

**TITLE: CONSTITUTIONAL DAMAGES FOR THE INFRINGEMENT OF A
SOCIAL ASSISTANCE RIGHT IN SOUTH AFRICA: Are monetary damages
in the form of interest a just and equitable remedy for breach of a social
assistance right?**

by

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DECLARATIONS:

DECLARATION BY SUPERVISORS

We, Professor Boyce P Wanda and Mr Jacques Mahler-Coetzee, hereby declare that this thesis by Bronwyn Le-Ann Batchelor entitled “CONSTITUTIONAL DAMAGES FOR THE INFRINGEMENT OF A SOCIAL ASSISTANCE RIGHT IN SOUTH AFRICA: Are monetary damages in the form of interest a just and equitable remedy for breach of a social assistance right?” submitted for the Degree of Master of Laws (LLM) be accepted for the award of the Degree.

DECLARATION BY CANDIDATE:

I, Bronwyn Le-Ann Batchelor, hereby declare that all the work contained herein is my own, if not, it has been duly acknowledged and referenced according to the referencing guide of the University of Fort Hare. This dissertation has not been submitted to any other university towards any other degree.

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ABSTRACT

This dissertation will explore the revolutionary progression in the provision of monetary damages and the availability thereof due to the change in South Africa's legal system from Parliamentary sovereignty to Constitutional supremacy after the enactment of the final Constitution in 1996¹.

The Constitution of South Africa brought with it the concepts of justification and accountability as the Bill of Rights enshrines fundamental rights and the remedies for the infringement of same. The available remedies for the infringement of a fundamental right flow from two sources, being either from the development of the common law remedies in line with the Bill of Rights or alternatively from Section 38 of the Constitution, which provides for a remedy which provides 'appropriate' relief. The question that will be raised in this dissertation is, 'does appropriate relief include an award of delictual damages?' or a question related thereto 'is an award of monetary damages an appropriate remedy?'

The motivation for this dissertation arises from the plethora of case law, especially in the Eastern Cape, that has come to the fore in the last sixteen years, highlighting the injustice of cancellations of social assistance grants and the non-payment of such in South Africa's social security system, as well as the precedent that was set by our Constitutional Court and Supreme Court in remedying that injustice. The central case to this dissertation is that of *Kate v Member of Executive Council for Department of Welfare, Eastern Cape* 2005 1 SA 141 SECLD; *Member of Executive Council, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA), which is generally regarded as having paved the way for the granting of monetary damages for the infringement of an individual's constitutional right as same require legal protection.

Firstly the past approach to damages will be explored in relation to South Africa's common law, being the Roman-Dutch law. The common law Aquilian action is the focal point of this dissertation in relation to the common law in that the granting of

¹ Constitution of 1996.

damages for the infringement of an individual's social assistance right (being a specific constitutional right framed within the 1996 Constitution) results in pure patrimonial loss which in our common law system was remedied by the *actio legis Aquilae*. In delict, an award of damages is the primary remedy, aimed at affording compensation in respect of the legal right or interest infringed.

After the common law system of damages has been explored, this dissertation will then examine the changes that have developed therefrom, and largely shaped by the current state of disorganization in the National Department of Welfare coupled with the all encompassing power of the final Constitution. The final Constitution provides the power, in section 38 of the 1996 Constitution, for the court to award a monetary remedy for the breach of a constitutional right. The question, however, is "does the award of monetary damages not merely throw money at the problem, whereas the purpose of a constitutional remedy is to vindicate guaranteed rights and prevent or deter future violations?"

The battle for domination between the common law approach and the constitutional approach to damages is witnessed as the two systems eventually amalgamate to form an essentially new remedy, unique to South Africa. South Africa's new system is aligned with the Constitution as the Constitution is the supreme law of the land and underpins the awarding of all damages and, especially, the awarding of constitutional damages.

For the sake of completeness, alternatives to monetary damages will also be canvassed in this dissertation.

It is hoped that the reader will, in the end, realize that the final Constitution is the supreme law of the land and as such dictates the manner and form in which damages are provided. If such provision is not in alignment with the Constitution, it will be declared invalid. The flexibility of our common law is put to the test, yet it is found to be adaptable to the ever-developing *boni mores* of society exemplified in the embracing constitutional principles and the production of this new remedy. The courts develop the common law under section 39(2) of the Constitution in order to

keep the common law in step with the evolution of our society and the ever changing nature of *bonos mores*.

