



**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 157/20

In the matter between:

**THUPETJI ALEXANDER THUBAKGALE** First Applicant

**EKURHULENI CONCERNED RESIDENTS ASSOCIATION** Second Applicant

**RESIDENTS OF THE WINNIE MANDELA INFORMAL SETTLEMENT** 3rd to 134th Applicants

and

**EKURHULENI METROPOLITAN MUNICIPALITY** First Respondent

**EXECUTIVE MAYOR, EKURHULENI MUNICIPALITY** Second Respondent

**CITY MANAGER, EKURHULENI MUNICIPALITY** Third Respondent

**HEAD OF DEPARTMENT: HUMAN SETTLEMENTS, EKURHULENI MUNICIPALITY** Fourth Respondent

**Neutral citation:** *Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others* [2021] ZACC 45

**Coram:** Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mhlantla J, Theron J, Tlaletsi AJ and Tshiqi J

**Judgments:** Majiedt J (dissenting): [1] to [120]  
Jafta J (majority): [121] to [195]

Madlanga J (concurring in part): [196] to [199]

**Heard on:** 18 February 2021

**Decided on:** 7 December 2021

**Summary:** Section 26 of the Constitution — housing rights — state failure — constitutional damages — constitutional damages not awarded

Section 38 of the Constitution — appropriate relief — constitutional damages — constitutional damages not appropriate relief in this case

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## ORDER

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On direct appeal from the High Court of South Africa, Gauteng Division, Pretoria, the following order is made:

1. The application for leave to appeal is granted.
2. The respondents are granted leave to adduce further evidence.
3. The appeal is dismissed.
4. There is no order as to costs.

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## JUDGMENT

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MAJIEDT J (Khampepe J, Theron J and Tlaletsi AJ concurring):

### *Introduction*

[1] The commitment to transform our society into one which respects and observes the values of human dignity, freedom and equality lies at the heart of our

constitutional order.<sup>1</sup> As former Chief Justice Chaskalson wrote in *Soobramoney*, “this commitment is reflected in various provisions of the Bill of Rights and in particular in sections 26 and 27 which deal with access to housing, health care, food, water and social security”.<sup>2</sup> Underlying the provision of socio-economic rights in our Bill of Rights is a consciousness that basic socio-economic rights are instrumental to our social and economic revolution as a society, which is a social transformative objective of our Constitution.<sup>3</sup>

[2] The fundamental question raised by the applicants in these proceedings is what effective remedy should be granted by courts to litigants who have demonstrated that the state has not only failed to realise the fundamental right to access to housing, but has conducted itself in such a way that one can only reasonably conclude that it refuses to realise this right. The question is whether such litigants are entitled to constitutional damages for this breach or whether they are entitled to an alternative remedy.

[3] Section 26 of the Constitution guarantees the right of access to adequate housing in the following terms:

- “(1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No 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.”

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<sup>1</sup> *Soobramoney v Minister of Health, KwaZulu-Natal* [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC) at para 8.

<sup>2</sup> *Id* at para 9.

<sup>3</sup> Langa “Transformative Constitutionalism” (2006) 17 *Stell LR* 351 at 355.

[4] In *Grootboom*,<sup>4</sup> this Court described the state’s constitutional obligations in relation to housing as “a constitutional issue of fundamental importance to the development of South Africa’s new constitutional order”.<sup>5</sup> In emphasising the importance of the right, it noted the dire consequences of homelessness:<sup>6</sup>

“This case shows the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the state to act positively to ameliorate these conditions. The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The state must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done. I am conscious that it is an extremely difficult task for the state to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution which expressly provides that the state is not obliged to go beyond available resources or to realise these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the state to give effect to them. This is an obligation that courts can, and in appropriate circumstances, must enforce.”<sup>7</sup>

[5] And in *Modderklip (CC)*,<sup>8</sup> this Court added:

“The problem of homelessness is particularly acute in our society. It is a direct consequence of apartheid urban planning which sought to exclude African people from urban areas, and enforced this vision through policies regulating access to land and housing which meant that far too little land and too few houses were supplied to African people. The painful consequences of these policies are still with us eleven years into our new democracy, despite government’s attempts to remedy them. The

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<sup>4</sup> *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) (*Grootboom*). This case is widely acknowledged as the seminal case, the jurisprudential lodestar, in respect of the socio-economic rights, particularly housing, entrenched in the Constitution.

<sup>5</sup> Id at para 1.

<sup>6</sup> I am aware that homelessness is a controversial concept, and that a distinction may be made between houselessness and homelessness. However, for purposes of this judgment, the term “homeless” will be used, as it is more commonly understood. See for example, The Haven Night Shelter “Homelessness and ‘Houselessness’” (4 January 2021), available at <https://www.haven.org.za/sharingiscaring/2021/1/4/homelessness-and-houselessness>.

<sup>7</sup> Id at paras 93-4.

<sup>8</sup> *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) (*Modderklip (CC)*).

frustration and helplessness suffered by many who still struggle against heavy odds to meet the challenge merely to survive and to have shelter can never be underestimated. The fact that poverty and homelessness still plague many South Africans is a painful reminder of the chasm that still needs to be bridged before the constitutional ideal to establish a society based on social justice and improved quality of life for all citizens is fully achieved.”<sup>9</sup>

[6] Sadly, 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. If anything, they have likely worsened over the last two decades since this Court’s pronouncement in *Grootboom*, thereby lending a hollow ring to our constitutional aspirations, so powerfully espoused by this Court in *Soobramoney*.

[7] In the case before us we are required to travel somewhat beyond the terrain covered in *Grootboom*. We must determine whether an award of constitutional damages is appropriate relief, as contemplated in section 38 of the Constitution,<sup>10</sup> where the state does have available resources to realise adequate housing and fails to make use of these resources. In this case, the state persistently infringed the right of access to adequate housing, despite houses having been allocated to residents more than two decades ago.

[8] The applicants in this matter seek direct leave to appeal against the order of the High Court of South Africa, Gauteng Division, Pretoria, which refused their counter-application for constitutional damages in the sum of R5 000 per month for each applicant for the infringement of their rights of access to adequate housing in

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<sup>9</sup> Id at para 36.

<sup>10</sup> Section 38 reads:

“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. The persons who may approach a court are—

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.”

terms of section 26(1) of the Constitution. The respondents have applied for leave to adduce further evidence in this Court to demonstrate the steps they have taken to provide the houses concerned.

### *Parties*

[9] The 1st and 3rd to 134th applicants live in the Winnie Mandela informal settlement in Tembisa, within the jurisdiction of the first respondent, the Ekurhuleni Metropolitan Municipality (Municipality), a metropolitan municipality that forms part of local government exercising authority over that area. The second applicant, the Ekurhuleni Concerned Residents Association (ECRA), is a voluntary organisation supporting the applicants. When referring to the 1st and 3rd to 134th applicants, I shall simply call them “the applicants” for the sake of brevity.

[10] This is not the first time that this Court has before it residents of the Winnie Mandela informal settlement. Similar residents featured in this Court’s decision in *Mathale*,<sup>11</sup> where this Court remarked:

“This case illustrates not only the dire situation in which multitudes of poor people find themselves, but also the administrative hodgepodge the Municipality has caused in its formalisation process. It appears that there is general displacement of people in the Municipality. *Some people who have been resident in Winnie Mandela Park for years have effectively become homeless as a result of their stands being allocated to other members of the community.*”<sup>12</sup> (Emphasis added.)

[11] The Municipality also featured in this Court’s decision in *Pheko I*.<sup>13</sup> There, the Municipality was declared by this Court to have violated the applicants’ rights under section 26 of the Constitution. That case related to another informal settlement, the Bapsfontein informal settlement.

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<sup>11</sup> *Mathale v Linda* [2015] ZACC 38; 2016 (2) SA 461 (CC); 2016 (2) BCLR 226 (CC). That case concerned whether execution orders granted in terms of section 78 of the Magistrates’ Court Act are appealable.

<sup>12</sup> *Id* at para 53.

<sup>13</sup> *Pheko v Ekurhuleni Metropolitan Municipality* [2011] ZACC 34; 2012 (2) SA 598 (CC); 2015 (6) BCLR 711 (CC) (*Pheko I*).

[12] As the facts at hand will demonstrate, poor governance at a local level and appalling levels of maladministration continue to plague the residents of Winnie Mandela informal settlement, directly implicating the lives of the applicants who are forced to continue to languish in squalor. The housing problems in that settlement are nothing new and there is no end in sight for the long-suffering residents. Not even the several court orders that have been granted in favour of the applicants in this case have afforded them any effective relief.

### *Background*

[13] Each of the applicants applied for and was granted a state housing subsidy, some as far back as 1998. The subsidies were granted in terms of the Upgrading of Informal Settlements Programme, contained in the National Housing Code, 2009.<sup>14</sup> Each applicant was matched to a particular stand developed with that subsidy in the Tembisa area, and, in due course, they ought to have been given possession and ownership of that stand and the house constructed on it. That did not occur. They have been patiently waiting for their houses ever since, and their concerted efforts to ascertain what has become of their subsidies, their land and their houses have been rebuffed for years.

[14] The applicants, through ECRA,<sup>15</sup> approached the Municipality as a group and demanded an explanation for the failure to provide housing. They also sought help from the Special Investigations Unit, the Office of the Member of the Executive Council for Human Settlements in Gauteng, as well as the Office of the President and the Office of the Public Protector. All to no avail. It was only when some of the applicants, including the first applicant, Mr Thubakgale, started receiving utilities accounts for services directed to land on which they did not live, that they made

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<sup>14</sup> Department of Human Settlements “National Housing Code: Incremental Interventions: Upgrading Informal Settlements” (2009) available at [http://www.dhs.gov.za/sites/default/files/documents/national\\_housing\\_2009/4\\_Incremental\\_Interventions/5%20Volume%204%20Upgrading%20Infomal%20Settlement.pdf](http://www.dhs.gov.za/sites/default/files/documents/national_housing_2009/4_Incremental_Interventions/5%20Volume%204%20Upgrading%20Infomal%20Settlement.pdf) (National Housing Code).

<sup>15</sup> ECRA was formed by the applicants in 2005 to seek redress for the Municipality’s failure to provide them with the benefit of their subsidies.

further enquiries and discovered the shocking truth. It became clear that the Municipality had unlawfully given possession of the subsidised houses intended for the applicants, and to which they were still matched on the national housing database, to other residents. Each of the applicants was able, with the help of ECRA and their attorneys, to identify the stand and the house that their subsidy was used for, together with the records that proved that these were indeed the plots of land and the houses they were supposed to have been given and to which they remained entitled.

[15] These facts are undisputed. It later became apparent, on facts adduced by the Municipality's Head of Human Settlements, that the Municipality had employed a "dummy numbers" scheme in respect of these plots of land. In brief, this scheme entailed allocating the same plot of land to more than one beneficiary, knowing full well that only one beneficiary would be able to receive that land and occupy that house. This inexplicable approach, and utterly ill-conceived scheme, inevitably lent itself to corruption and mismanagement or, at best for the Municipality, to administrative chaos. The upshot of all of this is that the plots allocated to the applicants, upon which houses were built, are now illegally occupied by other people. It is uncontroverted, or at least was never seriously disputed, that this lamentable 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. The applicants contend that as a consequence, the Municipality has infringed their right to adequate housing in terms of section 26 of the Constitution.

[16] As stated, things have not improved at all since this Court's remarks in *Mathale*. Several court cases have not borne any positive results for the applicants in their unending quest for the realisation of their right to adequate housing. Their forbearance and resilience in the face of bureaucratic ineptitude and malfeasance is quite remarkable. The Municipality and its officials obdurately refused, over a long period of time and in the face of numerous court orders, to comply with their constitutional obligations and to take the requisite steps to correct the mismanagement and corruption that has led to the deprivation of the applicants' right to adequate



housing. There is much to be said for the contention by the applicants in this Court that the respondents apparently view litigation as a means of “avoiding rather than fulfilling their constitutional obligations”. Ultimately, what bears consideration is whether constitutional damages would be appropriate relief in this case.

[17] The applicants are all desperately poor. They live in appalling conditions in squalid hovels with up to ten people each, and have to share modest structures that they have built for themselves out of wood, plastic and iron. They have little to nothing by way of access to water, sanitation and electricity. What is more, these deplorable living conditions have prevailed for them since 1996. Even the Municipality was driven to concede in its papers that these conditions are “lamentable”. Out of sheer desperation and with the assistance of their attorneys, the applicants have had to turn to the courts for relief. A series of cases in this matter preceded what is now before this Court, each one an attempt to secure the applicants’ right to housing. For ease of reference I will allude to the court cases sequentially by referring to them as *Thubakgale I, II* and *III*.

#### *Thubakgale I* (High Court)

[18] After more than a decade of futile interaction with the respondents and with provincial and national housing authorities, and in the face of their desperate but unsuccessful appeals for help to the Special Investigations Unit, the Office of the Gauteng Member of Executive Council for Human Settlements, the Office of the Public Protector and the Office of the President, the applicants launched an application in the High Court.<sup>16</sup> They sought an order compelling the Municipality to provide the houses that were to be allocated to them in terms of their successful subsidy applications. The respondents opposed the application, but did not dispute any of the applicants’ material allegations. They nonetheless denied that they were violating the applicants’ rights to housing and contended instead that the applicants were “queue-jumping”.<sup>17</sup> Teffo J upheld the applicants’ claims, rejecting the

<sup>16</sup> *Thubakgale v Ekurhuleni Metropolitan Municipality* 2018 (6) SA 584 (GP) (*Thubakgale I*).

<sup>17</sup> There was then, and there still is, a massive housing backlog and consequently a lengthy waiting list for housing in Ekurhuleni.

respondents' defences that the Municipality simply lacked resources and had "inherited" the problem from its predecessor.<sup>18</sup> The Court stated:

"In taking measures intended to give effect to the applicants' rights to adequate housing, the first respondent knowing full well what was done to the applicants, did not prioritise the correction of the breach. The applicants are in the most desperate need, given the lengthy period of time their right to adequate housing has been breached."<sup>19</sup>

[19] The Court tellingly held:

"All the excuses by the [Municipality] about the budgetary constraints, the various processes that have to be finalised, according to it, before the houses can be built, etc, are delaying tactics to continue to deprive the applicants access to adequate housing. They are rejected."<sup>20</sup>

[20] Consequently, the High Court made the following order:

1. The first respondent is ordered to:
  - 1.1 provide each of the first and the third to one hundred and thirty-four applicants (the residents) with a house at Tembisa Extension 25, or at another agreed location, on or before 31 December 2018;
  - 1.2 register the residents as the titleholders of their respective erven by 31 December 2019;
  - 1.3 deliver written reports to the residents, through their attorneys, and to the registrar and the court, not more than three months, from the date of this order, and at three months' intervals, setting out the timeline for completion of, and the progress which has been made in providing, the houses referred to in paragraph 1.1 above.

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<sup>18</sup> *Thubakgale I* above n 16 at paras 64-9.

<sup>19</sup> *Id* at para 68.

<sup>20</sup> *Id* at para 73.

2. The second, third and fourth respondents are ordered to take all the necessary administrative and other steps necessary to ensure that the first respondent complies with the order in paragraph 1 above.
3. The respondents will establish a Steering Committee which will meet quarterly to oversee the process of construction. The Steering Committee will include—
  - 3.1 three representatives from the residents, to be chosen from the residents, by the residents themselves;
  - 3.2 a representative from the second applicant;
  - 3.3 representatives from the first, fifth and sixth respondents, one of whom shall have direct responsibility for the construction of the houses to be provided to the residents.
4. In the event that the respondents fail to comply with their obligations in terms of paragraphs 1 to 3 above, the applicants may supplement their papers and enrol this application on 10 days' notice for further appropriate relief.”

*Thubakgale II* (Supreme Court of Appeal)

[21] The respondents appealed to the Supreme Court of Appeal, with the leave of the High Court.<sup>21</sup> That appeal concerned only the date of implementation of the High Court order in respect of the land and houses to be provided. The Municipality did not pursue its claim that there had been no violation of rights. At the request of the Supreme Court of Appeal, the respondents filed an updated progress report in respect of the date that the houses would become available to the applicants. Based on that report, the Supreme Court of Appeal amended the date for the provision of the land and houses from 31 December 2018 to 30 June 2019.<sup>22</sup> There was also an ancillary order issued that the Municipality had to register the applicants as the titleholders of their respective erven by 30 June 2020.

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<sup>21</sup> *Ekurhuleni Metropolitan Municipality v Thubakgale* [2018] ZASCA 76; 2018 JDR 0770 (SCA) (*Thubakgale II*).

<sup>22</sup> *Id* at paras 70-1.

*Thubakgale III* (High Court)

[22] On 28 June 2019, less than forty-eight hours before the deadline imposed by the order of the Supreme Court of Appeal was to expire, the respondents applied to the High Court for an order extending the deadline set by the Supreme Court of Appeal by another year.<sup>23</sup> They also sought an order declaring that the applicants be provided with flats, rather than the houses to which they were entitled by virtue of the order of Teffo J. This was, understandably, a devastating blow to the applicants. Clearly there was to be a lengthy delay in the implementation of the order of Teffo J and the variation application would repel any attempt to enforce that order.

[23] The applicants opposed the application and filed a counter-application for constitutional damages. They sought an amount of R5 000 per applicant for every month after 30 June 2019 that the order of Teffo J was not complied with. That date was based on the principle that their rights to housing had vested on the date of the deadline imposed by the Supreme Court of Appeal. They asserted that their claim of R5 000 was not for patrimonial loss, but for what it would reasonably cost them per month to rent suitable accommodation. Thus, the claim was for the reasonable cost of doing for themselves that which the Municipality had failed to do. In short, the amount of constitutional damages claimed represented the appropriate relief for the Municipality's infringement of their rights to adequate housing.

[24] Basson J dismissed the main application on the basis that: (a) the applicants' rights to housing had vested once the extended deadline set by the Supreme Court of Appeal had passed; and (b) once the rights granted in an order become vested, a court does not have the power to revive and then to extend the operation of an order that has already become final.<sup>24</sup>

[25] The counter-application suffered a similar fate. Basson J appeared to accept that the Municipality had failed to comply with its constitutional obligation to provide

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<sup>23</sup> *Ekurhuleni Metropolitan Municipality v Thubakgale*, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No 39602/2015 (13 July 2020) (*Thubakgale III*).

