

# Constitutional Damages – a Stagnant or a Changing Landscape?

A Mukheibir\*

Online ISSN  
1727-3781

**P·E·R**

Pioneer in peer-reviewed,  
open access online law publications

## Author

André Mukheibir

## Affiliation

Nelson Mandela University,  
South Africa

## Email

andre.mukheibir@mandela.ac.za

## Date Submitted

04 April 2023

## Date Revised

22 August 2023

## Date Accepted

22 August 2023

## Date Published

23 November 2023

## Guest Editors

Prof M Carnelley  
Mr P Bothma

## Journal Editor

Prof Christa Rautenbach

## How to cite this contribution

Mukheibir A "Constitutional Damages – a Stagnant or a Changing Landscape?" *PER / PELJ* 2023(26) - DOI <http://dx.doi.org/10.17159/1727-3781/2023/v26i0a15901>

## Copyright



## DOI

<http://dx.doi.org/10.17159/1727-3781/2023/v26i0a15901>

## Abstract

Section 38 of the *Constitution of the Republic of South Africa*, 1996 provides for appropriate relief where a right in the Bill of Rights has been infringed. In *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) the Constitutional Court raised the question of "appropriate relief" with reference to section 7(4)(a) of the *Constitution of the Republic of South Africa Act* 200 of 1993. In the *Fose* case the plaintiff claimed "punitive constitutional damages" together with delictual damages. While the court did not rule out an award for damages for the infringement, it did not award constitutional damages in that instance, specifically because the plaintiff claimed "punitive constitutional damages". The *Fose* case has been followed by most of the cases heard in the years after *Fose* was decided. In most instances where constitutional damages were claimed the courts, following *Fose*, have not awarded constitutional damages where delictual damages were available. The rules relating to constitutional damages are casuistic and it is submitted that the principle of subsidiarity could form a foundational principle to solve the problem of casuistry in this regard.

## Keywords

Appropriate relief; constitutional damages; delictual damages; principle of subsidiarity.

.....

## 1 Introduction

Section 38 of the Bill of Rights provides as follows:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.<sup>1</sup>

The question of what constitutes "appropriate relief" was first raised in *Fose v Minister of Safety and Security*<sup>2</sup> with reference to section 7(4)(a) of the interim Constitution.<sup>3</sup> In that instance constitutional damages were claimed for the first time.<sup>4</sup> In the decades since *Fose* a number of cases were decided in which the plaintiffs claimed constitutional damages; in some constitutional damages were awarded and in others not, the courts in most of those instances having opted for delictual damages.<sup>5</sup> In his unpublished doctoral thesis Kika states that "[t]he co-existence of constitutional damages with delictual damages is one of the most contentious issues in the constitutional damages debate."<sup>6</sup>

Insofar as the availability of constitutional damages is concerned, it has been noted that "[d]ecisions of our courts are not coherent on the question when an award of constitutional damages should be approved by a court ..."<sup>7</sup>. The availability of constitutional damages has also been described as having to "necessarily be determined casuistically".<sup>8</sup>

The aim of this article is to explore the availability of constitutional damages in the decades after *Fose*, with a special focus on two recent Constitutional Court cases, and to establish whether there has indeed been any change in the availability of this remedy.<sup>9</sup> The question of what constitutes "appropriate relief" will also be explored.

---

\* André Mukheibir. BMus BA Hons HDE BJuris LLB DJuris. Professor, Nelson Mandela University Email: andre.mukheibir@mandela.ac.za. ORCID: <https://orcid.org/0000-0002-7277-2910>.

<sup>1</sup> Section 38 of the *Constitution of the Republic of South Africa*, 1996 (the Constitution).

<sup>2</sup> *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC).

<sup>3</sup> *Constitution of the Republic of South Africa Act 200 of 1993* (the interim Constitution).

<sup>4</sup> See the discussion in 2.1 below.

<sup>5</sup> See 2 below.

<sup>6</sup> Kika *Fashioning Judicial Remedies* 126. Also see Price 2015 *Acta Juridica* 313-335

<sup>7</sup> Jafta J in *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg v Minister of Police* 2023 3 SA 329 (CC) para 128. Also see Zitzke 2020 *Litnet* 790-793.

<sup>8</sup> *Member of the Executive Council: Welfare v Kate* 2006 4 SA 478 (SCA) para 25.

<sup>9</sup> *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg v Minister of Police* 2023 3 SA 329 (CC) (hereafter *Residents*); *Thubakgale v Ekurhuleni Metropolitan Municipality* 2022 8 BCLR 985 (CC) (hereafter *Thubakgale*).

Reference will be made to the principle of subsidiarity insofar as it impacts on the availability of constitutional damages and whether it can be a foundational principle to solve the question of casuistry.

## 2 Constitutional damages - *Fose to Ngomane*

### 2.1 *Fose v Minister of Safety and Security*<sup>10</sup>

Fose sued the Minister of Safety and Security for damages as a result of harm which he sustained arising out of a series of assaults alleged to have been perpetrated by members of the South African Police Force.<sup>11</sup> The plaintiff alleged that a number of his constitutional rights<sup>12</sup> had been infringed and thus claimed delictual damages; in addition he claimed "punitive constitutional damages".<sup>13</sup> The Minister raised an exception to the claim of constitutional damages, on the following grounds:<sup>14</sup>

- (a) an action for damages in the nature of constitutional damages does not exist in law; and/or
- (b) an order for the payment of damages does not qualify as appropriate relief as contemplated in Section 7(4) (a) of the Constitution.

The High Court<sup>15</sup> upheld the exception but allowed leave to appeal to the Constitutional Court.<sup>16</sup> Van Schalkwyk J held, quoting *Esselen v Argus Printing and Publishing Co Ltd*,<sup>17</sup> that punishment was the function of criminal law.<sup>18</sup> Furthermore, while there was no delict of torture, the delictual claim could be brought within the ambit of assault.<sup>19</sup>

The Constitutional Court per Ackerman J held that in these circumstances (the fact that that plaintiff would be entitled to a "substantial sum of [delictual] damages", as well as the "problems inherent in punitive constitutional damages") the plaintiff was not entitled to recover punitive constitutional damages.<sup>20</sup>

The court recognised that appropriate relief in section 7(4) could include a declaration of rights, an interdict, and a mandamus "or such other relief as

---

<sup>10</sup> *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) (hereafter *Fose*). See also Dendy "Damages" para 9; Klopper *Damages* 250 fn 158, Loubser and Midgley *Law of Delict* 36-40; Neethling and Potgieter *Law of Delict* 22 fn 166, Price 2015 *Acta Juridica* 324 and further.

<sup>11</sup> *Fose* para 11.

<sup>12</sup> *Fose* para 15.

<sup>13</sup> *Fose* para 13.

<sup>14</sup> *Fose* para 14.

<sup>15</sup> *Fose v Minister of Safety and Security* 1996 2 BCLR 232 (W).

<sup>16</sup> *Fose* paras 3-4 with regard to the procedure to appeal directly to the Constitutional Court.

<sup>17</sup> *Esselen v Argus Printing and Publishing Co Ltd* 1992 3 SA 764 (T) para 771H.

<sup>18</sup> *Esselen v Argus Printing and Publishing Co Ltd* 1992 3 SA 764 (T) para 771H.

<sup>19</sup> *Fose* para 16.

<sup>20</sup> *Fose* para 73.

may be required to ensure that the rights enshrined in the Constitution are protected and may be enforced."<sup>21</sup> Ackerman J noted that the courts may have to fashion new remedies in the future to ensure the enforcement and protection of constitutional rights.<sup>22</sup>

The court moreover confirmed that it was concerned only with the rights infringed in the present case and only with regard to the claim for constitutional damages, and not to decide on the matter of whether the remedy of constitutional damages generally exists in law.<sup>23</sup>

The court went into the matter of punitive and constitutional damages in considerable detail, discussing comparative law<sup>24</sup> and noting that there were differences between these foreign jurisdictions and South African law.<sup>25</sup>

In spite of these differences, Ackermann J held that

[T]here is no reason in principle why 'appropriate relief' should not include an award of damages, where such an award is necessary to protect and enforce Chapter 3 rights. Such awards are made to compensate persons who have suffered loss as a result of the breach of a statutory right if, on a proper construction of the statute in question, it was the legislature's intention that such damages should be payable and it would be strange if damages could not be claimed for, at least, loss occasioned by the breach of a right vested in the claimant by the Supreme law.<sup>26</sup>

Ackermann furthermore pointed out that the common law of delict is flexible and can be developed with due regard to the spirit, purport and objects of the Bill of Rights.<sup>27</sup>

Regarding punitive damages Ackermann J, referring to Van der Walt, held that it "is for criminal law to punish and thereby discourage such conduct."<sup>28</sup>

He noted that, for various reasons, a constitutional remedy which had punishment or deterrence as its purpose would, even for the most ardent

---

<sup>21</sup> Fose para 19.

<sup>22</sup> Fose para 19.

<sup>23</sup> Fose para 20. It appears as if the court is supporting a casuistic approach. See *Member of the Executive Council: Welfare v Kate* 2006 4 SA 478 (SCA) para 25. Also see the discussion in 2.4 below.

<sup>24</sup> The court discussed the law in the following jurisdictions: United States (Fose paras 25-37); Canada (paras 38-41); United Kingdom (paras 42-45); Trinidad and Tobago (para 46); New Zealand (paras 47-49); Ireland (para 50); India (para 51); Sri Lanka (para 52); Germany (para 53); *European Convention for the Protection of Human Rights* (para 54).

<sup>25</sup> These differences are discussed in Fose para 58.

<sup>26</sup> Fose para 60. Also see Price 2015 *Acta Juridica* 324-325.

<sup>27</sup> Fose para 60.

<sup>28</sup> Fose para 63, quoting Van der Walt *Delict* 5-7. Also see Klopper *Damages* 250, where he states that an award for constitutional damages over and above delictual damages would be tantamount to an award for punitive damages.

supporters thereof, not be acceptable, as the remedy contained various "anomalous and unsatisfactory features".<sup>29</sup> Some reasons are mentioned here:<sup>30</sup>

- (a) it provides an unjustifiable windfall to the plaintiff;
- (b) punitive damages exact punishment without the protection provided by the criminal justice system and could lead to "multiple sanctioning"; and
- (c) where the defendant is the government, it is almost inevitable that the costs will be shifted onto the "public at large".

With regard to (c) Ackermann J added that there were "multifarious demands on the public purse and the machinery of government that flow from the urgent need for economic and social reform."<sup>31</sup> Punitive damages would not be appropriate and these resources could be better used, particularly in a country with scarce resources, and where the plaintiffs had already been fully compensated.<sup>32</sup>

The court thus upheld the exception and dismissed the plaintiff's appeal regarding the claim for constitutional punitive damages.<sup>33</sup>

Zitzke argues as follows:<sup>34</sup>

*Hidden in Fose is a vote of support for the principle of subsidiarity. If a constitutional right has been infringed and there is no legislation, the common law is relied on. Only if the common law then fails to provide adequate relief will a litigant be able to claim constitutional damages. Only once a litigant has reached the end of the 'sources rope' can constitutional damages be claimed. (Own emphasis)*

The influence of *Fose* continues to permeate case law, as will become evident in the case discussions below.

## **2.2 *Olitzki Property Holdings v State Tender Board*<sup>35</sup>**

The facts of the case are briefly as follows:<sup>36</sup>

The provincial government of Gauteng planned on moving from Pretoria to Johannesburg and invited tenders for office accommodation to house the

---

<sup>29</sup> *Fose* para 65.

<sup>30</sup> See *Fose* para 65 (a)-(l) for the full list.

<sup>31</sup> *Fose* para 72, quoting Didcott J in *S v Vermaas; S v Du Plessis* 1995 3 SA 292 (CC) para 16.

