CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 121/21

In the matter between:

SOCIAL JUSTICE COALITION	First Applicant
EQUAL EDUCATION	Second Applicant
NYANGA COMMUNITY POLICING FORUM	Third Applicant
and	
MINISTER OF POLICE	First Respondent
NATIONAL COMMISSIONER OF POLICE	Second Respondent
WESTERN CAPE POLICE COMMISSIONER	Third Respondent
MINISTER FOR COMMUNITY SAFETY, WESTERN CAPE	Fourth Respondent
WOMENS LEGAL CENTRE TRUST	Fifth Respondent

Neutral citation:	*Social Justice Coalition and Others v Minister of Police and Others* [2022] ZACC 27
Coram:	Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Theron J, Tshiqi J and Unterhalter AJ
Judgments:	Kollapen J (minority): [1] to [122] Unterhalter AJ (majority): [123] to [152]
Heard on:	3 February 2022

Decided on: 19 July 2022

Summary: Declaratory order — outstanding Equality Court order — constructive refusal — remedy

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ORDER

On appeal from the Equality Court of South Africa, Western Cape Division, Cape Town:

1. Leave to appeal is refused.

JUDGMENT

KOLLAPEN J:

Introduction

[1] Section 9(3) of the Constitution prohibits the state from unfairly discriminating directly or indirectly against anyone.[1]

[1] Section 9 of the Constitution provides:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social

[2] The rationale for the constitutional injunction against unfair discrimination lies deeply rooted in our shameful past and is synonymous with the commitment found in the preamble to the Constitution to "establish a society based on democratic values, social justice and fundamental human rights". Unfair discrimination is inimical to the idea of a just society and the Constitution sets its face firmly against it.

[3] It must remain a matter of grave concern that some 28 years into democracy that is posited on a Constitution unconditionally committed to an equal society, a recent World Bank study has concluded that South Africa is the most unequal country in the world.[2]

[4] This case is about a systematic and sustained pattern of discrimination in the allocation of policing resources that disparately impacts poor and Black communities in the Western Cape. It is also a case about a long and unfulfilled wait for a just and effective remedy to the unfair discrimination that was found to exist and which is common cause between the parties.

[5] The applicants seek declaratory relief that the Equality Court of South Africa, Western Cape Division, Cape Town (Equality Court) has constructively refused to grant them a remedy; and, arising from that, seek leave to appeal, alternatively leave to be granted direct access, to this Court from the Equality Court. It is an application that raises novel and unprecedented issues both of substance and procedure.

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origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[2] The World Bank *New World Bank Report Assesses Sources of Inequality in Five Countries in Southern Africa* (Press Release No 2002/055/AFE, March 2022).

[6] At the level of substance, it involves a determination made by the Equality Court that there has been ongoing discrimination in the allocation of police resources in the Western Cape on the basis of race and poverty. This is the first time a South African court has found unfair discrimination to exist on the basis of poverty and, given the centrality of poverty in the lives of millions of South Africans, this decision constitutes a finding of great significance both jurisprudentially as well as in the larger socio-economic transformation of South Africa.

[7] At the level of procedure, it raises the question whether and, in what circumstances, may an appellate court grant a declarator that an unreasonable delay constitutes a constructive refusal of a remedy in conflict with the right of access to courts.[3]

Factual background

The Safety and Justice Campaign

[8] The spectre of crime and violence looms large over the landscape of South Africa, impacting virtually all aspects of the lives of its people. In welcoming the first World Report on Violence and Health by the World Health Organisation in 2002, former President Nelson Mandela said:

> "Many who live with violence day in and day out assume that it is an intrinsic part of the human condition. But this is not so. Violence can be prevented. Violent cultures can be turned around . . . . Governments, communities and individuals can make a difference."[4]

[9] In 2003, the Safety and Justice Campaign was launched by the Treatment Action Campaign (TAC) to end the scourge of violent crime in townships around Cape Town.

[3] Section 34 of the Constitution deals with the right of access to courts and provides:

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[4] World Health Organisation *World Report on Violence and Health* 2002.

The campaign was triggered by the murders of three TAC activists and what was described as the unsatisfactory manner in which those murders were investigated and prosecuted. The TAC's campaign gained momentum when the first applicant, the Social Justice Coalition (SJC), joined its cause. Together with a coalition of organisations, including the second applicant, Equal Education (EE), and other partner organisations, the SJC organised more than a hundred demonstrations, pickets, marches and other forms of protest to highlight the levels of crime and what they described as the "continued failures of the Khayelitsha police and [the] greater criminal justice system".

[10] In November 2011, the SJC and EE, together with other partner organisations, lodged a formal complaint with the Premier of the Western Cape. This led to the establishment of the Khayelitsha Commission of Inquiry (Commission) commencing in August 2012, presided over by former Constitutional Court Justice, Kate O'Regan, and former National Director of Public Prosecutions, Advocate Vusi Pikoli. Prior to the Commission commencing with its work, the first respondent, the Minister of Police (Minister), and the second respondent, the National Commissioner of Police (National Commissioner), challenged the legality of the decision to establish the Commission and the power of subpoena it had been granted. The SJC opposed the challenge, and on 1 October 2013, the challenge was rejected by this Court in *Minister of Police*.[5]

Khayelitsha Commission of Inquiry

[11] During the period January to May 2014, the Commission conducted 37 days of formal, public hearings recording the testimony of dozens of witnesses, which included members of the community affected by crime; experts in various aspects of policing (including that of Ms Jean Redpath); and members of the South African Police Services (SAPS). The Commission further considered affidavits received from hundreds of

[5] *Minister of Police v Premier of the Western Cape* [2013] ZACC 33; 2014 (1) SA 1 (CC); 2013 (12) BCLR 1405 (CC).

residents of Khayelitsha expressing their concerns about the lack of effective policing in Khayelitsha which painted a vivid picture of the effects of the burden of crime felt by victims in their daily lives.

[12] SAPS' evidence before the Commission provided details of the manner in which policing human resources were allocated. SAPS explained that the theoretical determination of the number of police officers that would be required at each station if there were unlimited human resources was based on a model called the Theoretical Human Resource Requirement (THRR). This model had remained unchanged by SAPS since 2002 and was described by the Commission as being "irrational", based largely on the testimony of Ms Redpath.

[13] Ms Redpath, a researcher employed at the University of the Western Cape's Dullah Omar Institute at the time, gave evidence before the Commission. Ms Redpath was also the applicants' expert witness in the Equality Court proceedings. She told the Commission that analysis conducted on the available data suggested that crime was significantly under-reported in Khayelitsha and that the three Khayelitsha policing areas demonstrated exceptionally high rates of murder. Her findings were based on an analysis of the allocation of police resources by reference to population and crime. In determining the allocation of police resources by population, Ms Redpath found that the average police personnel per 100 000 of the population was 283 police personnel but that all three Khayelitsha policing areas received resources that were less than the average allocation. The core issue identified with this allocation system is that areas where there is significant under-reporting of crime will be under-resourced if regard is had to the true crime rate. Based on this analysis, she identified a number of flaws in SAPS' THRR premised largely on the reality of under-reported crime.

[14] She placed before the Commission a proposed method of allocation to address the shortcomings in the model, the first change being that the THRR should commence with the total number of human resources available. Once that number is determined, the starting point would then be the size of the population – areas with larger populations

requiring proportionally more resources. She argued that the focus of crime intelligence should be directly related to the number of crimes actually occurring in the area as opposed to reported crimes, and that the incidence of serious violent crime should be indicated by proxy through the number of murders, the latter not being determined by evidence of reporting. There should be room for individual police stations to tailor the command structure to meet unique needs. She recommended that, in relation to visible policing, the total population should remain the primary indicator of resourcing. The primary indicator of the administrative burden should be the population of the area served, alternatively, the total size of the policing allocation already made. Ms Redpath stated that regardless of the method used to allocate human resources, it should be open and transparent, and subject to public comment and scrutiny. The Commission relied substantially on her evidence in coming to some of its conclusions.

[15] In August 2014, after hearing all the evidence and argument from the parties, the Commission concluded that there were widespread inefficiencies in policing in Khayelitsha and there was a breakdown of relationships between the police and the community. The Commission found that SAPS' system for allocating police resources was systematically biased against poor, Black communities, resulting in the under-staffing of police stations which serve the poorest areas in Cape Town.

[16] The Commission recommended that the Minister request the National Commissioner to appoint a task team to investigate the system of human resource allocation within SAPS as a matter of urgency. Given that a significant re-allocation of resources would probably be necessary, the Commission recommended that the re-allocation should be phased in over a period of time not exceeding three years. It further recommended that the third respondent, the Western Cape Police Commissioner (Provincial Commissioner), allocate additional uniformed police to the three Khayelitsha police stations in terms of section 12(3) of the South African Police Services Act[6] (SAPS Act), to enable regular patrolling of informal settlements.

[6] 68 of 1995.

[17] Following the release of the Commission's findings in August 2014, the SJC and EE say they sought to engage with SAPS, the Minister and the National Commissioner on the implementation of the Commission's recommendations but that these efforts proved unsuccessful and were met with disinterest from SAPS. The SJC and EE concluded that they had no alternative in the circumstances but to litigate in order to address the serious imbalance in policing resources found to exist by the Commission.

Litigation history

Equality Court

[18] In March 2016, the applicants[7] approached the Equality Court to seek declarators; that police resources in the Western Cape unfairly discriminated against Black and poor people; that the system employed by SAPS to determine the allocation of police resources unfairly discriminated against Black and poor people on the basis of race and poverty; and that the Provincial Commissioner had the power to determine the distribution of police resources between stations within the province, as envisaged in section 12(3) of the SAPS Act.

[19] The fifth respondent, the Women's Legal Centre Trust (WLCT), was admitted as amicus curiae. It supported the applicants' contentions, and advanced submissions on the effect that under-resourced policing areas had on the extent and incidence of gender-based crimes.

