



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 246/25

In the matter between:

FUSI SIMON MOFOKENG

First Applicant

XOLISWA PERCIVAL MOKOENA N.O.

Second Applicant

and

**PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA**

First Respondent

THABO MVUYELWA MBEKI

Second Respondent

KGALEMA PETRUS MOTLANTHE

Third Respondent

JACOB GEDLEYIHLEKISA ZUMA

Fourth Respondent

**MINISTER OF JUSTICE AND
CONSTITUTIONAL
DEVELOPMENT**

Fifth Respondent

**DEPARTMENT OF JUSTICE AND
CONSTITUTIONAL
DEVELOPMENT**

Sixth Respondent

Neutral citation: *Mofokeng and Another v President of the Republic of South Africa and Others* [2026] ZACC 43

Coram: Mlambo DCJ, Dambuza J, Kollapen J, Majiedt J, Mathopo J, Mhlantla J, Nuku AJ, Rogers J and Savage J

Judgment: Kollapen J (unanimous)

Decided on: 21 October 2026

Summary: Failure to diligently and without delay decide joint pardon application — contravention of section 84(2)(j) read with sections 83(b) and 237 of the Constitution — constitutional damages most effective remedy — extent of to be determined later

ORDER

On application for direct access in terms of section 167(4)(e) of the Constitution:

1. This Court has exclusive jurisdiction in respect of the current and former Presidents' failures to fulfil their constitutional obligations.
2. Leave to amend the notice of motion is granted.
3. It is declared that the first to fourth respondents failed to fulfil their constitutional obligations, as provided by section 84(2)(j) of the Constitution read with sections 83(b) and 237 of the Constitution, in so far as they failed diligently and without delay to decide on the joint pardon application of Mr Fusi Simon Mofokeng and Mr Tshokolo Joseph Mokoena.
4. The applicants are entitled to constitutional damages for the first to fourth respondents' failure to fulfil their constitutional obligations.
5. The parties are directed to file written submissions not exceeding 30 pages on the quantum of constitutional damages:
 - (a) by the applicants, by 11 November 2026; and
 - (b) by the respondents, by 25 November 2026.
6. This order shall not preclude the applicants from instituting an action for delictual damages in the High Court, provided that—

- (a) nothing in this judgment determines whether such an action is available or any defences that might be raised to such an action; and
 - (b) if such an action is instituted and the High Court determines that delictual damages should be awarded, any amount of constitutional damages awarded by this Court shall be taken into account in quantifying the delictual damages.
7. The first respondent must pay the applicants' costs, including the costs of two counsel where employed.

JUDGMENT

KOLLAPEN J (Mlambo DCJ, Dambuza J, Majiedt J, Mathopo J, Mhlantla J, Nuku AJ, Rogers J and Savage J concurring):

Introduction

[1] This matter concerns obligations surrounding the power to grant presidential pardons pursuant to section 84(2)(j) of the Constitution.¹ The applicants seek declaratory orders that the current and former Presidents failed to fulfil their constitutional obligations by taking 24 years to decide a joint pardon application and that, had the pardon application been timeously determined, it would have been decided by 5 November 2003. They also seek constitutional or, alternatively, delictual damages and a structural interdict requiring the President to rectify systemic deficiencies in the administration of pardon applications.

¹ Section 84(2)(j) of the Constitution provides that the President is responsible for “pardoning or relieving offenders and remitting any fines, penalties or forfeitures”.

[2] The application is brought by Mr Fusi Simon Mofokeng and Ms Xoliswa Percival Mokoena (applicants), the latter in her capacity as representative of the estate of her late husband, Mr Tshokolo Joseph Mokoena (Mr Mokoena). The matter is opposed by the President of the Republic of South Africa, in his official capacity; the Minister of Justice and Constitutional Development (Minister); and the Department of Justice and Constitutional Development (Department). I will collectively refer to them as the respondents. The case is also brought against former Presidents Thabo Mvuyelwa Mbeki, Kgalema Petrus Motlanthe and Jacob Gedleyihlekisa Zuma (collectively, former Presidents) in their personal capacities. The former Presidents neither opposed nor participated in this matter.

Background

[3] On 2 April 1992, a shoot-out between an African National Congress self-defence unit (SDU) and members of the South African Police Service in Bethlehem, Free State resulted in the death of one police officer and serious injury to another. Following a flawed trial in which the only evidence against Mr Mofokeng and Mr Mokoena came from a single unreliable State witness, they were convicted of conspiracy to commit robbery, attempted murder and murder. Despite not having been at the scene of the shoot-out, nor involved with the SDU, they were convicted of attempted murder and murder on the basis of the doctrine of common purpose. They were sentenced to life imprisonment and an additional 18 years' imprisonment. Mr Mofokeng and Mr Mokoena were eventually released on parole in April 2011, after serving 19 years.

[4] Mr Mofokeng and Mr Mokoena maintained their innocence throughout the trial. After the trial, they exhausted all legal remedies, including attempting to appeal their conviction and lodging an application for amnesty before the Truth and Reconciliation Commission (TRC). They ultimately withdrew their application to the TRC as they were unwilling to admit guilt, a necessary precondition to pursuing an amnesty application. Four members of the SDU who were involved in the shoot-out were granted amnesty for the murder and attempted murder convictions. During their TRC hearing, three SDU members admitted that not only did Mr Mofokeng and Mr Mokoena

have no involvement with the SDU, but that the latter two “were complete strangers to them”.

[5] Mr Mofokeng and Mr Mokoena jointly applied for a presidential pardon pursuant to section 84(2)(j) of the Constitution in November 2001. The grounds on which they sought the presidential pardon were the admissions made by the SDU members before the TRC Amnesty Committee and their subsequent grant of amnesty, the unreliability of the single State witness’s testimony and the witness’s admission that he was bribed to present false information. Mr Mofokeng and Mr Mokoena requested their immediate release from prison or, in the alternative, a reprieve pursuant to section 325 of the Criminal Procedure Act² (CPA). The original pardon application did not include the trial transcript or applications for leave to appeal in the High Court and the Appellate Division due to the difficulty in obtaining them. Despite this, Mr Mofokeng and Mr Mokoena were not told that the absence of the criminal trial records made their pardon application incomplete. Instead, when they followed up with the Department and other government officials over the years, they were advised that the application was being considered.

[6] While their section 84(2)(j) application was pending, in or around 2008, Mr Mofokeng and Mr Mokoena applied for presidential pardons pursuant to former President Mbeki’s Special Dispensation,³ although they did so with the knowledge that their affirmation of innocence before the TRC would not qualify for the special dispensation. The Department communicated its inability to decide on the special dispensation applications to the National Council of Provinces Petitions and Executive Undertakings Committee in April 2010. Mr Mofokeng and Mr Mokoena also applied for the overturn of their convictions pursuant to section 327⁴ of the CPA in July 2017

² 51 of 1977. Section 325 states that “[n]othing in this Act shall affect the power of the State President to extend mercy to any person”.

³ Mbeki “Address by President of South Africa, Thabo Mbeki, to the Joint Sitting of Parliament to Report on the Processing of some Presidential Pardons” (21 November 2007), available at <https://www.gov.za/news/t-mbeki-joint-sitting-parliament-report-processing-presidential-pardons-21-nov-2007>.

