

Nonetheless he accepted that it is undesirable for this court to sit as a court of first and last instance on an important constitutional question such as the one involved in this case.

[39] For his part the appellant submitted that as the High Court did not address the merits of the constitutional question, this question should be referred back to the High Court. He submitted that it is not necessary for him to first obtain judgment against the appeal judges in his favour before asking a court to enforce the constitutional obligation contended for. Under Art 25(2) of the Constitution[15], he maintained, he is entitled to approach a court once his constitutional rights are threatened. He submitted that the absence of a statutory mechanism for the enforcement of a judgment in a foreign court threatens his constitutional rights.

[40] Now these are interesting constitutional arguments that go to the merits of the constitutional question. However, these are arguments that should be addressed to the court hearing the constitutional question. The fact of the matter is that the High Court did not consider the constitutional question. The proper course to follow is to refer the question back to the High Court for it to consider the merits of the question. Mr Marcus was constrained to concede that this is the proper course for this court to adopt.

[15] '25(2) Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.'

[41] But there are further considerations that militate against this court considering these issues at this stage. These issues raise important constitutional questions. The South African Constitutional Court has had the occasion to consider the implications of an apex court sitting as a court of first and last instance on important constitutional questions and has held:

> 'It is, moreover, not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given. Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised. In such circumstances the losing party has an opportunity of challenging the reasoning on which the first judgment is based, and of reconsidering and refining arguments previously raised in the light of such judgment.' [16]

[42] It is undesirable for this court to sit as a court of first and last instance on important constitutional questions without the benefit of the High Court's views on these questions. The importance of such views cannot be gainsaid. It enables the parties to refine and develop further arguments in the light of the reasoning of the High Court. Through this process, the issues will become more crystallised. By the time the matter reaches this court, all possible arguments would have been raised and debated, and this will place this court in a better position, as a court of final instance, to resolve the matter in the light of these arguments.

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[16] *Bruce and Another v Feecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC) paras 8 and 29. See also *Aparty and Another v Minister of Home Affairs and Another; Moloko and Others v Minister of Home Affairs and Another* 2009 (3) SA 649 (CC), in particular the cases cited in footnote 42.

[43] For all these reasons, the case must be referred back to the High Court.

[44] But does the decision of the High Court on jurisdiction present an obstacle to that court considering the constitutional issue raised? The reasons of the High Court, that it lacked jurisdiction, were broad and wide ranging. It held that the 'foundation or stepping stone' of the appellant's claim is the appeal judgment and its conclusion affects all claims made by the appellant. In other words, the High Court held that it lacks jurisdiction to consider any of the claims advanced by the appellant including the constitutional issue. In these circumstances, it is necessary to consider the question whether the High Court lacks jurisdiction to consider the constitutional questions.

Does the High Court lack jurisdiction to consider the appellant's claim?

[45] In holding that it lacked jurisdiction, the High Court placed much store by the provisions of Articles 78 and 81 of the Constitution as well as s 17 of the Supreme Court Act.[17] Article 78 sets out the hierarchy of courts and places the Supreme Court at the apex of the judicial hierarchy. Article 81 of the Constitution provides that: 'A decision of the Supreme Court shall be binding on all other courts of Namibia and all persons in Namibia unless it is reversed by the Supreme Court itself, or is contradicted by an Act of Parliament lawfully enacted'. Section 17(1) of the Supreme Court Act provides that: 'There shall be no appeal from or review of, any judgment or order made by the Supreme Court'.

[17]Section 17. Finality of decisions of the Supreme Court
(1) There shall be no appeal from, or review of, any judgment or order made by the Supreme Court.
(2) The Supreme Court shall not be bound by any judgment, ruling or order of any court which exercised jurisdiction in Namibia prior to or after Independence.'

