SOUND SUBSTANTIVE LAW APPLICATION YET DUBIOUS ADJECTIVAL PROCESS IN

R K v Minister of Basic Education [2019] ZASCA 192

1 Introduction

S K's was a life cut short. He was another victim of the dangerous and unsanitary school pit-latrine system, a rudimentary toilet infrastructure consisting of concrete slabs covering a French drain, with large holes that serve as a death trap for young pupils who accidentally fall through (Yates "Deadly Pit Toilets and the Right to a Basic Education" (2 December 2018) *Daily Maverick*). Thousands of children from underprivileged conditions face this shameful latrine system daily, despite ageing government promises to address the situation promptly (Somdyala "Almost 4000 Pit Latrines in SA's Schools, Zero Target Set 'Within the Next 3 Years'" (11 March 2019) *News24*; Chaskalson "Pit Toilets at Schools: You Can't Fix What You Can't Count" (10 May 2021) *Daily Maverick*; Fengu "MPs Give Angie Motshekga 60 Days to Submit Time Frames to Eradicate 'Death Trap' Pit Latrines at Schools" (21 February 2024) *Daily Maverick*).

The injustice of five-year-old S K's horrible drowning in a pit latrine at his Limpopo primary school in 2014 was finally vindicated in *R K v Minister of Basic Education* ([2019] ZASCA 192) when the Supreme Court of Appeal (SCA) delivered judgment in December 2019. The court awarded general damages to S K's family based on the emotional shock that they suffered and held that the common law is flexible enough to come to the aid of the aggrieved family. Although the court declined to award constitutional damages, it added to the context-sensitive body of jurisprudence that outlines constitutional damages as a relatively novel concept within the South African law of damages.

First, this case note relays that the court's reasoning (when applying the common law of delict and when it surveyed the law of constitutional damages) was in keeping with key legal developments and precedent. These long-standing legal principles are constitutionally imbued by the supremacy of the Constitution of the Republic of South Africa, 1996 (Constitution), particularly the "single-system-of-law" principle enunciated by the Constitutional Court in *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* (2000 (2) SA 674 (CC)). As far as substance goes, the judgment failed neither S K's memory, nor his family nor the need to hold the government accountable for failing to provide safe school-latrine infrastructure.

However, this case note argues further that the court did not rule correctly on two key adjectival issues in the case, namely the prayer for a declaration of invalidity and the admission of an *amicus curiae*. These are problematic aspects of the case. An incorrect or inadequate adjectival process falls short of the standard of a "fair public hearing" found in section 34 of the Constitution. Regarding the fairness of a hearing, adjectival law is key in maintaining due process and equality before the law, as enshrined in section 9(1) of the Constitution. Despite the private *lis*, a fair and consistent application of due adjectival process is in the public's interest and has implications for law as a public phenomenon.

This case note thus seeks to show how the court conflated a declaration of invalidity (a mandatory remedial procedure in terms of section 172(1)(*a*) of the Constitution) and a declaration of rights (a discretionary remedial procedure at common law and authorised by section 38 of the Constitution). Furthermore, the case note analyses how the *ratio* justifying the non-admission of the *amicus curiae* in *R K v Minister of Basic Education* (*supra*) was flawed in a certain respect. The court correctly refused admission on the basis that the *amicus* would relay superfluous assistance. However, the court's application of the test regarding an *amicus*'s interest in a matter sets the bar too high for future *amicus* applicants owing to its blanket approach to financial interests in the outcome of a case. The finding threatens to cause a chilling effect, particularly on juristic commercial entities' willingness to assist the courts as *amici* in future.

2 Facts and judgment of *R K v Minister of Basic Education*

2 1 Salient facts

S K attended a public school in rural Limpopo. The pit latrines used by learners were in an appalling condition for years. The school complained to the education authorities, asking them to improve the latrine system, to no avail. To fix the latrines, the school had appointed a handyman to construct a platform and seating structure over the pits. The rudimentary system deteriorated badly (*R K v Minister of Basic Education supra* par 9). Evidence showed structural improvement costs would have been R500 per toilet seat, which the education authorities had failed to provide. The school was placed on a list of schools scheduled to receive sanitation infrastructure support. Unfortunately, no work was done (*R K v Minister of Basic Education supra* par 10).

On 20 January 2014, while S K was at the latrines, a seat collapsed, and he fell into the pit where he drowned. When he could not be found, the school enquired if he was at home. His mother did not know where he was and rushed to the school. When she arrived at the school, S K's body was found in the latrine pit. His hand was outstretched from the filth as if looking for help (*R K v Minister of Basic Education supra* par 11). S K's mother, father, and eldest sister saw his body in the pit, while his eldest brother and other three siblings heard of how S K had passed on (*R K v Minister of Basic Education supra* par 12–14). The whole family was diagnosed with post-

traumatic stress disorder. In addition, S K's parents developed a depressive disorder (*R K v Minister of Basic Education supra* par 52).

They instituted claims in the Limpopo High Court for damages for emotional shock and grief. In addition to these claims, S K's family claimed constitutional damages for breach of their rights to a peaceful family life (*R K v Minister of Basic Education supra* par 1, 15, 17, 32–33 and 45). These claims were denied, and S K's family appealed to the SCA. A firm of attorneys (Richard Spoor Incorporated, or "RSI") filed an *amicus* application, as did Equal Education, a non-governmental organisation.

2 2 *Judgment*

The SCA dismissed RSI's *amicus* application because it adjudged the firm to have a financial interest in the outcome of the matter (*R K v Minister of Basic Education supra* par 5). The court held further that certain of the firm's submissions were not useful. It pointed out that certain of the firm's other submissions did not differ from the submissions that were made by S K's family and the other *amicus curiae*, Equal Education (*R K v Minister of Basic Education supra* par 8). On the merits, the court began with the claims made by S K's family regarding emotional shock. It held that the High Court had erred in dismissing the claims for emotional shock on the basis that a requirement of psychiatric injury had not been proved (*R K v Minister of Basic Education supra* par 25–27 and 47–48).

The court then considered the argument made by S K's family that the common law should be developed in terms of section 39(2) of the Constitution to recognise a claim for grief and bereavement experienced owing to S K's death without there being an underlying psychiatric injury, or to allow S K's family to be awarded constitutional damages flowing from their grief and bereavement. The court found that it was unnecessary to develop the common law to recognise a claim of damages for grief not arising from a psychiatric injury. S K family's grief was associated with the recognised psychiatric injuries underlying their claims for emotional shock and could be compensated for in the damages awards for those claims (*R K v Minister of Basic Education supra* par 33–35, 40, 45 and 49–50).

The court dismissed the claim for constitutional damages for breach of S K family's rights to a peaceful family life (*R K v Minister of Basic Education supra* par 57 and 63) because there was no authority for such an award in these circumstances. No financial loss had occurred and an award of damages for psychiatric injury could be granted (*R K v Minister of Basic Education supra* par 58). The SCA found that an award for constitutional damages could not be justified to compel the State to improve sanitation facilities (*R K v Minister of Basic Education supra* par 59).

On the prayer for declaratory relief, the SCA found that the High Court's refusal to grant a declaratory order that the Department of Education breached its constitutional obligations had been an appropriate exercise of the court's discretion (*R K v Minister of Basic Education supra* par 64 and 67). It reasoned that the request for the declaratory order was based on the court's obligation to declare invalid any unconstitutional policy, but it had not been state policy to provide poor sanitation (*R K v Minister of Basic*

Education supra par 64–65). The High Court reprimanded the State for its failure to provide proper sanitation facilities in the hope that it would act properly (*R K v Minister of Basic Education supra* par 65). Accordingly, the SCA found that a declaration would have no useful purpose, as the State was already aware of the problem and of its obligations to resolve it (*R K v Minister of Basic Education supra* par 66).