⁴ Section 327 is titled “Further evidence and free pardon or substitution of verdict by State President” and provides:

(section 327 application), which was rejected by the Director of Public Prosecutions in June 2018. This was not communicated to Mr Mofokeng and Mr Mokoena until March 2019, nor were they advised that the application had been formally rejected by the Minister, as is required by section 327.⁵

[7] After the lack of communication pertaining to their section 327 application, Mr Mofokeng and Mr Mokoena followed up with the Office of the Presidency in April 2021 on the status of the pardon application and requested that a decision be made by May 2021. In response, the Department noted that the matter had been referred back to it for a fresh recommendation in light of the amount of time that had passed, and

“(1) If any person convicted of any offence in any court has in respect of the conviction exhausted all the recognised legal procedures pertaining to appeal or review, or if such procedures are no longer available to him or her, and such person or his or her legal representative addresses the Minister by way of petition, supported by relevant affidavits, stating that further evidence has since become available which materially affects his or her conviction, the Minister may, if he or she considers that such further evidence, if true, might reasonably affect the conviction, direct that the petition and the relevant affidavits be referred to the court in which the conviction occurred.

...

- (4) (a) The court shall assess the value of the further evidence and advise the President whether, and to what extent, such evidence affects the conviction in question.
- (b) The court shall not, as part of the proceedings of the court, announce its finding as to the further evidence or the effect thereof on the conviction in question.
- (5) The court shall be constituted as it was when the conviction occurred or, if it cannot be so constituted, the judge-president or, as the case may be, the senior regional magistrate or magistrate of the court in question, shall direct how the court shall be constituted.
- (6) (a) The State President may, upon consideration of the finding or advice of the court under subsection (4)—
 - (i) direct that the conviction in question be expunged from all official records by way of endorsement on such records, and the effect of such a direction and endorsement shall be that the person concerned be given a free pardon as if the conviction in question had never occurred; or
 - (ii) substitute for the conviction in question a conviction of lesser gravity and substitute for the punishment imposed for such conviction any other punishment provided by law.
- (b) The State President shall direct the Minister to advise the person concerned in writing of any decision taken under paragraph (a), other than a decision taken under subparagraph (iii) of that paragraph, and to publish a notice in the *Gazette* in which such decision, other than a decision taken under the said subparagraph (iii), is set out.”

⁵ Id at section 327(6)(b).

requested that Mr Mofokeng and Mr Mokoena complete new forms, essentially restarting the process. Mr Mofokeng and Mr Mokoena submitted supplementary information after having received confirmation that the further updated information would not serve as a new application, and requested that the section 327 application be stayed pending a decision on their pardon application. After providing the requested documentary proof to the Department in July 2023 and not receiving a decision on the application despite numerous follow-ups, the applicants launched an application in this Court in August 2025.

[8] After the applicants initiated their application in this Court, the President undertook to decide their pardon application by 31 January 2026. On 19 December 2025, the President pardoned Mr Mofokeng and Mr Mokoena, the latter posthumously, on all counts for which they were convicted.

In this Court

Applicants' submissions

[9] The applicants argue that this Court's exclusive jurisdiction is engaged, as the current and former Presidents' failure to determine their pardon application constitutes a failure to fulfil a constitutional obligation. They contend that section 84(2)(j)⁶ of the Constitution, read with sections 83(b)⁷ and 237,⁸ requires the President to decide upon pardon applications rationally, in good faith, diligently, without delay and in accordance with the principle of legality. The applicants rely on the judgment of this Court in *Chonco I*,⁹ which affirmed that a challenge to the failure to determine pardon applications, properly constructed, falls within the exclusive jurisdiction of this Court.¹⁰

⁶ Quoted in n 1 above.

⁷ Section 83(b) of the Constitution states that the President "must uphold, defend and respect the Constitution as the supreme law of the Republic".

⁸ Section 237 of the Constitution notes that "[a]ll constitutional obligations must be performed diligently and without delay".

⁹ *Minister for Justice and Constitutional Development v Chonco* [2009] ZACC 25; 2010 (2) BCLR 140 (CC); 2010 (4) SA 82 (CC).

¹⁰ *Id* at paras 30 and 43.

[10] The applicants bring this case on the basis of direct access in the alternative. They say that it is in the interests of justice for the matter to be heard by this Court as a court of first instance in light of the prolonged delay in deciding the pardon application, the need for finality and the implications for their constitutional rights to freedom and security, dignity, psychological integrity and their right not to be subjected to cruel, inhuman and degrading treatment.

[11] On the merits, the applicants' case is that the only explanation for why it took so long for their application to be decided is "a complete breakdown of the systems in place for processing pardon applications or gross incompetence on the part of officials responsible for dealing with them". They clarify that they are not asking for a pardon; rather, they are seeking a decision on their pardon application. They contend that the amount of time which has passed should be calculated from the original November 2001 application, as there is nothing which indicates that pardon applications are suspended or paused pending other remedies, such as former President Mbeki's Special Dispensation or a section 327 application.

[12] In light of the granting of the presidential pardons, this Court issued directions calling for submissions on whether the granting of the pardon application affects the validity of the application before this Court and, arising from that, what a just and equitable remedy would be if one was warranted. The applicants note that two of the prayers for relief, directing the President to determine the pardon application and consider a posthumous pardon for Mr Mokoena, have fallen away. The remaining four prayers for relief, they argue, have not been rendered moot by the determination of the pardon application.

[13] Three of the other four prayers for relief pertain to declaratory orders: first and second, that the failure of the current and former Presidents to determine the pardon application constitutes a failure to comply with their constitutional obligations and violated the constitutional rights of Mr Mofokeng and Mr Mokoena; and third, that if

the pardon application had been processed diligently and without delay, it would have been finally determined by no later than 5 November 2003. The remaining prayer for relief is for constitutional or alternatively delictual damages, stemming from the violation of Mr Mofokeng and Mr Mokoena's constitutional rights.

[14] The applicants contend that the declaratory orders are necessary to vindicate the Constitution and uphold the rule of law, especially as this Court held in *Pheko*¹¹ and *Pillay*¹² that, firstly, a matter is not moot just because the immediate dispute has passed; the lawfulness of the State's conduct remains a live issue even after the conduct was carried out and, secondly, that declaratory relief can be necessary to vindicate rights. The applicants contend further that the granting of the pardons does not vindicate or cure the failure of the current and former Presidents to discharge their constitutional obligations, nor is that alone an adequate remedy in the face of the gross delay. Accordingly, the declaratory orders are necessary for future accountability, say the applicants.

[15] Similarly, the applicants contend that constitutional damages are the most appropriate remedy to address the extreme and shocking infringement of their constitutional rights. The harm stems from the failure of the current and former Presidents to fulfil their constitutional obligations pursuant to section 84(2)(j) of the Constitution, and which extended over such a prolonged period that constitutional damages are necessary to deter future abuses. Finally, the applicants say that they may be barred from bringing delictual claims arising out of their imprisonment in light of the three-year prescriptive period on delictual claims. According to them, the grant of the presidential pardons is not sufficient to address the prolonged, far-reaching and reprehensible infringement; accordingly, the claim for damages is not rendered moot.

¹¹ *Pheko v Ekurhuleni Metropolitan Municipality* [2011] ZACC 34; 2012 (2) SA 598 (CC); 2012 (4) BCLR 388 (CC).

¹² *MEC for Education, KwaZulu-Natal v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC).

