IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No. 157/20

High Court Case No: 39602 / 2015

In the matter between:

THUPETJI ALEXANDER THUBAKGALE	First Applicant
EKURHULENI CONCERNED RESIDENTS ASSOCIATION	Second Applicant
THE RESIDENTS OF THE WINNIE MANDELA INFORMAL SETTLEMENT	Third to 134th Applicants

and

EKURHULENI METROPOLITAN MUNICIPALITY	First Respondent
THE EXECUTIVE MAYOR, EKURHULENI MUNICIPALITY	Second Respondent
CITY MANAGER, EKURHULENI MUNICIPALITY	Third Respondent
HEAD OF DEPARTMENT: HUMAN SETTLEMENTS, EKURHULENI MUNICIPALITY	Fourth Respondent

---

FILING SHEET: PRACTICE NOTE AND HEADS OF ARGUMENT

HEREWITH PRESENTED FOR FILING:

1. Appellants' Practice Note
2. Appellants' Heads of Argument
3. Appellants' List of Authorities

DATED AT JOHANNESBURG ON THIS THE 23rd DAY OF DECEMBER 2020.

SERI LAW CLINIC
Appellants' Attorneys
6th Floor, Aspern House
54 De Korte Street
Braamfontein, 2001
Tel: 011 356 5860
Fax: 011 339 5950
Email: **nomzamo@seri-sa.org**
nerishka@seri-sa.org
REF: ZONDO/Winnie Mandela

TO: **THE REGISTRAR OF THE ABOVE HONOURABLE COURT,**
BRAAMFONTEIN

AND TO: **NOZUKO NXUSANI INCORPORATED**
Respondents' Attorneys
69 Jan Smuts Avenue
Westcliff, Johannesburg
Tel: 011 975 5666
Fax: 011 975 0707
Ref: Mr TG Chavalala/KP32-2020
Email: **given@nozukonxusaniinc.co.za**

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: 157/2020

In the matter between:

THUPETJI ALEXANDER THUBAKGALE	First Applicant
EKURHULENI CONCERNED RESIDENTS ASSOCIATION ("ECRA")	Second Applicant
RESIDENTS OF THE WINNIE MANDELA INFORMAL SETTLEMENT	Third to 134th Applicants

and

EKURHULENI METROPOLITAN MUNICIPALITY	First Respondent
EXECUTIVE MAYOR, EKURHULENI MUNICIPALITY	Second Respondent
CITY MANAGER, EKURHULENI MUNICIPALITY	Third Respondent
HEAD OF DEPARTMENT: HUMAN SETTLEMENTS, EKURHULENI MUNICIPALITY	Fourth Respondent

---

APPLICANTS' PRACTICE NOTE

A NATURE OF THE APPLICATION

1 This is an application for leave to appeal directly to this Court against part of a judgment of Basson J, sitting in the Gauteng Provincial Division of the High Court. The applicants seek leave to appeal against paragraph 2 of Basson J's order, which dismissed the applicants' claims for constitutional damages.

B BASIS FOR JURISDICTION

2 The applicants seek leave to appeal directly to this Court, on a constitutional issue, in terms of Rule 19 (2).

C ISSUES TO BE ARGUED

3 The principal issue in this case is whether the award of constitutional damages is "appropriate relief" under section 38 of the Constitution, 1996, for an admitted and ongoing breach of the applicants' constitutional rights of access to adequate housing.

4 A subsidiary issue concerns the meaning and application of the decisions of the Supreme Court of Appeal in *Komape v Minister*

of Basic Education 2020 (2) SA 347 (SCA) and *MEC, Department of Welfare v Kate* 2006 (4) SA 478 (SCA).

D ESTIMATE OF THE LENGTH OF ARGUMENT

5 Argument will take less than a day. The applicants' argument will take no more than one hour.

E PARTS OF THE RECORD THAT ARE IMPORTANT FOR THE DETERMINATION OF THE APPEAL

6 The record has been compressed to exclude unnecessary documentation or documentation that is not in dispute. It remains reasonably lengthy, because aspects of this matter have so far been argued and decided in three courts. We submit that the lengthy history of the matter is relevant to assessing the nature of the breach of the applicants' rights and the appropriateness of a compensatory remedy.

7 The record falls into four parts –

7.1 The papers before Teffo J, together with Teffo J's judgment (volumes 1 to 4).

7.2 Papers relating to the appeal to the Surpreme Court of Appeal against Teffo J's order, and the contempt of court application that followed it (volume 5).

7.3 The variation application and the counter-application for constitutional damages (volume 6 to volume 9, p 830).

7.4 The judgment of Basson J, and the application for leave to appeal to this Court (volume 9, p 831 to 901 through to volume 10).

8 We submit that the volumes 6 to 10 ought to be read in their entirety, but that only the parts of volumes 1 to 5 that we specifically refer to in our written submissions need be read.

F SUMMARY OF ARGUMENT

9 Constitutional damages are the only form of relief left open to the applicants to remedy a clear, egregious, and ongoing breach of their rights of access to adequate housing, that has stretched out for the better part of two decades.

10 The applicants have been unnecessarily required to endure the condition of effective homelessness for the duration of the

respondents' refusal to obey the order of Teffo J. There is no empirical monetary standard against which their loss can be measured, but we submit that R5000 a month, which would indisputably allow the applicants to house themselves in the Tembisa area, constitutes the only appropriate relief now available to them, since none of the other remedies granted by the various courts below have worked.

11 The bases upon which Basson J refused to award constitutional damages cannot be sustained. They misconceive the applicable law, and are inconsistent with Basson J's basic factual conclusions: viz. that the applicants have vested rights to houses that the respondents have simply not provided. The breach of those vested rights requires a remedy.

12 Basson J's order dismissing the applicants' application for constitutional damages should be set aside, and substituted with an order directing the first respondent to pay R5000 to each of the applicants for every month that the order of Teffo J has gone, and will remain, unfulfilled.

G AUTHORITIES UPON WHICH PARTICULAR RELIANCE WLL BE PLACED IN ARGUMENT

13 *Fose v Minister of Safety and Security* 1998 (3) SA 786 (CC).

14 *MEC, Department of Welfare v Kate* 2006 (4) SA 478 (SCA).