<sup>24</sup> *Id* at para 69.

the houses to which the applicants had become entitled through the allocation of subsidies, as confirmed by both the High Court in *Thubakgale I* and the Supreme Court of Appeal in *Thubakgale II*. The “different and further excuses . . . raised for the Municipality’s continued non-compliance with the court order” were rejected.<sup>25</sup> That rejection was based on the undertakings given by the respondents to the Supreme Court of Appeal that the applicants would be given preference and that the Municipality did not foresee any delays in that regard. However, the learned Judge declined to award constitutional damages on three grounds:

- (a) that contempt of court proceedings may yield a more appropriate remedy where the Municipality has delayed the execution of a court order, thereby effectively failing to comply with it;
- (b) that awarding that amount for constitutional damages “would have a punishing effect on the Municipality for not complying with a court order”; and
- (c) that the claimed amount of R5 000 was “arbitrary” and unsupported by any evidence as to the actual loss suffered by each applicant.

[26] The applicants now seek leave to appeal directly to this Court. There is also before us an application by the respondents for leave to adduce further evidence relating to developments after the judgment in *Thubakgale III* was handed down.

#### *Jurisdiction and direct leave to appeal*

[27] This case unequivocally raises constitutional issues relating to the right of access to adequate housing and whether constitutional damages constitute appropriate relief as envisaged in section 38 when there has been a breach of this right. These issues engage the jurisdiction of this Court, and it is in the interests of justice for this Court to pronounce on them.

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<sup>25</sup> Id at para 76.

[28] But, should we do so on direct appeal? For a direct appeal, “proof of exceptional circumstances . . . must be demonstrably established”.<sup>26</sup> Those exceptional circumstances will depend on the facts of each case but—

“often include urgency, prospects of success on appeal, the public interest and the saving in time and costs. The reasons advanced by an applicant must be persuasive enough to compel this Court to deviate from the normal procedure and appellate hierarchy.”<sup>27</sup>

This case meets most of those requirements and the most compelling consideration is the public interest in the matter. Certainty must be given as to whether constitutional damages constitute appropriate relief in circumstances where an organ of state has allegedly egregiously infringed the right to adequate housing in the face of several court orders. I accordingly conclude that a compelling case for a direct appeal has been made out.

[29] Further, the respondents do not oppose a direct appeal to this Court. As the narration thus far shows, this case has already travelled from the High Court to the Supreme Court of Appeal and back again to the High Court. Ordinarily the next stop should again be the Supreme Court of Appeal. However, requiring the applicants to go back and follow the normal appellate hierarchy would be placing procedural formalism ahead of the interests of justice. There are, in addition, cogent grounds for permitting the applicants to appeal directly to this Court. First, self-evidently various courts, including the Supreme Court of Appeal, have already had the occasion to consider the merits of this matter. There have already been extensive delays in realising the applicants’ rights to adequate housing, some of them even caused by the protracted nature of the litigation. The matter must be brought to a conclusion, one way or the other. And the central issue here is about the awarding of constitutional damages, a matter on which the Supreme Court of Appeal has already spoken in a

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<sup>26</sup> *United Democratic Movement v Speaker, National Assembly* [2017] ZACC 21; 2017 (5) SA 300 (CC); 2017 (8) BCLR 1061 (CC) at para 23.

<sup>27</sup> *Public Protector v Commissioner for the South African Revenue Service* [2020] ZACC 28; 2020 JDR 2735 (CC); 2021 (5) BCLR 522 (CC) at para 16.

number of cases, some of which will be discussed presently. Thus, it is in the interests of justice that this Court now grapples with these issues.

[30] I turn now to address the merits of the case and to expand on the importance of the right to housing in our constitutional dispensation, predicated as it is on the fundamental values of dignity and equality.

*The right to housing and the legislative scheme*

[31] The rights at issue here are grounded in section 26 of the Constitution, which has three components to it. Subsection (1) entrenches the right to have access to adequate housing; subsection (2) imposes an obligation on the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right; and finally, subsection (3) provides that evictions from, and the demolition of, a home are prohibited and are only to be occasioned by virtue of a court order.

[32] Parliament enacted the Housing Act<sup>28</sup> in compliance with its obligations in terms of section 26(2) and, in terms of that Act, it later enacted the National Housing Code. The Act proclaims in its preamble that it is enacted pursuant to the prescripts of section 26. It also tells us that Parliament recognises that housing:

- (a) as adequate shelter, fulfils a basic human need;
- (b) is both a product and a process;
- (c) is a product of human endeavour and enterprise;
- (d) is a vital part of integrated developmental planning;
- (e) is a key sector of the national economy; and
- (f) is vital to the socio-economic well-being of the nation.

[33] Section 3 of the Act sets out the functions of national government, acting through the responsible Minister, in respect of the obligation to provide for the right to access adequate housing. One of the functions is to institute and finance national

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<sup>28</sup> 107 of 1997.

housing programmes.<sup>29</sup> The national housing subsidy scheme is one such national housing programme.<sup>30</sup> Section 4 provides that the national Minister responsible for housing must publish a National Housing Code. That Code must set out national housing policy and must set out administrative or procedural guidelines to ensure the effective implementation and application of national housing policy and any other matter that is reasonably incidental to national housing policy.<sup>31</sup> A national housing database and associated national housing information system is to be established in terms of section 6 of the Act. These clearly serve as important sources of information for the planning and co-ordination of housing developments.

[34] Section 152 of the Constitution enumerates the objects of local government. One of these is “to ensure the provision of services to communities in a sustainable manner”.<sup>32</sup> To this end, the Housing Act requires municipalities, as part of their integrated development planning, to—

“take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to—

(a) ensure that—

(i) the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;

...

(f) initiate, plan, co-ordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction;

...

(h) plan and manage land use and development.”<sup>33</sup>

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<sup>29</sup> Section 3(4)(g) of the Housing Act.

<sup>30</sup> Section 3(5)(a) of the Housing Act.

<sup>31</sup> Section 4(2) of the National Housing Code.

<sup>32</sup> Section 152(1)(b) of the Constitution.

<sup>33</sup> Section 9(1) of the Housing Act.



[35] Municipalities are at the coalface of housing delivery. For purposes of developing a housing project, a Municipality may act as the developer in terms of section 9(2) of the Housing Act.<sup>34</sup> This provision operates in the context of a Municipality participating in a national housing programme. In addition, section 10 makes extensive provision for the administration of national housing programmes.

[36] It is clear that the state has established comprehensive legislative measures in respect of housing at all three spheres of government – local, provincial and national. This has gone a long way towards ensuring that the state complies with its constitutional obligations to “progressively realise” the right to adequate housing, as envisaged in section 26(2). As this Court observed in *Mazibuko*:<sup>35</sup>

“The Constitution envisages that legislative and other measures will be the primary instrument for the achievement of social and economic rights. Thus it places a positive obligation upon the state to respond to the basic social and economic needs of the people by adopting reasonable legislative and other measures. By adopting such measures, the rights set out in the Constitution acquire content, and that content is subject to the constitutional standard of reasonableness.”<sup>36</sup>

[34] The enormity of this endeavour is axiomatic. Recognition was given to the extent of the challenge in *Modderklip (CC)*, where this Court noted:

“[T]hose charged with the provision of housing face immense problems. Confronted by intense competition for scarce resources from people forced to live in the bleakest of circumstances, the situation of local government officials can never be easy. The progressive realisation of access to adequate housing, as promised in the Constitution, requires careful planning and fair procedures made known in advance to those most affected. Orderly and predictable processes are vital. Land invasions should always be discouraged. At the same time, for the requisite measures to operate in a reasonable manner, they must not be unduly hamstrung so as to exclude all possible adaptation to evolving circumstances. If social reality fails to conform to the best laid

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<sup>34</sup> Section 9(2)(a)(ii) of the Housing Act, read with section 9(2)(b). This is echoed in the National Housing Code, which also requires that a beneficiary be advised of this.

<sup>35</sup> *Mazibuko v City of Johannesburg* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC).

<sup>36</sup> *Id* at para 66.

plans, reasonable and appropriate responses may be necessary. Such responses should advance the interests at stake and not be unduly disruptive towards other persons. Indeed, any planning which leaves no scope whatsoever for relatively marginal adjustments in the light of evolving reality, may often not be reasonable.”<sup>37</sup>

[37] Severe budgetary constraints, the relentless influx of people from the rural areas and from neighbouring countries into South Africa’s sprawling urban centres in search of better opportunities, and the concomitant rapid urbanisation, are stark realities facing this country and asserting pressure on its governance structures. Gauteng is one of the provinces facing the most pressure insofar as urbanisation and housing needs are concerned. But in this case we have moved beyond the issues that bore consideration in *Grootboom*, namely, whether one is entitled to a justiciable right to housing, and what the state’s obligations are in this regard. We are concerned here with the state’s implementation of the housing policy encapsulated in the legislative measures already provided for. In this case, the respondents’ conduct in terms of that implementation is what bears close scrutiny. In particular, what must be assessed is whether the applicants deserve constitutional damages for the state’s failure to meet its constitutional obligations.

#### *The Municipality’s conduct*

[38] The facts narrated above reveal an appalling lack of diligence on the part of the Municipality in fulfilling its constitutional obligation to afford adequate housing to the applicants. Its conduct can rightly be described as a sustained and egregious breach of the applicants’ rights. There is largely uncontroverted evidence proffered by the applicants that they had been allocated subsidies and that, pursuant to the allocated subsidies, a plot of land had been allocated to each one of them on which a house was to be built, but which never materialised for their enjoyment. In the face of these undisputed facts, it bears repetition that the Municipality committed the following blunders:

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<sup>37</sup> *Modderklip* (CC) above n 8 at para 49.

- (a) First, it vehemently denied that there had been any deprivation of housing, by insisting that, although the applicants had been granted housing subsidies, no houses had actually been built for them. This assertion was conclusively disproved. The Municipality's concession followed only after a lengthy engagement process after the applicants had launched their application in *Thubakgale I*. That engagement entailed the applicants submitting to a further verification of their housing claims on the basis that the Municipality would then provide a timeframe within which the applicants would be afforded housing. The outcome of the verification process is contained in the auditor's report. There the Municipality finally acknowledged that the applicants' complaints were well-founded. It conceded that each of the applicants had in fact been deprived of the house built with their subsidy.
- (b) Next, the Municipality repeatedly cavilled about the reasons for that deprivation. All kinds of explanations were advanced until, eventually, the utterly inexplicable "dummy numbers" scheme and its calamitous consequences were admitted by the Municipality on its papers. And throughout all these denials and bickering, the Municipality did absolutely nothing to comply with its constitutional duties in respect of housing for the applicants.
- (c) In *Thubakgale I*, the Municipality accused the applicants of "queue jumping", a spurious claim that says more about the Municipality's uncaring attitude than the applicants' determination to enforce their rights. And the Municipality perplexingly sought to blame the difficulties on its own ill-conceived "dummy numbers" scheme to avoid accountability. Teffo J rightly dismissed that excuse and the Municipality's further defences that it lacked resources and that it had "inherited" the problem from its predecessor.
- (d) Before Teffo J, the Municipality was utterly dismissive of the applicants' claims to housing. Its approach bordered on a contemptuous disregard of the claims. The applicants had to be patient, it said, and had

to wait their turn. More forbearance and less demand, is what the Municipality advocated. This was not only a complete mischaracterisation of the situation, but in fact evinced a callous disregard for the applicants' plight. By 2015, when they launched their application, the applicants had been patiently waiting for almost two decades, during which time they had been sent from pillar to post. They were the recipients of housing subsidies, granted under a national housing scheme in terms of the Housing Act and the National Housing Code, in fulfilment of their section 26 right to housing. And yet nothing had come of that grant.

- (e) The Municipality's appeal in *Thubakgale II*, and its suspiciously last-minute (and somewhat insidious) attempt in *Thubakgale III* to obtain a variation of the court order, were entirely ill-conceived and suggested an abuse of court process to evade its constitutional obligations.
- (f) Now, more than 20 years later, the Municipality's failure to provide the applicants with adequate housing and its non-compliance with the court order in *Thubakgale I*, as amended in *Thubakgale II*, stand uncontested. And yet, placement of the applicants in the free-standing houses promised to them remains years away from fulfilment, even in the best case scenario.

[39] There can be no question then that the Municipality's conduct constituted an egregious breach of the applicants' rights of access to adequate housing. The applicants were corruptly deprived of houses built especially for them in terms of the very laws and policies that the state adopted to give effect to the right to adequate housing. For many years, the Municipality obdurately refused to acknowledge this simple fact. The applicants proceeded to obtain a court order confirming the breach of their rights. That order directed the respondents to provide new houses to replace those of which the residents had been deprived. But the respondents simply ignored that order. The respondents also then ignored the structural elements order granted by

Teffo J that required them to report to the applicants and to involve them through the steering committee in the construction of the houses that were meant to cure the initial infringement. To compound the applicants' misery, the Municipality embarked on frivolous litigation, which caused further lengthy delays and aggravated the violation of the applicants' rights.

### *Constitutional damages*

#### *General principles*

[40] 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*<sup>38</sup> considered the meaning of "appropriate relief" contemplated in section 7(4)(a) of the interim Constitution, which contained similar wording to section 38.<sup>39</sup> The majority said that "[a]ppropriate relief will in essence be relief that is required to protect and enforce the Constitution".<sup>40</sup> 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'".<sup>41</sup> 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".<sup>42</sup>

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<sup>38</sup> *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC).

<sup>39</sup> Section 7(4)(a) of the interim Constitution provided that a person listed in the section "has the right to apply to a competent court of law for appropriate relief, which may include a declaration of rights".

<sup>40</sup> *Fose* above n 38 at para 19.

<sup>41</sup> *Id* at para 57.

<sup>42</sup> *Id* at para 60.

[41] Axiomatically, appropriate relief must be effective if it is to fully and properly vindicate the right infringed.<sup>43</sup> As the majority of this Court explicated in *Fose*:

“Given the historical context in which the interim Constitution was adopted and the extensive violation of fundamental rights which had preceded it, I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to ‘forge new tools’ and shape innovative remedies, if needs be, to achieve this goal.”<sup>44</sup>

[42] Appropriate relief is therefore “in essence . . . relief that is required to protect and enforce the Constitution”.<sup>45</sup> It may include a declaration of rights, an interdict, a mandamus or relief of a different nature to ensure the protection and enforcement of enshrined rights for as long as the remedy opted for by a court protects and enforces the Constitution. Courts are required to be innovative in fashioning new remedies to meet this constitutional obligation.<sup>46</sup> And, as stated, that may include awarding constitutional damages where the facts and circumstances warrant these. 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.<sup>47</sup> Ultimately, the remedy must be effective, suitable and just. In *Steenkamp N.O.*, this Court explained:

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<sup>43</sup> *Modderklip (CC)* above n 8 at para 58.

<sup>44</sup> *Fose* above n 38 at para 69.

<sup>45</sup> *Id* at para 19.

<sup>46</sup> *Id* at para 100, where the minority states that no remedy ought to be excluded, provided only that it vindicates the Constitution and deters further infringement.

<sup>47</sup> *Hoffmann v South African Airways* [2000] ZACC 17; 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC) at para 55.

“In each case the remedy must fit the injury. The remedy must be fair to those affected by it and yet vindicate effectively the right violated. It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law.”<sup>48</sup>

[43] It bears emphasis that the language of section 38 is cast in permissive form – “the court *may* grant appropriate relief”.<sup>49</sup> This means that courts enjoy a wide discretion to decide what remedy would be effective, suitable and just, and therefore constitute “appropriate relief” based on the available facts and prevailing circumstances of the case. Where fundamental rights are proved to have been violated, there is no entitlement to a particular remedy. Common law and statutory law remedies may sometimes be ill-suited in the particular circumstances, for example where there is a pervasive and systematic infringement of rights.<sup>50</sup> And remedies in delict, specifically designed for the protection of personality interests, like dignity, may not be appropriate for harm that extends, in its impact, beyond the particular litigant(s). The nature of the infringement and its likely impact may well implicate our constitutional project as a whole. For, as the majority of this Court said in *Fose*, “the harm caused by violating the Constitution is a harm to the society as a whole, even where the direct implications of the violation are highly parochial”.<sup>51</sup>

[44] It is important to note that constitutional damages are not punitive in nature. This Court has set its face firmly against that notion. In *Fose*, this Court held that “there is no place for punitive constitutional damages”.<sup>52</sup> It explained that there is “no reason at all for perpetuating a historical anomaly which fails to observe the distinctive functions of the civil and the criminal law and which sanctions the imposition of a penalty without any of the safeguards afforded in a criminal

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<sup>48</sup> *Steenkamp N.O. v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) at para 29.

<sup>49</sup> Emphasis added.

<sup>50</sup> *Fose* above n 38 at paras 98 and 104.

<sup>51</sup> *Id* at para 95.

<sup>52</sup> *Id* at para 70.

prosecution”.<sup>53</sup> It held that there are a number of factors that militated against awarding constitutional damages for punitive purposes. These included that it will not serve as a deterrent nor would it have a significant preventative effect; it would provide an improper windfall to a successful claimant; and would be an undue burden on the fiscus, which already suffers from a lack of financial resources.<sup>54</sup>

[45] Whether damages are punitive is to some extent a matter of perspective. Damages that are intended by a court to be compensatory may of course be viewed as punitive by those who must pay them. That does not mean that they are in fact punitive, nor is it a reason not to award constitutional damages. Damages will only be punitive where they go beyond what is necessary to compensate the applicants, and what is necessary to compensate the applicants must be determined by a court. This appears to have been implied by this Court in *Fose*, given the framing of the question around punitive damages, which was—

“whether in the present case any additional amount of punitive constitutional damages can be awarded to the plaintiff *over and above* the amounts he would be entitled to recover for patrimonial loss, pain and suffering, loss of amenities . . . and other general damages.”<sup>55</sup> (Emphasis added.)