<sup>32</sup> *Fose* para 72.

<sup>33</sup> *Fose* para 75 and 76.

<sup>34</sup> Zitzke 2015 CCR 289.

<sup>35</sup> *Olitzki Property Holdings v State Tender Board* 2001 3 SA 1247 (SCA) (hereafter *Olitzki*).

<sup>36</sup> *Olitzki* para 4.

various departments. The plaintiff, having obtained an option to buy a building, tendered to provide office space. The tender was not accepted. The plaintiff thereafter sued the state tender board and the provincial government for damages, alleging that the state tender board and the provincial government had misconducted themselves. The damages claimed by the plaintiff were for losses incurred resulting from the defendant's unlawful conduct. The plaintiff claimed for the loss of profits it would have made from rentals had the tender been successful.

The Supreme Court of Appeal had two questions to consider, namely<sup>37</sup> (1) whether the provision dealing with procurement administration in terms of the 1993 Constitution<sup>38</sup> created a right to claim damages for lost profit by a party who claimed to have suffered loss as a result of its infringement, and (2) whether constitutional damages could be claimed for loss of profits.

The High Court, per Eloff JP, held that both claims were unsustainable in law.<sup>39</sup> For the purposes of this article only claim B (constitutional damages) will be discussed.

On appeal to the Supreme Court of Appeal the plaintiff claimed that the profit it lost must be awarded to it in order to assert the Constitution.<sup>40</sup> Cameron JA held that the judgment in *Fose* "casts an oblique but significant shadow across the plaintiff's path."<sup>41</sup> As pointed out by the High Court, the plaintiff was not in terms of the common law entitled to a right to be awarded the tender; the common law remedy of review was available should the plaintiff have been aggrieved by the award.<sup>42</sup>

Cameron JA noted that the plaintiff was in effect claiming a windfall, "and does so on the premise that its gain has also the public dimension of constitutional vindication."<sup>43</sup> Cameron JA further noted with reference to *Fose* that this for this award to have any effect on public officials they would have to be substantial, thus increasing the windfall and perpetuating the anomaly, and in addition it raised policy questions such as the fact that it strained the public purse.<sup>44</sup>

Cameron JA found that these "constitute powerful reasons of policy" that mitigated against the "constitutional entitlement to damages" in the terms

---

<sup>37</sup> *Olitzki* para 1.

<sup>38</sup> The interim Constitution.

<sup>39</sup> *Olitzki* para 8.

<sup>40</sup> *Olitzki* para 40. The plaintiff claimed that its option over the building did not last long enough; hence it did not make use of review proceedings.

<sup>41</sup> *Olitzki* para 40.

<sup>42</sup> *Olitzki* para 40.

<sup>43</sup> *Olitzki* para 41.

<sup>44</sup> *Olitzki* para 41. Also see the quotation from *Fose* para 72, quoted in para 41 of the present case.

the plaintiff claimed.<sup>45</sup> Cameron JA furthermore stated that it was not necessary to decide that loss of profits could never be claimed. In this case the question of out-of-pocket expenses was not before the court. Nevertheless, Cameron JA concluded that for the lost profit claimed by the plaintiff a constitutional remedy would not be appropriate.<sup>46</sup>

The plaintiff's claim was therefore dismissed.<sup>47</sup>

### **2.3 *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*<sup>48</sup>**

This case was concerned with an application for leave to appeal against a decision of the Supreme Court of Appeal.<sup>49</sup> The Court ordered the State to compensate the respondent, Modderklip, for the violation of its property rights in terms of section 25(2) read with section 7(2)(3) of the Constitution. Furthermore, the equality rights under sections 9(1)5 and 9(2)6 of Modderklip had also been violated. In addition the rights of unlawful occupiers of the Modderklip property in terms of section 26 had also been violated.<sup>50</sup>

Modderklip farm had been experiencing an influx of unlawful dwellers over a period of time. Reporting them to the police for arrest and prosecution was futile, as they would return as soon as they had been released from prison. Modderklip approached the municipality, but to no avail. At one stage there were 80 000 dwellers and it was impossible to move them.

The Supreme Court of Appeal awarded constitutional damages to Modderklip.<sup>51</sup> It held that courts "have a duty to mould an order that will provide effective relief to those affected by a constitutional breach." It went further by stating

The only appropriate relief that, in the particular circumstances of the case, would appear to be justified is that of 'constitutional' damages, i.e. damages due to the breach of a constitutionally entrenched right. No other remedy is apparent.<sup>52</sup>

---

<sup>45</sup> *Olitzki* para 42.

<sup>46</sup> *Olitzki* para 42.

<sup>47</sup> *Olitzki* para 43.

<sup>48</sup> *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) (hereafter *Modderklip*). See Dendy "Damages" para 10.

<sup>49</sup> *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 6 SA 40 (SCA) (hereafter *Modderklip SCA*).

<sup>50</sup> The factual background to the case is well-known and will not be discussed here in detail. It is set out in the judgment of Langa ACJ (as he was) in *Modderklip* paras 2-9.

<sup>51</sup> *Modderklip* para 68.

<sup>52</sup> *Modderklip* para 20, quoting *Modderklip SCA* para 43 (fn 33).

The Supreme Court of Appeal held, furthermore, that under the circumstances the return of the land to Modderklip was not feasible.<sup>53</sup> By ordering the State to pay damages it ensured that the occupiers could remain on the land. The Supreme Court of Appeal held, moreover, that the State might expropriate the land and that Modderklip might receive compensation for the past use of the land.<sup>54</sup>

The Constitutional Court had regard to several factors to determine what would constitute appropriate relief.<sup>55</sup> It also considered the "general tone and purpose of legislation enacted to govern evictions, read with the relevant constitutional provisions."<sup>56</sup>

Langa ACJ further noted that the relief given by the Supreme Court of Appeal had been foreshadowed in *Fose*, when it held that in principle appropriate relief could also include an award for damages.<sup>57</sup>

The state held that a declaratory order would have been sufficient. Langa ACJ held that this could go some way toward assisting Modderklip, and it could even bring a delictual action against the state;<sup>58</sup> however, after its long history of attempting to relieve its property from unlawful occupation, it needed something "more effective" than a declaration of rights.<sup>59</sup>

For the purposes of this article, the relevant parts of the order of the court are as follows:<sup>60</sup>

- (a) the applicant is entitled to payment of damages by the Department of Agriculture and Land Affairs; and
- (b) the damages are to be calculated in terms of the Expropriation Act.<sup>61</sup>

The court in this case held that while delictual damages could be claimed in that instance, constitutional damages would be a more effective remedy.<sup>62</sup>

According to De Vos, constitutional damages were granted here as the plaintiff was performing the duty of the state.<sup>63</sup>

---

<sup>53</sup> *Modderklip* para 20.

<sup>54</sup> *Modderklip* para 20.

<sup>55</sup> *Modderklip* para 54.

<sup>56</sup> *Modderklip* para 55.

<sup>57</sup> *Modderklip* para 57 referred to *Fose* para 60, where the court noted that in certain circumstances damages would be an appropriate remedy.

<sup>58</sup> *Modderklip* para 60.

<sup>59</sup> *Modderklip* para 60.

<sup>60</sup> *Modderklip* para 21, quoting *Modderklip* SCA para 43.

<sup>61</sup> *Expropriation Act* 63 of 1975.

<sup>62</sup> *Modderklip* para 99. See para 58, where it was held by Langa ACJ (as he then was), with reference to *Fose* para 69, that appropriate leave "must necessarily be effective".

<sup>63</sup> De Vos and Freedman *South African Constitutional Law* 461.



## 2.4 *Member of the Executive Council: Welfare v Kate*<sup>64</sup>

This case concerned a failure on the part of the Department of Welfare to process the plaintiff's application for a disability grant timeously. What should have been a waiting period of three months ended up being 40 months, without any explanation, before the application was approved. Eventually the plaintiff, Kate, was informed that her application had been successful. She received monthly payments and with the first payment she received R6 000 of the amount that had accrued and thereafter nothing. Again she was not given any explanation. She did not receive the balance of the accrual and interest on the amount. An application was launched in the High Court<sup>65</sup> for these amounts but the accrual was paid before the matter went to court. The issue before the court was whether she was entitled to interest on the accrual. The High Court ordered the defendant to pay the interest. The defendant was granted leave to appeal to the Supreme Court of Appeal

The court identified the real issue of the appeal as whether Kate was entitled to the interest from the date of application to the date on which she was notified that the payment had been made.<sup>66</sup> The court held that the interest during that period did not accrue "on ordinary principles" because the debt was not yet due.<sup>67</sup> Instead the interest for that period was "claimed and awarded as a measure of constitutional damages for the unreasonable delay that Kate was constrained to endure."<sup>68</sup>

The court held that the fact that the Department of Welfare had acted "in breach of its constitutional obligations" was not contentious. The question of whether an award of damages was "an appropriate remedy" would be contentious.<sup>69</sup> With reference to *Fose* the court noted that "in principle monetary damages are capable of being awarded for a constitutional breach."<sup>70</sup> Reference was also made to *Modderklip*.<sup>71</sup>

---

<sup>64</sup> *Member of the Executive Council: Welfare v Kate* 2006 4 SA 478 (SCA) (hereafter *Kate*). See paras 131 and further. The courts also awarded constitutional damages in circumstances similar to *Kate* in *Mahambehlala v MEC for Welfare, Eastern Cape* 2001 1 SA 342 (SE) and *Mbanga v MEC for Welfare, Eastern Cape* 2002 1 SA 359 (SE). These latter two cases are not discussed here. Also see Dendy "Damages" para 10 fn 1.

<sup>65</sup> *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 1 SA 141 (SECLD).

<sup>66</sup> *Kate* para 17.

<sup>67</sup> *Kate* para 17.

<sup>68</sup> *Kate* para 17.

<sup>69</sup> *Kate* para 23.

<sup>70</sup> *Kate* para 23. *Fose* para 60, quoted in 2.1 above, noted that in certain circumstances damages would be an appropriate remedy.

<sup>71</sup> *Kate* para 24.

The court held that in this particular case it was not called upon to decide whether constitutional damages were available in general; instead the question of whether they were available

*must necessarily be determined casuistically*<sup>72</sup> with due regard to ... the nature and relative importance of the rights that are in issue, the alternative remedies that might be available to assert and vindicate them, and the consequences of the breach for the claimant concerned.<sup>73</sup> (Own emphasis)

The appellant submitted that Kate could make use of delictual remedies that are "sufficiently restorative of any loss she suffered as a result of the breach of constitutional duties", rather than constitutional damages.<sup>74</sup>

The question raised by the submission, according to Nugent JA, was not so much whether constitutional damages were an appropriate remedy, but rather whether a constitutional remedy should be granted at all.<sup>75</sup> The "infusion of constitutional normative values" into delictual principles "plays a role in protecting constitutional rights, albeit indirectly". Furthermore, delictual remedies could be extended so as to include state liability. However, Nugent JA held, the relief provided for in section 38 was not "a remedy of last resort, to be looked at only if there is alternative – and indirect – means of asserting and vindicating constitutional rights".<sup>76</sup> He stated that while the availability of a delictual remedy was a possibility that could be borne in mind when deciding whether to award constitutional damages, it was not decisive;<sup>77</sup> there would be instances in which the "direct assertion and vindication of constitutional rights would be required."<sup>78</sup>

The fact that the public purse might be depleted was a possible factor which could mitigate against an award for (constitutional damages), however Nugent JA held that this conduct was unlawful and that concern over the public purse was not a reason to withhold a remedy.<sup>79</sup>

Nugent JA came to the conclusion that the only appropriate remedy in this case would be to award constitutional damages.<sup>80</sup> The purpose of these damages would be to compensate Kate for the breach of her right.<sup>81</sup> In relation to computing the damages to be awarded, the court held that while she had not suffered financial loss in the sense of loss of interest (as she

---

<sup>72</sup> *Kate* para 25. Also see *Fose* para 23, where the court held that its decision was made with regard to the facts of that case, and not to decide about the availability of constitutional damages in general.