[20] In her affidavit filed in the Equality Court, Ms Redpath dealt with her evidence before the Commission, the new analysis she had conducted upon the request of the applicants and an analysis of data concerning the province of KwaZulu-Natal.

[7] The applicants in the Equality Court at this point in time included the Nyanga Community Policing Forum. It subsequently joined the proceedings as the third applicant.

[21] She, in large measure, confirmed her evidence before the Commission that crime was significantly under-reported in Khayelitsha, and that the three policing areas concerned demonstrated exceptionally high rates of murder.

[22] The respondents opposed the application in the Equality Court and took the view that the relief sought by the applicants was "far-reaching". They denied that the THRR was racially discriminatory in its application and said that the allocation process was subject to regular and annual reviews, was dynamic and evolving, and multi-faceted. They further submitted that the human resource allocation, particularly in poor and Black areas, had benefitted greatly in recent years, borne out by the additional human resources allocated to these police stations. Alluding to any shortcomings in the allocation process, they countered that many of the concerns raised by the Commission were already being attended to by the time the Commission issued its report in August 2014. The respondents disputed Ms Redpath's evidence and rejected her proposals on the basis that she was not an expert on policing. Finally, they adopted the stance that the relief sought in the Equality Court infringed the principle of the separation of powers and that the application fell to be dismissed.

Findings of the Equality Court

[23] In its judgment dated 14 December 2018, the Equality Court pointed out that once the complainant had made out a prima facie case of discrimination, it fell on the respondent to prove on the facts before it, either that the discrimination did not take place as alleged, or that the conduct was not based on more than one of the prohibited grounds; or, if the discrimination did take place, that such discrimination was fair.[8]

[24] The Equality Court, relying in part on the Commission's report and findings as well as the evidence before it, accepted that the unequal distribution of resources led to the insufficient allocation of resources to Khayelitsha Police Stations. It further confirmed the Commission's conclusions based on the evidence of Ms Redpath that the

[8] *Social Justice Coalition v Minister of Police* 2019 (4) SA 82 (WCC) (Equality Court judgment) at para 39.

application of the THRR led to the skewed and unequal allocation of human resources, and that this undermined effective policing in Khayelitsha and other Black areas in the Western Cape.[9] The Equality Court, in its judgment, reiterated that Ms Redpath's evidence indicated that crime in Khayelitsha was significantly under-reported which influenced the allocation of police personnel to the area.[10] It also accepted her analysis that the THRR prejudiced township areas and left those Black townships at the bottom of the allocation of resources list.[11] It accepted that the THRR led to perverse outcomes and that these were not caused by any deliberate conduct but rather shortcomings in the methodology used. The result was unintentional, yet it led to severe discrimination on the grounds of race and poverty.[12]

[25] The Equality Court was satisfied that the incidence of poverty fell within the definition of the Equality Act[13] as an unlisted ground. In this regard, for an unlisted ground to meet the definitional requirements it must—

(a) cause or perpetuate systemic disadvantage;
(b) undermine human dignity; or
(c) adversely affect the equal enjoyments of a person's rights and freedoms in a serious manner that is comparable to discrimination on any of the prohibited grounds.[14]

[26] It was ultimately satisfied that the manifestation of poverty, its systemic nature, and the effect it has on human dignity and the equal enjoyment of rights and freedoms justified its recognition as a ground of discrimination.

[9] Id at para 41.

[10] Id at para 42.

[11] Id at para 48.

[12] Id.

[13] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

[14] Equality Court judgment above n 8 at para 57.

[27] The Equality Court concluded that police stations in the Western Cape that served poor, Black communities had the lowest police to population ratios in comparison to wealthier areas, which are White-dominant. It found that poor, Black areas have high rates of contact and violent crimes and held that Ms Redpath's evidence supported the view that SAPS' allocation system was prejudicial towards poor, Black townships. It concluded that the evidence unequivocally established a prima facie case of discrimination on the grounds of race and poverty.[15]

[28] The Equality Court then considered whether SAPS had succeeded in showing either that there was, in fact, no discrimination or that the discrimination was fair. SAPS' case was that the resource allocation did not discriminate at all but if it did, it was not unfair discrimination. SAPS also advanced other arguments based on the separation of powers doctrine and disputed the credibility of the evidence before the Equality Court. The Equality Court concluded that SAPS had failed to discharge the evidentiary burden of showing that there was no discrimination, alternatively that the discrimination was not unfair.

[29] The Equality Court held that the allocation of police human resources in the Western Cape unfairly discriminates against Black and poor people based on race and poverty. The Equality Court declined to grant the national relief sought by the applicants on the basis that the evidence before it was sufficient only to support the finding in respect of the Western Cape. It also declined to grant the relief sought by the WLCT, holding that the unfair discrimination challenged in the proceedings was on the basis of race and poverty and not gender.[16]

[30] It made the following order:

[15] Id at paras 30-8.

[16] Id at para 92.

"1. It is declared that the allocation of police human resources in the Western Cape unfairly discriminates against Black and poor people on the basis of race and poverty;

2. It is declared that the system employed by the South African Police Service to determine the allocation of Police Human Resources, in so far as it has been shown to be the case in the Western Cape Province, unfairly discriminates against Black and poor people on the basis of race and poverty.

3. The hearing on remedy is postponed to a date which shall be arranged with the parties.

4. Costs shall stand over for later determination."[17]

Events following the Equality Court order

[31] On 10 January 2019, the respondents filed an application for leave to appeal to the Supreme Court of Appeal against the entire judgment and orders made by the Equality Court on 14 December 2018, save for the findings in respect of section 12(3) of the SAPS Act. On 31 January 2019, the applicants filed an application for leave to cross-appeal against paragraph 2 of the Equality Court's order that refused to grant relief relevant to SAPS' resource allocation in other provinces. In April 2019, and after negotiations, the parties, by agreement, withdrew their respective applications, seemingly with the intention of attempting to expedite the finalisation of the proceedings in the Equality Court.

[32] The parties thereafter attempted to reach an agreement on the appropriate remedy but without success, resulting in the applicants on 6 June 2019, addressing a letter to Dolamo J and Boqwana J, requesting a directions hearing before the recess on 30 June 2019 in order to determine the way forward for the remedy stage of the hearing. On 27 June 2019, a meeting was convened between the parties and the Judges and on 4 July 2019 a court order was made by agreement between the parties. There, it was recorded that the parties would meet by 12 July 2019 to agree on the process to finalise a remedy and would thereafter report to the Equality Court by 26 July 2019, failing

[17] Id at para 94.

which the Court would set the matter down on an expedited basis to hear argument on the appropriate remedy.[18]

[33] On 6 August 2019, and upon receipt of the report of 26 July 2019, the Equality Court made an order substantially in accordance with the parties' proposals, setting out clear timeframes for the filing of a remedial plan by SAPS and a response thereto by the applicants, failing which the Equality Court would set the matter down for argument on the earliest suitable date.

[34] On 1 September 2019, SAPS filed what it called the Integrated Resource Strategy (IRS) as its plan. The applicants say that the IRS was contrary to what had been agreed to by SAPS at the 12 July 2019 meeting. It appeared to be a generalised document rather than a remedial plan that aimed at remedying the deficiencies and the unfair discrimination of resource allocation as identified in the Equality Court's judgment.

[35] Aggrieved by the approach adopted by SAPS, the applicants addressed a letter to Dolamo J and Boqwana J on 18 September 2019, advising them of the IRS filed by SAPS and their unhappiness with it, and requested the Court to set the matter down for hearing on remedy to avoid any further delays in concluding the matter. On 30 September 2019, the State Attorney representing the Provincial Minister addressed correspondence to the parties stating that the IRS was not a remedy for the problem of a discriminatory allocation of human resources. This was expanded upon in an affidavit filed on behalf of the Provincial Minister on 13 December 2019 in relation to the IRS stating, amongst other things, that: (a) the IRS did not constitute a remedy addressing the problem of discriminatory human resource allocation; (b) the IRS appeared to have been a generic document drafted in isolation from the Equality Court's judgment; (c) SAPS had failed to consult with the Western Cape Provincial Government in drawing up the IRS; and (d) the IRS did not provide sufficient detail concerning future policing plans and did not adequately address the problems identified in the THRR.

[18] Equality Court judgment above n 8 at para 60.

[36] The Court, in response to the applicants' letter of 18 September 2019, indicated that it was available to hear the matter in March 2020. That date did not suit the respondents and – attempts to agree on another date came to nothing. However, on 23 June 2020, the parties were advised by Dolamo J that since they were not able to agree on a suitable date before the end of April 2020, the matter was not enrolled then, as they were previously advised that Boqwana J was not available after April 2020. The parties were also informed that the matter would be determined on the papers on 11 August 2020. The issue of remedy was however not determined on 11 August 2020.

[37] On 8 September 2020, the Court gave the parties a choice between the following options—

(a) await Boqwana J's return, the exact date of which could not be confirmed;
(b) have the remedy determined by a differently constituted Bench; or
(c) have the remedy determined by Dolamo J and another Judge.

[38] The parties responded and the applicants indicated a preference for the third option, while the respondents preferred the first option. Thereafter, and during the period September 2020 to April 2021, the applicants' attorneys followed up both telephonically and in writing with the Equality Court as well as the office of the Judge President regarding the finalisation of the matter. In this regard, letters were written on 11 February 2021, 1 March 2021, and 19 March 2021, but there was no response to their enquiries which then led to the institution of the proceedings before this Court.

[39] On 30 April 2021, the State Attorney on behalf of the state respondents, suggested to the applicants that the parties make a joint approach to the Judge President to obtain a hearing date. They proposed that any ruling by this Court be held in abeyance until the Judge President had been approached. The suggestion made by the respondents was rejected by the applicants on the basis that the Judge President had

already received three letters from the applicants requesting that the hearing on remedy be set down as a matter of urgency, to which he failed to respond.

Issues before this Court

[40] The issues for determination are as follows:

(a) Is this Court's jurisdiction engaged on the basis that it has the power to grant declaratory relief in incomplete proceedings before another Court, where there has been an unreasonable delay in finalising proceedings in conflict with section 34 of the Constitution?

