



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
(4) DATE: 04 NOVEMBER 2025



(5) SIGNATURE: C.J COLLIS J

CASE NO: 33786/2010

In the matter between:

BROOKWAY PROPERTIES 30 (PTY) LTD

Applicant/Plaintiff

And

THE CITY OF TSHWANE

METROPOLITAN MUNICIPALITY

Respondent/Defendant

This judgment is issued by the Judges whose names are reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Senior Judge's secretary. The date of this judgment is deemed to 04 November 2025.

JUDGMENT

COLLIS J

INTRODUCTION

1] The present application is brought in terms of section 3(4)(b) of the Institution of Legal Proceedings Against Certain Organs of State Act, Act 40 of 2002 ("the Act"). The applicant is seeking condonation for the late delivery of its Notice of Intended Legal Proceedings against the respondent as provided for in terms of section 3(2) of the Act.

2] The applicant contends that Section 3(1) and (2) of the Act are not applicable as its claim against the respondent is not a "debt" as defined in the Act but in essence a referral to oral evidence of the applicant's claim for constitutional damages/compensation in respect of the eviction application with case number 33786/2010.

3] The referral of the applicant's claim for constitutional damages/compensation to oral evidence, is in accordance with the court order with case number 33786/2010 granted by Murphy J dated 30 September 2010¹ and as per the Deputy Judge President's directions contained in the pre-trial minute dated 5 December 2019.²

4] It is common cause between the parties that the respondent failed to comply with the above court order.

5] The applicant's claim against the respondent is for a declaratory order that the respondent's failure to comply with the said court order constitutes an infringement of the applicant/plaintiff's constitutional rights protected in terms of section 25(1) of the Constitution of the Republic of South Africa. If the declaratory order is granted, the applicant also seeks payment of constitutional damages, alternatively compensation.

6] As per the issued Notice of Motion the applicant is seeking the following relief:

"1. Condonation be granted to the Applicant in respect of the Applicant's non-compliance with sections 3(1)(a) and (2) of the

¹ Annexure "B2" – Condonation Application - Court order by Murphy J – Caselines D42 0 D46.

² Annexure "B3" – Condonation Application – Pre-Trial Minutes and Directions of the Acting DJP Potterill – D47 D49.

Institution of the Legal Proceedings Against Certain Organs of State Act, 40 of 2002;

2. Cost, only in the event of this application being opposed;

3. Further and/or alternative relief.”

FACTUAL CHRONOLOGY

7] The relevant factual chronology can be set out as follows:

7.1 On 10 June 2010, the applicant launched an application for the eviction of occupiers from its land against the City providing alternative accommodation to the occupiers and also seeking compensation from the City.³

7.2. On 30 September 2010 Murphy J delivered a judgment in the applicant's application. In terms of the judgment and order, it was directed that the claim for compensation is postponed *sine die*, and that the application for the payment of and the quantification of such compensation shall be referred to oral evidence on such date as to be determined by the Deputy Judge President.⁴

³ CaseLines C1 and B115.

⁴ CaseLines C1409 and C1445.

7.3. On 7 February 2020, after receiving a directive from the Deputy-Judge President on the 5 December 2019, the applicant filed a declaration alleging a constitutional breach by the City and claiming constitutional damages.⁵

7.4. On 16 March 2020, the City filed two special pleas, (the second one which is relevant for purposes of this application for condonation), in which the City pleaded that the applicant has failed to give notice in terms of Section 3 of the Institution of Legal Proceedings Against an Organ of State Act, 40 of 2002.⁶

7.5. On 23 April 2020, the applicant filed a replication to the respondent's special pleas.⁷

7.6. On 15 September 2021, the applicant brought an application for condonation, ex abundanti cautela, for non-compliance with Section 3 of the Institution of Legal Proceedings Against an Organs of State Act, 40 of 2002.⁸

7.7. On 31 January 2022, the City filed an answering affidavit, opposing the application for condonation brought by the applicant.⁹

⁵ CaseLines 8204 to 8219.

⁶ CaseLines 8148 to 8154

⁷ CaseLines 8181.

⁸ CaseLines D155-D189.

⁹ CaseLines D155 - 0189.

7.8. On 28 June 2022, the applicant filed a replying affidavit in the application for condonation.¹⁰

7.9. On 6 November 2022, the applicant delivered a notice in terms of Section 3 the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002.¹¹

7.10. On 23 April 2023, the applicant delivered its Amended Replication to the Respondent's Special Pleas.¹²

7.11. On 28 July 2023, the applicant delivered its amended Declaration.^{13"}

8] The applicant has approached the Court for relief, in so far as it may be necessary, essentially for condonation to be granted in terms of section 3 (4)(a) of the Act for the delay in delivering its Notice of Intended Legal Proceedings in terms of section 3(1) and (2) of the Act. The application is opposed by the respondent.