TABLE OF CASES

- August v Electoral Commission* 1999 3 SA 1 (CC)
- Bacela v Member of the Executive Council for Welfare (Eastern Cape Provincial Government)* 1998 1 ALL SA 525 (E)
- Baloro v University of Bophuthatswana* 1995 8 BCLR 1018 (B)
- Bernstein v Bester* 1996 2 SA 751 (CC)
- Bestway Agencies (Pty) Ltd and Another v Western Credit Bank Ltd* 1968 3 SA 400 (T)
- Booi v Jajula; Mnto v Jajula* ECD cases 431/99 and 433/99 (unreported)
- Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC)
- City Council of Pretoria v Walker* 1998 2 SA 363 (CC); 1998 (3) BCLR 257 (CC)
- City of Cape Town v Rudolph* 2004 (5) SA 39 (C)
- Coronation Brick (Pty) Ltd v Stachan Construction Co (Pty) Ltd* 1982 4 SA 371 (D)
- Combrinck Chiropraktiese Kliniek (Edms) Bpk v Datsun Motor Vehicle Distributors (Pty) Ltd* 1972 4 SA 185 (T)
- Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC)
- Dendy v University of Witswatersrand Johannesburg* 2005 5 SA 357 (W), [2005] 2 ALL SA 490
- De Lange v Smuts NO & others* 1998 ZACC 6
- Du Plessis v De Klerk* 1996 3 SA 850 (CC)
- De Klerk v Du Plessis* 1995 (2) SA 40 (T)
- Dunn v Minister of Defence* 2006 2 SA 107 (T)
- During NO v Boesak and Another* 1990 3 SA 661 (A)
- Ex parte Chairman of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC) 800.
- East London LTC v MEC for Health, Eastern Cape* 2001 3 SA 1133 (Ck).

Farr v Mutual and Federal Insurance 2000 (3) SA 684 (C).

Ferreira v Levin NO and Others 1996 1 BCLR 1 (CC); 1996 1 SA 984 (CC)

Fose v Minister of Safety and Security 1997 3 SA 786 (CC); 1997 7 BCLR 851

Goldberg v Kelly 397 US 254 1970

Government of the Republic of South Africa v Grootboom 2001 1 SA 46 (CC), 2000 11 BCLR 1169 (CC)

Grootboom v Oostenberg Municipality 2000 (3) BCLR 277 (C)

Hoffmann v South African Airways 2001 1 SA 1 (CC)

Jayiya v Member of Executive Council for Welfare, Eastern Cape Provincial Government Case number 264/02 Case [2003] SCA

Jayiya v Member of Executive Council for Welfare, Eastern Cape 2004 2 SA 611 (SCA)

Kate v Member of Executive Council of Welfare 2005 1 SA 141 SECLD; *Welfare Department v Kate* 2006 SCA 46 (RSA)

Knop v Johannesburg City Council 1995 (2) SA 1 (A).

Larbi –Odam and Others v Member of the Executive Council for Education and Another 1996 (12) BCLR 1612 (B) 1620I; [1996] 4 All SA 185 (B) 194a – b

Lillicrap, Wassenaar and Partners v Pilkington Brothers SA (Pty) Ltd 1985 1 SA 475 (A)

Mahambehlala v Member of Executive Council of Welfare, Eastern Cape 2002 1 SA 342; 2001 JDR 327 (SE)

Maluleke v Member of Executive Council, Health and Welfare, Northern Province 1999 4 SA 367 (T)

Matthews v Young 1922 AD 492

Madinda v Minister of Safety and Security 2008 4 SA 312 (SCA)

Magqbi v Mafundityala 1979 4 SA 106 (E)

Mbanga v Member of Executive Council of Welfare Eastern Cape 2001 JDR 328

Mbuyisa v Minister of Police, Transkei 1995 (2) SA 362 (Tk), 366C;

Minister of Education v Harris 2001 (11) BCLR 1157 (CC); 2001 (4) SA 1297 (CC)

Minister of Health v Treatment Action Campaign 2002 5 SA 721 (CC); 2002 BCLR 10 1033 (CC)

Minister of Health v Treatment Action Campaign (2) 2002 5 SA 721 (CC)

Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others 2005 3 SA 280 (CC), 2004 5 BCLR 445