[46] What constitutes an appropriate remedy will self-evidently differ depending on the circumstances of each case. In considering what the most effective remedy to assist the applicants is, one of the factors that must be considered is whether alternative remedies are available. This is just one factor, and constitutional damages may still be the most effective remedy in a particular case, even where other remedies are also available. The test is flexible and fact-specific, seeking to ensure that the most effective remedy for a particular applicant in a particular case can be crafted.

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at paras 71-2. With regard to deterrence, the minority judgment suggests a contrary approach see paras 96 and 98.

<sup>55</sup> *Id.* at para 69.



This is seen in the approach taken in the cases of *Olitzki*<sup>56</sup> and *Steenkamp N.O.*,<sup>57</sup> which list the presence of alternative remedies as one of several factors to be considered when deciding whether constitutional damages should be awarded. I agree with the approach recently adopted in *Residents*, where this Court explained:

“When determining effectiveness one must have regard to whether expecting the claimant to pursue an alternative remedy (if there is one) would be manifestly unjust or unreasonable in the circumstances. This is determined with reference to the nature and extent of the violation, the position of claimants, and the impact of the violation on the requirements for obtaining alternative relief.”<sup>58</sup>

[47] The focus then is the question of what constitutes the most appropriate remedy, whatever that may be. Effectiveness is axiomatically a component of appropriateness. Effectiveness becomes relevant when evaluating the availability of alternative remedies. Thus, an alternative remedy can only be a bar to a claim for constitutional damages if it is effective. Likewise, constitutional damages must, at a minimum, be effective relief. Properly understood therefore in the context of section 38, effectiveness is a necessary condition for appropriateness. A claim for constitutional damages cannot be refused on the basis that the applicant notionally has a delictual claim if that remedy would not in the circumstances be effective.

[48] It is nonetheless important to consider whether alternative remedies, aside from constitutional damages, exist. Where delictual damages are available, for example, this remedy must be carefully considered. This is because, as this Court explained in *Fose*, our common law is sufficiently flexible and may provide the necessary relief appropriate for a breach of constitutional rights, particularly as it is undergirded by the requirement in section 39(2) that it must be developed with due regard to the spirit,

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<sup>56</sup> *Olitzki Property Holdings v State Tender Board* [2001] ZASCA 51; 2001 (3) SA 1247 (SCA) (*Olitzki*) at paras 38-42.

<sup>57</sup> *Steenkamp N.O.* above n 48 at para 87.

<sup>58</sup> *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg v Minister of Police* [2021] ZACC 37 (*Residents*) at para 105.

purport and objects of the Bill of Rights.<sup>59</sup> There is a long line of cases, enumerated in *Fose*, that set out why claims in delict exclude additional awards for sentimental damages. Nothing more need be said about this, however, as I take the view that the applicants do not have a claim in delict available on the facts of this case, an aspect to be considered presently.

[49] In assessing whether constitutional damages constitute “appropriate relief” in this matter, it is important that we bear in mind that rights and remedies should be complementary<sup>60</sup> and that the object of constitutional damages as a remedy differs from that of a remedy at common law. We are concerned here with litigation in the public law sphere that is forward-looking and general in its reach.<sup>61</sup> The infringement of fundamental rights causes general harm to society and thwarts our constitutional project, particularly where the harm is considerably egregious and affects a broad group of people. Vindicating these rights therefore equates to vindicating our Constitution. This means, as this Court has expounded in *Fose*:

“[C]ertain harms, if not addressed, diminish our faith in the Constitution. It recognises that a Constitution has as little or as much weight as the prevailing political culture affords it. The defence of the Constitution – its vindication – is a burden imposed not exclusively, but primarily on the judiciary. In exercising our discretion to choose between appropriate forms of relief, we must carefully analyse the nature of a constitutional infringement, and strike effectively at its source.”<sup>62</sup>

[50] In summary, the appropriateness of relief envisages something that is suitable and capable of addressing the exigencies of a situation. The enquiry is self-evidently fact-driven. It follows that statutory and common law remedies may well constitute appropriate relief in a particular case. Included in the wide range of remedies under

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<sup>59</sup> *Fose* above n 38 at para 58(b). See also the comments of Zitzke on the untapped potential of delictual remedies in the context of the Life Esidimeni tragedy: Zitzke “The Life Esidimeni Arbitration: Towards Transformative Constitutional Damages?” (2020) *TSAR* 419 at 424-35.

<sup>60</sup> *Minister of the Interior v Harris* 1952 (4) SA 769 (A) at 780H-781A, cited in *Fose* above n 38 at para 94.

<sup>61</sup> Compare *Ferreira v Levin N.O.*; *Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 229.

<sup>62</sup> *Fose* above n 38 at para 96.

section 38 are common law remedies, statutory relief, declaratory relief and relief under the Constitution itself. I will consider these alternatives on the facts of this case presently.

*Contempt proceedings and declaratory relief as possible alternative remedies*

[51] The respondents contended forcefully that the High Court correctly found that constitutional damages are not appropriate in this case and that a more appropriate action would be to launch contempt of court proceedings. I disagree. First, contempt proceedings do not preclude an award of constitutional damages. Second, it is not effective relief for a breach of rights as envisaged in section 38. A contempt of court order will not vindicate the applicants' rights to access adequate housing by placing the applicants in the houses that they should have received some 20 years ago, pursuant to their subsidy allocations.

[52] In *Nyathi*, this Court cautioned with regard to holding public officials responsible for wrongs committed by them in seeking to vindicate rights, that—

“[t]he committal of public officials would only result in the ‘naming and shaming’ of such officials and would produce no real remedy for the aggrieved litigant who is primarily concerned with the payment of the judgment debt. The potential disruption of already overburdened state departments is also a result which should be avoided.”<sup>63</sup>

Because of this, contempt of court has been described as “a blunt instrument”.<sup>64</sup> Indeed, in *Meadow Glen*, the Supreme Court of Appeal noted in respect of the challenge of overcoming social problems that—

“[c]ontempt of court is a blunt instrument to deal with these issues and courts should look to orders that secure on-going oversight of the implementation of the order.”<sup>65</sup>

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<sup>63</sup> *Nyathi v Member of the Executive Council for the Department of Health, Gauteng* [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC) at para 76.

<sup>64</sup> *Matjhabeng Local Municipality v Eskom Holdings Ltd* [2017] ZACC 35; 2018 (1) SA 1 (CC); 2017 (11) BCLR 1408 (CC) (*Matjhabeng*) at para 50.

<sup>65</sup> *Meadow Glen Home Owners Association v Tshwane City Metropolitan Municipality* [2014] ZASCA 209; 2015 (2) SA 413 (SCA) (*Meadow Glen*) at para 35.

[53] Contempt orders in civil law have a dual nature, punitive and coercive.<sup>66</sup> In this instance, what the applicants seek most is to be provided with the housing to which they are entitled. We are therefore concerned with the coercive aspect. Relief in civil contempt proceedings can take a variety of forms other than criminal sanctions, such as declaratory orders, a mandamus, and structural interdicts. They all play an important role in the enforcement of court orders in civil contempt proceedings. Their objective is to compel a party to comply with a court order.<sup>67</sup> There can be no question that civil contempt orders are essential in upholding the authority of our courts.<sup>68</sup>

[54] But do they constitute appropriate and effective relief in this matter? I think not. And, in any event, the applicants have already pursued contempt of court proceedings, to no avail. After the Supreme Court of Appeal's decision to grant a further extension of six months to allow the respondents more time to comply with the order of Teffo J, more obdurate inaction followed. The Teffo J order required of the respondents to convene a steering committee that included representatives of the applicants and to furnish quarterly progress reports on the construction of the houses to be provided. Neither of these things happened. After eight months of this intransigence, the applicants launched contempt proceedings against the respondents on 31 January 2019.

[55] The respondents did not oppose the contempt proceedings. Instead, they contended that a steering committee had been set up and reports had been provided. That committee, and the reports, apparently related to the whole Tembisa Extension 25 project, and not to a specific plan to provide the applicants with houses,

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<sup>66</sup> *Pheko v Ekurhuleni City* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) (*Pheko II*) at para 31. See also *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* [2021] ZACC 18; 2021 (5) SA 327 (CC); 2021 (9) BCLR 992 (CC) at para 47.

<sup>67</sup> *Matjhabeng* above n 64 at para 54.

<sup>68</sup> *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer Port Elizabeth Prison* [1995] ZACC 7; 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC) at para 61 and *S v Mamabolo (E TV and Others Intervening)* [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) at para 14.

as specifically ordered by Teffo J. The steering committee did not include any of the applicants, nor had they been told about it. The reports had been provided to the Tembisa Extension 25 steering committee, but not to the applicants. On both scores then, the respondents were clearly non-compliant with the order of the High Court. Nonetheless, in keeping with their commendable forbearance, the applicants suggested holding their contempt application in abeyance, provided that the Municipality agreed to meet with them, an offer that was accepted.

[56] This renewed engagement resulted in a proper steering committee being formed and in reports being made available to it. The alarming facts that emerged from these reports were that two crucial changes had been made to the Municipality's initial plans for the development of housing at Tembisa Extension 25, that would have included the applicants' houses. First, the housing units to be provided to the applicants would only be available in July 2020, a year after the order of the Supreme Court of Appeal required them to be built. Second, and because the Municipality wished to densify the Tembisa Extension 25 development, the applicants would no longer be provided with land and houses, but with units in blocks of walk-up apartments. This was clearly not compliant with the court order and the applicants conveyed as much to the respondents.

[57] The respondents' attitude was simply that the applicants had to wait their turn to be accommodated. On Friday 28 June 2019, the last working day available for the implementation of the Teffo J order (as amended by the Supreme Court of Appeal), the respondents approached the High Court in *Thubakgale III* for the relief adumbrated earlier. The applicants' counter-application for constitutional damages ensued.

[58] On these facts, I fail to see how contempt proceedings would be an effective remedy for the applicants. It would achieve, at best, only a committal of the responsible municipal officials in "the 'naming and shaming' of such officials and

would produce no real remedy for the aggrieved litigant”.<sup>69</sup> That is not what section 38 envisages. It is apposite to borrow from this Court’s observations in *Modderklip* (CC):

“It is obvious in this case that only one party, the state, holds the key to the solution of Modderklip’s problem. There is no possibility of the order of the Johannesburg High Court being carried out in the absence of effective participation by the state. The only question is whether the state is obliged to help in resolving the problem, in other words, whether Modderklip is entitled to any relief from the state.

The obligation on the state goes further than the mere provision of the mechanisms and institutions referred to above. It is also obliged to take reasonable steps, where possible, to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution of court orders, thus undermining the rule of law. The precise nature of the state’s obligation in any particular case and in respect of any particular right will depend on what is reasonable, regard being had to the nature of the right or interest that is at risk as well as on the circumstances of each case.”<sup>70</sup>

[59] The position is no different here – it is the local government sphere of the state, the respondent Municipality, that must resolve the applicants’ quandary. The Municipality has dismally failed to deliver on its constitutional obligation in respect of the applicants’ rights to housing. Now, 20 years and three court decisions later, it would provide extremely cold comfort to suggest that a contempt application is the answer. That is in fact no answer at all. And, objectively speaking, a coercive order would serve no purpose here, given the alarming extent of the Municipality’s intransigence towards providing housing, as comprehensively outlined in this judgment.

[60] There is a further aspect that bears consideration as far as contempt proceedings as an alternative option for relief is concerned. In a contempt application the following must be proved:

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<sup>69</sup> *Nyathi* above n 63 at para 76.

<sup>70</sup> *Modderklip* (CC) above n 8 at paras 42-3. That case concerned constitutional damages as appropriate relief for the breach of a farmer’s right to property. This Court considered all the available remedies and concluded that eviction proceedings and expropriation did not constitute appropriate relief.

- (a) that there is an extant court order;
- (b) that the order was duly served, or brought to the notice of, the alleged contemnor;
- (c) that there has been non-compliance with the order; and
- (d) that the non-compliance was wilful or mala fide.<sup>71</sup>

Once an applicant has proved (a), (b) and (c), the alleged contemnor has an evidentiary burden to prove, beyond a reasonable doubt, the absence of wilfulness or mala fides.<sup>72</sup>

[61] The applicants do not deny the availability of this remedy. But they can hardly be faulted for postulating that the municipal officials would, in attempting to discharge their evidential burden, simply fall back on the old refrain that “the . . . applicants’ access to housing must be located in the Municipality’s existing projects”. In this fashion, contend the applicants, the respondents have “invented an unending circularity which will see them avoid compliance with Teffo J’s order, and the provision of a remedy to the residents, for years to come”. The respondents will provide housing, but only within the parameters of their existing projects, which projects will be subject to delays, for which the Municipality cannot be held accountable. So the applicants must simply wait – for an unspecified period of time – for the Municipality to get around to providing houses to them when it is convenient for it to do so. These views are unassailable – the uncontroverted facts bear them out. Ultimately, what requires determination is whether, considering all of the above, contempt proceedings would provide a suitable, effective remedy here. For the reasons advanced, I do not think a contempt of court order would be effective. Furthermore, the unfolding of events since the last institution of contempt proceedings by the applicants fully warrant their disinclination to go that route. They understandably eschew a remedy that has proved ineffective in the past and that holds no promise at all of their rights being vindicated.

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<sup>71</sup> *Pheko II* above n 66 at para 32.

<sup>72</sup> *Id* at para 36.

[62] This can never be what the Constitution envisages – that state officials are permitted to evade compliance with court orders for years, assisted by the inevitable delays in High Court and appellate litigation. And so, as the applicants rightly contend, the respondents may or may not ultimately be held in contempt. But it is certain that the residents will be without their houses while the courts decide. They will continue to live in squalor in their shacks with no end in sight. Coercion through a contempt of court order is also unlikely to provide effective relief. All the facts on record, already alluded to, graphically demonstrate the extent of the Municipality’s reluctance and intransigence to provide the required housing. In the circumstances, a coercive order would objectively serve no purpose. For all these reasons, contempt proceedings are not appropriate relief here.

[63] Declaratory relief will certainly confirm the fact of the infringement and, to a degree, may vindicate the applicants’ right to housing. It will not, however, provide an effective remedy. The applicants’ situation is similar to that of *Modderklip (CC)*, where this Court noted that “[w]hat Modderklip required at that stage . . . having regard to the long history of its efforts to relieve its property from unlawful occupation, was something more effective than the suggested clarification of its rights”.<sup>73</sup> A further possibility is a declaratory order coupled with a structural interdict. But this too has proved futile. The order made by Teffo J included a structural interdict in paragraph 1.3.<sup>74</sup> But, as stated, the structural interdict was also breached by the Municipality. Therefore, it too would not provide an effective remedy.

*Further possible alternative remedies in contract, statute, delict and property law*

[64] Contractual remedies, which may be capable of providing relief, are not available to the applicants, because the relationship between the Municipality and the applicants is not contractual in nature. As indicated, the Municipality acts as a

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<sup>73</sup> *Modderklip (CC)* above n 8 at para 60.

<sup>74</sup> The order appears in [20]. See also *Thubakgale I* above n 16 at para 76.



developer in terms of national legislation in executing its constitutional mandate.<sup>75</sup> The present development was undertaken in terms of the Upgrading of Informal Settlements Programme, contained in the National Housing Code.<sup>76</sup>

[65] There are also no statutory remedies available. Neither the Housing Act nor the National Housing Code provide a right to damages in the event that the granting of a subsidy does not result in a house actually being provided.

[66] What remains then is delict. The essential requisites for a successful claim in delict are well-established. They are:

- (a) harm sustained by the plaintiff;
- (b) conduct on the part of the defendant which is wrongful;
- (c) a causal connection between the conduct and the plaintiff's harm; and
- (d) fault or blameworthiness on the part of the defendant.<sup>77</sup>

[67] In respect of proving harm, a plaintiff must show that she has suffered patrimonial or pecuniary loss, or an injury to an interest of personality, or must have experienced pain and suffering. The Aquilian action is the remedy for the recovery of compensation for pecuniary loss resulting from harm to a plaintiff's person or property. Sentimental damages as a *solatium* (compensation or consolation) for an injury to the personality are formally claimed under the *actio iniuriarum*. Pain and suffering, associated with physical injury, are formally redressed by the award of "general damages" under an action for pain and suffering.<sup>78</sup> The same conduct may found a claim in respect of all three actions, provided that the different forms of harm arose and can be proved.

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<sup>75</sup> Section 9(2)(a)(ii), read with section 9(2)(b) of the Housing Act. See the National Housing Code at para 3.6.

<sup>76</sup> *Thubakgale I* above n 16 at para 1.

<sup>77</sup> See for example Van der Walt and Midgley *Delict: Principles and Cases* 2 ed (Butterworths, Durban 1997) vol 1 at 2-3.

<sup>78</sup> *Id* at 2.

[68] The law of delict is largely concerned with patrimonial loss. Instances of non-patrimonial loss are limited to recognised interests like damage to reputation and good name, for which an action in defamation is available.<sup>79</sup> Unlike the usual delictual claim against an organ of state, the harm here concerns neither a direct patrimonial loss nor an injury to person or property. Here, the harm relates to the infringement of a constitutional right. The traditional delictual claim does not elegantly map onto infringements of this nature.<sup>80</sup> Thus, absent a development of the common law, it does not appear that the applicants have a claim in delict. In any event, delictual relief would clearly not properly vindicate the applicants' rights, and that, after all, is what this Court is called upon to do.

[69] Another potential remedy would be the eviction of the current residents from the houses that were built with the applicants' housing subsidies, so that the applicants may finally be able to enjoy them. This might be based on the *rei vindicatio* (vindication of a thing), and might appear at first sight to be the simplest answer to the present problem, given the strong protection of the rights of an owner at common law.<sup>81</sup> However, these rights are no longer absolute, given the current legislative position in South Africa – in particular, the provisions of section 26 of the Constitution, and the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act.<sup>82</sup> The latter Act states in no uncertain terms, in its preamble, that no one may be evicted “without an order of court made after considering all the relevant circumstances”. Section 4 of the Act makes further provision for this. In this case, the “relevant circumstances” are simply not before us. Given that the applicant's houses are Reconstruction and Development Programme houses (RDP houses) in a poor area, it is possible – perhaps even likely – that the current residents would have nowhere else to go and would themselves be rendered homeless. In that case, they could most likely not be evicted until alternative housing is made available by the

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<sup>79</sup> *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at paras 27-8.