<sup>73</sup> *Kate* para 25.

<sup>74</sup> *Kate* para 26.

<sup>75</sup> *Kate* para 27.

<sup>76</sup> *Kate* para 27.

<sup>77</sup> See the *Residents* and *Thubakgale* cases and the discussion in 3.

<sup>78</sup> *Kate* para 27.

<sup>79</sup> *Kate* para 32.

<sup>80</sup> *Kate* para 33.

<sup>81</sup> *Kate* para 33.

would not have invested the money), she was "held in poverty ... a cursed condition".<sup>82</sup> This also amounted to an infringement of her right to dignity. The court held that she should be awarded the equivalent of interest to be paid when money was unlawfully withheld, provided that it was not more than the capital amount.<sup>83</sup>

De Vos notes that this is an instance of constitutional damages being payable where the compensation was already owed to the plaintiff.<sup>84</sup>

## **2.5 *Minister of Police v Mboweni***<sup>85</sup>

This case concerned a case of assault by fellow inmates on Mahlathi, when he was detained at a local police station. During the course of his assault, the other inmates had been making a noise, so as not to be heard by the police. Mr Mahlathi was eventually released but died five days later.

The two respondents *in casu* were the mothers of Mr Mahlathi's children, who claimed damages based on the fact that the children's "right to parental care as provided for in Section 28(1) (b) [of the Constitution] was impaired upon when their father died as a result of 'the unconstitutional conduct.'"<sup>86</sup>

The High Court awarded delictual damages for loss of support (agreed upon by the parties)<sup>87</sup> as well as constitutional damages.<sup>88</sup> Insofar as the quantum of damages was concerned, the matter was referred to trial.<sup>89</sup>

The Minister appealed the award of constitutional damages.

The court considered both *Modderklip* and *Kate* as the only cases in which constitutional damages had hitherto been awarded, but that the facts of the present case differed from those cases.<sup>90</sup> Wallis JA noted that upholding the judgment of the High Court would "break new ground",<sup>91</sup> which would require "careful consideration of the legal basis for the claim and the reasons for holding that constitutional damages are the appropriate remedy to be afforded to the claimants."<sup>92</sup>

In the present case the parties had not pleaded the facts necessary to determine an appropriate remedy.<sup>93</sup> *Fose*, *Modderklip* and *Kate* showed

---

<sup>82</sup> *Kate* para 33.

<sup>83</sup> *Kate* para 33.

<sup>84</sup> De Vos and Freedman *South African Constitutional Law* 462.

<sup>85</sup> *Minister of Police v Mboweni* 2014 6 SA 256 (SCA) (hereafter *Mboweni*).

<sup>86</sup> *Mboweni* para 3.

<sup>87</sup> *Mboweni* para 2.

<sup>88</sup> *Mboweni* para 3.

<sup>89</sup> The case was reported as *M v Minister of Police* 2013 5 SA 622 (GNP).

<sup>90</sup> *Mboweni* para 4.

<sup>91</sup> *Mboweni* para 4.

<sup>92</sup> *Mboweni* para 4.

<sup>93</sup> *Mboweni* paras 5-10.

that the question of remedy could arise only once the relevant facts had been identified and pleaded and it had been shown that the rights in question had been infringed.<sup>94</sup>

The second problem raised by Wallis JA was that it had not been shown that the children had the right to parental care. Another issue was that the parties had not pleaded that the breach of the children's constitutional right was wrongful. While it had been wrongful as against the deceased, there was no proof that it had been wrongful against the children.<sup>95</sup>

Even if these questions had been decided in favour of the respondents, the question which remained was whether constitutional damages was an appropriate remedy for that breach.<sup>96</sup>

The proper starting point, according to Wallis JA, was to consider whether the delictual remedy for damages for loss of support was appropriate for compensating the children for a breach of their constitutional rights.<sup>97</sup>

With reference to two *dicta* of Moseneke DCJ,<sup>98</sup> Wallis JA noted that delictual remedies might be appropriate in the case of breaches of constitutional rights. Wallis J further noted that the High Court had not considered whether a delictual claim for damages for loss of support was an appropriate or adequate remedy for the breach of the children's constitutional rights.<sup>99</sup> If the common law remedy was inadequate, the court should have considered whether this could be remedied by the development of the common law. Wallis JA next referred to *Fose*, where Ackermann J held that the law of delict is flexible enough to give effect to the spirit, purport and objects of the Bill of Rights.<sup>100</sup>

Ackermann J, according to Wallis JA, did not endorse a general proposition that constitutional damages would compensate general damages. It would be anomalous if Mr Mahlali were, because of the decision in *Fose*, not entitled to constitutional damages but, on the other hand his daughters could claim such damages in addition to damages for loss of support.<sup>101</sup>

---

<sup>94</sup> *Mboweni* para 6.

<sup>95</sup> *Mboweni* para 94. The question which arises here is whether wrongfulness is an element of the infringement of a constitutional right and further, which test would be used.

<sup>96</sup> *Mboweni* para 20.

<sup>97</sup> *Mboweni* para 21.

<sup>98</sup> *Law Society of South Africa v Minister for Transport* 2011 1 SA 400 (CC) para 74 cited in *Mboweni* para 21; *Dikoko v Mokhatla* 2006 6 SA 235 (CC) para 91 cited in *Mboweni* para 21. See Mhlantla J's majority judgment in *Residents*.

<sup>99</sup> *Mboweni* para 22.

<sup>100</sup> *Mboweni* para 22.

<sup>101</sup> *Mboweni* para 24.

Wallis also referred to claims for loss of support in the context of Road Accident Fund claims and noted that if constitutional damages were to be awarded in addition to delictual damages for loss of support, this would only add to the "existing burden" of the Fund.

Wallis JA held that the High Court had not addressed the factual and legal issues that were important to the decision it had to make and thus the judgment of the High Court for the award of constitutional damages was overturned.<sup>102</sup>

## **2.6 *RK v Minister of Basic Education*<sup>103</sup>**

The tragic facts of this case are well known. Michael Komape, a little boy, fell into a pit latrine and drowned in his own faeces. His traumatised family claimed and was awarded damages for emotional shock and grief and future medical treatment for two members of the family.<sup>104</sup>

The family also claimed cumulatively the amount of R2 million in respect of grief "based on the common law as developed in accordance with section 39(2) of the Constitution"; alternatively they claimed to be entitled to that sum as constitutional damages "in accordance with the development of the common law under s39(2)."<sup>105</sup> This claim was dismissed.

In deciding the claim for constitutional damages the Supreme Court of Appeal per Leach JA had regard to a number of cases, *inter alia* *Kate*,<sup>106</sup> *Modderklip*<sup>107</sup> and *Fose*.<sup>108</sup> The court noted that in the first two instances constitutional damages had been awarded for financial loss. Leach JA noted, however, that constitutional damages had not been awarded as a *solatium* for the breach of any right where there had not been patrimonial loss.<sup>109</sup> There were also no cases in which damages had been awarded for a physical or psychiatric injury.<sup>110</sup> The court furthermore held that because the parties had received compensation for general damages, any additional damages would amount to punishment for the breach of a right already compensated.<sup>111</sup>

---

<sup>102</sup> *Mboweni* para 26.

<sup>103</sup> *RK v Minister of Basic Education* 2020 2 SA 347 (SCA) (hereafter *RK*).

<sup>104</sup> *RK* paras 9-14.

<sup>105</sup> *RK* para 17.

<sup>106</sup> See the discussion in 2.4. The court in *RK* also referred to two other cases similar to *Kate* where constitutional damages had been awarded, namely *Mahambehlala v MEC for Welfare, Eastern Cape* 2001 1 SA 342 (SE) and *Mbanga v MEC for Welfare, Eastern Cape* 2002 1 SA 359 (SE); for the sake of brevity these cases are not discussed.

<sup>107</sup> See the discussion above in 2.3.

<sup>108</sup> See the discussion above in 2.1.

<sup>109</sup> *RK* para 58.

<sup>110</sup> *RK* para 58.

<sup>111</sup> *RK* para 59.

Leach JA referred to the *dictum* in *Fose*, where it was held that past awards for police brutality did not have a deterrent effect on this conduct.<sup>112</sup> It was held furthermore that in a country with scarce resources where the plaintiffs had already been compensated the resources could rather be used to eliminate or reduce the causes of infringement.<sup>113</sup>

The appellants *in casu* argued that that the approach followed in *Fose* "was not cast in stone" and referred to decisions in Canada,<sup>114</sup> New Zealand<sup>115</sup> and Ireland.<sup>116</sup> The appellant also referred to the *Life Esidimeni* arbitration.<sup>117</sup> With regard to the latter Leach JA held that it did not have binding force, firstly because it lacked the force of judicial precedent, and secondly because the facts were substantially different.<sup>118</sup> Insofar as the decisions in the other jurisdictions were concerned, the court held that the circumstances in these jurisdictions were substantially different to those in South Africa.<sup>119</sup> In South Africa there was a "chronic shortage of what would in foreign jurisdictions be regarded as basic infrastructure."<sup>120</sup>

Leach JA held that circumstances in the country had not changed so much as to regard the *Fose* approach as no longer applicable and hence concluded that constitutional damages could not be awarded in the present case.<sup>121</sup>

## 2.7 *Life Esidimeni Arbitration*<sup>122</sup>

The facts of the *Life Esidimeni* arbitration are as tragic as those of *RK* and have been described in detail, both by Moseneke DCJ in his award and Zitzke in his article.<sup>123</sup>

---

<sup>112</sup> *Fose* 72 quoted in *RK* para 59.

<sup>113</sup> *Fose* 72 quoted in *RK* para 59.

<sup>114</sup> *RK* para 60, reference to the Canadian case of *Vancouver (City) v Ward* [2010] 2 SCR 28.

<sup>115</sup> *RK* para 61, reference to the New Zealand cases of *Dunlea v Attorney-General* [2000] 3 NZLR and *Liston-Lloyd v The Commissioner of Police* [2015] NZHC 2614.

<sup>116</sup> *RK* para 61, reference to the Irish cases of *Kennedy v Ireland* [1987] IR 587 and *Conway v Irish National Teachers Organisations* [1991] 2 IR 305.

<sup>117</sup> See the discussion below.

<sup>118</sup> *RK* para 62.

<sup>119</sup> *RK* para 63.

<sup>120</sup> *RK* para 63.

<sup>121</sup> *RK* para 63.

<sup>122</sup> *Arbitration Award between Families of Mental Health Care Users Affected by the Gauteng Mental Marathon Project (Claimants) and National Minister of Health of the Republic of South Africa, Government of the Province of Gauteng, Premier of the Province of Gauteng, Member of the Executive Council of Health: Province of Gauteng (Respondents)*  
<http://www.saflii.org/images/LifeEsidimeniArbitrationAward.pdf> accessed 13 March 2023 (hereafter the *Life Esidimeni* arbitration) before Justice Dikgang Moseneke.

<sup>123</sup> Zitzke 2020 *TSAR* 419.

