THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 9873/21

In the matter between:

THE ECONOMIC FREEDOM FIGHTERS	First Applicant
2nd TO 24th APPLICANTS LISTED IN ANNEXURE "A" TO THE NOTICE OF MOTION	Second to Twenty-fourth Applicants
and	
SPEAKER OF THE NATIONAL ASSEMBLY	First Respondent
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES	Second Respondent
MINISTER OF POLICE	Third Respondent

Coram: Wille, J

Heard: 15 and 16 April 2024

Supplementary Notes: 2 and 9 May 2024

Delivered: 10 June 2024

JUDGMENT

WILLE, J:

INTRODUCTION

[1] This opposed application concerns some complex legal issues. However, it is essentially about applying the rule of law in our new constitutional democracy. While I must accept that there are disagreements about what the rule of law means, we can, however all, without difficulty, accept that the rule of law can be distilled into at least eight basic principles in that laws are required to be: (a) general; (b) publicly accessible; (c) forward-looking; (d) clear; (e) non-contradictory; (f) not impossible to comply with; (g) stable and, (h) congruent with how officials enforce them.[1]

[2] Further, I need to be aware that there generally is limited liberty when legislative power is united with executive power in a single body. This is so because one may fear that the same body that makes tyrannical laws will execute them tyrannically. More than seven years ago, certain members of the applicants' political party allegedly wilfully, violently and with premeditation unlawfully disrupted certain presidential proceedings. It is alleged that the express intention of these parliamentary disruptions was to prevent two presidential-parliamentary speeches from being delivered.[2]

[3] On both occasions, these proceedings were disrupted for inordinately long periods. The disruptors refused to obey the instructions to desist from their disruptive behaviour. Ultimately, the members disrupting the proceedings were instructed to withdraw and refused. After their refusal to withdraw caused further significant disruptions, the personnel responsible for security were instructed to escort out those members who were disrupting proceedings and who refused to leave.[3]

[4] According to the respondents, the first applicant's parliamentary members refused to cooperate (on both occasions), and they allegedly physically resisted their ejectment and assaulted the personnel instructed to implement their ejectment. The first and second respondents' case is that they did not instruct that any members be assaulted or harmed in any way when they were being removed and took every

---

1 Fuller, L.R. 1968 - "The Morality of Law" - Oxford University Press: Oxford.
2 The "State of the Nation" addresses in 2015 and 2017 (SONA). I will refer to these as the "President's" speeches.
3 In terms of the Provincial Legislatures Act 4 of 2004 ("the Powers Act"), the Joint Rules and our Constitution.

reasonable measure to ensure that, when as a last resort, members were ejected by the parliamentary personnel to restore order, they would not be physically harmed.[4]

[5] Firstly, the applicants sought a declarator that it was unconstitutional to order the first applicant's parliamentary members to be ejected. This process was styled as including some gratuitous violence. In summary, the first applicant says that its members were unlawfully and violently assaulted during and after the process of their removal. This is against the canvass of prevailing legislation and with no frontal attack on the validity of any parliamentary rules.[5]

[6] Secondly, the applicants seek what they style to be '*constitutiona*l' damages. This relief is contingent upon the declaratory relief being granted. The applicants submit that their damages claims are competent in law. The respondents say this relief is not competent, and these claims have, in any event, been prescribed due to the effluxion of time.[6]

[7] About three months ago, three related applications by the first applicant about their alleged ongoing disruptions of parliamentary sittings were dismissed. This jurisprudence indicated, among other things, that the applicants were unlikely to suffer irreparable harm and be at risk of being ordered to leave any parliamentary processes if they obeyed the parliamentary rules and procedures.[7]

[8] It was a matter of common cause that a parliamentary member would only be ordered to leave the *'chamber'* if that member had not complied with the applicable parliamentary rules. It was accepted that members ran the risk of expulsion either under the old or the new rules once and if a member disobeyed the rules and was accordingly requested to leave. The applicants conceded that they do not challenge the parliamentary rules and that this is not an issue for decision in this matter.[8]