3 Sound substantive law application yet dubious adjectival process: Engaging with the *R K v Minister of Basic Education* judgment

3 1 A single system of law

This part of the case note considers whether the common law of delict provides an adequate remedy for the breach claimed in *R K v Minister of Basic Education* (*supra*). The supremacy clause in section 2 of the Constitution provides that the Constitution is the supreme law of the land, and that all law or conduct that is not in line with the Constitution is invalid. The section further provides that obligations that are imposed by the Constitution must be fulfilled, and is coupled with the “single-system-of-law” principle, as stated in *Pharmaceutical Manufacturers* (*supra*). In *Pharmaceutical Manufacturers* (*supra*), the court held that there is only one system of law in the Republic. The Constitution as the supreme law shapes the system. The court further mentioned that all law, including the common law, derives its force from the Constitution and is subject to constitutional control (*Pharmaceutical Manufacturers supra* par 44; see also Van der Walt “Normative Pluralism and Anarchy: Reflections on the 2007 Term” 2008 1 *CCR* 77 90–98).

The common law of delict is part of a single system of South African law. It is shaped by the Constitution as the supreme law, and it derives its force from the Constitution. This means that the common law of delict is subject to constitutional control and regulation. Considering this framework, a litigant must first determine what source of law can be applied to protect their constitutional rights. The sources of law that may generally apply are the Constitution and the common law. In this instance, the common law seems to be the obvious source of law regarding the claim for emotional shock (see Buthelezi “The Impact of the *Komape* judgment on the South African Common Law of Delict: An Analytical Review – *Komape v Minister of Basic Education* [2020] 1 All SA 651 (SCA); 2020 (2) SA 347 (SCA)” 2022 43 *Obiter* 630 630–640).

The Constitutional Court has developed two subsidiarity principles to determine the legal source that applies in a legal dispute. The first subsidiarity principle provides that where legislation was enacted to give effect to a constitutional provision, a litigant must first rely on the provisions of the specific legislation, and may not rely directly on the constitutional provision to protect their rights (Van der Walt 2008 *CCR* 100–103; Van der Walt *Property and Constitution* (2012) 49–61; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) par 21–26; *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311

(CC) par 92–97 and 436–437; *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) par 51–52; *MEC for Education: KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) par 39–40; *Chirwa v Transnet Ltd* 2008 (2) SA 347 (CC) par 59 and 69; *Walele v City of Cape Town* 2008 (6) SA 129 (CC) par 29–20; *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 (4) BCLR 312 (CC) par 47–49; *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) par 73; *PFE International v Industrial Development Corporation of South Africa Ltd* 2013 (1) SA 1 (CC) par 4 and 32; *Sali v National Commissioner of the SA Police Service* 2014 (9) BCLR 997 (CC) par 4; *De Lange v Methodist Church* 2016 (2) SA 1 (CC) par 53; *My Vote Counts NPC v Speaker of The National Assembly* 2016 (1) SA 132 (CC) par 53; *Thubakgale v Ekurhuleni Metropolitan Municipality* 2022 (8) BCLR 985 (CC) par 178; *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg v Minister of Police* 2022 (1) BCLR 46 (CC) par 112; *Women's Legal Centre Trust v President of the Republic of South Africa* 2022 (5) SA 323 (CC) par 82; *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* 2023 (2) SA 31 (CC) par 46; *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* 2023 (4) SA 325 (CC) par 149). This first subsidiarity principle will not apply to a claim for emotional shock because this area of the law is not regulated by legislation.

The second subsidiarity principle provides that where there is no legislation that deals with a claim (such as for emotional shock), the common law should be directly relied upon (Van der Walt 2008 *CCR* 115–125; Van der Walt *Property and Constitution* 40–91). The application of the subsidiarity principles "denotes a hierarchical ordering of institutions, of norms, of principles, or of remedies, and significance of the Constitution" (*My Vote Counts NPC v Speaker of The National Assembly supra* par 46). The principles of subsidiarity explained above indicate the common law as the initial *locus* for a claim for emotional shock. The matter should then be decided according to common-law principles associated with emotional shock – unless these principles are not in line with the Constitution (section 39(2) of the Constitution; Van der Walt *Property and Constitution* 82). Once the relevant common-law position has been determined, the common law should be applied to the facts of the case. It must be determined what the common-law position entails and what outcome is prescribed by the common law, given the facts (*Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd* 2016 (1) SA 621 (CC) par 38).

At this stage, it is not necessary to question whether the prescribed outcome of the case is fair or whether the common law should be developed, but the aim is primarily to set out what the position is in terms of the common law (*Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd supra* par 38; Van der Walt 2008 *CCR* 115–125). Regarding a claim brought under the separate heading for grief or bereavement (allegedly suffered because of negligence, but which does not flow from a psychiatric lesion), the assessment of the common law becomes relevant (*R K v Minister of Basic Education supra* par 33). The common law holds that a litigant may only claim damages for nervous or emotional shock suffered owing to a detectable psychiatric injury (*R K v Minister of Basic Education supra* par 25; *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 (1) SA 769 (A) 779–782; *Clinton-Parker v Administrator,*

Transvaal; Dawkins v Administrator, Transvaal 1996 (2) SA 37 (W) 54; *Barnard v Santam Bpk* 1999 (1) SA (SCA) 214–215; *Road Accident Fund v Sauls* 2002 (2) SA 55 (SCA) par 13 and 17).

In *R K v Minister of Basic Education* (*supra*), the court considered whether a claim brought under the separate heading of grief or bereavement allegedly suffered owing to negligence, but not flowing from a psychiatric lesion, could entitle S K's family to an award of damages (*R K v Minister of Basic Education supra* par 33). The court found that S K family's grief was associated with the recognised psychiatric injuries underlying their emotional-shock claims (*R K v Minister of Basic Education supra* par 33–35, 40, 45 and 49–50). As such, the family could be compensated under those claims.

Since the common-law position has been established, the next step is to determine whether the outcome prescribed by the common law is adequate, acceptable and justifiable in the context of constitutional rights (section 39(2) of the Constitution; Van der Walt 2008 *CCR* 115–125). The common law of delict is not immune to the Constitution, nor can it be excluded from constitutional scrutiny, especially where the common law seems not to provide an adequate or appropriate remedy (*Pharmaceutical Manufacturers supra* par 44; Van der Walt 2008 *CCR* 115–125).

The question is whether the common law should be developed, having regard to the spirit, purport and objects of the Bill of Rights (section 39(2) of the Constitution). In the SCA, the appellants argued that the common law should be developed either to recognise a claim for grief and bereavement experienced as a result of the death without there needing to be an underlying psychiatric lesion (*R K v Minister of Basic Education supra* par 16), or to allow an award to a litigant for constitutional damages flowing from their grief and bereavement. In other words, it was important to consider when constitutional damages may be awarded, as is explained below in detail. It should be mentioned that the SCA did not agree to a development of the common law (*R K v Minister of Basic Education supra* par 45). It first needed to be established whether the common law as developed in case law dealing with a claim for damages regarding nervous or emotional shock was sufficient to provide a litigant with adequate or appropriate relief for the breach of constitutional rights (*R K v Minister of Basic Education supra* par 42, relying on *Minister of Police v Mboweni* 2014 (6) SA 256 (SCA) par 21).

The starting point for investigating the impact of the Constitution on the outcome prescribed by the current position of the common law is to determine whether the common law conflicts with constitutional rights such as the right to a peaceful family life (section 11 of the Constitution; *R K v Minister of Basic Education supra* par 42; *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd supra* par 38; Van der Walt 2008 *CCR* 115–125). Although *R K v Minister of Basic Education* (*supra*) was decided solely on common-law principles and essentially prescribes the ambit of the common-law position regarding a claim for emotional shock, the case shows how the court's application of common-law rules may protect constitutional rights because the court recognised that S K family's grief was in fact associated with the recognised psychiatric injuries caused by their emotional shock, for which they claimed compensation.