9] In this opposed application this Court is called upon to determine the following:

¹⁰ CaseLines 0192 - 0205.

¹¹ CaseLines 0150

¹² Case Lines 8181 & 0177.

¹³ Case Lines 8204.

9.1. Whether the applicant's claim for constitutional damages was originally sought by the applicant when it first entered the court?

9.2. Whether the applicant's claim for constitutional damages against the City is simply a continuation of existing proceedings under the same case number or *de novo* proceedings?

9.3. Whether the applicant's claim for constitutional damages is subject to the provisions of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002? In this respect:

9.3.1 Whether the applicant's claim for constitutional damages is a "debt" as envisaged by the Prescription Act 68 of 1969 or sections 3(1) and (2) of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002.

9.4. In the event of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002, being applicable:

9.4.1. Whether the debt has been extinguished by prescription;

9.4.2. Whether a good cause exist for the condonation of the failure by the applicant;

9.4.3. Whether the City will be unreasonably prejudiced by the failure to give timeously notice in terms of the Institution of Legal Proceedings Against Certain Organs of State Act, 40 of 2002.

10] Thus, if the Court finds that constitutional damages were not originally sought and are subject to both Acts, then the Court must find that the applicant should have sought condonation in terms of the Act for the late filing of the action. But, in that condonation, the applicant must show that its claim for constitutional damages has not prescribed otherwise condonation cannot be granted.

11] In essence it is the applicants' case that constitutional damages/compensation is not a "debt" as defined and envisaged in the Prescription Act because the adjudication of the applicant's claim against the respondent is a referral to oral evidence as per court order and the directions of the DJP of this Division.

12] Consequently, the applicant reasons that the provisions of the Act in so far as the giving of notice of intended legal proceedings do not find application in the present matter.

13] The applicant has however, purely ex abundante cautela, nevertheless delivered a Notice in terms of section 3(1) of the Act on 6 November 2020,¹⁴

¹⁴ Annexure "B22" – Condonation Application – Notice i.t.o s 3(1)&(2) of ILPOSA

this pursuant to the respondent's Special Plea dated 16 March 2020, relying on the applicant's failure to deliver a Notice in terms of section 3 (1) & (2)(a) of the Act.

14] On the other hand, the respondent contends that firstly, the applicant did not initially, in the eviction application, seek constitutional damages, which damages are different from 'compensation' as originally sought. The applicant in its claim in 2010 was predicated on a claim for occupational rent, alternatively delict. The cause of action now being raised in its 2020 declaration for constitutional damages is a completely new and different claim, which has prescribed.

15] Secondly, the claim for constitutional damages is a 'debt' as defined in terms of the Institution of Legal Proceedings Against Certain Organs of State Act, which has prescribed. The applicant must therefore obtain condonation before it can proceed with it.

16] Thirdly, the Court cannot grant condonation in instances where a claim has prescribed.

BACKGROUND

17] As mentioned in paragraph 7.1 supra, on 10 June 2010 the applicant brought an urgent application to evict certain individuals who were accused of unlawfully occupying its property. In paragraphs 3 and 4 in Part B of the notice of motion, the applicant sought the following relief:

“3. That the Third Respondent be ordered to give the First and Second Respondents alternative accommodation after making a full audit of the particulars of each and every of the unlawful occupiers, occupying the vacant land at the date of the said Court order, which alternative accommodation has to be provided at the date when the eviction order becomes effective, which date has to be determined by the Honourable Court;

4. Further alternatively to Paragraph 3, that the Third Respondent be ordered to give the First and Second Respondents alternative accommodation after making a full audit of the particulars of each and every of the unlawful occupiers of the vacant land, at the date of the Court order, which accommodation has to be provided at the date when the eviction becomes effective, which date has to be determined by the Honourable Court, and the Third Respondent be ordered to pay the Applicant compensation for the duration of the unlawful occupation of the vacant by the said First and Second Respondents, which compensation will be payable until the date of the eviction of the unlawful occupiers and/or the provision of the

alternative accommodation to unlawful occupiers and/or excavation of the land in which compensation is calculated at R991 666,00 per month;”

18] In the eviction application, the first respondent was the alleged unlawful occupiers whereas the Municipality/City was cited as the third respondent.

19] On a proper interpretation of paragraph 4 of the notice of motion, the respondent argued, the applicant sought that the Municipality be held liable for compensation in the form of occupational rent from the period of the unlawful occupation by the unlawful occupiers until their eviction or provision of the alternative accommodation by the Municipality or excavation of the vacant land. The applicant thus sought compensation for the entire period of the occupation, regardless of the fact that an eviction order was yet to be obtained and despite that the Municipality’s obligation to provide alternative accommodation to the unlawful occupiers would only arise after the eviction application had been granted.

