REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: A5019/2022

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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DATE
SIGNATURE

In the matter between:

LIVING AFRICA ONE (PTY) LTD Appellant

AND

EKURHULENI METROPOLITAN MUNICIPALITY First Respondent

MUNICIPAL MANAGER: EKHURHULENI METROPOLITAN MUNICIPALITY Second Respondent

Coram: Coppin, Opperman et Dippenaar JJJ

Summary:
Appeal - Failure of municipality to provide temporary alternative housing for execution of eviction order - contempt of court - wilfulness and *mala fides* not proved - Failure resulting in infringement of constitutional rights - just and equitable remedy - constitutional damages - quantification of deferred.

JUDGMENT

COPPIN J (OPPERMAN *et* DIPPENAAR JJ CONCURRING)

[1] This is an appeal to the Full Court of this Division, with the necessary leave, against a decision of Francis J (the court *a quo*) of 16 September 2021 in terms of which the court *a quo* dismissed: (a) the appellant's application to hold the respondents (the municipality and its municipal manager) in contempt of court – the orders relating to the temporary accommodation of illegal occupants on the appellant's land known as a Portion of the Remaining Extent of the Farm Driefontein 85, Registration Division IR. Province of Gauteng (the property) and (b) a constitutional damages claim brought by the appellant for the alleged infringement of its rights in terms of section 25(1), alternatively sections 25(2) and (3), and section 34 (1), read with section 1, of the Constitution, because of the continued illegal occupation of the property.

[2] Accordingly, the main issues that arise for consideration in this appeal are: (a) the contempt; (b) the alleged infringement of the constitutional rights as aforementioned; and (c) the appropriateness of constitutional damages as just and equitable relief, if any such infringements have been proved. The facts relevant to the issues are set out in detail in the judgment of the court *a quo*, consequently in this judgment a repeat of only the salient facts should suffice.

Salient Facts

[3] Between October and December 2013 representatives of the appellant met with representatives of the municipality in order to inform the municipality that the appellant intended developing the property and presented the municipality with a proposal regarding the relocation of the Angelo Informal Settlement. There was no response from the municipality and the appellant proceeded to apply to the Gauteng Local Division of the High Court for an order removing the informal settlements from the property. In that application the first respondent was cited as "the unlawful invaders of the Angelo dump" and the second respondent there was cited as "the unlawful occupiers of the Angelo dump". The municipality was also cited in those proceedings as a respondent.

[4] On 1 August 2014 Sutherland J (as he then was) made an order evicting the first and second respondents in those proceedings from the property. In terms of the order, they were to vacate the property on or before 1 February 2015 and if they did not vacate the property by then, the Sheriff or his lawful deputy were authorised and directed to evict them from the property. The unlawful occupiers in that application were also interdicted and restrained from re-entering the property after they had been evicted therefrom, as aforesaid. The court also authorised the Sheriff or his deputy to evict them if they re-occupied the property in those circumstances.

[5] Of significance in this matter is the following order granted by Sutherland J on that occasion:

> "6. The [municipality] is to provide temporary emergency accommodation for any of the First and Second Respondents who may be entitled to such temporary emergency accommodation, and to take any and all steps necessary prior to 1st February 2015 to identify those who may require it."

[6] The order of Sutherland J was not appealed against and it is further not disputed that the municipality did not comply with that order by the deadline, that is 1 February 2015. As a result, the appellant approached the court again for relief.

[7] On 6 October 2015 Mashile J granted an order (i.e. a structured interdict) in effect, confirming that the municipality was constitutionally and statutorily obliged to ensure that it complied with paragraph 6 of Sutherland J's order. Mashile J further declared that the municipality's failure to comply with its obligations in that regard has infringed the appellant's right not to be arbitrarily deprived of its property as contemplated in section 25 (1) of the Constitution.[1]

[8] Mashile J further ordered the municipality to:

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[1] The Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution).

"3.1 [U]ndertake a survey of the occupiers of the property on or before the 15th October 2015;

3.2 report, on oath, to this Court on or before the 22nd October 2015 with the outcome of the survey undertaken and included therein, [and] to provide the details of [its] plan of action to give effect to Sutherland J's Order, including the particulars of any application to the Gauteng Department of Housing for the provision of funds for any project to be undertaken and the timing of [its] compliance with Sutherland J's Order."

[9] In terms of Mashile J's order the appellant was also given the entitlement to comment on the municipality's report within one week, after which the matter could be set down by either party for such relief "as is just and equitable in the circumstances." The municipality was also ordered to pay the appellant's costs on the attorney and client scale.

[10] The order of Mashile J was also not appealed against and had also not been complied with. The deadline set for the municipality to survey the occupiers of the property came and went and an exchange of correspondence between the parties followed.

[11] It is common cause that during December 2015 the municipality applied to the National Government for funding for the relocation of the illegal occupiers of the property, but the application was unsuccessful and there was no follow-up. During March 2016 the municipality (seemingly) completed a household audit of the occupiers and at the end of 2016 started a public consultation process regarding the relocation. However, no plan of action was submitted.

[12] According to the municipality the final audit report, which was compiled by PMM Mobile Solutions, and which utilised youth from the area to undertake the audit, reflected the following: that there were a total of 748 households involved; potential qualifiers and non-qualifiers for a full housing subsidy were noted, as well as persons having an income exceeding R3500, as well as those who previously benefited from the housing subsidy scheme; their

citizenship and those individuals with dependants and; those who are single (and with no dependants) were also noted.

[13] In 2017 the municipality purchased Germiston Extension 46 for an amount of R12 100 000.00 (twelve million and one hundred thousand rand) from the appellant for the purpose of re-locating the unlawful occupiers. This land was part of the appellant's proposed "Green Reef" development.

[14] In 2017 steps were taken by the municipality to develop the land it purchased from the appellant, and the municipality and the appellant exchanged correspondence and held meetings at the instance of the appellant where possible solutions to the appellant's plight, namely the continued occupation of its land by the illegal occupants, was discussed.

[15] On 13 February 2017 the municipality informed that the first portion of Germiston extension 46 had been cleared and pegged and was ready for the installation of temporary structures to accommodate the persons that were to be relocated. The municipality's Roads and Stormwater Department and its Parks Department assisted in the clearing of the site. By 4 March 2017 95% of the area had been cleared. In May 2017 the City Planning Department of the municipality approved the township plan.

[16] However, on 23 October 2017 the Gauteng Department of Agriculture and Rural Development issued the municipality with a non-compliance notice in respect of the site. In terms of the notice the municipality was to cease all work on the land that is known as Germiston Extension 46, and was also barred from relocating unlawful occupiers from the Angelo Informal Settlement to that site. Businesses situated adjacent to Germiston Extension 46 also successfully brought an application in the Gauteng Local Division of the High Court for an interim interdict to interdict and restrain the municipality from erecting structures on the land and from allowing persons from the Angelo Informal Settlement to relocate to the site for the purposes of residing there. The municipality was also ordered to secure the site. The businesses

contended, *inter alia*, that the municipality had failed to comply with building laws.