However, if the court found that psychiatric injury – a requirement for a claim for emotional shock – had not been proved, the application of the common law in that regard would arguably have resulted in S K's family being denied a claim for damages that protects their right to a peaceful family life, which would then have opened up consideration of the need to develop the common law to comply with constitutional values. Nevertheless, the way that *R K v Minister of Basic Education* (*supra*) was decided ensured that S K's family was compensated by the claim for damages. In this regard, there was no need to develop the common law because it was applied in an unproblematic and flexible way, as necessitated by the "single-system-of-law".

It is submitted that the common law is sometimes sufficient to provide litigants with an adequate or appropriate remedy for breach of constitutional rights. The way that the SCA in *R K v Minister of Basic Education* (*supra*) applied the common law of delict in a flexible manner indirectly upheld constitutional rights through the court's willingness to safeguard S K family's right to a peaceful family life (*Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) par 58; Currie & De Waal *The Bill of Rights Handbook* 6ed (2013) 202). *R K v Minister of Basic Education* (*supra*) indicates that the common law of delict is inherently part of a "single-system-of-law", shaped by the Constitution as the supreme law of the land (*Pharmaceutical Manufacturers supra* par 44–49).

As a result, the common law of delict does in effect promote the spirit, purport and objects of the Bill of Rights in terms of section 39(2) of the Constitution (Van der Walt 2008 *CCR* 115–125). It is important to state that when the Constitution was put into effect it was intended that the law, including the common law of delict, should reflect the recognised normative value-based system as found in the Constitution (Davis "How Many Positivist Legal Philosophers Can Be Made to Dance on the Head of a Pin? A Reply to Professor Fagan" 2012 129 *SALJ* 59 59; Woolman "The Amazing, Vanishing Bill of Rights" 2007 124 *SALJ* 762 769).

3 2 Constitutional damages: When and where to be awarded?

Constitutional damages flow directly from section 38 of the Constitution (*Residents of Industry House v Minister of Police supra* par 90). Msimanga, however, states:

> "[T]he awarding of constitutional damages is a contentious issue in the South African legal system. Our courts, including the Constitutional Court, have struggled to determine the circumstances under which constitutional damages should be awarded." (Msimanga *Thubakgale v Ekurhuleni Metropolitan Municipality* [2021] ZACC 45*; Municipal Non – Fulfilment of Socio-Economic Rights and Constitutional Damages* (treatise, Nelson Mandela University) 2022 60; see also Mukheibir "Constitutional Damages: A Stagnant or a Changing Landscape" 2023 6 *PELJ* 1 41)

Section 38 of the Constitution allows for an appropriate remedy, including an award of constitutional damages following an infringement of a right in the Bill of Rights (*Fose v Minister of Safety and Security* 1997 (7) BCLR 851 par

60; *Modder Estate Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa Modderklip Boerdery (Pty) Ltd* [2004] 3 All SA 169 (SCA) par 20 and 57; *MEC for the Department of Welfare v Kate* 2006 (4) SA 478 (SCA) par 27; *Residents of Industry v Minister of Police supra* par 90; *Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 40). As *per Fose v Minister of Safety and Security* (*supra*), constitutional damages should be awarded only when such relief would be most appropriate in the circumstances of the case (*Fose v Minister of Safety and Security supra* par 60; see also *Hoffmann v South African Airways* 2001 (1) SA 1 CC par 55). Such an award must be reasonable in the opinion of the court to compensate the affected party (Currie & De Waal *The Bill of Rights Handbook* 200). The case note now discusses the development of constitutional damages in South Africa from the decision in *Fose v Minister of Safety and Security* (*supra*) to the most recent judgment in *Thubakgale v Ekurhuleni Metropolitan Municipality* (*supra*).

The first case to deal with the issue of constitutional damages in South Africa was *Fose v Minister of Safety and Security* (*supra*). Mr Fose was allegedly assaulted by police (*Fose v Minister of Safety and Security supra* par 11), and he claimed delictual damages for pain and suffering, loss of enjoyment of amenities of life and shock, *contumelia* and past and future medical expenses (*Fose v Minister of Safety and Security supra* par 13). Fose further claimed constitutional damages for the infringement of his constitutional rights to human dignity, freedom and security of the person and privacy (*Fose v Minister of Safety and Security supra* par 12–13). The Constitutional Court refused to award constitutional damages because the plaintiff had received relief in delict and such relief was powerful enough to vindicate the plaintiff's violated constitutional rights (*Fose v Minister of Safety and Security supra* par 67).

The court in *Fose v Minister of Safety and Security* (*supra*) acknowledged the need to vindicate the violation of constitutionally entrenched rights through effective relief that might include constitutional damages, but held that such relief would not have to amount to punitive damages, which are damages over and above a successful delictual claim (*Fose v Minister of Safety and Security supra* par 68, 71 and 72). Owing to the prevailing economic circumstances in our country, awarding constitutional damages even when not appropriate, would leave us in an untenable position (*Fose v Minister of Safety and Security supra* par 71–72; see also *Olitzki Property Holdings v State Tender Board* [2001] ZASCA 51 par 40). In essence, the court in *Fose v Minister of Safety and Security* (*supra*) did not set itself against constitutional damages as a means of vindicating rights, especially given our past of gross human-rights violations. It simply did not see an award of constitutional damages as appropriate given the circumstances of the case (*Fose v Minister of Safety and Security supra* par 60 and 67).

The matter of *Olitzki Property Holdings v State Tender Board* (*supra*) involved a company that had tendered to house the Gauteng provincial government offices following the move of the provincial government from Pretoria to Johannesburg (*Olitzki Property Holdings v State Tender Board supra* par 4). Olitzki Property Holdings, the plaintiff, obtained an option to purchase a building and tendered to provide office space to the provincial

government. Unfortunately, its tender was not accepted (*Olitzki Property Holdings v State Tender Board supra* par 4). The plaintiff sued the provincial government and tender board, alleging misconduct by the government and tender board during the tender process (*Olitzki Property Holdings v State Tender Board supra* par 4). The plaintiff sought damages, which according to the plaintiff, were payable because of how the tender process and award were managed. The damages consisted in the profit the plaintiff asserted it would have made from rentals if it had been awarded the tender. The relevant issue was whether constitutional damages may be awarded for loss of profits (*Olitzki Property Holdings v State Tender Board supra* par 1). The plaintiff fashioned its case in two claims, namely A and B. Claim A dealt with whether a breach of the procurement provisions of the Constitution of the Republic of South Africa Act, 1993 (Interim Constitution) gave rise to a civil claim in damages for loss of profit. Claim B addressed whether an award for damages for loss of profit was an appropriate remedy for breach of administrative-justice provisions of the Interim Constitution. Unfortunately, both claims failed.

In rejecting the plaintiff's Claim A, the SCA *per* Cameron JA held that the argument that an award for loss of profit was just and reasonable, or in line with the convictions of society, or aligned to the Interim Constitution, was not persuasive (*Olitzki Property Holdings v State Tender Board supra* par 30). Cameron JA also highlighted the exorbitance of the plaintiff's "loss of profit" claim, which amounted to R10 million, and the hammering effect it would have on the public purse, because the State would have to pay the plaintiff (*in casu,* R10 000 000.00) and still pay the successful tenderer (*Olitzki Property Holdings v State Tender Board supra* par 30) – a situation the court called a "double imposition on the state". Cameron JA found no basis in the procurement provisions (see section 187) of the Interim Constitution, and in consideration of public policy, that entitled the plaintiff to claim lost profits (*Olitzki Property Holdings v State Tender Board supra* par 31). The court set aside Claim A (*Olitzki Property Holdings v State Tender Board supra* par 31).