<sup>80</sup> Van der Walt and Midgley above n 77 at 6-7.

<sup>81</sup> *Graham v Ripley* 1931 TPD 476 at 479. See also, Van der Walt *Constitutional Property Law* (Juta & Co Ltd, Cape Town 2005) at 411-2.

<sup>82</sup> 19 of 1998 (PIE).

state – and the applicants would be back at square one. In any event, it cannot be in the interests of justice for a remedy to be provided to one set of applicants, which concomitantly renders an entire group of people vulnerable to homelessness. That is no remedy at all.

[70] To sum up: neither contractual or delictual damages claims, nor contempt proceedings, nor eviction orders, nor any other conceivable remedy can properly vindicate the right to housing in the present instance, as these alternatives simply cannot furnish the applicants with housing. We are dealing here with a “diffuse and systematic pattern of rights violations” and, as this Court stated in *Fose*, it is less likely that ordinary remedies will address these types of situations effectively.<sup>83</sup> Constitutional damages are the appropriate remedy to address “systematic, pervasive and enduring infringements of constitutional rights”.<sup>84</sup> That is unquestionably the case here.

#### *The High Court erred in its approach*

[71] The High Court dismissed the counter-application for constitutional damages on the three grounds outlined earlier.<sup>85</sup> The reasons why contempt proceedings would not yield appropriate relief in this matter have already been expounded. And it has been explained why the High Court was wrong in finding that constitutional damages are punitive. In any event, that was not the basis upon which the applicants sought constitutional damages. They sought to vindicate their rights to adequate housing. They did not seek to punish the Municipality, but rather, to hold it accountable for infringing their rights. No compensation has been paid to them in delict, contract or on any other basis. There can be no question here of “punitive damages”.

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<sup>83</sup> *Fose* above n 38 at para 98.

<sup>84</sup> *Id* at para 102.

<sup>85</sup> *Thubakgale III* above n 23 at para 84.

*Constitutional damages are appropriate relief*

[72] Our courts rarely award constitutional damages. That is understandable. After all, relief in the form of constitutional damages ought to be considered only in those rare instances where it will provide the most effective relief. As stated, all available remedies must be considered, be they in common law, statute or the Constitution. Determination of what would constitute appropriate relief must be considered on the facts and the circumstances of each case.

[73] In *Dikoko*,<sup>86</sup> the view was expressed that delictual damages for the infringement of dignity can constitute appropriate relief in terms of section 38. In a separate concurrence, Moseneke DCJ observed:

“It seems to me that the delict of defamation implicates human dignity (which includes reputation) on the one side and freedom of expression on the other. Both are protected in our Bill of Rights. It may be that it is a constitutional matter because although the remedy of sentimental damages is located within the common law, it is nonetheless ‘appropriate relief’ within the meaning of section 38 of the Constitution.”<sup>87</sup>

[74] This Court confirmed in *Law Society* that a private law remedy in delict may serve as appropriate relief to protect and enforce the Constitution. It held:

“It seems clear that in an appropriate case a private law delictual remedy may serve to protect and enforce a constitutionally entrenched fundamental right. Thus a claimant seeking ‘appropriate relief’ to which it is entitled, may properly resort to a common law remedy in order to vindicate a constitutional right. It seems obvious that the delictual remedy resorted to must be capable of protecting and enforcing the constitutional right breached.”<sup>88</sup>

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<sup>86</sup> *Dikoko v Mokhatla* [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC).

<sup>87</sup> *Id* at para 90.

<sup>88</sup> *Law Society of South Africa v Minister for Transport* [2010] ZACC 25; 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC) (*Law Society*) at para 74.

[75] In *Olitzki*, the Supreme Court of Appeal had to determine whether, on the facts and circumstances, constitutional damages for loss of profits were an appropriate remedy for the infringement of a fundamental constitutional right.<sup>89</sup> The main claim was premised on the averment that the Tender Board had breached its responsibilities under the procurement provision of the interim Constitution, and therefore was liable for the loss of profits that the plaintiff had suffered as a result of not receiving the tender concerned.<sup>90</sup> The Supreme Court of Appeal held that it was not necessary to decide whether a loss of profits can ever be claimed as constitutional damages, but held that the applicant was not entitled to constitutional damages.<sup>91</sup> It reached this finding primarily on the basis that the plaintiff had alternative remedies at its disposal, such as an interdict,<sup>92</sup> and an order for the revocation of the tender award.<sup>93</sup>

[76] Unlike *Dikoko*, *Law Society* and *Olitzki*, on the applicants' papers we are dealing here with a self-standing claim for constitutional damages. Section 38 is central to this determination. And so, too, is section 172(1)(b) of the Constitution, which requires this Court to "make any order that is just and equitable". The use of the word "any" denotes a wide discretion to fashion effective remedies, although that discretion is, of course, not unbridled. It is circumscribed by the factors of justice and equity, referred to in section 172(1)(b) itself.<sup>94</sup>

[77] Recently, in *Residents*, this Court declined to award constitutional damages to a group of poor, vulnerable residents who were subjected to warrantless cruel, degrading and invasive search and seizures that were conducted without warrants over a period of approximately a year.<sup>95</sup> Its decision was based on the fact that an alternative common law remedy, a claim under the *actio iniuriarum*, was available to

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<sup>89</sup> *Olitzki* above n 56 at para 1.

<sup>90</sup> *Id* at paras 9-10.

<sup>91</sup> *Id* at para 42.

<sup>92</sup> *Id* at paras 37-8.

<sup>93</sup> *Id* at para 41.

<sup>94</sup> *Corruption Watch NPC v President of the Republic of South Africa; Nxasana v Corruption Watch NPC* [2018] ZACC 23; 2018 (2) SACR 442 (CC); 2018 (10) BCLR 1179 (CC) at para 68.

<sup>95</sup> *Residents* above n 58 at paras 1 and 126.

the residents and provided effective relief.<sup>96</sup> Furthermore, this Court held that a claim for compensation under section 8(1)(c)(ii)(bb) of the Promotion of Administrative Justice Act (PAJA)<sup>97</sup> was also available to them.<sup>98</sup> The facts in that case are plainly distinguishable and this Court’s refusal to award constitutional damages is clearly premised on those peculiar facts.

[78] In my view, constitutional damages are appropriate relief as they are the only effective remedy in this matter. The applicants have been denied their fundamental right to adequate housing for over two decades. There are three court orders in their favour, confirming not only this right in general, but their specific entitlement to free-standing houses in Tembisa, on the strength of the subsidies allocated to them in accordance with the Upgrading of Informal Settlements programme.<sup>99</sup> The applicants have been remarkably patient and have engaged throughout with the Municipality in an effort to find a solution. They were compelled to approach the courts when all these engagements and requests for assistance to the Special Investigations Unit, the Office of the Gauteng MEC for Human Settlements, the Office of the President and the Office of the Public Protector failed.

[79] There has been the most pervasive and lamentable breach of the applicants’ rights. And the three court orders have not borne any results; the Municipality

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<sup>96</sup> Id at paras 108 and 121.

<sup>97</sup> 3 of 2000. Section 8(1)(c)(ii)(bb) reads:

- “8. Remedies in proceedings for judicial review
- (1) The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders-
    - ...
    - (c) setting aside the administrative action and—
      - ...
      - (ii) in exceptional cases—
        - ...
        - (bb) directing the administrator or any other party to the proceedings to pay compensation.”

<sup>98</sup> *Residents* above n 58 at paras 111-2.

<sup>99</sup> This programme was set out in the National Housing Code.

remains in default to this day. All the normal remedies for the breach have been tried, and have failed. The applicants' concerted efforts to engage with the respondents and negotiate a resolution have all failed. The mandatory and structural relief ordered by Teffo J has been ineffective. Proceedings for contempt of court were tried, but the respondents then headed these off by bringing what turned out to be a wholly meritless application to vary the scope and content of Teffo J's order. And they did so at a cynically late stage, hours before the deadline imposed by the Supreme Court of Appeal was to expire. This case merits constitutional damages as appropriate relief on these compelling facts and circumstances.

[80] Budgetary constraints and pressure on the fiscus are a justified concern that must be weighed in the balance before constitutional damages are awarded. That caution was pertinently expressed in *Fose*.<sup>100</sup> These concerns are particularly acute in a post-pandemic reality.<sup>101</sup> We must carefully assess whether an award of constitutional damages is warranted, against the stark backdrop of scarce resources and significant gaps in the fulfilment of socio-economic rights. The limited resources debate notably took a different turn in the First Certification judgment.<sup>102</sup> During the certification of the Constitution, it was argued that the inclusion of justiciable socio-economic rights in the Constitution would be inconsistent with the separation of powers as it would give the Judiciary power to dictate to the government how the budget should be allocated.<sup>103</sup> This Court agreed that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters.<sup>104</sup> However, this Court reasoned that even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications.<sup>105</sup> Therefore, it cannot be said that

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<sup>100</sup> *Fose* above n 38 at para 65.

<sup>101</sup> The SARS-CoV-2 virus, commonly known as the Corona Virus, has been declared a global pandemic by the World Health Organisation. Its effect on the global economy has been calamitous.

<sup>102</sup> *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996 1996 (4) SA 744 (CC)* (First Certification judgment).

<sup>103</sup> *Id* at paras 76-7.

<sup>104</sup> *Id* at para 77.

<sup>105</sup> *Id*.

by including socio-economic rights within a Bill of Rights, the task conferred upon the Courts is altogether different from that ordinarily conferred upon them by the other rights under the Bill of Rights that it results in a breach of the separation of powers.<sup>106</sup> This is the backdrop against which the argument on budgetary constraints should be considered.

[81] The applicants' case must be distinguished. Here we are not concerned with the general constitutional obligation which section 26(1) imposes on the state, which was discussed extensively in *Grootboom*. Nor are we seized here with a complaint that the measures taken to progressively realise the right to housing, in the form of the Housing Act and the National Housing Code, are unreasonable. A complaint of that nature would trigger a review to ensure that the measures comply with the constitutional standard of reasonableness. This case goes beyond the situation contemplated in *Mazibuko*:

“Thus the positive obligations imposed upon government by the social and economic rights in our Constitution will be enforced by courts in at least the following ways. If government takes no steps to realise the rights, the courts will require government to take steps. If government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness. From *Grootboom* it is clear that a measure will be unreasonable if it makes no provision for those most desperately in need. If government adopts a policy with unreasonable limitations or exclusions as described in *Treatment Action Campaign (No 2)*, the court may order that those be removed. Finally, the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised.”<sup>107</sup>

[82] Here, the applicants were allocated subsidies in terms of a housing programme under a comprehensive suite of legislation promulgated in fulfilment of the state's obligations under section 26(2). The applicants' complaints are not about a failure to adopt measures to realise their rights to housing. Nor are they complaining about the

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<sup>106</sup> Id.

<sup>107</sup> *Mazibuko* above n 35 at para 67.



unreasonableness of those measures. There is a complaint about the lamentable failure of an organ of state to fulfil its constitutional obligations in terms of reasonable measures enacted to progressively realise their rights to housing. The allocation of a subsidy to each applicant, in terms of those measures, entitled each applicant to a house built with those funds on the specific plot of land earmarked by the Municipality for that applicant. The applicants have an unequivocal court order to that very effect, confirmed in two subsequent orders. Those orders remain extant. The applicants have a specific right to the practical vindication of their constitutional right to adequate housing. They have vested rights to a free-standing house with a plot of land. Those rights vested on 1 July 2019, as Basson J correctly held in *Thubakgale III*. The applicants thus have more than a mere general section 26(1) right to access to adequate housing, subject to available resources in terms of section 26(2). In this case, it is clear that the resources are available, so that the state's failure is beyond what was seen in *Grootboom*. Importantly, the Municipality must have budgeted specifically for the houses when the subsidies were awarded to the applicants. The provisions of the Housing Act and the National Housing Code alluded to are clear in that regard.

[83] The applicants seek leave to appeal the order that refused their claim for constitutional damages. They thus seek to enforce their right to an effective remedy as envisaged by the notion of "appropriate relief" in section 38 of the Constitution. Properly contextualised, the relief they seek is in relation to a specific violation of their rights, and they seek to enforce their rights through constitutional damages. The question they ask this Court to answer is whether they are entitled to appropriate relief in the form of constitutional damages. They contend that that is the only effective remedy available as appropriate relief. For the reasons advanced, I am of the view that that answer must be in their favour. This Court must not eschew awarding constitutional damages simply because they have rarely been granted in the past. Where, on the particular facts and circumstances, it is the only effective remedy, constitutional damages ought to be granted. Failing 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.

### *The second judgment*

[84] The second judgment, penned by my Brother, Jafta J, sets its face against constitutional damages playing a role where the state acts to progressively realise socio-economic rights. It holds that section 26 “imposes no obligation directly enforceable against the state to provide citizens with houses on demand”.<sup>108</sup> And it concludes that:

“[A] failure by the state to provide houses to a particular group of people who need them, cannot give rise to a claim that those people should be provided with houses immediately or by a particular date. If we accept, as we must do, that section 26 does not confer a right to claim a house within a specified time, the failure to provide a house cannot cause an injury or damage to the individual in need of a house.”<sup>109</sup>

On this basis, the second judgment holds that absent an injury, there can be no question of constitutional damages. It also concludes that the scheme of section 26 militates against any direct claim for damages.

[85] I disagree. I differ with the approach that the reasonableness standard is a barrier to the relief sought by the applicants, as my Brother suggests. While it is true that the reasonableness test applies to the question of whether the progressive realisation of rights is achieved, the reasonableness standard also compels the state to act without unreasonable delay. This Court made a similar finding in *Nokotyana*,<sup>110</sup> when it stated:

“The remaining question that requires the attention of this Court is the delay of more than three years on the part of the Gauteng Provincial Government in reaching a

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<sup>108</sup> See the second judgment at [149].

<sup>109</sup> Id at [150].

<sup>110</sup> *Nokotyana v Ekurhuleni Metropolitan Municipality* [2009] ZACC 33; 2009 JDR 1211 (CC); 2010 (4) BCLR 312 (CC).

decision on the Municipality's application to upgrade the Settlement to a township. The rights of residents under Chapter 13 are dependent on a decision being taken. The provincial government should take decisions for which it is constitutionally responsible, without delay. *A delay of this length is unjustified and unacceptable. It complies neither with section 237 of the Constitution, nor with the requirement of reasonableness imposed on the government by section 26(2) of the Constitution with regard to access to adequate housing.*"<sup>111</sup> (Emphasis added.)

[86] *Nokotyana* establishes a close relationship between socio-economic rights and section 237 of the Constitution, which requires that "[a]ll constitutional obligations must be performed diligently and without delay". It suggests that this feeds into the standard of reasonableness as it applies to section 26 of the Constitution. In this matter, the extensive and unwarranted delay in providing the applicants with housing is well documented and is plainly relevant to the question of reasonableness. The applicants' section 26 rights were unquestionably violated. And that gives rise to the possibility of constitutional damages.

[87] Generally speaking, therefore, I disagree that constitutional damages can never be an appropriate remedy where socio-economic rights are violated, as is the case here. And in the instant matter in particular, the applicants rely on more than their general socio-economic rights under section 26. It bears repetition that they rely on their vested rights to a house, granted more than 20 years ago in terms of the national housing policy at that time, and confirmed twice by the High Court and also by the Supreme Court of Appeal. Their rights extend far beyond the entitlement to a reasonable policy being adopted, which will ultimately and progressively lead to housing for them. Their case does not concern the progressive realisation of their rights at all, as was the case in *Grootboom*. They have vested rights to houses – it is as simple as that. This distinguishes them from the many others in need of housing, and distinguishes their case from one based only on section 26 entitlements.

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<sup>111</sup> Id at para 55.

[88] As I stated at the outset, here we must travel somewhat beyond the terrain covered in *Grootboom*. My Brother is correct that “the state is under a negative obligation not to interfere with the enjoyment of the right” and that “[t]his negative obligation arises only where an individual was already enjoying the right in question . . . [f]or there can be no negative duty not to interfere with the enjoyment of something that does not exist”.<sup>112</sup> It bears repetition that, importantly, we are not concerned here with the reasonableness of the legislative measures taken by the state to progressively realise the right to housing. We are beyond that enquiry. The Housing Act and the National Housing Code are the legislative measures taken by the state. And those very measures, constituting the state’s housing policy, form the basis upon which the applicants’ vested rights were established. The state has not failed to take legislative measures. It has failed to meet its obligations under established legislation.

[89] For these reasons then, my Brother is, with respect, wrong where he concludes that “the order granted by Teffo J was at odds with the jurisprudence of this Court on the role played by the courts in enforcing socio-economic rights”, and that “constitutional damages are not competent for enforcing socio-economic rights”.<sup>113</sup> The reliance on the dictum in *Mazibuko* is also misplaced.<sup>114</sup> As stated, this case is not about the failure of the state to progressively realise the right to housing. That has been done through the Housing Act and the National Housing Code. It is also not about the unreasonableness of those measures. The subsidies allocated to the applicants demonstrate not only that the measures are reasonable, but also that they are effective in their reach. This case, as stated, is about the egregious failure of the Municipality, qua organ of state, to comply with its constitutional obligation to give effect to the right to housing, as encapsulated in the reasonable measures enacted by the state.

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<sup>112</sup> See the second judgment at [26] to [27]. *Grootboom* above n 4; *Mazibuko* above n 35; and *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (*Treatment Action Campaign (No 2)*) are relied upon.

<sup>113</sup> See the second judgment at [170] and [177].

<sup>114</sup> See the second judgment at [167].