Minister of Finance v Barberton Municipal Council 1914 AD 335

Mjeni v Minister of Health & Welfare, Eastern Cape 2000 4 SA 446 (Tk)

Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae) 2004 6 SA 40

Modderklip Boerdery (Edms) Bpk v President of the RSA 2003 6 BCLR 638 (T)

Mohlomi v Minister of Defence 1997 1 SA 124 (CC), 1996 12 BCLR 1559

Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development intervening (Womans Legal Center as amicus curiae) 2001 4 SA 491 (CC), 2001 8 BCLR 765

Mpofu v Member of Executive for Welfare and Population Development, Gauteng and another WLD case 99/2848 unreported judgment of 18 February 2000

N v T 1994 1 SA 862 (C)

National Media Ltd v Bogoshi 1998 4 SA 1196 (SCA)

Njongi v MEC, Department of Welfare, Eastern Cape 2008 4 SA 237 (CC)

Ntame v MEC, Department of Social Development, Eastern Cape; Mnyaka v MEC, Dept of Social Development, Eastern Cape [2005] 2 All SA 535 (SE)

Nyathi v MEC for the Department of Health, Gauteng and Another, 26014/2005 TPD, 20 March 2007 (unreported), [2007] JOL 19612 (T)

Nyathi v MEC, Department of Health, Gauteng & another, Media Summary, [2007] JOL 19612 (T), [dated: 30 March 2007]

Nyathi v Member of the Executive Council for the Department of Health, Gauteng and Minister of Justice and Constitutional Development with the Centre For Constitutional Rights CCT 19/07 [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC)

Olitzki Property Holdings v State Tender Board 2001 3 SA 1247 (SCA)

Perlman v Zoutendyk 1934 CPD 151

Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuzza 2001 4 SA 1184 (SCA)

Potgieter v Killian 1996 (2) SA 276 (N)

Premier, Western Cape v Fair Cape Property Developers (Pty) Ltd 2003 6 SA 13 (SCA)

President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and others, amici curiae) 2005 5 SA 3 (CC)

President of the Republic of South Africa and Others v South Africa Rugby Football Union and Others 1999 10 BCLR 1059 (CC); 2000 1 SA 1 (CC)

Qokose v Chairman, Ciskei Council of State 1994 (2) SA 198 (Ck)

Re: The National Education Policy Bill No. 83 of 1995 1996 3 SA 289 (CC)

R v Oakes (1986) 26 DLR 4th (200)

Radebe v Hough 1949 1 SA 380 (A)

Rail Commuters Action Group and Others v Transnet Limited t/a Metro-Rail 2005 2 SA 359 (CC), 2005 4 BCLR 301

Rail Commuter Action Group v Transnet Ltd t/a Metrorail 2003 (5) SA 518 (C)

Rivett-Carnac v Wiggins 1997 3 SA 80 (C)

S v Mhlungu 1995 3 SA 867 (CC)

Somyani v MEC for Welfare, Eastern Cape, and Another SECLD case 1144/01 unreported judgment undated

Soobramoney v Minister of Health, KwaZulu Natal 1998 1 SA 765 (CC)

Sanderson v Attorney-General, Eastern Cape 1998 2 SA 38 (CC)

Strydom v Minister of Correctional Services 1999 (3) BCLR 342 (W)

Treatment Action Campaign v Minister of Health 2002 (4) BCLR 356 (T).

Telimatrix (Pty) Ltd v Advertising Standards Authority of SA [2005] 2 ALL SA 97 (W)

Tobani v Minister of Correctional Service NO [2000] 2 ALL SA 318 (SE)

Transnet Limited v Sechaba Photoscan (Pty) Ltd 20051 SA 299 (SCA), (reportable) case number 98/03 SCA

Union Government v Ocean Accident and Guarantee Corporation Ltd 1956 1 SA 577 (A)

Union Government (Minister of Railways and Harbours) v Warneke 1911 AD 657.

