IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC CASE NUMBER: CCT 157/20
SCA CASE NUMBER: 125/2018
GD CASE NUMBER: 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

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RESPONDENTS' HEADS OF ARGUMENT

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INTRODUCTION

1. This Court is called to decide whether the respondents' ("Municipality's") delays in complying with the SCA Order[1] justify the exceptional remedy of constitutional damages as *"appropriate relief"*[2] (a) in principle and (b) for the full period of the Municipality's non-compliance with the SCA Order until the future date by which it complies with the SCA Order.[3] We submit that it does not.

2. According to the Municipality's understanding, the parties have recently reached an agreement in terms of which the Applicants will take interim occupation of apartments at Tembisa 25 in a few months' time until free standing houses at Esselen Park are ready in a few years.[4] As a result, the Applicants will be imminently housed. The Municipality seeks leave to admit a supplementary affidavit filed on 8 January 2021 containing recent correspondence with the Applicants, including this Agreement and other offers for housing, some of which the Applicants rejected.

3. The Municipality has since received correspondence in which the Applicants dispute that an agreement has in fact been reached. The parties are continuing to correspond hereon, and leave will be sought to place such further correspondence

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[1] The SCA Order amends the Teffo Order. It requires the Municipality to provide to each of the applicants, a house at Tembisa Ext 25 *"or at another agreed location"* on or before 30 June 2019. SCA Order Vol 5 p 421 par 2.
[2] In terms of section 38 of the Constitution.
[3] The Municipality does not oppose the relief sought in the applicants' notice of motion, in seeking leave to appeal to this court directly and directing that costs are to be costs in the appeal. NoM para 1 – 2, pp 869 – 870; AA par 7, p 4.
[4] Supp Affi par 18.

before this Court before the hearing date of this matter.

4. The Applicants persist with their claim for constitutional damages for the Municipality's failure to give effect to their vested right to a house in terms of the SCA Order, from 1 July 2019 until the Municipality's date of compliance with the Order. We submit that the relevant period under consideration must necessarily exclude the period of available interim accommodation in apartments. This is so especially because the Applicants themselves cast the purpose of their constitutional damages to house themselves until the Municipality complies with the SCA Order. As the Applicants may now be housed before 1 June 2021, the relevant period before this Court is just under two years: 1 July 2019 to 1 June 2021 (or earlier, on whatever date the Applicants take occupation of apartments). If the Applicants ultimately refuse this temporary housing option, this would be unreasonable and ought to preclude them from any damages from the date of availability of the Apartments.

5. The following main reasons to dismiss the Applicants' appeal arise:

    5.1. First, the applicants have alternative remedies. These are delict, contempt of court and supervisory orders such as the appointment of a special master. They have chosen not to pursue these remedies. The effect of their attempt to circumvent existing remedies is to avoid establishing e.g. fault and/or wrongfulness and circumvent the requirements of their alternative remedies many of which require a degree of fault. This seeks to impose strict liability for breach of a court order on a state organ incongruent with public policy and existing remedies for breach of a court order such as contempt proceedings.

We submit that alternative remedies ought first to be explored by the Applicants. Alternatively, fault, wrongfulness and/or the reasonableness of the Municipality's explanations ought to be considered by this Court as relevant factors in formulating an "appropriate remedy".

5.2. Second and related, the Applicants' attempt to circumvent the Municipality's explanations result in constitutional damages being punitive on the Municipality. At the level of principle, granting constitutional damages (which would total more than R15 million for the 23-month period) would unduly punish the Municipality. But even if this Court does find constitutional damages to be appropriate, significant portions of the 23-month period ought not to attract constitutional damages for a variety of reasons, including the Municipality's explanation for period of delay (e.g. Lockdown).

5.3. Third, the award of constitutional damages for the Municipality's inability to comply with the SCA Order on time would have a far-reaching effect on the public purse and the state's service delivery ability. It would mean that any person who obtains an order against the state (or even a private person) can directly claim constitutional damages for any delay in compliance with the order, regardless of circumstances. This would significantly hamper the state's ability to give effect to its constitutional obligations and further deplete already scarce resources.

5.4. Finally, there is no contradiction between the SCA judgments in *Komape* and *Kate*. To the extent that the two judgments conflict, *Komape* as the later judgment clearly overruled *Kate*.

6. We address each in turn, with reference to the Applicants' mischaracterisation of the Municipality's conduct and the Applicants' conduct, where relevant.