Regarding Claim B, the court held that an interdict of the tender process would have been the more appropriate relief, rather than trying to convince the court that an award for loss of profit for not getting the tender was appropriate (*Olitzki Property Holdings v State Tender Board supra* par 38). Not only would an interdict have anticipated a dispute, but it would also have eliminated the source of the loss the plaintiff claimed to have suffered (*Olitzki Property Holdings v State Tender Board supra* par 38). The court held that the plaintiff ought to have considered a review application to review the tender process, and not to have resorted to a claim for loss of profit (*Olitzki Property Holdings v State Tender Board supra* par 40–41). Finally, the court held that Claim B was correctly set aside because the plaintiff had alternative relief by way of an interdict before the award of the impugned tender and a review of the process (*Olitzki Property Holdings v State Tender Board supra* par 42). Therefore, the court concluded that the lost profit claimed by the plaintiff was not an appropriate constitutional remedy (*Olitzki Property Holdings v State Tender Board supra* par 42). It is submitted that the court in *Olitzki Property Holdings v State Tender Board* (*supra*) dismissed the plaintiff's claims because a claim for loss of profit was

unfounded and had no basis. According to the court, the plaintiff ought to have pursued other remedies available to it, such as an interdict or review process.

In *Modder Estate Squatters v Modderklip Boerdery (Pty) Ltd* (*supra*), the SCA awarded constitutional damages to Modderklip Boerdery (Pty) Ltd, a company whose land was occupied by more than 40 000 unlawful occupiers (*Modder Estate Squatters v Modderklip Boerdery (Pty) Ltd supra* par 8). The company had applied to court for an eviction order. The Pretoria High Court granted the eviction, but it could not be enforced, because consideration had to be given to the number of people to be evicted (*Modder Estate Squatters v Modderklip Boerdery (Pty) Ltd supra* par 7 and 9). This resulted in Modderklip applying for a declaratory order of its section 25(1) right and the unlawful occupiers' section 26(1) right (*Modder Estate Squatters v Modderklip Boerdery (Pty) Ltd supra* par 11). The court *inter alia* declared that Modderklip's right not to be deprived of its property had been violated and that the unlawful occupiers' right to housing had also been violated (*Modder Estate Squatters v Modderklip Boerdery (Pty) Ltd supra* par 15). It ordered the police to investigate whether the unlawful occupiers should be prosecuted to protect Modderklip's property rights (*Modder Estate Squatters v Modderklip Boerdery (Pty) Ltd supra* par 16). Finally, the court imposed a structural interdict on the State to report to it on its compliance with the order (*Modder Estate Squatters v Modderklip Boerdery (Pty) Ltd supra* par 16).

The President and the unlawful occupiers appealed to the SCA (*Modder Estate Squatters v Modderklip Boerdery (Pty) Ltd supra* par 51–52). The SCA confirmed the High Court's declaratory order. However, the structural interdict was not regarded as an effective remedy and the SCA awarded constitutional damages against the State to vindicate Modderklip's property rights (*Modder Estate Squatters v Modderklip Boerdery (Pty) Ltd supra* par 40). The President appealed to the Constitutional Court. The Constitutional Court *per* Langa ADCJ (as he then was) confirmed the order of the SCA. It held that constitutional damages were the more effective remedy based on the facts in issue, even though a declarator clarifying rights was also available as an alternative remedy (*Modder Estate Squatters v Modderklip Boerdery (Pty) Ltd supra* par 60). The court had regard to the long history of Modderklip's efforts to free its property from unlawful occupation and held that more effective relief (an award of constitutional damages) would be the more appropriate relief (*Modder Estate Squatters v Modderklip Boerdery (Pty) Ltd supra* par 60). The position taken in *Modder Estate Squatters v Modderklip Boerdery (Pty) Ltd* (*supra*) confirms the decision in *Fose v Minister of Safety and Security* (*supra*) that courts should grant appropriate relief, and that such relief should be effective relief in vindicating a right (*Fose v Minister of Safety and Security supra* par 69). Therefore, in *Modder Estate Squatters v Modderklip Boerdery (Pty) Ltd* (*supra*), constitutional damages were awarded because they were a more effective relief compared to a declaratory order.

In *MEC for the Department of Welfare v Kate* (*supra*), the SCA awarded constitutional damages to Mrs Kate, a disabled 54-year-old woman, because of the State's delay in granting her a social grant (*MEC for the Department of Welfare v Kate supra* par 10). Kate's right to social security in terms of

section 27(1)(*c*) of the Constitution had been infringed (*MEC for the Department of Welfare v Kate supra* par 1 and 28). The court in that case held that constitutional damages were not a remedy of last resort, to be looked to only when there is no alternative and indirect means of asserting and vindicating constitutional rights (*MEC for the Department of Welfare v Kate supra* par 27). According to Nugent J, while consideration of alternative remedies is an option, it is not decisive in determining whether to grant or not grant constitutional damages, because there are cases in which direct assertion and vindication of constitutional rights is required (*MEC for the Department of Welfare v Kate supra* par 27).

Nugent J held that constitutional damages were the only appropriate remedy to award Kate for the breach of her right; however, what was left was how the loss would be measured in monetary terms (*MEC for the Department of Welfare v Kate supra* par 33). In answering this, the court held that:

> "[i]t has not been shown that Kate suffered direct financial loss and it is most unlikely that she did, for the grant was destined to be consumed and not invested, but the loss was just as real. Hence, to be held in poverty is a cursed condition. Quite apart from the physical discomfort of deprivation, it reduces a human in his or her dignity. The 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." (*MEC for the Department of Welfare v Kate supra* par 33)

It is submitted that the position in *MEC for the Department of Welfare v Kate* (*supra*) is that for constitutional damages to be invoked there must be an infringement of a constitutionally protected right, but the loss suffered need not be monetary and constitutional damages are not a remedy of last resort. Of course, consideration must be given to other remedies, but the availability of such should not be considered to bar an award for constitutional damages when such an award would be more effective in vindicating an infringed right.

In *Families of Mental Health Care Users Affected by the Gauteng Mental Marathon Project v National Minister of Health of the Republic of South Africa* (arbitration award https://www.saflii.org/images/LifeEsidimeniArbitrationAward.pdf (accessed 2024-03-15)), Moseneke J, the arbitrator, awarded constitutional damages in the sum of R1 000 000 to the families in addition to common-law damages for the breach of constitutional rights (*Families of Mental Health Care Users v National Minister of Health supra* par 214 and 266). The State opposed the award of constitutional damages, arguing that the claimants could rely on common-law damages (*Families of Mental Health Care Users v National Minister of Health supra* par 212). Most relevant is Moseneke's reasoning that the Constitution trumps the common law (par 216). To emphasise that constitutional damages were appropriate relief, he held that:

> "[m]ore importantly, the claim of the claimants in this arbitration for compensation arising from invasive and pervasive violation of constitutional guarantees by the Government cannot readily be couched in common law terms. What is the common law equivalent of a claim based on the State's

> breach of the right of access to healthcare; right of access to food and water; freedom from torture; protection from cruel degrading and inhuman treatment? Similarly, what is the common law equivalent of a claim against the State for breaching the rule of law, for disregarding protections provided by legislation that is meant to give effect to constitutional guarantees or a claim arising from a breach of international obligations on Mental Health care? And on the facts here all these breaches together led to agonising devastation for families of the deceased, survivors and their families." (*Families of Mental Health Care Users v National Minister of Health supra* par 217)

In this instance, Moseneke J awarded constitutional damages because of the "invasive and pervasive" violation of constitutional rights, which, according to him, could only be vindicated with a constitutional-damages award.