[17] According to the municipality, this proved onerous. In compliance with the court order, the process of relocating the unlawful occupiers ceased. The municipality contends that they could not secure the site due to inadequate funds and had requested its Police Department to undertake ad hoc patrolling of the site. This, however, proved ineffective due to limited capacity. As a result, unauthorised persons still accessed the site and vandalised it. Structures on the site were stripped of material which was then stolen.

[18] The municipality made efforts to have the non-compliance notice withdrawn. It contends that it was not responsible for the non-compliance that had resulted in the notice being issued. According to the municipality, it also engaged the relevant MEC and in January 2017 submitted an environmental report to the Gauteng Department of Agriculture and Rural Development in which it addressed the alleged non-compliance. The municipality contends that these efforts proved unsuccessful. The Department was adamant that there had to be compliance first before the notice could be withdrawn.

[19] In early 2018, and according to the municipality, due to all the difficulties it experienced in respect of its efforts to relocate the unlawful occupiers of the property to the site at Germiston Extension 46, it decided to relocate them to another site, namely, Comet Extension 17, instead. Comet Extension 17 is part of the farm Driefontein and is situated in the Boksburg area. It had the potential to accommodate 3300 high-density housing units. The initial projected timeline for the installation of services at this site was as follows: the tender award date was 13 December 2018; the introductory meeting was on 18 January 2019; the site hand over occurred on 27 March 2019; the contractual starting date was 1 April 2019; the anticipated duration of the project was 10 months and the anticipated completion date was sometime in February 2020.

[20] On 4 July 2019 the appellant brought an urgent application in the Gauteng Local Division of the High Court under case number 2019/23725 to compel the municipality to comply with the orders that had been granted by Sutherland J on 1 August 2014 and by Mashile J on 6 October 2015. On 19 September 2019 Siwendu J granted an order in favour of the appellant in that matter. In essence, Siwendu J ordered the municipality to ensure that the relocation of the unlawful occupiers of the property was given effect to by no later than 30 September 2020, and referred the matter for case management.

[21] On 28 November 2019, the case management judge, Meyer J (as he then was) directed the municipality to provide a report by 5 December 2019 setting out the steps taken since the grant of Sutherland J's order on 1 August 2014. On 6 December 2019, Meyer J noted a lack of particularity in the report the municipality had submitted and required it to submit a new report by 3 February 2020. The municipality filed a report as ordered, although the appellant contends that the report fell short of what Meyer J required. The municipality further assured Meyer J in a letter that it intends complying with the court orders made in respect of the unlawful occupiers of the property.

[22] On 28 February 2020, Meyer J directed the municipality to file monthly reports regarding its compliance. On 5 August 2020 the parties met on Meyer J's direction, where the municipality revealed that compliance with those court orders would only be possible in the next 6 to 7 years. On 11 September 2020 Meyer J directed timelines for the litigation, that culminated in the order of Francis J, which is the subject of this appeal, to be furnished.

[23] The municipality submitted further reports. It contends, basically, that it needs more time to effect the relocation of the unlawful occupiers off the appellant's property and that it cannot simply relocate people from one point to another, but can only do so after it had made "alternative, decent accommodation available to them." It further contends that "the relocation itself must be

carried out in a manner that is fair and protects the right to dignity of the people concerned."

[24] The municipality further contends that the required services at the places to which these people are to be relocated takes time to be installed and requires planning by various of its departments, as well as funding, approval from other organs of state, community participation, et cetera, and that all of this cannot be accomplished "overnight". With reference in particular to a timeline that the municipality had agreed to with the appellant for compliance with the order of Siwendu J, namely 30 September 2020, the municipality contends that the date was unrealistic if regard is had to the steps that still had to be taken to get the alternative land ready to receive occupants.

[25] The municipality submitted in the court *a quo* and in this Court that it required an extension of the time period within which it was required to fully implement the relevant court orders. Besides the logistical challenges, and resistance from established communities, it cites financial and budgetary constraints as hindering the implementation of the court orders. In its supplementary answering affidavit, which was deposed to by the city manager, Mr Davey, on or about 20 November 2020, it stated that as at that stage the following was the position: in respect of Germiston Extension 46 – environmental authorisation was still required as a precondition for proclaiming it as a township and the municipality was required to resubmit its application for the formal housing project. In addition, the site there required rehabilitation which would take no less than 24 months.

[26] According to Mr Davey, in respect of Comet Extension 17, the following still required attention: town planning; a handover of the water and sewage network after an audit had been completed; roads and storm water services still required construction; the electricity's network still required construction and implementation and top structure construction was still required. Mr Davey stated that this would only commence once the budget application approval had been received by the Gauteng Department of Human Settlements and that at the stage he made the affidavit the municipality

anticipated "that it would take a minimum of six years to complete the whole project." Further, according to Mr Davey, it was anticipated that the municipality would relocate the relevant people as and when the required housing units were completed from time to time.

[27] At the outset of the hearing on appeal, reference was made to further reports that had been submitted by the municipality before the hearing of the appeal and after the judgment of the court *a quo*. The detail of those reports will only be dealt with insofar as it is relevant to the issues in this matter and at that juncture. For now, it should suffice to indicate that in terms of the last report the municipality submitted, it anticipates that the relocation of the unlawful occupiers off the appellant's property is only likely to occur in or about a few years' time, that is, by no earlier than 2035 and possibly only by 2038.

The Issues

(a) <u>The alleged contempt</u>

[28] It is now trite that the party in civil contempt proceedings, who alleges that the other (the contemnor) is guilty of acting in contempt of a court order, must establish (a) that the order alleged to have been breached was granted against the contemnor; (b) that the order was served upon the contemnor or that the contemnor had knowledge of it; and (c) that the contemnor did not comply with the order. Upon proof of those facts there is a presumption or inference of wilfulness and *mala fides*, and the contemnor has an onus to rebut that inference on a balance of probabilities. This may be done, for example, by establishing that the court order was not deliberately or intentionally disobeyed. Before imposing a criminal sanction, the guilt of the contemnor has to be established beyond a reasonable doubt,[2] for other

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[2] See, *inter alia*, *Pheko v Ekhurhuleni City* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) (*Pheko*) at paras 28-37 where the Constitutional Court approvingly applied *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (*Fakie*); *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State v Zuma and Others* [2021] ZACC 18; 2021 (5) SA 327 (CC); 2021 (9) BCLR 992 (CC) at para 37.

coercive remedies to be applied, the contempt must be established on a balance of probabilities.