CONSTITUTIONAL DAMAGES AND ALTERNATIVE REMEDIES

7. This Court has broad powers to determine what constitutes "appropriate relief". In doing so this Court must have regard to the following considerations on a case-specific basis:

   7.1. The circumstances of the case, including the nature and importance of the particular right that has been infringed;[5]

   7.2. The alternative remedies that might be available to assert and vindicate these rights;[6]

   7.3. The consequences of the breach for the Applicants;[7]

   7.4. What would be an effective remedy,[8] or differently put, what relief is required in the circumstances to protect and enforce the Constitution;[9] and

   7.5. Other case-specific considerations.[10]

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[5] *Fose v Minister of Safety and Security* 1997 (3) SA 786 ("*Fose*") par 60; *MEC for the Department of Welfare v Kate* 2006 (4) SA 478 (SCA) ("*Kate*") par 25.
[6] *Kate* par 25.
[7] Ibid.
[8] *Fose* par 65.
[9] *Fose* par 19.
[10] See e.g. the case-specific considerations in *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) pars 54-55.

8. We submit for the reasons set out below that the following additional considerations must also be taken into account:

   8.1. The Municipality's reasons for the delay in complying with the SCA Order;

   8.2. The degree of fault and wrongfulness; or wilfulness and bad faith, that can be attributed to the Municipality in respect of specific periods of non-compliance;

   8.3. The impact of the remedy on the public purse; and

   8.4. The far-reaching consequences of ordering constitutional damages in this case, to others similarly situated and also the adverse impact on other housing beneficiaries as a result of the drain on the Municipality's funding.

9. The question of whether constitutional damages are appropriate without any resort to alternative remedies is "*of considerable difficulty and importance with far-reaching ramifications"*.[11] We submit that alternative remedies must first be exhausted, alternatively, it must be taken into account as a key factor in determining appropriate relief.

10. The importance of considering alternative causes of action lies in their elements. By directly and exclusively seeking constitutional damages of more than R15 million,[12] the Applicants ask this Court to impose a form of strict liability on the Municipality for delays in complying with court orders in respect of the provision of

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[11] *Minister of Police v Mboweni* 2014 (6) SA 256 (SCA) ("*Mboweni*") pars 4; 18.
[12] Calculated at R5 000 per applicant per month from 1 July 2019 to 1 June 2021 (23 months).

housing. The Municipality's reasons for non-compliance must matter. Its degree of fault and wrongfulness in respect of the period from 1 July 2019 onwards, must matter. Whether it acted wilfully and in bad faith must matter. And finally, balancing its obligations towards the other 118 informal settlements, must matter.

11. The SCA in *Mboweni* found that the *"proper starting point for the enquiry was to consider whether the existing remedy by way of damages for loss of support was an appropriate remedy for any breach of the children's constitutional rights"*.[13] It then found that the Court *a quo* erred in not first considering whether, "*[a]s a starting point"*, this Court ought first to consider whether the common law provides an adequate or appropriate remedy for the breach complained of in the present case.[14] This is also consistent with the principle of subsidiarity.[15]

12. We submit that:

    12.1. Constitutional damages ought only to be awarded when other existing remedies are not available, or would not provide effective relief.

    12.2. In the alternative, the availability of alternative remedies and the defendant's reasons for its action or inaction, including its relative degree of fault or wilfulness, ought to be necessary considerations in deciding

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[13] At par 21.
[14] *Komape* par 42.
[15] For further support of constitutional damages as a remedy of last resort, see e.g. *Snyman v van Tonder* (WCHC) 24 May 2017 (16402/16) (Unreported) at pars 5 – 6 (Available at http://www.saflii.org/za/cases/ZAWCHC/2017/60.pdf) Zitzke "Constitutional Heedlessness and Over-excitement in the Common Law of Delict's Development" [2018] CCR (11) 259 at 288-289; Bosch "Bent out of shape?: Critically assessing the application of the right to fair labour practices in developing South African Labour Law" (2008) 19 Stell LR 374 at fn 22.

whether constitutional damages are an appropriate remedy. Parties ought not to be permitted to sidestep central issues such as fault and wrongfulness merely by choosing the more nebulous 'appropriate relief' route.

13. The Applicants have at least three available alternative remedies: Delict; contempt of court and structural interdicts with a third-party supervisor. In light of the Applicant's decision not to pursue any of these routes, constitutional damages cannot be an appropriate remedy.

Delict

14. The Applicants have not explained why delict is not available to them and why they chose not to persist with it. While they did not *"plead patrimonial loss in their application"*,[16] they are free to bring a delictual claim against the Municipality, for either *solatium* or pure economic loss. Yet, they have been unwilling or unable to bring a claim for *"wrongful, culpable conduct by one person that factually causes harm to another person that is not too remote"*,[17] through no fault of the Municipality. If the Applicants succeed in this matter, it would amount to granting a delictual claim through the back door without the Applicants needing to prove *inter alia* wrongfulness or negligence.