[9] Further, it was not disputed that if a parliamentary member disobeyed the rules by refusing to leave, the requisite controlling bodies on duty could facilitate their removal following the extant rules. Thus, the removal from the parliamentary process was not in itself unlawful. How it occurred could be unlawful. In summary,

---

[4] The first and second respondent deny that they acted unlawfully at the 2015 SONA and the 2017 SONA sittings.
[5] The EFF does not challenge either the validity of Rules or the Powers Act.
[6] More than five years have elapsed, and no proceedings were instituted in the interim.
[7] The parliamentary rules always govern the conduct of members of parliament.
[8] No frontal challenge was made against the validity of the existing (including the amended) rules.

the apparent harm complained of would only manifest if a member of parliament elected to ignore or not be bound by the extant parliamentary rules.[9]

CONTEXT

[10] This application concerns the alleged behaviour of a minority political party attempting to disrupt a parliamentary process and collapse the sittings of a democratically elected multi-party government. This allegedly by wilfully disregarding the rules and rulings made by its controlling officers following democratic prescripts and the framework rules adopted by and considered binding on all parties involved in the parliamentary process.[10]

[11] The applicants' case hinges on a liberal interpretation of the right to free speech to the exclusion of all limitations to that right to free speech. They say their members have the right to free speech in absolute terms. Put another way, they say the constitutional limitations that limit the right to free speech during parliamentary sittings find no application. They contend that the limits imposed upon the rights of freedom of speech by making such rights subject to rules and orders designed to ensure that parliamentary business is conducted effectively and in an orderly and predictable way find no application.[11]

[12] The first and second respondents contend that the applicants, like all other parliamentary members, have freedom of speech during the parliamentary process when at the podium. The applicants argue that this right of freedom of speech includes the right to disrupt legitimate addresses and to collapse parliamentary sittings.[12]

[13] The first and second respondents say that these disruptions by the applicants were undemocratic. They advance that the first and second applicants acted in a manner which contravened the parliamentary rules. Thus, it is advanced that their actions were in contempt of parliamentary authority and, as such, constituted grossly disorderly conduct.[13]

[14] The first part of the relief sought by the applicants bears scrutiny. The founding affidavit pertains to the alleged conduct of the respondents, at whose

---

[9] It is the respondents' case that the applicants were ejected because they disobeyed the parliamentary rules.
[10] The first applicant only holds six-point five percent of the voting electoral support.
[11] This references the limitations in sections 57 and 58 of our Constitution and the National Assembly Guide to Procedure.
[12] The applicants say they were entitled as a matter of law to interrupt these Presidential speeches.
[13] The respondents argue that they were entitled in law to remove the applicants from the "chamber."

behest several of the applicants were allegedly violently and unlawfully assaulted during their duties as legislators participating in a parliamentary joint sitting.[14]

CONSIDERATION

THE CAUSE OF ACTION

[15] The allegation is that the parliamentary protection services engaged in excessive and unreasonable force to frustrate the applicants' fulfilment of their parliamentary duties. By contrast, the first and second respondents say that the applicants deliberately attempted to collapse the parliamentary sittings.[15]

[16] 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 gratuitous violence and thus do not set out a cause of action to justify such a finding in support of the declaration contended for by the applicants.[16]

[17] They say this because neither the first nor the second respondent instructed any person to be assaulted. It is the case of the first and second respondents that the applicants' founding affidavits do not allege any facts to support the essence of the claims made by the applicants.[17]

[18] It seems to me to be undisputed that the ejectment of the applicants was done as a last resort and was necessitated to ensure that the parliamentary proceedings could proceed without unnecessary interruption. Most significantly, the applicants do not challenge the prevailing legislation or the rules. This is important because a claim for constitutional damages should not be instituted where an effective remedy exists at common law.[18]