[46] These provisions do not, either individually or cumulatively, preclude the High Court from considering a delictual claim arising from the findings or statements made by the Supreme Court. Article 81 is clear and admits of no ambiguity; decisions of the Supreme Court are binding on everyone including all other courts. This is so because the Supreme Court is the apex court and has a final say on all disputes that come to it. Section 17 of the Supreme Court Act, merely gives effect to these provisions of the Constitution by providing that no appeal or review shall lie against any judgment or order of the Supreme Court. As the apex court, no other court has the constitutional authority to set aside the decisions of the Supreme Court. What is precluded by the Constitution and the Supreme Court Act are proceedings directed at appealing or reviewing a judgment or an order of the Supreme Court with the aim of setting these aside.

[47] In supporting the decision of the High Court, Mr Marcus sought to make a distinction between an action based on a violation of the right to a fair trial and one based on defamation. The former, he submitted, requires a court to review findings of another court while the latter does not. He went further and submitted that what matters is not the result of the exercise but what the inquiry involves; an inquiry into the case of an action based on a breach of the right to a fair trial, he maintained, involves an inquiry into, and a pronouncement, on the irregularity of the proceedings. This submission misconceives the nature of the inquiry involved in a claim for damages based on the alleged wrongful conduct of a judicial officer committed in the course of judicial proceedings. The basis of the inquiry is the

same whether the wrongful conduct complained of is based on common law or a violation of a constitutional right.

[48] An action based on the alleged unlawful or wrongful conduct of a judicial officer committed in the course of judicial proceedings is not aimed at reviewing or setting aside an order or judgment of a court as would be the case in an appeal or review proceedings. Such an action involves an investigation into whether the alleged wrongful or unlawful conduct was committed, and if it was, the circumstances under which the alleged wrongful or unlawful conduct was committed. This investigation involves considering the context in which the alleged wrongful conduct was committed and the context includes the record of the proceedings, the judgment given, and the order made in the proceedings. The purpose of this exercise is not to set aside the judgment or order in the proceedings concerned; it is aimed at determining whether the wrong conduct complained of occurred.

[49] In bringing the present claim, the appellant does not seek to appeal against the judgment or order of the Supreme Court. Nor does he seek to review the proceedings of the Supreme Court with a view to having those proceedings set aside. He is not concerned with the result reached in the appeal judgment; he is only concerned with the conduct of the appeal judges as well as statements made in the course of reaching that result. It is true, a court considering a claim for defamation or violation of the right to a fair trial may have to consider the findings

made by the appeal judges. It is also true that the court may even go to the extent of considering whether the impugned findings are borne out by the record.

[50] In considering the findings made by the appeal judges, the court considering the action for damages will be investigating whether or not these statements were made as well as the circumstances under which they were made. The consideration of these findings is not to be directed at setting aside the judgment or order of the Supreme Court. This investigation is necessary because 'the irrelevance of the defamatory matter to the proceedings or the absence of some reasonable foundation for it, may, depending upon the circumstances of the particular case, be indicative of malice on the part of a judicial officer'.[18]

[51] The nature of the inquiry to be conducted in a defamation claim against a judicial officer was considered in *Soller v President of the Republic of South Africa.*[19] There, the North Gauteng High Court of South Africa held that to establish malice, the court may have to consider the nature of the case before a judge, the relevance of the remarks made and the entire context in which the remarks were made, and more importantly, the findings that the court had to make.[20]

[52] The purpose of such an inquiry is not to set aside the findings of facts or law made by a court as would be the case in an appeal or review; the purpose is to establish whether those findings or the conduct complained of are sufficient to sustain the wrongful act complained of such as a claim for defamation or a violation

[18] *May v Udwin* 1981 (1) SA 1 (A) at 20D-E.
[19] 2005 (3) SA 567 (T) at 572B-F.
[20] Id para 10.

of the Constitution. This is what distinguishes an appeal or review from a consideration of a claim for a violation of the Constitution or a claim for defamation which arises from conduct or statements made in the course of judicial proceedings or a court judgment in such proceedings. It is a fine distinction but it is fundamental to these processes. It sets these processes apart from each other.