Respondents' submissions

[16] The President states that the delay since November 2021, when the application for pardon was re-submitted, is “deeply regrettable”, for which he apologises. He notes that he sought to discover why there was a significant delay between the first application for pardon in 2001 and the date he claims the application was presented to him. The President states that he can find no evidence that the application for pardon was placed before the former Presidents, despite having been processed by the Department, nor has he been able to determine why the original application never reached the Presidency.

[17] The respondents argue that the decision on the presidential pardons has rendered the matter moot and that the relief sought by the applicants would not have any practical effect, which would make any decision reached by this Court essentially an advisory opinion. Even in instances in which this Court has a discretion to adjudicate matters that no longer raise live issues, the respondents argue that this discretion is restricted to situations in which orders would have a practical effect on the applicants or others. Citing *Pridwin*,¹³ the respondents note that the Court should decline to decide matters unlikely to recur. Since a President’s decision to grant pardons is based on individual factors and is discretionary, and the President has admitted that while the delay since 2021 was “unfortunate and regrettable”, the respondents argue that the matter is unlikely to recur and the relief sought by the applicants would have no practical effect.

[18] The respondents argue further that the matter does not fall within this Court’s exclusive jurisdiction, nor do the applicants make out a case for direct access. Firstly, sections 83(b) and 237 of the Constitution do not fall within the Court’s exclusive jurisdiction, pursuant to the test set out in *Women’s Legal Centre*,¹⁴ as these provisions do not impose obligations that rest on the President alone. They distinguish *Chonco I* on the basis that it was *obiter dictum* (non-binding, incidental remarks that are not

¹³ *AB v Pridwin Preparatory School* [2020] ZACC 12; 2020 (5) SA 327 (CC); 2020 (9) BCLR 1029 (CC) at para 58.

¹⁴ *Women’s Legal Centre Trust v President of the Republic of South Africa* [2009] ZACC 20; 2009 (6) SA 94 (CC) at para 20.

essential to decide the case), and made without express reasoning. In addition, the respondents point out that the power to grant pardons is a discretionary power of the President and one whose exercise is not necessary for the proper functioning of the State. On direct access, the respondents contend that the applicants' explanation of a need for finality is insufficient in light of their claim for damages, which will have to be adjudicated by the High Court, and their rejection of the President's with-prejudice tender to determine the pardon application by 31 January 2026 and to pay the applicants' costs in this Court.

[19] On the merits, the respondents submit that the delay should be reckoned from November 2021, rather than November 2001. The respondents contend that Mr Mofokeng and Mr Mokoena submitted a new application for pardon in November 2021, rather than supplementing their original application. Further, the original November 2001 application was overtaken by Mr Mofokeng and Mr Mokoena's application pursuant to former President Mbeki's Special Dispensation, their parole and their section 327 application. By pursuing avenues other than their original pardon application, the respondents note that Mr Mofokeng and Mr Mokoena interrupted their pardon process and rendered it incompetent for their pardon application to be decided. They explain that the primary reason for the four-year delay is the under-capacitation of the Directorate: Legal Process in the Department, which processes applications for the expungement of criminal records and applications for pardon. Though the delay of four years is "regrettable", the respondents contend that "it is no longer than it took the applicants, themselves, to put together their section 327 applications".

[20] The respondents contend, further, that the constitutional violations raised by the applicants in this Court merge the delay in deciding the pardon application with the outcome they were hoping to receive, as the claimed constitutional violations are reliant on an expected outcome that the pardon application would be granted. Finally, the respondents argue that, regarding the claim for damages, Ms Mokoena does not have standing to pursue a damages claim on behalf of Mr Mokoena as the claim was not

instituted before his death, nor does Mr Mokoena's estate have any interest in a breach of his rights, which were personal in nature.

Leave to amend

[21] The applicants have applied for leave to amend their notice of motion to include a claim for a structural interdict in light of what they refer to as “the administrative process for dealing with pardon applications [being] in disarray . . . compounded by the bureaucratic resistance to the pardon process being used for the core purpose of redressing mistaken convictions”. The remedy requested is that the President rectify the systemic deficiencies in the administration of pardon applications, and submit a report to this Court within six months of the Court's order, detailing the steps taken to comply with the directive. The respondents oppose this amendment application on the basis that the matter does not fall within this Court's exclusive jurisdiction, there was no opportunity for them to answer the leave to amend application and there is an inadequate explanation for the amendment, which the respondents contend is a misguided attempt to cure mootness in their case.

Issues

[22] There are four issues for determination: first, whether this Court has exclusive jurisdiction over the matter and whether leave to amend should be granted; second, whether the matter is moot, in light of the President's granting of Mr Mofokeng and Mr Mokoena's pardons on 19 December 2025; third, whether the conduct of the current and former Presidents violated their constitutional obligations pursuant to sections 84(2)(j), 83(b) and 237 of the Constitution; and finally, the appropriate remedy, if any.

Analysis

Jurisdiction

[23] It is trite that jurisdiction is a “threshold requirement” that must be met before this Court can consider a matter¹⁵ and is determined on the pleadings.¹⁶ Pursuant to section 167(4)(e) of the Constitution, this Court has exclusive jurisdiction over determinations that Parliament or the President failed to fulfil a constitutional obligation. The relevant constitutional obligation must be construed narrowly to maintain the jurisdiction of lower courts,¹⁷ must impose an obligation on Parliament or the President exclusively and cannot merely pertain to conduct of Parliament or the President.¹⁸ As the exercise of exclusive jurisdiction impacts access to courts and risks treading on the jurisdiction of lower courts, this Court has cautioned:

“An interpretation of section 167(4)(e) that is cognisant of the imperative not to unduly deprive these other courts of their constitutional jurisdiction, would be loath to assume that this Court has exclusive jurisdiction even if pleadings state strongly or clearly that the President or Parliament has failed to fulfil constitutional obligations.”¹⁹

[24] Further, section 83(b) is not enough on its own to invoke this Court’s exclusive jurisdiction; this must be coupled with conduct illustrative that the President failed to fulfil their constitutional obligations.²⁰ The primary question is thus whether

¹⁵ *S v Boesak* [2000] ZACC 25; 2001 (1) BCLR 36 (CC); 2001 (1) SA 912 (CC) at para 11. See also *Sunwest International (Pty) Ltd v Western Cape Gambling and Racing Board* [2025] ZACC 18; 2026 (2) SA 9 (CC) (*Sunwest*) at para 14 and *Fraser v ABSA Bank Ltd* [2006] ZACC 24; 2007 (3) BCLR 219 (CC); 2007 (3) SA 484 (CC) at para 35.

¹⁶ *Sunwest* id; *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31; 2015 (12) BCLR 1407 (CC); 2016 (1) SA 132 (CC) at para 132; and *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) BCLR 35 (CC); 2010 (1) SA 238 (CC) at para 75.

¹⁷ *President of the Republic of South Africa v South African Rugby Football Union* [1998] ZACC 21; 1999 (2) SA 14 (CC); 1999 (2) BCLR 175 (CC) at para 25.

¹⁸ *Zuma v President of the Republic of South Africa* [2025] ZACC 21; 2025 (12) BCLR 1428 (CC) (*Zuma*) at paras 29-30; *Women’s Legal Centre* above n 14 at paras 20 and 23; and *Doctors for Life International v Speaker of the National Assembly* 2006 [ZACC] 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at para 254 (judgment of Yacoob J).