Van der Merwe v Road Accident Fund 2006 4 SA 230 (CC)

York Timbers v Minister of Water Affairs and Forestry 2003 4 SA 477 (T)

Zantsi v Chairman, Council of State, Ciskei 1995 (2) SA 534 (Ck)

Zimbabwe Township Developers v Lou's Shoes 1984 (2) SA 778 (ZSC)

TABLE OF STATUTES

Basic Conditions of Employment Act 3 of 1983

Constitution of South Africa Act 108 of 1996

Commissions Act 8 of 1947

Compensation for Occupational injuries and disease Act 130 of 1993

Conventional Penalties Act 15 of 1962

Crown Liabilities Act 1 of 1910,

Defence Act 44 of 1957

Expropriation Act 63 of 1975

High (Supreme) Court Act 59 of 1959

Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002

Interim Constitution, section 235 (8)

Limitation of Legal Proceedings Act 94 of 1970

Municipal Finance Management Act 56 of 2003

Prescription Act 68 of 1969

Prescribed Rate of Interest Act 55 of 1975

Promotion of Administrative Justice Act 3 of 2000

Public Finance Management Act 1 of 1999

Social Assistance Act 59 of 1992

Social Assistance Act 13 of 2004

Social Security Agency Act 9 of 2004

South African Police Service Act 68 of 1995

State Liability Act 20 of 1957

Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948)

Unemployment Insurance Act 30 of 1966

CHAPTER 1

INTRODUCTION

This Chapter will firstly introduce the topic of this dissertation, secondly discuss the context and issues pertaining to this dissertation, thirdly discuss the research question or questions of this dissertation which will provide the purpose of this study, fourthly detail the methodology utilized by the author in this dissertation, and fifthly this Chapter will provide an essential overview of the fundamental works read during the course of the preparation of this dissertation. Finally, this Chapter will conclude with the structure and overview of the Chapters to follow in this dissertation and essential definitions utilized within this dissertation.

1.1. INTRODUCTION OF TOPIC

This section of Chapter 1 seeks to introduce the topic of this research dissertation.

The dominant field which this dissertation researches is that of constitutional law and specifically that of constitutional damages. However, prior to the enactment of the South African Constitution² (hereinafter referred to as the “Constitution”) the Roman-Dutch common law served as the basis for South Africa’s legal system and hence it is appropriate that the common law concept of damage and patrimonial loss should also be explored. It should become apparent as to what effects the Constitution has had on the concept and essence of damages in general as we move from the common law concept to the constitutional law concept of damage.

The function of the law, and in particular private law, is to regulate relations between individuals in a community. On the other hand, it is the task of public law to regulate the relations between the State and the individual, and between the organs of the State *inter se*. A legal order would not be necessary if people lived in natural or inherent harmony; the reality is that individual interests may and do regularly conflict. Accordingly, it is the function of private law to recognize these interests, delimit them in relation to each other and harmonize those that are in conflict. In particular, it is the role of the law of delict to indicate which interests are recognized by the law,

² The 1996 Constitution, Act 108 of 1996.

under which circumstances they are protected against infringement and how such a disturbance in the harmonious balance of interests may be restored.³

It should be noted at this introductory stage that the term damages⁴ as utilized in this dissertation relates to the law of delict (as found in South Africa's common law) and, as such, the field of this research focuses in essence on an amalgamation of the 'old dispensation' being South Africa's common law with the 'new dispensation' being South Africa's Constitution.⁵ Similarly, as the concept of delictual damages is explored it will become apparent that delictual damages are now intertwined with constitutional damages and that this area of the law is continuously developing.

Further, two areas of constitutional rights have been identified and have accordingly been compensated with constitutional damages. These areas are the right to social security and the right to just administrative action – both of these are specific rights contained in the Bill of Rights.⁶ The aforementioned serves to reiterate the predominance of constitutional law as the field of research for this dissertation.

³ Neethling, Potgieter and Visser, *Law of Delict*, 6th edition (2010) 3.

⁴ Actual loss and expenses incurred up to the date of the trial is known as *damnum emergens*. Damages, that is the amount to be paid as compensation for the harm suffered, are assessed in exactly the same way as the extent of harm is calculated, according to the sum formula approach according to Van der Walt and Midgley, '*Delict*' *Principles and Cases* 2nd edition (1997) 185. Neethling *et al*, *Law of Delict*, 6th edition (2010) 212 - 213.

⁵ The 'old dispensation' refers to the era in South African history prior to the enactment of our 1996 Constitution and democracy. The 'old dispensation' therefore refers to the period of parliamentary sovereignty as opposed to the 'new dispensation' which is premised on constitutional supremacy and the rule of law.

⁶ Chapter 2 of the 1996 Constitution, section 27 states:

- “(1) Everyone has the right to have access to –
- (a) health care services, including reproductive health care;
 - (b) sufficient food and water; and
 - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. (emphasis added)
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatments.”