In short, a large number of mental health users were moved from Life Esidimeni facilities after October 2014. Of these, 144 died, 1418 were exposed to trauma and morbidity, and at the time of the arbitration the whereabouts of 44 remained unknown.<sup>124</sup>

Following the recommendations of a report<sup>125</sup> of the Health Ombudsman, the parties referred the dispute to arbitration before a single arbitrator.<sup>126</sup>

The issue that the arbitrator had to determine was the "nature and extent of the equitable redress including compensation" that was due to the victims and their families.<sup>127</sup>

The Government acknowledged liability for funeral expenses and general damages for pain, suffering and emotional shock. The claimants in addition called for "equitable redress", which would include constitutional damages, for the "the pervasive, egregious, uncaring and wanton violations of the constitutional rights of all mental health care users affected and their families."<sup>128</sup> In some instances punitive damages were claimed in addition to constitutional damages.<sup>129</sup>

The Government opposed the claim for constitutional damages, holding that if the claimants had been compensated under the common law, they might not rely on the Constitution to "seek equitable redress".<sup>130</sup> The Government further held that all civil claims had to be brought in terms of the common law.<sup>131</sup> The Government therefore wanted to settle common law damages and held that the claimants could not rely on the Constitution for equitable redress.<sup>132</sup>

The Government furthermore relied on *Mboweni*,<sup>133</sup> in which the court held that the claimants could not claim constitutional damages in addition to the common law claim for loss of support. In *Mboweni* the Supreme Court of Appeal had held that

the question of remedy can only arise after the relevant right has been properly identified and the pleaded or admitted facts show that the right has been infringed. An inquiry into damages cannot take place in the air. It must be an inquiry into the damages arising from an identified wrong.<sup>134</sup>

---

<sup>124</sup> *Life Esidimeni* arbitration para 2.

<sup>125</sup> Office of the Health Ombud 2017 <http://healthombud.org.za/wp-content/uploads/2017/05/FINALREPORT.pdf>.

<sup>126</sup> *Life Esidimeni* arbitration para 3.

<sup>127</sup> *Life Esidimeni* arbitration para 5.

<sup>128</sup> *Life Esidimeni* arbitration para 10.

<sup>129</sup> *Life Esidimeni* arbitration paras 17(c) and 19(c).

<sup>130</sup> *Life Esidimeni* arbitration para 212.

<sup>131</sup> *Life Esidimeni* arbitration para 212.

<sup>132</sup> *Life Esidimeni* arbitration para 212.

<sup>133</sup> See the discussion in 2.2.4 above.

<sup>134</sup> *Life Esidimeni* arbitration para 213 – see 2.5 above.

The Government furthermore referred to the cases on which the court in *Mboweni* had relied, namely *Dikoko v Mokhatla*<sup>135</sup> and *Law Society of South Africa v Minister for Transport*,<sup>136</sup> (both majority judgments written by Moseneke) for authority that the claimant could have claimed for loss of parental care in terms of the common law.<sup>137</sup>

The Government had held that the claimants should be non-suited if they did not convert all their claims into common law claims, but neither of the two cases on which the Government relied, nor *Mboweni*, were according to Moseneke J authority for the Government's proposition.<sup>138</sup> Moseneke J held that these cases had simply held that the section 38 remedy could be "vindicated by a common law mode of pleading and claim" and parties were not barred from relying on the Constitution in circumstances where breaches "defied common law formulation".<sup>139</sup> He furthermore noted that

It would be strange if not bizarre if a claim under the supreme law would be denied vindication simply because it could not fit into the common law framework. If that were so, the constitutional remedies would be granted only subject to the common law. That would be a remarkably retrogressive understanding of the hierarchy of sources of law. It is important to restate that the common law is subservient to the Constitution and not the other way around.<sup>140</sup>

Moseneke J went further and held that the "invasive and pervasive violation of Constitutional rights" cannot simply be brought within the ambit of the common law.<sup>141</sup> The common law has no equivalent for breaches by the State of the right to a number of constitutional rights, including the right to health and the protection of cruel, degrading and inhuman treatment.<sup>142</sup> The common law also does not have an equivalent of a claim against the State for violating the rule of law and also for not having regard to legislative protection which is meant to "give effect to constitutional guarantees or a claim arising from a breach of international obligations on Mental Health care."<sup>143</sup> All these breaches led to "agonising devastation" for the claimants.<sup>144</sup>

In effect the Government has invited me to squeeze this pervasive and reeking violation of our Constitution and many valuable laws into psychological injury

---

<sup>135</sup> *Dikoko v Mokhatla* 2006 6 SA 235 (CC).

<sup>136</sup> *Law Society of South Africa v Minister for Transport* 2011 1 SA 400 (CC).

<sup>137</sup> *Life Esidimeni* arbitration para 215; *Mboweni* para 21.

<sup>138</sup> *Life Esidimeni* arbitration para 216.

<sup>139</sup> *Life Esidimeni* arbitration para 216.

<sup>140</sup> *Life Esidimeni* arbitration para 216.

<sup>141</sup> *Life Esidimeni* arbitration para 217.

<sup>142</sup> *Life Esidimeni* arbitration para 217.

<sup>143</sup> *Life Esidimeni* arbitration para 217.

<sup>144</sup> *Life Esidimeni* arbitration para 217.



and shock for which R180 000 might be the going rate in trial courts under the common law. I decline that invitation.<sup>145</sup>

Moseneke J found that the parties could not be expected to rely only on the "narrow and dated strictures of the common law".<sup>146</sup> He thus awarded constitutional damages in addition to damages for funeral expenses and general damages for shock and psychological trauma.<sup>147</sup> It is submitted that the constitutional damages constitute punitive damages in this case, as Moseneke J clearly wanted to send a message to the government regarding the pernicious treatment of the victims.<sup>148</sup>

Zitzke is critical of this award, noting *inter alia* that it was not necessary to relegate the common law to the side-lines, as a similar message could have been sent "through a hefty award of common law damages coupled with appropriate criminal sanctions ..."<sup>149</sup>

## **2.8 Ngomane v Johannesburg (City)<sup>150</sup>**

The facts of the case are, shortly, that the claimants, homeless people, had lived under a bridge for some time. Some of the members of the group were employed and earned money from collecting recyclable goods. They had make-shift homes which they would assemble at night, and during the day they would break them down. The material for these homes as well as their other possessions was left on the traffic island every day as they went to find food and earn money.

These possessions, as well as the material for their make-shift homes, had been confiscated and removed without engaging with the claimants and without a court order. The claimants alleged that their rights in terms of sections 25(1)<sup>151</sup> and 26(3)<sup>152</sup> of the Constitution had been breached because their homes had been demolished without a court order, they had been deprived unlawfully of their property, and their rights to dignity and adequate shelter had been infringed.<sup>153</sup>

---

<sup>145</sup> *Life Esidimeni* arbitration para 218.

<sup>146</sup> *Life Esidimeni* arbitration para 219.

<sup>147</sup> *Life Esidimeni* arbitration para 226.

<sup>148</sup> Klopper *Damages* 250. Neethling and Potgieter *Law of Delict* 343 fn. 14 refers to the damages awarded as "substantial constitutional bereavement damages".

<sup>149</sup> Zitzke 2020 *TSAR* 439.

<sup>150</sup> *Ngomane v Johannesburg (City)* 2020 1 SA 52 (SCA) (hereafter *Ngomane*).

<sup>151</sup> Section 25(1) of the Constitution provides as follows: "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

<sup>152</sup> Section 26(3) of the Constitution provides that "[n]o one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

<sup>153</sup> *Ngomane* para 3.

The respondents opposed this application, holding that this was a "clean-up exercise" which involved removing the personal belongings of the people concerned and that valuable personal belongings which had been removed would be noted in an inventory and kept for the owners to collect them.<sup>154</sup>

The High Court rejected the vindicatory claim on the basis that the property which had been removed had not been properly described and had in any event been destroyed and could not be returned.<sup>155</sup>

The High Court furthermore rejected a claim in terms of the *mandament van spolie*, in terms of which the applicants wished their property to be replaced. It was, furthermore, held that their claim was not limited to patrimonial loss.<sup>156</sup>

On appeal the applicants raised certain issues, *inter alia* whether (a) they ought to have been granted a constitutional remedy similar to that in the case of *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality*;<sup>157</sup> and whether (b) they were entitled to punitive constitutional damages.<sup>158</sup>

The Supreme Court of Appeal agreed with the High Court's stance on the *mandament van spolie*.<sup>159</sup>

The respondents had not acceded to the proposal of the applicants, namely that an amount of money (R1 500 per applicant, totalling R45 000) be paid to each one of the applicants. In this regard Maya P for the Supreme Court of Appeal held as follows:<sup>160</sup>

[I]n my view, it constitutes appropriate relief in the specific circumstances of this case. It will vindicate the Constitution and protect the applicants and others similarly situated against violations of their rights to dignity and property in the manner envisaged in *Fose*.

The court thus awarded constitutional damages for the destruction of the property of the applicants.<sup>161</sup>

Zitzke regards this decision as in line with the decisions of *Mboweni* and *Komape*, in addition to what can "generally be described as a constitutional

---

<sup>154</sup> *Ngomane* paras 4 and 5.

<sup>155</sup> *Ngomane* para 7.

<sup>156</sup> *Ngomane* para 8.

<sup>157</sup> *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 6 SA 511 (SCA).

<sup>158</sup> *Ngomane* para 11.

<sup>159</sup> *Ngomane* para 18.

<sup>160</sup> *Ngomane* para 27.

<sup>161</sup> *Ngomane* para 28.

transformative approach to the sources of the law of delict and remedies" and thus welcomes this decision.<sup>162</sup>

## 2.9 *The effect of Fose*

*Fose* was clear on the fact that an award for delictual damages in that particular constituted appropriate relief. It held, furthermore, that punitive constitutional damages could not be awarded because of the fact that punitive damages were not recognised in South African law. The cases prior to the *Residents* and *Thubakgale* cases were not consistent in the awarding of constitutional damages, with *Modderklip* and *Kate* deviating from *Fose*, albeit distinguishing the facts of these cases from *Fose*. In the *Life Esidimeni* arbitration constitutional damages were awarded alongside delictual damages, as the arbitrator thought that delictual damages were wholly unsatisfactory in this instance. It is submitted, as held by Zitzke (see above), that a substantial award of damages, along with criminal prosecution, would have had the desired effect.

The *Residents* and *Thubakgale* cases, discussed below, have established more detailed guidelines for the availability of constitutional damages. In the *Residents* case in particular Jafta J, in his concurring judgment, listed instances in which constitutional damages would or would not be available. As will be seen, the availability of constitutional damages remains casuistic and in need of a general principle to solve the problem of incoherence referred to in the introduction.<sup>163</sup>

## 3 Recent case law

This section deals with the most recent pronouncements of the Constitutional Court on the availability of constitutional damages. For the sake of brevity the focus of the discussion below is on constitutional damages only.

### 3.1 *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg v Minister of Police*<sup>164</sup>

#### 3.1.1 *Facts*

The applicants in this case consisted of a group of almost 3 000 people who lived in the inner city of Johannesburg over eleven different properties. They had been subjected over a period of a year to "cruel, invasive and degrading

---

<sup>162</sup> Zitzke 2020 *Litnet* 800. Own translation from Afrikaans, the original of which reads as follows: "ons oor die algemeen kan beskryf as 'n grondwetlik-transformatiewe benadering tot bronne van die deliktereg en regshulp."

<sup>163</sup> Jafta J in *Residents* para 128.

<sup>164</sup> *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg v Minister of Police* 2023 3 SA 329 (CC).

raids" by the police without warrants.<sup>165</sup> In each case the occupants were forced out of their houses. Those who were not in possession of valid documents were arrested. The other occupants were allowed to return after the searches, only to find the dwellings in complete disarray and with some of their possessions missing. In each instance the raids were conducted in terms of the section 13(7) of the *South African Police Service Act*.<sup>166</sup>

The applicants approached the High Court claiming the following, amongst other things: compensation for the infringement of their constitutional rights to dignity and privacy in the amount of R1 000 constitutional damages for each applicant.<sup>167</sup>

The claim for constitutional damages was dismissed, partly because there was no evidence that every room had been searched,<sup>168</sup> the court having held that it was not appropriate to grant a blanket order for constitutional damages.<sup>169</sup>

The applicants approached the Constitutional Court claiming *inter alia*<sup>170</sup> leave to appeal against the High Court's refusal to award the applicants constitutional damages.