¹⁹ *Economic Freedom Fighters v Speaker, National Assembly* [2016] ZACC 11; 2016 (3) SA 580 (CC); 2016 (5) BCLR 618 (CC) at para 17.

²⁰ *Id* at paras 33 and 35. See also *Zuma* above n 18 at para 25.

section 84(2)(j) imposes obligations on the President alone that would fall within the scope of this Court's narrow construction of exclusive jurisdiction.

[25] The presidential pardon power is one which the President exercises as Head of State, stemming from the prerogative powers historically exercised by monarchs.²¹ Though the pardon power is discretionary in so far as the President is not obligated to grant a pardon, there are corresponding obligations to that power:

“[T]he function conferred on the President to make a decision entails a corresponding right to have a pardon application considered and decided upon rationally, in good faith, in accordance with the principle of legality, diligently and without delay. That decision rests solely with the President.”²²

[26] The right to have one's application decided rationally, in good faith, in accordance with the principle of legality and in terms of the requirements of section 237 of the Constitution, imposes a corresponding obligation on the President, who is the only actor with the power to determine such applications. Such a matter is what was contemplated when this Court noted:

“While the conferring of a [permissive] power may in certain circumstances be coupled with a duty to exercise it, this would only arise where, on a proper construction of the power in question, it is a power coupled with a duty.”²³

[27] The failure of the current and former Presidents to decide on Mr Mofokeng and Mr Mokoena's pardon application accordingly falls within the scope of a failure to fulfil a constitutional obligation. The matter does not pertain to a decision made on the pardon application, which, as a positive act, would fall outside the scope of

²¹ *President of the Republic of South Africa v Hugo* [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) (*Hugo*) at paras 5-8.

²² *Chonco I* above n 9 at para 30.

²³ *Zuma* above n 18 at para 30.

section 167(4)(e),²⁴ but rather the egregious delay in reaching a conclusion on the merits of the application itself.

[28] As this Court stated in *Chonco I*, a challenge to the President’s failure to decide on pardon applications falls within the scope of this Court’s exclusive jurisdiction.²⁵ Though this comment was *obiter* in light of the facts of the case,²⁶ and thus not binding, even *obiter dicta* are highly persuasive when they come from the apex Court and should only be departed from “after due and careful consideration”.²⁷ There is no reason why it should be departed from in this case. The analysis applied in *Chonco I* which led to the conclusion that, had the matter been correctly brought, it would have fallen within this Court’s exclusive jurisdiction, is fully fleshed out and provides a foundation upon which we can confidently reach the same conclusion. Even without considering the *obiter* remarks in *Chonco I*, I am satisfied that the matter falls within this Court’s exclusive jurisdiction.

Leave to amend

[29] An application for leave to amend pleadings pursuant to rule 28 of the Uniform Rules of Court²⁸ will be allowed—

“unless the amendment is *mala fide* (made in bad faith), or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for

²⁴ Id at para 29.

²⁵ *Chonco I* above n 9 at para 43.

²⁶ In *Chonco I*, the case was erroneously brought against the Minister for Justice and Constitutional Development on the basis that the Minister, as assignee of the President, failed to exercise her constitutional obligation to process the pardon applications diligently and without delay. The Court held that the case should have been brought against the President as the sole individual who can decide on pardon applications. The Court then noted that, had the case been brought against the correct party, it would fall under this Court’s exclusive jurisdiction.

²⁷ *Turnbull-Jackson v Hibiscus Coast Municipality* [2014] ZACC 24; 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310 (CC) at para 56, citing *Durban City Council v Kempton Park (Pty) Ltd* 1956 (1) SA 54 (N) at 59D-F and *Rood v Wallach* 1904 TS 187 at 195-6.

²⁸ Rule 28 of the Uniform Rules of Court, which pertains to amendments, applies in this Court by virtue of rule 29 of the Rules of this Court.

costs, or ‘unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed’.”²⁹

[30] I am satisfied that there is no reason why the application for leave to amend should not be granted. It was made in response to information presented in the answering affidavit that was not available to the applicants at the time that they prepared their founding affidavit, particularly that the President is unable to ascertain why Mr Mofokeng and Mr Mokoena’s application was not placed before the Office of the Presidency until 2021. The respondents have filed an answering affidavit in response to the application for leave to amend, which is permitted by rule 11 of the Rules of this Court. The leave to amend application has been fully ventilated in this Court, is not prejudicial to the respondents and it is something that could be addressed through a costs order. The application for leave to amend is thus granted.

Mootness

[31] In light of the grant of presidential pardons on 19 December 2025, is the matter moot? At its heart, this case is about more than the grant of the joint pardon application; it is about the delay in deciding the application and the harm which arose from that. Although a decision of this Court would not have a practical effect on the granting of the pardon application, the question as to whether the President failed to fulfil his constitutional obligations, whether Mr Mofokeng and Mr Mokoena’s constitutional rights were infringed and what remedy is to come from that, all remain live issues.³⁰ Granting the presidential pardons now does not absolve the current and former Presidents of their failure to have decided the pardon application in the past, nor does it inherently absolve the President of any infringement of Mr Mofokeng’s and Mr Mokoena’s constitutional rights.

²⁹ *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2005 (6) BCLR 529 (CC); 2006 (3) SA 247 (CC) (*Affordable Medicines*) at para 9, citing *Moolman v Estate Moolman* 1927 CPD 27 at 29 and *Commercial Union Assurance Co Ltd v Waymark N.O.* 1995 (2) SA 73 (TK) at 76D-I.

³⁰ See, for example, *Pheko* above n 11 at para 32, holding that claims for restitutionary relief based on unlawfulness of government actions are live issues even after the actions have been carried out.

[32] In addition, this case presents an opportunity for this Court to clarify the scope of presidential obligations pertaining to a discretionary constitutional power. Although there have been several cases pertaining to presidential pardons,³¹ the scope of the President's power under the Constitution has never been the primary issue for determination. Accordingly, it is in the interests of justice for this Court to pronounce upon this issue.

Presidents' failures to fulfil constitutional obligations

[33] As noted previously, and as held in *Chonco I*, the presidential power to pardon is a permissive power, which only the President may exercise, coupled with an obligation to determine applications rationally, in good faith, in accordance with the principle of legality, diligently and without delay.³² This aligns with obligations imposed by sections 2,³³ 83(b) and 237 of the Constitution.³⁴

[34] Such obligations inherently require the President, first and foremost, to *decide* all pardon applications placed before him. The discretionary nature of the President's power relates to his ability to *grant or reject* the applications for pardon, not his duty to *decide* the applications. A failure of this nature constitutes a dereliction of duty and "is out of kilter with the vision of democratic and accountable governance".³⁵

³¹ *Hugo* above n 21; *Chonco I* above n 9; *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) (*Albutt*); and *Chonco v President of the Republic of South Africa* [2010] ZACC 7; 2010 (6) BCLR 511 (CC).

³² *Chonco I* id at para 30 and *Zuma* above n 18 at para 30.

³³ Section 2 of the Constitution provides that "[t]his 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".

³⁴ See also *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 11; 1999 (10) BCLR 1059 (CC); 2000 (1) SA 1 (CC) (*SARFU II*) at para 148; *Affordable Medicines* above n 29 at paras 48-9; and *Law Society of South Africa v President of the Republic of South Africa* [2018] ZACC 51; 2019 (3) SA 30 (CC); 2019 (3) BCLR 329 (CC) (*Law Society*) at paras 46-9.