20] As already mentioned, on 30 September 2010, Murphy J granted an order evicting the unlawful occupiers, with a further order that the Municipality make available alternative emergency accommodation or land on or before 31 January 2011.

21] The applicant in terms of paragraph 39 of the judgment by Murphy J, abandoned its claim for R991 666,00 monthly rental and instead sought an order that should the Municipality fail to provide alternative accommodation and land on a specified date, it be entitled to compensation calculated in terms of Section 12(1) of the Expropriation Act, No. 63 of 1975 ("the Expropriation Act"), as if the right to use had been obtained in terms of this Act.

22] It is common cause between the parties, that Murphy J, in his judgment, postponed the prayer for compensation *sine die* for oral evidence as follows:

"The Applicant's prayer for compensation in Paragraph 4 in Part B of this Notice of Motion is postponed sine die. The application for payment of and the quantification of such compensation shall be referred to and decided by oral evidence on such date in accordance with any directions regarding pleadings, discovery, inspection and other matters of procedure as determined by the Deputy Judge President or any other Judge designated by him."

23] Thereafter on 4 December 2019, the parties indeed held a pre-trial conference before Acting Deputy Judge President Potterill, who gave directives regarding the conduct of the matter going forward.¹⁵

¹⁵ Annexure B3, Caselines D47.

24] In terms of the directive so issued, the applicant was required to file a declaration by 31 January 2020.

25] However, the applicant delivered its declaration on 7 February 2020, in terms which it claimed against the Municipality compensation in respect of unlawful occupation of its property in the amount of R36 026 003 and constitutional damages in the amount of R140 500 000.00.

26] The applicant relies on the alleged failure by the Municipality to comply with the order of Murphy J, to contend that it suffered constitutional damages. The applicant goes further and seeks to claim: -

26.1 In Claim 1, the compensation in respect of unlawful occupation of its properties calculated at a rate of 7% per annum as if it had invested the amount of R169 million, being the value of the properties at a commercial bank. In doing so, it sought an amount of R36 026 003,00 for the period January 2010 to 11 February 2013. The period of January 2010, is the period upon which the Applicant alleged in the eviction application that the unlawful occupiers occupied its property, whereas the period of 11 February 2013, is the period which it alleges the properties were sold due to a compromise.

26.2 In Claim 2, the applicant seeks an order for constitutional damages being the difference between the value of the properties and the amount that the properties were sold for in terms of a compromise.

27] In respect of Claim 2, the Municipality contends that it is a new claim, which has prescribed. The Municipality further contends that it is akin to a claim for a loss of profit which is not recognized in our law where there are no allegations of fraud, corruption or mala fides.

28] The Municipality raised a special plea in respect of the above claims contending that the applicant's claim insofar as it relates to payment of compensation from the date of unlawful invasion/occupation, it is a new claim which has prescribed. Also, that the claim for payment of constitutional damages has also prescribed insofar as it was not originally sought when the eviction application was instituted.

29] The applicant then brought this condonation application, supposedly, *ex abundante cautela*, as a result of the above special plea raised by the Municipality.

30] The applicant filed a replication on 23 April 2020, therein contending that the claim for constitutional damages is not *de novo* proceedings as it emanates from existing proceedings which were postponed sine die ("the

eviction application"). The applicant also asserted that constitutional damages is not a debt. These are the issues before this Court.

31] The first question, therefore, is whether constitutional damages is "compensation" as originally sought by the applicant in its eviction application?

32] In this respect the argument advanced by the applicant was that the applicant's claim for compensation is dealt with in para (xii) of the judgment by Murphy J which reads as follows:

"(xii) The applicant's prayer for compensation in paragraph 4 of Part B of the notice of motion is postponed sine die. The application for the payment of and the quantification of such compensation shall be referred to and decided by oral evidence on such date and in accordance with any directions regarding pleadings, discovery inspection and other matters of procedure as determined by the Deputy Judge President or any other judge designated by him."¹⁶

33] In order to establish what the content of the Applicant's claim was when the matter was heard by Murphy J, the judgement and order should be properly interpreted, applying the normal principles of interpretation of a court order.

¹⁶ Caselines D73.

34] In terms of the normal principles the judgement and the court order should be read together, in order to properly interpret same and ascertain its intention and its purpose.

35] In *Firestone South Africa (Pty) Ltd v Centicuro AG* [1977] 4 ALL SA 600 (A) the Appellate Division stated as follows:

“The basic principles applicable to construing documents also apply to the construction of a court’s judgment or order: the court’s intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules.”