[19] Elaborating on the facts, the applicants unnecessarily delayed the launch of proceedings because these events occurred more than seven years ago and more than five years after the alleged second parliamentary disruption. This delay notwithstanding, the applicants do not apply for any species of condonation. I say this because no factual basis or foundation is set out in the applicants' papers for this court to exercise discretion concerning this inordinate delay. However, it must be so

---

[14] These duties referred to were never defined or formulated with any specificity.
[15] This is in connection with the SONA 2015 and the SONA 2017. The applicants rely on section 1(d) of the Constitution.
[16] The allegations of alleged violence against the applicants lacked specificity.
[17] This, they say, has nothing to do with the right to freedom of speech.
[18] A constitutional damages claim is not permissible simply because a claim in delict was not pursued timeously.

that if no explanation is given for the delay, this, as a matter of pure logic, must count heavily against the applicants.[19]

[20] This is significant because the applicants submit that if the application is granted, they intend in the future, by pursuing the second part of their application, to bring a constitutional claim against the respondents on behalf of the applicants. This may be so, but this does not amend or explain the initial cause of action or why this application was delayed.[20]

[21] The applicants remain steadfast in their submission that if the application is granted, they will bring a constitutional claim against the respondents on behalf of the applicants even though the applicants do not challenge the enacted legislation. This legislation provides that no person shall be liable for damages for any act done in good faith according to such legislation, under the authority, or within the scope of the statutory powers granted.[21]

[22] The respondents sought refuge in this targeted enacted legislation and aver that any claim that the applicants may have had for damages, including constitutional 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.[22]

[23] 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 applicants in this regard) why the applicants first sought a declarator and then only sought to institute a claim for damages should the declarator be granted.[23]

[24] I also say this because it is trite that constitutional damages may not be claimed where a clear and effective alternative remedy for damages was readily available to the applicants. It is difficult to discern the need to obtain a declarator before instituting a constitutional or other claim for damages. It seems that the declaratory relief is claimed to camouflage the true cause of action to circumvent prescription. This must be seen against the canvass of the material before me

---

[19] Hoexter and Penfold (Eds) Administrative Law in South Africa, (Third Edition, 2021) at page 735.
[20] No plausible explanation is advanced for the inordinate delays on the part of the applicants.
[21] Section 22 of the Powers Privileges and Immunities Act, 2004.
[22] The cause of action matters not as the wording caters immunity for any act done in good faith
[23] This could only be because the applicants sought to circumvent the Prescription Act, 68 of 1969.

because it tells that the applicants do not explain, engage with or contextualize in any manner the inordinate delays in this litigation against the respondents.[24]

THE DECLARATOR

[25] 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. 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 a declaratory order 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 true.[25]

[26] 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.[26]

[27] 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. I needed more persuasion to understand how a declarator would advance the matter or have any practical effect on the litigation.[27]

[28] I say this primarily because the academic nature of the relief sought by the declarator becomes apparent considering the following: (a) the constitutional damages claim is prohibited in terms of the enacted immunity legislation; (b) any claim for damages, constitutional or otherwise, has prescribed due to the effluxion of

---

[24] The delays seem to be wished away because of the constitutional nature of the declarator sought by the applicants.
[25] Giant Concerts CC v Rinaldo Investments (Pty) Ltd & others 2013 (3) BCLR 251 (CC) at para 51.
[26] JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others 1996 (12) BCLR 1599 (CC).
[27] The applicants at all material times had the common law remedy for a claim in delict.

time and, (c) the applicants have failed to give the required statutory notice to institute their claims against the respondents.[28]

LIMITATION OF LIABILITY

[29] This targeted legislation excludes liability for all damages, and the exclusion's breadth necessarily limits liability for constitutional damages. The applicants were driven to concede that the common law of delict would have provided them with an effective remedy but for the effect of the provisions of this targeted legislation.[29]

[30] The applicants contend that this targeted legislation excludes only the liability for damages in the common law of delict. They must say so because they want their claim for constitutional damages to be viable. However, this is an improper approach to objective interpretation and shows no regard for the express statutory language.[30]