15. The Applicants' facts fit into the Aquilian action, at the very least for a claim for pure economic loss. Under a claim for pure economic loss, the Applicants would have

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[16] Basson Judgment par 84 Vol 9 p 865.
[17] *De Klerk v Minister of Police* 2019 (12) BCLR 1425 (CC) par 15.

to prove negligence, an act or omission, causation and damages, and wrongfulness: In pure economic loss cases, wrongfulness is not presumed and therefore needs to be specifically established. This inquiry into wrongfulness involves the weighing of competing norms and interests, and testing conduct against the legal convictions of the community, underpinned by the Constitution.[18]

16. This raises several questions, including: Does the community informed by Constitutional values consider a state organ's inability to comply with a court order as actionable *regardless* of that state organ's explanation for its non-compliance, and/or regardless of its other obligations towards its other residents? Such issues ought to be grappled with by a court appropriately seized with a delictual claim. If policy considerations do not require that the Municipality acted wrongfully, then a court has to grapple with why constitutional damages would be an appropriate remedy *despite* the Municipality not having acted wrongfully. In doing so it would also have to grapple with indeterminate liability, which wrongfulness typically limits. Here the Applicants seek constitutional damages in respect of a future date as well regardless of what the circumstances might be. If for any reason the Municipality is unable to house the Applicants by 1 June 2021, the issue of indeterminate liability will loom large. If the Applicants succeed, by 1 June 2021, the Municipality would have paid about R115 000 to each Applicant. This is about the same amount as the value of their free-standing houses would have been per the old plans at Tembisa 25.[19]

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[18] *Loureiro and Others v Imvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) par 34. See also *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2015 (1) SA 1 (CC) para 20; *Mashongwa v PRASA* 2016 (3) SA 528 (CC) pars 22 - 23

[19] The market value of each of these houses was estimated at R116 000. AA par 28 Vol 10 p 916.

17. The Applicants can also frame their loss as one of solatium as a result of an alleged breach of their rights to privacy and dignity because of the delay in providing adequate housing. This option too, has not been pursued.

18. On the present facts, especially with the large amounts at stake,[20] a delictual remedy is plainly available to the Applicants. A claim for constitutional damages will in any event not assist the Applicants in housing them as the Municipality will house them imminently. What the Applicants seek in truth is damages for past non-compliance with a court order.

Contempt of Court

19. The applicants have declined seriously to pursue contempt of court proceedings. This avenue remains available to them.

20. First, the Applicants baldly allege that contempt proceedings *"are unlikely to succeed in this case".*[21] But even if this is the Applicants' genuine belief,[22] this is to admit that they cannot establish the necessary wilfulness or bad faith required for contempt on the necessary standard of proof.[23] The consideration of alternative

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[20] This case is unlike *Ngomane and Others v City of Johannesburg Metropolitan Municipality* 2020 (1) SA 52 (SCA), where the SCA found (at par 25) that the value of the property destroyed was negligible and because it had *"trifling commercial value"*, it was not necessary to first pursue a delictual claim. (A total amount of R40 500, R1 500 per applicant, was awarded.) What is significant is that the SCA nonetheless considered whether alternative remedies were appropriate, and did not seek to lay down a general principle that alternative remedies are irrelevant for the purpose of deciding a claim for constitutional damages. Nor is this case like *Kate*, where the state did not offer any explanation at all for its more than three-year delay to process Ms Kate's grant application. Instead, the SCA (at par 10) made room for the practical realities of governance and delays inherent therein.

[21] FA par 8 Vol 9 p 874.

[22] The Applicants have threatened imminent contempt of court proceedings in virtually every letter written to the Municipality. See e.g. the letters from the Applicants in the Municipality's supplementary affidavit.

[23] For the requirements of contempt of court see e.g. *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA).

available remedies is not whether the Applicants *think* that they can *succeed* with an alternative remedy but whether the remedy is, as a matter of law and fact, *available* to be pursued. Contempt is patently available.

21. Second, contempt is patently available in respect of *both* past and future non-compliance. It is established that contempt proceedings may also be brought in respect of past non-compliance with court orders.[24] It therefore remains an appropriate available remedy.

22. Third, constitutional damages will not succeed in housing the Applicants sooner than they may now be housed in interim accommodation.

23. Finally, an order for constitutional damages instead of contempt, permits the Applicants to circumvent the fault requirements for contempt of court. A Court should be very slow to permit parties to obtain damages against an organ of state on such a 'per se' or strict liability basis when it is unwilling or unable—on its own admission—to prove the requisite degree of wilfulness and/or bad faith.

Structural interdicts

24. The Applicants argue that supervisory orders have categorically failed because of the Municipality's non-compliance with the Teffo Order. This is not so. The Teffo Order merely required reporting not oversight. The following options, amongst others, remain available as appropriate relief:

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[24] *Matjhabeng Local Municipality v Eskom Holdings Ltd* 2018 (1) SA 1 (CC) par 54; *Lan v Or Tambo International Airport Department Of Home Affairs Immigration Admissions*, 2011 (3) SA 641 (GNP) pars 71 – 72.

