

Pro Bono & Human Rights ALERT

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CLIFFE DEKKER HOFMEYR

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Recently, in the latest round of litigation in the matter of *Thubakgale v Ekurhuleni Metro Municipality* (Case No 39603/2015) [29/08/2023] (a contempt of court application) the Gauteng Division of the High Court, Pretoria was once again called upon to determine the question of what would constitute an appropriate remedy for the respondents' ongoing failure to comply with a court order directing them to provide the applicants with houses in terms of section 26 of the Constitution – and whether constitutional damages could ever be a competent relief for such a breach (such damages being sought in the alternative in this case).

The fundamental question in these proceedings was what **effective remedy** should be granted by courts to litigants who have demonstrated that the state has not only failed to realise the fundamental right to access to housing but is also in ongoing breach of two court orders and has conducted itself in such a way that one can only reasonably conclude that it refuses to realise this right.

The applicants initially launched High Court proceedings more than five years ago to compel the Ekurhuleni Metro Municipality (municipality), the first respondent, to take the necessary steps to upgrade their housing conditions or, alternatively, to provide them with houses in Tembisa Extension 25 (Tembisa). Teffo J presided over the matter and on **15 December 2017** granted an order (order) directing the respondents to *inter alia* provide houses to the applicants in Tembisa by no later than **31 December 2018**. Teffo J also ordered supervisory relief requiring the respondents to report on their progress in complying with the order to provide the applicants with houses, to the court and the applicants' legal representatives at three months intervals from the date of the order.

The respondent appealed this order to the Supreme Court of Appeal (SCA) but only succeeded in having the order modified to extend the deadline of 31 December 2018 for the provision of houses to **30 June 2019**. On 28 June 2019, less than one court



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day before the deadline imposed by the SCA, the respondents brought another application, this time to the High Court, seeking to vary the order. They sought not only to extend the deadline by a further year (to 1 July 2020) but also to vary the order to allow them to provide flats, rather than houses. In response, the applicants brought a counterapplication for constitutional damages as compensation for not having been provided with houses in terms of the deadline of 30 June 2019 set by the SCA. The High Court dismissed both applications.

In the Constitutional Court

The matter ultimately made its way to the Constitutional Court on 18 February 2021 when, in an attempt to vindicate their rights, the applicants brought an appeal against the High Court's refusal to grant constitutional damages. While the appeal was dismissed by the majority of the justices, the Constitutional Court

was divided on the question of whether constitutional damages could ever be sought for breaches of socio-economic rights.

Three separate judgments were issued. Jafta J (together with two justices, including the then chief justice) held that constitutional damages could never be sought for a breach of socio-economic rights and dismissed the appeal in the main, on this basis, while Majiedt J (with three justices concurring) held that constitutional damages would be the only appropriate relief in the circumstances. In his judgment concurring in Jafta J's order, Madlanga J (with one justice concurring) refused to completely discount the possibility of the appropriateness of constitutional damages whenever socio-economic rights are at issue. He held that the answer to whether constitutional damages are **warranted lies in determining what the most "appropriate relief" is in the given circumstances.** On the facts

he concluded that the award of constitutional damages was not the most appropriate remedy in the circumstances of this case.

Enforcement of socio-economic rights

In the final analysis, when taking into account the concurring judgment of Madlanga J, although the majority of justices dismissed the appeal, the majority did not support Jafta J's finding that constitutional damages could never be granted in socio-economic rights cases, and so the take away from the Constitutional Court's judgments collectively is that constitutional damages may be awarded in cases dealing with the enforcement of socio-economic rights, where this would be the most appropriate remedy. In this particular case, on the facts, the majority were of the view that contempt of court was the most appropriate remedy because **all that was left was to execute the High Court's Order (as amended by the SCA).**



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Having been denied constitutional damages by the Constitutional Court and having been advised by the majority of that court to rather pursue contempt proceedings, the applicants returned to the High Court (this application being the fifth round of litigation) for relief for the respondents' ongoing failure to comply with Teffo J's order, as amended by the SCA. They sought to enforce the order by way of contempt proceedings and also sought an order directing the respondents to pay a fine in the sum of R1,330,000. They further sought an order directing the respondents to grant them the houses by 31 December 2023, together with supervisory relief. In the alternative (and should the respondents not have complied with the order and provided the houses by 31 December 2023) the applicants sought an order granting them leave to re-enrol the matter and to seek an order declaring that the respondents are liable to compensate the applicants

for breaches of their rights under section 26 of the Constitution – and to accordingly seek compensation for this breach based on constitutional damages.