[31] I say this because this approach would undermine the very purpose of the legislation to render immune any person who acts under parliamentary authority in good faith for the autonomous and effective functioning of that arm of the state. Put another way, interpreting this in any other way would not be a sensible and purposive construction.[31]

[32] The applicants accept that the law of delict would have provided them with an effective remedy but for the effect of this targeted legislation. The wording of the section in the targeted legislation is unambiguous. It provides, among other things, as follows

'….No person is liable for damages or otherwise for any act done in good faith in terms of this Act, or under the authority of a House or committee and within the legal powers of the House or committee, or under any order or summons issued by virtue of those powers…'[32]

[33] The applicants say that by dressing up their claims against the respondents formulated as constitutional damages, this section finds no application. I disagree. The place where the alleged harm occurred does not chameleonically change the

---

[28] Section 3 (1) and 3 (2) of the Legal Proceedings Against Certain Organs of State Act, 40 of 2002.
[29] Section 22 of the Powers Privileges and Immunities Act, 2004 ("The Powers Act").
[30] The wording of the section refers explicitly to damages or otherwise for any act done in good faith.
[31] Chisuse v Director-General Department of Home Affairs 2020 (6) SA 14 (CC) at paras 47-58.
[32] Section 22 of the Powers Privileges and Immunities Act, 2004

cause of action against the respondents and morph the applicants' cause of action into a constitutional cause of action. The conduct complained of is gratuitous violence, and by its very nature, this alleged conduct is a delict in our common law.[33]

PRESCRIPTION

[34] Further, it was argued that the applicants could not be granted condonation for the late filing of their application in these circumstances, even if they had applied for condonation. They did not. As a matter of pure logic, this must be so because if a debt becomes extinguished by prescription, condonation cannot generally be 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.[34]

[35] 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…'[35]

[36] The applicants' 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.[36]

[37] 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. They say this because the initial part of their application is only to seek a declarator. The argument is that this is not an obligation to pay money, deliver goods, or render services.[37]

---

[33] There is nothing extraordinary about the applicant's alleged "gratuitous violence" claims.
[34] Premier of the Western Cape Provincial Government v BL [2012] 1 All SA 465 (SCA), at paras 4 and 15.
[35] Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd 1981 (3) SA 340 (A) at 344E-G.
[36] No distinguishing features of the cause of action contended for were advanced by the applicants.
[37] The applicants attempt in some way to rely on section 39(2) of the Constitution of the Republic of South Africa, 1996.

[38] I remain unpersuaded as our apex court has decided on what comprises a debt in circumstances such as these. I say this because it has even been confirmed that a claim to transfer immovable property in the name of another amounts to debt.[38]

CONSTITUTIONAL DAMAGES

[39] By labelling their claims as ones for constitutional damages, the applicants seek to circumvent the effect of prescription on their claims. The applicant's case is that their constitutional damages claim is the appropriate claim for their relief. However, as I understand our jurisprudence, considering all alternatives, it must be the most appropriate relief.[39]

[40] The rights the applicants seek to protect are adequately provided for in delict. The common law is a powerful vindication of those constitutional rights. This must be so because our constitution is primary, while its influence is indirect because it is perceived through its effects on the legislation and the common law.[40]

[41] 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 applicants. 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.[41]

[42] Thus, in this case, the applicants' difficulty is not that the law of delict is insufficiently protective but rather that the statutory law on prescription and the limitation of liability for acts done under the parliamentary authority preclude a claim in delict. But even if prescription did not apply to a claim for constitutional damages, it would not be just and equitable for the applicants' failures to support an argument that constitutional damages are the most appropriate relief in the circumstances.[42]

[43] 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

---

[38] Ethekwini Municipality v Mounthaven (Pty) Ltd 2019 (4) SA 394 (CC) at para 93.
[39] Residents, Industry House and Others v Minister of Police and Others 2023 (3) SA 329 (CC) at para 118.
[40] Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others 2023 (4) SA 325 (CC) at para 233.
[41] Fose v Minister of Safety and Security 1997 (3) SA 786 (CC).
[42] Their claim in delict prescribed and is excluded by section 22 of the Powers Act.