24.1. An order that directs the Municipality to file progress reports on a quarterly basis on oath with this Court, failing which the Court or the Applicants may set the matter down again for hearing and in respect of which this Court expressly retains its supervisory jurisdiction until discharged; and/or

24.2. The appointment of a third party, whether called an independent expert or special master, to oversee the Municipality's implementation of the SCA Order and report to this Court on its progress.

25. The Applicants rely on *Meadowglen* to argue that contempt of court is often not suitable to give effect to socio-economic rights. However, *Meadowglen* is no authority in support of constitutional damages as an alternative to contempt. The SCA in *Meadowglen* preferred a *structural interdict* over contempt to ensure future compliance with a court order. It did so because it had regard to the complexity of giving effect to socio-economic rights, and the need to take limited state resources into account in crafting an effective remedy. It held:[25]

> *"Both this Court and the Constitutional Court have stressed the need for courts to be creative in framing remedies to address and resolve complex social problems, especially those that arise in the area of socio-economic rights. It is necessary to add that when doing so in this type of situation courts must also consider how they are to deal with failures to implement orders; the inevitable struggle to find adequate resources; inadequate or incompetent staffing and other administrative issues; problems of implementation not foreseen by the parties' lawyers in formulating the order and the myriad other issues that may arise with orders the operation and implementation of which will occur over a substantial period of time in a fluid situation. Contempt of court is a blunt instrument to deal with these issues and courts should look to orders that secure on-going oversight of the*

[25] At par 35.

implementation of the order."

26. A viable alternative to contempt is not constitutional damages, but a structural interdict that addresses any potential non-compliance by the Municipality and takes into account resource and other Municipality constraints as the SCA did in *Meadowglen.*

PUNITIVE DAMAGES AND THE PARTIES' CONDUCT

27. On the level of principle, awarding constitutional damages to the Applicants from day one of the Municipality's breach of the SCA Order until an uncertain future date of provision of housing, is inherently punitive in nature. In the words of Basson J *a quo*, it would have a *"punishing effect on the municipality for not complying with a court order"*.[26] This *"punishing effect"* is even more pronounced where constitutional damages is to be ordered regardless of the Municipality's explanation for non-compliance, including a disregard for fault and wrongfulness and/or bad faith and wilfulness, and where doing so would drain state resources.

28. In *Fose*, this Court was concerned with using state resources for punitive purposes in the context of constitutional damages. This Court held that punitive damages against government does not serve as a significant deterrent and, the more substantial such punitive damages are, *"the greater the anomaly that a single plaintiff receives a windfall of such magnitude"*.[27] The Court went on to find that ordering punitive constitutional damages would be an inappropriate use of scarce

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[26] Basson Judgment par 84 Vol 9 p 865.
[27] *Fose* par 71.

government funding:[28]

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

29. It is so that the Courts in *Fose* and *Komape* were concerned with the punitive effect of ordering constitutional damages *in addition to* common law damages which the Applicants have not sought in this case. However, we submit that the same principle applies to any order that would have a financially punitive effect on the state. The only reason why the exact same enquiry as in *Fose* and *Komape* does not arise in this case is because of the Applicants' attempt to circumvent existing remedies.

30. The Municipality has sought to explain its delay in giving effect to the SCA Order. In respect of its timeline, the Municipality has said *inter alia* that:

    30.1. Housing projects are complex and typically beset with difficulties and delays;[29]

    30.2. Simply installing Municipal services to a site (i.e. water, sanitation and

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[28] At pars 71 – 72. See also *Komape* at par 59.
[29] AA par 11 Vol 10 p 906.

electricity, ("bulk services") ordinarily takes longer than a year, in part because the services are specially designed for dolomitic land;[30]

30.3. Before installation and housing construction, a competitive bid process must be undertaken;[31]

30.4. The Municipality only inherited the Tembisa Ext 25 project in 2013;[32]

30.5. Since 2013, the Municipality has demarcated three housing megaprojects: at Tembisa, Esselen Park and Clayville;[33]

30.6. *In situ* upgrades of the informal dwellings cannot be made because of the dolomitic land;[34]

30.7. At the time that the matter was argued before Teffo J, the Municipality's plans reflected that free-standing houses would be built on Tembisa 25, which would contain 1500 houses;[35]

30.8. The issue of whether an apartment (which is what is currently being rolled out to residents) would suffice was not before Teffo J;[36]

30.9. Teffo J gave the Municipality 12 months to start and complete a building development which was not a realistic timeline. The Municipality at the

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[30] AA par 11 Vol 10 p 906.
[31] Ibid.
[32] AA par 14 Vol 10 p 907.
[33] AA par 15 Vol 10 p 908.
[34] AA par 17 Vol 10 p 908.
[35] Ibid.
[36] AA par 18 Vol 10 p 909.

time planned the Tembisa 25 project to be complete by 2021;[37]