In *Residents of Industry House v Minister of Police* (*supra*), the Constitutional Court refused to award constitutional damages because the applicants had alternative appropriate relief in terms of the common law and the Promotion of Administrative Justice Act (3 of 2000) (*Residents of Industry House v Minister of Police supra* par 108, 111 and 126). The court also held that despite the availability of alternative remedies, it may be open to the court to award constitutional damages if the alternative remedies were not effective (*Residents of Industry House v Minister of Police supra* par 99; see also *MEC for the Department of Welfare v Kate supra* par 27 for the emphasis that constitutional damages may be awarded even if alternative remedies exist). The court in *Residents of Industry House v Minister of Police* (*supra*) developed a guide as to when constitutional damages may be awarded as follows:

> "When considering whether, on the facts of the particular case, constitutional damages are appropriate relief, several pertinent factors for consideration have emerged from the jurisprudence of this Court and of the Supreme Court of Appeal. There are two overarching considerations; the first is the existence of an alternative remedy that would vindicate the infringement of the rights alleged by the claimant and the second is, whether the alternative remedy is effective or appropriate in the circumstances. Ancillary factors include whether the infringement of the constitutional rights was systemic, repetitive and particularly egregious; whether the award will significantly deter the type of constitutional abuse alleged; the effect of the award on state resources; and the need to avoid opening floodgate in respect of similar matters." (*Residents of Industry House v Minister of Police supra* par 103)

Dealing with the issue of alternative remedies, Mhlantla J held that the availability of alternative remedies was not an absolute bar to an award of constitutional damages, but could be a factor mitigating against such an award (*Residents of Industry House v Minister of Police supra* par 104). According to Mhlantla J, the court must consider whether expecting a claimant to pursue alternative remedies would be manifestly unjust or unreasonable (*Residents of Industry House v Minister of Police supra* par 105). The nature and extent of the violation, the position of the claimants, and the impact of the violation on the requirements of obtaining alternative relief, all play a role in the determination of whether it would be manifestly unjust or unreasonable to expect the applicants to seek an alternative remedy (*Residents of Industry House v Minister of Police supra* par 105).

On the issue of appropriate relief, Mhlantla J held that section 38 of the Constitution grants courts flexibility in determining what constitutes appropriate relief in a particular case (*Residents of Industry House v Minister of Police supra* par 113). She added that appropriate relief means any relief that is justified by the facts of the case and all other legal considerations (*Residents of Industry House v Minister of Police supra* par 113; see also *Fose v Minister of Safety and Security supra* par 60, where it was highlighted, that appropriate relief was fact-specific). This is the relief that is suitable to the specific facts and needs of the applicants in a particular case (*Residents of Industry House v Minister of Police supra* par 113). If there are many appropriate remedies available in each case, the courts enjoy a discretion to select the most appropriate one (*Residents of Industry House v Minister of Police supra* par 113).

The court also held that "appropriate" in section 38 of the Constitution must be read as relief that is effective in protecting the claimants as well as the interests of good governance (*Residents of Industry House v Minister of Police supra* par 115; see also *Fose v Minister of Safety and Security supra* par 69). Mhlantla J concluded by holding that constitutional damages must be the most appropriate remedy available to vindicate constitutional rights, considering the availability of alternative common-law and legislative remedies (*Residents of Industry House v Minister of Police supra* par 118). In *Residents of Industry House v Minister of Police* (*supra*), the court focused on circumstances that would entail appropriate relief for the award of constitutional damages; the court may be summarised as saying that for constitutional damages to be awarded, it must be the most appropriate relief. This means that constitutional damages should follow the interrogation of whether or not other remedies would work, based on the facts of the case.

Most recently, in *Thubakgale v Ekurhuleni Metropolitan Municipality* (*supra*), the Constitutional Court refused to award constitutional damages to applicants whose rights to have access to adequate housing had been violated for more than two decades. The applicants had applied for housing in 1998 and been allocated housing subsidies and sites on which their houses would be built, but the applicants had not received their housing (*Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 13 and 21). The lived realties of the applicants remained unfortunate as they were very poor people who were languishing in squalor, with no access to water, electricity and sanitation (*Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 17).

After many failed attempts to get their housing, the applicants approached the High Court, which ordered that the municipality provide the applicants with housing by 31 December 2018 (*Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 21). The municipality appealed to the SCA for an amendment of the delivery date, which was extended to 30 June 2019, coupled with a secondary order that the applicants had to be registered as titleholders of the erven by 30 June 2020 (*Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 21). Owing to pervasive non-compliance with both the High Court and SCA orders, the municipality approached the High Court to have the decision of the High Court varied *(Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 22). The court dismissed the

application by the municipality because the rights of the residents had vested, and the High Court did not have the powers to vary the SCA decision (*Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 24). As a result of the municipality's recalcitrance, the applicants made a counter-application for constitutional damages, which was dismissed by the High Court (*Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 8).

Left with no other option, the applicants sought leave to appeal directly to the Constitutional Court for constitutional damages, without success (*Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 8 and 121). An unfortunate aspect to *Thubakgale v Ekurhuleni Metropolitan Municipality* (*supra*) is that it resulted in increasing the uncertainty regarding when exactly constitutional damages may be awarded. In these circumstances, it is necessary to sum up the three judgments in *Thubakgale v Ekurhuleni Metropolitan Municipality* (*supra*) – namely, the majority judgment by Jafta J, the concurrence by Madlanga J, and the dissent by Majiedt J.

The majority judgment by Jafta J refused to award constitutional damages because such damages could not be awarded for the violation of socio-economic rights, and the applicants had not suffered actual patrimonial loss (*Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 121 and 162). Further reasons advanced by Jafta J for refusing to award constitutional damages were that the applicants had been granted relief in their favour by the High Court and they had not pleaded a proper case for constitutional damages (*Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 122).

The concurrence by Madlanga J could not set itself against the awarding of constitutional damages for the breach of socio-economic rights (*Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 196). Instead, Madlanga J held that, given the decision in *Residents of Industry House v Minister of Police* (*supra*), constitutional damages were not the most appropriate relief. Madlanga J held in *Thubakgale v Ekurhuleni Metropolitan Municipality* (*supra*) that, for constitutional damages to be awarded, they must be the most appropriate relief available to vindicate constitutional rights (*Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 197). According to Madlanga J, contempt-of-court proceedings were available to the applicants as alternative relief, which would have been the most appropriate in vindicating their right of access to adequate housing, but they opted not to pursue such proceedings (*Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 198).

In dissent, Majiedt J argued that, when determining the most effective remedy, the availability of other remedies must be considered (*Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 46). However, in some cases constitutional damages may be the most effective remedy despite the availability of other remedies (*Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 46). According to Majiedt J, in *Thubakgale v Ekurhuleni Metropolitan Municipality* (*supra*), constitutional damages were the most effective relief because the applicants had been denied their right to housing for more than two decades (*Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 78). Majiedt J further held that, other than constitutional damages, no effective remedy existed to vindicate the

applicants' rights, given the intrusive and pervasive violation of their right of access to adequate housing (*Thubakgale v Ekurhuleni Metropolitan Municipality supra* par 70).

The *R K v Minister of Basic Education* case (*supra*) correctly reaffirms the principle that constitutional damages will not be awarded where the infringement of a constitutional right may be sufficiently compensated under a delictual claim. Therefore, the SCA in *R K v Minister of Basic Education* (*supra*) relied on *Fose v Minister of Safety and Security* (*supra*) in deciding to deny the claim for constitutional damages. As in *Fose v Minister of Safety and Security* (*supra*), *R K v Minister of Basic Education* (*supra*) set itself against the awarding of constitutional damages over and above delictual damages. In our view, *R K v Minister of Basic Education* (*supra*) took the stance in *Fose v Minister of Safety and Security* (*supra*) that if a litigant already has a successful delictual claim, that litigant cannot also be awarded constitutional damages, because such an award would be punitive.

The decision of the court in *R K v Minister of Basic Education* (*supra*) shows the flexibility of the law of delict. In most instances, the law of delict is broad enough to provide litigants with appropriate relief for a breach of constitutional rights (*R K v Minister of Basic Education supra* par 58; see also Currie & De Waal *The Bill of Rights Handbook* 202). However, this position will depend on the facts of each case (*R K v Minister of Basic Education supra* par 58). In this regard, the facts of R *K v Minister of Basic Education* (*supra*) fall within the precedent established in *Fose v Minister of Safety and Security* (*supra*).

