



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

(1)REPORTABLE: NO

(2)OF INTEREST TO OTHER JUDGES: NO

(3)REVISED

22/11/2024

DATE

SIGNATURE

CASE NO: 5670/2023

In the matter between:

GUMEDE GLADYS BUKEKA

FIRST APPLICANT

UBUHLE BE AFRIKA

SECOND APPLICANT

AND

SMALL ENTERPRISE DEVELOPMENT AGENCY

FIRST RESPONDENT

**DEPARTMENT OF TRADE, INDUSTRY AND
COMPETITION**

SECOND RESPONDENT

Flynote: Civil: Procedure - Remedial Action by the Public Protector-Whether complied with – Delictual Claim - Applicants seeking damages in terms of section

38 of the Constitution – not appropriate where delict - can remedied by common law – Application dismissed.

JUDGEMENT

MATSEMELA AJ

[1] This action according to the amended notice of motion, is an application for a declaratory order to declare that:

- (a) The Respondents have failed to comply with the remedial action of the public protector.
- (b) This Court to direct that the Respondents be ordered to comply with the remedial action of the Public Protector.
- (c) This Court to order that the Respondents to “make an offer of an ex- gratia payment” as appropriate relief to compensate the applicants.

BACKGROUND

[2] In 2015 the applicants submitted an application to participate in the South African Lifestyle Hub (SALH) in Atlanta, Georgia, USA (Atlanta). The purpose of the SALH was to promote South African products in the United States of America.

[3] The Second Respondent (Seda) was responsible for the operational management of the SALH as per memorandum of Agreement signed between Seda and the second respondent.

[4] Upon the closure of the SALH the applicants lodged a complaint with the office of the Public Protector's office. The essence of the complaint was that, the arts and crafts belonging to the Applicants were not returned to the applicants.

THE LEGAL ISSUES

[5] The first applicant in his papers seeks that this Court award constitutional damages for violation of rights. He seeks an "appropriate" relief as a result of alleged financial prejudice suffered by the applicant.

[6] The first applicant alleges financial prejudice of \$7 467.00 (+-R140 000) and loss of opportunity to tune of R2 000 000.00.

[7] The above relief is requested in terms of section 38 of the Constitution which empowers the court to award appropriate relief where a right in the bill of rights has been violated.

FACTS

[8] The Public Protector issued remedial action which can be found on page 77 of the Public Protector's Report. The first remedial action says that within sixty (60) days Seda was to make an ex-gratia payment to the complainant as compensation.

[9] The Public Protector quantified the loss suffered by the applicants to R35 450, 00. This can be found on page 25 (Twenty five) of the Public Protector's report.

[10] Seda proposed a settlement with the applicants and drafted a settlement agreement for the amount as quantified by the Public Protector. The applicants rejected the settlement offer.

[11] In other words there was compliance with the remedial action proposed by the Public Protector and the applicants rejected the offer.

[12] The second remedial action was for Seda to, within ninety (90) days, develop a policy and /or standard operating procedure manual with clear guidelines for the SALH and similar projects.

[13] The first respondent alleges that SALH was a once off project, which has been moved from Seda to the Second Respondent. Seda has brought this to the attention of the office of the Public Protector, the Public protector has not come back to state that Seda's explanation is unacceptable.

[14] The third remedial action was for Seda to within thirty (30) days ensure that the staff dealing with similar projects to SALH be trained on the developed policies and/or standard operating procedure manual.

[15] As with the previous remedial action at paragraph 13, this remedial action would be futile as the project was a once off project. This was accepted by the Public Protector.

[16] Seda undertook to train to train staff should similar projects come in the future. Seda cannot be expected to train staff for projects that do not exist or are not in the future plans of the entity. The purpose is to use taxpayers money wisely.

[17] The fourth remedial action was for Seda to within sixty (60) days from the date of the report jointly conduct a verification process and prepare a close off report for the SALH showroom in Atlanta. Seda and the Second Respondent did come together to compile the close out report. The close out report is attached to the answering affidavit as annexure SED 3.

THE LAW

[18] In *Fose v Minister of Safety and Security*¹, the Constitutional Court was confronted with the question of constitutional damages as a means of affording "appropriate relief". The claim for constitutional damages, which included an element of punitive damages which arose from a series of alleged assaults by the police. This was in violation of the right not to be tortured or subjected to cruel, inhuman and degrading treatment.

[19] The Court made it clear that the enquiry it was called to answer was confined to the facts of that specific case. It did not deal with the question of whether an action for constitutional damage exists generally, in law or whether payment for damages constitutes appropriate relief for violating constitutional rights. Four (4) factors can be determined from the judgement. Appropriate relief can be granted from the judgment.

[20] The first is that the courts should look at the circumstances of each case to determine what relief will best ensure the protection and enforcement of the rights enshrined in the Constitution and may where necessary, formulate fresh remedies to do so².