alternative means of appropriate relief where a claim in delict could more than have adequately compensated the applicants and where that relief itself is an extraordinarily effective and powerful vindication of any constitutional rights that may be in question.[43]

[44] 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 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.[44]

[45] Most significantly, in support of the declaratory relief sought by the applicants, they contend that due to the first and second respondents' orders to remove applicants from the parliamentary processes, the beatings of the applicants followed as a fact. The applicants say that using unbridled force against them at the instruction of the first and second respondents was to frustrate the execution of their duties as members of parliament and was thus unconstitutional and unlawful.[45]

[46] That being said, the papers before me did not contain the facts supporting the conclusions the applicants desired the court to draw. Thus, it is difficult, if not impossible, to discern (let alone decide) from the material before me how the first and second respondents instructed or directed members of the parliamentary protection services and/or the third respondent's members to perform the alleged assaults that form the subject matter of the declaratory relief order sought by the applicants.[46]

THE RULES

[47] The relevant joint rule now indicates that if the presiding officer believes that a member is deliberately contravening a provision of these rules, or that a member is in contempt of or is disregarding the authority of the chair, or that a member's conduct is grossly disorderly, he or she may order the member to withdraw

---

[43] Fose v Minister of Safety and Security, 1997 (3) SA 786 (CC).
[44] Fose v Minister of Safety and Security 1997 (3) SA 786 (CC).
[45] This allegation is not borne out by the papers and is in any event disputed.
[46] These disputes could not be resolved on motion into the benefit of the applicants.

immediately for the remainder of the sitting. Some of the applicants' members refused to withdraw, following valid instructions to do so during these disruptions. They were then removed in terms of a different and discrete rule, which, among other things, provides that if a member refuses to leave when ordered to do so by the presiding officer, the presiding officer may (or must) instruct the '*serjeant-at-arms'* to remove the member forthwith. These rules are not the subject of any frontal challenge by the applicants.[47]

[48] Suppose the '*serjeant-at-arms'* is unable in person to affect the member's removal, the presiding officer may call upon the parliamentary protection services to assist in removing the member and if the member still resists attempts to be removed, the *'serjeant-at-arms'* and the parliamentary protection services may use such force as may be reasonably necessary to overcome any resistance so offered.[48]

[49] Notably, the applicants do not challenge the constitutionality or lawfulness of the above provisions in the rules. Thus, for this application, I must accept that these rules applied to the applicants during these disruptions. It was also common cause (or not materially challenged) that the applicants: (a) disregarded the authority of the first and second respondents; (b) disregarded the order for them to withdraw from the chamber; (c) refused to leave the chamber; and (d) the assistance of the parliamentary protection services and the police was requested for the removal of the applicant members from the chamber so that the parliamentary business could continue without interruption which interruptions had by then endured for some considerable period.[49]

[50] In summary, all the parliamentary rules are merely agreements between the various political parties and their members that regulate and govern the procedures and limitations for democratic debate, participation, and decision-making following the rule of law. This case is, in essence, about the proper functioning of our democracy. The respondents argue that the first applicant's members' actions were unlawful and unconstitutional. This is because they infringed the rights of all the

[47] Joint Rule 14G read with the National Assembly Rule 73.
[48] National Assembly Rule 73.
[49] For the State President to deliver his State of the Nation addresses for 2015 and 2017.

parliamentary members and the rights of all voters in the country by attempting to prevent them from fulfilling their constitutional obligations.[50]

DIGNITY AND FREEDOM

[51] The applicants' fallback position always seems to be that they believe freedom of speech entitles them to ignore the parliamentary rules and the authority of the first and second respondents. That said, it can never be so that free speech becomes so important that it trumps entirely the nature of the parliamentary process and its functions. I touch on but two of these many functions.[51]

[52] It is so that the best possible legislative outcomes are undoubtedly achieved if the parliamentary process admits the expression of the views of all parties, including minority parties.[52]