[53] What must be borne in mind is that the High Court has the constitutional authority to hear and adjudicate upon all civil disputes including those arising from the Constitution. Indeed, the authority of the High Court to do so, even in relation to the findings of the Supreme Court is derived from Art 80(2) of the Constitution which provides that the 'High Court shall have original jurisdiction to hear and adjudicate upon all civil disputes . . . including cases which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder . . . '.

[54] Article 80 must be read with Art 12(1)*(a)* which guarantees the right of access to court in the following terms:

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

[55] The right to have civil rights determined in 'a fair and public hearing by an independent, impartial and competent court' is a fundamental right that is guaranteed by the Constitution.[21] The High Court is a 'competent court' which is empowered to hear all civil disputes including those that arise under the Constitution. To this must be added Art 25(4) of the Constitution which sets out the power of a court when considering the alleged violation of constitutional rights. The power 'include the power to award monetary compensation in respect of any damage suffered by the aggrieved persons in consequence of such unlawful denial or violation of their fundamental rights and freedoms. . .'.

[56] The decision of the High Court does not pay sufficient attention to the fundamental right of access to court which is implicit, if not explicit, in Art 12(1)*(a)* read with Art 80(2) of the Constitution. The status of this Court as an apex court as appears from Art 78(1) of the Constitution including, the binding effect of its judgment as provided for in Art 81 and the preclusion of appeals or reviews against judgments or orders of the Supreme Court by s 17(1) of the Supreme Court Act must be construed and understood in the light of Art 80(2) of the Constitution which confers on the High Court 'original jurisdiction to hear and adjudicate upon all civil disputes' including cases arising under the Constitution as well as the fundamental right of access to court.

[57] The High Court erred in three respects; firstly, it paid insufficient attention to the purpose of considering the findings made by a court in a claim based on a

[21]Art 12(1)*(a)*.

violation of the Constitution; secondly, it paid insufficient attention to the distinction between, on the one hand, the appeal and review, and, on the other, a consideration of a claim for a violation of a constitutional right based on the conduct and statements made in the course of the proceedings and judgment of the Supreme Court; thirdly, it paid insufficient attention to the fundamental right of access to a court and the constitutional authority of the High Court to hear and adjudicate on all civil disputes including those arising under the Constitution.

[58] Apart from this, the High Court erred in applying the special plea to the claim based on a breach of a constitutional obligation as it was not the target of the special plea.

[59] For all these reasons, the conclusion by the High Court that it lacked jurisdiction cannot stand. The decision of the High Court upholding the special plea based on lack of jurisdiction therefore falls to be set aside.

Costs

[60] Then there is the question of costs.

[61] In his notice of appeal, the appellant did not ask for costs in this court. On the contrary, he asked that each party pays its own costs and that the decision of the High Court on costs must also stand. The High Court ordered each party to pay its own costs. In the course of argument, he asked for costs only in this court, indicating that his costs are limited to expenses for making photocopies of

documents. He did not ask for the reversal of the High Court's order for costs. The High Court order for costs must therefore stand.

[62] The appellant has been successful in this appeal. There is no reason to depart from the general rule that costs must follow the result. Mr Marcus did not contend otherwise.

Order

[63] In the event, the following order is made:

(a) The appellant's late filing of the notice of appeal and the record is hereby condoned.

(b) The appeal is upheld.

(c) The order made by the High Court upholding the respondents' special plea and exception is set aside and is replaced by an order dismissing the special plea and the exception.

(d) The case is referred back to the High Court to consider the matter afresh.

(e) The costs order made by the High Court is to stand.

(f) The respondents are ordered to pay the appellant's costs of appeal excluding those relating to the application for condonation. Such costs shall be limited to actual disbursements incurred by the appellant.

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NGCOBO AJA

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ZIYAMBI AJA

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GARWE AJA

APPEARANCES

APPELLANT:	In person
RESPONDENTS:	Mr N Marcus Instructed by Government Attorney