¹ [1997] ZACC 6

[21] The second is that in several instances, the common law will be broad enough to encompass all the relief that will be appropriate to remedy a violation of constitutional rights.³

[22] The third is that in principle, appropriate relief may include an award for constitutional damage where such an award to protect and enforce right in the Bill of Rights.⁴

[23] The fourth is that in a country where there is a heavy demand for scarce resources with which the state must fulfil several constitutional obligations, courts ought not to award punitive constitutional damages to a claimant who is already fully compensated for any loss or damage.⁵

[24] In the matter of ***MEC for Department of Welfare v Kate***⁶ the Supreme Court of Appeal set out further guidelines for determining whether an order awarding constitutional damage is appropriate. A court should take into account, amongst other things:

- 23.1 The nature and relative importance of the rights that are in issue;
- 23.2 Alternative remedies that may be available to assert and vindicate the rights; and
- 23.3 The consequences of breaching these rights for the claimants.

² FOSE AT PARA 19

³ FOSE AT PARA 58

⁴ FOSE AT PARA 60

⁵ FOSE AT PARA 72

⁶ [2006] ZASCA AT PARA 25

[24] Therefore, courts will look at the circumstances of each case to determine whether it is appropriate to award constitutional damages or whether an alternative remedy is sufficient to vindicate rights.

[25] Alternative remedies may include a declaration of rights, an interdict, a mandamus or any other relief that will ensure that the constitutional rights are protected and enforced.⁷

[26] In the more recent decision of *Thubakgale and other v Ekurhuleni Metropolitan Municipality and others*⁸ the Constitutional Court dismissed a claim for constitutional damages sought by the applicant on the grounds of an alleged infringement of their constitutional right to access adequate housing for the respondents.

[27] The core issue that the Constitutional Court had to decide was whether there had been an infringement of the right to adequate housing and if so whether the applicants were entitled to constitutional damages for such an infringement.

[28] The majority unanimously agreed that it was not appropriate to award constitutional damages in this particular case because contempt of court proceedings were available to the applicants as an appropriate remedy for the Municipality's non-compliance with the High Court judgment dated 15 December 2017. It was open to the applicants to use contempt of court proceedings as a remedy, which, they chose not to, at their detriment.

⁷ FOSE AT PARA 19

⁸ [2021] ZACC 45

[29] The applicants had successfully obtained a remedy in the High Court judgment dated 15 December 2017, and reopening that litigation for purposes of altering that final order would offend against our rule of law, which place a premium on finality in litigation, which in turn promotes the principles of certainty.

[30] The Court held that no proper case was pleaded for constitutional damages and there was no proof of any damages let alone constitutional damages. In short, the decision of the majority to refuse constitutional damages was based on the fact that other remedies, such as contempt of court proceedings were available to the applicants and they opted for the wrong one.

[31] In the unfortunate matter of ***Komape and Others v Minister of Basic Education***⁹ constitutional damages once again came into the spotlight. Michael Komape, a five year old boy attending his third day of grade R in Polokwane faced an untimely and undignified death when he drowned in a faeces infested pit toilet.

[32] The family claimed constitutional damages, amongst other heads against the Department of Basic Education for violating several constitutional rights.

[33] Notwithstanding a finding by the court that many constitutional rights were violated¹⁰ in the end it was held that the constitutional

⁹ [2018] ZALMPPHC 18

¹⁰ KOMAPE AT PARA 63

damages claimed by the Komape family were “nothing short of punitive damages” and that, if successful it would result in the family being over compensated without the award serving the interests of society.¹¹

[34] From the above caselaw, it is clear that the concept of appropriate relief in terms of section 38 of the constitution includes an award for constitutional damages.

[35] However, whether it is appropriate to make an award for constitutional damages and what the measure of the damage should be will depend on the circumstances of each case, the particular rights that have been infringed and the other remedies available.

[36] Constitutional damages are not appropriate relief where a claimant could be compensated by delictual damages because that in itself, is powerful vindication of constitutional rights.

[37] Constitutional damages should also not be awarded where there is no evidence to prove that such damages would serve as significant deterrent against an individual or systematic repetition of the infringement in question.

[38] In most cases, the common law will be broad enough to provide all the relief that would be “appropriate” for a breach of constitutional rights.

[39] Accordingly, where a violation of a constitutional right involves

¹¹ KOMAPE PARAS 67 AND 68

the commission of delict, an award of constitutional damages in addition to those available under the common law will seldom be available as seen in the Komape matter¹².

[40] If a common law remedy exists, a claimant must first have recourse to that remedy.

[41] The applicants herein can pursue a delictual claim to vindicate their constitutional rights, they must prove all the elements of a delict before being compensated. A delictual claim does not cease to be a remedy simply because it may be onerous to prove.

[42] In conclusion it is clear that the first respondent has fully complied with the remedial action on the public protector. The Public Protector has not issued any non-compliance notice or taken steps against Seda for non-compliance. There is absolutely no merit in the applicants' claim. The applicants claim in this regard stands to be dismissed.

ORDER

The applicants' claim is dismissed with costs.

¹² KOMAPE PARAS 67 AND 68



J M MATSEMELA

Acting Judge of the Gauteng High Court Pretoria

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 22 November 2024

DATE OF HEARING 18 SEPTEMBER 2024

APPEARENCES

FOR THE APPLICANT	ADV M H MHAMBI
INSTRUCTED BY	T MATU ATTORNEYS
FOR THE RESPONDENT	MR SB DLAMINI
INSTRUCTED BY	SMALL ENTERPRISE DEVELOPMENT AGENCY