Insofar as the claim for constitutional damages was concerned, the applicants submitted that the constitutional damages were "an appropriate surrogate for non-pecuniary loss caused by the negation of constitutional values embodied in a breach of rights."<sup>171</sup>

The Constitutional Court dismissed the appeal for constitutional damages.<sup>172</sup>

### 3.1.2 Judgments

#### 3.1.2.1 Mhlantla J (majority)

Mhlantla J commenced by stating that in terms of section 38 a court can award damages for infringements of rights contained in the Bill of Rights.<sup>173</sup> He canvassed the existing case law before formulating general principles on the availability of constitutional damages. Mhlantla J then referred to

---

<sup>165</sup> See *Residents* paras 6-18 for a detailed exposition of the raids that were conducted on the homes of the twelve applicants.

<sup>166</sup> *South African Police Service Act* 68 of 1995.

<sup>167</sup> *Residents* para 19.

<sup>168</sup> *Residents* para 27.

<sup>169</sup> *Residents* para 27.

<sup>170</sup> *Residents* para 28 and further.

<sup>171</sup> *Residents* para 89.

<sup>172</sup> *Residents* paras 1 and 2.

<sup>173</sup> *Residents* para 90.

*Fose*, where it was held by Ackermann J that in appropriate cases an award for [constitutional] damages could be made.<sup>174</sup>

The concept of appropriate relief included an award for constitutional damages in instances of a direct infringement of a right,<sup>175</sup> but appropriateness was an "elusive" term.<sup>176</sup> With reference to *Fose*, Mhlantla J noted that appropriateness could be equated with effectiveness, because without effective remedies for breach, constitutional rights could not be upheld.<sup>177</sup> In referring to both *Fose* and *Dikoko* he held that the law of delict would in most cases be "broad enough" to provide appropriate relief for the infringements of constitutional rights;<sup>178</sup> where a delictual remedy would be available, constitutional damages would seldom be available in addition to a common law remedy.<sup>179</sup> This would be because the delictual remedy would be "the most appropriate remedy".<sup>180</sup>

Mhlantla J next referred to the *Modderklip* case, in which, as indicated above, constitutional damages were awarded.<sup>181</sup>

In *Modderklip* the court held that "appropriateness should be understood to denote effectiveness".<sup>182</sup> However, in that case the Constitutional Court chose the more effective remedy in the circumstances.<sup>183</sup>

Claims for constitutional damages for pure economic loss had not been successful, for example in *Olitzki*.<sup>184</sup>

Insofar as the availability of constitutional damages was concerned there were, according to Mhlantla J, "two overarching considerations".<sup>185</sup>

The first "overarching consideration" was whether there was an existing common law or statutory law remedy.<sup>186</sup> According to Mhlantla J the availability of an alternative remedy was "not an absolute bar to the granting of constitutional damages, but a weighty consideration against the award of such damages."<sup>187</sup> In some instances a delictual remedy would be available but it would not be effective because the damage-causing conduct could be an inherent barrier to the remedy, because the wrongful conduct itself

---

<sup>174</sup> *Fose* para 60 quoted in *Residents* para 92.

<sup>175</sup> *Residents* para 92.

<sup>176</sup> *Residents* para 92.

<sup>177</sup> *Residents* para 92.

<sup>178</sup> *Residents* para 96.

<sup>179</sup> *Residents* para 97.

<sup>180</sup> *Residents* para 97.

<sup>181</sup> See discussion in 2.3.

<sup>182</sup> *Residents* para 99. See *Modderklip* para 58.

<sup>183</sup> *Residents* para 99 as opposed to delictual damages.

<sup>184</sup> *Residents* para 101.

<sup>185</sup> *Residents* para 103.

<sup>186</sup> *Residents* para 104.

<sup>187</sup> *Residents* para 104.

created<sup>188</sup> a complete barrier to proving one of the elements of delict.<sup>188</sup> The circumstances of the case might also be such that the delictual remedy might not be effective.<sup>189</sup> In these instances a court might consider an award of constitutional damages despite the fact that there was an alternative (delictual) remedy.<sup>190</sup>

In the present case the applicants could have instituted the *actio iniuriarum* and the fact that it might be onerous to prove the elements did not in itself cause the remedy to be ineffective.<sup>191</sup>

The second "overarching consideration" related to whether the alternative remedy would be appropriate under the circumstances.<sup>192</sup> If the remedy was appropriate, it would not be necessary to resort to constitutional damages.<sup>193</sup> Where there were many appropriate remedies, the court had a discretion to select one that was the most appropriate under the circumstances.<sup>194</sup> If constitutional damages were an appropriate remedy, the court might still choose another remedy as appropriate relief in accordance with section 38. However, section 38 had to be read together with "the command of section 172(1) of the Constitution".<sup>195</sup>

Mhlantla J noted that if constitutional damages were to be deemed available if they met the "mere threshold of appropriate relief", this would give rise to considerable uncertainty. It would also result in inequality in the sense that claimants who wanted to enforce the same right might be treated differently.<sup>196</sup> This would in turn create uncertainty as to the availability of constitutional damages.<sup>197</sup>

The uncertainty and unpredictability would be at variance with the rule of law, a linchpin of the Constitution. *Therefore, constitutional damages must be the most appropriate remedy available to vindicate constitutional rights with due weight attached to other alternative remedies available in the common law and statutes.*<sup>198</sup> (Own emphasis)

Mhlantla J mentioned other factors such as

whether the infringement of the constitutional rights was systemic, repetitive and particularly egregious; whether the award will significantly deter the type

---

<sup>188</sup> *Residents* paras 104 and 105.

<sup>189</sup> *Residents* para 103.

<sup>190</sup> *Residents* para 104. See *Modderklip* in 2.3 above.

<sup>191</sup> *Residents* para 110.

<sup>192</sup> *Residents* para 113.

<sup>193</sup> *Residents* para 113.

<sup>194</sup> *Residents* para 113.

<sup>195</sup> *Residents* para 114.

<sup>196</sup> *Residents* para 118.

<sup>197</sup> *Residents* para 118.

<sup>198</sup> *Residents* para 118.

of constitutional abuses alleged; the effect of the award on state resources; and the need to avoid opening the floodgates in respect of similar matters.<sup>199</sup>

Mhlantla J further remarked that there was no evidence that constitutional damages would have a deterrent effect against repetition of infringements.<sup>200</sup>

In the present matter the appropriate remedies were the delictual remedies and the declaration of invalidity of section 13(7)(c) of the *South African Police Service Act*.<sup>201</sup> Once an appropriate remedy has identified it becomes unnecessary to award constitutional damages in addition to that awarded in terms of the delictual remedy.<sup>202</sup> "It is not fair to burden the public purse with financial liability where there are alternative remedies that can sufficiently achieve that purpose,<sup>203</sup> because that would effectively amount to punishing the taxpayers for conduct for which they bear no responsibility."<sup>204</sup>

While recognising the egregious conduct of the respondents Mhlantla J found that awarding constitutional damages in the present instance would not be just and equitable.<sup>205</sup>

### 3.1.2.2 Jafta J (concurring)

Jafta J wrote a separate, concurring judgment to highlight why constitutional damages were not justified in this instance.<sup>206</sup> As mentioned in the introduction, Jafta J stated that the decisions of our courts in deciding whether to award constitutional damages were not "coherent".<sup>207</sup> Below follows a summary of Jafta J's judgment regarding the availability of constitutional damages.

- (1) An award for constitutional damages must be necessary for enforcing the Bill of Rights.<sup>208</sup> A distinction must be drawn between compensation for loss and damages for infringement of rights.<sup>209</sup>
- (2) If the common or statutory law provides "adequate and effective" relief for the protection of rights in the Bill of Rights, there is no need to award

---

<sup>199</sup> *Residents* para 103.

<sup>200</sup> *Residents* para 119. See *Fose* para 65. Also see 2.1 above.

<sup>201</sup> *Residents* para 119.

<sup>202</sup> *Residents* para 120.

<sup>203</sup> It is not clear whether Mhlantla J refers here to constitutional damages in addition to delictual remedies – if not, then it should be noted that delictual remedies will also "burden the public purse with financial liability".

<sup>204</sup> *Residents* para 120.

<sup>205</sup> *Residents* para 120. It is not clear whether "just and equitable" would be a new ground for the availability of constitutional damages.

<sup>206</sup> *Residents* para 127 and further.

<sup>207</sup> *Residents* para 128.

<sup>208</sup> *Residents* para 148.

<sup>209</sup> *Residents* para 148.

constitutional damages.<sup>210</sup> "The claimant must make use of those remedies. It is not permissible for him or her to eschew the remedies in question and prefer to ask for constitutional damages because they can conveniently be established."<sup>211</sup>

- (3) In *Modderklip* the court did not base its decision to award constitutional damages on the ground that it was the only effective remedy. It found constitutional damages in the circumstances to be the most appropriate remedy, because it took into consideration the circumstances of all the parties.<sup>212</sup>
- (4) The courts do not grant constitutional damages in every case where there has been an infringement of rights in the Bill of Rights.<sup>213</sup> "In some cases, those damages were awarded where they were the only effective relief. In others they were granted on the basis that there were special circumstances which rendered such damages the most appropriate relief. In respect of each instance, the computation of those damages was based on a clear and objective formula."<sup>214</sup>
- (5) These requirements do not apply to the infringements of socio-economic rights "as these require a different approach to enforce".<sup>215</sup>
- (6) In order to grant such damages, it is not enough to show that there was an infringement of a right; there should also be harm and a causal link between harm and the wrongful conduct.<sup>216</sup>
- (7) A remedy such as a delictual remedy does not cease to be an alternative remedy merely because it is onerous to prove.<sup>217</sup> Constitutional damages may be awarded only where it is necessary and the fact that an alternative (delictual) remedy is difficult to prove does not make it necessary.<sup>218</sup>

The *Thubakgale* case, which is discussed in the next section, does not deal with the availability of constitutional damages where delictual damages are available, instead the Constitutional Court decided the non-availability of constitutional damages on the basis of the availability of a remedy in terms

---

<sup>210</sup> *Residents* para 150.

<sup>211</sup> *Residents* para 150.

<sup>212</sup> *Residents* para 151.

<sup>213</sup> *Residents* para 152.

<sup>214</sup> *Residents* para 152. It is not clear what this "clear and objective formula" is.

<sup>215</sup> *Residents* para 153; see the discussion of *Thubakgale* below.

<sup>216</sup> *Residents* para 155. It is not clear from the judgment why delictual damages cannot be claimed in this instance, unless there is a problem proving fault.

<sup>217</sup> *Residents* para 157.

<sup>218</sup> *Residents* para 157.



of the *Housing Act*<sup>219</sup> and the National Housing Code<sup>220</sup> and the principle of constitutional subsidiarity.

### **3.2 *Thubakgale v Ekurhuleni Metropolitan Municipality*<sup>221</sup>**

#### **3.2.1 *Facts***

The applicants in this case had applied for and been granted housing subsidies. Each applicant was matched to a particular stand developed with that subsidy in the Tembisa area. The applicants were supposed to have been given possession and ownership of the stands for the purpose of having a house constructed thereon. This did not happen. The applicants approached the Municipality and demanded an explanation for its failure to provide housing. They also requested assistance from other parties but this bore no fruit. When they started to receive utility accounts for the properties, they made further enquiries and discovered that the Municipality had given possession of the houses to other parties. The applicants were able to identify the stands and houses for which their subsidies had been used. There were also records proving that these were the plots to which they had been entitled. What had happened in this case was that the Municipality had employed a "dummy numbers" scheme. The consequence of this was that the plots had each been allocated to more than one beneficiary, while only one beneficiary could occupy each of them. It was not disputed that this state of affairs "is the direct result of the Municipality's connivance in – or at best the enablement of – the fraudulent and corrupt occupation of the houses."