(b) If it does have such power, has a case been made out for the declaratory relief of a constructive refusal of a remedy?

(c) If so, do the interests of justice warrant granting leave to appeal?

(d) If leave is granted, should this Court determine the remedy or refer the matter back to the Equality Court for such a determination?

Jurisdiction

[41] What is novel and unusual about this matter is the antecedent jurisdictional question whether this Court may exercise its appellate jurisdiction over another Court in the absence of an order of such a Court. That goes to the heart of the question whether this Court can be said to have such a power that it may exercise to enable it to exercise its appellate jurisdiction. The argument advanced against this is that if the matter still serves, and remains outstanding before the Equality Court, this Court will not have jurisdiction to entertain this appeal. It may be useful to deal with this issue first.

Does this Court have the power to grant the declaratory relief?

[42] The applicants locate their application for leave to appeal in what they say is a constructive refusal by the Equality Court to grant them a remedy, alternatively, they seek direct access to this Court on the basis of section 167(6) of the Constitution.[19] An

[19] Section 167(6) of the Constitution provides:

application for leave to appeal will ordinarily lie against the order of another court and a preliminary issue in determining the application for leave to appeal is whether there is an order of another court that can be appealed against. The existence or otherwise of an "order" as a necessary jurisdictional fact to unlock this Court's jurisdiction is central to this application. The applicants seek a declaratory order that there has been a constructive refusal of a remedy by the Equality Court and this, in their view, is the "order" in respect of which leave to appeal would then be sought, satisfying the jurisdictional fact that will trigger jurisdiction. The state respondents take a different view and argue that unless and until the Equality Court makes a determination on remedy this Court's jurisdiction cannot be engaged.

[43] In *New Clicks CC*,[20] upon which the applicants rely in advancing their case for the declaratory relief, the facts related to proceedings before the High Court in an application for leave to appeal. In that instance, the High Court, after making a determination on the merits and remedy of a claim, had heard the application for leave to appeal but its judgment was outstanding under circumstances which the applicant in *New Clicks CC* regarded as being unreasonably long. This prompted the applicant to approach the Supreme Court of Appeal, seeking leave to appeal on the basis that the delay by the High Court in deciding the application for leave to appeal constituted a constructive refusal of leave, justifying the approach to the Supreme Court of Appeal and engaged its jurisdiction. This argument found favour with the Supreme Court of Appeal.

[44] The Supreme Court of Appeal granted the application for leave to appeal and, on a further appeal to this Court, it was held:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court—
>
> (a) to bring a matter directly to the Constitutional Court; or
>
> (b) to appeal directly to the Constitutional Court from any other court."

[20] *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC).

> "An application to the [Supreme Court of Appeal] to grant leave to appeal on the ground that there has been a constructive refusal of leave to appeal by the High Court is a legitimate cause of action. An unreasonable delay in dealing with an application for leave to appeal interferes with a litigant's constitutional right to have access to court. This is of particular concern where the issues are urgent and the delay may cause substantial prejudice."[21]

[45] *New Click*s *CC* is authority for the proposition that an unreasonable delay in dealing with an application for leave to appeal interferes with the right of access to courts. However, the question at the level of principle that arises in these proceedings is whether such an unreasonable delay in incomplete proceedings may similarly constitute an interference with the right of access to courts, and may justify the conclusion of a constructive refusal.

[46] The answer to this question requires an overview of both a number of substantive and procedural rights that all in the main relate to access to courts as well as the inherent and remedial power of this Court.

[47] This matter, like *New Clicks CC,* implicates the scope and content of the right of access to courts. The right of access to courts contained in section 34 is significant in that it represents an enabling right to access a court to have a justiciable dispute decided. These disputes range in their diversity and complexity and in the context of this matter, relates to the assertion and enforcement of fundamental human rights.

[48] Human rights may be advanced, promoted and protected in a variety of ways including through legislation, the adoption of policies consistent with them and the implementation of programs that give effect to them. When that fails or proves inadequate, an aggrieved person has the right to assert that right in a court and seek the determination of that court. It is those decisions that become binding and definitive and have relevance not just for the parties but also for others who find themselves similarly

[21] Id at para 68.

situated. The right of access to courts as inimical to the notion that for rights to have real meaning, they must be capable of being enforced, and that enforcement of rights through the courts, are an important feature of the broad machinery of democracy and the concomitant commitment to protect human rights.

[49] In *Barkhuizen*,[22] Ngcobo J expressed this principle as follows:

> "Our democratic order requires an orderly and fair resolution of disputes by courts or other independent and impartial tribunals. This is fundamental to the stability of an orderly society. It is indeed vital to a society that, like ours, is founded on the rule of law. Section 34 gives expression to this foundational value by guaranteeing to everyone the right to seek the assistance of a court."[23]

[50] In *Chief Lesapo*,[24] Mokgoro J stated:

> "The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable."[25]

[51] The right to access to court is more than simply the right to approach a court and initiate a case in support of a justiciable dispute. The object of going to court is to secure a decision on a dispute and the language of section 34 expressly extends to the right to have a dispute decided. Similarly, the process by which a decision is reached is also

[22] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); [2008] JOL 19614 (CC).

[23] Id at para 31. See also Erasmus *Superior Court Practice* 2 ed (Juta & Co Ltd, Cape Town 2018) vol 1 (Erasmus I) at A1-4.

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

[25] Id at 22. See also Erasmus I above n 23 at A1-4A.

covered by the right in its reference to a "fair hearing". Put differently, section 34 is a right that guarantees access to court to have a dispute decided in a fair public hearing.

[52] To achieve this objective, the Rules of court facilitate the litigation process that invariably underpins the expression of the right of access. Erasmus II[26] explains this as follows:

> "[T]he object of the rules is to secure the inexpensive and expeditious completion of litigation before the courts: they are not an end in themselves. Consequently, the rules should be interpreted and applied in a spirit which will facilitate the work of the courts and enable litigants to resolve their disputes in as speedy and inexpensive a manner as possible. Thus, it has been held that the rules exist for the court, not the court for the rules. Formalism in the application of the rules is not encouraged by the courts."[27]

[53] In *Eke*,[28] this Court held:

> "Without doubt, rules governing the court process cannot be disregarded. They serve an undeniably important purpose. That, however, does not mean that courts should be detained by the rules to a point where they are hamstrung in the performance of the core function of dispensing justice. Put differently, rules should not be observed for their own sake. Where the interests of justice so dictate, courts may depart from a strict observance of the rules. That, even where one of the litigants is insistent that there be adherence to the rules. Not surprisingly, courts have often said '[i]t is trite that the rules exist for the courts, and not the courts for the rules'.
>
> Under our constitutional dispensation, the object of court rules is twofold. The first is to ensure a fair trial or hearing. The second is to 'secure the inexpensive and expeditious completion of litigation and . . . to further the administration of justice'. I have already touched on the inherent jurisdiction vested in the superior courts in South Africa. In terms of this power, the High Court has always been able to regulate its own proceedings for a number of reasons, including catering for circumstances not

[26] Erasmus *Superior Court Practice* 2 ed (Juta & Co Ltd, Cape Town 2018) vol 2 (Erasmus II).

[27] Id at D1-7 to D1-8.

[28] *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 (CC) at para 39-40. See also id at D1-8.

> adequately covered by the Uniform Rules and generally ensuring the efficient administration of the courts' judicial functions."[29]

[54] The Rules of court provide both details of substance and of procedure that govern the litigation of disputes and it would be fair to say that those rules seek to broadly achieve the fair and efficient management of the litigation process. Fairness is ensured by allowing the proper participation of parties and the full ventilation of issues and efficiency is advanced through the regulation of timelines and time periods that apply in the litigation process.

[55] In *Mukaddam*,[30] this Court stated:

> "However, a litigant who wishes to exercise the right of access to courts is required to follow certain defined procedures to enable the court to adjudicate a dispute. In the main these procedures are contained in the rules of each court. The Uniform Rules regulate form and process of the high courts. The Supreme Court of Appeal and this court have their own rules. These rules confer procedural rights on litigants and also help in creating certainty in procedures to be followed if relief of a particular kind is sought."[31]

[56] The Rules of court to this extent also create mechanisms where non-compliance with the rules may result in far-reaching and prejudicial consequences for a party in default. It may result in a claim being dismissed or a defence being struck out regardless of the merits of the claim or the defence.[32]

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[29] Id. See also Erasmus II above n 26 at D1-8A.

[30] *Mukaddam v Pioneer Foods (Pty) Ltd* [2013] ZACC 23; 2013 (5) SA 89 (CC); 2013 (10) BCLR 1135 (CC).

[31] Id at para 31. See also Erasmus II above n 26 at D1-8.

[32] Rule 30A(1) of the Uniform Rules of Court provides:

> "Where a party fails to comply with these rules or with a request made or notice given pursuant thereto, or with an order or direction made in a judicial case management process referred to in rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order—
>
> (a) that such rule, notice, request, order or direction be complied with; or
>
> (b) that the claim or defence be struck out."

[57] All this is in advance of the objective of efficient and expeditious litigation and the very idea of being intolerant of unreasonable delay is consistent with the imperatives of efficient litigation. Indeed, unreasonable delay may well present as an insurmountable obstacle to advancing a claim, even one that is meritorious in all other respects.

[58] In *Cassimjee*,[33] the Supreme Court of Appeal dealt with the inordinate delay in prosecuting a claim and held that "[a]n inordinate or unreasonable delay in prosecuting an action may constitute an abuse of process and warrant the dismissal of an action".[34]

[59] And so, if the Rules of court demonstrate an intolerance of unreasonable delay on the part of litigating parties and create mechanisms to visit far-reaching consequences on defaulting parties, what then of inordinate or unreasonable delay on the part of the Court itself? It would defeat the very objective of efficient and expeditious litigation if the parties to the litigation were held to relatively tight timeframes in ripening a matter for hearing, but that from that point onwards, time would cease to be of essence.