³⁵ *Chonco I* above n 9 at para 45.

How much time has lapsed?

[35] The respondents aver that although the pardon application was received by the Department in 2001, there is no record that the application and related correspondence were received by the Office of the Presidency until the application was supplemented in 2021. The respondents are unable to explain this oversight, though the President does acknowledge ultimate responsibility as the sole individual with the power to pardon. Despite this, the respondents contend that the 2021 pardon application was a new application, the 2001 pardon application having been superseded by Mr Mofokeng and Mr Mokoena's section 327 applications, their applications pursuant to former President Mbeki's Special Dispensation and their parole in 2011. This contention must be rejected. None of those processes had the effect of nullifying the original 2001 application, nor does the alleged incompleteness of the 2001 application have such an effect.

[36] The presidential pardon power is unique in so far as the President is restricted only by the aforementioned obligations imposed on his decision-making – that he must make his decision rationally, in good faith, in accordance with the principle of legality, diligently and without delay. The exercise of the power cannot be limited or otherwise affected by legislation, as this would be directly contrary to the separation of powers and the supremacy of the Constitution.³⁶ In contrast, the grant of free pardon by section 327 of the CPA is statutorily prescribed and is based upon the existence of further evidence that materially affects the conviction. This Court noted the distinction between criminal proceedings and the pardon process in *Albutt*:

“The question in a criminal trial is whether the accused is guilty of the crime charged and, if so, what sentence should be imposed. By contrast, in the pardon process the question is whether, notwithstanding the conviction and sentence, the applicant should be granted a pardon.”³⁷

³⁶ *Albutt* above n 31 at paras 49-50.

³⁷ *Id* at para 64.

[37] The same distinction applies to the section 327 process and the constitutionally-prescribed process. Though both could result in substantially the same outcome, the process under section 327 is essentially a subsequent hearing on the new evidence. In contrast, the presidential pardon under section 84(2)(j) is based on the President's prerogative, in which they would typically have regard to the individual's interests and the public interest.³⁸ The two processes are fundamentally different, with different legal bases and sources of authority.

[38] Regardless, this Court need not reach the question whether a section 327 process can run simultaneously with a presidential pardon process. The respondents' contention that Mr Mofokeng's and Mr Mokoena's pardon application was essentially nullified when they submitted their section 327 applications is not what occurred in this situation. There was no communication that the 2001 application was refused.

[39] The President's contention that the Office of the Presidency did not receive the application until 2021 does not affect the analysis. As noted earlier, the President retains full control over the presidential pardon process, even preliminary determinations delegated to other functionaries, as the power is one granted to the President by virtue of being the Head of State.³⁹ Though such delegation is permissible, the President is responsible for any failure which happens in the delegated consultation structure which the Office of the Presidency has established:

³⁸ See *Hugo* above n 21 at paras 44-6.

³⁹ See *SARFU II* above n 34 at para 41:

“When contemplating the exercise of presidential powers, there can be no doubt that it is appropriate and desirable for the President to consult with and take the advice of Ministers and advisers. . . . Similarly, where the President acts as Head of State, it is not inappropriate for him or her to act upon the advice of the Cabinet and advisers. What is important is that the President should take the final decision.”

The Court stated further, in para 148, that “[t]he constraints upon the President when exercising powers under section 84(2) are clear: the President is required to exercise the powers personally.”

See also *Mncwabe v President of the Republic of South Africa* [2023] ZACC 29; 2023 (11) BCLR 1342 (CC); 2024 (1) SACR 447 (CC) at para 123.

“Advice rendered, be it by request or standing practice, does not transform the solo character of Head of State powers and functions into national executive powers characterised by their collective exercise. The preparatory steps to be taken by the Minister and her department fall within the auxiliary powers of the President in the decision-making process. They are neither separate from, nor external to, that process. The President retains full powers and functions – and is therefore the bearer of all obligations – in the greater pardons process under section 84(2)(j).”⁴⁰

[40] Ultimately, whether the pardon application reached the Presidents’ desks does not change the consideration surrounding the amount of time which has lapsed, nor the potential failure to fulfil a constitutional obligation. The President is required to maintain full control of, and accordingly has full obligations in respect of every step of, the pardon process. This is a feature of the power being one which can only be exercised by the Head of State and is the only way to avoid an accountability gap in which neither the President nor the Department can be held responsible for failures occurring at a particular step. The President is accountable for any failure of the process which occurred in the portions he has delegated to the Minister or Department. In light of the President’s acknowledgement that the pardon application was originally submitted to the Department in 2001 and was not decided until 2025, the only logical conclusion is that the amount of time which has lapsed is 24 years.

Did the President fail to fulfil his constitutional obligations?

[41] The President does not contest that he failed to fulfil his constitutional obligations, even acknowledging that the delay was “regrettable” and apologising for it. He similarly concedes that, although the fault may lie with the Minister or within the Department, he holds ultimate responsibility as the pardon power is one exercised solely by him. This aligns with this Court’s holding in *Chonco I* that the President’s pardon power in section 84(2)(j), derived from his position as Head of State, requires him to have ultimate control over the pardon process.⁴¹

⁴⁰ *Chonco I* above n 9 at paras 39-40.

⁴¹ *Id* at paras 38-40.

[42] These concessions by the President are properly made. Even if one considers the delay to be four years, rather than 24, that would be no less unacceptable and inexplicable. An under-capacitated administrative process is not a valid explanation, nor is the respondents' statement that the four-year delay is acceptable since it is as long as Mr Mofokeng and Mr Mokoena's attorneys took to prepare the section 327 application. The only way in which a 24-year delay could have occurred is through wilful neglect or gross negligence. Regardless of the reason, the fact remains that Mr Mofokeng and Mr Mokoena lived for two decades not only imprisoned for a substantial period of time for crimes they did not commit, but also under societal stigma and the pall of having been forgotten and shunned by their government despite their every effort to follow up. Mr Mokoena passed away before his rights could be vindicated, and also without receiving a conclusion to his long and relentless quest to have his name cleared.

[43] Not only is the delay itself unacceptable, but the entire pardon process, including but not limited to the manner in which the respondents have approached this case, is shocking. For decades, Mr Mofokeng and Mr Mokoena, and later their attorneys, contacted the Department and other government officials on a regular basis asking for the pardon application to be decided. The Department was advised that Mr Mokoena was in poor health and had requested a decision on his application before he passed away. The follow-up letter two weeks later advised the Department that Mr Mokoena had passed away; there was no response. This was not the only instance in which Mr Mofokeng and Mr Mokoena's humanity was ignored by the government constitutionally tasked with protecting them and their rights.

[44] The callousness with which the respondents approached this situation is evident not only from the record but also in the submissions themselves. The respondents granted Mr Mokoena a posthumous pardon, which one can argue does not properly vindicate the harm done to him, yet they simultaneously claim that, because of their own delay in deciding the pardon application, there is no longer a remedy for the harm

done to Mr Mokoena. This is untenable and smacks of an uncaring attitude, something which must be strongly deprecated in our constitutional dispensation. What happened here was far worse than the President's euphemistic description of the circumstances as "deeply regrettable". Such behaviour, stretching from the initial handling of the pardon application to the pleadings before this Court, is inexplicable and must be condemned in the strongest terms.