STUART WILSON

IRENE DE VOS

Applicants' Counsel

Chambers, Sandton, 23 December 2020

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: 157/2020

In the matter between:

THUPETJI ALEXANDER THUBAKGALE	First Applicant
EKURHULENI CONCERNED RESIDENTS ASSOCIATION ("ECRA")	Second Applicant
RESIDENTS OF THE WINNIE MANDELA INFORMAL SETTLEMENT	Third to 134th Applicants

and

EKURHULENI METROPOLITAN MUNICIPALITY	First Respondent
EXECUTIVE MAYOR, EKURHULENI MUNICIPALITY	Second Respondent
CITY MANAGER, EKURHULENI MUNICIPALITY	Third Respondent
HEAD OF DEPARTMENT: HUMAN SETTLEMENTS, EKURHULENI MUNICIPALITY	Fourth Respondent

---

APPLICANTS' WRITTEN SUBMISSIONS

CONTENTS

A INTRODUCTION

1 The first and third to 134th applicants ("the residents") are 133 people who live in the Winnie Mandela Informal Settlement.[1] They are supported by a voluntary association ("ECRA"), which is the second applicant.

2 The residents seek leave to appeal against the refusal of the High Court (per Basson J) to award them damages for an admitted and ongoing breach of their constitutional rights of access to adequate housing.

3 The claim for damages arises in circumstances where the respondents –

3.1 deprived the residents of access to adequate housing, by failing to give the residents possession of the houses to which their successful subsidy applications entitled them;

[1] A list of the residents, containing their names and further particulars appears on the Record at vol 2, pp 145 to 150.

3.2 initially denied, over a period of several years, that any such deprivation took place;

3.3 eventually conceded that they were responsible for preventing the residents from gaining access to state-subsidised housing to which they are entitled, but then refused to do anything about it;

3.4 opposed an application for a High Court order directing the respondents to correct the breach of the residents' rights of access to adequate housing they had committed;

3.5 launched a substantially unsuccessful appeal against that order;

3.6 brought a frivolous application to vary their obligations under that order, which was predictably unsuccessful; and

3.7 now admit that, over twenty years after they initially deprived the residents of access to adequate housing, they remain in clear and continuing breach of the court

order meant to correct that deprivation,[2] and will only provide the houses required by the court order in another "few years".[3]

The residents and their plight

4 The residents are all very poor. They have a median income of just R2000 per month.[4] They live in poverty, with up to ten people each having to share modest structures made of wood, plastic and iron that they built for themselves.[5] They have little to nothing by way of access to water, sanitation and electricity.[6] The respondents accept that these conditions are "lamentable".[7] The residents have endured them since 1996.[8]

5 Each of the residents applied for, and was granted, a state housing subsidy as far back as 1998.[9] Each of the residents was matched to a particular stand developed with that subsidy in the Tembisa area, and, in due course, ought to have been given

[2] Record, vol 10, p 940, para 72.1.
[3] Record, vol 10, p 926, para 54, line 4.
[4] Record, vol 2, p 109, para 187.
[5] Record, vol 2, pp 107 and 108, paras 181 and 184.
[6] Record, vol 2, p 107, para 182.
[7] Record, vol 3, p 242, para 60.
[8] Record, vol 2, p 107, para 188.
[9] Record, vol 2, p 107, para 188.

possession and ownership of that stand and the house constructed on it.[10]

6 But this did not happen. For years, the first respondent ("the Municipality") stonewalled the residents' attempts to find out what had happened to their subsidies, their land and their houses.

7 In 2005, the residents formed ECRA to seek redress for the respondents' failure to provide them with the benefit of their subsidies. They approached the Municipality as a group and demanded an explanation. They sought information from the Special Investigations Unit, the Gauteng MEC for Human Settlements, the Presidency and the Office of the Public Protector.

8 But there were still no real answers.

9 Meanwhile, the first applicant ("Mr. Thubakgale") started to receive bills for utilities consumed on land that he did not live on.[11] The sixteenth applicant ("Mr. Moshupya") discovered that

[10] Record, vol 1, pp 7 to 8, para 5.
[11] Record, vol 1, p 111, para 14.

he had been registered as the owner of land and a house to which he had patently not been given access.[12]

10 It was perhaps then that the awful truth started to dawn: the Municipality had allowed other people to take illegal possession of subsidised houses meant for the residents, and to which the residents were still matched on the national housing database.

11 Through painstaking work, and with the assistance of ECRA and their attorneys of record ("SERI"), each of the residents was able to identify the stand and the house that their subsidy was used to develop and build, together with the records that proved that these were the plots of land and the houses that they were supposed to have been given.[13]

12 Still, the Municipality proceeded as if nothing had gone awry – even in the face of an admission by its Head of Human Settlements that land and houses frequently fail to get to their

[12] Record, vol 1, p 20 para 30.
[13] These records are identified in the residents' founding papers on the Record at vol 1, pp 11 to 94, paras 14 to 148. The records were themselves produced as annexures to the founding papers in the High Court, but they have been excluded from the Record in this Court, because their authenticity and the truth of their contents has never been in dispute. They would also have added several volumes to the Record.

intended beneficiaries because "corruption, fraud and/or bribery" lead to a "stand being illegally occupied".[14]

13 There can be no serious dispute that this is what happened in the residents' case. The residents did not get their houses because of fraud and corruption that the Municipality either connived in or failed to prevent.

14 By doing so, the Municipality breached the residents' rights of access to adequate housing.

The judgments of the courts below

15 The respondents have now been ordered to correct that breach by no less than seven judges in three courts.

16 In *Thubakgale 1*[15] the High Court (per Teffo J) directed that the residents must be provided with land and a house at a housing project known as Tembisa Extension Extension 25, or at another agreed location, by no later than 31 December 2018.[16]

[14] Record, vol 2, p 165.
[15] *Thubakgale v Ekurhuleni Metropolitan Municipality* 2018 (6) SA 584 (GP).
[16] *Thubakgale 1*, para 76 (1.1).

17 The respondents appealed against that order in *Thubakgale 2*.[17] They asserted that the residents were no different from anyone else in the housing queue, and that the Municipality had no obligation to prioritise them beyond the date on which their next housing project would be completed, in 2021. The Supreme Court of Appeal rejected this,[18] but for practicality's sake,[19] gave the respondents an extra six months – until 30 June 2019 – to provide the housing ordered by Teffo J.[20]

18 The respondents then waited out the extra time they had been afforded. Less than 48 hours before the extended deadline was due to expire, on Friday 28 June 2019, they launched an application to extend the deadline still further, to 30 June 2020.