[90] My Brother’s further reasons for holding that constitutional damages are inappropriate here, also do not bear scrutiny. First, there is the finding that, because of the principle of constitutional subsidiarity, the applicants’ failure to ground their claim for damages on the Housing Act and the National Housing Code was fatal to the claim. Jafta J holds further that, “[i]f these pieces of legislation were defective, the remedy open to the applicants was for them to challenge the validity of this legislation rather than relying directly on the Constitution”.<sup>115</sup> The answer is simply that, first, the applicants have in fact attempted to obtain housing through the housing policy (the Housing Act and the National Housing Code), but have not been successful; and, secondly, the fact that neither the Housing Act nor the National Housing Code allow for damages means that the applicants are unable to rely on them, given that they consider damages to be appropriate relief. In any event, neither the Housing Act nor the National Housing Code deal with a situation where, as here, the state fails to comply with its statutory obligations. The principle of subsidiarity cannot apply where a piece of legislation does not cover the relevant issue,<sup>116</sup> so it is not applicable here.

[91] The second further reason advanced is that the applicants are said to have already obtained a remedy before Teffo J, and cannot seek a new remedy, in accordance with the requirements of certainty and finality in litigation.<sup>117</sup> My Brother holds that the order for delivery of houses, obtained before Teffo J, and the order for constitutional damages, unsuccessfully sought before Basson J, are based on the same cause of action (the failure to deliver houses) which, therefore, offends the “once and for all” rule.<sup>118</sup> According to my Brother, the applicants were obliged in law to execute that *ad factum praestandum* (performance of a particular act) order through contempt of court proceedings.<sup>119</sup> And, continues my Brother, “[t]he applicants’

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<sup>115</sup> See the second judgment at [186].

<sup>116</sup> *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31; 2016 (1) SA 132 (CC); 2015 (12) BCLR 1407 (CC) at para 66.

<sup>117</sup> See the second judgment at [181] to [182].

<sup>118</sup> Embodied in the maxim *ne bis in idem*, that a defendant should not be compelled to defend themselves twice on the same cause of action.

<sup>119</sup> See the second judgment at [186].

pleading is so defective that it fails to disclose a claim for damages recognised in law. A claim for damages for failing to comply with a court order only is not known in our law.”<sup>120</sup> He regards the damages sought in this case as “punitive damages”, firmly eschewed by this Court in *Fose*.<sup>121</sup>

[92] My Brother is correct that the “once and for all” rule is firmly established in our law. The principle was expressed as follows in *Custom Credit Corporation*,<sup>122</sup> where the Court stated that “[t]he law requires a party with a single cause of action to claim in one and the same action whatever remedies the law accords [them] upon such cause”.<sup>123</sup> This is closely related to the principle of *res judicata*,<sup>124</sup> for which the justification was identified by Voet as follows: “to prevent inextricable difficulties arising from discordant or perhaps mutually contradictory decisions due to the same suit being aired more than once in different judicial proceedings”.<sup>125</sup>

[93] The first, and shortest, answer to my Brother’s point here is that the applicants do not in fact rely on the same cause of action. Prior to Teffo J’s order, the cause of action was the respondents’ failure to take a decision to grant the applicants with housing benefits for which they had been approved. In the later counter-application for constitutional damages, by contrast, the respondents had committed a further breach of the applicants’ rights by failing to provide housing by 30 June 2019. The test for whether different claims are based on a single cause of action is whether there is a substantial difference in the *facta probanda*<sup>126</sup> between the two, despite possible overlapping.<sup>127</sup> The *facta probanda* before Teffo J was whether the applicants had

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<sup>120</sup> Id at [190].

<sup>121</sup> Id.

<sup>122</sup> *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A).

<sup>123</sup> Id at 472.

<sup>124</sup> A matter that has already been adjudicated by a competent court and therefore may not be pursued further by the same parties.

<sup>125</sup> Voet *Commentary on the Pandects* (Gane’s translation) (Butterworth & Co. (Africa) Ltd, Durban 1957) at 553.

<sup>126</sup> Facts to be proven for a successful claim.

<sup>127</sup> Visser and Potgieter *Law of Damages* (Juta and Co Ltd, Cape Town 1993) at 128. See also *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 839.

received the housing benefits for which they had been approved in terms of the housing policy. The *facta probanda* associated with the counter-application for constitutional damages was whether there had been a failure to provide the applicants with housing by 30 June 2019, as stipulated in the order of Teffo J. While it is true that these sets of facts to be proven do overlap, they are distinct.

[94] Even if this were not the case, however, the “once and for all” rule should not be considered to be inflexible in our law. It does not apply to nuisance cases, for example, where “the damage-causing event is not ‘complete’ but there is a series of successive causes of action until the cause of the nuisance has been abated”.<sup>128</sup> In such a case, a plaintiff may claim as soon as the damage is “complete”, and may institute a fresh action for further damage.<sup>129</sup> The “once and for all” rule also does not apply in cases of continuing unlawful conduct,<sup>130</sup> of which the present case is an example. There is continuing unlawful conduct for as long as the respondents fail to provide the applicants with housing. It is not the fault of the applicants that the respondents have not complied with various court orders, and it would not be just and equitable to deny them access to court if their hard-won remedies have proven ineffective. Nor is it an answer to require them to institute contempt of court proceedings, which would not provide them with housing.

[95] It may be that cases of systemic state failure constitute a new category of cases where the “once and for all” rule cannot apply. In *DZ obo WZ*,<sup>131</sup> this Court recognised that, while the development of the common law “once and for all” rule was inappropriate in that particular case, it could occur in the future.<sup>132</sup> And, in another case of horrendous state failure, *AllPay I*, this Court expressly left the door open for

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<sup>128</sup> Visser and Potgieter *id* at 130. See for example *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) and *De Charmoy v Day Star Hatchery (Pty) Ltd* 1967 (4) SA 188 (D).

<sup>129</sup> Visser and Potgieter *id*.

<sup>130</sup> *Id*. See for example *Slomowitz v Vereeniging Town Council* 1966 (3) SA 317 (A) at 331; *Symmonds v Rhodesia Railways* 1917 AD 582 at 588; and *Ngcobo v Minister of Police* 1978 (4) SA 930 (D) at 825.

<sup>131</sup> *Member of the Executive Council for Health and Social Development, Gauteng v DZ obo WZ* [2017] ZACC 37; 2018 (1) SA 335 (CC); 2017 (12) BCLR 1528 (CC) (*DZ obo WZ*).

<sup>132</sup> *Id* at paras 54-8.

the applicant to claim further relief in separate proceedings.<sup>133</sup> Systemic state failure is open-ended by its very nature, and courts should be wary of shutting potential litigants out of the judicial system as soon as they have had one bite of the apple, particularly given the skewed power dynamics at play between the state and right-holders.

[96] In addition, the availability of other remedies does not preclude a claim for constitutional damages. My Brother does not appear to suggest otherwise. What must be determined is what the appropriate relief is on the facts and circumstances of each case. I have comprehensively traversed this terrain and there is no need for repetition. It will suffice to reiterate that section 38 requires this Court to grant *appropriate relief*. The question is therefore, not whether there are other remedies available, but rather whether constitutional damages are an appropriate remedy in the circumstances. This is in line with the dictum in *Fose*, in which this Court embraced the duty to craft orders which provide “effective relief” to litigants.<sup>134</sup>

[97] In this instance, the applicants do not have other remedies at their disposal which would be effective. My Brother says that the applicants have an order in their possession, which they need only execute. However, the order is worth very little if the Municipality refuses to act in accordance with it. The Municipality’s track record is lamentably against them – they have failed over several years to heed the order, and that is why we are where we are. It may be that the somewhat vulnerable position of the applicants has functioned as a barrier to their being able to secure execution of the order.

[98] Contempt of court proceedings would, as I have attempted to demonstrate, provide no effective resolution of the applicants’ problems, and would thus not constitute appropriate relief. Any relief flowing therefrom would not satisfy the requirements of section 38. Contempt of court would not provide the applicants with

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<sup>133</sup> *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) (*AllPay I*) at para 72.

<sup>134</sup> *Fose* above n 38 at para 69.



housing, and even if those proceedings were to lead to a coercive order, the Municipality has so far been singularly unresponsive to orders. Nor would eviction orders against the unlawful occupiers of their houses provide effective, appropriate relief. The position here is similar to that in *Modderklip (CC)*, although the number of unlawful occupiers is not as high.<sup>135</sup> It is not at all assured that the applicants could obtain an eviction order, which would need to be granted by a court considering all the relevant circumstances.<sup>136</sup> I respectfully disagree with my Brother's assertion that it is improper for the applicants to rely on the Municipality to provide alternative housing for the occupants of their houses. Section 7 of the Constitution confers the duty of fulfilling housing rights on the state. This is the approach that was taken in *Modderklip (CC)*, for example, where it was accepted that it is the state that must provide alternative land if an eviction would result in homelessness.<sup>137</sup> If the state had not borne this obligation, the landowner would not have had to wait so long for alternative housing to be provided, and ultimately there would have been no need for the extensive damages granted in that case.

[99] In sum then, I respectfully disagree with the second judgment's conclusion that constitutional damages are inappropriate in the case of socio-economic rights, and therefore the applicants have no claim for such damages. I have already shown why socio-economic rights claims may be satisfied using constitutional damages. And further, I have already shown that, in any event, the applicants are relying on more than broadly applicable socio-economic rights. They have vested rights to a house. Further, I disagree, with respect, that the applicants need to show that they have no other remedy before they can seek constitutional damages. Even if they did, however, they have no other effective remedy in the circumstances, and certainly none that would meet the requirements of section 38 of the Constitution, which enjoins this Court to find and grant a remedy that is "appropriate".

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<sup>135</sup> There was a staggering amount of some 40 000 unlawful occupiers in *Modderklip (CC)* above n 8 at para 8).

<sup>136</sup> See the preamble to PIE above n 83.

<sup>137</sup> *Modderklip (CC)* above n 8 at paras 43 and 45.

*What amount of damages should be awarded?*

[100] As far as the amount of damages is concerned, had I commanded the majority, I would have awarded a once-off amount as a token. It is self-evidently impossible to quantify, in monetary terms, the breach of the applicants' fundamental human rights occasioned by the pervasive, lamentable conduct of the Municipality. One cannot apply a benchmark for the "cursed condition" of poverty.<sup>138</sup> An indignity of that sort cannot easily form the basis of an actuarial exercise. Even an attempt to quantify breaches of rights like dignity and housing, would amount to a degrading exercise.

[101] There is an inherent challenge in trying to characterise how damages in monetary terms can reflect and properly remedy the breach of a constitutional right that is, by its very nature, laden with both morals and values. Any probe for a Rand value to remedy the woeful municipal shortcomings that have endured for over 20 years is bound to fail.

[102] A further consideration is that the Municipality offered free-standing houses at Palm Ridge to the applicants as an alternative. That offer was rejected on the basis that Palm Ridge was too far away from their places of work, schools and established social networks. This offer must bear consideration, as it could potentially weigh against the applicants in respect of constitutional damages as an appropriate remedy or, at the very least, the amount of damages. It is well established that the Constitution does not guarantee a person a right to housing at state expense at the locality of their choice.<sup>139</sup> But here of course, as stated, the applicants have a right to the housing specifically allocated to them in terms of their subsidies.

[103] In *Claytile*,<sup>140</sup> the applicants were evicted from the farm where they worked and lived.<sup>141</sup> They were offered alternative accommodation, but they rejected it for almost

<sup>138</sup> *MEC for the Department of Welfare v Kate* [2006] ZASCA 49; 2006 (4) SA 478 (SCA) (*Kate*) at para 33.

<sup>139</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes (Centre on Housing Rights, Amici Curiae)* [2009] ZACC 16; 2010 (3) SA 454 (CC); 2009 (9) BCLR 847 (CC) at para 254.

<sup>140</sup> *Baron v Claytile (Pty) Limited* [2017] ZACC 24; 2017 (5) SA 329 (CC); 2017 (10) BCLR 1225 (CC) (*Claytile*).

<sup>141</sup> *Id* at paras 8-9.

the same reasons as those advanced by the applicants in this matter.<sup>142</sup> There was also an offer to relocate and transport children to and from school until the end of the school year.<sup>143</sup> This Court held that it cannot be expected that the applicants be accommodated on the farm indefinitely whilst refusing an offer of alternative accommodation from the City.<sup>144</sup> In the result, an order of eviction was granted on the basis that there was only a duty to progressively realise the right to access to housing, and that offer was consonant with the means available to the City.<sup>145</sup> It is an important consideration though that, unlike here, there were no vested rights that the applicants could lay claim to in *Claytile*.

[104] On the other hand, the effect of the offer, even though it may have been made in good faith, is troublingly reminiscent of apartheid spatial planning, in terms of which black people were shunted away to places far from their work places, schools and medical facilities. The concept of spatial justice was explored by Lefebvre, who considered space to be socially contextualised, stating that “the spatial practice of a society secretes that society’s space [over time]”.<sup>146</sup> Apartheid’s spatial structures persist, and today continue to maintain race- and class-based inequities in access to resources and services across Johannesburg and surrounding areas.<sup>147</sup> It has been suggested that the law plays a role in more deeply entrenching these inequities, for example where it props up urban regeneration projects that exclude the poor.<sup>148</sup>

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<sup>142</sup> Id at paras 30-1.

<sup>143</sup> Id at para 34.

<sup>144</sup> Id at para 43.

<sup>145</sup> Id at para 50.

<sup>146</sup> Lefebvre *The Production of Space* (Éditions Anthropos, Paris 1974) Trans: Nicholson-Smith (Blackwell, Oxford UK and Cambridge USA 1991) at 38. See also, specifically in respect of the Johannesburg area: Madlalate “(In)Equality at the Intersection of Race and Space in Johannesburg” (2017) 33 *SAJHR* 472 at 480-5, who points out that spatial practice here meant that a viciously segregated space was created, which enabled oppression and a fierce inequality in access to resources.

<sup>147</sup> Madlalate id at 485-6.

<sup>148</sup> Id at 486-7.

[105] The concept of the right to the city, first conceived by Lefebvre,<sup>149</sup> is composed of claims to habitation (to live in the city), appropriation (to make use of the city) and participation (to help create the city),<sup>150</sup> all of which are curtailed by spatial injustice. This is a useful lens through which the applicants' housing needs may be viewed.

[106] "Adequate housing" must be interpreted within the context of socio-economic rights and the related jurisprudence. In *Mahlangu*, the majority of this Court stressed the remedial purpose of socio-economic rights under our constitutional dispensation, specifically to remedy the on-going inequities inherited from our apartheid and colonial past.<sup>151</sup> To this end, the majority stated:

"The approach to interpreting the rights in the Bill of Rights and the Constitution as a whole is purposive and generous and gives effect to constitutional values, including substantive equality. So, when determining the scope of socio-economic rights, it is important to recall the transformative purpose of the Constitution which seeks to heal the injustices of the past and address the contemporary effects of apartheid and colonialism."<sup>152</sup> (Emphasis added.)

[107] It follows then, that when this Court determines the content and scope of socio-economic rights, it must consider their primary purpose, which is to promote substantive equality and human dignity, and also to undo the racialised system of poverty inherited from apartheid. The right to adequate housing enshrined in section 26 is one such right, which must therefore serve a purpose that is both remedial and transformative. The same applies to the land rights that are implicit in section 25. Together, these rights function to overturn the many spatial injustices created under apartheid and colonialism, and perpetuated today. They would ring hollow – and could not achieve their central aims – if actions to fulfil housing and land rights did not include a consideration of spatial apartheid.

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<sup>149</sup> Lefebvre *Writings on Cities* (translated and edited by Kofman and Lebas) (Blackwell Publishing, Oxford and Malden 1996) at 6 and 158 and Madlalate above n 165 at 474-5.

<sup>150</sup> Coggin and Pieterse "Rights and the City: An Exploration of the Interaction between Socio-Economic Rights and the City" (2012) 23 *Urban Forum* 257 at 259.

<sup>151</sup> *Mahlangu v Minister of Labour* [2020] ZACC 24; 2021 (2) SA 54 (CC); 2021 (1) BCLR 1 (CC) at para 55.

<sup>152</sup> *Id.*

[108] Recently, in *Adonisi*<sup>153</sup> the High Court held that the Constitution clearly imposes an obligation on the state to address spatial apartheid. This finding was based on the right of access to housing and the right to have access to land on an equitable basis.<sup>154</sup> The Court described the nature of this duty as follows:

“I believe that the approach mandated by the Constitutional Court in the cases referred to takes account of these obligations, viz. that all levels of state are to provide affordable housing in *locations proximal to socio-economic goods, services and opportunities, as expeditiously as possible, through the design and implementation of policies and programmes that not only provide better housing to the poor and marginalised, but also challenge and overcome spatial and socio-economic inequality and exclusion.*”<sup>155</sup> (Emphasis added.)

[109] I endorse the approach adopted in *Adonisi*. Along similar lines, in the context of temporary accommodation to be provided by the state, this Court held in *Dladla* that this obligation extends beyond the building itself, to include the social reality of that accommodation:

“Temporary accommodation of necessity entails more than just providing a roof and four walls; it must include all that is reasonably appurtenant to making the temporary accommodation adequate. The provision of housing entails not only the delivery of a building or tent. The conditions the state attaches to the accommodation are part of its provision. Therefore, any rules the Shelter implemented to regulate the conduct of its inhabitants necessarily informed the adequacy of the housing it was providing. It cannot be that the provision of temporary accommodation implicates section 26(2) while rules designed to fulfil that provision do not.”<sup>156</sup>

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<sup>153</sup> *Adonisi v Minister for Transport and Public Works: Western Cape; Minister of Human Settlements v Premier of the Western Cape Province*, unreported judgment of the High Court of South Africa, Western Cape Division, Cape Town, Case No 7908/2017 (31 August 2021).

<sup>154</sup> *Id* at paras 249 and 445.

<sup>155</sup> *Id* at para 75.

<sup>156</sup> *Dladla v City of Johannesburg* [2017] ZACC 42; 2018 (2) SA 327 (CC); 2018 (2) BCLR 119 (CC) above n 115 at para 57.

[110] For present purposes, the permanent accommodation to be provided by the Municipality must be more than “four walls”. It must include ensuring continued access to schools, jobs, social networks and other resources which the applicants in this case enjoy where they currently stay, and which they will lose if displaced. This interpretation is in line with spatial justice and the right to the city, and therefore also in line with the remedial and transformative purposes of socio-economic rights and the Constitution more broadly.