Remedy

[45] The applicants seek declaratory relief and damages against the current and former Presidents, the latter group in their personal capacities, though they limit their requested structural interdict and costs to the current President in his official capacity. As I have already explained, the current and former Presidents all failed to fulfil a constitutional obligation in so far as they neglected to decide the pardon application diligently, without delay and in accordance with the principle of legality. However, this applies to the former Presidents in their official capacities rather than their personal capacities. As this Court held in *Law Society*:

"One President is a successor in title of another and the obligations are similarly transferable from one to the other. For the execution of the duties attendant to the presidential office and antecedent authority is never really incumbent-specific. The power and obligations devolve from one personality to another – it is, after all, the Presidency."⁴²

[46] The failure of previous Presidents to fulfil a constitutional obligation is generally attached to their time in office and accordingly to their official roles, rather than their persons. That is not to say that no relief can be sought in cases when a President has left office, especially if such failures are coupled with a delictual claim. However, in this matter, the proper relief is against the Office of the Presidency rather than any President in their personal capacity.

⁴² *Law Society* above n 34 at para 94.

Declaratory relief

[47] This Court has held that declaratory relief may be necessary to vindicate harm done to applicants or to protect and enforce their constitutionally-protected rights.⁴³ The applicants seek declarations that the current and former Presidents failed to fulfil their constitutional obligations in so far as they did not decide the pardon application diligently, without undue delay, in good faith and in accordance with the principle of legality. The applicants submit that had the pardon application been decided timeously, it would have been decided no later than November 2003 on a most generous interpretation for the Presidency.

[48] A declaration regarding the failure to fulfil constitutional obligations would not only assist in validating the harm suffered by the delayed decision on the application, but will also hopefully serve to discourage further lapses by the President, Minister and Department. However, although it is evident that the delay is unconscionable, it would be improper for this Court to prescribe how long the President should take to decide pardon applications, or how long would have been reasonable to determine the initial application. That is a question which will always be context- and fact-specific.

Constitutional damages

[49] It is trite that a breach of a right must be effectively vindicated by a suitable remedy.⁴⁴ Arising out of the declaratory relief, the applicants seek constitutional damages and, in the alternative, delictual damages. The question before us now shifts to what remedy, or combination of remedies, would properly vindicate the rights of Mr Mofokeng and Mr Mokoena in these circumstances.

[50] This matter pertains to a procedural shortcoming with substantive consequences, as has already been explored above. Indeed, this is the first occasion on which this

⁴³ See *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) (*Fose*) at paras 18-19, as echoed in *Pillay* above n 12 at para 115 and *Pheko* above n 11 at paras 48-9.

⁴⁴ *Fose* id at para 69.

Court has considered the possibility of constitutional damages for constitutional violations not arising out of the Bill of Rights. However, it is inconceivable to say that the President’s constitutional obligation to consider the pardons of offenders, as contained in section 84(2)(j), does not create a corresponding constitutional right on the part of petitioners to have their pardon applications properly and timeously considered by the President. Indeed, this Court has already concluded in *Hugo* that this is so.⁴⁵

[51] The question of the appropriateness of constitutional damages in any given matter is complicated by the seemingly indistinct legal principles governing this remedy. In *Fose*, this Court accepted that an award of constitutional damages may well be in the basket of “appropriate relief” available for a constitutional breach as was contemplated by the then section 7(4) of the Constitution.⁴⁶ This Court said:

“[I]t 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. . . . 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.”⁴⁷

[52] This Court went on to observe that in most cases the common law is broad enough to provide the relief that would be “appropriate” for breaches of constitutional rights, but what remedy is proper depends on the circumstances presented before the court in each case.⁴⁸ In other words, an award of this nature requires a fact-specific assessment. On the facts in *Fose*, this Court concluded that the applicant stood to receive “a substantial sum” in delictual damages for the assaults he had suffered at the hands of police; and since this would fully vindicate his rights, an award of constitutional damages was determined to be unnecessary.⁴⁹ This means that even in

⁴⁵ *Hugo* above n 21 at paras 5-8.

⁴⁶ *Fose* above n 343 at para 60.

⁴⁷ *Id.*

⁴⁸ *Id.* at paras 58(b) and 60.

⁴⁹ *Id.* at para 73.

instances where there are constitutional infringements by the State, that does not automatically warrant an award of constitutional damages.

[53] A further principle arising from *Fose* is that punitive damages have never been a part of our law, and it would be inappropriate to infuse such an objective into the formulation of constitutional damages. In that matter, this Court described punitive damages as “anomalous and unsatisfactory”, cautioning that they grant an “unjustifiable windfall”, punish without the criminal law’s procedural protections and, where the State is the defendant, inevitably shift costs onto “the public at large” at the expense of scarce resources needed for “economic and social reform”.⁵⁰ As such, courts must avoid the inevitable inclination to punish the wrongdoer in circumstances of constitutional right infringements. Rather, constitutional damages must serve to vindicate constitutional violations, especially in cases of systemic and egregious harms. Their purpose should be to maintain faith in the Constitution and illustrate that this foundational text is one that must be honoured and respected in its quest to protect all who fall within its scope.

[54] In *Modderklip*,⁵¹ this Court confirmed an award by the Supreme Court of Appeal of constitutional damages for the State’s failure to facilitate a court-ordered eviction, framing the award as being “foreshadowed” by *Fose*’s acceptance that appropriate relief could include damages of this nature.⁵² This Court held that, although *Modderklip* could have brought a separate delictual claim and a bare declaratory order “would go some way” to addressing the State’s failure to protect *Modderklip*’s rights, given its “long history of efforts to relieve its property from unlawful occupation”, constitutional damages was the *more effective* remedy in the circumstances.⁵³

⁵⁰ Id at paras 65 and 72.

⁵¹ *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC).

⁵² Id at paras 66-7.

⁵³ Id at para 60.

[55] In *Kate*,⁵⁴ the Supreme Court of Appeal dealt with a claim for constitutional damages. The Court held that whether constitutional damages are appropriate should be determined casuistically, considering the nature and importance of the infringed right, the availability of alternative remedies and the consequences of the breach for the claimant.⁵⁵ The Supreme Court of Appeal further said that, in rejecting the argument that Ms Kate should be confined to ordinary delictual remedies, the real question is not whether an award of constitutional damages is *appropriate* but whether *any* constitutional remedy should be granted. It said:

“No doubt the infusion of constitutional normative values into delictual principles itself plays a role in protecting constitutional rights, albeit indirectly. And no doubt delictual principles are capable of being extended to encompass state liability for the breach of constitutional obligations. But the relief that is permitted by section 38 of the Constitution is 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. While that possibility is a consideration to be borne in mind in determining whether to grant or to withhold a direct section 38 remedy it is by no means decisive, for there will be cases in which the direct assertion and vindication of constitutional rights is required. Where that is so the further question is what form of remedy would be appropriate to remedy the breach.”⁵⁶

[56] The Supreme Court of Appeal’s approach in *Kate* addresses the overlap between other remedies and constitutional damages.⁵⁷ It simultaneously identified that an award of constitutional damages is most suitable in circumstances where the vindication of a constitutional right requires more than an indirect acknowledgment by the court but a direct assertion of the rights which had been violated.

⁵⁴ *MEC for the Department of Welfare, Eastern Cape v Kate* [2006] ZASCA 49; [2006] 2 All SA 455 (SCA); 2006 (4) SA 478 (SCA).

⁵⁵ *Id* at para 25.

⁵⁶ *Id* at para 27.

⁵⁷ *Id*.