[60] It must follow that, if section 34 is to have its proper effect it must be interpreted as both encompassing a right to bring a dispute to court, a right to have it litigated to finality and a right to have it decided. All the components of the litigation process are meant to flow seamlessly into each other, and they all collectively give expression to the right of access to court. No single component is more important than the other.

[61] In *New Clicks SCA*,[35] the Supreme Court of Appeal dealt with the duty that this created on the part of the Court in the following terms:

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[33] *Cassimjee v Minister of Finance* [2012] ZASCA 101; 2014 (3) SA 198 (SCA).

[34] Id at para 10.

[35] *Pharmaceutical Society of South Africa v Minister of Health; New Clicks South Africa (Pty) Limited v Tshabalala-Msimang N.O.* [2004] ZASCA 122; 2005 (3) SA 238 (SCA) at para 39.

> "There rests an ethical duty on judges to give judgment or any ruling in a case promptly and without undue delay and litigants are entitled to judgment as soon as reasonably possible. Otherwise the most quoted legal aphorism, namely that 'justice delayed is justice denied', will become a mere platitude. Lord Carswell recently said:
>
> > 'The law's delays have been the subject of complaint from litigants for many centuries, and it behoves all courts to make proper efforts to ensure that the quality of justice is not adversely affected by delay in dealing with the cases which are brought before them, whether in bringing them on for hearing or in issuing decisions when they have been heard.'"[36]

[62] While the Court spoke of an ethical duty on Judges to act promptly, it also made reference elsewhere in its judgment to what is described as a constitutional duty when it said that "[i]f properly engaged, this court has a constitutional duty to deal with a matter and deal with it expeditiously".[37]

[63] It should not ultimately matter much if the duty contended for is an ethical one or a constitutional one, as in either case a breach of the duty may result in an actionable infringement of the right of access to court where there has been an unreasonable delay. I take the approach, however, that characterising the duty as a constitutional one is more consistent with the overall scheme of the Constitution and the text of section 34.

[64] The right to fair hearing and a decision that would follow must, in order to be meaningful, create a corresponding obligation for the fulfilment of that right. The Legislature will carry a part of that obligation in so far as it relates to a passage of legislation and the enactment of rules and procedures governing litigation, while the executive would equally carry the responsibility for availing the resources that would enable courts to be established, staffed and operationalised. What then of the courts and judicial officers? It is inconceivable that courts and judicial officers can somehow

[36] Id.

[37] Id at para 10.

be insulated from this important need to effect a fair division of labour. But beyond fairness, the very essence of the right of access and its fulfilment must mean that courts and judicial officers carry a legal responsibility to discharge the obligations that section 34 places upon them, and foremost amongst these are to convene and conduct a fair hearing, and thereafter render a decision. The notion that courts have binding obligations is also consistent with section 8(1) of the Constitution which provides, amongst other things, that the Bill of Rights binds the judiciary. If that obligation is correctly characterised as a constitutional obligation, then it must in terms of section 237 of the Constitution, be discharged diligently and without delay.

[65] Section 39(2) of the Constitution also reminds us that when interpreting the Bill of Rights, a court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom, all of which point compellingly in the direction that section 34 is binding on the judiciary.

[66] The effect of an unreasonable delay on the part of a court that results in the infringement of the right of access to court must result in the need for an effective remedy. In practise, it often happens that parties who experience unreasonable delay may seek the intervention of the head of the court or will prevail upon the Judge in question to bring the matter to finality. In many instances, this may well resolve the problem. But what if it does not, as the applicants say in these proceedings?

[67] It must be that an unreasonable delay on the part of a court may well in certain situations result in an infringement of the right of access to court. How then should such an infringement of the right in section 34 be dealt with as a matter of law and in a manner that provides an effective remedy, and one that is able to, at the level of principle, overcome the jurisdictional challenge to which reference has been made?

[68] This Court has, in *Fose*,[38] spoken about the need for an effective remedy when rights are breached when it said:

> "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."[39]

[69] In *Mwelase*,[40] this Court held:

> "The vulnerability of those who suffer most from these failures underscores how important it is for courts to craft effective, just and equitable remedies, as the Constitution requires them to do. In cases of extreme rights infringement, the ultimate boundary lies at court control of the remedial process. If this requires the temporary, supervised oversight of administration where the bureaucracy has been shown to be unable to perform, then there is little choice: it must be done. Here, the fact that the Department's tardiness and inefficiency in making land reform and restitution real has triggered a constitutional near-emergency, as explained earlier. This fact underscores the need for practically effective judicial intervention."[41]

[70] In search of an effective remedy, *New Clicks CC* is of assistance but admittedly in a limited sense as it was confined to an application for leave to appeal where the merits and the remedy had already been decided by the High Court. The Rules of court appear silent on the matter, but this Court in *Mukaddam* contemplated precisely such a situation. It said in relation to the rules and to any lacuna that may exist:

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

[39] Id at para 69.

[40] *Mwelase v Director-General, Department of Rural Development and Land Reform* [2019] ZACC 30; 2019 (6) SA 597 (CC); 2019 (11) BCLR 1358 (CC).

[41] Id at para 49.

> "It is important that the [R]ules of courts are used as tools to facilitate access to courts rather than hindering it. Hence rules are made for courts and not that the courts are established for rules. Therefore, the primary function of the [R]ules of courts is the attainment of justice. *But sometimes circumstances arise which are not provided for in the rules. The proper course in those circumstances is to approach the court itself for guidance. After all, in terms of section 173 each superior court is the master of its process*."[42] (Emphasis added.)

Similar sentiments were expressed by this Court in *Eke*.[43]

[71] *Mukaddam* directs us to section 173 which in turn provides that "the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice".[44] The inherent power of this Court and other superior courts to protect and regulate their own processes, is closely associated with and inextricably linked to the manner and fashion in which a litigant may exercise the right of access to courts.

[72] This Court in *SABC*,[45] described the provision as an important one, pointing out that the only qualification on the exercise of the power contained in section 173 was that the Court must take into account the interests of justice. This Court said in that context:

> "Courts, therefore, must be independent and impartial. The power recognised in section 173 is a key tool for courts to ensure their own independence and impartiality. It recognises that courts have the inherent power to regulate and protect their own process. A primary purpose for the exercise of that power must be to ensure that

[42] *Mukaddam* above n 30 at para 32. See also Erasmus II above n 26 at D1-8.

[43] See [53] above.

[44] *Mukaddam* above n 30 at para 33.

[45] *South African Broadcasting Corp Ltd v National Director of Public Prosecutions* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC).

> proceedings before courts are fair. It is therefore fitting that the only qualification on the exercise of that power contained in section 173 is that courts in exercising this power must take into account the interests of justice."[46]

[73] This Court went on to state that:

> "In my view it must be added that the power conferred on the High Courts, Supreme Court of Appeal and [the Constitutional Court] in section 173 is not an unbounded additional instrument to limit or deny vested or entrenched rights. The power in section 173 vests in the judiciary the authority to uphold, to protect and to fulfil the judicial function of administering justice in a regular, orderly and effective manner. Said otherwise, it is the authority to prevent any possible abuse of process and to allow a Court to act effectively within its jurisdiction. However, the inherent power to regulate and control process and to preserve what is in the interests of justice does not translate into judicial authority to impinge on a right that has otherwise vested or has been conferred by the Constitution."[47]

[74] Does section 173 provide a basis for this Court to interfere in the process of another Court? While it would not ordinarily do so, it may well have the right and the obligation to do so in some circumstances. This Court has, in terms of section 29 of the Superior Courts Act and rule 19(2) of the Rules of this Court, the appellate power to hear appeals directly from other courts on constitutional matters. However, rule 19(2) expressly contemplates a "decision" of another court as the basis for this Court exercising its power in terms of rule 19(2). It is not in dispute that the Equality Court has not made a "decision" and to that extent it is argued that this Court does not have jurisdiction until the Equality Court makes a decision.

[75] While such an approach appears reasonable and practical, and is one that preserves the comity between courts and the orderly movement of matters within the hierarchy of the court system, it may well have unintended and prejudicial consequences

[46] Id at para 36.

[47] Id at para 90.

and be contrary to the interests of justice if applied rigidly and out of context. *New Clicks CC* compellingly illustrates that the approach is not cast in stone and that an order or a decision is not always a prerequisite for an appellate court to enjoy appellate jurisdiction. This may, at first, sound like a far-reaching proposition, but it may be a necessary one in those rare cases and when used as a measure of last resort. In particular, when it is alleged that a court has unreasonably delayed in finalising a matter or in rendering a judgment which results in the infringement of the right of access to court, the insistence that there be an order at the court of first instance should not and cannot be dispositive of the enquiry into the appellate jurisdiction of this Court.

[76] In such a case, it would mean that this Court would be precluded from exercising its appellate jurisdiction because there is no order of another court. More concerning, it would mean that the infringement of a litigant's right of access by another court would stand as an insurmountable obstacle to this Court exercising its appellate jurisdiction. In addition, it would leave the aggrieved party in perpetual legal limbo: they would be at the mercy of the court that has unreasonably delayed the determination of the dispute and would have no legal means to end the delay, while at the same time they would be procedurally barred from approaching this Court for relief until the lower court has made an order on the matter. Such a party would face a so-called double jeopardy – it would have no remedy in respect of its original claim, in this instance one of unfair discrimination – and it would also have no remedy in respect of the violation of its section 34 right of access to courts occasioned by the unreasonable delay as it would be barred from engaging this Court.

[77] It is impossible to conceive how that outcome would fit into the structure of our Constitution, and, in particular, the commitment to protect and promote human rights, and to provide an effective remedy when those rights are violated or infringed. It would lead to the absurd conclusion that for so long as there remains a continued violation of the right to a decision on a dispute on account of the unreasonable delay of a lower court, then the right to seek relief from this Court would simply not exist. The drafters of the Constitution could never have contemplated this, and to the extent that is required

and necessary, this Court must exercise its inherent power in the interests of justice to become seized with the matter. Of course, whether it grants the necessary relief would depend on the facts of the matter however, as a matter of law, its jurisdiction cannot be ousted.