[111] Importantly, in interpreting socio-economic rights, courts must also have regard to international law such as the International Covenant on Economic, Social and Cultural Rights, which South Africa signed in 1994 and ratified in 2015.<sup>157</sup> The Committee on Economic, Social and Cultural Rights (CESCR) has elaborated on the extent of states parties’ obligations in respect of the right to adequate housing. The CESCR has stressed that the right to adequate housing must be understood within the context of the indivisibility of human rights, and so the right must be understood in relation to the rights to human dignity and non-discrimination.<sup>158</sup> To this end, the CESCR has noted that the right to adequate housing entails more than having a roof over one’s head, but “rather it should be seen as the right to live somewhere in security, peace and dignity”.<sup>159</sup> This would suggest that *Dladla* is consonant with relevant international law. In the context of South Africa’s highly segregated urban areas and scarce access to resources, it should also mean that spatial justice must be considered in determining what constitutes “adequate housing”.

[112] In its General Comment No. 4, the CESCR has explained that “adequacy” is one of the primary components of the right to housing.<sup>160</sup> Adequate housing has

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<sup>157</sup> United Nations Human Rights: Office of the High Commissioner “Status of ratification: interactive dashboard” (2021), available at <https://indicators.ohchr.org/>.

<sup>158</sup> Office of the United Nations High Commissioner for Human Rights “The Human Right to Adequate Housing” (2021), available at <https://www.ohchr.org/EN/Issues/Housing/Pages/AboutHRandHousing.aspx>.

<sup>159</sup> *Id.*

<sup>160</sup> General Comment No. 4 of the CESCR at 2-3.

several defining features such as accessibility, affordability and location.<sup>161</sup> In respect of location, the CDESCR has said:

“Adequate housing must be in a location which allows access to employment options, health-care services, schools, childcare centres and other social facilities. This is true both in large cities and in rural areas where the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households.”<sup>162</sup>

[113] There may well be adequate access to the relevant services at Palm Ridge, just as there is at Tembisa. However, it must be taken into account that the applicants have established social networks where they are, and are likely to be reliant on schools and jobs near Tembisa. It is not as simple as placing people in a new place and expecting all services to be equally available to them. If they are displaced to Palm Ridge, they may have to commute, and the costs of this may be prohibitive. In addition, the experience of relocation is likely to be traumatic in and of itself. Apartheid’s racist policies of spatial segregation affected whole communities, who in many cases remain traumatised by the experience.<sup>163</sup> It is a composite trauma, including the violence of the removal itself, the difficulty of setting up in a new place, and the ongoing deprivation associated with having been severed from the social and physical resources needed for survival.<sup>164</sup> For the remedial purposes of socio-economic rights to be properly served, the trauma of removal and resettlement must be considered when practical solutions to socio-economic problems are sought.

[114] Naturally, if the applicants were to be resettled at Palm Ridge, this would not have the same racist context as apartheid’s forced removals. However, to be uprooted

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<sup>161</sup> Id at 3-4.

<sup>162</sup> Id at 4.

<sup>163</sup> See for example: Trotter “Trauma and Memory: The Impact of Apartheid-Era Forced Removals on Coloured Identity in Cape Town” in *Burdened by Race: Coloured Identities in Southern Africa* (UCT Press, Cape Town 2009) at 57-62 and Chigeza, Roos and Puren “‘...Here We Help Each Other’: Sense of Community of People Subjected to Forced Removals” (2013) 23 *Journal of Psychology in Africa* 97 at 97-9.

<sup>164</sup> Oosthuizen and Molokoe “The Bakwena ba Magopa (North West Province, South Africa): Consequences of a Forced Removal, 1983-1994” (2002) 47 *Historia* 345 at 347-54 and Krüger, Cundill and Thondhlana “A Case Study of the Opportunities and Trade-Offs Associated with Deproclamation of a Protected Area Following a Land Claim in South Africa” (2016) 21 *Local Environment* 1047 at 1052.

is in itself a traumatic experience, even if it is done pursuant to the best possible motives. This Court should be sensitive to this potential trauma and should therefore have some understanding of, and empathy with, the applicants' refusal to accept the accommodation offered to them in Palm Ridge. In evaluating the conduct of the respondents, and the question of whether adequate housing has indeed been offered to the applicants, the recent history of this country, and the potential for further trauma, should be considered and carefully navigated.

[115] In addition, it is noteworthy that the South African Law Reform Commission has recently called for submissions on laws that may continue to further the apartheid project, although they may appear neutral on the face of it.<sup>165</sup> By so doing, they are shining a light on the potential impacts of supposedly colour-blind laws which have a disproportionate effect on people who are poor and black. Clearly, housing policies can act in this way. This Court should be wary of endorsing housing solutions which enhance the segregation of our cities, and may cause great difficulties to already vulnerable people. In the premises, the applicants cannot be said to have been unreasonable in rejecting their proposed resettlement at Palm Ridge.

[116] Against this background, and taking into account the immense challenges of placing a monetary value on the pervasive breach of the applicants' constitutionally entrenched rights to adequate housing, I am of the view that a once-off award of R10 000 per applicant, as a token, would be appropriate in the circumstances. Given that no monetary amount can properly capture the breaches of the rights at issue, an award of R10 000 would, in my view, acknowledge the harm suffered by the applicants and the recalcitrance of the Municipality, whilst at the same time avoiding a situation whereby the public purse is drained entirely. Awarding constitutional damages in an amount to be paid monthly, until the applicants are settled at Esselen Park, which is the relief that the applicants sought, might have had a chilling effect on local service delivery. It might also have discouraged the state from creating

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<sup>165</sup> South African Law Reform Commission "Call for Submissions – Repeal of Colonial and Apartheid Legislation (Project 149)" (4 May 2021), available at <https://www.justice.gov.za/salrc/media/20210504-prj149-ColonialLegislation.pdf>.



similar policy-oriented initiatives for fear of facing penalties where it anticipates a possibility of being unable to carry them out expeditiously. What is required though, in my view, is for the applicants to be granted the right to approach this Court again a year from the granting of this order to reassess this award of constitutional damages, should the municipality continue to procrastinate in its constitutional obligations. Had I held the majority, the order would have made provision for that right. Any further order for payment, if it had been made, would not have been punitive – it would have been recognition of the ongoing hardship faced by the applicants, and the need for them to be compensated for it.

[117] Next, I consider the application to adduce further evidence in this Court.

#### *Further evidence*

[118] The respondents have applied to adduce further evidence regarding events that transpired after the order in *Thubakgale III*. The record shows that the Municipality had offered the applicants free-standing housing at Palm Ridge, but this offer was rejected because the applicants contended that Palm Ridge was too far from the Winnie Mandela settlement. The applicants were also offered interim accommodation at Clayville Extension 80 and Tembisa Extension 27, which was anticipated to be available by November or December 2020. The prospective further evidence relates to offers of temporary accommodation in walk-up apartments at Tembisa Extension 27 until free-standing houses become available a few years from now at another municipal housing development at Esselen Park. This emerges from correspondence between the parties' legal representatives attached to the further affidavits filed in this respect. The offers were rejected by the applicants. This evidence is undoubtedly directly relevant to the issues before us and indeed crucially important to affording the applicants appropriate relief. Moreover, it is incontrovertible evidence of an offer of interim accommodation made by the Municipality and ultimately rejected by the applicants, that demonstrates the availability of interim housing, pending permanent housing being allocated in several years' time. The factual material the Municipality seeks to place before us is relevant

to the determination of the issues (particularly as to appropriate relief), does not appear specifically on the record and is otherwise common cause.<sup>166</sup> Therefore, I would have admitted it.

### *Supervisory order*

[119] In my view, there is a need in this case for a supervisory order, given the Municipality's persistent recalcitrance and its legacy of failing to comply with successive court orders. Further, this supervisory order would have included an obligation to the effect that the Municipality must report back both to this Court and to the applicants, in an ongoing fashion. This would be in line with the importance of meaningful engagement,<sup>167</sup> which has been stressed by this Court in relation to the realisation of socio-economic rights. This Court has the power to craft such a supervisory order based on the obligation to provide appropriate relief for an infringement of rights in terms of section 38, as well as its wide powers to grant an order which is "just and equitable" in terms of section 172 of the Constitution. A supervisory order is appropriate as a useful mechanism to ensure that organs of state perform their constitutional duties and that the Constitution is upheld.<sup>168</sup>

### *Order*

[120] Had I held the majority, I would have made the following order:

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<sup>166</sup> Rule 31 of the Rules of the Constitutional Court, which governs the admission of evidence, provides:

"(1) Any party to any proceedings before the Court and an amicus curiae properly admitted by the Court in any proceedings shall be entitled, in documents lodged with the Registrar in terms of these rules, to canvass factual material that is relevant to the determination of the issues before the Court and that does not specifically appear on the record: Provided that such facts—

- (a) are common cause or otherwise incontrovertible; or
- (b) are of an official, scientific, technical or statistical nature capable of easy verification.

(2) All other parties shall be entitled, within the time allowed by these rules for responding to such document, to admit, deny, controvert or elaborate upon such facts to the extent necessary and appropriate for a proper decision by the Court."

<sup>167</sup> See for example, *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street Johannesburg v City of Johannesburg* [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC) at paras 13-7.

<sup>168</sup> *Treatment Action Campaign (No 2)* above n 112 at para 113.

1. The application for leave to appeal is granted.
2. The respondents are granted leave to adduce further evidence.
3. The appeal is upheld.
4. Paragraph 2 of the order of the High Court in *Thubakgale v Ekurhuleni Metropolitan Municipality* 2018 (6) SA 584 (GP) is set aside and substituted with the following:
  - “(a) It is declared that the first respondent, the Ekurhuleni Metropolitan Municipality (Municipality), is liable to compensate each of the 1st and 3rd to 134th applicants for the following breaches of their rights under section 26 of the Constitution—
    - (i) the Municipality’s failure to provide the 1st and 3rd to 134th applicants with the plot of land and the house constructed using that applicant’s housing subsidy; and
    - (ii) the first to fourth respondents’ failure to take the steps necessary to implement the order granted by this court in *Thubakgale v Ekurhuleni Metropolitan Municipality* 2018 (6) SA 584 (GP).
  - (b) The Municipality is directed to pay to 1st and 3rd to 134th applicants the sum of R10 000 as and for constitutional damages.”
5. The Municipality is ordered to report back to this Court and to the applicants’ attorneys in writing every three months after the delivery of this judgment on the progress made in settling the applicants permanently in Esselen Park. The Municipality’s report must include responses to any concerns submitted to them by the applicants in written form.
6. The amount in paragraph 4(b) must be paid into the trust account of the applicants’ attorneys within one month of the date of this order.
7. The applicants are granted leave to approach this Court after a year from the granting of this order for a reassessment of the constitutional

damages awarded, in the event of further delays on the part of the municipality in fulfilling its constitutional obligations as set out herein.

8. The respondents are directed to pay the applicants' costs, including the costs of two counsel.

JAFTA J (Mogoeng CJ and Tshiqi J concurring)

[121] I have had the pleasure of reading the judgment of my colleague Majiedt J (first judgment). While I agree with the first judgment that leave to appeal should be granted because a decision of this Court will provide guidance on whether constitutional damages should have been granted, I disagree that such damages should have been allowed here. I accept that in an appropriate case constitutional damages may be awarded but not to enforce socio-economic rights. As a matter of principle, there is no room for constitutional damages where one is enforcing a socio-economic right.

[122] But even if it was competent to award constitutional damages in a case like the present, here it would not have been permissible to do so for a number of reasons. These include the fact that the applicants obtained an order from the High Court on the same issue and that order was confirmed on appeal by the Supreme Court of Appeal. All that was left was to execute the order. The other reason is that in the present proceedings no proper case was pleaded for constitutional damages and there was no proof of any damages, let alone constitutional ones.

### *Background*

[123] But before I address these issues it is necessary to outline the context within which the claim for constitutional damages arose. The matter has a long and sad history permeated by claims for incorrect remedies and deplorable conduct on the part of the municipality, which failed to honour undertakings made to the applicants and failed to obey the court order issued by Teffo J in their favour. For a proper

understanding of the matter, we must go back to 1998 when each of the applicants were allocated a housing subsidy and a site on which a house was to be built for each applicant. These allocations were made under the National Housing Code<sup>169</sup> that applied at that time. The National Housing Code constituted a reasonable measure taken by the state, within its available resources, to achieve the progressive realisation of the right of access to adequate housing. The applicants had no complaint against the National Housing Code and in the various cases that they instituted, they did not challenge the validity of the National Housing Code. This means that the applicants accepted that the National Housing Code itself complied with section 26(2) of the Bill of Rights.<sup>170</sup>

[124] Instead, the applicants' complaint was that despite the approval of the subsidies and allocation of sites, those properties were not handed over to them. Some of the applicants even had the properties registered in their names but they were occupied by other members of the community. Others even received utility bills for services rendered on the sites that were allocated to them. The applicants contend that houses allocated to them were illegally occupied by other people. But we are not told why the applicants did not seek the eviction of the illegal occupiers instead of launching an application in which they sought an order compelling the municipality to provide them with houses in Tembisa Extension 25. This relief was sought on behalf of all applicants, including those who are registered owners of houses.

[125] In the founding affidavit before Teffo J the applicants averred:

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<sup>169</sup> National Housing Code above n 14.

<sup>170</sup> Section 26 of the Constitution provides:

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- (3) No 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."

“The Respondent’s failure to deliver the benefits for which we are approved amounts to a breach of our constitutional rights under sections 26(1) and 33, and of the state’s obligations in terms of section 26(2).”

[126] Evidently, the applicants did not seek an order evicting the illegal occupiers of houses allocated to them. On the contrary, they sought an order compelling the municipality to give them title to the land they themselves occupied. They stated:

“Accordingly in this application, the applicants seek an order:

- (a) compelling the Municipality to grant the Applicants title to the land where they currently reside, by taking the necessary steps, by no later than two months of the date of this order, to upgrade the Applicants’ housing accommodation where they currently reside, in terms of the Upgrading of Informal Settlements Programme, contained in the National Housing Code, 2009; or in the alternative,
- (b) compelling the municipality to provide low-cost housing opportunities to the applicants in developments that are within a 5 kilometre radius of Winnie Mandela . . .”

[127] The municipality opposed the relief sought on various grounds. First, it pointed out that it was not involved in the allocation of subsidies and sites to the applicants. According to the municipality, it only assumed the responsibility to provide housing to people in Tembisa Extension 25 in 2013. This was long after the allocations referred to by the applicants had occurred. With regard to upgrading the land on which the applicants had erected informal houses, the municipality stated that part of that land was not suitable for establishing a formal township because it was dolomitic and susceptible to developing sinkholes, which would be dangerous to residents.

[128] While accepting that the obligation to provide residents of Tembisa Extension 25 fell on it, the municipality said that it had an obligation to accommodate 6 000 households from that area alone and that the land available could allow only 1 500 houses to be built on it. In addition, the municipality stated that it had 119

informal settlements within its jurisdiction, including Winnie Mandela where the applicants live. It pointed out that there were three housing projects undertaken by it within Tembisa including Tembisa Extension 25, Esselen Park and Clayville. Based on its plans, the municipality made an undertaking to the effect that the applicants would receive houses in 2021 from the 1 500 to be built in Tembisa Extension 25.

[129] The High Court accepted as common cause the fact that the applicants' subsidies had been approved and that they were allocated plots of land on which houses were to be built for them. However, those houses were occupied by other people whereas the applicants were receiving utility bills from the municipality. Teffo J rejected the promise made by the municipality to the effect that the applicants would receive houses from the 1 500 houses to be built in Tembisa Extension 25. She viewed it as unreasonable that the applicants were to be made to wait until 2021 when the building of 1 500 houses was to be completed.

[130] Although the applicants had relied on section 26(1) and (2) of the Constitution and the National Housing Code for their claim, Teffo J held that the Constitution did not apply and that the subsidy and sites allocated to the applicants were made in terms of the National Housing Code, a measure that was adopted to facilitate the realisation of progressive access to adequate housing. The learned Judge concluded that decisions of this Court in cases like *Grootboom*<sup>171</sup> and *Treatment Action Campaign (No 2)*<sup>172</sup> were distinguishable on the facts.

[131] With regard to the fact that the municipality assumed the responsibility to provide houses to the applicants only in 2013, the High Court said:

“It is no excuse to say the first respondent should only be accountable for the period after 2013. It is an organ of state. It inherited the complaints of the applicants, the matter was investigated, it knows exactly what happened. It should have taken

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<sup>171</sup> *Grootboom* above n 4.

<sup>172</sup> *Treatment Action Campaign (No 2)* above n 112.

reasonable measures to correct the breach and provide the applicants with access to adequate housing within a reasonable time.”

[132] The learned Judge rejected the municipality’s argument to the effect that from 2013 it had taken reasonable steps to ensure that the applicants’ access to adequate housing was realised. She stated:

“It is the respondents’ contention that they have acted reasonably in the progressive realisation of the applicants’ right to adequate housing in terms of section 26(2) as they have undertaken to provide them with houses in 2021. In my view the respondents have taken too long to address the complaints of the applicants. Their actions prompted the applicants to come to court. They did not prioritise the realisation of the rights of the applicants who are in the most desperate need.

In delaying to provide the applicants with access to adequate housing, the first respondent has failed to act reasonably in the implementation of the national housing policy as required of it in terms of section 26(2) of the Constitution.”

[133] The Court proceeded to order the municipality to provide each applicant with a house in Tembisa Extension 25 or at another agreed location on or before 31 December 2018. In addition, the municipality was directed to register the applicants as titleholders of those houses by 31 December 2019.

[134] The municipality was granted leave to the Supreme Court of Appeal which changed the date fixed by Teffo J to 30 June 2019 and 30 June 2020 respectively.

[135] The order issued by Teffo J, which was confirmed by the Supreme Court of Appeal, was not subjected to a further appeal. And that order does not form part of the present appeal, except to the extent of providing the background to the claim for constitutional damages to which I shall return in a moment.