After more than a decade of "futile interaction" with the Municipality and unsuccessful appeals to the special investigations unit, the applicants went to court, seeking an order in terms of which the Municipality had to provide them with houses in terms of their successful subsidy applications. The court in *Thubakgale I* upheld the claim.<sup>222</sup> The Municipality and others appealed to the Supreme Court of Appeal (*Thubakgale II*);<sup>223</sup> this case concerned only the date of the implementation of the High Court order.

Less than 48 hours before the deadline imposed by the SCA was to expire the respondents applied to the High Court for an order extending the deadline for another year (*Thubakgale III*).<sup>224</sup> This was opposed by the

---

<sup>219</sup> *Housing Act* 107 of 1997.

<sup>220</sup> Department of Human Settlements *National Housing Code*.

<sup>221</sup> *Thubakgale v Ekurhuleni Metropolitan Municipality* 2022 8 BCLR 985 (CC).

<sup>222</sup> *Thubakgale v Ekurhuleni Metropolitan Municipality* 2018 6 SA 584 (GP) (*Thubakgale I*).

<sup>223</sup> *Ekurhuleni Metropolitan Municipality v Thubakgale* (125/2018) [2018] ZASCA 76 (31 May 2018) (*Thubakgale II*).

<sup>224</sup> *Ekurhuleni Metropolitan Municipality v Thubakgale* (High Court, Gauteng Division, Pretoria) (unreported) case number 39602/2015 of 13 July 2020 (*Thubakgale III*).

applicants and they also filed a counter-claim for constitutional damages in the amount of R5 000 for every person for every month that the Municipality did not comply with the order. The judge refused to award constitutional damages, based on the following reasons:<sup>225</sup>

- (a) A contempt of court order might be a more appropriate remedy in the case where the Municipality had delayed the execution of a court order;
- (b) Awarding constitutional damages would "have a punishing effect on the Municipality for not complying with the order"; and
- (c) The amount of R5 000 was arbitrary and there was no evidence as to the actual loss of the parties.

The applicants then sought leave to appeal directly to the Constitutional Court.

### 3.2.2 Judgments

#### 3.2.2.1 Jafta J (majority)<sup>226</sup>

Jafta J granted leave to appeal *inter alia* because a judgment of the court would provide guidance on whether constitutional damages should be granted.<sup>227</sup>

He held that, for the following reasons, these damages were not available:<sup>228</sup>

- (a) Constitutional damages were "as a matter of principle" not available for the enforcement of socio-economic rights.<sup>229</sup>
- (b) The applicants had obtained an order from the court which had been confirmed by the Supreme Court of Appeal – all that remained was to execute that order.
- (c) No proper case regarding constitutional damages had been pleaded; and
- (d) There was no proof of damage suffered by the parties.

---

<sup>225</sup> *Thubakgale* para 25.

<sup>226</sup> See Liebenberg 2022 *CCR* 147 for a summary of Jafta J's judgment.

<sup>227</sup> *Thubakgale* para 121.

<sup>228</sup> *Thubakgale* paras 121-122.

<sup>229</sup> See however Liebenberg 2022 *CCR* 148.

After a detailed discussion of the facts and the judgment of the High Court in *Thubakgale III*,<sup>230</sup> Jafta J proceeded to discuss the matter of constitutional damages for socio-economic rights.<sup>231</sup>

In our law socio-economic rights are justiciable and hence enforceable against the state. Decisions of the Constitutional Court have emphasised that, insofar as rights enshrined in sections 26 and 27 are concerned, section 26(1) must be read with section 26(2) to determine the nature and content of the right of access to housing. The right of access to adequate housing is not a self-standing right that is enforceable against the state; instead it depends on the provisions of section 26(2) for it to be complete and enjoyable.

Unlike the common law, the mere existence of a right under section 26(1) does not in itself place a positive duty on the State; rather it provides that the State has a negative duty not to interfere with the right under circumstances where someone was already enjoying that right. Quoting *Mazibuko v City of Johannesburg*,<sup>232</sup> the court held that "[t]he State bears a duty to refrain from interfering with social and economic rights just as it does with civil and political rights."<sup>233</sup>

Where the right is not yet being enjoyed, there is a positive duty, set out in section 26(2) in terms of which the State has "to take reasonable legislative and other measures to realise the right of access to adequate housing. It is the open-endedness of this obligation, which rules out direct enforcement."<sup>234</sup>

The Constitutional Court had stated in the past that the right to access to adequate housing does not entitle "citizens to approach a court to claim a house from the state".<sup>235</sup> The Constitutional Court had furthermore held that section 26 does not impose "a directly enforceable obligation upon the state to provide every citizen with a house immediately."<sup>236</sup>

This means that the failure to provide a house cannot give rise to damage to the individual wanting a house. In the absence of damage there is no claim for constitutional damages. Furthermore, the scheme of section 26 rules out any direct claim for damages.<sup>237</sup>

---

<sup>230</sup> *Thubakgale* paras 123-144.

<sup>231</sup> *Thubakgale* para 145 and further.

<sup>232</sup> *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC)

<sup>233</sup> *Thubakgale* para 146; *Mazibuko* para 47.

<sup>234</sup> *Thubakgale* paras 148-149.

<sup>235</sup> *Thubakgale* para 147.

<sup>236</sup> *Thubakgale* para 147.

<sup>237</sup> *Thubakgale* para 150.

Referring to *Grootboom* Jafta J identifies three elements of the obligation imposed by the state in terms of section 26(2):<sup>238</sup> (a) the obligation to "take reasonable legislative and other measures"; (b) "to achieve the progressive realisation" of the right; and (c) "within available resources".

Jafta J draws a distinction between two situations, namely where a house is destroyed by a storm. If the state had sufficient resources it could rebuild the house. On the other hand, where the house is destroyed by a third party, a claim would lie against the third party in terms of the common law of delict.<sup>239</sup>

Sections 26(2) and 27(2) are provisions that "impose a general obligation on the state and do not create a duty of care in relation to any particular individual. When there is a breach of that obligation, no specific damage or loss is caused to any individual".<sup>240</sup>

With reference to *Fose*, Jafta J notes that a claim for compensatory damages arises where there has been damage. Where the victim has suffered no harm, awarding compensatory damages is not appropriate.<sup>241</sup> Where there is a violation of a right that has been conferred on a group, a "distributive form of relief is more suited for the latter situation as that kind of relief seeks to benefit all members of the group".<sup>242</sup> The purpose of socio-economic rights is not to give citizens access to the basic necessities, but to achieve these goals over a period of time.<sup>243</sup>

Jafta J explains the progressive nature of the rights in sections 26 and 27 as follows:

*The failure to fulfil the obligation imposed by section 26(2) of the Constitution does not cause individual harm to those who are in need of housing. It does not, it bears repetition, translate into a claim of damages enforceable at their instance. In an appropriate case, the remedy for such failure is an order directing the state to fulfil the obligation. This is because in the jurisprudence of this Court, the socio-economic rights enshrined in sections 26 and 27 have been construed to entitle the beneficiaries of those rights only to a reasonable state action undertaken within available resources to progressively realise those rights. More importantly, sections 26(2) and 27(2) define the means towards the realisation of the rights in sections 26(1) and 27(1), which realisation must be achieved progressively. This means that beneficiaries may not receive houses on the same date, even if they had put in applications at the same time. Nor are they entitled to receive houses at a location of their choice.*<sup>244</sup> (Own emphasis).

---

<sup>238</sup> *Thubakgale* paras 151 and 152

<sup>239</sup> *Thubakgale* para 156.

<sup>240</sup> *Thubakgale* para 160.

<sup>241</sup> *Thubakgale* para 162.

<sup>242</sup> *Thubakgale* para 162.

<sup>243</sup> *Thubakgale* para 164.

<sup>244</sup> *Thubakgale* para 169.

Jafta J furthermore notes that Majiedt J<sup>245</sup> failed to consider the jurisprudence of the Constitutional Court on socio-economic rights. The question here is whether section 26(1) and (2) allows for a claim for constitutional damages. This question was not addressed in either *Kate* or *Modderklip*. Jafta J continues by stating that if constitutional damages cannot be awarded for enforcing socio-economic rights, they can also not be regarded as constituting appropriate relief for the violation of these rights.<sup>246</sup>

Further reasons for not granting constitutional damages *in casu*:

- (1) In terms of the principle of constitutional subsidiarity, where legislation has been passed to give effect to a constitutional right, litigants must base their claims on that legislation and may not rely directly on the Constitution.<sup>247</sup> In this case it means that the parties should have based their claim on the *Housing Act*<sup>248</sup> and the National Housing Code.<sup>249</sup>
- (2) The parties already have a remedy, namely a court order for the delivery of the houses. In this instance both the principles of certainty and finality will be violated if the litigants are allowed to seek a fresh remedy based on the same cause of action.<sup>250</sup> The "bedrock of this principle is the once and for all rule."<sup>251</sup>
- (3) The applicants claimed damages as punishment for non-compliance with the court order, the punishment to continue until there was compliance but, according to Jafta J "[t]his is a novel means of enforcing a court order and we were not told its source in law."<sup>252</sup> However, as stated in *Fose* our law does not recognise punitive damages.<sup>253</sup>
- (4) The damages would not have a deterrent effect on the officials.<sup>254</sup> Instead it would be the taxpayers who would have to foot the bill.<sup>255</sup>

---

<sup>245</sup> In his dissenting judgment – see below.

<sup>246</sup> *Thubakgale* para 171.

<sup>247</sup> *Thubakgale* para 178. See Liebenberg 2022 *CCR* 147.

<sup>248</sup> *Housing Act* 107 of 1997.

<sup>249</sup> Department of Human Settlements *National Housing Code* para 179. In *Thubakgale* para 178 Jafta J describes constitutional subsidiarity as follows: "In terms of this principle, where legislation has been passed to give effect to a right in the Constitution, litigants must base their claims on that legislation and may not rely directly on the Constitution."

<sup>250</sup> *Thubakgale* paras 180 and 181.

<sup>251</sup> *Thubakgale* para 183.

<sup>252</sup> *Thubakgale* para 189.

<sup>253</sup> See *Fose* paras 63 and 63.

<sup>254</sup> *Thubakgale* para 192.

<sup>255</sup> *Thubakgale* para 191.

### 3.2.2.2 Majiedt J (dissenting)

Majiedt J held that had he had the majority, he would have ordered *inter alia* that the municipality had to pay to 134 applicants the sum of R10 000 each "as and for" constitutional damages.<sup>256</sup>

Referring to *Grootboom* and *Modderklip*, Majiedt J emphasised the state's obligations with regard to housing and noted the "dire consequences of homelessness".<sup>257</sup> He further referred to the "abysmal living conditions which are reflective of the great disparities in wealth in our society persist, manifesting in despair in almost every corner of South Africa."<sup>258</sup>

He identified the legal question as determining "whether an award of constitutional damages is appropriate relief, as contemplated in section 38 of the Constitution, where the state does have available resources to realise adequate housing and fails to make use of these resources."<sup>259</sup>

#### **Constitutional damages - general principles**

Appropriate relief was, Majiedt J held with reference to *Fose*, relief that was "required to protect and enforce the Constitution".<sup>260</sup> It might include various remedies,<sup>261</sup> as long as the remedy enforced the Constitution. Courts had a duty to be innovative in framing new remedies in this regard.<sup>262</sup> The facts of the case would determine what appropriate relief was and what other remedies were at the disposal of the party.<sup>263</sup> In the end the remedy had to be "effective, suitable and just".<sup>264</sup> Majiedt J furthermore noted that in the event of fundamental rights having been violated, there was no entitlement to a particular remedy.<sup>265</sup>

In some instances common law and statutory remedies might not be appropriate under the circumstances, namely "where there is a pervasive and systematic infringement of rights". Under certain circumstances a delictual remedy for the protection of personality interests might also not be appropriate where harm extended beyond particular claimants.<sup>266</sup>

---

<sup>256</sup> *Thubakgale* para 120.