[53] In our new democracy, parliamentary members enjoy freedom of speech, but this right cannot be absolute. It is governed and regulated by parliamentary rules and regulations.[53]

[54] Thus, the applicants do not have the right to reject the authority of the first and second respondents and the parliamentary rules. Put another way, the applicants do not have the right to disrupt parliamentary proceedings or to resort to self-help. Such conduct does not fall within the scope and duties of parliamentary members.[54]

[55] According to the foundations of our constitutional dispensation, we are all obliged to respect and adhere to constitutional supremacy and the rule of law. In these circumstances, it would not be legally permissible for the applicants to assert their rights to some species of constitutional protection to excuse their conduct.[55]

[56] During these parliamentary disruptions, the first and second respondents exercise joint control and authority over the parliamentary precinct. The members of the security services may only enter or remain in the precinct to perform any policing function with the permission and under the authority of the first or second respondents.[56]

---

[50] The then President of South Africa was unable to deliver his presidential speeches.
[51] The applicants' pilot for an unbridled freedom of speech without any limitations.
[52] Healthy and respectful debate must be encouraged.
[53] Sections 58 (1) and 71(1) of the Constitution provide that members of Parliament have freedom of speech in Parliament.
[54] In any event, the rules are not subject to challenge in this application.
[55] The applicants were always obliged to respect the rules which govern the parliamentary process.
[56] Section 3 and Section 4 of the Powers Act.

[57] To enable parliamentary members to carry out their constitutional functions effectively, specific targeted legislation was enacted to provide for further privileges and immunities for parliamentary members to protect the authority, independence and dignity of the legislatures and their members.[57]

[58] Following this targeted legislation, a person who causes or participates in a disturbance in the chamber during a parliamentary session may be arrested and removed from the chamber on the order of the first or second respondent or a person designated by them, a staff member, or a member of the security services.[58]

[59] The applicants do not complain that they were removed from the parliamentary processes when they caused the disruptions. The alleged gratuitous violence is the focus, not the removal itself.[59]

[60] Thus, the rights at issue are dignity and freedom. The alleged limitation of the applicants' parliamentary privileges and duty to hold the executive to account are not grounds on which they claim relief. The law of delict is the common law provision that gives effect to the rights to dignity and bodily integrity. The applicants do not dispute this, and they do not suggest that the common law is deficient or in need of development.[60]

THE STATE OF THE NATION ADDRESS IN 2015

[61] The applicants made it publicly known that they intended to cause disruptions to these parliamentary proceedings from the outset. Given the planned disruption of proceedings and that parliamentary staff did not have the requisite training, capacity, or skillset to remove members from these proceedings, the first and second respondents decided to second members of the third respondent who were specifically trained in crowd control to eject a member who refused to leave when ordered to do so.[61]

[62] These members of the third respondent were instructed to act upon the instructions of the first and second respondents under guidance from the

---

[57] The Powers Act was enacted in terms of sections 58 (2) and 71 (2) of the Constitution.
[58] Section 7(e), Section 7 (f), Section 11 and Section 13 of the Powers Act.
[59] The issue is the alleged gratuitous violence. This cause of action falls squarely within our common law of delict.
[60] The applicants do not make out a case of why the common law of delict is an inadequate remedy in these circumstances.
[61] This was done as a preventative measure.

parliamentary protection services. These police members were specifically trained to restrain and remove misbehaved persons while minimizing the risk of injury.[62]

[63] Within a few minutes of the first address, the applicant's members repeatedly raised points of order to disrupt the parliamentary process. Despite repeated requests that the proceedings not be interrupted, the applicants' members continued unabated. Despite all efforts to maintain order, the applicant's members continued to disrupt the proceedings in a determined and dedicated effort to disrupt the parliamentary process. When all attempts to regain control of this sitting failed, these trouble-causing members were removed by members of the third respondent.[63]