Section 33 of the 1996 Constitution states:

- “(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must –
- (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - (b) impose a duty on the state to give effect to the rights in subsection (1) and (2); and
 - (c) promote an efficient administration.”

In *Kate v Member of the Executive Council for the Department of Welfare, Eastern Cape*⁷ the High Court granted certain declaratory relief and ordered the defendant to pay interest that had been claimed on the arrear amount of the social grant due to Kate which had been unduly delayed. Interest in *Kate's*⁸ case was claimed and awarded as a measure of *constitutional damages* for the unreasonable delay she had experienced in obtaining her social assistance grant. The delay that Kate experienced in not receiving her social grant timeously resulted in undue hardship to her. The question remains: “Is an award of monetary damages, being more than just interest due to the claimant in terms of delictual remedies, an appropriate remedy for an admitted breach of a constitutional right to social assistance?”

In examining the reason for the Court’s decision in *Kate's*⁹ case, it is noted that section 27 of the Constitution obliges the State to achieve the progressive realization of the right that everyone has to social security, in so far as available public resources allow. Further, section 235 (8) of the interim Constitution¹⁰ provided for the

⁷ 2005 1 SA 141 (SECLD).

⁸ 2006 SCA 46 (RSA).

⁹ *Supra*.

¹⁰ Act 2003 of 1993, section 235 (8) states that:

“(a) The President may, and shall if so requested by the Premier of a province, and provided the province has the administrative capacity to exercise and perform the powers and functions in question, by proclamation in the Gazette assign, within the framework of section 126, the administration of a law referred to in subsection (6) (b) to a competent authority within the jurisdiction of the government of a province, either generally or to the extent specified in the proclamation.

(b) When the President so assigns the administration of a law, or at any time thereafter, and to the extent that he or she considers it necessary for the efficient carrying out of the assignment, he or she may-

- (i) amend or adapt such law in order to regulate its application or interpretation;
- (ii) where the assignment does not relate to the whole of such law, repeal and re-enact, whether with or without an amendment or adaptation contemplated in subparagraph (i), those of its provisions to which the assignment relates or to the extent that the assignment relates to them; and
- (iii) regulate any other matter necessary, in his or her opinion, as a result of the assignment, including matters relating to the transfer or secondment of persons (subject to sections 236 and 237) and relating to the transfer of assets, liabilities, rights and obligations, including funds, to or from the national or a provincial government or any department of state, administration, force or other institution.

(c) In regard to any policing power the President may only make that assignment effective upon the rationalization of the police service as contemplated in section 237: Provided that such assignment to a province may be made where such rationalization has been completed in such a province.

(d) Any reference in a law to the authority administering such law, shall upon the assignment of such law in terms of paragraph (a) be deemed to be a reference *mutatis mutandis* to the appropriate authority of the province concerned.”

administrative capacity to administer the Social Assistance Act¹¹, because the duty was permitted only if that capacity existed, hence obliging the provincial government to provide social grants to disabled persons, amongst others. It was held by Nugent J that the fact that the public purse would be depleted by interest claims does not justify withholding the remedy.¹² The only appropriate remedy in the circumstances was an award of constitutional damages¹³ to recompense Kate for the breach of her right to a social grant.

Reference in *Kate's case*¹⁴ was made to the case of *Fose v Minister of Safety and Security*¹⁵ where it was recognized that in principle, monetary damages are capable of being awarded for breach of a constitutional right. Monetary damages for a breach of a constitutional right have been awarded by the Supreme Court of Appeal, and have been endorsed by the Constitutional Court in *President of the Republic of South Africa v Modderklip Boerdery (Pty) (Ltd)* as compensation for the damage sustained by the aggrieved party.¹⁶ A further case on point is that of *Jayiya v Member of the Executive Council, Eastern Cape Provincial Government*¹⁷, which makes reference to state liability for the payment of social grants.

Froneman J in *Kate v Minister of the Executive Council for the Department of Welfare, Eastern Cape*¹⁸ followed earlier decisions of Leach J in the High Court in the cases of *Mahambehlala v Member of the Executive Council of Welfare, Eastern Cape*¹⁹ and *Mbanga v Member of the Executive Council of Welfare Eastern Cape*²⁰, which were heard simultaneously in 2002 with regard to the interpretation of the Act²¹

¹¹ Act 59 of 1992. The capacity must exist for the achievement of a substantive right, in order for the right to be justiciable, hence, the introduction of the Promotion of Administrative Justice Act 3 of 2000 in order to provide the administrative capacity and framework for the implementation of many socio-economic rights.