30.10. After the Teffo Order was granted, the Municipality amended its plans for Tembisa 25 to cater for more of their residents and to house an additional 2000 families in apartments. The plans for Tembisa 25 therefore changed.[38] The Municipality may be criticised for having changed this plan, but there is no factual basis on which to conclude that the plan was corruptly changed. It was a *bona fide* attempt to accommodate more residents and to more economically use the *"scare resources"* that the Court refers to in the context of socio-economic rights. In its May 2018 report to the SCA, the Municipality explained that *"the project proved to be uneconomical, hence a densified approach was considered"*;[39]

30.11. Before the SCA, the Municipality again sought a deadline of 2021 but when pressed by the bench, moved the date up to 30 June 2019. This date turned out to be unrealistic.[40]

30.12. The litigation before Basson J was instituted by the Municipality to clarify whether an apartment, instead of a free-standing house, would comply with the Teffo Order (a question that was not before that Court). Basson J only held on 13 July 2020 that it would not comply and that free-standing houses must be provided.

30.13. The Municipality's explanation seeks to contextualise some of the delays

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[37] AA par 18 Vol 10 p 909.
[38] AA par 21 Vol 10 p 910.
[39] AA par 21 Vol 10 p 911.
[40] AA par 22 Vol 10 p 911.

and is based on the view that, while the Applicants ought to be prioritised, the Municipality must balance its obligations to the Applicants in terms of the court orders with that of its other thousands of residents in its 119 informal settlements who need urgent access to housing.[41] The Municipality has explained that it does not have spare funding available for additional projects.[42] The Applicants have suggested in reply that the Municipality can simply apply for more funding and get it.[43] They do not accept that the Municipality has limited resources, as does the Province from which the Municipality receives its funding.

31. The Applicants' case is for damages for the period of non-compliance with the SCA Order. While the Municipality can be criticised for its conduct prior to 1 July 2019, this is not relevant for determination of the reasons for the Municipality's delays from 1 July 2019 onwards.

32. In respect of the relevant period from 1 July 2019 onwards: Basson J was not in a position to make findings on the Municipality's conduct in respect to most of the period from 1 July 2019 to date. This is so because the timeline before Basson J ends in September 2019, when the Municipality's replying affidavit was filed. Facts relating to the reasons for the Municipality's non-compliance after September 2019 was not, and could not have been, before Basson J.

33. These more recent facts are appropriate to put before this Court because:

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[41] AA par 9 Vol 10 p 905.
[42] AA par 10 Vol 10 p 906.
[43] RA par 54 Vol 10 p 995.

33.1. This case is actually one of contempt of court, as Basson J correctly held.[44]

33.2. The new facts advanced by the Municipality are incontrovertible, and in fact uncontroverted by the Applicants, and/or common cause.[45]

33.3. These facts relate to a new period which postdates the facts before the Court *a quo*, and which in some respects postdate the date of judgment of the Court *a quo*.

33.4. The new facts are relevant to determining the issues in this matter. The Applicants seek an open-ended, forward-looking order of constitutional damages regardless of the reasons for the Municipality's non-compliance at present or in the future. These circumstances cannot be ignored.

33.5. Finally, it would be artificial and not in the interests of justice to decide the case in respect of the period from 1 July 2019 to the future without reference to the facts and circumstances and reasons for non-compliance for most of this period. These ongoing developments are a further reason why a remedy like a structural interdict, which will permit of ongoing explanation and justification, is appropriate.

34. We briefly canvass relevant facts relating to:

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[44] Basson Judgment par 83 Vol 9 p 865.
[45] Admissible in terms of Rule 31.

34.1. the Applicants' unreasonable insistence that the Municipality must buy them houses on the open market, or provide them with houses at Clayville worth more than 5 or 6 times the value of what their houses would have been at Tembisa 25;

34.2. the availability of free-standing houses at Palm Ridge;

34.3. progress and delays at Tembisa 25 apartments after September 2019; and

34.4. the availability of free-standing houses in Esselen Park in due course.

35. These facts show that the present case is very different from *Kate*, where the state offered no explanation for their delay at all, and the recipient of the social grant could not have been said to have acted unreasonably.

Demanding houses on the open market or at Clayville is unreasonable

36. For the Applicants to insist that the Teffo Order and judgment, which must be read as a whole,[46] means that the Municipality must purchase houses for them on the open market regardless of any cost constraints or considerations must with respect be dismissed out of hand.

37. The Applicants insist that the SCA Order does not cap the Municipality's liability towards them and as a result the Municipality must buy them free-standing houses on the open market. This fails to have regard to the Teffo Order and Judgment,

[46] *Administrator, Cape and Another v Mtshwagela and Others* 1990 (1) SA 705 (A) at 715 F-I.

read in context, and to the realities of the Municipality's constrained resources and obligations towards its other residents. It rises to the level of an *"unsupportable budgetary intrusion"*.[47]

38. The Teffo Order, as amended by the SCA Order, requires the Municipality to provide the Applicants with houses at Tembisa 25 *"or at another agreed location"*. This means that both parties must negotiate in good faith to reach an agreement in respect of another (permanent) location, now that the apartments are held to be non-compliant with the SCA Order. The Municipality does not agree, nor can it reasonably be expected to agree, to purchase houses on the open market for the Applicants. The Municipality's refusal to do so does not breach the plain language of the Teffo Order, nor is there any basis to find that this is a bad faith position.