Contempt of court

The matter was heard by a full bench of the High Court. The majority of the full bench granted the order as sought by the applicants – holding the respondents in contempt for failure to discharge a positive obligation under the Constitution and ordering that they, *inter alia*, provide the applicants with houses as per the original order and further ordering them to pay the fine in the sum of R1,330,000 as failure to comply with the order. According to the majority, it was apparent that the respondents were coming up with excuses upon excuses and that their conduct was repetitive, systemic, and particularly egregious – it was common cause that the applicants, even though their subsidies were long approved, were homeless for over two decades.

On the issue of constitutional damages the majority stated that having had regard to the cumulative circumstances surrounding the applicants, and the submissions made, they were of the view that *"nothing precludes this court from awarding constitutional damages to the applicants as an effective remedy, and ultimately the appropriate relief within the meaning of section 38 of the Constitution"*. The majority accordingly also granted the relief as sought – granting the applicants leave to re-enrol the matter before the court to seek constitutional damages should the respondents fail to provide them with houses by 15 December 2023 (given that the 31 December 2022 (as the initial deadline) had already passed at the time of the handing down of this judgment (on 29 August 2023)).



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Conclusion

It is beyond debate now that ordinary South Africans increasingly struggle to access basic needs and services like adequate housing, water, sanitation, electricity, and many other services that they are entitled to in terms of the Constitution. What is also beyond debate is the fact that these deprivations are systemic and a result of a multitude of factors including, maladministration, capacity and skills deficiency, as well as resource constraints. Given this, there is a possibility that there could be more legal proceedings brought against the state for constitutional damages in appropriate cases that impact socio-economic rights under the Constitution. In such instances, bearing in mind the fierce controversy sparked by the division in the

Constitutional Court in this matter, it might be prudent where feasible for applicants to ground their claim(s) for constitutional damages on supportive legislative frameworks – and if those pieces of legislation don't provide for such relief, another remedy open to the applicants might be for them to challenge the validity of that legislation rather than solely relying directly on the Constitution.

It is important to note and reiterate that this High Court decision is of major significance – as it further confirms and affirms that the state, in appropriate cases, will be held accountable and liable (even in monetary terms) for unreasonable failures to discharge its positive obligations in respect of socio-economic rights.

[Gift Xaba and Jacquie Cassette](#)



OUR TEAM

For more information about our Pro Bono & Human Rights practice and services in South Africa and Kenya, please contact:



Jacquie Cassette

Practice Head & Director:
Pro Bono & Human Rights
T +27 (0)11 562 1036
E jacquie.cassette@cdhlegal.com



Brigitta Mangale

Director:
Pro Bono & Human Rights
T +27 (0)21 481 6495
E brigitta.mangale@cdhlegal.com



Gift Xaba

Senior Associate:
Pro Bono & Human Rights
T +27 (0)11 562 1089
E gift.xaba@cdhlegal.com



Clarice Wambua

Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E clarice.wambua@cdhlegal.com



Elgene Roos

Senior Associate:
Pro Bono & Human Rights
T +27 (0)11 562 1863
E elgene.roos@cdhlegal.com



Lauriene Maingi

Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E lauriene.maingi@cdhlegal.com



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JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.

Dx 154 Randburg and Dx 42 Johannesburg.

T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.

T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI

Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.

T +254 731 086 649 | +254 204 409 918 | +254 710 560 114

E cdhkenya@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.

T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

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