¹² 2006 SCA 46 (RSA) para 32.

¹³ Constitutional damages refers to compensation for a constitutional delict (in other words the infringement of a constitutional right), which may be in the form of interest or patrimonial compensation; in other words, monetary damages.

¹⁴ 2006 SCA 46 (RSA).

¹⁵ 1997 3 SA 786 (CC).

¹⁶ 2004 6 SA 40 (SCA) para 43; 2005 5 SA 3 (CC) paras 65 - 66.

¹⁷ Case number 264/02 [2003] SCA.

¹⁸ 2005 1 SA 141 (SECLD), the court *a quo*.

¹⁹ 2002 1 SA 342; 2001 JDR 327 (SE).

²⁰ 2001 JDR 328.

²¹ Social Assistance Act 59 of 1992.

and constitutional damages. Leach J held in the above cases²² that the delay experienced by the applicants in receiving their social grants as provided for in the Constitution resulted in an unlawful and unreasonable infringement of the applicant's fundamental right to just administrative action²³ as set out in section 33 (1) of the Constitution. Leach J awarded constitutional damages equivalent to interest for the period of the delay. This was done in order to place the applicant in the position in which she would have been in had her constitutional right not been breached by the delayed manner in which her application for a social grant was processed²⁴. A similar order was made in the *Mbanga case*²⁵ on the same grounds.²⁶

Although there is nothing in the Constitution itself that prevents a court from awarding damages as a remedy for the violation of fundamental rights, the Constitution itself provides very little guidance on constitutional remedies. Section 172 of the Constitution simply requires a court deciding a constitutional matter to make an order which is 'just and equitable'. However, the jurisprudence of the courts, specifically the Constitutional Court, is not encouraging. According to the Constitutional Court in *Fose v Minister of Safety and Security*²⁷, 'it is left to the courts to decide what would be appropriate relief in any particular case'. Not only must the court's order afford effective relief to the successful claimants, but to all similarly-situated people in order to remain 'community orientated' in that justice is to be served to all those in the same position as the claimant. The remedy must operate generally to eradicate inconsistencies between law or conduct and the Constitution. Hence, constitutional remedies are forward-looking, community orientated and structural as opposed to backward-looking, individualistic and corrective or retributive.²⁸ An award of damages is, historically, not a particularly forward-looking remedy. On the contrary, it is a remedy which requires a court to look back to the past in order to determine how to compensate the victim.²⁹

²² 2002 1 SA 342; 2001 JDR 327 (SE), 2001 JDR 328.

²³ *Id* at footnote 6 above whereat Section 33 of the Constitution is reproduced indicating that everyone is entitled to just administrative action which is lawful, reasonable and procedurally fair.

²⁴ 2002 1 SA 342; 2001 JDR 327 (SE).

²⁵ *Supra*.

²⁶ 2006 SCA 46 (RSA) para 20.

²⁷ 1997 3 SA 786 (CC) para 19.

²⁸ Currie, and De Waal, *The New Constitutional and Administrative Law* Volume 1 (2001) 288.

²⁹ *Id* at 297.

There is an uneasy relationship between the purpose of damages and the purpose of constitutional remedies in that the purpose of damages is to award a person damages with the object of eliminating his loss whereas the purpose of constitutional damages is aimed at punishment or deterrence. However, despite this uneasy relationship there is nevertheless room for the development of the notion of damages as a remedy for certain violations of fundamental rights. This is so for at least two reasons. Firstly, there are some situations where a declaration of invalidity or an interdict makes little or no sense and an award of damages is then the *only form* of relief which will vindicate the fundamental right and deter future infringements.³⁰ Secondly, substantial awards of damages may encourage victims to come forward and litigate, something which may serve to vindicate the Constitution and deter future infringements. Most directly on point, when it comes to constitutional damages, is the decision of the Constitutional Court in *Fose v Minister of Safety and Security*³¹, which appears at first to be rather discouraging on the subject of monetary damages. Nevertheless, in analyzing the case it becomes apparent that all that the court held in *Fose's case*³² was that if a violation of a fundamental right could be dealt with by a claim for damages in delict, the plaintiff cannot claim an additional amount of damages for breach of a constitutional right. In other words, a plaintiff cannot be compensated twice for the same wrong. In *Fose's case*³³, the court³⁴ envisaged an amount of delictual damages for the breach of a victim's constitutional rights amongst the components of the plaintiff's common law claim and was satisfied that an award of common law damages gave sufficient relief for the breach of a victim's right contained in the Bill of Rights.³⁵