39. For the same reasons, free-standing houses at Clayville was also not an option. While this option has since become moot as the houses have been occupied,[48] the houses at the Clayville development are larger, more expensive houses of R500 000 to R600 000 each that are partly subsidised and partly bonded.[49] Again, the Municipality cannot be expected reasonably to agree, in terms of the Teffo Order, to both provide the Applicants with a house *and* pay half of each of their bonds, certainly not under the banner of 'appropriate relief'. A bond of R300 000 per applicant would total more than R40 million. If the Applicants are entitled to such large amounts at all, which we deny, they must at least be required to make out such a case in delict. Otherwise, it would be punitive on the Municipality and without

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[47] *Mvumvu and Others v Minister of Transport* 2011 (2) SA 473 (CC) at par 52 and authorities referred to therein.
[48] AA par 52 Vol 10 p 923.
[49] AA pars 50 – 52 Vol 10 p 923.

basis.

The Applicants' refusal of free-standing houses at Palm Ridge is unreasonable

40. The Municipality has previously offered free standing houses at Palm Ridge to the Applicants which they declined.[50] In light of the Applicants' denial that the Municipality ever made such an offer,[51] the Municipality again offered the Applicants free-standing houses at Palm Ridge on 8 September 2020.[52] The Municipality explained in its written offer that houses at Palm Ridge are built and rolled out on a monthly basis and that the Applicants can be accommodated by about November 2020.[53] The Municipality encouraged those Applicants whose individual circumstances permit or favour this option, such as Applicants without school-going children, to consider this option.[54]

41. The Applicants unanimously rejected this offer out of hand.[55] In correspondence, they only sought to explain that *"many"* of the Applicants with jobs in the Tembisa area will have to pay more for commuting from Palm Ridge than they currently earn.[56] They also dismissed the Palm Ridge houses because they said these houses were not *"actually ready and available for our clients' occupation"*.[57] The Applicants' reasons for refusing the Palm Ridge houses are with respect unreasonable for the following reasons.

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[50] AA par 44 Vol 10 p 921.
[51] RA pa 36 Vol 10 p 991.
[52] Ann SDF5 Vol 10 p 972.
[53] AA par 44 Vol 10 p 921; Ann SDF5 par 6.
[54] AA par 44 Vol 10 p 921.
[55] AA SDF6 Vol 10 p 979 par 9.2
[56] AA SDF6 par 9.2 Vol 10 p 979.
[57] Ibid.

42. First, it is unreasonable to expect the Municipality to first build houses in a location which the Applicants may or may not agree to, and only thereafter present it for the Applicants' consideration. Yet this is what the Applicants demanded.

42.1. The Municipality explained to the Applicants that it cannot, and does not, build houses and leave them standing empty. Such houses are frequently invaded and occupied by non-beneficiaries resulting in extensive eviction processes at the Municipality's cost. The Municipality further explained on 5 October 2020 that the houses at Palm Ridge are being built and 'rolled out' on a per month basis and that some of the Applicants could be accommodated as soon as October and November 2020 – at most, a few weeks later. The Municipality then invited the Applicants to reconsider the Palm Ridge offer.[58]

42.2. In their letter of 17 December 2020, the Applicants poured further scorn on this offer. They raised two objections: first, they said that the offer does not comply with the Teffo Order, and second, they said that these houses are not ready and available for occupation.[59] Both these allegations are untrue.

42.3. The Municipality corrected this view in its response of 7 January 2021. It explained that there is no geographic or other prohibition on offering these houses and that, contrary to the Applicants' assertion, they would

[58] Supp Affi pars 7 – 9 (letter dated 5 Oct 2020 at par 2.3).
[59] Supp Affi par 17.

have been ready by November 2020.[60]

42.4. The Applicants are within their rights to refuse the offer if they have a *bona fide*, factual basis for doing so. However, such factual basis is absent from the papers. As a result, it would not be 'appropriate relief' to award the Applicants constitutional damages as 'appropriate relief' for the period from November 2020 onwards.

43. Second, the Applicants failed to provide a factual basis on which Palm Ridge would be unsuitable for them in respect of their respective circumstances.

43.1. The Applicants are individuals who will likely have some circumstances and needs in common and some not. Some persons may be employed near Tembisa. Some may be employed closer to Palm Ridge. Many are unemployed. Some may have children in schools nearby, some will not have children of school-going age at all. We do not know these facts because the Applicants have declined to provide any, even upon invitation.[61]

43.2. There is no reason to treat the Applicants as a single, globular entity with identical needs and circumstances. The Municipality pointed this out and said to the Applicants that (a) they do not explain at all how many of the Applicants are employed near Tembisa and (b) this basis for refusal does not explain the position of, for example, unemployed or retired

[60] Supp Affi par 18 ff.
[61] Supp Affi par 9.