[64] Thus, it is argued that legitimate steps were taken to remove the applicants' members who caused these disruptions. What was telling in this unfortunate process was that after the removal of the applicants' members, they publicly announced that they had assaulted parliamentary staff and threatened to brandish firearms in future sittings. In a direct response to this campaign of disruptions, which was escalating in intensity, new rules were adopted, and an express provision was made for removing a member who refused to leave when instructed to do so.[64]

[65] In their replying affidavits, the applicants did not advance any facts demonstrating that any assaults upon them (which assaults were denied) resulted from any instruction to be ejected from the parliamentary sittings. By contrast, they publicly announced that they were the ones who intended to and did act with violence and assaulted members of the third respondent.[65]

THE STATE OF THE NATION ADDRESS IN 2017

[66] Before this address, the first applicant made several media statements that it intended to disrupt these proceedings again. Indeed, these disruptions occurred even before the proceedings officially commenced. Despite repeated requests to refrain from doing so, spurious points of order were raised, and these disruptions

---

[62] These allegations were not materially engaged with by the applicants.
[63] The applicants' members do not dispute that they were causing disruptions.
[64] Parliament also adopted a Standard Operating Procedure to affect such removals.
[65] Thus, no case is made out regarding the State of the Nation address in 2015.

occurred for more than an hour, unabated. A ruling was made that no further points of order would be permitted.[66]

[67] Despite this ruling, the applicant's members continued to shout down these instructions, and the leader of the first applicant was then ordered to leave. The leader of the first applicant refused to leave. The allegation is made that it was the members of the first applicant who assaulted the respondents' staff by using their hard hats. Undoubtedly, from the material before me, it is apparent that some of the members of the first applicant indeed attacked and injured those attempting to restore order so that these proceedings could commence. Put another way, there is no evidence supporting the applicants' allegations that any of the respondents ordered them to be injured in any manner. There was no evidence of gratuitous violence.[67]

[68] Thus, there is no evidence that any gratuitous violence was used against the applicant's members and that their constitutional rights were violated in any way or that the first and second respondents instructed that they be '*unconstitutionally'* assaulted.[68]

THE THIRD RESPONDENT

[69] The applicants sought no relief against the third respondent. This respondent advances that even if the applicants amended their notice of motion for a declaration and damages against it, this species of relief would be legally unsustainable, and liability could not ensue. I agree with this as a matter of law, and in any event, the applicants do not dispute this in reply.[69]

[70] The applicants' case is squarely against the alleged conduct of the staff of the parliamentary protection services. Thus, the applicants do not intend to pursue any claim against the third respondent. I find it difficult to discern why the third respondent was joined in these proceedings.[70]

[71] By elaboration and for clarity (which may impact the outcome's reasoning regarding the first and second respondents), the relief claimed in the two parts of the application was not independent and discrete as they both rested on a finding of

---

[66] This ruling was made by the Speaker of the House.
[67] The applicants' papers do not make out a case in this connection.
[68] No case was made out for this relief on the papers.
[69] No case at all was made out against the third respondent.
[70] The third respondent had no direct or substantial interest in the relief sought by the applicants.

unlawfulness in respect to the same conduct. Therefore, it was argued that the two-part relief approach should not be artificially delinked to bolster a claim for constitutional damages through declaratory relief. On this, I also agree.[71]

[72] A declaration of liability would produce no tangible result in circumstances where the applicants are unlikely to prove a likelihood of recurrence of the alleged harm to warrant the declaratory relief. If the applicants cannot sustain a case for damages in delict (or constitutional damages) and seek no other consequential relief, it would be difficult to discern how a declarator would assist the applicants' 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.[72]

STATUTORY NOTICE

[73] 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 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.[73]

[74] The obligatory prior notice must also comply with strictly imposed time limits. If these time limits and other legislative requirements are not complied with, the party in default may seek condonation for non-compliance. The respondents aver that the claim for constitutional damages, as will ultimately be contended for by the applicants, falls to be characterized as a '*debt*' as set out in the legal proceeding's legislation.[74]