“Thus, as in the case of a document, the judgment or order and the court’s reasons for giving it must be read as a whole in order to ascertain its intention.” ¹⁷

36] In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2102 (4) SA 593 (SCA) the SCA once again described the process of interpreting as involving a unitary exercise of considering language, context and purpose. Interpretation is an objective exercise where, in the face of ambiguity, a

¹⁷ *Firestone South Africa (Pty) Ltd v Centicuro AG* [1977] 4 ALL SA 600 (A) Par [h] page 604. Also followed in *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Limited and others* [2012] JOL 29082 (SAC) para [13]; *Martrade Shipping and Transport GmbH v United Enterprises Corporation and other* [2020] ZASCA 120 at para [3]

sensible meaning is to be preferred to one which undermines the purpose of the document or order.¹⁸

37] On this basis counsel for the applicant had argued that as it was common cause, and it also appears clearly from the judgment, that at the time when the matter was heard, the applicant:

37.1 Abandoned the initial reliance on constitutional compensation, based on rental, by orally at the time of hearing the application requesting amended relief, in the form of a draft order which was handed up to the Court and not opposed at the time by the Respondent;

37.2 Relied on the principles of the President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd 2005(5) SA3 (CC) ("Modderklip Boerdery") in support for a claim for constitutional compensation, in the event that the City failed to provide emergency alternative accommodation or land, last-mentioned being a mandatory order also covered by the same draft order;

37.3 The constitutional compensation which was sought in terms of the draft order, for the breach of the mandatory order to provide

¹⁸ Natal Joint Municipal Pension Fund v Endumeni Municipality 2102 (4) SA 593 (SCA) at para [18].

alternative emergency accommodation or land, was at that stage requested in terms of Section 12 (1) of the Expropriation Act, 63 of 1975, similarly, as was done in Modderklip Boerdery.

38] It is on this basis that counsel had argued that the applicant's claim for compensation against the respondents is therefore not *de novo* proceedings but a referral to oral evidence for the "payment of and quantification" of the applicant's claim for compensation against the respondent in respect of an existing application which was postponed *sine die*.

39] The Constitutional Court in Modderklip Boerdery stated the following:

"I agree with the observation of the Supreme Court of Appeal that:

"If a constitutional breach is established, this Court is (as was the Court below) mandated to grant appropriate relief. A claimant in such circumstances should not necessarily be bound to the formulation of the relief originally sought or the manner in which it was presented or argued."¹⁹

¹⁹ Id at para 18. The Court referred to *Carmichele v Minister of Safety and Security and Another* (Centre for Applied Legal Studies intervening) 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC); and *Bannatyne v Bannatyne* (Commission for Gender Equality, as amicus curiae) 2003 (2) SA 363 (CC); .2003 (2) BCLR 111 (CC) in support of this approach.

40] Thus, in appropriate circumstances a Court can invent an “appropriate remedy” for the breach of a Constitutional right and is not bound to what relief the applicant has sought in its notice of motion.

41] The above proposition was repeated in the matter of Steven Ngomane & Others v The City of Johannesburg Metropolitan Municipality & others, [2108] ZASCA 57 where the SCA as per Maya JA held as follows:

“Although the applicants sought only the return of their property, it bears mention that a claimant in respect of a constitutional breach that has been established is not necessarily bound to the formulation of the relief originally sought or the manner in which it was presented or argued. Thus, it matters not that the applicants sought to vindicate their constitutional rights for the first time in this Court.²⁰

42] In the present matter, Murphy J, decided not to dismiss the claim for constitutional compensation, as amended in open court (without objection) in terms of the draft order handed up, which draft order, Murphy J duly considered, and decided that:

“The appropriate time for determining any entitlement to compensation or damages is where any such violation or breach actually materialises. The city has not effectively expropriated the

²⁰ Steven Ngomane & Others v City of Johannesburg Metropolitan Municipality, [2108] ZASCA.57 par [23]

applicant. At most it is perhaps in breach of its duties to access provincial government funding and to facilitate a solution. It may be that its persistent failure to act will concretise into a creeping expropriation of the applicant's rights to use. But I do not accept, and nor is there evidence sufficient for that purpose, that its present contact can be equated with expropriation. Should it fail to comply with the directives and orders are proposed to issue, its conduct, justifications and explanations associated with such failure, should it occur, must be assessed ex post facto to determine whether a creeping expropriation has indeed occurred. "

43] Murphy J, concluded with regards to the Applicant's reliance on the Modderklip Boerdery case, that:

"We are not at that stage in the present matter" and "an order declaring any entitlement to compensation contingent on future possible failures or duty or violation of constitutional rights, in my opinion would be premature."

44] Murphy J therefore decided not to dismiss the prayer for constitutional compensation, based on the draft order received and acknowledged that:

"The Application for payment of a quantification of such compensation shall be referred to a decided by oral evidence on such date and in

accordance with any directions regarding pleadings, discoveries, inspection and other matters of procedure as determined by the Deputy Judge Pres or any other judge designated by him".

45] The relief for constitutional compensation counsel therefore argued was not dismissed, but was pending and referred for oral evidence, subject to a rider that the Deputy Judge President would issue directions relating to the way forward.