19 That application was dismissed in *Thubakgale 3*.[21] The High Court (per Basson J) held that it had no jurisdiction to vary the order of Teffo J, because the right to a house confirmed in that

[17] *Ekurhuleni Metropolitan Municipality & others v Thupetji Alexander Thubakgale & 134 others* (125/2018) [2018] ZASCA 76 (31 May 2018).
[18] Record, vol 7, pp 688 to 689, para 32. See also Record, vol 5, p 448, para 56.
[19] Record, vol 5, p 423, para 4.
[20] Record, vol 5, p 424, para 6 (1.1.1).
[21] *Ekurhuleni Metropolitan Municipality v Thubakgale* (39602/2015) [2020] ZAGPPHC 373 (13 July 2020).

order vested in the residents once the extended deadline set by the Supreme Court of Appeal had expired, on 30 June 2019.[22]

The application for constitutional damages

20 Even though Basson J accepted that the residents each have a vested right to a house with effect from 1 July 2019, the fact remains that none of them actually has a house.

21 To cater for this reality, the residents asked Basson J to order the Municipality to pay constitutional damages in the sum of R5000 per resident per month, for every month that the order of Teffo J has gone, and will go, unfulfilled.

22 Despite accepting that the residents' constitutional rights of access to adequate housing had been breached,[23] Basson J refused to award constitutional damages.

23 It is against that order that the residents now seek leave to appeal.

[22] *Thubakgale 3*, para 69. See Record, vol 9, p 859, para 69, lines 20 to 21.
[23] Record, vol 9, p 860, para 73.

24 The need to give effect to the constitutional rights embodied in the order of Teffo J is one that can only be met by an order for constitutional damages, payable for so long as the order goes unfulfilled. The residents have no other legal right to compensation. Neither the Housing Act 107 of 1997 nor the National Housing Code, 2009 provide a right to damages in the event that the award of a subsidy does not result in a house actually being provided.[24] The residents' claim is plainly not a case in which Aquilian liability could arise.

25 The reasons for refusing constitutional damages given by Basson J are, respectfully, unconvincing.

26 Basson J found that, because this case involves the disobedience of a court order, the residents' remedy is really to seek an order directing that the respondents be held in contempt.[25] But this overlooks the fact that in *Modderklip* this Court found that the possibility of bringing contempt

[24] *Fose v Minister of Safety and Security* 1998 (3) SA 786 (CC) ("Fose"), para 60. See also *Callinicos v Burman* 1963 (1) SA 489 (A) at 497H-498C; *Da Silva and Another v Coutinho* 1971 (3) SA 123 (A) at 134H-135A, 140E-F; *Goldberg v Minister of Prisons* 1979 (1) SA 14 (A) at 27A-C.
[25] Record, vol 9, p 866, para 84.

proceedings does not preclude the award of constitutional damages.

27 Besides, the residents have brought contempt proceedings against the respondents, to no practical effect.[26]

28 Basson J also held that the damages sought by the residents were “punitive”. This was, respectfully, misconceived. Punitive damages are meant solely to punish those ordered to pay them. They arise, if at all, where compensatory damages have already been awarded, but are simply not enough to express the appropriate level of public or judicial opprobrium for the wrong committed.[27]

29 The residents do not seek damages of that kind. They want to be compensated for the period during which the order of Teffo J has gone, and will continue to go, unfulfilled. They do not seek damages over and above compensation they have already received, because they have received no compensation at all.

[26] See Record, vol 5, pp 426 to 455.
[27] *Fose*, para 63.

30 If the residents are not awarded damages, then their vested rights to a house will be meaningless.

31 Basson J found that the quantum of damages sought was "arbitrary".[28] But there was no basis laid for this conclusion. The damages were calculated on the basis of what it would cost the residents to house themselves in the Tembisa area for so long as the order of Teffo J goes unfulfilled. That amount – R5000 per resident per month – was based on a number of estate agents' advertisements annexed to the residents' papers and authenticated by the residents' attorney.[29] The respondents did not dispute the contents of these advertisements. Nor did they dispute that the advertisements were an accurate reflection of the cost of rental housing in the Tembisa area. In these circumstances, the amount is not arbitrary. It is clear, well-grounded and appropriate.

32 Finally, Basson J relied upon a dictum in the Supreme Court of Appeal decision in *Komape,*[30] to the effect that constitutional

[28] Record, vol 9, p 865, para 84.
[29] Record, vol 8, pp 771 to 782.
[30] *Komape v Minister of Basic Education* 2020 (2) SA 347 (SCA).

damages are not available for non-financial loss.[31] It appears that Basson J held that *Komape* precludes the award of constitutional damages, because the residents' claims are not "patrimonial" in nature.[32]

33 Yet Basson J overlooked the fact that the dictum in *Komape* cannot be reconciled with the decision in *Kate*,[33] where the Supreme Court of Appeal awarded constitutional damages precisely because the appellant could not show, or claim for, actual financial loss.[34]

34 Basson J also overlooked the fact that the purpose of constitutional damages is not to restore financial losses, but to "effectively vindicate the Constitution and deter further violations of it".[35] This purpose could never properly be served if only breaches of rights that resulted in financial injury could be compensated by an award of constitutional damages.

---

[31] *Komape*, para 58.
[32] Record, vol 9, p 865, para 84.
[33] *MEC, Department of Welfare v Kate* 2006 (4) SA 478 (SCA).
[34] *Kate*, para 33.
[35] *Fose*, para 98.

35 The infringement in this case is one that only constitutional damages can remedy. Everything else has been tried, and it has failed. As Basson J held, there is "no end in sight"[36] for the residents. An award of damages will enable the residents to house themselves until the Municipality obeys the order of Teffo J. It will also encourage the Municipality to obey the order as soon as possible, because once the order is fulfilled, the damages will no longer be payable.

36 In sum, this case cries out for compensatory relief.

37 In the remainder of these submissions, we will address –

37.1 The relevant facts;

37.2 The principles governing awards of constitutional damages, and why they demand an award of such damages in this case;

37.3 The reasons why a direct appeal to this Court against the order of Basson J should be permitted; and

[36] Record, vol 9, p 860, para 73.