[136] On 28 June 2019, two days before the deadline for providing the applicants with houses, the municipality instituted an application in the High Court for a variation of Teffo J’s order. The municipality contended that it had houses in the form



of flats which it intended to allocate to the applicants. It stated that it did not have free-standing houses ready for occupation. In the parties' meetings before that application was launched, the applicants had rejected the offer of a block of flats. This made it impossible for the municipality to comply with Teffo J's order. It will be recalled that before her, the municipality had already indicated that free-standing houses in Tembisa Extension 25 would be available in 2021.

[137] The applicants opposed the municipality's variation application on the basis that Teffo J's order clearly granted them free-standing houses and that the High Court had no authority to vary that order after it had been confirmed on appeal. In the same matter the applicants lodged a counter-application in which they sought constitutional damages arising from the municipality's failure to comply with Teffo J's order. The applicants contended that the delay in providing them with houses was unreasonable and that it was occasioned by the municipality's fault. The municipality was accused of failing to take appropriate steps to provide them with houses at another location agreed to by the parties. Each of the applicants claimed R5 000 per month in constitutional damages "for every month of delay beyond 30 June 2019".

[138] The municipality opposed the claim for constitutional damages on two grounds. First, it argued that damages were not the appropriate relief because the applicants' rights had already been vindicated in the order of Teffo J. Second, the municipality argued that the remedy of constitutional damages in the present circumstances will only serve to punish it for a delay in service delivery.

[139] The matter was placed before Basson J for adjudication. She dismissed the municipality's application for variation on the basis that under section 172(1) of the Constitution, she could not competently vary the order in question after 30 June 2019 and since the matter was placed before her after that date, she did not have the power to vary it. She held that the common law did not empower her to grant the order sought in the circumstances of this case and declined the request to develop it.

[140] As she had “difficulty in accepting the monetary basis on which [the applicants] base their claim for constitutional damages”,<sup>173</sup> the learned Judge invited the parties to submit further written argument on the issue. Her misgivings arose from the fact that the dispute between the parties was about enforcement of a court order which could essentially be enforced by means of contempt of court. She observed that the parties referred to no authority where constitutional damages were ordered “in essentially a case of contempt of court”.<sup>174</sup>

[141] In addition to the contention that constitutional damages would constitute punishment, the municipality argued that on the pleaded case, the claim was unsustainable in law and that the evidence presented did not establish the claim. It also argued that the quantum was based on inadmissible evidence on the market related rental for Tembisa.<sup>175</sup> While accepting that constitutional damages may be awarded in an appropriate case, Basson J held that such damages were not justified in the present matter.

[142] The learned Judge reasoned thus:

“Although it is accepted in principle that ‘appropriate relief’ may be awarded in circumstances where persons have suffered loss as a result of a failure to give effect to the rights afforded to individuals pursuant to a successful enforcement of their right to housing in terms of section 26 of the Constitution, I am not persuaded that awarding constitutional damages in this particular case is warranted for the following reasons: Firstly, I have difficulty in accepting that the proposed amount – which is, in my view, arbitrary at best – could be used as an acceptable basis in a claim for constitutional damages. Moreover, an amount of R5 000.00 is claimed for each of the residents in the absence of any particularity as to the extent of the loss actually suffered by each of these residents. The residents certainly did not plead patrimonial loss in their counter-application. Secondly, I am in agreement with the submission that the effect of an order for constitutional damages (based on a vague assertion that R5 000.00 is a market related rental for the area of Tembisa) would have a punishing

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<sup>173</sup> High Court judgment above n 23 at para 81.

<sup>174</sup> Id at para 83.

<sup>175</sup> Id at para 82.

effect on the municipality for not complying with a court order. The pleaded case in the counter-application is not couched to seek damages to vindicate an infringement of the fundamental rights of the residents. The pleaded case is for monetary compensation that will allow the residents to house themselves until the municipality does what it was supposed to do almost twenty years ago. Thirdly, I am also in agreement with the submission that the fact that the applicants have delayed in the execution of the court order, is a question of contempt of court.”<sup>176</sup>

[143] It is apparent from this reasoning that the learned Judge was troubled by how the claim was pleaded and “the absence of any particularity as to the extent of the loss actually suffered” by each applicant. The pleaded case, she held, sought monetary compensation for the delay in complying with the order of Teffo J. She concluded that instead, this delay should have been addressed by means of contempt proceedings. She also upheld the contention that in the present circumstances, an award of constitutional damages “would have a punishing effect on the municipality for not complying with a court order”. The learned Judge dismissed both the main application and the counter-application. She ordered the municipality to pay costs on a punitive scale.<sup>177</sup>

[144] The appeal before this Court is limited to the dismissal of the counter-application only. For it to succeed, we must be persuaded that Basson J erred in concluding that constitutional damages were not justified here, for reasons she had furnished. It is now convenient to consider the issues arising here. I propose to begin with the determination of whether socio-economic rights may be enforced by means of constitutional damages.

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<sup>176</sup> Id at para 84.

<sup>177</sup> The order issued reads:

“In the event, the following order is made:

1. The application is dismissed.
2. The counter-application is dismissed.
3. The applicants, jointly and severally, the one paying the other to be absolved, are ordered to pay the costs of the entire application (inclusive of the counter-application) on a punitive scale. Such costs to include the costs occasioned by the employment of two counsel.”

### *Constitutional damages to enforce socio-economic rights*

[145] The question whether socio-economic rights are justiciable under the Constitution is well-established. Our jurisprudence is to the effect that those rights are enforceable, especially against the state.<sup>178</sup> When it comes to the rights enshrined in sections 26 and 27 of the Constitution, decisions of this Court emphasise that in order to determine the nature and content of the right of access to adequate housing, section 26(1) must be read together with section 26(2).<sup>179</sup> On this interpretation, section 26(1) does not create a self-standing right that is enforceable against the state. The right of access to adequate housing depends on the provisions of section 26(2) for it to be complete and enjoyable.

[146] Unlike under the common law, the mere existence of the right under section 26(1) does not give rise to a positive obligation on the state. Instead, the state is under a negative obligation not to interfere with the enjoyment of the right. In *Mazibuko*, this Court said:

“Traditionally, constitutional rights (especially civil and political rights) are understood as imposing an obligation upon the State to refrain from interfering with the exercise of the right by citizens (the so-called negative obligation or the duty to respect). As this court has held, most notably perhaps in *Jaftha v Schoeman*, social and economic rights are no different. The State bears a duty to refrain from interfering with social and economic rights just as it does with civil and political rights.”<sup>180</sup>

[147] This negative obligation arises only where an individual was already enjoying the right in question. For there can be no negative duty not to interfere with the enjoyment of something that does not exist. What triggers this obligation is the exercise or enjoyment of the right. Where the right is still to be exercised or enjoyed, a positive duty applies. The content and scope of that positive duty are defined in

<sup>178</sup> *Grootboom* above n 4; *Treatment Action Campaign (No 2)* above n 112; *Mazibuko* above n 35; *Khosa v Minister of Social Development*; *Mahlaule v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC); and *Soobramoney* above n 1.

<sup>179</sup> *Grootboom* above n 4.

<sup>180</sup> *Mazibuko* above n 35 at para 47.

section 26(2).<sup>181</sup> In *Mazibuko, Grootboom and Treatment Action Campaign (No 2)*, this Court declared that the right of access to adequate housing does not entitle “citizens to approach a court to claim a house from the state”. This Court held that section 26 does not impose “a directly enforceable obligation upon the state to provide every citizen with a house immediately”.<sup>182</sup>

[148] In *Mazibuko*, O’Regan J pronounced:

“This court concluded that section 26 does not impose such an obligation. Instead, the court held that the scope of the positive obligation imposed upon the State by section 26 is carefully delineated by section 26(2). Section 26(2) provides explicitly that the State must take reasonable legislative and other measures progressively to realise the right of access to adequate housing within available resources. In *Treatment Action Campaign (No 2)* this court repeated this in the context of section 27(1)(a), the right of access to health care services:

‘We therefore conclude that section 27(1) of the Constitution does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2). Sections 27(1) and 27(2) must be read together as defining the scope of the positive rights that everyone has and the corresponding obligations on the State to respect, protect, promote and fulfil such rights.’<sup>183</sup>

[149] The established interpretation of section 26(1) and (2) tells us plainly that it imposes no obligation directly enforceable against the state to provide citizens with houses on demand. Rather the obligation is 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. Without direct enforcement there can be no legal basis for concluding that certain individuals must be given houses by a particular date. That proposition cannot flow from section 26(2) as interpreted by this Court.

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<sup>181</sup> *Grootboom* above n 4 at para 38 and *Treatment Action Campaign (No 2)* above n 112 at para 39.

<sup>182</sup> *Mazibuko* above n 35 at para 48.

<sup>183</sup> *Id* at para 49.

[150] Consequently, a failure by the state to provide houses to a particular group of people who need them, cannot give rise to a claim that those people should be provided with houses immediately or by a particular date. If we accept, as we must do, that section 26 does not confer a right to claim a house within a specified time, the failure to provide a house cannot cause an injury or damage to the individual in need of a house. And without an injury, there can be no claim for constitutional damages. Moreover, the scheme of section 26 rules out any direct claim for damages.

[151] It is evident from the decision of this Court in *Grootboom* that the obligation imposed on the state by section 26(2) has three key elements. Those elements were defined in these terms:

“Subsection (2) speaks to the positive obligation imposed upon the State. It requires the State to devise a comprehensive and workable plan to meet its obligations in terms of the subsection. However subsection (2) also makes it clear that the obligation imposed upon the State is not an absolute or unqualified one. The extent of the State’s obligation is defined by three key elements that are considered separately: (a) the obligation to ‘take reasonable legislative and other measures’; (b) ‘to achieve the progressive realisation’ of the right; and (c) ‘within available resources’.”<sup>184</sup>

[152] With regard to reasonableness, *Grootboom* tells us that this test is directed at measures like policies and programmes adopted to make the realisation of the right to be progressive. This Court declared:

“The State is required to take reasonable legislative *and* other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The State is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programs implemented by the Executive. These policies and programs must be reasonable both in their conception and their implementation. The formulation of a program is only the first stage in meeting the State’s obligations.

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<sup>184</sup> *Grootboom* above n 4 at para 38.

The program must also be reasonably implemented. An otherwise reasonable program that is not implemented reasonably will not constitute compliance with the State's obligations.

In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the program. The program must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs. A program that excludes a significant segment of society cannot be said to be reasonable. Conditions do not remain static and therefore the program will require continuous review.”<sup>185</sup>

[153] It appears that Teffo J overlooked that the reasonableness test is that of the measure taken as required by section 26(2). Instead, the learned Judge applied the reasonableness standard to the delay in placing the applicants in possession of houses. This is not consistent with the test in section 26(2) which requires the state to take reasonable measures to achieve the progressive realisation of the right of access to adequate housing. This provision does not even remotely oblige the state to provide individuals with houses within a reasonable time from the date on which they have applied for a house.

[154] But even if that was the case, here the facts show that the applicants have been allocated sites and that their subsidies were approved. And some of them even have houses registered in their names. These facts seriously undermine the delay point. Instead, the applicants were confronted by a different problem of illegal occupation of their houses.

[155] The requirements of section 26(2) in relation to the obligation imposed on the state are inter-dependent. In *Grootboom*, the Court said:

“The third defining aspect of the obligation to take the requisite measures is that the obligation does not require the State to do more than its available resources permit. This means that both the content of the obligation in relation to the rate at which it is

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<sup>185</sup> Id at paras 42-3.

achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources. Section 26 does not expect more of the State than is achievable within its available resources.”<sup>186</sup>

[156] In simple terms, this means that the realisation of the right of access to adequate housing and the continued enjoyment of that right in a given case depends on available resources at the disposal of the state. Take for example, a case of a person who receives a house from the state and whilst she lives in it, the house gets destroyed by a storm. It would depend on whether the state has financial resources to rebuild the house for that person to continue enjoying the right. If the state does not have those resources, it cannot be said that the non-enjoyment of the right has caused that person an injury or damage in the same way that she could claim if the same house was destroyed wrongfully by a third party. The distinction lies primarily in the source of each claim. The latter claim would be sourced in the common law and it would not be subject to available resources whereas the former would be sourced from section 26 of the Constitution and, of necessity, depends on the availability of resources.

[157] The approach adopted in the first judgment overlooks this important distinction. It fails to see the difference between socio-economic rights and other rights. With regard to other rights, the approach is simply that if a right conferred upon a claimant is breached, she must be compensated for the violation. Not so in relation to socio-economic rights. A breach of those rights arising from non-fulfilment or non-enjoyment of the rights does not translate into an injury or damage that warrants compensation to be ordered.

[158] Similarly, a person who requires medical care at a public hospital but is turned away because of lack of resources, as the available resources are presently deployed in giving care to those who suffer from Covid-19, may claim damages from the state on the approach adopted in the first judgment. This is so because her right to medical care would have been violated. This reveals the absurd consequences of the proposition that a breach of a socio-economic right gives rise to a claim for damages.

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<sup>186</sup> Id at para 46.



And the proposition is in conflict with the jurisprudence of this Court in decisions like *Soobramoney*.<sup>187</sup> The fact that in that matter the Court was dealing with section 27(1) and (2) of the Constitution makes no difference. The approach to interpreting and enforcing sections 26 and 27 is the same, hence *Grootboom* was followed in *Treatment Action Campaign (No 2)* and *Mazibuko*.

[159] In *Soobramoney* an individual was refused the special medical care he needed to continue to live, on the ground that he did not qualify for it under a departmental policy, which afforded that treatment to a specific class of patients. Under the policy, treatment was given to patients whose conditions were still reversible and since Mr Soobramoney's condition was irreversible, he was not given the treatment. The underlying reason was that resources were limited and if the treatment was available to all patients, those resources would be exhausted and a greater number of patients would be without treatment. The crucial question was whether the policy in question met the requirements of section 27(2) of the Constitution. This Court held that the policy was reasonable despite the fact that it did not cater for Mr Soobramoney and that from his perspective, he was denied access to health care.

[160] The failure to provide health care that was necessary to prolong Mr Soobramoney's life in that matter did not give rise to a claim for damages, even though his right of access to health care was not fulfilled. The reasons for this legal position are not difficult to fathom. Sections 26(2) and 27(2) 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.

[161] Unlike in *Soobramoney*, here, despite the fact that the applicants were allocated subsidies and plots of land in respect of which some are title-holders, the municipality included the applicants in the project of 1500 houses that were to be built in Tembisa. The undisputed evidence was that those houses were to be ready for occupation during

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<sup>187</sup> *Soobramoney* above n 1.

2021. In all these circumstances, it is difficult to appreciate how the so-called constitutional damages could have arisen unless they flow purely from non-compliance with Teffo J's order. Even so, it is not clear how the failure to comply in and of itself alone could result in constitutional damages.

[162] By nature, compensatory damages arise where there has been an injury or damage. They are designed to serve corrective justice by placing the victim in the position she or he would have been in if no harm had occurred. Compensatory damages are inappropriate where the victim has suffered no physical injury or pecuniary loss and damages are claimed purely on the ground that there is a violation of a right conferred on a group of people. 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. In *Fose* this Court rejected a claim for constitutional damages which was in addition to compensatory damages:

“In the present case there can, in my view, be no place for further constitutional damages in order to vindicate the rights in question. Should the plaintiff succeed in proving the allegations pleaded he will no doubt, in addition to a judgment finding that he was indeed assaulted by members of the police force in the manner alleged, be awarded substantial damages. This, in itself, will be a powerful vindication of the constitutional rights in question, requiring no further vindication by way of an additional award of constitutional damages.”<sup>188</sup>

[163] Here the applicants sought constitutional damages over and above the order of Teffo J which directed the municipality to provide them with houses. This meant that the damages sought were not to replace the houses they were entitled to but were in addition to them. The applicants' right of access to housing was fully vindicated by Teffo J's order and as observed in *Fose*, “no further vindication by way of an additional award of constitutional damages” was required.

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<sup>188</sup> *Fose* above n 38 at para 67.

### *Purpose of socio-economic rights*

[164] The objective of socio-economic rights is not to give South Africans access to basic necessities of life within a fixed period of time. But it is to set goals to achieve this purpose over time. It was not lost on the framers of the Constitution that when the Constitution was adopted, millions of people in this country had no access to basic necessities of life and that with limited resources available to it, the state cannot possibly grant access to those necessities at once. The framers opted for progressive access under the control of the Legislature and the Executive, to the exclusion of the Judiciary. In *Mazibuko*, this Court stated:

“[O]rdinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter in the first place for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so, for it is their programmes and promises that are subjected to democratic popular choice.”<sup>189</sup>

[165] On the progressive realisation of socio-economic rights and the reasons for that structure, this Court observed:

“At the time the Constitution was adopted millions of South Africans did not have access to the basic necessities of life, including water. The purpose of the constitutional entrenchment of social and economic rights was thus to ensure that the State continue to take reasonable legislative and other measures progressively to achieve the realisation of the rights to the basic necessities of life. It was not expected, nor could it have been, that the State would be able to furnish citizens immediately with all the basic necessities of life. Social and economic rights empower citizens to demand of the State that it act reasonably and progressively to ensure that all enjoy the basic necessities of life. In so doing, the social and economic

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<sup>189</sup> *Mazibuko* above n 35 at para 61.

rights enable citizens to hold government to account for the manner in which it seeks to pursue the achievement of social and economic rights.”<sup>190</sup>

[166] A proper reading of *Mazibuko* reveals that in the context of socio-economic rights, the role played by the Judiciary in enforcing those rights differs from the role it plays in respect of other rights. In the context of socio-economic rights, the mere adoption of reasonable legislative and other measures gives content to those rights.<sup>191</sup> And reasonableness is the only standard that can be invoked judicially in challenging what was done by the state pertaining to socio-economic rights.