[78] The Supreme Court of Appeal and this Court recognised and affirmed the view that a litigant, who in principle, has a right to approach a higher court, should not, on account of the unreasonable delay of a lower court, be prevented from doing so. In *New Clicks SCA*, the Supreme Court of Appeal said the following:

> "The Supreme Court Act assumes that the judicial system will operate properly and that a ruling of either aye or nay will follow within a reasonable time. The Act – not surprisingly – does not deal with the situation where there is neither and a party's right to litigate further is frustrated or obstructed. The failure of a lower court to give a ruling within a reasonable time interferes with the process of this Court and frustrates the right of an applicant to apply to this Court for leave. Inexplicable inaction makes the right to apply for leave from this Court illusory. *This Court has a constitutional duty to protect its processes and to ensure that parties, who in principle have the right to approach it, should not be prevented by an unreasonable delay by a lower court*."[48] (Emphasis added.)

[79] The Court placed explicit reliance on section 173 in coming to its conclusion and, expressing similar sentiments, this Court said in *New Clicks CC*:

> "Superior Courts have an inherent right to regulate and protect their own process. In the exercise of this power they can decide whether or not to grant an application based on a constructive refusal of leave to appeal, and to penalise a litigant by a costs order where such an application is wrongly brought."[49]

[48] *New Clicks SCA* above n 35 at para 31. See also section 173 of the Constitution, which deals with this Court's inherent power to regulate and protect its own process. In *S v Venter* 1999 (2) SACR 231 (SCA), the trial court took eight months to enroll the application for leave to appeal. The applicant had been sentenced to 4 years effective imprisonment. He was in prison and on appeal his sentence was reduced to six months. A clear failure of justice due to judicial delay.

[49] *New Clicks CC* above n 20 at para 72.

[80] At the same time, section 173 does not provide the Court with unlimited powers to do as it pleases and, in *Molaudzi*,[50] this Court located that power carefully in the overall power and jurisdiction of the Court when it said:

> "This inherent power to regulate process does not apply to substantive rights but rather to adjectival or procedural rights. A court may exercise inherent jurisdiction to regulate its own process only when faced with inadequate procedures and rules in the sense that they do not provide a mechanism to deal with a particular scenario. A court will, in appropriate cases, be entitled to fashion a remedy to enable it to do justice between the parties."[51]

[81] More importantly, *New Clicks SCA* cautions that the court's inherent power "does not extend to the assumption of jurisdiction not conferred upon it by statute".[52] In doing so, the Court cautioned that a court's inherent power could not be invoked to give a party a right it would otherwise not have. In *Moch*,[53] the Court was urged to use its inherent power to grant a party a right of appeal which the statute, the Insolvency Act,[54] did not give to it. It was in response to this submission that the Court observed that its inherent power did not extend to the assumption of jurisdiction it otherwise did not have. In *Basson*,[55] this Court refused to use its inherent power to grant the state a right of appeal that the law did not provide for. Similarly in *Oosthuizen*,[56] it was said that the use of the Court's inherent power was only possible in a case where the Court otherwise has jurisdiction but is faced with [R]ules of court and procedures which do not provide mechanisms to deal with the problem at hand. This case is not about using the inherent power of the court to create a substantive right where one does not otherwise exist. It is, as it was done in *New Clicks SCA*, about using

[50] *S v Molaudzi* [2015] ZACC 20; 2015 (2) SACR 341 (CC); 2015 (8) BCLR 904 (CC).

[51] Id at para 33.

[52] *New Clicks SCA* above n 35 at para 19.

[53] *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* [1996] ZASCA 2;1996 (3) SA 1 (A).

[54] 24 of 1936.

[55] *S v Basson* [2004] ZACC 13; 2005 (1) SA 171 (CC); 2004 (6) BCLR 620 (CC).

[56] *Oosthuizen v Road Accident Fund* [2011] ZASCA 118; 2011 (6) SA 31 (SCA).

the inherent power of the Court in situations where a right of appeal exists but is subject to procedural pre-conditions.[57] It is about procedure rather than substance and fits precisely into the correct side of the distinction made in *Molaudzi*.

[82] Therefore, in *New Clicks CC*, the absence of an order on leave by the High Court was not fatal in enabling the Supreme Court of Appeal to find that it had jurisdiction. That Court recognised the appellant's right of appeal in those proceedings and made an order of constructive refusal in order to cure any procedural pre-conditions that stood in the way of dealing with the matter. In addition, it placed reliance on section 39(2) of the Constitution in interpreting and giving effect to the appellant's rights of appeal located in section 20(4) of the Supreme Court Act.[58]

[83] Those same considerations apply here and even though the Equality Court did not make an order on remedy on account of unreasonable delay, the applicants have a right of appeal in terms of section 29 of the Superior Courts Act. That right is the subject of a procedural pre-condition that an order first be granted to enable the appeal to be considered and an order of constructive refusal fulfils that pre-condition by putting in place the order of the Equality Court.

[84] There are no reasons why *New Clicks CC* must be narrowly construed to confine its application to applications for leave to appeal. In its judgment, this Court expressed its view on delay generally and the impermissibility of preventing a litigant from approaching a higher court because of delay.[59]

[85] Finally, the provisions of section 39(2) must also find application and be of relevance in these proceedings in giving effect to the right of appeal the applicants enjoy.[60]

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[57] *New Clicks SCA* above n 35 at para 20.

[58] 59 of 1959.

[59] *New Clicks CC* above n 20 at para 84.

[60] Section 39(2) of the Constitution provides:

[86] This Court has the power to consider appeals before it without the leave of another court first being obtained. That said, and if there is an unreasonable delay on the part of another court in determining proceedings before it, this Court must equally be entitled to use its inherent power to enable it to exercise its appellate jurisdiction.

[87] The second judgment says that *New Clicks CC* does not hold that the inherent power of an appellate court to regulate its own process extends to making decisions for other courts, in pending proceedings before those courts. However, that is precisely what occurred in *New Clicks CC* when this Court concluded that the unreasonable delay in making an order on the part of the High Court constituted a constructive refusal of the application by the High Court. The applicants seek a similar order in these proceedings and the fact that no hearing on remedy was convened by the Equality Court cannot be dispositive. The ultimate enquiry must accept that there has been an unreasonable delay in convening a remedy hearing which would constitute a constructive refusal of remedy. Once such an order is made, and it is an order that the applicants have made out a compelling case for, the procedural pre-condition for this Court to exercise its appellate jurisdiction is satisfied.

[88] The second judgment says that there has been an unconscionable delay in the determination of a remedy by the Equality Court, but contends that if such a delay constitutes a violation of the applicants' section 34 rights of access to court, the applicants must approach the Equality Court by way of application as the competent court and not this Court. The difficulty with that proposition is that all reasonable attempts to approach the Equality Court to convene a hearing on remedy has come to nothing and it is no remedy to redirect the applicants to the Court that has acted in violation of their rights to now vindicate their rights. The Equality Court is not the competent court to sit in judgment of its own conduct and it is a doubtful proposition to suggest, as the second judgment does, that it would have the jurisdiction to hear an

"When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights".

application that it has violated the applicants' rights of access in terms of section 34. In addition, what the applicants seek is not for this Court to vindicate their access rights as an end in itself but advances the violation of those rights as part of the factual and legal matrix that entitle them to an order of constructive refusal and for the appeal to be considered by this Court.

[89] The second judgment also cautions that it would be impermissible for this Court to interfere in regulating the process of another court which is what a declaration of constructive refusal has the effect of doing. The order of constructive refusal that is sought will enable this Court to regulate its own process in exercising its appellate power and is not in the main about regulating the process of the Equality Court. In *Psychological Society*,[61] this Court said:

> "This Court has emphasised repeatedly that the power to intervene in unconcluded proceedings in lower courts will be exercised only in cases of great rarity – where grave injustice threatens, and where intervention is necessary to attain justice."[62]

[90] The idea that an appellate court should not interfere in unconcluded proceedings in lower courts is not absolute as *Psychological Society* reminds us. The need to avoid grave injustice and attain justice, which finds application in these proceedings would justify such interference.

[91] Finally, and in the event that any doubt may still exist with regard to the power of this Court to consider the relief that is being pursued, the provisions of section 172 of the Constitution are instructive in providing that when deciding a constitutional matter within its power, a court may make any order that is just and equitable. I have already set out the basis for concluding that this is a constitutional matter *within the power of this Court*. (Emphasis added.)

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[61] *Psychological Society of South Africa v Qwelane* [2016] ZACC 48; 2017 JDR 0062 (CC); 2017 (8) BCLR 1039 (CC).

[62] Id at para 40.

[92] *In Hoërskool Ermelo*,[63] this Court in analysing the power contained in section 172(1)(b) said the following:

> "The power to make such an order derives from section 172(1)(b) of the Constitution. First, section 172(1)(a) requires a court, when deciding a constitutional matter within its power, to declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. Section 172(1)(b) of the Constitution provides that when this Court decides a constitutional matter within its power it 'may make any order that is just and equitable'. The litmus test will be whether considerations of justice and equity in a particular case dictate that the order be made. In other words the order must be fair and just within the context of a particular dispute.
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> It is clear that section 172(1)(b) confers wide remedial powers on a competent court adjudicating a constitutional matter. The remedial power envisaged in section 172(1)(b) is not only available when a court makes an order of constitutional invalidity of a law or conduct under section 172(1)(a). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements. In several cases, this Court has found it fair to fashion orders to facilitate a substantive resolution of the underlying dispute between the parties. Sometimes orders of this class have taken the form of structural interdicts or supervisory orders. This approach is valuable and advances constitutional justice particularly by ensuring that the parties themselves become part of the solution."[64]

[93] The caution expressed by this Court that form must, in proper cases, yield to substance in the manner in which this Court approaches its remedial jurisdiction in constitutional disputes is of critical relevance here. At the level of principle, it must consolidate the conclusion that this Court does indeed have the power to consider the

[63] *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC).