[57] In *Residents*,⁵⁸ this Court formulated an operative test that constitutional damages are available only when it is “the most appropriate remedy”, which is to be assessed through “two overarching considerations”: whether an alternative remedy exists that would vindicate the right, and whether that alternative would be effective or appropriate in the circumstances.⁵⁹ When determining whether the alternative remedy is effective, this Court prescribed that the following must be considered:

“whether expecting the claimant to pursue an alternative remedy (if there is one) would be *manifestly unjust or unreasonable* in the circumstances. This is determined with reference to the nature and extent of the violation, the position of claimants, and the impact of the violation on the requirements for obtaining alternative relief.”⁶⁰

[58] In his concurring majority decision, Jafta J was critical of both the award made in *Kate* and some of the guiding principles as to constitutional damages set out therein. On this, he posited that granting constitutional damages where delictual damages had already addressed the harm transformed them into punitive damages. Such especially rings true, Jafta J noted, in situations in which a breach of a constitutional right has not, in the past, given rise to claims for damages, pointing to administrative justice and fair trial rights as examples;⁶¹ where the common law has ordinarily protected the rights infringed through delictual damages awards, providing personality rights such as dignity and privacy as examples;⁶² or where constitutional damages are granted to one person for systemic issues affecting entire communities.⁶³

[59] The concerns raised by Jafta J in *Residents* do not, however, displace the principles in *Kate* that whether constitutional damages should be awarded must be determined on the facts of the situation and the view that where a direct vindication of

⁵⁸ *Residents of Industry House, New Doornfontein, Johannesburg v Minister of Police* [2021] ZACC 37; 2022 (1) BCLR 46 (CC); 2023 (3) SA 329 (CC).

⁵⁹ Id at para 103.

⁶⁰ Id at para 105.

⁶¹ Id at para 139.

⁶² Id at paras 139 and 144.

⁶³ Id at para 138.

a right is the most appropriate remedy, such an award may be made. That is not to say that in terms of *Kate* a direct violation of a constitutional right will always require a direct constitutional vindication of such a right. Rather, constitutional damages may still be appropriate when the egregiousness of the harm requires a direct vindication of the rights as the most appropriate remedy.

[60] As is apparent from the above, this Court has traditionally been cautious to grant constitutional damages, and indeed the jurisprudence surrounding the topic has resulted in some confusion. Though there is an interest in maintaining certainty in the treatment of claimants vindicating the same right,⁶⁴ we must also ensure that considerations regarding the appropriateness of granting constitutional damages do not set such a high bar that the remedy is a legal hypothetical, out of reach for most claimants.⁶⁵ The presence of an alternative remedy, either under common law or statute, is insufficient on its own to displace a claim for constitutional damages; rather, it must be the case that the alternative remedy is an equally appropriate one for effectively vindicating the violation of the relevant rights.⁶⁶

[61] In conclusion, and having regard to the jurisprudence that has developed over time, the following may serve as a useful summation of the principles and considerations that have emerged with regard to an award of constitutional damages:

- (a) The nature of the right violated and the degree and extent of the violation of the right must be considered. The egregiousness of the violation is a factor that should be considered in determining whether constitutional damages should be awarded.
- (b) The existence of an alternative remedy does not preclude consideration of an award of constitutional damages. Where an alternative remedy is available to the claimant, the court must determine whether that remedy,

⁶⁴ Id at para 118.

⁶⁵ Moroeng “Easing the Harness: Exploring the Development of Remedies for Socio-Economic Rights Violations” (2025) 15 *Constitutional Court Review* 141 at 155.

⁶⁶ Determination of an appropriate remedy will inherently involve consideration of effectiveness considering the circumstances of the case. See *Fose* above n 43 at para 69.

or one of constitutional damages, would be the most appropriate in the circumstances to vindicate the violated right.

- (c) An award of constitutional damages cannot be punitive in nature or go beyond addressing the harm that has been caused to the claimant.
- (d) In assessing whether a claimant should pursue the alternative remedy, a Court will inquire whether doing so would be manifestly unjust or unreasonable in the circumstances.
- (e) While constitutional and delictual damages are conceptually different, they are related and ideally should be dealt with together. The High Court is ideally suited to deal with such claims together.

[62] With the above in mind, I turn now to a consideration of the most appropriate remedy in the circumstances of this case.

[63] The delictual remedy sought by the applicants in the alternative is insufficient to provide any meaningful compensation, financial or otherwise, in this situation. Firstly, it bears noting that although the President's decision may warrant delictual damages for violations of Mr Mofokeng and Mr Mokoena's rights under the Bill of Rights, this would not be the most appropriate remedy for the reasons that follow. Similar to *Modderklip*, this is a situation in which "only one party, the State, holds the key to the solution"⁶⁷ of the problem facing the applicants and where the significant time that has passed requires a remedy more effective than a future delictual action.⁶⁸

[64] Secondly, as acknowledged by the parties, there may be nuances that hinder the extent to which delictual damages may be granted in this situation. These include whether a delay in deciding the pardon application is a delictual wrong; the degree to which the Presidents' failures to timeously decide the pardon applications caused the harms claimed by the applicants; the transferability of such a delictual claim to

⁶⁷ *Modderklip* 51 at para 42.

⁶⁸ *Id* at para 60.

Mr Mokoena's estate; and exactly how and why such an extensive delay occurred. Such matters may impact upon the existence and quantum of delictual damages.

[65] Thirdly, the appropriateness and quantum of delictual damages would have to be determined by the High Court. A High Court judgment might be the subject of further appeals to the Supreme Court of Appeal and ultimately to this Court. In light of the extensive delay that Mr Mofokeng and Mr Mokoena have already endured in vindicating their rights, the interests of justice call for an expeditious remedy that will not be prolonged by protracted litigation and appeals. This conclusion is bolstered by this Court's holding in *Residents* that ordering the claimant to pursue an alternative remedy should not be "*manifestly unjust or unreasonable*" in the circumstances.⁶⁹

[66] In an instance such as this, where there has been such a blatant and egregious violation of a constitutional obligation by the most powerful office in the country, there are a number of factors which render constitutional damages the most appropriate remedy. These include: the inordinate period of 24 years during which the breach of the constitutional rights endured; the callous attitude of the Presidency when concerns were repeatedly raised over time regarding the delay in taking a decision; and the nature of the right in question – being the right to have one's pardon application properly and timeously considered, which, if acted on appropriately, would have seen Mr Mofokeng and Mr Mokoena released from detention some years prior to their release in 2011. I am also of the view that, having regard to these factors, directing the applicants to pursue a delictual remedy would be *manifestly unjust and unreasonable*.

[67] Lastly, it is necessary to deal briefly with the argument by the respondents that constitutional damages are in any event not available in respect of Mr Mokoena, because he had already passed away by then. The respondents contend firstly that such a claim could only be pursued by Mr Mokoena himself, not his heirs, and that even if Mr Mokoena's heirs could pursue such a claim, this would only be the case if all

⁶⁹ *Residents* above n 58 at para 105.

pleadings had closed prior to Mr Mokoena's death. In essence, what the respondents seek to do is apply common law principles regarding transmissibility of delictual damages in a constitutional damages setting. In my view, this is not the correct approach.