[29] The issue in this matter is whether the respondents had rebutted the inferences of wilfulness and *mala fides* on a balance of probabilities, or to put it differently, whether they had managed to establish a reasonable doubt that their failure to comply with the court orders was not wilful and *mala fide.*

[30] The court *a quo* found that the respondents had succeeded in that regard. The court *a quo*, in essence, found that the efforts made by the municipality, which could not be contested by the appellant, and were effectively common cause, demonstrated that its non-compliance with the court orders (including the time stipulations therein) was not wilful and *mala fide.* It found that the steps that had been taken were serious and that the municipality had spent money in its effort to relocate the unlawful occupiers and that there was no evidence that this had been done in bad faith.

[31] The court *a quo* summed up the position as follows:

> "It is clear from what is stated in the [appellant's] founding and supplementary affidavits and the correspondence attached thereto that it cannot be said that the respondents have been unreasonable or that they simply sat back and did absolutely nothing about complying with the court orders in issue. It shows that the respondents have taken serious, deliberate and reasonable steps within their powers to comply and give effect to the court orders. The mere fact that it has taken long to fully comply with the court orders is not indicative of the respondents' intention to violate the dignity, reputation and authority of this court. The delays were occasioned by all the processes which must be embarked upon in order to construct decent temporary emergency accommodation. The respondents had gone further to actually provide permanent accommodation to the relevant affected individuals. This was consistent with the respondents' obligations in terms of the Constitution."

[32] The court *a quo* went further to find that the appellant had not produced any evidence which would justify it to conclude that the respondents have

deliberately violated the dignity, authority and reputation of the court. It found, effectively, that the respondents had made genuine efforts to comply with the court orders and the case management directions. Furthermore, it found that the respondents had meaningfully engaged with the appellant and the court in respect of the steps that they had taken to comply with the court orders.

[33] The court *a quo* found, in effect, that realistically, the relocation of the concerned individuals could only take place after the construction of permanent structures and that this would take a number of years and required adequate funding. These persons, according to the court *a quo*, could not simply be relocated, but their relocation ought to occur in a manner that is consistent with the municipality's constitutional obligations, meaning that these persons had to be "relocated in a manner which is protective" of their rights in terms of the Constitution. In conclusion, the court *a quo* found that there was no factual or legal basis for it to declare that the respondents were in contempt of the court orders that had been made.

[34] The court *a quo* rejected the appellant's criticism of the steps that the respondents had taken. It found that even if it were to accept that the delays experienced by the respondents were as a result of alleged general institutional incompetence and maladministration that did not mean that such incompetence or maladministration was deliberate, or wilful or *mala fide*. Of significance, the court *a quo* found that the effect of the order of Siwendu J was to alter the timeframes set in the judgments of Sutherland J and Mashile J. It held as follows:

> "What happened in the past about the non-compliance of the two court orders is strictly speaking not a factor that needs to be considered by this court simply because the time period within which the respondents had to act was extended."

In coming to its conclusion, that it had not been established that the respondents had acted in contempt of the court orders, the court *a quo* also took into account the "serious interaction" of the parties to find a solution to the problem of the illegal occupiers of the appellant's property.

[35] On appeal the appellant argued, essentially, that it is apparent from the papers that the requirements for finding that the respondents had acted in contempt had been met and that the presumption of wilfulness and *mala fides* had not been rebutted by the respondents. In particular, it contended: (a) that the appellant's conduct was not relevant to the enquiry whether the respondents had rebutted the presumption of wilfulness and *mala fides* and that the court *a quo* erred in taking into account such conduct in that regard; (b) that the following facts on their own and cumulatively showed wilfulness and *mala fides* on the part of the respondents and that the court *a quo* erred in not finding accordingly, namely: (i) there was a seven-year period of delay since the order of Sutherland J; (ii) Siwendu J's order was granted by agreement between the parties, and the respondents consciously agreed in that order to comply with Sutherland J's order by 30 September 2020; (iii) they did not contend there that the date was unrealistic and their change in attitude gives rise to a reasonable inference that at the time of the agreement inadequate facts had been placed before Siwendu J.

[36] The appellant further contends (iv) that despite agreeing then to the date of 30 September 2020, it appeared (i.e. at the time of the matter being argued in the court *a quo*) that the order of Sutherland J would "only be implemented possibly by, but in all likelihood only well after 2027, which can only mean that [the order made by Siwendu J] was, at best, recklessly agreed to by [the municipality]."; (v) instead of focusing on providing emergency temporary accommodation as was required in the order of Sutherland J, the municipality chose to focus on providing permanent accommodation for the illegal occupants of the appellant's property. This deliberate choice was a significant cause for the delay in compliance with Sutherland J's order; and (vi) "obvious extensive poor planning and lack of foresight" on the part of the municipality contributed to the non-compliance with Sutherland J's order. According to the appellant, this is evident, *inter alia*, from the facts alleged in the interdict by the business community in respect of the occupation of the Germiston Extension 46 land; and (vii) very little had been done by the municipality to accelerate compliance with the court orders and the progress reports were submitted

merely to comply with the case management directions but do not demonstrate the respondents' commitment to comply with any of the relevant court orders.

Discussion

[37] The appellant's conduct was relevant in considering the question whether the respondents were in contempt, as it was in response to, or support of, all the efforts made by the respondents to comply with the court orders requiring the relocation of the illegal occupiers. Hence the court *a quo* did not err in taking such conduct into account and, instead, would have erred by ignoring it.

[38] There is no evidence that the respondents simply wilfully and *mala fide* ignored the court orders, but there is ample evidence that the respondents acted with good intention and that they encountered a myriad of obstacles in their efforts to relocate the unlawful occupiers of the appellant's property. In all probability they, including the appellant, had grossly underestimated the enormity or the true depth of the challenges that such a relocation would present, and as a result, unrealistic deadlines or timelines were fixed or agreed to.

[39] Institutional incompetence, maladministration and a lack of adequate resources, further bedevilled the execution of the task of the relocation, but there is no definitive evidence that competence and optimum utilisation of the resources available to the respondents would have resulted in the deadlines that had been set or agreed to, or anticipated by the appellant, and stipulated in the respective orders, being met by those dates.

[40] The efforts made by the respondents cannot simply be ignored and their conduct in attempting to give effect to the court orders is wholly inconsistent with an inference of wilfulness and *mala fides*. Even if some of the difficulties the respondents experienced may have been as a result of incompetence and could, arguably, have been avoided, that still, does not mean that they were wilful or *mala fide*.