[64] Id at paras 96-7.

grant of the declaratory relief necessary to regulate its processes to ensure that, if a proper case is made out, a litigant is not unjustifiably denied the right to access this Court. It is a power contemplated by section 173 and one that is closely aligned to activating its own jurisdiction, and it is a power the court must exercise in the interests of justice, which is the only qualifying consideration to the exercise by this court of its section 173 power.

[94] I do not believe that the extension of the principle in *New Clicks CC* beyond matters involving applications for leave to appeal, and subject to the caveat that it is to be seen as a measure of last resort is offensive with the general scheme of the Constitution or creates uncertainty in the litigation process. Indeed, its extension may be necessary and consistent with the general spirit and tenor of the Constitution and the need to properly recognise and give meaningful effect to the rights enshrined in it, in particular, the right to have access to court. If, as *SABC* reminds us, the primary purpose of section 173 is to ensure fairness in the judicial process and to enable a court to uphold, protect and fulfil the judicial authority it must then exercise that power in order to deal with a complaint of unreasonable delay on the part of a Court – this is perfectly consistent with the rationale for the giving of such power.

[95] Judicial delay in either convening a hearing or in delivering a decision in itself threatens the independence and the integrity of the judicial function and the judicial authority. When a court intervenes to address judicial delay, its objective is to protect the integrity and the independence of the judiciary and of all courts, rather than to imperil the relationship between courts. For these reasons, I conclude that this Court does have the power to make the declaratory order of constructive refusal in the proceedings before the Equality Court.

The case in support of declaratory relief

[96] Having concluded that this Court may consider the granting of the declaratory relief, what remains for consideration is whether a proper case has been made out for

declaratory relief, including whether the factors that are relevant to an order of constructive refusal as espoused in *New Clicks CC* find application here.

[97] Our courts have accepted that declaratory relief can generally be employed as a useful tool in the resolution of disputes and that there is generally a two-staged approach to follow. In *Cordiant Trading CC*[65] that two-staged approach was described as follows:

> "First the Court must be satisfied that the applicant is a person interested in an 'existing, future or contingent right or obligation', and then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it."[66]

[98] The applicants are interested parties to the extent required. They initiated the proceedings in the Equality Court to assert the right to equality and continue to seek to bring that matter to finality in these proceedings, relying in addition on their right of access to court. They have a direct interest in the right to which the declarator relates.

Is this a proper case for the exercise of this Court's discretion?

[99] In approaching the question whether there was unreasonable delay on the part of the Equality Court, a useful starting point in order to set the context would be to recall the observations of the Commission. In finding that the SAPS' system for the allocation of human resources had – albeit in good faith – produced an in-built bias against poor areas in the Western Cape, the Commission raised the following concern:

> "One of the questions that has most troubled the Commission is how a system of human resource allocation that appears to be systematically biased against poor black communities could have survived twenty years into our post-apartheid democracy. In

[65] *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* [2005] ZASCA 50; 2005 (6) SA 205 (SCA).

[66] Id at para 16 quoting from *Durban City Council v Association of Building Societies* 1942 AD 27 at 32.

> the view of the Commission, the survival of this system is evidence of a failure of governance and oversight of SAPS in every sphere of government."

[100] Those observations, and the subsequent finding, by the Equality Court in December 2018 that SAPS' system of resource allocation unfairly discriminated against poor and Black people, should have created a sense of urgency on the part of the parties and the Court for the need to deal with, and finalise, the question of remedy without delay. This would, in turn, have been bolstered by the provisions of the Equality Act which provides for expeditious proceedings.[67]

[101] By September 2019, the applicants took the view that negotiations were not yielding the desired outcome on settlement. The plan filed by SAPS was the IRS, and SAPS later conceded that this plan was inadequate, generic and did not even begin to engage and respond to the judgment of the Equality Court on the merits. The applicants in the same month requested the Equality Court to convene a hearing to determine the remedy and the Court, in engaging with the parties, proposed March 2020 for the hearing, which was not suitable to the respondents. Further attempts to find a suitable date were unsuccessful and the Court finally indicated that it would determine the matter of remedy on the papers on 11 August 2020. However, in September 2020, the parties were advised that as one of the Judges who constituted the Court was acting in the Supreme Court of Appeal, the parties were invited to indicate whether they wished to await the return of the Judge or preferred a new court being constituted. The respondents indicated a preference for the former while the applicants were comfortable with a new court being constituted.

[102] The applicants' attorneys made both telephonic and written enquiries with the Court regarding the enrolment of the matter from about October 2020, but they say

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[67] Section 4(1)(a) of the Equality Act provides:

> "In the adjudication of any proceedings which are instituted in terms of or under this Act, the following principles should apply:
>
> (a) The expeditious and informal processing of cases, which facilitate participation by the parties to the proceedings."

no response was forthcoming. These enquiries spanned the period from October 2020 to January 2021. In the period from 11 February 2021 to 19 March 2021, three letters were addressed to the presiding Judge as well as the Judge President, seeking their intervention to arrange an urgent hearing to determine the question of remedy. The applicants say that there was no response to these letters and that they were left with no option but to launch these proceedings in April 2021.

[103] Following the issue of this application, the respondents' attorneys approached the applicants' attorneys suggesting that the parties make a joint approach to the Judge President to secure a hearing date. However, the stance of the applicants' attorneys was that they believed that the Court was *functus officio* (of no further official authority or legal effect) on the basis that its refusal to convene a remedy hearing constituted a constructive refusal of remedy.

[104] If regard is had to the timespan from December 2018, when the order on the merits was made, to April 2021, when this application was brought, it does represent a considerable passage of time. While there were some unsuccessful attempts during that period to negotiate an agreement on remedy, by September 2019, the Court had been requested to convene a remedy hearing. By April 2021 no such hearing had been convened. The applicants were not appraised of when such a hearing would take place or even how the Court would be constituted for such a hearing, notwithstanding that the parties' views were sought and obtained as far back as in September 2019.

[105] It has been pointed out by the state respondents that part of the delay was occasioned by the unavailability of counsel as well as the Judges who made the merits order. While those are factors that would require consideration, I am not satisfied that they stand as justification for the delay. What was required was the Court fixing a date for hearing, and that simply did not happen from September 2019 to April 2021. The diary of counsel or the unavailability of Judges (even for good reason) cannot justify an

inordinate delay, in particular, where a matter requires a level of urgency to be brought to it. Also, *New Clicks CC* reminds us that the delay need not be deliberate.[68]

[106] Following the withdrawal of the applications for leave to appeal and cross-appeal in the Supreme Court of Appeal, the applicants pursued the finalisation of the matter with consistency and with the necessary degree of urgency. They initially sought directions on ensuring the negotiations between the parties on remedy was time-bound and court supervised, and then when that failed sought a remedy hearing. In the months that followed, the applicants maintained what may be described as a level of persistency to bring the matter to finality. All of the interventions to bring the matter to finality were initiated by the applicants – from the seeking of directions on remedy to the requests for hearing dates – it was them who demonstrated a focused commitment to bring closure to the litigation and have in place an effective remedy. Rather than criticising them for this stance and their final decision to institute this application, they should be commended for their perseverance – mindful that they were not responsible for the system of unfair discrimination that the Equality Court found to exist, nor was the capacity to remedy that within their remit. These were matters that fell squarely within the duties and the powers of the state respondents and one would have hoped for a greater level of urgency and decisiveness on their part.

[107] The circumstances that could constitute an unreasonable delay may include "deliberate obstructionism on the part of a court of first instance or sheer laxity or unjustifiable or inexplicable inaction, or some ulterior motive".[69] In these proceedings inexplicable action for at least seven months from September 2020 to April 2021 coupled with hardly any progress for most of 2020, under circumstances where action of an urgent nature was required, would suffice to constitute unreasonable delay.

[68] *New Clicks CC* above n 20 at para 69.

[69] *New Clicks SCA* above n 35 at para 31.

[108] The determination whether there has been an unreasonable delay, is not to be arrived at only by some mechanical calculation on a timeline, important as that may be, but also by the urgency that the matter would ordinarily warrant; the public interest in deciding the matter expeditiously; the effect of the finding on the merits which was no longer in dispute and the effect of any further delay in bringing the matter to finality. All these considerations lead to the conclusion that the Equality Court did not deal with the matter with the requisite degree of urgency and that the delay was unreasonable. A finding of unreasonable delay is accordingly justified on the facts before this Court.

[109] In *New Clicks CC*, this Court said that in addition to the unreasonable delay, regard must be had to whether the remedy sought is a measure of last resort, the urgency of the issue and whether the delay caused substantial prejudice.

[110] Having outlined the steps they took to bring the matter to finality, the applicants say that this was a measure of last resort. The state respondents disagree and contend that the applicants should have responded favourably to their suggestion of a joint approach to the Judge President. This suggestion was made after the lodging of this application. Whether this was a measure of last resort must be assessed at the time the application was brought to this Court. As at early April 2021, there had been no response to the various telephonic and written requests by the applicants for a date for a hearing on remedy, and the state respondents were ominously silent, while the applicants took all these measures to secure a hearing date, albeit without success. In addition, some of those requests by the applicants had also been directed to the Judge President so it is not clear why a joint approach would have made any difference. It may have, but that does not mean that this was not a measure of last resort. One should be cautious in not setting an absolute bar for the determination of a measure of last resort. It would suffice if the applicants were able to show that they had diligently followed and exhausted all reasonable measures open to them. I am satisfied that they did.

[111] On the urgency of the issue, it is evident for the reasons I have provided that the matter carries with it the necessary attributes of urgency. Ending unfair discrimination against communities that have faced the brunt of apartheid inequality for centuries cannot ever be anything but urgent, and from this it must follow that the delay will continue to cause prejudice in addressing the matters of safety and security for poor and Black communities in the Western Cape. That prejudice will exist in how people are able to live, to work, to play, to learn or simply to express their humanity under the constraints that living in an unsafe environment brings. It is so far removed from the constitutional promise of a society "based on democratic values, social justice and fundamental human rights".[70]

[112] Therefore, and regard being had to the unreasonable delay, the urgency of the matter, the issue involved and the conclusion that this was a measure of last resort, I am satisfied that the applicants have succeeded in making out a case for this part of the relief they seek.