37.4 The appropriate form order to be granted.

B THE FACTS

The deprivation of access to adequate housing

38 The founding papers before Teffo J amply demonstrate that each of the residents applied for a housing subsidy, that the subsidy was paid to the Municipality, and that the Municipality used the subsidy to purchase and develop a stand intended for occupation by the resident to whom the subsidy had been allocated.[37]

39 The residents produced substantial and meticulously sourced documents which demonstrated these facts.[38] They also produced photographs of the houses constructed with their subsidies, but illegally occupied by other people, together with photographs of the shacks in which they are forced still to live.[39]

40 The respondents have never seriously disputed that they are responsible for allowing other people to illegally occupy houses

[37] Record, vol 1, pp 11 to 94.
[38] Examples of these documents appear at Record, vol 2, pp 158 to 163. The bulk have been excluded from the record. See Record vol 10, pp 998 to 1014.
[39] Record, vol 2, p 159.

meant for the residents. An auditor's report commissioned by the Municipality confirms that this exactly is what happened.[40]

41 The most the respondents have done is quibble about the reasons why the residents have been deprived of their houses.

42 Notwithstanding the Head of Human Settlements' own admission that systematic "bribery", "fraud" and "corruption" are features of the housing allocation process within the Municipality,[41] the respondents resist the obvious conclusion: that the residents were corruptly excluded from the houses meant for them.

The residents' attempts to engage

43 Initially, the attitude of the state, including the respondents, was to deny that anything had gone wrong.

44 When the residents realised, in or about 2005, that they had lost out on the houses meant for them, they formed ECRA. The purpose of ECRA was to allow the residents to address

[40] Record, vol 4, pp 306 to 309, paras 25 to 36. See also vol 2, pp 185 to vol 3, p 212. The audit of what became of the residents' subsidies appears at vol 2, pp 208 to 212.
[41] Record, vol 2, p 165, lines 1 and 2.

misallocation of their houses as a group. From 2005 to 2014, there were a series of attempts to engage with the Mayor,[42] the Gauteng Department for Human Settlements,[43] the Presidency,[44] and the Office of the Public Protector.[45]

45 These engagements ended in 2014. The Municipality and the Gauteng Department of Human Settlements flatly insisted that, although the residents had been allocated housing subsidies, no houses had actually been built for them. There could accordingly be no question that the residents had been deprived of houses meant for them.[46] The Municipality and the Department simply had no regard to the multiple instances in which it was clear that the residents had been allocated actual houses, that had then become illegally occupied.[47]

46 It is matter of regret that the Public Protector also overlooked these facts, and accepted the Municipality's and the

[42] Record, vol 2, pp 120 to 122, para 222.
[43] Record, vol 2, p 116 to 118, paras 205 to 213.
[44] Record, vol 2, p 118, paras 214 to 217.
[45] Record, vol 2, p 123 to 124, paras 225 to 227.
[46] Record, vol 2 p 122, paras 223 and 224.
[47] Record, vol 2, p 123, paras 226.1 to 226.5.

Department's explanation wholesale, without so much as bothering to check if it was true.[48]

The *Thubakgale 1* application

47 Yet the residents knew that that neither the Municipality nor the Department could possibly be correct. With the assistance of SERI, they compiled the documentary evidence necessary to show that their subsidies had been used to purchase and develop land that others had been allowed to occupy illegally.

48 That evidence was incorporated into an application to compel the Municipality to make good on the misallocation by providing the residents with 133 alternative houses. That application was launched on 19 May 2015. The Gauteng MEC for Human Settlements and the Minister of Human Settlements were both joined to it.[49]

49 Initially, none of the respondents elected to oppose the application. They invited the residents to engage once again. That engagement process issued in a memorandum of

[48] Record, vol 2, p 124, para 227.
[49] Record, vol 1, p 1.

understanding, in which the residents agreed to submit to a further “verification” of their claims. Depending on the outcome of that verification, the respondents undertook to provide a timeframe within which the residents would be provided with houses.[50]

50 The outcome of the verification process is contained in the auditor’s report to which we have already referred.[51] In that report, the Municipality finally acknowledged that the residents’ complaints were well-founded. Each of them had in fact been deprived of the house built with their subsidy.

51 From here it should have been a short step to the agreement of a timetable for the provision of alternative houses.

52 That was not to be. The respondents again stonewalled the residents, who were left with no alternative but to proceed with the application.[52]

[50] Record, vol 2, pp 183 to 184.
[51] See also Record, vol 4, pp 306 to 309.
[52] Record, vol 4, p 313. Para 50 to 52.

53 Neither the MEC nor the Minister of Human Settlements ultimately opposed the application, but the respondents did.

54 Notwithstanding their own auditor's report to the contrary, the respondents rehashed a half-hearted denial that the residents been deprived of their houses. They suggested that the real culprit was not corruption, but a spectacularly ill-conceived housing allocation system involving "dummy numbers", through which the Municipality matched several beneficiaries to the same stand with the intention that only one of them would actually be able to take occupation of it.[53]

55 Plainly, there is no conceivable rational or lawful purpose the "dummy numbers" scheme could serve. Moreover, the "dummy numbers" excuse could never explain why Mr. Thubakgale, Mr. Moshupya, and others like them, were registered as owners of the stands that their subsidies were used to develop, if it was never intended that they would take occupation and ownership of those stands.

[53] Record, vol 4, p 366, para 30.

56 In truth, the “dummy numbers” scheme must either have been devised for the corrupt purpose of allowing those municipal officials in control of the allocation process to seek and accept bribes, or must at the very least have lent itself to that corrupt result.

57 The respondents further contended that their “limited resources . . . unfortunately cannot meet the demands of millions of people that live in the unfortunate circumstances of the applicants”.[54] They also said that the residents’ application was unnecessary. It was “merely an attempt to pressure the Respondents to prioritise the Applicants”.[55]

58 The residents were told to wait their turn. They were assured that houses on serviced stands at Tembisa Extension 25 would eventually be provided.[56] The residents just had to be less demanding, and more patient.

59 This of course misconceived the situation entirely. The point of the residents’ ten-year struggle up until that stage was that they

[54] Record, vol 2, p 182, para 47.
[55] Record, vol 3, p 238, para 45.
[56] Record, vol 3, p 239, para 48.

had been patient, that they had waited, and that they had actually been given a house. It was just that the Municipality had corruptly allowed someone else to take illegal occupation of it. The very least the residents deserved was the priority allocation of houses to replace the ones of which the Municipality had deprived them.