[41] Taking all the facts into account there is a reasonable doubt that the respondents wilfully and *mala fide* disobeyed the court orders. Or to put it differently, it has not been proven beyond a reasonable doubt, or on a balance of probabilities that the respondents acted in contempt of the court orders, or that they wilfully and in bad faith set out to violate the dignity, authority and reputation of the court by not complying to the letter with the court orders that were made. Non-compliance on its own, provided it is *bona fide*, does not constitute contempt.[3]

[42] Without detracting from what is stated above, there is no evidence that the second respondent, the City Manager, Mr Davey, who is cited in his personal capacity, deliberately defied any of the court orders. It had to be shown that he himself, wilfully and maliciously failed to comply with the court orders[4]. In my view, the respondents managed to rebut the inference of wilfulness and *mala fides* and the court a quo's conclusion to that effect cannot be faulted.

(b) Constitutional damages

[43] The court *a quo* held that since it was found that the respondents were not guilty of contempt of court the issue of constitutional damages fell away. Accordingly, the court *a quo* did not consider that aspect of the case.

[44] The appellant contends that the court *a quo* was wrong, because that aspect was not dependent on whether the respondents were guilty of contempt, but was a self-standing claim based on the infringement by the municipality of its rights in terms of sections 25 and 34 of the Constitution.

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[3] *Fakie* above n 2 at para 6; *Pheko* above n 2; *Matjhabeng Local Municipality v Eskom Holdings Limited and Others; Mkhonto and Others v Compensation Solutions (Pty) Limited* [2017] ZACC 35; 2018 (1) SA 1 (CC); 2017 (11) BCLR 1408 (CC) (*Matjhabeng*) at para 65.
[4] *Matjhabeng* id at para 76.

[45] In its original notice of motion in the application brought in the court *a quo*, the appellant, in addition to seeking an order that the matter be treated as one of urgency, sought an order in the following terms:

> "2 That the first and second respondents are in contempt of the orders of the Honourable Messrs Justice Sutherland and Mashile of 1 August 2014 and 6 October 2015 respectively;
> 3. That the first respondent is fined an amount of R1 000 000.00 (One Million Rand);
> 4. That the second respondent is fined an amount of R250 000.00 (Two Hundred and Fifty Thousand Rand) which amount is to be paid *de bonis propriis*, alternatively the second respondent is to be imprisoned for a term deemed appropriate by the Honourable Court;
> 5. That the penalties in paragraphs 3 and 4 above be suspended on condition that the first and second respondents procure the relocation of the residential occupiers of the applicant's property, as reflected in the orders referred to in paragraph 2 above, within 1 (one) month of any order of this Honourable Court;
> 6. Alternatively to paragraph 5 above, that the first and second respondents are to relocate any residential occupiers of the said property within 1(one) year of the date of any order of this Honourable Court on condition that the first respondent pays to the applicant rental for its property, reflected in the orders referred to in paragraph 2 above, in the amount of R1.00 (one rand) per square metre from the date of non-compliance with the order of the Honourable Mr Justice Sutherland dated 1 August 2014, until final relocation of all residential occupants;
> 7. Further and/or alternative relief;
> 8. That the costs of this application be reserved for consideration at the hearing of this application."

[46] In paragraph 9 of its founding affidavit , the appellant, in essence, repeats the relief it sought in its notice of motion. It is thus clear from its application that its monetary claim of one rand per square metre was an alternative to its prayer that the fines imposed on the respondents for contempt be suspended on condition that the respondents relocate the illegal occupiers of its property within one year of the order that it wanted the court *a quo* to make in respect

of the contempt. Furthermore, the monetary relief sought was claimed in the event that the respondents did not procure the relocation within one year of the court's orders.

[47] Monetary relief is thus claimed as an alternative condition of suspension of the penalty sought. It is thus self-evident that if the respondents were not found to be in contempt and no penalties (or fines) were imposed, the issue of the suspension, including the conditions of such suspension, would not have arisen for decision.

[48] The claim of one rand per square metre in the appellant's original papers was not the constitutional damages claim which the appellant is referring to. In its amended notice of motion, the appellant inserted a paragraph in terms of which it seeks an order that the municipality be declared to have infringed its rights in terms of section 25(1), alternatively sections 25(2) and (3) and section 34, read together with section 1(c) of the Constitution, in that it "failed to provide temporary emergency accommodation to the unlawful occupiers" of the appellant's property pursuant to the eviction order of Sutherland J of August 2014.

[49] In addition, in its amended notice of motion, the appellant sought an order declaring that it was entitled to the payment of compensation in respect of the occupation of its property by the unlawful occupiers from 1 February 2015. And it alleged further in that document that just and equitable relief for the infringement of its rights would be compensation in the amount of R6.50 (six rands and fifty cents) per square meter, totalling R3 672 500.00 (three million six hundred and seventy two thousand five hundred rands) per month.

[50] In its supplementary founding affidavit, the appellant clarifies that the constitutional damages remedy which it is seeking is separate and distinct from the citation for contempt. The appellant further avers that the common law remedy of contempt cannot effectively address the harm that it suffered

through the unlawful infringement of its rights in terms of sections 25 and 34 of the Constitution.

[51] Hence, the appellant's claim for "constitutional damages" is not dependent on a finding that the respondents were in contempt of court. The court *a quo* thus erred in concluding that it became a "non-issue" because of its finding that the respondents were not in contempt. Accordingly, the court *a quo* had to deal with the claim for constitutional damages notwithstanding its finding on the contempt issue.

[52] Even though the court *a quo* did not deal with that issue, this is not a matter where that issue ought to be referred back for a decision by that court. Given all the circumstances, including the interests of justice, it is appropriate for this court to deal with the issue, even though it is effectively raised for the first time, on appeal.[5]

[53] In terms of the court orders that are the subject of this appeal, the municipality was obliged to provide emergency temporary housing to those illegal occupiers that would require the same upon their eviction from the appellant's property. The failure to provide such alternative housing meant that the evictions could not be carried out. The survey conducted by the respondents seem to indicate that more than 700 households would be affected, but does not clearly spell out whether certain or all of those households would be in need of emergency housing upon their eviction from the property.

[54] The end result is that even though an eviction order was issued as long ago as August 2014 by Sutherland J, and was to be executed by 1 February 2015, the unlawful occupiers effectively still remain in occupation of the appellant's property, and will in all probability still remain in occupation of that property for an indefinite period, or at least for many more years until the municipality relocates them.

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[5] Compare: *Stokwe v Member of the Executive Council: Department of Education, Eastern Cape and Others* [2019] ZACC 3; (2019) 40 ILJ 773 (CC); 2019 (4) BCLR 506 (CC) at paras 87-8.