[68] In cases concerning the Bill of Rights, this Court has stated that the power to make a constitutional damages award arises from section 38 of the Constitution, read with section 172, and that the power is a “flexible power to determine what is appropriate relief to a specific case”.⁷⁰ In the present case, where the constitutional obligation breached falls outside the Bill of Rights, the power of the Court to grant constitutional damages arises from the power conferred by section 172(1)(b) of the Constitution to make “any order that is just and equitable”. This Court has repeatedly emphasised the extraordinary breadth and flexibility of this power:

“Section 172(1)(b) clothes our courts with remedial powers so extensive that they ought to be able to craft an appropriate or just remedy even for exceptional, complex or apparently irresolvable situations. And the operative words in this section are “an order that is just and equitable”. This means that whatever considerations of justice and equity point to as the appropriate solution for a particular problem, may justifiably be used to remedy that problem. If justice and equity would best be served or advanced by that remedy, then it ought to prevail as a constitutionally sanctioned order contemplated in section 172(1)(b).”⁷¹

[69] A constitutional damages award sought under section 38 or section 172(1)(b) of the Constitution is not a common law damages award. There is accordingly no basis to transplant common law rules regarding delictual damages into the constitutional damages context in a manner that straightjackets the Court's ability to grant an order that is “just and equitable”.

⁷⁰ *Residents* above n 58 at para 113

⁷¹ *Electoral Commission v Mhlope* [2016] ZACC 15; 2016 (5) SA 1 (CC); 2016 (8) BCLR 987 (CC) at para 132.

[70] In the present case, as this judgment has made clear, it can never be “just and equitable” to allow the respondents’ own egregious delays to mean that they escape liability for constitutional damages in respect of Mr Mokoena. On the contrary, as I have explained in detail above, this is a case where the awarding of constitutional damages – including in respect of Mr Mokoena – is the most appropriate remedy.

[71] For these reasons, an award of constitutional damages is the most effective remedy that will serve to vindicate this particular harm.⁷² The circumstances which Mr Mofokeng and Mr Mokoena were forced to endure require that we go beyond an indirect assertion of their rights and demand a direct vindication to effectively and properly address the harm caused. As the power to grant a pardon or reprieve is exclusively exercised by the President and it has yet to be conclusively determined whether the exercise of such power falls under the scope of the Promotion of Administrative Justice Act⁷³ – which is not a matter before the Court at this time – there is no clear statutory remedy to address this harm.⁷⁴

[72] None of this is intended to suggest that a claim for delictual damages may not be pursued, or to offer any comment on the merits of any such claim, if brought. Indeed, any conclusion this Court reaches does not preclude the applicants from pursuing a claim for delictual damages. Similarly, none of these findings should be understood to mean that the award of constitutional damages to be made in this matter should not be taken into consideration if a court is ever called upon to quantify delictual damages where an action is successfully prosecuted.

[73] In light of the conclusion that constitutional damages should be awarded, what remains to be determined is the appropriate quantum of the constitutional damages. For

⁷² See *id* at para 118, where this Court held:

“[C]onstitutional damages must be the *most appropriate remedy* available to vindicate constitutional rights with due weight attached to other alternative remedies available in the common law and statutes.”

⁷³ 3 of 2000.

⁷⁴ See *Albutt* above n 31 at paras 80-3 and *SARFU II* above n 314 at para 142.

the reasons already explored above, the interests of justice and finality call for this Court to determine the quantum of constitutional damages. However, as this issue has not been ventilated by the parties, the prudent course of action is to invite them to make written submissions on the quantum of constitutional damages.

Structural interdict

[74] The interests of justice do not require the granting of a structural interdict, especially one of the type sought by the applicants. Structural interdicts should be made only when necessary and for the primary purpose of securing compliance with court orders.⁷⁵ Whilst it is understandable that the applicants requested the structural interdict in light of the respondents' inability to explain the cause of the delay, and their slothfulness, granting such a remedy would be contrary to the principles underlying structural interdicts.

[75] Although it would be improper for this Court to grant the structural interdict sought by the applicants, in light of the clear systemic failures, I would hope, and expect, that the Presidency would conduct a proper review into the pardon process, and put in place the measures suggested by the applicants to ensure such an egregious and inexplicable oversight does not happen again.

Conclusion

[76] As a final note, this case identifies a category of pardon cases that fall within a unique space, given our history and the way the TRC was structured to address amnesty applications. Emerging from these facts, it is evident that there was a category of cases which fell between the cracks of the TRC and the criminal justice system. As amnesty at the TRC depended on an admission of guilt, one could receive amnesty for a politically motivated crime. However, this was not available to individuals who did not commit a crime and yet were still charged and convicted. We cannot fault the TRC for

⁷⁵ See *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) at para 129.

this, as it was operating within a particular legal framework and for a particular purpose. Nevertheless, what emerges is that there is a category of applicants for pardons who were excluded from the TRC process, and their cases accordingly warranted special attention by the President.

[77] It appears, from the way the case was argued and the lack of appropriate remedial measures taken by the Presidency until this Court became involved, that the political and legal space within which the TRC functioned was not sufficiently factored into the processes of the Presidency relating to pardon applications for this category of persons. If it had been, one would not have had the untenable result that those who acknowledged their role in the crimes they were convicted of were the recipients of amnesty, while others, such as Mr Mofokeng and Mr Mokoena, who were innocent, languished in prison for many years. For them, all their hopes of freedom and the vindication of their innocence would lie in their applications for pardons. This made it even more compelling that those applications be considered and decided upon without delay. They were failed and callously so. I can only trust that this shortcoming, together with others identified in this judgment, will be addressed without delay, through proper systems and heightened diligence, and that there will never be a repeat of what has happened in this case.

Costs

[78] The applicants raised an important constitutional issue and have been successful in this Court; accordingly, there is no reason why costs should not follow the outcome. Costs are only requested against the current President in his official capacity. I am of the view that this is appropriate. The President's decision on the pardon application upon the applicants' intervention in this Court does not affect his and his predecessors' dereliction and similarly does not mitigate the costs order against him.

Order

[79] I make the following order:

1. This Court has exclusive jurisdiction in respect of the current and former Presidents' failures to fulfil their constitutional obligations.
2. Leave to amend the notice of motion is granted.
3. It is declared that the first to fourth respondents failed to fulfil their constitutional obligations, as provided by section 84(2)(j) of the Constitution read with sections 83(b) and 237 of the Constitution, in so far as they failed diligently and without delay to decide on the joint pardon application of Mr Fusi Simon Mofokeng and Mr Tshokolo Joseph Mokoena.
4. The applicants are entitled to constitutional damages for the first to fourth respondents' failure to fulfil their constitutional obligations.
5. The parties are directed to file written submissions not exceeding 30 pages on the quantum of constitutional damages:
 - (a) by the applicants, by 11 November 2026; and
 - (b) by the respondents, by 25 November 2026.
6. This order shall not preclude the applicants from instituting an action for delictual damages in the High Court, provided that—
 - (a) nothing in this judgment determines whether such an action is available or any defences that might be raised to such an action; and
 - (b) if such an action is instituted and the High Court determines that delictual damages should be awarded, any amount of constitutional damages awarded by this Court shall be taken into account in quantifying the delictual damages.
7. The first respondent must pay the applicants' costs, including the costs of two counsel where employed.

For the Applicants:

P Hathorn SC and K Petersen instructed
by Webber Wentzel

For the First, Fifth and Sixth
Respondents:

K Hofmeyr SC and N Stein instructed
by Office of the State Attorney,
Johannesburg