[75] Thus, it was submitted on behalf of the respondents that the applicants have failed to comply with these mandatory notices, and their claim for constitutional damages is now stillborn. This is because the respondents have not consented in

---

[71] There was no legitimate basis for the two-stage approach adopted by the applicants.
[72] J T Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others 1997 (3) SA 514 (CC) at para 15.
[73] Section 3 (1) and 3 (2) of the Legal Proceedings Against Certain Organs of State Act, 40 of 2002.
[74] Sections 1 (1) (iii) of the Legal Proceedings Against Certain Organs of State Act 40 of 2002.

writing to the institution of the legal proceedings without such notice having been given by the applicants.[75]

[76] I have already dealt with a portion of this argument as it was advanced in connection with the issue of prescription and the definition of the word debt. A similar wide definition of the word debt appears in this legislation. 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 certain informative requirements.[76]

[77] It seems that on the papers presented before me, the applicants have not adequately engaged with or given a judicially acceptable reason why they did not comply with this legislation and the reason why they did not give this statutory notice, which would have been a relatively simple exercise by their legal representatives.[77]

CONCLUSION AND COSTS

[78] The respondents seek a punitive costs order against the applicants. They say this application was fatally flawed. Further, they allege that several unfounded serious claims and allegations were made against them. In addition, they say the application was unjustified, vexatious, impermissibly delayed and moot. They say a punitive costs order is warranted.[78]

[79] The applicants submit that more emphasis must be placed on this application's constitutional character. They say this because these proceedings essentially sought to vindicate fundamental rights in connection with certain 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 principals dictate whether the matter has a constitutional ingredient

[75] The applicants were obliged to give the respondents written notice within six months from when the debt became due.
[76] This notice was not given to the respondents in any form, and no consent was granted at the instance of the respondents.
[77] No reasons were advanced why this statutory notice was not given to the respondents,
[78] Turnbull-Jackson v Hibiscus Court Municipality and Others 2014 (11) BCLR 1310 at para 35

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.[79]

[80] Further, an analysis of some of the decided authorities in dealing with proceedings of this nature demonstrates that the more prevalent approach is that the successful party is entitled to its costs, with the court always retaining the discretion to make an order that seems just and equitable, considering the position of the party against whom any such costs order is levied. At the end of the day, 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, without further evidence, I am not satisfied that a punitive costs order should be granted. In my view, a contextual approach must, of necessity, be adopted.[80]

[81] However, I find that the disguised and chameleonic approach of dressing up the true cause of action was simply an attempt to circumvent several statutory hurdles, and this application was not infused with any true constitutional ingredients.[81]

[82] A new tariff of costs regime came into operation a few days before this matter was heard, thus finding application. This new regime has no retrospective effect, but it does mean that some of the costs incurred in this matter would have been before the promulgation of the new rule concerning the tariff of costs.[82]

ORDER

[83] The following order is issued:

1. The application is dismissed.

2. The first applicant is ordered to pay the application costs.

3. The costs shall be on the scale between party and party, as taxed or agreed.

4. The costs shall include the costs of two counsel where so employed.

5. The costs of senior counsel shall be on scale C.

---

[79] Biowatch Trust v Registrar Genetic Resources 2009 (6) SA 232 (CC).
[80] A holistic approach must be adopted with a view to assess the different positions adopted by the parties.
[81] The "Biowatch" principle does not find application.
[82] Rule 67 A came into operation on 12 April 2024. (GN R4477 of 8 March 2024) (GG 502720 of 8 March 2024).

6. The costs of junior counsel shall be on scale B.

7. The costs incurred before 12 April 2024 shall be determined by the taxing master unless otherwise agreed.

_____

E D WILLE

(CAPE TOWN)

COURT APPEARANCES:

FOR THE APPLICANTS: -	K PREMHID S MOHAMMED
FOR THE FIRST AND SECOND RESPONDENTS: -	M LE ROUX SC M VASSEN
FOR THE THIRD RESPONDENT: -	E DE VILLIERS-JANSEN SC U NAIDOO