[55] In *Blue Moonlight*,[6] the Constitutional Court, in determining the question of whether it was just and equitable to grant an eviction under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE),[7] considered the property owner's rights to property; the right of the occupiers to housing and equality; and the local government's legal obligation to provide temporary emergency housing in the event of an eviction. The CC held, concerning the continued occupation by the occupiers of the owner's land after process had been issued for their eviction, that "the owner, who is aware of the presence of occupiers over a long time, must consider the possibility of having to endure the occupation for some time."[8] However, the CC also went on to hold that "[o]f course a property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period."[9]

[56] The Constitutional Court further held that "in certain circumstances an owner may have to be somewhat patient, and accept that the right of occupation may be temporarily restricted . . . An owner's right to use and enjoy property at common law can be limited in the process of the justice and equity enquiry mandated by PIE."[10]

[57] The appellant contends that the municipality's conduct in failing to relocate the unlawful occupiers of its property has resulted in a breach of section 25(1) of the Constitution, alternatively, that its property has been temporarily expropriated in breach of sections 25(2) and (3) of the Constitution.

[58] The appellant argues that part of the order made by Mashile J on 6 October 2015, was to declare that the municipality's failure to provide the temporary emergency accommodation to those unlawful occupiers that require such accommodation had infringed the appellant's right not to be arbitrarily

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[6] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* and Another [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC) (*Blue Moonlight*) at para 40.
[7] 19 of 1998.
[8] *Blue Moonlight* above n 6 at para 40.
[9] Id.
[10] Id.

deprived of its property as contemplated in section 25(1) of the Constitution and the municipality has never appealed that order of Mashile J.

[59] The appellant further contends that the municipality's continued failure to relocate the occupiers of its property interferes with its ability to use, enjoy and exploit the property and that it is prevented from developing, selling or using the property. It further argues that this interference with its rights to use, enjoy and exploit the property, is a "deprivation of property" as contemplated in section 25(1) of the Constitution and that the deprivation is substantial.[11]

[60] In *Mkontwana*[12] the Constitutional Court held that whether there has been a deprivation depends on the extent of the interference with or limitation of the use, enjoyment and exploitation of the right. It further held that substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation.

[61] According to the appellant's argument, Sutherland J undertook the same justice and equity enquiry considered in *Blue Moonlight*[13] and effectively held that it was just and equitable to expect the appellant to accept that its section 25 rights may be temporarily restricted for a period of another six months, i.e. between the date of the order (1 August 2014) and the date of the eviction (i.e. 1 February 2015). And further, that Sutherland J considered that it was just and equitable and possible for the municipality to relocate those unlawful occupiers that required emergency accommodation in fulfilment of its constitutional duties.

[62] The appellant argues that the continued deprivation of its property, beyond 1 February 2015 was unjustifiable because "it takes place outside the law of

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[11] *Mkontwana v Nelson Mandela Municipality* (CCT57/03) [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) (*Mkontwana*)at para 32; First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) (*First National Bank*) at para 57.
[12] *Mkontwana* id at para 32.
[13] *Blue Moonlight* above n 6 at para 40.

general application" that reasonably promotes the limitation of its property rights in terms of PIE.

[63] Relying on the decision in *Modderklip*,[14] counsel for the appellant submitted that the Supreme Court of Appeal (SCA) in that matter held the local authority there liable for violating landowner's rights in similar circumstances and that there too the continued unlawful occupation of the owner's land, after an eviction order had been issued, came about because the occupiers had nowhere else to go. According to the appellant, the SCA held there that the State could have ended the unlawful occupation by either relocating the occupiers there to other land or by purchasing the Modderklip land. The appellant submits that, since that did not happen there, the SCA held that the failure of the State to provide the unlawful occupiers with alternative housing constituted a breach of their rights in terms of section 26(1) and (2) of the Constitution, and that such finding led "ineluctably to the conclusion that the State simultaneously breached its section 25(1) obligations"[15] toward the owner of Modderklip. Given the similarities, so argued the appellant, the same findings could be made in this matter.

[64] In addition to alleging an infringement of its section 25 rights, the appellant alleged that its rights in terms of section 34 of the Constitution had been infringed. That section provides that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[65] The appellant contended that because it is precluded from executing Sutherland J's order as a result of the municipality's failure to provide emergency temporary accommodation to occupiers of its property, its rights in terms of section 34 have been limited unjustifiably. For this claim the

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[14] *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 and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resouces Centre, amici curiae)* (*Modderklip*) 2004 (6) SA 40 (SCA); 2004 (8) BCLR 821 (SCA).
[15] Id at para 28.

appellant once again relied on *Modderklip*, albeit the Constitutional Court's decision in that matter,[16] where the Constitutional Court held that the State had infringed a landowner's section 34 rights because it had not assisted the owner to execute the eviction order because of its failure to take reasonable steps to ensure that the owner had an effective remedy.

[66] The appellant argued that in this matter the municipality had to do more than merely take reasonable steps to comply with the order of Sutherland J. It had to comply fully with that order, but, more importantly, had to do so by the date specified in the order. The appellant argued that the municipality has not taken reasonable steps to ensure that the appellant's remedy was effective as required by the rule of law.

[67] It contended that a just and equitable remedy, as contemplated in section 172(1)(a) of the Constitution, for the infringement of its section 25 and 34 rights, was an award of constitutional damages and that such damages would not only serve to protect and enforce the Constitution, but to vindicate its rights and compensate it to the extent that it is prevented from using, letting out or selling that portion of its property that is being unlawfully occupied. The appellant contended that such an award is supported by precedent of the Constitutional Court and the SCA, and also refers in that regard to the decision of the SCA in *MEC for the Department of Welfare v Kate*[17] and the Constitutional Court's decisions in *Modderklip*[18] and in *Thubakgale.*[19]

[68] The appellant also made submissions regarding the quantum of those damages, but those are considered later in this judgment.

[69] In answer to the appellant's arguments in support of its claim for constitutional damages, the respondents essentially submitted the following: That the claim

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[16] *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786.
[17] [2006] ZASCA 49; 2006 (4) SA 478 (SCA).
[18] See n 16 above.
[19] *Thubakgale and Others v Ekhurhuleni Metropolitan Municipality and Others* [2021] 1 ZACC 45; 2022 (8) BCLR 985 CC) (*Thubakgale*).

is based on the finding that the respondents were in contempt of the court orders, and that contempt cannot be enforced by such a claim; they contended that the relief contemplated in section 172(1)(b) of the Constitution, which may include an award of constitutional damages, can only ensue upon an order being granted in terms of section 172(1)(a), in terms of which a law or conduct that is inconsistent with the Constitution is declared invalid to the extent of its inconsistency. Since the appellant had not been granted such an order, it cannot seek constitutional damages as relief.