46] On this basis counsel for the applicant submitted that there is, as a result, no doubt whatsoever that the constitutional compensation claim based on a breach of a constitutional right or duty, was pending since the judgement and order issued by Murphy J, and failing any appeal by the City, it is bound by such judgement and order.

47] In opposition, however, the Municipality contends that constitutional damages were not originally sought by the applicant in the original eviction application.²¹ In the initial eviction application brought by the applicant, it pleaded:

47.1 That the current occupation of the properties by the unlawful occupiers resulted in the land being useless for the applicant.²²

²¹ Para 23 to 30, caselines D163 to D166.

²² Para 45, caselines C59: Founding affidavit in the eviction application.

47.2 That "I am advised that the applicant has a constitutional claim for rental against the Third Respondent, for the duration of the unlawful occupation of the said properties endure".²³

47.3 That "If the Applicant would rather invest the current market value of the properties, within a banking institution it would have received a risk-free monthly interest of 7 % per annum, which would have amounted to a yearly yield of R11 899 992,00, which calculated on a monthly basis amount to R991 666,00 per month".²⁴

47.4 That "There is no conceivable reasons why the Applicant should not be compensated for the period of the unlawful occupation, until the unlawful occupiers are evicted alternatively alternate land be provided for them alternatively the land be expropriated in terms of the normal procedures".²⁵

47.5 That it was on the above basis that the applicant sought a declaratory order that it was "entitled to be compensated by the Third Respondent for the period of the unlawful occupation, commencing from the date"²⁶ of the eviction application.

²³ Para 46, caselines C59: Founding affidavit in the eviction application.

²⁴ Para 49, caselines C60: Founding affidavit in the eviction application.

²⁵ Para 50, caselines C61: Founding affidavit in the eviction application.

²⁶ Para 51, caselines C61.

48] This Court agrees that the order of Murphy J postponed the applicants claim for compensation *sine die*. This claim for compensation was sought in addition to the main relief in the form of eviction, alternatively occupational rental, which is different to constitutional damages.

49] As previously mentioned however the applicant moved for an amendment in terms of the draft handed up, which amendment was not opposed by the respondent and it is this amendment that introduced the claim for constitutional damages claimed by the applicant, which Murphy J ultimately elected to postpone.

50] Murphy J in his judgment made it clear that there was a distinction between compensation and constitutional damages. At paragraph 40 he said the following:

"40. Compensation could be payable in a case such as this when a relevant organ of state through its conduct or omissions in effect expropriates or arbitrarily deprives a party of its property. It is also conceivable that an applicant could be awarded constitutional or delictual damages for proven constitutional violations or breaches of statutory duty. However, I am not persuaded that the applicant has adduced sufficient evidence of any such violation or has laid a proper basis for a declarator that it be entitled to compensation for the contingency of the City not providing emergency accommodation or

land. The appropriate time for determining any entitlement to compensation or damages is when any such violation or breach actually materialises.....”

51] Section 38 of the Constitution, 1996 provides that anyone listed therein whose rights have been infringed or threatened may approach the Court and the Court may grant appropriate relief, including a declaration of rights.

52] Apparent from past caselaw in respect of constitutional damages the following principles have crystalized over the years:

52.1 Our Courts have clarified that for constitutional damages to be awarded, a determination of the remedies available to a litigant must be made in order to evaluate whether those remedies are appropriate. This is a strong indication that a claim for constitutional damages is a separate claim that must be pleaded as such;

52.2 In *Fose v Minister of Safety and Security*²⁷ albeit in relation to our interim Constitution, the Constitutional Court held that:-

“Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an

²⁷ [1997] ZACC 6 at Par. 19.

interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.”

52.3 The Court above stressed in paragraph 20 that it was dealing with a narrow issue and not whether constitutional damages exist in law and whether payment for damages in that regard qualifies as appropriate relief. The Constitutional Court only confined itself to the questions in relation to the infringement of rights as alleged and a separate claim for constitutional damages.

52.4 The Court thus recognised that the relief of constitutional damages would be distinct from the relief as dealt with at paragraph [19] of the judgment. The Court ultimately found at paragraph [61] that:-

“[60] Notwithstanding these differences it seems to me that there is no reason in principle why “appropriate relief” should not include an award of damages, where such an award is necessary to protect and enforce Chapter 3 rights. Such awards are made to compensate persons who have suffered loss as a result of the breach of a statutory right if, on a proper construction of the statute in question, it was the Legislature’s intention that such damages should be payable, and it

would be strange if damages could not be claimed for, at least, loss occasioned by the breach of a right vested in the claimant by the Supreme law. When it would be appropriate to do so, and what the measure of damages should be, will depend on the circumstances of each case and the particular right which has been infringed”.