Leave to appeal

[113] The result and, in sum, is that this Court has the power to grant the declaratory relief that is sought and there is, in addition, a proper case made out for the grant of such relief. The consequence is that this Court has the necessary jurisdiction to hear the appeal. The interests of justice stands firmly in support of granting leave to appeal, regard being had to the nature of the issue before this Court as well as the prospects of success.[71] Leave to appeal must be granted and the Court must make the declaratory order sought by the applicants in paragraph 1 of their Notice of Motion, namely, "[d]eclaring that the Equality Court has constructively refused to grant the [a]pplicants a remedy pursuant to the declaratory orders it made on 14 December 2018 in case number EC03/2016".

[70] See the Preamble of the Constitution.

[71] *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 12.

Merits and remedy

[114] Before dealing with remedy, I deal briefly with the relief as set out in paragraph 2(ii) of their Notice of Motion, namely, [g]ranting the [a]pplicants leave to appeal to this Court against . . . paragraph two of the Equality Court's order of 14 December 2018". As I understand paragraph 2 of the order of 14 December 2018, it was the subject of a cross-appeal by the applicants, however, following negotiations, the parties agreed to withdraw the appeal and the cross-appeal and this was formalised by notice to that effect. That would effectively have put an end to the cross-appeal and that relief is not before this Court, nor can it be resuscitated.

[115] The determination of a suitable remedy is what ultimately remains outstanding in this litigation and, for all the reasons given, its expeditious determination is warranted. At the same time, that issue has not been ventilated before any court, including this one. While the parties are broadly in agreement that the remedy will take the form of a filing of a remedial plan, there are many issues that may require consideration with regard to that plan. In particular, whether the plan is sufficiently responsive to, and deals adequately with, the unfair discrimination the Equality Court found to exist. The order of constructive refusal of a remedy cannot stand and must be set aside and, in its place, the Court must then consider what an appropriate remedy would be.

[116] As *Fose* reminds us, a remedy must be effective,[72] and this Court should resist the temptation to deal with remedy notwithstanding its desire to bring the matter to finality. The suitable remedy will require careful deliberation and possibly expert input, and it would be just and equitable to remit the matter to the Equality Court for determination.

[117] A remittal would be the most effective order that this Court can make and, given the history of the matter, there may be a need to place timeframes on when the

[72] *Fose* above n 38 at para 69.

Equality Court deals with the matter so as to avoid any further delays. This would not constitute an unwarranted interference in the work of the Equality Court but rather to ensure that, given the history of the matter, a plan for the expeditious resolution thereof is put in place.

[118] The failure to do so may carry the risk of further delays and, in this regard, it is worth recalling that at the hearing of this matter, counsel for the state respondents, in reference to the approval of the THRR, said that the plan was "meandering" somewhere within the SAPS hierarchy as part of the process for its approval.

[119] In all the circumstances, it would be just and equitable to remit the matter to the Equality Court and request the Judge President of the Western Cape High Court to constitute a bench that will hear the outstanding issue of remedy within 90 days of this order, and to issue directions with regard to the filling of written submissions, expert evidence or any other matter relevant for the hearing to be convened as the Judge President may deem fit.

[120] Given that one of the Judges who sat on the merits part of the application has been elevated to the Supreme Court of Appeal, and that a complaint has been submitted to the Judicial Service Commission regarding the other Judge on which we offer no view, it will probably be consistent with the interests of justice that a differently constituted bench be appointed.

Costs

[121] The applicants have achieved substantial success in this Court and there is no reason why they should not be awarded their costs, which should include the costs of two counsel.

Order

[122] Had I commanded the majority in this Court, I would have proposed an order granting a declarator that the unreasonable delay by the Equality Court of South Africa, Western Cape Division, Cape Town (Equality Court) in convening a hearing and deciding the issue of remedy constitutes a constructive refusal of remedy. I would have further proposed that leave to appeal be granted, the appeal be upheld, and the matter be remitted to the Equality Court for the determination of a remedy before a different bench and in accordance with proposed timelines.

Unterhalter AJ (Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Theron J and Tshiqi J concurring):

[123] I have had the pleasure of reading the judgment penned by my Brother, Kollapen J (first judgment). It reflects a deep concern that poor and Black communities in the Western Cape have been discriminated against and have not, after so long, been provided with a remedy by the Equality Court. That is a concern I share. That the applicants are entitled to have the issue of remedy determined is plain. That the Equality Court has unconscionably delayed in doing so is also clear. We differ as to whether this Court enjoys the power to make a declaratory order of constructive refusal so as to entertain an application for leave to appeal from the Equality Court.

[124] My Brother Kollapen J finds this power to flow from the Equality Court's infringement of the applicants' rights of access to courts in terms of section 34 of the Constitution, read with the broad remedial powers conferred upon this Court under section 172(1) of the Constitution. It is with regret that I conclude that this Court does not have the power to effect the remedy sought by the applicants. That regret is rooted in my wish that the applicants should enjoy an effective remedy. But the powers of a

court cannot be derived from the consequences that it would wish to effect. This Court enjoys only those powers conferred upon it, no more and no less.

[125] The applicants move to this Court for sequenced relief. They seek declaratory relief that the unreasonable delay of the Equality Court, in convening so as to decide the issue of remedy, constitutes a constructive refusal of a remedy by that Court. Such declaratory relief is the basis upon which the applicants then rely to seek leave to appeal to this Court, from an order of refusal of a remedy that is imputed to the Equality Court. Should leave to appeal be granted and the appeal upheld, then this Court may either grant a remedy that the Equality Court has thus far failed to determine, or give other relief that would permit the applicants to secure a remedy for the unfair discrimination that the Equality Court has found to exist.

[126] The declaratory relief of constructive refusal is a necessary predicate for the further relief sought by the applicants from this Court. The case that the applicants seek leave to appeal is pending before the Equality Court. That Court has yet to bring those proceedings to a conclusion and issue an order. That is the very complaint that the applicants make. Until the Equality Court does so, the case remains pending before it, and the power to decide the case rests with that Court. There is no order of the Equality Court from which leave to appeal to this Court may be sought.

[127] So too, absent an order of the Equality Court from which leave to appeal to this Court is sought, the appellate jurisdiction of this Court is not engaged. It is elementary, but fundamental, that a court's appellate jurisdiction rests upon an order having been made by the court from which leave to appeal is sought. An appeal lies from the order of the court below. It was ever so, as *Heyman*,[73] and a long line of authority since has confirmed. Rule 19(2) of this Court's Rules gives effect to section 167(6)(b) of the Constitution and sets out the basis upon which a person may

[73] *Heyman v Yorkshire Insurance Co. Limited* 1964 (1) SA 487 (A) at 490C-D.

appeal directly to this Court from any other court.[74] In terms of the rule, there must be a litigant who has been aggrieved by a decision of a court. Although this Court has interpreted what constitutes a decision in a generous fashion,[75] absent a decision of a court, no appeal can lie to this Court, and this Court enjoys no jurisdiction to entertain such an appeal.

[128] The applicants recognise this jurisdictional obstacle. Since the Equality Court has made no decision as to remedy, there is nothing from which to appeal to this Court. Hence the applicants seek declaratory relief from us that the failure by the Equality Court to take a decision should be taken to constitute a refusal of a remedy by that Court. The grant of such declaratory relief deems a decision to have been taken by the Equality Court, clearing the way for the applicants to then seek leave to appeal to this Court.

[129] The question that then arises is this: where is the power that permits this Court to make the declaratory order sought of it to be found? This Court is being asked to deem another court to have taken a decision, so as then to sit on an appeal from that very decision. Both the content and effect of the declaratory order sought by the applicants is to have this Court make a substantive order of the Equality Court, that is, to make a decision that no remedy is granted to the applicants.

[130] That is an order of extraordinary reach. Clothed as a declaratory order, it makes a decision for another court, in a case pending before that court, on the basis that this other court has refused relief to the applicants, when in fact it has made no such order. The power to make such an order is not to be found in section 167 of the Constitution.

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[74] Rule 19(2) of the Constitutional Court Rules provides:

> "A litigant who is aggrieved by the decision of a court and who wishes to appeal against it directly to the Court on a constitutional matter shall, within 15 days of the order against which the appeal is sought to be brought and after giving notice to the other party or parties concerned, lodge with the Registrar an application for leave to appeal: Provided that where the President has refused leave to appeal the period prescribed in this rule shall run from the date of the order refusing leave."

[75] *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771 at paras 7-9.

As we have observed, section 167(6)(b) references an appeal to this Court from any other court as allowed under the Rules of this Court. Those Rules require that the other court has rendered a decision. The Rules do not permit this Court to make the decision for the other court so as to entertain an appeal from that decision.

[131] Nor is the power located as an incident of the inherent power of this Court to regulate its own process in terms of section 173 of the Constitution. In *New Clicks CC*,[76] this Court recognised that superior courts have an inherent power to regulate and protect their own process, and in the exercise of this power, they can decide whether to grant leave to appeal based upon a constructive refusal of leave by the lower court. The holding in *New Clicks CC* goes no further than to say that an appellate court may exercise its own power to grant or refuse leave to appeal on the merits of the application before it, and it is not prevented from doing so if the lower court has unreasonably delayed in its own decision as to whether leave should be granted. That is an incident of the appellate court's inherent power to regulate its own processes, because the ultimate power to grant leave to appeal resides with the court to which an appeal lies.

[132] *New Clicks CC* does not hold that the inherent power of an appellate court to regulate its own processes extends to making decisions for other courts in pending proceedings before those courts. That would accord powers to an appellate court to regulate the processes of other courts, which is not a power given to appellate courts, including this Court under section 173.