[70] It was argued by the respondents that in a previous hearing, Mashile J already granted an order declaring that the municipality's failure to comply with the order of Sutherland J has infringed the appellant's right not to be arbitrarily deprived of its property, as contemplated in section 25(1) of the Constitution, that there was no basis for the appellant to seek the same relief in this matter and that the court in this matter was precluded from granting such damages in those circumstances, because of the "once and for all rule". According to this argument, Mashile J's order "brought to an end whatever cause of action" the appellant had relied on to enforce the municipality's failure to comply with the eviction order of Sutherland J. They contended that the order of Siwendu J merely fixed another date by which the respondents had to comply with the orders of Sutherland J and Mashile J, and did not address the question of constitutional damages at all. They submit the appellant should have claimed damages in the matter that served before Mashile J but since it did not do so, it was precluded from claiming those damages in this matter, essentially relying on the same cause of action. The respondents argued that the appellant's rights in terms of section 34 of the Constitution were not infringed and remain unfettered. According to the respondents, the appellant's complaint is about a failure to comply with court orders and not about the judicial process contemplated in section 34.

[71] According to the respondents, the facts in *Modderklip* are distinguishable from those in this matter and the steps taken by the respondents to comply with the court orders "do not justify a conclusion that the delay in giving full effect to the court orders entitles [the appellant] to constitutional damages." The mere

fact that there have been delays "does not on its own mean that reasonable steps were not taken and does not justify the constitutional damages sought" by the appellant. The respondents argued that the municipality could not simply relocate the unlawful occupiers "on an extremely urgent basis without having established appropriate and adequate housing for them" and that such action would have violated their rights. The precaution not to do so resulted in the delay.

[72] Further, on the same point, the respondents contended that on the versions of both the appellant and the respondents, the relocation of the unlawful occupiers would take years because of the municipality's constitutional obligation to provide proper (alternative) housing for them. Those delays were exacerbated because the unlawful occupiers "have built homes for themselves and [have] established their own communities" on the appellant's property.

[73] The respondents argued that the mere fact that the appellant does not have the use and enjoyment of the property, because it is occupied unlawfully, does not on its own mean that the municipality is as a result liable for constitutional damages. The contend that the award of constitutional damages cannot be appropriate relief in circumstances where the municipality was not given enough time to provide temporary emergency accommodation to those unlawful occupiers that required it. The time given in the order of Sutherland J was insufficient, and the mere fact that the municipality did not approach the court to vary the time period given in Sutherland J's order (and had agreed to the time period in the order of Siwendu J) does not mean that it has to be punished as a result with an award of constitutional damages against it.

[74] Relying on the Constitutional Court's decision in *Residents of Industry House*[20] the respondents submitted that constitutional damages in this case

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[20] *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg and Others v Minister of Police and Others* [2021] ZACC 37; 2023 (3) SA 329 (CC); 2022 (1) BCLR 46 (CC) (*Residents of Industry House*).

was not the "most appropriate remedy". In that matter the Constitutional Court held that constitutional damages may only be awarded if it is "the most appropriate remedy available to vindicate constitutional rights with due weight attached to other alternative remedies available in the common law and statutes".[21] If there is such other appropriate relief "it becomes unnecessary to award constitutional damages as an additional remedy when the object of the damages is not to compensate the claimants for the loss they have suffered, but to uphold the Constitution"[22] and that "[i]t is not fair to burden the public purse with financial liability where there are alternative remedies that can sufficiently achieve that purpose."[23]

[75] The respondents further submitted that the appellant has not made out a case that it had suffered patrimonial loss as a result of the continued unlawful occupation, or that an award of constitutional damages was "the most appropriate relief" in the circumstances and that there was no evidence upon which the court could properly make such a finding. The respondents pointed out that there was, *inter alia*, no evidence of the size of the property of the appellant that was unlawfully occupied.

[76] Lastly, the respondents argued that in terms of the Constitutional Court's decision in *Blue Moonlight*, the owner of land in whose favour an eviction order has been granted may have to wait until alternative adequate housing has been provided before accessing and using its land. According to this argument, it is only where the municipality has been granted a reasonable time to relocate the unlawful occupiers that the land owner can expect to access and use its land at the end of that period. In this matter, so it was argued, the municipality has not been given reasonable or sufficient time.

Discussion

[77] In *Thubakgale* the Constitutional Court dealt with the general principles concerning constitutional damages. It held:

[21] Id at para 118.
[22] Id at para 120.
[23] Id at para 120.

"Courts are under an obligation in terms of section 38 of the Constitution to grant 'appropriate relief'' when approached by anyone who seeks to enforce a right in the Bill of Rights that has been infringed or threatened, and this may include constitutional damages. This court in *Fose* considered the meaning of 'appropriate relief' contemplated in section 7(4)(a) of the interim Constitution, which contained similar wording to section 38. The majority said that '[a]ppropriate relief will in essence be relief that is required to protect and enforce the Constitution'. In that case, the applicant sought constitutional damages in addition to common law damages (delictual damages) for an assault perpetrated against him by the police. After a comprehensive excursus on foreign jurisprudence, this Court observed that 'it is preferable, for the present, to refer to the 'appropriate relief' envisaged by section 7(4) merely as a 'constitutional remedy'. And, said this Court, 'notwithstanding the differences between foreign jurisdictions and ours, appropriate relief can include an award of damages, to compensate for a loss occasioned by the breach of a right vested in the claimant by the supreme law', to be adjudicated based 'on the circumstances of each case and the particular right which has been infringed'.

Axiomatically, appropriate relief must be effective if it is to fully and properly vindicate the rights infringed… .

… Self-evidently, a determination of what constitutes appropriate relief must depend on the facts of each case and necessarily involves an evaluation of what other remedies are available. Ultimately, the remedy must be effective, suitable and just… .

… Where fundamental rights are proved to have been violated, there is no entitlement to a particular remedy."[24]

[78] From the arguments of the parties the following questions arise for consideration, namely, whether the appellant's claim for constitutional damages is based on the alleged failure of the municipality to comply with the court orders, or is based on the alleged infringement of its rights in terms of sections 25(1) and 34 of the Constitution.

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[24] *Thubakgale* n 19 above at paras 40-3.

[79] If the answer to the first part of the question is in the affirmative, that would be the end of the enquiry in light of the decisions of the Constitutional Court in *Residents of Industry House*[25] and *Thubagale*.[26] If the answer to that part is in the negative and the answer to the second part of the question is in the affirmative, that would call for the following further enquiries.

[80] Namely, whether the appellant was precluded from bringing the claim because Mashile J had previously declared that the municipality's failure to comply with Sutherland J's order has infringed the appellant's right not to be arbitrarily deprived of its property as contemplated in section 25(1) of the Constitution and had granted relief consequential thereto, i.e. is the issue of the constitutional damages *res judicata*?