<sup>257</sup> *Thubakgale* paras 5-6.

<sup>258</sup> *Thubakgale* para 6.

<sup>259</sup> *Thubakgale* para 7.

<sup>260</sup> *Thubakgale* para 42.

<sup>261</sup> Including a declaration of rights or an interdict.

<sup>262</sup> *Thubakgale* para 42.

<sup>263</sup> *Thubakgale* para 42.

<sup>264</sup> *Thubakgale* para 42.

<sup>265</sup> *Thubakgale* para 43.

<sup>266</sup> *Thubakgale* para 43. See *Modderklip*.

With reference to *Fose* Majiedt J stated that it was important to note that "constitutional damages are not punitive".<sup>267</sup>

### **Constitutional damages and alternative remedies**

Regarding other remedies, such as contempt proceedings and declaratory relief as possible alternative remedies,<sup>268</sup> contractual remedies,<sup>269</sup> the *Housing Act* and the National Housing Code and the *rei vindication*.<sup>270</sup> Majiedt held that these remedies would be ineffective.<sup>271</sup>

Insofar as delictual damages were concerned, he held that in this instance the harm was constituted by the infringement of a constitutional right and delictual remedies did "not elegantly map onto infringements of this nature."<sup>272</sup>

Majiedt J referred to the *Residents* case and the fact that the Constitutional Court in that instance refused to award constitutional damages. According to him, the facts of the case were different, as the parties had other remedies at their disposal.<sup>273</sup>

Majiedt J, however, held that constitutional damages would be appropriate relief in the present case,<sup>274</sup> based on the "compelling facts" of the case. The applicants had been denied their right to adequate housing for over two decades, had approached the court only as a last resort and had three court orders in their favour, but these had not borne any results. There had "been the most pervasive and lamentable breach of the applicants rights."<sup>275</sup>

He held that the court should not avoid granting constitutional damages simply because they had not often been granted in the past.<sup>276</sup> Where on the facts of the case they were the only effective remedy, constitutional damages should be granted because "[f]ailing to do so in meritorious cases will render the rich promise in the preamble of our Constitution, to '[i]mprove the quality of life of all citizens and free the potential of each person', a mere chimera."<sup>277</sup>

---

<sup>267</sup> *Thubakgale* para 44.

<sup>268</sup> *Thubakgale* paras 61 and 63.

<sup>269</sup> *Thubakgale* para 64.

<sup>270</sup> *Thubakgale* para 69.

<sup>271</sup> *Thubakgale* para 70.

<sup>272</sup> *Thubakgale* para 68.

<sup>273</sup> The *actio iniuriarum* and a remedy in terms of the *Promotion of Administrative Justice Act* 3 of 2000. *Thubakgale* para 77.

<sup>274</sup> See *Thubakgale* para 78.

<sup>275</sup> *Thubakgale* para 79.

<sup>276</sup> *Thubakgale* para 83.

<sup>277</sup> *Thubakgale* para 83.

Majiedt furthermore disagreed with the statement that constitutional damages could not be awarded in the absence of injury.<sup>278</sup> He also did not agree that the wording of section 26 militated against an award of constitutional damages in the case of the violation of socio-economic rights.<sup>279</sup>

While the reasonableness test in section 26 applied to whether or not progressive realisation had taken place, the "reasonableness standard also compels the state to act without unreasonable delay".<sup>280</sup> In the present instance the applicants were relying on vested rights (the rights had been granted more than 20 years previously and confirmed twice by the High Court and the Supreme Court of Appeal) and therefore this was not a case of the progressive realisation of rights.<sup>281</sup> Majiedt J therefore concluded that constitutional damages might be appropriate in the case of socio-economic rights and that the applicants in this case had such a claim.<sup>282</sup>

Majiedt J then challenged the other reasons raised by Jafta J regarding why constitutional damages would not be available.<sup>283</sup>

### **The principle of subsidiarity**

Majiedt J disagreed with Jafta J regarding the principle of subsidiarity, as the parties had initially attempted to find relief by means of the *Housing Act* and the National Housing Code but that had not been successful.<sup>284</sup> Furthermore, neither the *Housing Act* nor the National Housing Code made provision for damages.<sup>285</sup>

### **The once and for all rule**

Insofar as Jafta J had relied on the once and for all rule,<sup>286</sup> while recognising the importance of the rule Majiedt J disagreed with the finding that the two remedies were based on the same cause of action.<sup>287</sup> It is submitted that Majiedt is correct.

The next section deals with the availability of constitutional damages, when such damages could constitute an appropriate remedy, and the use of the principle of subsidiarity as an underlying principle able to solve the casuistry problem of constitutional damages.

---

<sup>278</sup> *Thubakgale* para 84.

<sup>279</sup> *Thubakgale* para 84.

<sup>280</sup> *Thubakgale* para 85.

<sup>281</sup> *Thubakgale* para 87.

<sup>282</sup> *Thubakgale* para 99.

<sup>283</sup> *Thubakgale* para 90 and further; also see the discussion above.

<sup>284</sup> *Thubakgale* para 90.

<sup>285</sup> *Thubakgale* para 90.

<sup>286</sup> See the discussion above.

<sup>287</sup> *Thubakgale* para 93.



## 4 Commentary

### 4.1 Availability

From the cases cited above it is clear that constitutional damages will usually not be available where the claimants have a delictual remedy at their disposal.<sup>288</sup> If the common or statutory law provides "adequate and effective" relief for the protection of rights in the Bill of Rights, there is no need to award constitutional damages (see above). The mere fact that proof of delictual liability is onerous does not give rise to the availability of constitutional damages.<sup>289</sup>

Kika argues as follows:<sup>290</sup>

The existence of delictual remedies neither negates nor renders cosmetic the direct application of constitutional remedies ... constitutional remedies cannot be extinguished or devalued on account of the existence of other remedies at common law and in statute. ... it would go against the constitutional order of the day for one to be denied use of constitutional remedies directly owing to the existence of those common law remedies.

There are situations where a delictual remedy will be available but it will not be effective because the damage-causing conduct could be an inherent barrier to the remedy.<sup>291</sup>

Other principles that can be deduced from the cases as well as other sources include the following:

- (1) An award for constitutional damages must be necessary for enforcing the Bill of Rights.<sup>292</sup> There is a distinction between compensation for loss and damages for the infringement of rights.<sup>293</sup>
- (2) Constitutional damages are, according to Jafta J, not available in the case of the infringement of socio-economic rights.<sup>294</sup> However, Liebenberg notes however that "[f]ortunately, the part of Jafta J's judgment holding that constitutional damages can never be an appropriate remedy for violations of the socio-economic rights in sections 26 and 27 does not stand as binding precedent due to the separate judgment of Madlanga J (in which Mhlanga J concurred)."<sup>295</sup>

---

<sup>288</sup> Refer to *Fose* and other cases. However, also see *Modderklip* and *Olitzki*. In the latter it was held that constitutional damages should not be a remedy of last resort.

<sup>289</sup> *Residents* para 157.

<sup>290</sup> Kika *Fashioning Judicial Remedies* 131. Also see Price 2015 *Acta Juridica* 325.

<sup>291</sup> *Residents* para 104.

<sup>292</sup> See *Residents* para 148.

<sup>293</sup> *Residents* para 148.

<sup>294</sup> See Jafta J's majority judgment in *Thubakgale* and the discussion above in 3.2.2.1. See Majiedt's minority judgment and the discussion in 3.2.2.2.

<sup>295</sup> Liebenberg 2022 *CCR* 148.

- (3) Constitutional damages are usually not available in the case of pure economic loss.<sup>296</sup>
- (4) In order to grant such damages, it is not enough to show that there was an infringement of a right; there should also be harm and a causal link between harm and the wrongful conduct.<sup>297</sup>
- (5) The purpose of constitutional damages is not to punish the defendants.<sup>298</sup> However, the awarding of constitutional damages in the *Life Esidimeni* arbitration counters this.<sup>299</sup>
- (6) The once and for all rule applies to constitutional damages – they cannot be claimed where the parties have an effective remedy based on the same cause of action.<sup>300</sup>
- (7) Where there are many appropriate remedies, the court has a discretion to choose the one that is most appropriate.<sup>301</sup>
- (8) Constitutional damages must not only be an effective remedy; they must be the only effective remedy.<sup>302</sup>
- (9) Where the parties have a remedy in terms of legislation that has been passed to give effect to a right in the Constitution, litigants must, in terms of the principle of subsidiarity, base their claims on that legislation and not rely directly on the Constitution.<sup>303</sup>
- (10) Constitutional damages may be granted where the plaintiff is performing the duty of the state, as in *Modderklip*.<sup>304</sup>
- (11) In some instances the fact that the public purse would be depleted, was held to be a reason for not awarding constitutional damages,<sup>305</sup>

---

<sup>296</sup> See *Residents* para 101. Also see *Olitzki* para 42 and the discussion in 2.2.2 above. The question arises, however, whether the interest awarded in *Kate* did not amount to damages for pure economic loss.

<sup>297</sup> *Residents* para 155.

<sup>298</sup> *Fose* discussion on punitive damages in paras 62-63, 65, 72.

<sup>299</sup> See 2.9.

<sup>300</sup> *Thubakgale* paras 182 and 183. Also see Majiedt J in *Thubakgale* paras 91 and 92.

<sup>301</sup> See, however, s 38 read with s 172 of the Constitution.

<sup>302</sup> *Residents* para 151.

<sup>303</sup> Jafta J in *Thubakgale* para 179. *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* 2023 5 BCLR 527 (CC) paras 230 and further regarding the principle of subsidiarity and the references to the cases under discussion, as well as *inter alia* *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC); *My Vote Counts NPC v Minister of Justice and Correctional Services* 2018 5 SA 380 (CC). See Zitzke 2015 CCR 289 and the discussion below in 4.2.

<sup>304</sup> De Vos and Freedman *South African Constitutional Law* 461.

<sup>305</sup> *Fose* para 72; *Olitzki* para 30; *Residents* para 120; *Thubakgale* para 191.

while in others the courts held that that this could not be a reason to withhold constitutional damages.<sup>306</sup>

From the above one can deduce that the rules relating to constitutional damages are casuistic, with no underlying general principle guiding them. The availability of constitutional damages remains limited, with only a few cases having awarded these damages in the aftermath of *Fose*. The role of the principle of subsidiarity as a generalising factor is discussed below.

#### **4.2 Appropriate relief**

The question as to what entails "appropriate relief" was addressed in *Fose*.<sup>307</sup> As noted above, Ackermann J opined that this could include a declaration of rights, an interdict, and a mandamus "or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and may be enforced." Ackermann J recognised that the courts would in future have to create new remedies to ensure that constitutional rights were enforced and protected.<sup>308</sup>

Ackermann J further noted that where it was necessary to protect Chapter 3 (Chapter 2 in the 1996 Constitution) there was no reason "appropriate relief" could not include an award for damages.<sup>309</sup> He did not refer here to constitutional damages. Instead reference was made to the common law of delict and the fact that it was flexible enough to be developed.<sup>310</sup>

Ackermann J held, though, that constitutional damages with a punitive element had no place in South African law.<sup>311</sup>

Most of the cases that followed *Fose* agreed that constitutional damages would be available only where they proved to be the most effective and appropriate remedy, but in most cases the courts held that where delictual damages were available, constitutional damages should not be awarded. Appropriate relief would thus also include delictual damages.