As such, the judgment of *R K v Minister of Basic Education* (*supra*) cannot be faulted. It is submitted further that this is so even if *R K v Minister of Basic Education* (*supra*) is compared to cases decided after *Fose v Minister of Safety and Security* (*supra*) that awarded constitutional damages – matters such as *Modder Estate Squatters v Modderklip Boerdery (Pty) Ltd* (*supra*) and *MEC for the Department of Welfare v Kate* (*supra*). In those two cases, constitutional damages were awarded because they constituted more effective relief based on the facts of the cases as outlined above. Also, it is our considered view that despite constitutional damages not being a remedy of last resort as was decided in *MEC for the Department of Welfare v Kate* (*supra*), such damages should not be awarded where delictual damages may vindicate the breach of a constitutional right and be an effective remedy.

3 3 Declaratory relief: The courts' confusion

Notwithstanding the substantively just outcome of the claims for damages, the appellants also prayed for declaratory relief. However, such relief was not granted, based on, it is submitted, doubtful reasoning. It appears that both the court *a quo* (*R K v Minister of Basic Education* [2018] ZALMPPHC 18 par 13, for convenience "*R K HC*") and the SCA conflated two types of declaratory relief, namely a declaration of rights as provided for in section 38 of the Constitution, and a declaration of invalidity as provided for in section 172 of the Constitution.

The court *a quo* interpreted the appellants' (*a quo* plaintiffs') prayer for declaratory relief as a prayer for a declaration of rights *(R K HC supra* par 58), which is a discretionary remedial procedure at common law and contained within section 38 of the Constitution. The SCA proceeded, correctly, on the basis that the appellants' prayer was based on the mandatory remedial procedure in section 172(1)(*a*) of the Constitution (*R K v Minister of Basic Education supra* par 64). Yet, the SCA's reasoning shows that it confused the section 172(1)(*a*) procedure with a discretionary declaration of rights.

3 3 1 Mapping the courts' conflation

In the court *a quo*'s judgment, Muller J sets out the prayer for declaratory relief:

> "In addition to the claims for damages, the plaintiffs also seek a declaratory order that the defendants have breached their constitutional obligations in respect of the rights contained in sections 9, 10, 11, 24, 27, 28 and 29 of the Constitution." (*R K HC supra* par 13)

The court *a quo* (*R K HC supra* par 69) found that "[a] declaratory order, to effectively vindicate the Constitution is a discretionary remedy". The court *a quo* cited the pre-constitutional case of *Ex parte Nell* (1963 (1) SA 754 (A)) in support of this finding, a case on the "verklaring van regte" (declaration of rights) in terms of the repealed Superior Courts Act (59 of 1959). Earlier in the relevant section of its judgment, the court *a quo* precedes its finding in paragraph 69 based on *Fose v Minister of Safety and Security* (*supra*):

> "Our object in remedying these kinds of harms should, at least, be to vindicate the Constitution, and to deter its further infringement." (*R K HC supra* par 55)

This may seem strange, since *Ex parte Nell* (*supra*) came long before *Fose v Minister of Safety and Security* (*supra*), the Interim Constitution and the Constitution. The *Ex Parte Nell* judgment does not mention the need for constitutional harm to be addressed with remedial procedures that vindicate the Constitution. What can be inferred from this finding is that the court *a quo* considered the plaintiffs' prayer to be for a "verklaring van regte", a declaration of rights. Such a declaration is authorised by section 38 of the Constitution:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights."

The declaration of rights, accordingly, is the discretionary remedial procedure that Muller J considered in the judgment of the court *a quo*. Courts "may" grant a declaration of rights where rights in the Bill of Rights are threatened or infringed. Its discretionary nature is further confirmed by Didcott J in *JT Publishing (Pty) Ltd v Minister of Safety and Security* (1997 (3) SA 514):

> "[A declaration of rights] is also a discretionary remedy, in the sense that the claim lodged by an interested party for such an order does not in itself oblige

> the court handling the matter to respond to the question which it poses." (*JT Publishing v Minister of Safety and Security supra* par 15)

The appellants were not asking for a declaration of rights. They were praying for a section 172(1)(*a*) declaration that the government's conduct (its consistent failure to eliminate the dangerous pit-latrine system) is invalid for its inconsistency with the Constitution. The SCA itself pointed to section 172(1)(*a*) of the Constitution as the source of the plaintiffs' prayer (*R K v Minister of Basic Education supra* par 64), but it then embarked on reasoning that culminated in a finding that the court *a quo* exercised its discretion judicially when it refused a declaratory order (*R K v Minister of Basic Education supra* par 67). Here, the court clearly confused the discretionary declaration of rights with the remedial procedure that was prayed for, namely the mandatory section 172(1)(*a*) declaration of invalidity.

The court advanced two reasons for not interfering with the court *a quo's* refusal to grant declaratory relief. First, it held somewhat disingenuously that it could not have been government policy to provide abysmally inadequate pit-latrine facilities and accordingly there was nothing to declare invalid for constitutional inconsistency (*R K v Minister of Basic Education supra* par 64). The court draws this conclusion because section 172(1)(*a*) declarations had thus far been applied in cases involving government policy (see *Minister of Health v Treatment Action Campaign (II)* 2002 (5) SA 721 (CC)) or statute (see *National Director of Public Prosecutions v Mohamed NO* 2003 (4) SA 1 (CC)). It must be noted that neither of these cases provided a closed list of what may be declared invalid in terms of section 172(1)(*a*) of the Constitution. Those courts applied the section to conduct that manifested as government policy on HIV/AIDS, and section 38 of the Prevention of Organised Crime Act (121 of 1998), respectively. These cases placed no reasoned restriction on the meaning and extent of "conduct", and certainly did not exclude it from referring to omissions to act where a legal duty is owed.

Secondly, the court cemented its conflation of the two remedial procedures in a second advancement when it relied on its judgment in *MEC for the Department of Welfare v Kate* (*supra*). That case entailed a claim for damages by an elderly disabled woman after the Eastern Cape government failed to pay her social security grant. The court had to decide whether it would entertain the appellant's urging that the respondent's relief be limited to a declaration of rights, which the court refused (*MEC for the Department of Welfare v Kate supra* par 29). The SCA in *R K v Minister of Basic Education* (*supra* par 66) tailored its second argument for refusing the appeal according to case law that dealt with the discretionary remedial procedure in section 38 of the Constitution, and not the mandatory section 172(1)(*a*) procedure, which was at stake here.

3 3 2 Criticism

From the exposition above it appears that the court *a quo* misunderstood the plaintiffs' prayer as relying on the law relating to declarations of rights, while the SCA conflated the two remedial procedures. The SCA made use of the same term, "declarator", during its interweaving of case law relating to

declarations of rights and declarations of invalidity (*R K v Minister of Basic Education supra* par 64–67).

This poses problems. A failure by the courts to appreciate the difference between the two remedial procedures may lead to remedies being refused owing to judicial deliberation that is wrong on the law. The conflation also creates the risk of courts missing opportunities to declare invalid conduct that is patently inconsistent with the Constitution. Such declarations are not only mandatory in terms of 172(1)(*a*) of the Constitution, but are also necessary to hold the executive accountable to the Constitution. While accountability without judicial overreach is incidentally a trait shared by declarations of rights and declarations of invalidity (as stated in *MEC for the Department of Welfare v Kate supra* par 28: "[Declarations of rights] can promote a non-coercive dialogue between courts and government in preference to an injunction"), it is exactly the mandatory nature of the declaration of invalidity that makes it such a powerful remedial tool. If the substantive inquiry determines that a party's conduct was inconsistent with the Constitution, a court is mandated to issue a declaration of invalidity. This is unlike the discretionary declaration of rights, which can easily be declined if the court is not convinced of its usefulness to clarify a matter; it can instead declare the law on the facts (*MEC for the Department of Welfare v Kate supra* par 28).