[81] If not, whether the rights of the appellant in terms of section 25(1) and/or in terms of section 34(1) of the Constitution had been infringed by the continued occupation of its property? And if so, whether they have been infringed by the municipality? The alleged infringement by the municipality would not only involve an enquiry into the limitation of those rights, but also whether the limitation has been reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom and taking into account the other factors listed in and as contemplated in section 36(1) of the Constitution.

[82] Only if it is determined that the rights had been infringed, i.e. that they had been limited unreasonably and unjustifiably, would it be necessary to declare the conduct resulting in the infringement to be invalid or inconsistent with the Constitution, as contemplated in section 172(1)(a), and then to consider an order that is just and equitable. As held in *Residents of Industry House*,[27] constitutional damages can only be awarded if it is the most appropriate remedy in the circumstances.

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[25] *Residents of Industry House* n 20 above.
[26] *Thubakgale* n 19 above.

[27] *Residents of Industry House* n 20 above at paras118 and 120.

[83] It is only if constitutional damages are considered to be the most appropriate that a consideration of the quantum would become necessary. The decision of the Constitutional Court in *Modderklip* is relevant not only to the question of the infringement of the alleged rights, but also to the appropriateness of constitutional damages as a remedy and the quantification thereof. In respect of the latter issue, the question may arise whether the Court may, instead of awarding a specific amount as damages, leave its quantification to be determined by another process, as the SCA and Constitutional Court did in *Modderklip*.

The basis of the claim

[84] It is apparent from a cursory reading of the appellant's founding papers that its claim for constitutional damages is based on (an alleged) infringement of its constitutional rights in terms of section 25(1), alternatively sections 25(2) and 25(3) and section 34, read together with section 1(c), of the Constitution.

[85] The wording of section 34 has been referred to earlier. Section 1(c) refers to the values of constitutional supremacy and the rule of law upon which the Republic of South Africa, as a sovereign and democratic state, are founded.

[86] Section 25(1) provides that "[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property." Section 25(2) and (3) deal with the expropriation of property. The former provides, essentially, that expropriation may only be in terms of a law of general application: (a) for a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided on or approved by a court. The latter section deals, essentially, with the determination of the amount of the compensation, and the manner and time of its payment. The section provides that those:

"[M]ust be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation."

[87] It is apparent from section 25 that deprivation of property by the State is permissible, as long as it is not arbitrary and it occurs in terms of a law of general application. And further, that the one deprived has no right to the compensation envisaged there, unless the deprivation is substantial, or amounts to an expropriation of the property.

[88] The appellant alleges that the said infringement came about due to the municipality's failure to provide temporary accommodation to the unlawful occupiers of its property who would require such accommodation pursuant to the execution of the eviction order granted by Sutherland J. It is noteworthy that the appellant is not seeking the damages as a penalty for the municipality's failure to comply with the orders of Sutherland J, Mashile J or that of Siwendu J, but is seeking it as compensation for the losses it suffered because of the infringement of its constitutional rights as aforesaid, and in order to vindicate those rights.

[89] The facts in *Thubakgale* are distinguishable. There the High Court awarded damages to residents against the municipality after the municipality had failed to provide them with houses in accordance with a court order. There the damages were clearly sought, not for the breach of Constitutional rights, but for the municipality's failure to comply with the court order. It is in that context that the Constitutional Court overturned the award of the damages. It held, essentially, that a claim for damages only for failing to comply with a court

order is not known in our law and that the recognition of such a claim would cause endless litigation and be contrary to the rule of law.[28]

Res Judicata

[90] The respondents only raised this defence in argument, but did not raise it in their affidavits in response to the appellant's claim for constitutional damages. It is trite that a party that relies on that defence must not only specifically raise it appropriately, which would have been in their responding affidavits in this case, but also has an onus to prove the elements of the defence.[29] If not specifically pleaded, the defence is taken to have been waived.[30]

[91] In any event, the elements of the defence have not been proved by the respondents. They are the following: (a) there must be a previous judgment by a competent court; (b) between the same parties; (c) based on the same cause of action; and (d) with respect to the same subject matter or thing.[31] In essence, *res judicata* strictly means that a matter has already been decided by a competent court on the same cause of action and for the same relief between the same parties.[32] And the crux of the principle is:

> "[T]hat where a cause of action has been litigated to finality between the same parties on a previous occasion, a subsequent attempt to litigate the same cause of action by one party against the other party should not be allowed. The underlying rationale for this principle is to ensure certainty on matters that have already been decided, promote finality and prevent the abuse of court processes."[33]

[92] The appellant's claim before Mashile J was based on alleged infringement of its right in terms of section 25(1) of the Constitution by the respondent's failure

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[28] *Thubakgale* n 19 above at paras 188-190.
[29] See *Tradax Ocean Transportation SA v MV "Silvergate" properly described as MV "Astyanax"* [1999] ZASCA 30; 1999 (4) SA 405 (SCA).
[30] See *Blaikie-Johnstone v P Hollingsworth (Pty) Ltd* and Others1974 (3) SA 392 (D) at 395.
[31] See *Ascendis Animal Health (Pty) Ltd v Merck Sharpe Dohme Corporation and Others* [2019] ZACC 41; 2020 (1) SA 327 (CC); 2020 (1) BCLR 1 (CC) (*Ascendis*) at para 71.
[32] Id at para 69.
[33] Id at para 70.

to comply with the order of Sutherland J. There is also no proof that constitutional damages were sought as relief for such alleged infringement. Mashile J found that the respondent's conduct at that stage, did indeed constitute the infringement as alleged. On the other hand, the claim for constitutional damages before the court *a quo* was based on an alleged infringement of the appellant's rights in terms of section 25(1), alternatively sections 25(2) and 25(3), and section 34, read with section 1(c) of the Constitution, after the respondents had failed to comply with the order of Siwendu J in terms of which they agreed that the unlawful occupiers of the appellant's property would be relocated by no later than 30 September 2020.

Infringement of rights

[93] The appellant's cause of action, i.e. in respect of the damages claim, is really focused on the limits to which an owner of land, in whose favour an eviction order has been granted, must wait until alternative housing has been provided to the illegal occupiers of its land, and before being entitled to accessing and using its land. In *Blue Moonlight* the Constitutional Court accepted that even though an owner of land may have to endure the illegal occupation for some time after having obtained an eviction order, and had to be "somewhat patient" and "accept that the right to occupation may be temporarily restricted", the landowner "cannot be expected to provide free housing for the homeless on its property for an indefinite period."

[94] Thus, the appellant's claim brings into sharp focus the question "how long is long enough?" When does the continued occupation of the land at the instance of the state become an unlawful deprivation?

[95] The continued occupation of the appellant's property by the unlawful occupiers, despite the appellant having obtained an eviction order as long ago as 1 August 2014, and that many years have passed since, is a common cause fact. Effectively, the appellant's property serves as (free) accommodation until the respondents are able to relocate the unlawful occupiers permanently, which is also a matter of uncertainty. A responsibility

that is essentially that of the municipality, has effectively been shirked by it, and has been made that of the appellant, while the respondents grope around to find a permanent housing solution for the unlawful occupiers.