60 Teffo J agreed. Teffo J found that the respondents had breached the residents' rights of access to adequate housing, and directed that the violation be cured by the provision of houses at Tembisa Extension 25 or at another agreed location, by no later than 31 December 2018.[57] Teffo J was particularly critical of the respondents' "delaying tactics to continue to deprive the applicants of adequate housing".[58]

Thubakgale 2

61 The respondents have never challenged Teffo J's conclusion that the Municipality is responsible for a clear and egregious breach of the residents' rights of access to adequate housing.[59]

[57] *Thubakgale 1*, para 76 (1.1).
[58] *Thubakgale 1*, para 73. See also Record, vol 4, p 381, para 73.
[59] *Thubakgale 1*, paras 53 to 58.

In the aftermath of Teffo J's judgment, they finally accepted as a fact that the Municipality had deprived the residents of their state subsidised housing.

62 However, the respondents did not accept that this meant that they had to prioritise the residents for the provision of housing in future. The respondents accordingly appealed to the Supreme Court of Appeal against the date set by Teffo J for the provision of houses to the residents. They sought an extension of 3 years, to 31 December 2021.[60] The basis for this extension was that this was the date upon which it was convenient for the Municipality to incorporate the residents into one of their existing housing projects. There was no appreciation of the fact that the residents were entitled to be treated differently to the "millions" of others on the housing waiting list.

63 The Supreme Court of Appeal rejected the respondents' position that they need not prioritise the residents for housing. It ordered the respondents to file a report setting out the earliest date on which the first available houses to be constructed as

[60] Record, vol 4, pp 393 to 394, para 1.1.

part of their housing programme would be provided to the residents.[61]

64 That date turned out to be significantly earlier than 31 December 2021. It was 30 June 2019.

65 Citing concerns about the practicality of leaving an order that could not apparently be obeyed intact,[62] the Supreme Court of Appeal amended Teffo J's order to provide the respondents with a further six months in which to provide the residents with houses.

The contempt application

66 Yet the respondents again refused to lift a finger to implement the order of Teffo J. They once again stonewalled the residents' attempts to encourage them to do so.

67 The order of Teffo J requires the respondents to convene a steering committee including representatives of the residents,[63]

[61] Record, vol 5, p 448, para 56
[62] Record, vol 5, p 423, para 4.
[63] Record, vol 4, p 383, paras 1.3 and 3.

and provide quarterly progress reports on the construction of the houses to be provided to the residents.[64]

68 Eight months passed without any action from the Municipality. No reports were provided. No steering committee was convened. Accordingly, on 29 January 2019, the residents instituted contempt proceedings against the respondents.[65]

69 The Municipality did not oppose those proceedings. However, it contended that a steering committee had been set up, and reports had been provided. The committee and the reports apparently related to the whole Tembisa Extension 25 project, and not to a specific plan to provide the residents with houses.[66] The steering committee did not include any of the residents, and the residents had not been told about it. The reports had been provided to the Tembisa Extension 25 steering committee, but not to the residents.[67]

70 This was a plainly cynical response. The residents nonetheless offered to hold their contempt application in abeyance if the

[64] *Thubakgale 1*, para 76 (1.3) and (3).
[65] The contempt application appears on the Record at vol 5, pp 426 to 456.
[66] Record, vol 6, pp 511 to 512, para 30 and 31.
[67] Record, vol 8, p 714, para 112.

Municipality agreed to meet with, and report directly to, them.[68] The Municipality accepted this offer.

71 Once the steering committee was properly convened, and the reports were delivered, the motive behind the respondents' stonewalling became clear. The respondents had made two changes to their plans for the Tembisa Extension 25 housing project. These changes made clear that the Municipality had no intention of obeying the order of Teffo J.[69]

72 Firstly, the housing units to be provided to the residents would not materialise until July 2020, a year after the court order required them to be built.[70] Secondly, and because the Municipality wished to densify the Tembisa Extension 25 development, the residents would no longer be provided with land and houses, but with units in blocks of flats.[71]

73 The residents made abundantly clear that neither the delay nor the change from houses to flats actually complied with the order

[68] Record, vol 7, p 698, para 60.
[69] Record, vol 10, pp 910 to 911, para 21.
[70] Record, vol 7, p 699 paras 63 and 64.
[71] Record, vol 6, p 534, lines 30 to 50.

of Teffo J.[72] They sought to engage the Municipality on the provision of housing at "another agreed location" in terms of the order. Despite producing documents which demonstrated that there were many parcels of land available to Municipality,[73] the respondents took the view that the residents would simply have to wait until 2020, when they would be provided with flats.

Thubakgale 3

74 On 28 June 2019, on the last working day available to comply with the order of Teffo J, the respondents brought an application to extend the deadline for compliance with the order from 30 June 2019 to 30 June 2020. They also sought a declarator that the residents had to accept flats rather than houses as due compliance with that order.[74]

75 The residents opposed that application, and counter-applied for constitutional damages.[75] They sought payments that would

[72] Record, vol 7, p 698, para 60.
[73] Record, vol 8, pp 768 to 769. See also Record, vol 7, p 699, para 67 and vol 8, p 700, paras 67 and 68.
[74] Record, vol 6, p 449, para 3.
[75] Record, vol 7, pp 671 and 672.

allow them to house themselves in the Tembisa area for the period during which the order of Teffo J remained unfulfilled.[76]

76 These applications came before Basson J, who dismissed them both in a judgment delivered on 13 July 2020.

77 Basson J held that the right to a house confirmed in Teffo J's order vested in the residents on 1 July 2019. Beyond that date, High Court no longer had any jurisdiction to vary the order in a manner that would interfere with those vested rights.[77] In relation to the declarator, Basson J found that the judgment and order of Teffo J was not consistent with the provision of flats to the residents.[78]

78 There is no appeal against these aspects of Basson J's judgment and order.

79 Having found that the residents had vested rights embodied in a court order that the respondents had consistently ignored for

[76] Record, vol 7, p 672, para 2.
[77] Record, vol 9, p 859, para 69.
[78] Record, vol 9, p 849, para 54.

at least two years, Basson J found that she could do nothing to give effect to those rights through an award of damages.

80 That, we submit, led to a fundamental contradiction. Basson J held that each of the residents has a vested right to delivery of a house by the respondents. Those rights vested on 1 July 2019.

