



## CONSTITUTIONAL COURT OF SOUTH AFRICA

### **Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others**

**Case CCT 157/20**

**Date of Judgment: 7 December 2021**

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### **MEDIA SUMMARY**

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

On Tuesday, 7 December 2021 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal against a judgment of the High Court of South Africa, Gauteng Division, Pretoria, which dismissed the applicants' claims for constitutional damages from the Ekurhuleni Metropolitan Municipality (the Municipality). The applicants sought damages in compensation for the breach of their right of access to adequate housing.

The applicants are all desperately poor. They live in appalling conditions in squalid hovels with up to ten people each, and have little to nothing by way of access to water, sanitation and electricity. Each of the applicants applied for and was granted a state housing subsidy, some as far back as 1998. They were matched to a particular stand developed with that subsidy in the Tembisa area, and, in due course, they ought to have been given possession and ownership of that stand and the house constructed on it. That did not occur. Instead, the Municipality unlawfully gave possession of the subsidised houses intended for the applicants, and to which they were still matched on the national housing database, to other residents.

After more than a decade of futile interaction with the respondents and with provincial and national housing authorities, the applicants launched an application in the High Court. The High Court made an order requiring the Municipality to provide the applicants with houses at Tembisa Extension 25 on or before 31 December 2018, register them as titleholders and deliver written reports to the applicants at three-month intervals, setting out the progress made. The respondents then appealed to the Supreme Court of Appeal, challenging the date of implementation of the High Court order. Based on a report by the Municipality, the Supreme Court of Appeal amended the date for the provision of the land and houses from 31 December 2018 to 30 June 2019. However, two days before this deadline, the respondents applied to the High Court

for an order extending the deadline by another year and declaring that the applicants be provided with flats, rather than the houses specified in the initial High Court order. The applicants opposed the application and filed a counter-application for constitutional damages. The main application was dismissed, as was the counter-application. The applicants then sought leave to appeal to the Constitutional Court.

The first judgment (dissenting) was penned by Majiedt J and concurred in by Khampepe J, Theron J and Tlaletsi AJ. It held that the conduct of the Municipality should be evaluated against the legal framework comprising the housing rights in section 26 of the Constitution, the Housing Act 107 of 1997 and the National Housing Code, 2009. In light of this framework, the first judgment held that there can be no question that the Municipality's conduct constituted an egregious breach of the applicants' rights of access to adequate housing. The applicants were corruptly deprived of houses built especially for them, and obtained a court order confirming the breach of their rights. That order directed the respondents to provide new houses to replace those of which the residents had been deprived. But the respondents simply ignored that order.

The first judgment recognised that the breach of rights was clear in this matter. Therefore, the question before this Court was whether constitutional damages were the appropriate remedy in line with the Court's powers under section 38 of the Constitution. The appropriate remedy would be one that would be effective in these specific circumstances. The first judgment considered a number of alternative remedies: contempt of court, a declaratory order coupled with structural relief, contractual relief, statutory remedies, delict and eviction. It concluded that only constitutional damages were an effective remedy, and further that budgetary constraints were not a concern in this matter, as the Municipality must have budgeted for the houses when the subsidies were awarded to each applicant.

Having concluded that constitutional damages were appropriate relief in the circumstances, the first judgment would have awarded a once-off amount of R10 000 to each applicant as a token. The applicants would have also been given the right to approach this Court again a year from the granting of this order to reassess this award of constitutional damages, had the municipality continued to procrastinate in its constitutional obligations. In coming to this conclusion, the first judgment held that it is impossible to quantify, in monetary terms, the breach of the applicants' fundamental human rights occasioned by the pervasive, lamentable conduct of the Municipality. It would also not be appropriate to over-burden the fiscus. What was held not to be a consideration, however, was the fact that the applicants rejected the Municipality's offer of free-standing houses, on the basis that they were too far away from their places of work, schools and established social networks. The first judgment held that the effect of the offer was troublingly reminiscent of apartheid spatial planning, in terms of which black people were shunted away to places far from their work places, schools and medical facilities. Spatial justice was considered to be a relevant factor, along with the trauma associated with resettlement, so that ultimately the applicants' refusal of faraway free-standing houses was held not to reduce their claim to constitutional damages.

Finally, the first judgment would have granted the applicants their costs, and would have made a supervisory order, requiring the Municipality to report back to the applicants every three months on the progress made in settling the applicants permanently.

The second judgment (majority), penned by Jafta J (Mogoeng CJ and Tshiqi J concurring), agreed with the first judgment that leave to appeal should be granted, because a decision of this Court would provide guidance on whether constitutional damages should have been granted, but disagreed that such damages should have been allowed in this matter. It held that in an appropriate case, constitutional damages may be awarded, but that it was not permissible in this case based on the fact that as the applicants obtained an order from the High Court on the same issue and that order was confirmed on appeal by the Supreme Court of Appeal, all that was left was to execute the order. Furthermore, no proper case was pleaded for constitutional damages and there was no proof of any damages, let alone constitutional ones. It found that the established interpretation of section 26(1) and (2) imposes no obligation directly enforceable against the state to provide citizens with houses on demand, and such failure cannot cause an injury or damage to the individual in need of a house. Without an injury, there can be no claim for constitutional damages.

The second judgment found that the first judgment failed to see the difference between socio-economic rights and other rights. If the other right is breached the claimant must be compensated for the violation, whereas a breach of socio-economic rights arising from non-fulfilment or non-enjoyment of the rights does not translate into an injury or damage that warrants compensation to be ordered. Constitutional damages may not be awarded to enforce socio-economic rights. It held that the applicants' failure to ground their claim for damages on the Housing Act and the National Housing Code was fatal to the claim. If those pieces of legislation were defective, the remedy open to the applicants was for them to challenge the validity of that legislation rather than relying directly on the Constitution. The High Court order granted to the applicants required delivery of houses to the applicants and the only way of enforcing it was through contempt of court proceedings. Awarding constitutional damages in this matter would treat the applicants differently from others countrywide and the punishment would fall upon the taxpayer and not the officials responsible for non-compliance with the court order. For these reasons, the second judgment held that the High Court was right to dismiss the claim for constitutional damages in this matter. In the result, the majority of the Constitutional Court held that the application for leave to appeal be granted, the respondents be granted leave to adduce further evidence, the appeal be dismissed with no order as to costs.

The third judgment (concurring), penned by Madlanga J (Mhlantla J concurring), accepted that the applicants failed to meet the stringent test for the award of constitutional damages and concurred in the outcome reached by the second judgment. However, it refused to completely discount the possibility of the appropriateness of constitutional damages whenever socio-economic rights are at issue. For the third judgment, the answer to whether constitutional damages are warranted lies in determining what the "appropriate relief" is in the given circumstances. It concluded that the award of constitutional damages is not the appropriate remedy in the circumstances of this case.