It is fair to state beforehand that the plaintiffs *a quo* could have pleaded for declaratory relief in clearer terms. In the court *a quo's* judgment, the prayer reads

> "[T]he plaintiffs also seek a declaratory order that the defendants have breached their constitutional obligations in respect of the rights contained in sections 9, 10, 11, 24, 27, 28 and 29 of the Constitution." (*R K HC supra* par 13)

The court *a quo* ostensibly took this to mean a declaration of rights, since both section 38 of the Constitution and section 172(1)(*a*) of the Constitution entail declaratory relief where there is conduct infringing on constitutional rights. However, it remains questionable that the court *a quo* chose to rely on authority (*Ex parte Nell supra*), that has been superseded or at least been engrossed with new developments in the constitutional era.

Where an inconsistency with constitutional rights is present, such as in the facts of this case, a court in the constitutional dispensation is enjoined to consider section 172(1)(*a*) of the Constitution. Furthermore, in the SCA, the appellants quite puzzlingly chose to limit the scope of their understanding of "conduct" for purposes of the declaration of invalidity to "state policy". This approach forced them into the unenviable corner of having to argue that "state policy" led to the continued presence of the pit-latrine system and, eventually, to S K's death. To an extent, one may lay the failure of the plaintiffs *a quo* to succeed with the point of appeal on declaratory relief at their own feet.

When adjudicating a prayer for the mandatory remedial procedure in section 172(1)(*a*) of the Constitution, the question is whether the court is confronted with conduct that is inconsistent with the Constitution. If the answer is yes, then the court must issue a declaration of invalidity. If the

answer is no, the Constitutional Court held in *Rail Commuters Action Group v Transnet t/a MetroRail* (2005 (4) BCLR 301 (CC)):

> "[Section 172(1)(a)] does not mean, however, that this Court may not make a declaratory order in circumstances where it has not found conduct to be in conflict with the Constitution. Indeed section 38 of the Constitution makes it clear that the Court may grant a declaration of rights where it would constitute appropriate relief." (*Rail Commuters Action Group v Transnet t/a MetroRail supra* par 106)

When a prayer for the discretionary remedial procedure at common law, as contained in section 38 of the Constitution, is adjudicated, the court has a discretion to grant declaratory relief even if rights are merely threatened.

Case law such as *MEC for the Department of Welfare v Kate* (*supra*) and *Rail Commuters Action Group v Transnet* (*supra*) guide the court's discretion as follows:

> "A declaration of rights is essentially remedial and corrective and it is most appropriate where it would serve a useful purpose in clarifying and settling the legal relations in issue." (*MEC for the Department of Welfare v Kate supra* par 28)

Given this, the SCA's reasoning and refusal to interfere with the court *a quo*'s finding on the declaratory order remain perplexing. When the appellants framed their appeal on the prayer for declaratory relief within the bounds of the mandatory remedial procedure, the court was not at liberty to embark on an excursion in discretionary adjudication. Yet, this is exactly what it did when it considered that declaratory relief would be superfluous, given the court *a quo's* "stinging rebuke" of the government (*R K v Minister of Basic Education supra* par 66); it invoked *MEC for the Department of Welfare v Kate* (*supra*), an authority on the declaration of rights to bolster its reasons for refusal (*R K v Minister of Basic Education supra* par 67); and it concluded by having regard to the court *a quo's "*judicial exercising" of its discretion.

What the SCA should have done was consider whether there was conduct by the government that was inconsistent with the Constitution. First, it should have identified the government's conduct as the consistent omission to address the impugned pit-latrine facilities at S K's school. By constraining itself to state policy and statute, the court did not properly interpret the meaning of "conduct" within the meaning of section 172(1)(*a*) of the Constitution. It considered itself to be bound by how the term "conduct" was applied in *Minister of Health v TAC II* (*supra*). That case did not restrictively interpret the meaning of "conduct" in section 172(1)(*a*) of the Constitution. The court in *Minister of Health v TAC II* (*supra*) accepted state policy to be a subject of the remedial procedure in that section and did not place any constraints on its scope or create some form of closed list. This is the correct approach, being in line with the purposive and generous approach to interpretation that our courts ought to follow (see, for e.g., *African Christian Democratic Party v Electoral Commission* 2006 (3) SA 305 (CC) par 21–31; *Daniels v Campbell NO* 2004 (5) SA 331 (CC) par 22).

This is the approach that the SCA in *R K v Minister of Basic Education* (*supra*) ought to have adopted. It is in line with the interpretive rule

prescribed in section 39(2) of the Constitution, which mandates judicial *fora* to interpret legal provisions in such a way that the spirit, purport and object of the Bill of Rights are promoted (see *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism supra* par 91). Interpreting the scope of "conduct" widely, to include executive omissions by government as conduct for purposes of section 172(1)(*a*) of the Constitution, accepts that inconsistency with the Constitution may very well arise during government's *failure* to act. Failure to give effect to the spirit, purport and objects of the Bill of Rights and the aims of the Constitution is, after all, in conflict with section 172(1)(*a*)'s logical precursor, the supremacy clause in section 2:

> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

This generous approach to understanding "conduct" also accords with the mode of interpretation followed in *Natal Joint Municipal Pension Fund v Endumeni Municipality* (2012 (4) SA 593 (SCA)):

> "Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed, and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors." (*Natal Joint Municipal Pension Fund v Endumeni Municipality supra* par 18)

Conduct is commonly understood as a person's behaviour, which itself ordinarily includes positive acts or refusals to act. The law of delict divides "conduct" into omission and commission – that is, failure to act and positive acts. Taken together, these ordinary meanings of a legal term and designation for behaviour very clearly include refusals to act. Moreover, in the context of section 172(1)(*a*) of the Constitution, there is no separate remedial procedure specially tailored for omissions. If "conduct" here excluded omissions, it would imply that omissions that are inconsistent with the Constitution are shielded from being declared so by a court of law, even if omissions may conceivably be as detrimental as commissions.

If the purpose of section 172(1)(*a*) of the Constitution is to provide a mandatory remedial procedure that "vindicate(s) the Constitution" (*Fose v Minister of Safety and Security supra* par 96), which flows from the supremacy clause in section 2 of the Constitution, then it follows that section 172(1)(*a*) of the Constitution is not curiously blind to seeing omissions as conduct. It is therefore a disingenuous rationalisation to hold narrowly that the government could not have created and acted in terms of a policy that directed dangerously inadequate toilet facilities at schools. It should have considered that the government's failure to end the pit-latrine system was omissive conduct, which falls within the remedial scope of section 172(1)(*a*) of the Constitution.

The second step that the court ought to have taken was to evaluate whether the government's omissive conduct was inconsistent with the Constitution. It should on that basis have decided if there was a need for a declaration of invalidity. It should not have applied a discretion-based

approach, because that is the approach under a declarations of rights, not the section 172(1)(*a*) procedure. It is submitted that insofar as the court considered the common law flexible enough to address the constitutional wrongs suffered by the appellants in *R K v Minister of Basic Education* (*supra*) owing to government neglect, a declaration of invalidity would have been appropriate to create a precedent for both the government and future victims of such omissive, harmful and constitutionally inconsistent conduct. It would have provided a blueprint for similar legal disputes with the State and have served as an enforceable accountability mechanism, without prescribing to the government exactly how to execute their constitutional duties. Issuing an order in terms of the section 172(1)(*a*) procedure would be effective: it goes further than a vaguely enforceable "stinging rebuke" (*R K v Minister of Basic Education supra* par 65*),* but not so far that it encroaches upon the separation of powers between the courts and the executive arm of the State.