[167] The only route through which socio-economic rights may be enforced by the Judiciary is the review of measures taken by the state on the ground of reasonableness. This was affirmed in *Mazibuko*:

“Thus the positive obligations imposed upon government by the social and economic rights in our Constitution will be enforced by courts in at least the following ways. If government takes no steps to realise the rights, the courts will require government to take steps. If government’s adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness. From *Grootboom* it is clear that a measure will be unreasonable if it makes no provision for those most desperately in need. If government adopts a policy with unreasonable limitations or exclusions as described in *Treatment Action Campaign (No 2)*, the court may order that those be removed. Finally, the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised.”<sup>192</sup>

[168] Once the court finds that the impugned measure was unreasonable, it must set it aside and leave the matter in the hands of the relevant authority to remedy the defect in the measure. Based on the principle of separation of powers, this Court has

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<sup>190</sup> Id at para 59.

<sup>191</sup> Id at para 66.

<sup>192</sup> Id at para 67.

cautioned against ordering the state to provide houses.<sup>193</sup> In *Treatment Action Campaign (No 2)*, this Court said:

“Courts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.”<sup>194</sup>

[169] 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.

[170] It appears from this analysis that the order granted by Teffo J was at odds with the jurisprudence of this Court on the role played by the courts in enforcing socio-economic rights. However, that order does not form part of the appeal before us. Consequently, it may not be overturned in these proceedings.

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<sup>193</sup> Id at paras 62-5.

<sup>194</sup> *Treatment Action Campaign (No 2)* above n 112 at para 38.

[171] The first judgment fails to address the jurisprudence of this Court on the enforcement of the socio-economic rights and simply proceeds to consider if constitutional damages would constitute appropriate relief here. The anterior question is whether section 26(1) and (2), properly construed, permit a claim for constitutional damages. This is a vital question which the decisions of the Supreme Court of Appeal in *Kate*<sup>195</sup> and *Modderklip (SCA)*<sup>196</sup> do not answer. If constitutional damages are not competent for enforcing socio-economic rights, they cannot constitute appropriate relief for the violation of those rights.

[172] To distinguish *Mazibuko* and similar cases on the basis that here the claim arose from the Housing Act and the National Housing Code and not section 26 of the Constitution is mistaken. First, this proposition suggests that there are two rights of access to adequate housing. One under section 26(1) of the Constitution and another arising from the Housing Act and the National Housing Code. This is incorrect. The Act and the National Housing Code give effect to the right defined in section 26(1) of the Constitution read with 26(2). The Housing Act and the National Housing Code form part of one scheme with section 26 of the Constitution. Second, In *Mazibuko* and other cases, legislation and regulations were passed to give effect to the right of access to socio-economic rights like water and health care. Yet this Court laid down a particular way of enforcing those rights. This applied even where there was nothing constitutionally objectionable to legislation in question.

[173] In *Mazibuko* this Court observed that Parliament has passed the Water Services Act<sup>197</sup> to give effect to the right of access to water entrenched in section 27 of the Constitution.<sup>198</sup> There the claim of access to water was based on both section 27 of the Constitution and the relevant provisions of the Water Services Act.<sup>199</sup> And yet this

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<sup>195</sup> *Kate* above n 138.

<sup>196</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) (*Modderklip (SCA)*).

<sup>197</sup> 108 of 1997.

<sup>198</sup> *Mazibuko* above n 35 at paras 19-24.

<sup>199</sup> *Id* at para 6.

Court held that “it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails”.<sup>200</sup> This Court concluded that this is a matter for the executive and legislature to determine in the light of social conditions and available resources. It is those arms of government which may determine targets achievable at a given time in relation to the realisation of socio-economic rights. Therefore there is no basis for departing from *Mazibuko* on how socio-economic rights are enforced.

[174] The difficulty with the approach followed in the first judgment is that it renders the conditions in section 26(2) of the Constitution redundant and irrelevant to the enforcement of the right of access to adequate housing. On that approach those who are in need of houses are entitled to be given houses on demand through litigation, regardless of lack of resources and in spite of the state having taken reasonable measures to make the right progressively realisable. The approach adopts a standard for enforcing the right of access to housing which is less exacting than the one prescribed by section 26(2) of the Constitution.

[175] While *Modderklip* (SCA) dealt with a situation where an eviction order was granted and there was no compliance with it, that case is distinguishable from the present matter. First, *Modderklip* (SCA) was not concerned with the enforcement of socio-economic rights. Second, it was practically impossible for the sheriff to evict 40 000 people from Modderklip Boerdery’s land. Third, no remedy other than damages was appropriate in that matter. Harms JA stated:

“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. Return of the land is not feasible.”<sup>201</sup>

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<sup>200</sup> Id at para 61.

<sup>201</sup> *Modderklip* (SCA) above n 196 at para 43.

[176] The present is not such a case. The applicants do not contend that allocating them houses is no longer feasible. Nor do they contend that the award of damages is the only appropriate relief. Moreover, in *Modderklip* (SCA) the order of damages was regarded to be competent by both sides.<sup>202</sup> Therefore, reliance on *Kate* and *Modderklip* (SCA) for awarding constitutional damages here is mistaken.

[177] Although I have come to the conclusion that constitutional damages are not competent for enforcing socio-economic rights, I consider it necessary to state further reasons for holding that here those damages are inappropriate. The order issued by Teffo J remains extant until set aside by a competent court. In terms of that order, the municipality is obliged to provide the applicants with free-standing houses.

#### *Further reasons*

[178] A further hurdle standing in the way of granting constitutional damages is the principle of constitutional subsidiarity. 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>203</sup> Here, Parliament enacted the Housing Act in order to give effect to the progressive realisation of access to adequate housing. Section 9 of the Housing Act obliges municipalities to take steps within the framework of the Housing Act and national policy to ensure that the inhabitants have access to adequate housing on a progressive basis.<sup>204</sup>

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<sup>202</sup> Id at para 44.

<sup>203</sup> *MEC for Education, Kwazulu-Natal v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC); *South African National Defence Union v Minister of Defence* [1999] ZACC 7; 1999 (4) SA 469 (CC); 1999 (6) BCLR 615 (CC); and *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

<sup>204</sup> Section 9(1) of the Housing Act provides:

“Every municipality must, as part of the municipality's process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to—

- (a) ensure that—
  - (i) the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis;
  - (ii) conditions not conducive to the health and safety of the inhabitants of its area of jurisdiction are prevented or removed;



[179] Indeed in 2009, the Minister of Housing adopted and published the National Housing Code in terms of which the applicants claim that they were allocated subsidies and plots of land. This means that the applicants must have based their claim for damages on the Housing Act and the National Housing Code. Even so, a claim for damages would only succeed if the Housing Act or the National Housing Code, when properly construed, confer the right of action for damages where individuals are not given possession of houses allocated to them.<sup>205</sup> The applicants' failure to ground their claim for damages on the Housing Act and the National Housing Code was fatal to the claim. If these pieces of legislation were defective, the remedy open to the applicants was for them to challenge the validity of this legislation rather than relying directly on the Constitution.<sup>206</sup>

[180] Another obstacle standing in the way of granting constitutional damages is that the applicants successfully obtained a remedy in the litigation that was resolved by Teffo J. Once that order was confirmed by the Supreme Court of Appeal and there was no further appeal to this Court, the dispute between the applicants and the respondents was finally settled by judicial decree. What was then open to the applicants was to execute the order in their favour. Much as it was impermissible for the respondents to reopen that litigation for the purposes of altering a final order

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- (iii) services in respect of water, sanitation, electricity, roads, stormwater drainage and transport are provided in a manner which is economically efficient;
  - (b) set housing delivery goals in respect of its area of jurisdiction;
  - (c) identify and designate land for housing development;
  - (d) create and maintain a public environment conducive to housing development which is financially and socially viable;
  - (e) promote the resolution of conflicts arising in the housing development process;
  - (f) initiate, plan, co-ordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction;
  - (g) provide bulk engineering services, and revenue generating services in so far as such services are not provided by specialist utility suppliers; and
  - (h) plan and manage land use and development.”

<sup>205</sup> *Steenkamp N.O.* above n 48 and *Olitzki* above n 56.

<sup>206</sup> *My Vote Counts NPC* above n 116 at para 53.

granted by Teffo J, it was not competent for the applicants to reopen the same matter and seek a new remedy while keeping in hand the order granted by Teffo J.

[181] The rule of law, which forms part of our Constitution, places a premium on finality in litigation which in turn promotes the principle of certainty. Certainty itself is a component of the rule of law. The twin principles of finality and certainty cannot be achieved if courts allow litigants, in whose favour an order settling the matter was made, to reopen a case and seek a fresh remedy based on the same cause of action.<sup>207</sup> The authority of the High Court over this matter ceased when the order of Teffo J was delivered, hence it could only be revisited on appeal. When that process was exhausted, finality in the matter was reached<sup>208</sup> and that marked the end of a judicial process on the matter. In *African Farms and Townships Ltd* this principle was affirmed in these terms:

“The rule appears to be that where a court has come to a decision on the merits of a question in issue, that question, at any rate as a *causa petendi* of the same thing between the same parties cannot be resuscitated in subsequent proceedings.”<sup>209</sup>

[182] This principle applies even where the remedies sought like here, are not the same. The fact that before Teffo J the applicants obtained an order for delivery of houses and here they sought payment of constitutional damages does not exclude the operation of the principle. Both remedies are based on the same cause of action, namely, the failure to give houses to the applicants. In *Union Wine* the Court observed:

“[I]t is settled practice in South Africa that where a cause of action gives rise to more than one remedy a plaintiff who pursues one of those remedies and has obtained judgment thereupon can be met with a plea of *res judicata* if he should institute a second action to pursue the other remedies.”<sup>210</sup>

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<sup>207</sup> *S v Molaudzi* [2015] ZACC 20; 2015 (2) SACR 341 (CC); 2015 (8) BCLR 904 (CC) at para 37.

<sup>208</sup> *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 306.

<sup>209</sup> *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 562 C-D.

<sup>210</sup> *Union Wine Ltd v E Snell and Co Ltd* 1990 (2) SA 189(C) at 196 D-E.

[183] The bedrock of this principle is the once-and-for-all rule which requires a litigant to seek all remedies in one action or proceedings. In this regard the Court in *Union Wine* said:

“It is a well-established principle of our common law that there should be an end to litigation in the public interest and that a defendant should not be compelled to defend himself twice on the same cause of action. This principle is embodied in the maxim *ne bis in idem*, [which] is commonly referred to as the “once and for all rule””.<sup>211</sup>

[184] Once a matter reaches finality and an order defining the parties’ rights is issued, it is usually expected that there will be compliance with it. If the order is not carried out, the party in whose favour it was granted proceeds to the phase of execution. In *Chief Lesapo* execution was described thus:

“An important purpose of s 34 is to guarantee the protection of the judicial process to persons who have disputes that can be resolved by law. Execution is a means of enforcing a judgment or order of court and is incidental to the judicial process. It is regulated by statute and the Rules of Court and is subject to the supervision of the court which has an inherent jurisdiction to stay the execution if the interests of justice so require.”<sup>212</sup>

[185] And in *University of Stellenbosch Legal Aid Clinic* that description was elucidated on in these terms:

“While there is a connection between the judicial process and execution, these are separate processes, which occur consecutively. There can be no execution without a judicial process as a prelude. The judicial process ends with a delivery of judgment or the granting of an order defining the parties’ rights. Execution may only commence after the judicial process has ended. For execution is a process of

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<sup>211</sup> Id at 196 A-B.

<sup>212</sup> *Chief Lesapo v North West Agricultural Bank* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC).

enforcing a court order. Depending on the nature of the order granted, execution may be against the person or the property of the judgment debtor.”<sup>213</sup>

[186] Since the order granted by Teffo J was *ad factum praestandum* (performance of a particular act), it cannot be enforced as if it is an order sounding in money. In other words, that order cannot be enforced by attachment of goods and their sale, in a sale in execution. The order requires delivery of houses to the applicants and the only way of enforcing it is through contempt of court proceedings. It was not open to the applicants to seek to enforce that order by asking for constitutional damages.

[187] In their counter application before Basson J, the applicants pleaded their claim for constitutional damages in these words:

“96 It is now clear that the municipality has not complied with the December 2017 Court order. The residents remain without any remedy for the breach of their rights identified in Teffo J’s judgment.

97 The municipality’s clear and brazen breach of its constitutional obligations ought to have been cured by the provision of houses to the residents by 30 June 2019. That has not happened. The municipality’s continuing misconduct leaves the residents without any effective relief for the breach of their rights found to have been committed in the December 2017 judgment.

98 In these circumstances, I respectfully submit that, whether or not the municipality is granted the variation it seeks, the residents are entitled to some recompense for the period during which they will now be left without the houses to which they are entitled. In the circumstances, I submit that the appropriate relief is to direct the municipality to pay damages equivalent to one month’s rental for a house in Tembisa to each of the residents. This amount must be paid to each of the residents monthly, from 1 July 2019, until the date on which the municipality provides the residents with the houses to which they are entitled in terms of the December 2017 court order.”

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<sup>213</sup> *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* [2016] ZACC 32; 2016 (6) SA 596 (CC); 2016 (12) BCLR 1535 (CC) at para 34.

[188] It is apparent from this statement that “constitutional damages” are not sought for the breach of the Constitution but for the failure to comply with the order. The damages in question are not sought from the date on which the cause of action arose but from the date following the day on which Teffo J delivered the judgment until the date on which the municipality delivered houses in terms of that order. To describe the damages sought as constitutional damages is a misnomer. They are not.

[189] Instead, as correctly observed by Basson J, the applicants sought damages as punishment for non-compliance with Teffo J’s order and they wanted that punishment to continue to operate until there was compliance. This is a novel means of enforcing a court order and we were not told its source in law. On the contrary, when the applicants’ counsel was asked during the hearing why contempt of court proceedings were not pursued, he informed this Court that it would have been more onerous to prove that non-compliance was mala fide. The applicants opted for constitutional damages as an easier path to vindicating their rights. This startling submission underscored the lack of justification for damages.

[190] The applicants’ pleading is so defective that it fails to disclose a claim for damages recognised in law. A claim for damages for failing to comply with a court order only is not known in our law. Were such a claim to be recognised, there would be no end to litigation and this would be contrary to the rule of law. Furthermore, for a number of reasons, this Court in *Fose* rejected a claim for punitive damages. There the Court said:

“In a country where there is a great demand generally on scarce resources, where the government has various constitutionally prescribed commitments which have substantial economic implications and where there are ‘multifarious demands on the public purse and the machinery of government that flow from the urgent need for economic and social reform’, it seems to me to be inappropriate to use these scarce resources to pay punitive constitutional damages to plaintiffs who are already fully compensated for the injuries done to them with no real assurance that such payment will have any deterrent or preventative effect. It would seem that funds of this nature

could be better employed in structural and systemic ways to eliminate or substantially reduce the causes of infringement.”<sup>214</sup>

[191] In a similar vein, the minority in *Fose* eschewed payment of punitive constitutional damages for widespread torture of detainees in police stations on the basis that such damages would be inappropriate. The minority agreed with the majority that damages would have no deterrent effect on those responsible for the torture because the award would have no bearing on their finances. It also rejected the proposition of vindicating the Constitution by enriching a particular claimant when the problem affects many people.<sup>215</sup>

[192] The facts of this case confirm that the conditions referred to in *Fose* have not changed. The municipality involved here has no less than 119 informal settlements with thousands of people who need access to adequate housing. Most of them have been waiting for a house since the dawn of democracy. Awarding damages in this matter would treat the applicants differently from those thousands and perhaps millions countrywide. It would be the taxpayer that gets punishment and not the officials responsible for non-compliance with the court order. By parity of reasoning, those damages would have no deterrent effect upon the relevant officials.

[193] As mentioned earlier, this would occur in a case where the applicants have other options of enforcing their rights. It was their choice not to enforce Teffo J’s order by a competent process of contempt of court which was available to them. It was again their choice not to seek the eviction of people whom they say occupy houses allocated to them illegally. Even those in whose names the houses in question are registered sought damages. When this point was raised with their counsel during the hearing, he submitted that the applicants did not want to render the illegal occupiers homeless by ejecting them from the houses. Yet the applicants pursued punitive damages against the municipality.

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<sup>214</sup> *Fose* above n 38 at para 72.

<sup>215</sup> *Id* at para 84.

[194] For these reasons, the High Court was right to dismiss the claim for constitutional damages here. The applicants have various remedies at their disposal but they chose the wrong one.

[195] I am persuaded, for the reasons given in the first judgment, that leave to adduce further evidence should be granted. In the result, the following order is made:

1. The application for leave to appeal is granted.
2. The respondents are granted leave to adduce further evidence.
3. The appeal is dismissed.
4. There is no order as to costs.

MADLANGA J (Mhlantla J concurring)

[196] I have had the pleasure of reading the first and second judgments by my colleagues, Majiedt J and Jafta J, respectively. I agree with the outcome reached by the second judgment. I write this very brief judgment because, unlike Jafta J, I cannot be absolute and completely discount the possibility of the appropriateness of constitutional damages whenever socio-economic rights are at issue. For me, the answer lies in the provisions of section 38 of the Constitution: what is “appropriate relief” in the given circumstances?

[197] I agree with the outcome of the second judgment because I am not convinced that the applicants have met the stringent test for the award of constitutional damages we set recently in *Residents*.<sup>216</sup> There Mhlantla J, writing for the majority, said:

“To hold that constitutional damages are available in any matter if they meet the mere threshold of appropriate relief would create considerable uncertainty in our law and inequality in the sense that claimants who seek to vindicate the same right would be treated differently. This would generate uncertainty on when constitutional damages

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<sup>216</sup> *Residents* above n 58.

may be allowed. The uncertainty and unpredictability would be at variance with the rule of law, a linchpin of the Constitution.”<sup>217</sup>

And what she said next is what I want to emphasise. It is that “constitutional damages must be the *most appropriate remedy* available to vindicate constitutional rights”.<sup>218</sup>

[198] As the second judgment says, contempt of court proceedings were available to the applicants to enforce Teffo J’s order. They did not pursue them for reasons that appear purely to have been for convenience. Those reasons are summed up in the second judgment. In those circumstances, constitutional damages are not available to the applicants.

[199] For these short reasons, I agree that the appeal must fail.

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<sup>217</sup> Id at para 118.

<sup>218</sup> Id. Emphasis in original.