81 Yet the effect of the Basson J's order dismissing the application for constitutional damages is that the residents can do nothing to vindicate those rights except continue to press the respondents to belatedly provide houses that comply with the order of Teffo J.

82 The respondents' position in this Court is that those houses will not be provided for another "few years".[79]

83 The unfortunate effect of Basson J's order is that, in the interim, the residents' vested rights mean nothing, and the order of Teffo J is toothless.

84 That, we submit, cannot be correct.

[79] Record, vol 10, p 926, line 4.

C CONSTITUTIONAL DAMAGES

85 We submit that the only possible relief for each of the residents' vested rights to a house – for so long as those houses remain unbuilt – is the award of constitutional damages. There is simply no other adequate remedy.

Constitutional damages are "appropriate relief"

86 Section 38 of the Constitution entitles those whose rights have been infringed to appropriate relief for that infringement. To formulate appropriate relief, a court "must carefully analyse the nature of a constitutional infringement and strike effectively at its source".[80]

87 Appropriate relief is that which is "specially fitted or suitable. Suitability, in this context, is measured by the extent to which a particular form of relief vindicates the Constitution and acts as a deterrent against further violations of rights . . . In pursuing this enquiry one should consider the nature of the infringement and the impact of a particular remedy. One cannot be more specific.

[80] *Fose*, para 96.

The facts surrounding the violation of rights will determine what form of relief is appropriate".[81]

88 The more "diffuse and systematic" a pattern of rights violations is, the less likely it is that ordinary common law remedies will address it effectively.[82] For example, "[w]here there are systematic, pervasive and enduring infringements of constitutional rights, delictual relief compensating a particular plaintiff does not seem adequate as a means of vindicating the Constitution and deterring future violations of it".[83]

89 In this case, there has been an enduring and systematic breach of the residents' rights of access to adequate housing.

89.1 The residents were corruptly deprived of houses built especially for them in terms of the laws and policies that the state adopted to give effect to the right.

89.2 For years, the state refused to acknowledge this.

[81] *Fose*, para 97.
[82] *Fose*, para 98.
[83] *Fose*, para 102.

89.3 The residents then obtained a court order confirming the breach of rights. The order directed the provision of new houses to replace the ones of which the residents had been deprived. But the respondents ignored that order.

89.4 The respondents also then ignored the structural elements of the order that required them to report to the residents and involve them in the construction of the houses that were meant to cure the initial infringement.

89.5 The respondents then embarked on extensive, frivolous litigation to defeat the purpose of the order.

89.6 The respondents now purport to have made a range of offers to provide housing to the residents.[84] But none of that housing is available now. Much of it takes the form of accommodation in flats, which Basson J held would not comply with Teffo J's order. And the only houses the respondents identify that would, in principle, comply

[84] Record, vol 10, pp 924 to 926, para 54. These "offers" are dealt with at vol 10, pp 928 to 929, para 9.

with Teffo J's order will not be constructed for another "few years".

90 This is the infringement for which "appropriate relief" must be found.

91 All the ordinary remedies for the breach have been tried, and have failed. The residents' remarkably patient attempts to engage with the respondents and negotiate a resolution failed. The mandatory and structural relief ordered by Teffo J has been ineffective. Proceedings for contempt of court were tried, but the respondents then headed these off by bringing what turned out to be a wholly meritless application to vary the scope and content of Teffo J's order.

92 We know that if contempt proceedings are tried again, the respondents' answer will be the same: that they will not be able to comply with the order of Teffo J for another "few years".

93 This is, of course, patently untrue. Even the respondents accept that they could easily "buy land on the open market and start a

new development for the residents" or "go into the open market and purchase 133 individual houses for the residents".[85]

94 The respondents do not say that this is impossible. They simply say that they have no obligation to do this because "the residents' access to housing must be located in the Municipality's existing projects".[86]

95 The respondents have accordingly invented an unending circularity which will see them avoid compliance with Teffo J's order, and the provision of a remedy to the residents, for years to come. The respondents will provide housing, but only in their existing projects. These projects are subject to delays, for which the Municipality cannot be held accountable. So the residents must simply wait – for an unspecified period – for the Municipality to get around to providing houses to them when it is convenient to do so.

96 Whether or not this position is sustainable (we submit that it is not), that will be the argument in future contempt proceedings.

[85] Record, vol 10, p 915, paras 26.1 and 26.2.
[86] Record, vol 10, p 915, para 26.

The respondents will admit a breach of the Teffo J order, and of the residents' rights, but will deny that it is wilful or *mala fide*. They will evade compliance with the order for the next several years in this way, assisted by the inevitable delays in High Court and appellate litigation.

97 The respondents may or may not ultimately be held in contempt. But it is certain that the residents will be without their houses while the courts decide. They will live in their shacks. And, one by one, they will die.[87]

98 This simply cannot be what the Constitution means, especially when it has been given effect to in a court order that stands unfulfilled. In *Meadow Glen*, the Supreme Court of Appeal held that contempt of court is a "blunt instrument" that is often ill-suited to the resolution of the problems posed in giving effect to socio-economic rights.[88] In that case, the court extoled the virtues of structural relief. But, in this case, we know that structural relief, too, has failed.

[87] Record, vol 9, p 897, para 2.
[88] *Meadow Glen Homeowners' Association v Tshwane Metropolitan Municipality* 2015 (2) SA 413 (SCA) para 35.

99 It is in this context that the residents contend that the only form of relief that will "strike effectively"[89] at the source of the infringement of their rights is the award of constitutional damages. The residents seek R5000 per month each, calculated from 1 July 2019, to the date on which houses are made available to them in terms of the order of Teffo J.

100 The probable effect of such an award is three-fold –

100.1 First, it will enable the residents to move out of their shacks and house themselves while the Municipality goes about complying with the order of Teffo J in whatever way it chooses. This will achieve what has eluded the Municipality, and the courts that have hitherto been seized with this case. It will actually house the residents.

100.2 Second, it will encourage the Municipality to comply with Teffo J's order as quickly as possible, in order to bring the damages payments to an end.

[89] *Fose*, para 96.

100.3 Third, it will effectively deter future violations of rights, because the Municipality will know that it cannot in future string the residents, and those similarly situated, along in endless litigation. Sooner or later, it will have to pay for its delinquency.