[96] Besides failing in its constitutional duty toward the appellant, the municipality failed in its constitutional duty towards the Court in not providing alternative emergency housing for those that require such accommodation, as ordered by Sutherland J on 1 August 2014, because if it did that then the eviction order granted could be enforced. But until that happens the eviction order cannot reasonably be enforced.

[97] While the position of the unlawful occupiers draws sympathy, it is not the appellant's constitutional duty or obligation to provide them with adequate housing, or housing of any kind, on its property. That is the duty of the State in terms of the Constitution. There is no proof that the appellant was culpable or had delayed in asserting its rights to have the unlawful occupiers removed from its property. On the other hand, the respondents had a duty, as part of the State's responsibility to provide adequate housing, to engage with those that are unlawfully occupying the appellant's property, as soon as it became aware of such occupation. The problem of removing the unlawful occupiers may not have been so immense if the municipality had been diligent in executing its duties in that regard.

[98] For the municipality to now argue that it did not have enough time to fulfil its constitutional obligations and comply with the orders of the courts, sounds fairly hollow in light of the following facts: The respondents did not appeal against the orders of Sutherland J, Mashile J or Siwendu J. Instead, before Siwendu J, the respondents expressly agreed to a deadline by which the unlawful occupiers, who required temporary accommodation, were to be relocated. Because of their new position and responsibilities regarding housing, their knowledge of the availability of alternative accommodation or land within the municipal area, and the problem of squatting within its boundaries, the respondents had to be acutely and timelessly aware of what

was and what was not legally attainable within the time periods stipulated in the court orders.

[99] Until alternative accommodation can be found for those illegal occupiers, they remain on the appellant's property and the appellant would until then be arbitrarily deprived of its right to use and enjoy the property. Requiring the appellant to effectively bear the burden of providing free accommodation to the illegal occupiers to the extent it has and may still have to, while the respondents grope around to find a permanent housing solution, is clearly not acceptable. The interference with and limitation of the appellant's rights are substantial and "go beyond the normal restrictions on property use and enjoyment found in an open and democratic society" and amounts to an actionable deprivation.[34] Even though one cannot find expropriation as such, this deprivation is deceivingly close.

[100] Equally unacceptable is the denial of an effective and appropriate legal remedy for the position the appellant finds itself in. The appellant is precluded from executing the eviction order granted as long ago as August 2014. In *Modderklip,* the Constitutional Court held that the State had infringed the landowner's rights of access to court in terms of section 34 of the Constitution, because the State had failed to take reasonable steps to ensure that the landowner was provided with an effective remedy as required by the rule of law.[35]

[101] The respondents have not relied on any law of general application that justifies their limitation of the appellant's rights in terms of section 25(1), and section 34(1), read with section 1(c) of the Constitution and therefore section 36 of the Constitution is not applicable. But even if it is, it has not been established that the limitation of those rights of the appellant by the municipality is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account the factors

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[34] *Mkontwana* above n 11 *at* para 32.

[35] *Modderklip* n 16 above at para 43.

contemplated in section 36 of the Constitution. That the municipality in this case has failed to even take reasonable steps, is evidenced by the facts. Fundamentally, it failed to properly or reasonably plan for the implementation of the eviction order, and particularly, to plan regarding the provision of alternative temporary housing to those unlawful occupiers that required it, and to relocate them accordingly.

[102] The only ‘’just and equitable relief”” to grant to the appellant for the unlawful infringement of its rights, in addition to a declaratory order, is an order for constitutional damages. It will serve to assist the appellant to effectively vindicate its rights. In addition to compensating it for the unlawful occupation of its property in violation of its rights, such a remedy will, *inter alia*, ensure that the unlawful occupiers of its property are accommodated until suitable alternative places to accommodate them are found and would alleviate the pressure of finding such alternatives very urgently. Simply setting another date for the relocation will not be effective.

[103] However, the quantification of the damages is also in issue. In *Modderklip*, the SCA alluded to some of the difficulties in that regard. The submissions of the parties on that aspect do not address those difficulties. A further enquiry regarding that aspect along the lines considered by the SCA in *Modderklip* is required, namely, quantification in terms of section 12(1) of the Expropriation Act.[36] As in *Modderklip*, it would not serve the interests of justice to require the appellant to institute new or fresh proceedings simply for the purpose of such quantification. A further fact to bear in mind is that if the State should decide to expropriate the property of the appellant that is being unlawfully occupied, the amount awarded as compensatory relief could be set off against the amount awarded as compensation for such expropriation.[37]

[104] There is no reason why the municipality should not be held liable for the costs of the appellant, both, in respect of the application and of the appeal.

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[36] Act 63 of 1975.
[37] *Modderklip* n 16 above at para 64.

Order

[105] The following is ordered:

1. The appeal is upheld in part.
2. The order of the court *a quo* is set aside and is substituted with the following order:

   "(a) Declaring that it has not been proven that the Respondents were in contempt of court and dismissing the application in respect of that aspect;

   (b) Declaring that the First Respondent's failure to provide the illegal occupiers of the applicant's property with alternative temporary accommodation, resulting in the continued illegal occupation by those occupiers of the applicant's property, without compensation; and a resultant inability to give effect to the eviction order of the High Court, unlawfully infringes the applicant's rights in terms of section 25(1) and in terms of section 34 read with section 1(c) of the Constitution;

   (c) Declaring that the applicant is entitled to be paid compensation by the First Respondent for such unlawful infringement as from 1 February 2015 until such infringement ceases;

   (d) The compensation envisaged in (c) is to be calculated in terms of section 12(1) of the Expropriation Act 63 of 1975;

   (e) If, with regard to the investigation and determination of the amount of compensation to be awarded, the parties are unable to agree on the pleadings to be filed, discovery, inspection, or any other procedural matter relating thereto, leave is hereby granted to the parties to apply to the High Court with jurisdiction for directions in that regard in terms of section 33(5) of the Uniform Rules of the High Court;

   (f) The First Respondent is to pay the costs of the application."

3. The First Respondent is to pay the costs of the appeal.

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P COPPIN
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

I CONCUR

_____

I OPPERMAN
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNEBSURG

I CONCUR

_____

EF DIPPENAAR
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES:

For the Appellant:	S Budlender SC and A Raw
Instructed By:	Vermaak Marshall Wellbeloved Inc.
For the Respondents:	C Georgiades SC and B Bhabha
Instructed By:	Mohamed Randera & Associates
Date Heard:	19 April 2023
Judgment Date:	This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for hand-down is deemed to be 11 August 2023.