[133] Where then is the power that would permit this Court to make the declaratory order sought of it by the applicants located? The first judgment finds that power in the infringement by the Equality Court of the applicants' rights of access to court in terms of section 34 of the Constitution, read with the broad remedial powers enjoyed by

[76] *New Clicks CC* above n 20 at para 72.

this Court under section 172 of the Constitution. I turn to consider this aspect of the matter.

[134] Section 34 of the Constitution provides that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum". The right of access to courts, by its clear wording, is a right to have a dispute decided, if the dispute can be resolved by the application of law. The dispute before the Equality Court is one that can be so resolved. If the hearing of a dispute has been egregiously delayed, that prevents a dispute from being decided and may thus amount to the infringement of the right.

[135] The applicants' case is that the Presiding Judge in the Equality Court and the Judge President of the Division have unreasonably delayed the convening of the Equality Court to decide the question of remedy. The question that arises is this: assuming, for the sake of argument, the delay amounts to an infringement of the applicants' right of access to the Equality Court, is the right enforceable against the Equality Court?

[136] The answer to this question is not free of difficulty. In terms of section 8(1) of the Constitution, the Bill of Rights binds the judiciary. Section 7(2) of the Constitution, requires that the state must respect, protect, promote and fulfil the Bill of Rights. The courts, being the judicial authority of the state, form part of the state. The courts are thus bound to do what section 7(2) of the Constitution requires. Indeed, the courts are the principal institution under the Constitution by recourse to which the Bill of Rights is enforced. It follows that the courts must respect, protect, promote and fulfil the Bill of Rights.

[137] Judicial officers are central to the constitutional commitment to secure the right of access to courts. The right of access to the courts is a right to have a dispute decided in a fair public hearing. By reason of the fact that judicial officers preside over the

courts to which they are appointed, they bear the principal, but not exclusive, duty to ensure that the disputes that come before their courts are decided fairly, in public hearings, and within a reasonable time. That duty is plainly owed to the judiciary, as an institution. But it is also owed to everyone who looks to the courts to secure justice and enjoys the right of access to the courts that section 34 provides.

[138] That judicial officers owe duties to those who enjoy the right of access to the courts, does not resolve a distinct issue that lies at the heart of the case before us how are these duties enforced? Section 38 of the Constitution provides that "[a]nyone 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".[77] Where a judge is alleged by a litigant to have infringed their right of access to the court, which court is the competent court the litigant has a right to approach to decide whether there has been an infringement and, if so, what relief is appropriate?

[139] Section 38 gives expression to an important principle. To enforce a right, a litigant must approach a competent court. Which court is competent is a threshold question of jurisdiction. It does not follow that because the applicants' right of access to court may have been infringed and they require appropriate relief, this Court is the competent court that the applicants may, in the first instance, approach to secure that relief. In my respectful view, this is the error from which the first judgment proceeds. It reasons that because the Presiding Judge of the Equality Court has failed to convene his Court, he has breached the applicants' rights to a decision on remedy within a reasonable time, and the wide remedial powers of this Court permit us to grant a remedy, including the declaratory relief sought by the applicants. This reasoning does not explain the basis upon which this Court is the competent court that the applicant may approach to enforce their rights.

[77] Emphasis added.

[140] There are a number of considerations that weigh against this Court as a competent court that may be approached, as a court of first instance, to enforce an alleged infringement of a litigant's right of access to the courts.

[141] First, if a judge, presiding over a case, is alleged to have failed to comply with their constitutional duties, the aggrieved litigant must, in the first instance, bring an application before the Presiding Judge and seek to have the judge cure the breach. The Presiding Judge, as we have observed, owes duties to the litigants who come before the courts. But the Presiding Judge must be called up to comply with those duties, and, if a proper case is made out, the Presiding Judge is best placed to resolve the issue in the very proceedings where the infringement is alleged to arise.

[142] So, for example, if a Presiding Judge acts in a manner that compromises the fairness of the proceedings, perhaps because of some bias or conflict of interest, it has long been part of our law that the litigant seeks the judge's recusal. It is for the judge against whom the allegation is made to decide, in the first instance, whether recusal is warranted. The Presiding Judge will grant or refuse the order sought. A refusal will permit the litigant who remains aggrieved to seek leave to appeal. But the competent court from which to seek redress is the court in which the unfairness occurs. The same is true of the many decisions required of a Presiding Judge to ensure the fairness of the proceedings: in camera rulings, confidentiality regimes that govern the disclosure of documents, the recalling of a witness, to offer but a few examples. It is for the Presiding Judge to rule on these matters. There is no supervisory jurisdiction accorded to other courts to make these rulings when the Presiding Judge has not yet done so.

[143] The second consideration is this: the right of access to the courts is much concerned with due process. As I have observed, in terms of section 173 of the Constitution, the courts have the inherent power to protect and regulate their own process. The court that has the duty to protect access by a litigant to the courts is also vested with the power to regulate its own process. It would be anomalous and contrary to the scheme of the Constitution if the court that is expressly given the power to

regulate its own process and thereby fulfil its duty under section 34 was not the competent court, in the first instance, by recourse to which enforcement takes place.

[144] Third, the inherent power of a court to regulate its own process also entails a principle of comity as between courts. One court will respect the power of another court to regulate its own process. To do otherwise would be to disregard the very power that section 173 confers. In particular, an appellate court will not regulate the process of a lower court where the lower court has yet to exercise its powers and render a decision as to how its process will be regulated so as to protect a litigant's right of access. Remedial powers under this section are wide but certainly not unfettered:

> "The wide remedial power of making a just and equitable order under section 172 of the Constitution has limits. Here, the words 'a court . . . may make any order that is just and equitable' must be read in proper context. They do not mean that a court is free to grant whatever order it considers to be just and equitable. In context, these words enable a court to issue a just and equitable remedy within its jurisdiction. The limit to what a court may order is apparent from the opening words of section 172(1)."[78]

The notion that this Court is the competent court to enforce a litigant's right of access to the Equality Court, when the Equality Court has not yet been moved to do so, would conflict with the principle of comity.

[145] Fourth, the applicants invite this Court to accept a broad supervisory jurisdiction to regulate the process and enforce the duties of another court, when that court has yet to rule on the matter. This would have far-reaching consequences. This Court would be assuming an original jurisdiction to entertain hundreds of applications to supervise the many ways in which litigants may complain that other courts are failing to carry out their duties under section 34. For the purposes of enforcing the right of access to the

[78] *AmaBhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC* [2021] ZACC 3, 2021 (3) SA 246 (CC); 2021 (4) BCLR 349 (CC) at para 192.

courts, it could never have been contemplated that this Court is, in terms of section 38, a competent court to undertake this supervisory jurisdiction.

[146] For these reasons, I conclude that this Court is not competent to enforce the duties of the Equality Court by giving the applicants access to that Court when no application has been made to the Equality Court to do so. It is unsustainable to contend that this Court can intervene here through it regulating its own process as the first judgment appears to suggest. I simply cannot see how that power can emanate from section 167 or section 171 of the Constitution or rule 19 of this Court's Rules.

[147] This conclusion rests upon the proposition that this Court has no competence to enforce the section 34 rights of the applicants until such time as the Equality Court has declined to do so. But the force of the declaratory relief sought of this Court is to deem the Equality Court to have refused the applicants' a remedy, and hence the Equality Court must be taken to have made an order, from which an appeal lies to this Court, rendering it a competent court to enforce the applicants' right of access to the Equality Court.

[148] This argument cannot prevail. The Equality Court has been repeatedly approached to set down the applicants' case for hearing. No application has ever been made to it by the applicants to enforce their constitutional rights of access. The declaratory relief sought of this Court is that the Equality Court should be taken to have refused a substantive remedy to the applicants. The declaratory relief that is sought does not declare the Equality Court to have refused to give the applicants access to it. Nor could it do so because no such application has been made by the applicants to the Equality Court to enforce their constitutional rights of access.

[149] It follows that this Court is not the competent court in terms of section 38 that the applicants may approach to enforce their rights under section 34, when the applicants have not first sought to enforce these rights before the Equality Court. If, as I find, this Court therefore lacks jurisdiction to entertain the application before it, there

can be no basis to source its jurisdiction by recourse to a determination that the applicants' rights have been infringed and the wide remedial remit of section 172 that gives this Court the power to make an order to cure that infringement. Jurisdiction is a binary concept - a court either enjoys jurisdiction or it does not. This Court cannot simultaneously lack jurisdiction in terms of section 38 but enjoy jurisdiction under section 172. Section 172 makes this very clear. Its introductory words are these: "[w]hen deciding a constitutional matter *within its power*".[79] This Court must enjoy jurisdiction to decide a matter. If it does, only then may it exercise the remedial powers given to it in section 172. The first judgment holds to the proposition that if a remedy is required to make good an infringement of rights, this Court enjoys jurisdiction. That reverse engineering of jurisdiction is not, in my respectful view, a tenable interpretation of the Constitution.

[150] For these reasons, I conclude that the application before us must fail. The Constitution does not give this Court the power to make the declaratory order sought so as then to entertain an application for leave to appeal from that order. Nor is this Court competent to enforce the applicants' rights of access to the Equality Court, when the applicants have not moved the Equality Court to do so. I appreciate that the applicants have, with much persistence, requested the Presiding Judge in the Equality Court to convene his Court. His failure to do so is to be deprecated. What is required is an application, brought urgently if there are grounds, to the Equality Court, setting out the infringement of the applicants' rights and requiring the Presiding Judge to convene his Court.

Conclusion

[151] In the result, leave to appeal must be refused for want of jurisdiction. In a case of this kind, no order for costs is warranted.

[79] Emphasis added.

Order

1. Leave to appeal is refused.

For the Applicants:	P Hathorn SC, N Mayosi and M Bishop instructed by the Legal Resources Centre
For the First to Third Respondents:	R T Williams SC, K Pillay SC, U K Naidoo and R Matsala instructed by the State Attorney, Cape Town
For the Fifth Respondent:	A Christians and V Jere instructed by the Women's Legal Centre Trust