101 We respectfully submit, that, in the extraordinary circumstances of this case, the award of constitutional damages is the only thing that is likely to effectively remedy the breach of the residents' rights.

The High Court was wrong to refuse constitutional damages

102 It remains to deal with the bases on which Basson J refused to award constitutional damages. We respectfully contend that none of them can be sustained.

The *Komape* case

103 Basson J was clearly animated by the Supreme Court of Appeal's dictum in *Komape* that "there is no reported decision in this country where constitutional damages have been awarded as a *solatium* for breach of a rights where there has

been no financial loss, either direct or indirect, or where the compensation had been awarded for physical and psychiatric injury".[90]

104 Accordingly, Basson J's conclusion, relying on *Komape,* appears to have been that, because the residents had not shown actual financial or "patrimonial" loss, there could have been no claim for constitutional damages.[91]

105 *Komape* is not a happy analogue of this case. What the Court in *Komape* had to deal with was the contention that constitutional damages could be awarded when the claimant had already received substantial compensation at common law. The courts have been generally been clear that damages of that nature are inevitably punitive, and for that reason inappropriate.[92]

106 Basson J ought accordingly have been slow to accept that *Komape* intended to lay down a general rule that constitutional

[90] *Komape,* para 58. See Record, vol 9, p 864, para 82.
[91] Record, vol 9, p 865, para 84, lines 11 to 14.
[92] *Fose*, para 70. *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA), paras 41 and 42.

damages could only ever be awarded for financial or patrimonial loss.

107 However, if this is what *Komape* means, then it is plainly wrong.

108 In the first place, it conflicts with the Supreme Court of Appeal's earlier decision in *Kate*. In *Kate*, Nugent JA awarded constitutional damages for what he called "a direct breach of a substantive constitutional right."[93]

109 The damages were awarded for the Eastern Cape Provincial Government's failure to pay a social grant on time. The amount awarded in that case was equal to the amount in interest that Ms. Kate would have earned if the grant had been paid within a reasonable time after the application for it was made.

110 But the amount awarded had nothing to do with any financial loss. Indeed, Nugent JA held that it had "not been shown that Kate suffered direct financial loss, and it is most unlikely that she did" because Ms. Kate's social grant "was destined to be consumed and not invested".[94] In other words, Ms. Kate would

[93] *Kate*, para 27.
[94] *Kate*, para 33.

never have earned the interest the Supreme Court of Appeal awarded her.

111 In characterising the nature of Ms. Kate's non-financial loss, Nugent JA said that "[t]he inevitable result of being unlawfully deprived of a grant that is required for daily sustenance is the unnecessary further endurance of that condition for so long as the unlawfulness continues. That is the true nature of the loss that Kate suffered. There is no empirical monetary standard against which to measure a loss of that kind".[95]

112 Clearly, the Court in *Kate* awarded constitutional damages for non-financial loss.

113 The second reason why *Komape* must be wrong is simply this: if constitutional damages were only available for financial injury, they would hardly be available at all. Constitutional damages are meant to remedy breaches of constitutional rights – whatever the loss caused by those breaches, whether financial

[95] *Kate*, para 33. Emphasis added. The decision in *Komape* distinguishes between "direct" and "indirect" financial loss. This was perhaps to eliminate any apparent tension with the decision in *Kate* – which refers only to the fact that Ms. Kate had not shown any "direct" financial loss. It is not clear what "indirect" financial loss resulting from a breach of constitutional rights would be. But it is clear from the decision in *Kate*, that Ms. Kate had not shown any "indirect" financial loss either.

or non-financial. The only question is whether an award of damages is suitable having regard to the nature of the breach.

114 To narrow the range of cases in which constitutional damages may be awarded to those in which the breach of rights amounted to a mere financial injury is to miss the point entirely. It is also to accept that constitutional damages may never be awarded, because delictual remedies for pure economic loss will almost always permit the recovery of financial loss.

115 The residents' case is precisely that their loss cannot be quantified in financial terms. That – in addition to the fact that they simply have no other remedy – is what makes constitutional damages the appropriate relief in this case.

116 Like Ms. Kate, the residents have been unnecessarily required to endure the condition of effective homelessness for the duration of the respondents' refusal to obey the order of Teffo J. Like Nugent JA, we accept that "there is no empirical monetary standard against which their loss can be measured", but we submit that R5000 a month, which would indisputably

allow them to house themselves in the Tembisa area, would be a very good start.

The damages sought are *not* punitive

117 Basson J held that the damages the residents sought were "punitive".[96] This is, respectfully, wrong, for at least two reasons.

118 First, it misconceives the residents' case. The residents' case is that the money they seek is needed to house them for so long as the respondents fail to do so. As Basson J put it "the pleaded case is for monetary compensation that will allow the residents to house themselves until the municipality does what it was supposed to do almost twenty years ago".[97] The point is clearly to compensate the residents, not to punish the respondents.

119 Second, it misconstrues the nature of punitive damages. Punitive damages are only punitive because the claimant has already been adequately compensated for their actual loss, and some further punishment or opprobrium is required.

[96] Record, vol 9, p 865, para 84, line 15.
[97] Record, vol 9, p 866, para 84.

120 That is clearly not the case here. The fact is that the residents have not been compensated at all.

Contempt of court

121 Basson J held that "the fact that the [respondents] have delayed in the execution of [Teffo J's order], is a question of contempt of court". The implication of this is that constitutional damages are not available where contempt of court proceedings can be pursued.

122 Basson J gave no reasons for drawing this conclusion, which is inconsistent with existing law. In *Modderklip*, a landowner was awarded constitutional damages because the state was unwilling to provide alternative accommodation that would enable the landowner to execute an order evicting thousands of poor people who had unlawfully occupied its land.

123 It was suggested by the state in that case that the landowner's proper remedy was to execute the eviction order, whether through civil contempt proceedings, prosecutions for trespass, or asking the Sheriff to remove the unlawful occupiers forcibly.

124 Both this Court,[98] and the Supreme Court of Appeal,[99] rejected the notion that contempt of court proceedings, prosecutions for trespass or the forced removal of the unlawful occupiers could be effective alternatives to constitutional damages.

125 Because of the large number of people in occupation, none of these remedies was practical, unless the state provided some alternative land to accommodate the unlawful occupiers. Accordingly, the landowner was awarded damages for the breach of its section 25 (1) right against arbitrary deprivation of property, which were payable for so long as the state failed or refused to provide the alternative land.