3 4 Amicus procedure: Misapplication of the law

The SCA disposed of the *amicus* application on two main grounds. It is submitted that while the second of the court's two reasons for rejection of the application (*R K v Minister of Basic Education supra* par 8) is correct, the first misapplied the law on the admission of *amici curiae.* The court held that the *amicus* applicant, the attorney firm RSI, had a personal financial interest at stake in the matter, in that an outcome in line with its submissions (that a claim for emotional shock ought to be recognised) would provide it with a precedent. This would bolster RSI's chances of success in a pending class action where emotional-shock claims also came to the fore. Accordingly, RSI – acting for the plaintiffs in the separate class-action matter on a contingency basis – would see its contingency fee significantly increased (*R K v Minister of Basic Education supra* par 5)*.* The SCA held, as a first reason for rejecting RSI's application, that this apparent personal financial interest disqualified the application. This reasoning does not hold water in the face of case law relating to joinder and the requirement of a direct and substantial interest. The court also misinterpreted Moseneke DCJ's finding in *National Treasury v Opposition to Urban Tolling Alliance* (2012 (6) SA 223 (CC) par 18).

Rule 16 of the SCA Rules require *inter alia* a prospective *amicus* to explain their interest in a matter in which they purport to be offering assistance. Given that external parties with a direct and substantial interest in a matter or with a legal interest in the subject matter of litigation that may be prejudicially affected by the outcome of the litigation ought to be joined as litigants (*Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) par 657), it follows that a prospective *amicus* with an interest that is direct and substantial ought to be joined as a litigant and cannot participate as an *amicus. Amici* merely offers assistance to the court in matters on which they can provide helpful expertise (*Hoffman v SA Airways* 2001 (1) SA (CC) par 63).

In *National Treasury v Opposition to Urban Tolling Alliance* (*supra*)*,* the Constitutional Court held that *amicus* submissions should

> "be directed at assisting the court to arrive at a proper and just outcome in a matter in which the friend of the court does not have a direct or substantial interest as a party or litigant." (*National Treasury v Opposition to Urban Tolling Alliance supra* par 13)

The interest of an *amicus* is a lesser interest than those of the parties. An *amicus* interest falls within the realm of indirect interests and within a context of usefulness and assistance to the court. There is no closed list of interests that qualify for *amicus* status, as the court in *National Treasury v Opposition to Urban Tolling Alliance* (*supra*) found, and the court's discretion is exercised within the bounds of case law and the rules governing *amici curiae* applications. Lastly, the court in *National Treasury v Opposition to Urban Tolling Alliance* (*supra* par 15) rejected the Democratic Alliance's *amicus* application on the basis that it is improper for a political party to use the *amicus* procedure as a means of advancing a "sectarian or partisan interest" against one of the opposing parties. If its interest was of a direct and substantial nature, even if politically partisan, it should intervene or join the proceedings (*National Treasury v Opposition to Urban Tolling Alliance supra* par 15).

The ruling rejecting the DA's application arose in the context of the court's wariness of being misused in political battles, which ought to be reserved for "the National and Provincial Legislatures and Municipal Councils where [the DA] says it is widely represented" (*National Treasury v Opposition to Urban Tolling Alliance supra* par 15). This differs markedly from what the SCA was seized with in *R K v Minister of Basic Education* (*supra*), where a firm of attorneys requested permission to provide its expert assistance – not an odd request at all, given that the legal practitioner's foremost duty is to lead the courts to law. This cannot be analogous to a political party using the *amicus* procedure to score political points against an ANC-led National Treasury.

The court's insistence that an *amicus* must be "objective and not seek to advance an interest of its own" (*R K v Minister of Basic Education supra* par 5) can be squared with a legal practitioner's duty to assist the court on objective points of law, but does not tally with the finding in *National Treasury v Opposition to Urban Tolling Alliance* (*supra* par 13) that an *amicus* may well "urge upon a court to reach a particular outcome". Indeed, *amici* are interested in select cases precisely because they have certain subjective socio-political or philosophical dispositions. Renowned *amici* such as the Helen Suzman Foundation or the Centre for Child Law provide briefs based on an interest in a certain outcome, concomitantly advancing their organisational purpose. Disparaging an *amicus* applicant for advancing its own interests shows a misunderstanding of how *amicus* briefs operate. Insofar as RSI could provide legal assistance on objective points of law and urge an outcome based on its interest in the matter, the firm was in the clear.

The court finally reasoned that RSI's personal financial interest lay at the heart of its application (*R K v Minister of Basic Education supra* par 5). If RSI's contentions won the day, the precedent would give it an edge over its opponent in the separate pending class action. If the class action were successful, RSI would benefit from its contingency-fee agreement with its plaintiff clients. The court saw RSI as better suited to being a litigant (*R K v Minister of Basic Education supra* par 5–6), but RSI would be disqualified

from intervening or joining the litigation in *R K v Minister of Basic Education* (*supra*) owing to its clear lack of a direct and substantial interest in that matter. The *lis* did not originate between it and the respondents in *R K v Minister of Basic Education* (*supra*).

Even if RSI applied the test and showed that it had a legal interest in the subject matter of the litigation that could be prejudicially affected, the finding by Horwitz AJP (as he then was) upon an exhaustive review of English and Roman-Dutch authority in *Henri Viljoen (Pty) Ltd v Awerbuch Bros* (1953 (2) SA 151 (O) par 169H) precludes those with an indirect financial interest from joining or intervening. Insofar as RSI may potentially benefit financially, depending on the outcome of *R K v Minister of Basic Education* (*supra*) and the myriad conditions affecting the litigation, its financial outlook cannot be said to depend directly on the *R K v Minister of Basic Education* (*supra*) judgment. In a rather ironic twist, the SCA found that a claim based on emotional shock does indeed lie in our law of delict. Whether RSI's submissions were admitted or not made no difference in the end. The outcome of the litigation in the class action suit in which RSI is involved might ultimately still benefit the firm, bolstering the argument that RSI's benefit was in any event of an indirect nature.

If RSI's interest was not direct and substantial, is precluded from joinder or intervention by the rule in *Henri Viljoen (Pty) Ltd v Awerbuch Bros* (*supra*), and does not amount to a partisan political spat such as in *National Treasury v Opposition to Urban Tolling Alliance* (*supra*), where does it fit in? Given the generous approach to assessing the interest of an *amicus (National Treasury v Opposition to Urban Tolling Alliance supra* par 15)*,* it is submitted that RSI was well placed to assess the applicable law. It faced a similar case, and if it is accepted that *amici* do act with a measure of self-interest, RSI still acted in the best interests of its indignant clients. It did so by submitting a brief that may eventually urge its similar class action towards a less litigious and settled end, saving both time and money. Additionally, RSI's practitioners offered to lead the courts to law, which is the primary duty of the legal practitioner. It is finally submitted that if an indirect financial interest is enough to disqualify a potential *amicus*, particularly legal practitioners, it would cast a chilling effect on lawyers willing to provide courts with expert input. It would simply set the bar too high and exclude valuable potential *amici* who are best placed to lead courts to law.

4 Conclusion

The SCA in *R K v Minister of Basic Education* (*supra*) illustrates how the "single-system-of-law" principle operates when constitutional considerations beg vindication through the common law. It shows that the common law may be flexible enough in various instances to come to the aid of parties who are constitutionally aggrieved. If the outcome prescribed by the common law is inadequate, unacceptable, or unjustifiable, given the implication of constitutional rights, the development of the common law will have to be considered by the court in view of relevant constitutional rights. Thus, apart from the courts developing a normative framework for decisions, the courts should always take into consideration the effect of the Constitution on the common law.

However, the sound application of our sources of law in accordance with the "single-system-of-law" approach should not lead to courts skimming over adjectival details. The adjectival law, *in casu* the adjudication of *amicus* applications and providing the correct declaratory relief, is essential to ensure that public trials are fair in all respects. A just outcome on most substantial points does not justify a less-than-thorough approach to matters of procedure. The SCA's finding shows how a conflation of two wholly different forms of declaratory relief can deprive a party of constitutionally mandated relief, which was probably due on these facts. Lastly, the incorrect application of law relating to *amici curiae* created precedent that may actively discourage legal practitioners from assisting courts with intelligent legal development, which indeed is the profession's finest skill and foremost duty.

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