#### **4.3 Constitutional subsidiarity**

As indicated above, the principle of constitutional subsidiarity was invoked in *Thubakgale* to deny an award of constitutional damages.<sup>312</sup>

Constitutional subsidiarity entails avoiding "two parallel systems of law".<sup>313</sup> This may also be applied to the common law. Zitzke sees adjudicative

---

<sup>306</sup> *Kate* para 32.

<sup>307</sup> See 2.1 above.

<sup>308</sup> *Fose* para 19.

<sup>309</sup> *Fose* para 60. Also see Price 2015 *Acta Juridica* 324-325.

<sup>310</sup> *Fose* para 60.

<sup>311</sup> See the discussion under 2.1.

<sup>312</sup> *Thubakgale* para 178.

<sup>313</sup> *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* 2023 2 SA 31 (CC).

subsidiarity as medium<sup>314</sup> between what he refers to as constitutional heedlessness ("substantive avoidance of the potential impact of the Constitution")<sup>315</sup> and constitutional over-excitement ("relegation of established common-law rules that are ultimately replaced by a pure application of constitutional principles").<sup>316</sup>

In *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd*<sup>317</sup> the Constitutional Court per Madlanga J noted the following regarding constitutional subsidiarity:

The principle of subsidiarity, repeatedly recognised by this Court, has a number of applications. One application of the principle is that a litigant cannot directly invoke a constitutional right when legislation has been enacted to give effect to that right. The litigant must either challenge the constitutionality of the legislation so enacted or rely upon the legislation to make its case.<sup>318</sup>

He went on to quote Khampepe J in *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku*:<sup>319</sup>

Broadly, the principle of subsidiarity is the judicial theory whereby the adjudication of substantive issues is determined with reference to more particular, rather than more general, constitutional norms. The principle is based on the understanding that, although the *Constitution enjoys superiority over other legal sources, its existence does not threaten or displace ordinary legal principles* and its superiority cannot oust legislative provisions enacted to give life and content to rights introduced by the Constitution. (Own emphasis).

Reference is made here to "other legal sources" and "ordinary legal principles"; this could therefore include the common law. In this regard reference is made to the quotation of Zitzke above regarding the "hidden subsidiarity" in *Fose*.<sup>320</sup> In the same vein Price wrote in 2015 that

constitutional damages are still regarded as a long-stop or subsidiary remedy: in accordance with the constitutional principle of subsidiarity, *constitutional damages 'might be awarded where no statutory remedies have been given or no adequate common-law remedies exist'*.<sup>321</sup> (Own emphasis).

(The principle of subsidiarity was not applied In *Modderklip, Kate* and the *Life Esidimeni* arbitration. In *Modderklip* the court specifically held that

---

<sup>314</sup> Zitzke 2015 CCR 260, 281 and further.

<sup>315</sup> Zitzke 2015 CCR 260, 261 and further.

<sup>316</sup> Zitzke 2015 CCR 260; 285 and further.

<sup>317</sup> *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* 2023 5 BCLR 527 (CC) (hereafter *Eskom*).

<sup>318</sup> *Eskom* para 149.

<sup>319</sup> *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku* 2022 4 SA 1 (CC) para 102, quoted in *Eskom* para 236.

<sup>320</sup> See 2.1 above.

<sup>321</sup> Price 2015 *Acta Juridica* 325.

constitutional damages in that instance were more suited than delictual damages.)<sup>322</sup>

The principle of subsidiarity could thus provide a general principle for the availability of a remedy such as constitutional damages, making the rules less casuistic. Instead of having regard to a list of instances when constitutional damages would or would not be available, subsidiarity could be applied as a single principle.

## 5 Conclusion

Insofar as the awarding of constitutional damages is concerned, *Fose* remains the *locus classicus*, having been referred to extensively in cases where constitutional damages have been claimed. *Fose* emphasised the compensatory nature of the law by stating clearly that punitive damages have no place in South African law. The court, furthermore, in that instance also did not award constitutional damages, as this would have put an undue burden on the state. As with the cases after *Fose*, the court held that where delictual damages are available, there is no need for constitutional damages. The court in *Fose* did not identify situations in which constitutional damages would be available.

The rules for the availability have been described as "casuistic" and lacking coherence. In most cases where constitutional damages have been claimed, either on their own or in addition to delictual damages, the courts have provided that constitutional damages cannot be awarded in addition to delictual damages. An exception to this is the *Life Esidimeni* arbitration, where constitutional damages with a punitive element were awarded. The arbitration, as indicated above, is not binding. This is the only instance in which constitutional damages were awarded alongside delictual damages. In *Modderklip* and *Kate* constitutional damages were awarded, in *Modderklip* the court held that delictual damages could be awarded, but found that constitutional damages in that instance would be the more effective remedy. The latest two Constitutional Court cases are still advocating that constitutional damages cannot be awarded where delictual damages would suffice. In *Thubakgale* the Constitutional Court specifically invoked the principle of subsidiarity in this regard.<sup>323</sup>

This position, when considering the *Residents* and *Thubakgale* cases, seems not to have changed.<sup>324</sup> One has to conclude therefore that the constitutional damages landscape has remained somewhat static.

---

<sup>322</sup> See 2.3 above.

<sup>323</sup> See 3.2 above.

<sup>324</sup> See 3 above.

## Bibliography

### Literature

De Vos and Freedman *South African Constitutional Law*

De Vos P and Freedman W *South African Constitutional Law in Context 2<sup>nd</sup> ed* (Oxford University Press Cape Town 2021)

Dendy "Damages"

Dendy M "Damages" in Faris JA (ed) *Law of South Africa* (LexisNexis Durban 2018) vol 14(1)

Department of Human Settlements *National Housing Code*

Department of Human Settlements *National Housing Code* (Department of Human Settlements Pretoria 2009)

Kika *Fashioning Judicial Remedies*

Kika M *Fashioning Judicial Remedies that Work in a Constitutional Society Establishing a Framework for a Functional Approach to the Awarding of Constitutional Damages in South Africa Law and Comparative Jurisdictions* (PhD-thesis University of Cape Town 2019)

Klopper *Damages*

Klopper H *Damages* (LexisNexis Durban 2017)

Liebenberg 2022 *CCR*

Liebenberg S "The Art of the (Im)possible? Justice Froneman's Contribution to Designing Remedies for Structural Human Rights Violations" 2022 *CCR* 139-169

Loubser and Midgley *Law of Delict*

Loubser MM and Midgley R (eds) *The Law of Delict in South Africa 3<sup>rd</sup> ed* (Oxford University Press Cape Town 2017)

Neethling and Potgieter *Law of Delict*

Neethling J and Potgieter JM *Law of Delict 8<sup>th</sup> ed* (LexisNexis Durban 2020)

Price 2015 *Acta Juridica*

Price A "State Liability and Accountability" 2015 *Acta Juridica* 313-335

Van der Walt *Delict*

Van der Walt JC *Delict: Principles and Cases* (Butterworths Durban 1979)

Zitzke 2015 *CCR*

Zitzke E "Constitutional Heedlessness and Over-Excitement in the Common Law of Delict's Development" 2015 *CCR* 259-290

Zitzke 2020 *Litnet*

Zitzke E "Grondwetlike Skadevergoeding as 'Nominale' en 'Verswaarde' Skadevergoeding in Dringende Aansoek *Ngomane v Johannesburg (City)* 2020 1 SA 52 (HHA)" 2020 *Litnet* 790-802

Zitzke 2020 *TSAR*

Zitzke E "The Life Esidimeni Arbitration: Towards Transformative Constitutional Damages?" 2020 *TSAR* 419-440

## **Case law**

### **Canada**

*Vancouver (City) v Ward* [2010] 2 SCR 28

### **Ireland**

*Kennedy v Ireland* [1987] IR 587

*Conway v Irish National Teachers Organisations* [1991] 2 IR 305

### **New Zealand**

*Dunlea v Attorney-General* [2000] 3 NZLR

*Liston-Lloyd v The Commissioner of Police* [2015] NZHC 2614

### **South Africa**

*Arbitration Award between Families of Mental Health Care Users Affected by the Gauteng Mental Marathon Project (Claimants) and National Minister of Health of the Republic of South Africa, Government of the Province of Gauteng, Premier of the Province of Gauteng, Member of the Executive Council of Health: Province of Gauteng (Respondents)*  
<http://www.saflii.org/images/LifeEsidimeniArbitrationAward.pdf> accessed 13 March 2023

*Dikoko v Mokhatla* 2006 6 SA 235 (CC)

*Ekurhuleni Metropolitan Municipality v Thubakgale* (125/2018) [2018] ZASCA 76 (31 May 2018)

*Ekurhuleni Metropolitan Municipality v Thubakgale* (High Court, Gauteng Division, Pretoria) (unreported) case number 39602/2015 of 13 July 2020

*Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* 2023 5 BCLR 527 (CC)

*Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* 2023 2 SA 31 (CC)

*Esselen v Argus Printing and Publishing Co Ltd* 1992 3 SA 764 (T)

- Fose v Minister of Safety and Security* 1996 2 BCLR 232 (W)
- Fose v Minister of Safety and Security* 1997 3 SA 786 (CC)
- Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC)
- Kate v MEC for the Department of Welfare, Eastern Cape* 2005 1 SA 141 (SECLD)
- Law Society of South Africa v Minister for Transport* 2011 1 SA 400 (CC)
- M v Minister of Police* 2013 5 SA 622 (GNP)
- Mahambehlala v MEC for Welfare, Eastern Cape* 2001 1 SA 342 (SE)
- Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC)
- Mbanga v MEC for Welfare, Eastern Cape* 2002 1 SA 359 (SE)
- Member of the Executive Council: Welfare v Kate* 2006 4 SA 478 (SCA)
- Minister of Police v Mboweni* 2014 6 SA 256 (SCA)
- Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 6 SA 40 (SCA)
- My Vote Counts NPC v Minister of Justice and Correctional Services* 2018 5 SA 380 (CC)
- Ngomane v Johannesburg (City)* 2020 1 SA 52 (SCA)
- Olitzki Property Holdings v State Tender Board* 2001 3 SA 1247 (SCA)
- President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC)
- Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg v Minister of Police* 2023 3 SA 329 (CC)
- RK v Minister of Basic Education* 2020 2 SA 347 (SCA)
- S v Vermaas; S v Du Plessis* 1995 3 SA 292 (CC)
- South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku* 2022 4 SA 1 (CC)
- Thubakgale v Ekurhuleni Metropolitan Municipality* 2018 6 SA 584 (GP)
- Thubakgale v Ekurhuleni Metropolitan Municipality* 2022 8 BCLR 985 (CC)



**Legislation**

*Constitution of the Republic of South Africa Act 200 of 1993*

*Constitution of the Republic of South Africa, 1996*

*Expropriation Act 63 of 1975*

*Housing Act 107 of 1997*

*Promotion of Administrative Justice Act 3 of 2000*

*South African Police Service Act 68 of 1995*

**Internet sources**

Office of the Health Ombud 2017 <http://healthombud.org.za/wp-content/uploads/2017/05/FINALREPORT.pdf>

Office of the Health Ombud 2017 *Report into the Circumstances Surrounding the Deaths of Mentally Ill Patients: Gauteng Province* <http://healthombud.org.za/wp-content/uploads/2017/05/FINALREPORT.pdf> accessed 8 August 2023

**List of Abbreviations**

CCR

Constitutional Court Review

TSAR

Tydskrif vir die Suid-Afrikaanse Reg