126 It follows that the theoretical availability of contempt of court proceedings does not preclude an award of constitutional damages. The question will always be whether those proceedings would provide any practical relief.

127 We have already set out why contempt of court proceedings will not provide the residents with any practical relief for at least the

[98] *President of the Republic of South African v Modderklip* 2005 (5) SA3 (CC), para 11.
[99] *Modderfontein Squatters v Modderklip Boerdery* 2004 (6) SA 40 (SCA), para 7.

foreseeable future. We also emphasise that they will do nothing, in themselves, to provide any relief for the past breach of the residents' vested rights, since 1 July 2019.

128 For all of these reasons, contempt of court proceedings will not result in the residents being afforded "effective relief" for the respondents' breach of their rights.

The quantum of damages sought

129 Finally, Basson J characterised the quantum of damages the residents sought as "arbitrary at best".[100]

130 In truth, though, the quantum was fully justified. The basis for the quantum is clear. It is what it would cost to house the residents in rental accommodation in the Tembisa area for so long as the respondents have failed, and continue to refuse, to give effect to the order of Teffo J.

131 As to the quantification of this amount, the residents' attorney searched the websites of estate agents who let property in the Tembisa area. It is clear from these searches that the cheapest

[100] Record, vol 9, p 865, para 84.

rentable accommodation in the Tembisa area costs approximately R5000 per month.[101]

132 It was open to the respondents to place this figure in dispute. They did not. They stated merely that the question of the cost of accommodation in the Tembisa area could only be introduced by way of expert evidence.[102]

133 This is transparently wrong. The residents' case is not that the average cost of accommodation in the Tembisa area is R5000 per month. Their case is that they can rehouse themselves for that amount if it is paid to them. Even if the question of the average cost of accommodation in the Tembisa is an expert question (it does not seem to us that it really is), the question of what the residents would need to rehouse themselves in the area is clearly not an expert question. It is something upon which the residents, through their attorney, were perfectly entitled to adduce evidence.

[101] Record, vol 8, p 711, para 99.
[102] This point is echoed in the judgment of Basson J on the Record at vol 9, p 864, para 82.

134 It is also something that called for a response from the respondents. Given that none was forthcoming, it has to be accepted that the quantum of damages sought is undisputed. It is, in any event, far from arbitrary.

135 Even if, however, the quantum claimed was, for whatever reason, unsatisfactory, it was open to Basson J to declare that the residents are entitled to constitutional damages, and to postpone the question of quantum. With the consent of the parties, the question could have been referred to arbitration.

136 The alleged "arbitrariness" of the quantum the residents claimed was accordingly no obstacle to the award of constitutional damages.

Constitutional damages must be awarded

137 It follows from all of this that constitutional damages are the only form of relief left open to the residents. That relief is necessary to remedy a clear, egregious, and ongoing breach of their rights, that has stretched out for the better part of two decades.

D LEAVE TO APPEAL AND THE INTERESTS OF JUSTICE

138 The residents clearly raise important constitutional issues that it is in the interests of justice to decide. The question is whether this Court ought to entertain them on direct appeal.

139 For their part, respondents do not oppose the application for leave to appeal directly to this Court.[103] But we submit that two further considerations militate decisively in favour of direct appeal being permitted.

140 First, there has already been extensive litigation on this matter in the High Court and Supreme Court of Appeal. It is not in the interests of justice to subject the residents to the further delays that would be caused by sending this leg of the case to the Supreme Court of Appeal.

141 Second, the questions raised in this leg of the case are all about the appropriateness of constitutional damages. There are already a number of decisions in the Supreme Court of Appeal that bear on this question. Two of those decisions appear to be

[103] Record, vol 10, p 905, para 6.

in tension with each other on a point that is vital to this case. This is, accordingly, an appropriate matter in which to resolve those tensions on direct appeal.

142 The application for leave to appeal directly should accordingly be granted.

E CONCLUSION

143 We ask for the following order –

1. The application for leave to appeal is granted.
2. The appeal is upheld.
3. Paragraph 2 of the order of the High Court is set aside, and replaced with the following –
    a. It is declared that the first applicant ("the municipality") is liable to compensate each of the first and third to one-hundred-and-thirty-fourth respondents for the following breaches of their rights under section 26 of the Constitution, 1996 –
        i. the municipality's failure to provide each respondent with the plot of land and the house constructed used that respondent's housing subsidy; and
        ii. the first to fourth applicants' failure to take the steps necessary to implement the order granted by this court in *Thubakgale v Ekurhuleni Metropolitan Municipality* 2018 (6) SA 584 (GP).

b. The municipality is directed to pay to each respondent a sum equal to R5000 for every month, from 1 July 2019, to the date on which that respondent is given occupation of the land and the house required by the order of this court in *Thubakgale v Ekurhuleni Metropolitan Municipality* 2018 (6) SA 584 (GP).

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

STUART WILSON

IRENE DE VOS

Applicants' Counsel

Chambers, Sandton, 23 December 2020

LIST OF AUTHORITIES

Statutes

Housing Act 107 of 1997.

National Housing Code, 2009.

Cases

Callinicos v Burman 1963 (1) SA 489 (A).

Da Silva and Another v Coutinho 1971 (3) SA 123 (A).

Ekurhuleni Metropolitan Municipality & others v Thupetji Alexander Thubakgale & 134 others (125/2018) [2018] ZASCA 76 (31 May 2018).

Ekurhuleni Metropolitan Municipality v Thubakgale (39602/2015) [2020] ZAGPPHC 373 (13 July 2020).

Fose v Minister of Safety and Security 1998 (3) SA 786 (CC).

Goldberg v Minister of Prisons 1979 (1) SA 14 (A).

Komape v Minister of Basic Education 2020 (2) SA 347 (SCA).

Meadow Glen Homeowners' Association v Tshwane Metropolitan Municipality 2015 (2) SA 413 (SCA).

MEC, Department of Welfare v Kate 2006 (4) SA 478 (SCA).

Modderfontein Squatters v Modderklip Boerdery 2004 (6) SA 40 (SCA).

Olitzki Property Holdings v State Tender Board 2001 (3) SA 1247 (SCA).

President of the Republic of South African v Modderklip 2005 (5) SA3 (CC).

Thubakgale v Ekurhuleni Metropolitan Municipality 2018 (6) SA 584 (GP).