52.5 In the above matter therefore the Constitutional Court dealt with the matter by accepting that there was a difference between a claim based on delict [i.e., the assault and detention] and one based on constitutional damages [i.e., a claim based on the infringement of constitutional rights].²⁸

52.6 Past caselaw further indicate that in all cases where constitutional damages were dealt with, they were sought ancillary to a remedy in delict, common law or otherwise. But the violation of a constitutional right had to be pleaded and so too the relief had to be pleaded.

53] The violation of a constitutional right and the relief for constitutional damages indeed was pleaded when Murphy J granted the amendment to the applicant. In *President of the Republic of South Africa and Another v Modderklip Boerdery*,²⁹ mentioned above, Modderklip asked for a declaration that the State had breached their section 25(1) and its equality rights under section 9(1) and (2) of the Constitution as well as the unlawful

²⁸ See paragraph 14.

²⁹ (Pty) Ltd (CCT20/04) [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) (13 May 2005).

occupiers' rights to access to adequate housing [section 26].³⁰ In this matter the Court a quo granted the relief regarding the State's breach of rights as explained above.³¹ The Supreme Court of Appeal upheld the Court a quo's order.³² The Constitutional Court however declined to answer the question as to whether the rights of the unlawful occupiers and Modderklip had been breached. It dealt with the issue in a different way by finding that the State's failure to assist Modderklip regarding the eviction of the unlawful occupiers breached Modderklip's section 34 right to an effective remedy.³³ This was because Modderklip had an eviction order it could not execute due to the sheer number of unlawful occupiers on its property and the refusal of the State to assist it with the eviction.

54] Herein, in terms of the eviction order granted by Murphy J, the City was supposed to provide alternative accommodation by 31 January 2011 for the eviction to take place and this the City has failed to do.

55] The City, being bound to the judgement and order, is not free to defy the content thereof, and all the parties are bound to it.

56] An organ of state further has a duty to respect and give effect to a judgement or court order, even if it silently does not agree with. If the

³⁰ Modderklip at para 11.

³¹ Modderklip at para 15.

³² Modderklip at paras 18 and 19.

³³ Modderklip at para 51.

content is defied or ignored, it will be viewed as a contemptuous behaviour.³⁴

57] It would therefore seem to me, properly interpreted and with reference to Modderklip Boerdery, that the applicant's claims at all material times has been for compensation based upon the infringement of the applicant's fundamental right of ownership as entrenched in s 25(1) and s 25(3).³⁵

58] For the above reasons this Court concludes that the applicant's claim for constitutional damages is not new or subject to the provisions of the Institution of Legal Proceedings Against Certain Organs of State Act³⁶, Act 40 of 2000 and it is for this reason that there was no duty on the applicant to comply with the provisions of Section 3(1) & (2) of the Act.

59] The second question to then be answered is whether the applicant's claim for constitutional damages is a "debt" as envisaged by the Prescription Act or section 3(1) and 3(2) of the Institution of Legal Proceedings Against Certain Organs of States Act and whether such debt has prescribed.

³⁴ Municipal Manager OR Tambo District Municipality and another v Ndabeni [2022] 5 BLLR (CC) par [24].

³⁵ Section 25(1) – Constitution of the Republic of South Africa: "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

³⁶ Act 40 of 2002.

60] The Institution of Legal Proceedings Against Certain Organs of State Act was enacted to provide uniformity in both periods of limitation and procedure of enforcement against Organs of State due to the plethora of statutory provisions, which previously dealt with prescription. This Act regulates all claims against Organs of State arising from an act performed or omission of any duty in law or any duty in terms of any law.

61] In respect of the above question, the applicant had argued that the referral to oral evidence by Murphy J of specified issues being “the payment and quantification of such compensation” is a continuation of an existing application and does not constitute de novo proceedings.

62] In support of this argument, the applicant relied on the decision of *Greyling v George Randall High School* [2023] 5 BLLR 412 (LC) where the court held as follows:

“If oral evidence is allowed under rule 6(5)(g) the proceedings remain motion proceedings and do not become a *rauw actie*.”^{37, 38}

³⁷ Para 35 – *Greyling v George Randell High School* [2023] 5 BLLR 412 (LC).

³⁸ In *Taylor v Hollard* Aug 31 - Sept 4 1885 “*rauw actie*” according to Van Der Linde (Jud. Pract. 2-6, & 2) means “Whenever a case comes before the Court in the first instance”; and according to Wassenaar’s Jud. Pract., *rauw-actie* means an action in the first instance, and not by appeal or reformation.”