Applicants, of which there are many.[62]

43.3. The Applicants then sought to do better in their replying affidavit. There they sought to explain that free standing houses at Palm Ridge do not replace free-standing houses at Tembisa *"like for like"*. Again in the aggregate, they said that the Applicants' *"jobs, homes, families, schools, clinics, social services, cultural life – in other words all the social networks on which they, as poor and vulnerable people depend – are in Tembisa"* and called the Municipality cynical.[63] With respect, this offer is a good faith offer in an attempt to comply with the SCA Order. It is so that Palm Ridge is about 62 km from where the Applicants currently live. But Esselen Park, which the Applicants have now accepted, is not around the corner either. The Esselen Park development is about 12 km and many schools and clinics from where the Applicants currently live. The Applicants have not alleged that social and related services are not available in Palm Ridge.

43.4. Any move of one's home, unfortunately, does disrupt existing social and related networks. This is inevitable. The Teffo Order does not limit the geographical scope of where the houses ought to be located within the boundaries of the Ekurhuleni Municipality. Would an offer of e.g. 20 km from their current homes suffice but 25 kms not? If so on what basis? The Municipality has explained that it has a scarcity of available land due to the dolomitic conditions. The Municipality simply offered the self-

[62] Ibid.
[63] RA pars 37-38 Vol 10 p 992.

standing houses at Palm Ridge as one of many offers, to the Applicants as this would have been their quickest route to home ownership short of the Municipality buying them houses on the open market.[64] These houses are still within the Municipality's boundaries. Again, the Applicants are at liberty to decline the offer, but ought not on any construction to be entitled to constitutional damages for the period after their refusal.

Apartments at Tembisa 25

44. The continued progress and delays in respect of Tembisa 25 remain relevant as the Municipality have offered to house the Applicants therein on an interim basis until free-standing houses are available. The Applicants have previously agreed thereto,[65] but more recently expressed reservations and denied that they had agreed thereto. The parties continue to correspond hereon.

45. The specifications of the Tembisa apartments are 40m^2 with two bedrooms, a kitchen, lounge and bathroom. The previous self-standing houses that the Applicants intended to occupy on Tembisa 25 had the same specifications: 40 m^2 floor space with two bedrooms, a kitchen, lounge and bathroom. However, the apartments have a significantly higher estimated value of R195 000 than the free-standing houses at R116 000 would have had.[66]

46. A detailed progress report shows that as at August 2020, the top structure

[64] See e.g. AA SDF6 Vol 10 p 972 ff.
[65] Supp affi par 12 (letter dated 1 Dec 2020).
[66] AA par 28 Vol 10 p 916.

assembly (the last phase of the project) was 20% complete and that site establishment was almost 100% complete.[67] The following delays occurred during 2020 which are not attributable to the Municipality:

46.1. South Africa's first lockdown caused delays of about 2 months from late March to late May 2020 in respect of contractors' ability to work on the site itself.[68]

46.2. Supply and materials delivery were delayed to site as a result of the Lockdown.[69]

46.3. Inspections needed to be conducted by the National Home Builders Registration Council ("Council") at every construction milestone of the project. Counsel inspectors only resumed work on 15 June 2020 and no work could commence before 15 June 2020 without the Council's approval.[70]

46.4. After work on the site had re-commenced, there were several incidents of COVID infections among the workers on site and the site had to be shut down for disinfection, which slowed progress.[71]

46.5. Work stopped on 30 June 2020 because the Municipality reached its financial year-end. As is ordinarily required, the Municipality had to re-

[67] AA par 40 Vol 10 p 919 Ann SDF4.
[68] AA par 41.1 Vol 10 p 920.
[69] AA par 41.2 Vol 10 p 920.
[70] AA par 41.3 Vol 10 p 920.
[71] AA par 41.4 Vol 10 p 920.

apply for funding, as it has to do every year, from National Treasury to roll over its money allocated to Tembisa to the next financial year. The Municipality duly submitted its 'rollover application'. Construction would have resumed as soon as possible once the funding had been approved.[72]

47. The August 2020 progress report further estimated that it would take about four months to complete the top structures once construction resumed.[73] With the exception of Covid-related closures, the appointed contractors did work over weekends to try to accelerate the program, both before and after the March 2020 'hard' Lockdown.[74]

48. The Applicants have the option of temporarily living in apartments at Tembisa once available until free standing houses become available.

Esselen Park

49. After Palm Ridge, the next available free-standing houses that the Municipality can provide to the Applicants, are in Esselen Park. This project is at an early planning stage. While the project was earmarked exclusively for apartments, the Municipality had, after extensive consultation, changed its plans to specifically build a free-standing house for each of the Applicants next to the apartment blocks.[75] It will be completed in a few years.