63] Further, in *Macsteel Tube and Pipe, a Division of Macsteel Service Centres SA (Pty) Ltd v Vowles Properties (Pty) Ltd* [2021] JOL 52604 (SCA) the SCA stated as follows:

"A plaintiff is not precluded from augmenting its claim for damages if the new claim merely represents a fresh quantification of the original claim."³⁹

64] On this basis, counsel had argued that the referral to oral evidence of the payment and quantification of the applicant's claim is merely a continuation of existing proceedings under the application with case number 33786/2010 and do not constitute de novo proceedings and as such the applicant's claim for constitutional damages is not a "debt" and subject to the provisions of the Act.⁴⁰

65] In addition, counsel submitted that the applicant's claim for constitutional damages against the respondent is also not a claim for damages in the context of delict and in this regard it relied on the decision of *Director-General, Department of Public Works v Kovac Investments 289 (Pty) Ltd*, [2011] JOL 26645 (GNP)⁴¹ where the court held that the plaintiffs claim against the defendant was not for damages and was thus not a "debt"

³⁹ *Macsteel Tube and Pipe, a Division of Macsteel Service Centres SA (Pty) Ltd v Vowles Properties (Pty) Ltd* [2021] JOL 52604 (SCA) – par [16].

⁴⁰ *Institution of Legal Proceedings Against Certain Organs of State Act*, 40 of 2002.

⁴¹ *Director-General, Department of Public Works v Kovac Investments 289 (Pty) Ltd*, [2011] JOL 26645 (GNP) par[7, 8,9,10 & 12].

as defined in the Act. Accordingly, the provisions of section 3 of the Act⁴² did not apply to the plaintiff's claim.

66] The Institution of Legal Proceedings Against Certain Organs of State Act defines a debt as: -

“Any debt arising from any cause of action –

(a) Which arising from delictual, contractual or any other liability, including a cause of action which relates to or arises from any

–

(i) Act performed under or in terms of any law;

(ii) Omission to do anything which should have been done in terms of any law;

(b) for which an Organ of State is liable for payment of damages, which such debt became due before or after the fixed date.”

67] Further, the Act states that:

“3. Notice of intended legal proceedings to be given to organ of state

–

⁴² Institution of Legal Proceedings Against Certain Organs of State Act, Act 40 of 2002.

(1) No legal proceedings for the recovery of a debt may be instituted against an organ of state unless—

(a) The creditor has given the organ of state in question notice in writing of his or her or its intention to institute the legal proceedings in question; or

(b) The organ of state in question has consented in writing to the institution of that legal proceedings—

(i) Without such notice; or

(ii) Upon receipt of a notice which does not comply with all the requirements set out in subsection (2).

(2) A notice must -

(a) Within six months from the date on which the debt became due, be served on the organ of state in accordance with section 4 (1); and

(b) Briefly set out -

(i) The facts giving rise to the debt; and

(ii) Such particulars of such debt as are within the knowledge of the creditor.

(3) For purposes of subsection (2) (a) –

(a) A debt may not be regarded as being due until the creditor has knowledge of the identity of the organ of state and of the facts giving rise to the debt, but a creditor must be regarded as having acquired such knowledge as soon as he or she or it could have acquired it by exercising reasonable care, unless the organ of state wilfully prevented him or her or it from acquiring such knowledge; and

(b) A debt referred to in section 2 (2) (a), must be regarded as having become due on the fixed date.

(4)(a) If an organ of state relies on a creditor's failure to serve a notice in terms of subsection (2) (a), the creditor may apply to a court having jurisdiction for condonation of such failure.

(c) The court may grant an application referred to in paragraph (a) if it is satisfied that –

(i) The debt has not been extinguished by prescription;

(ii) Good cause exists for the failure by the creditor;

And

(iii) The organ of state was not unreasonably prejudiced by the failure.”

68] In terms of Sections 11(d) of the Prescription Act, debts not specified in Sections 11 (a) to 11(c) prescribe after three (3) years have elapsed.

69] On behalf of the respondent the argument advanced was that the applicants’ constitutional damages is a debt as prescribed above and thus subject to the Act. In support of this argument counsel relied on the decision of *Makate v Vodacom*,⁴³ where the definition of debt was considered. The Constitutional Court dealt with the definition of a debt in the determination of whether a claim had prescribed or not. The Court confirmed the definition of a debt as ascribed by the Supreme Court of Appeal in *Electricity Supply Commission v Stewards and Llyods of SA (Pty) Ltd*⁴⁴ in that a debt is:-

“1. Something owed or due: something (as money, goods or service) which one person is under an obligation to pay or render to another.

⁴³ (Pty)Ltd [2016] ZACC 13.

⁴⁴ 1981 (3)SA 340 (A).

2. A liability or obligation to pay or render something; the condition of being so obligated.”

70] This stance adopted by the respondent is supported as the applicant contends, its cause of action arose out of the failure by the City to provide alternative accommodation.

71] I do not agree with the argument advanced by the respondent in this regard. Herein the referral to oral evidence for the payment and quantification of such compensation does not constitute de novo proceedings but properly construed is merely an augmentation of the applicants claim already pleaded before the court. For this reason, this Court concludes that this claim is not a “debt” as defined in the Act and has therefore not prescribed.

72] The applicant notwithstanding the above, nevertheless applies for condonation ex abundante cautela for such late filing of the notice this notwithstanding the fact that the applicant is not a creditor, as referred to in s 3 of the Act. This is so as the applicant contends, it will not have a claim for any constitutional compensation/damages, prior to the court exercising its discretion, at remedy stage and awarding constitutional compensation. Even if the applicant succeeds in proving a constitutional breach, constitutional compensation does not follow automatically as of right, as in the instance of a delict.

73] In order to succeed with condonation an applicant must show good cause for any extension or abridging of time and any absence of prejudice to the opposing party in order for a court to exercise its discretion in its favour.

74] On “good cause” our courts have held entails consideration of all factors which have a bearing on the fairness of granting the relief affecting the proper administration of justice.⁴⁵ These factors include prospects of success in the action, the reasons for the delay, the sufficiency of the explanation offered, the bona fides of the applicant, and any other contribution by other persons or parties to the delay and the applicant’s responsibility therefor.⁴⁶

75] The standard of proof in the context of good cause is not one on a balance of probabilities but rather the “overall impression made on the court which brings a fair mind to the facts set up by the parties.”⁴⁷

76] In this regard, the applicant had argued that the City raised the defence of non-compliance with the Act for the first time only in its second special plea on the 16 March 2020. However, the City was already aware of the constitutional claim, since the urgent application which was lodged on the

⁴⁵ Madinda v Minister of Safety and Security 2008 (4) SA 312 (SCA) at para 8.

⁴⁶ Madinda - para 10.

⁴⁷ Madinda v Minister of Safety and Security 2008 (4) SA 312 (SCA) at para 8.

10 June 2010. The City was furthermore acutely aware of the order granted by Murphy J, dated 30 September 2010, to which it had to give effect to but it failed to do.

77] As the order by Murphy J was given during the Covid 19 pandemic, the applicant thereafter could not react effectively and only send out a letter in terms of the Act to the City on the 6 November 2020 given the lockdown restriction applicable at the time. The lapsing of time is fully explained in the founding affidavit and inter alia refers to what occurred during the Covid 19 lockdown.⁴⁸

78] This court is satisfied that good cause has sufficiently been explained justifying condonation to be granted to the applicant.

79] In addition to showing good cause, an applicant must also show absence of prejudice to his opposing party for a court to exercise its judicial discretion in its favour.

80] In this regard the applicant had submitted that there can be no conceivable prejudice for the City, as technically speaking, it already received notice of the claim when the urgent application was lodged.

⁴⁸ Founding Affidavit D28 para 63 and 64.

81] It did not at that stage, take the point that there was non-compliance with the Act, although the affidavits constituted pleadings and it was only 10 years later, that it opportunistically decided to rely in the first special plea of non-compliance with the Act.

82] The respondent being a party to the eviction application and in possession of all documents and papers relevant to the eviction application has been in possession of these documents since 2010. In addition, the full record of the eviction application has been uploaded onto the electronic casefile of the matter, and the respondent has been invited onto the matter and has access thereto.

83] The nub of the dispute between the parties as mentioned, is the respondent's failure to comply with the court order granted by Murphy J dated 30 September 2010. The respondent has been aware of the obligations imposed upon it by the court order since 2010 which is further evidenced by its reply to the applicant's Rule 35(3) Notice, wherein in response, the respondent filed on 4 February 2021 an affidavit deposed to by Metse Olivia Mabeba, a Director Human Settlement Policy and Planning at the City of Tshwane Metropolitan Municipality who admitted that the respondent does not have the requested documents and never submitted an application for assistance with the provincial government to provide emergency alternative accommodation as ordered by the court order dated 30 September 2010.

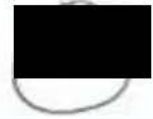
84] In the answering affidavit on the issue of prejudice, the deponent merely asserts that it will suffer prejudice if condonation was to be granted by the court without expanding what that prejudice will entail given the litigation history that has occurred. Absence such explanation, this Court accepts that no prejudice exists to the respondent, if condonation is to be granted.

85] In the result the following order is made:

85.1 It is ordered that the applicant's claim is not subject to the provisions of section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act, Act 40 of 2002 (the "Act").

85.2 Insofar as the applicant's claim might be subject to the provisions of section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act, Act 40 of 2002, condonation is hereby granted in terms of section 3(4) of the Act;

85.3 Costs, including the costs of counsel on scale C.



C.J COLLIS J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

APPEARANCES

Counsel for the Applicant:

Adv. T Strydom SC

Instructed by:

Hennie Kotze Attorneys

C/O:

DVJ Inc

Counsel for the Respondent:

Adv. J A Motepe SC

Adv. M S Manganye

Instructed by:

Kunene-Rampala Inc.

Dates of Hearing:

14 November 2024

Date of Judgment:

04 November 2025