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[72] AA par 41.5 Vol 10 p 920.
[73] AA par 42 Vo 10 p 921.
[74] Ibid.
[75] Ann SDF6 par 10 p 974.

Attribution of periods of delay to the Municipality

50. Even if constitutional damages is considered not to be punitive by this Court and competent in principle, the Applicants are simply not entitled to constitutional damages where the delays cannot be attributed by the Municipality. For example:

50.1. First, the Applicants' case against the Municipality is based on *"unreasonable delay"* in complying with the SCA Order. Unreasonable delay to give effect to the SCA Order cannot start running on the first day of non-compliance. At least the first few months ought to be excluded for this reason alone.

50.2. Second, the Applicants have declined to accept free standing houses at Palm Ridge from 8 September 2020, which would have been able to house at least some of them in October or November 2020.

50.3. Third, the Applicants took about seven weeks to consider the Municipality's offer of alternate housing of 8 October 2020 until seemingly agreeing thereto on 1 December 2020 and later distancing themselves from this agreement.

50.4. Fourth, the Applicants would at most only be entitled to constitutional damages until they take occupation of temporary accommodation in apartments at Tembisa.

50.5. Finally, the reasons for future delays that may occur at Tembisa must first be considered by a Court before it can order constitutional damages. To our knowledge, no order of constitutional damages with such an open-ended

future end date has ever been awarded. Delays outside the Municipality's control may well occur, such as a further Lockdown. This Court ought we submit not to pre-empt these periods regardless of the circumstances. To do otherwise would be to ignore future facts and circumstances and not constitute appropriate relief.

FAR-REACHING CONSEQUENCES

51. We submit that a Court should be slow to grant constitutional damages for a state organ's delay in complying with a court order where it relates to a fundamental right. This could have far reaching effects beyond the present facts. Every person with a court order requiring compliance by a certain date would then be entitled to 'per se' constitutional damages for the delay, regardless of the state organ's explanation or the rightsholder's conduct.

52. This Court was aware of this conundrum in *Fose*, when it questioned on what in-principle basis a Court could deny constitutional damages to similarly placed victims if it allowed punitive damages in that case. It said:[76]

> *"[I]f more than one person has been assaulted in a particular police station, or if there has been a pattern of assaults, it is difficult to see on what principle, which did not offend against equality, any similarly placed victim could be denied comparable punitive damages. This would be the case even if, at the time the award is made, the individuals responsible for the assaults had been dismissed from the police force or other effective remedial steps taken.*

53. The SCA in *Mboweni* was also concerned about the *"considerable financial*

[76] At par 71.

pressure" that similar claims for constitutional damages would bring to bear on already strained organs of state.[77] It sought to decide the case cognisant of the far-reaching consequences of ordering constitutional damages. We urge this Court to do the same.

KOMAPE* HAS OVERRULED *KATE

54. Basson J correctly relied on *Komape* only for the proposition that constitutional damages ought not to be awarded for breach of a right where there has been no financial loss.[78]

55. The Applicants have made much of what they style to be a conflict between the SCA cases in *Komape* and *Kate*. To the extent that the two judgments conflict, there is no contradiction to be reconciled by this Court: *Komape* is the later judgment. It has overruled *Kate.*[79] It thus remains authority that constitutional damages ought not to be awarded where there has been no financial loss. At the very least, this ought to be a factor against the Applicants in determining appropriate relief.

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[77] *Mboweni* at par 25.
[78] Basson Judgment pars 82 – 83 Vol 9 pp 864-5.
[79] *Competition Commission of South Africa v Standard Bank of South Africa Limited; Competition Commission of South Africa v Standard Bank of South Africa Limited; Competition Commission of South Africa v Waco Africa (Pty) Limited and Others* 2020 (4) BCLR 429 (CC) at par 176.

CONDONATION

56. The Municipality requires condonation for the late filing of their opposing affidavit and their heads of argument.

57. In respect of the opposing affidavit:[80] The Municipality had sought to explain the reasons for its six-week delay in filing the answering affidavit. These reasons include a change of attorneys who required time to read into and consider this voluminous matter; time to conduct further investigations to place the most up to date information before this Court; the need to have further consultations and the exchange of further correspondence between the parties. We submit that the delay is relatively short and that no prejudice is suffered by the Applicants. Conversely, if the affidavit is not admitted the Municipality will be deprived of *audi*. We respectfully submit that the interests of justice require condonation.

58. In respect of these submissions: The delay is very short: only one day. The Applicants suffer no prejudice as a result of the delay. The explanation for the delay is contained in a separate condonation application. We respectfully submit that condonation is in the interests of justice.

CONCLUSION

59. For the reasons set out herein, we submit that the appeal be dismissed, with no order as to costs.

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[80] AA pars 62 – 64 Vol 10 p 936.

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11 January 2021