De Waal *et al* submit that the public law action for constitutional damages has the following objectives in addition to the objective of compensation of the victim. Firstly, the vindication of the fundamental right itself so as to promote the values of

³⁰ *Ibid.* Currie *et al* states that this will be the case when, for example, an employee is forced to work on Election Day and as a result the employee is prevented from voting. In this type of situation, where the employee has missed an important opportunity to exercise a constitutional right, an award of damages is the only remedy which is logical in that the award is effective to vindicate the employee's constitutional right.

³¹ 1997 3 SA 786 (CC).

³² *Supra.*

³³ *Supra.*

³⁴ Currie, and De Waal *Op cit* note 28 at 30.

³⁵ *Id* at 298.

an open and democratic society based on dignity, freedom, equality and respect for human rights. Secondly, the deterrence and prevention of future infringements of fundamental rights by the legislative and executive organs of state at all levels of government and finally, the punishment of those organs of state whose officials have infringed fundamental rights in a particularly erroneous manner.³⁶

In *Fose's case*³⁷, which will be explored in greater detail in Chapter 2 to follow, the court started out positively, by stating 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 the Bill of Rights.³⁸ But, later in the judgment, the court expressed considerable doubt whether, even in the case of the infringement of a constitutional right, which does not cause delictual damage to the plaintiff, an award of constitutional damages to vindicate the right would be appropriate. The negative comments of the court are directed at constitutional damages in the 'strong sense'.³⁹ In other words the court does not see any room at this stage for deriving a claim for damages directly from the Constitution. But the same does not apply to the development of new claims under the law of delict to give effect to the values contained in the Bill of Rights. On the contrary, in this regard the court observed that the South African law of delict is flexible and will, in most cases, be broad enough to provide all the relief that would be appropriate for a breach of constitutional rights provided the requirements of a delict are satisfied. It would seem that the court is open to recognize such claims in cases where there is no other form of appropriate relief available, and damages will serve to deter further violations of the fundamental rights.⁴⁰

Even the most ardent supporters of constitutional remedies draw attention to inconsistent and unsatisfactory features of a constitutional damages remedy aimed at punishment or deterrence⁴¹. It has been suggested that to give punitive damages the

³⁶ De Waal, Currie, and Erasmus, *The Bill of Rights Handbook* 5th edition (2005) 193 - 198. It is noted by the writer that the punishment of the organ of state would be effected by punishing the specific individuals who display an attitude of apathy, the method of how this punishment would be administered falls to labour law.

³⁷ 1997 3 SA 786 (CC).

³⁸ *Supra* para 65.

³⁹ In other words the direct application of the Bill of Rights.

⁴⁰ De Waal, Currie, and Erasmus, *The Bill of Rights Handbook* 5th edition (2001) 195 - 198.

⁴¹ *Id* at 169.

primary focus runs counter to the Anglo-Canadian tradition, which favours calculated compensatory damages. The deterrent effect of any award of damages is difficult to assess, since the empirical evidence of the deterrent impact is only evident by its absence.⁴²

Nothing has been adduced which tends to lead to the conclusion that punitive damages against the State will serve as a significant deterrent against individual or general repetitions of the infringements.⁴³ Kriegler J noted that nothing in South Africa's recent history, where substantial awards for death and brutality in detention were awarded⁴⁴ or agreed to, suggests that this had any preventative effect. Further, to make nominal punitive awards will, if anything, trivialize the right involved and hence for awards to have any conceivable deterrent effect against the State they would have to be exceedingly substantial and, the more substantial they are, the greater the anomaly that a single plaintiff receives a windfall of such a magnitude.⁴⁵ In a country where there is a great demand for scarce resources, where the State has various constitutionally prescribed commitments which have substantial economic implications and where there are multifaceted demands on the public purse and the machinery of government that flow from the urgent need for economic and social reform, it seems to be inappropriate to use these scarce resources to pay constitutional damages to plaintiffs who are already fully compensated for the injuries done to them through delictual remedies, with no real assurance that such payment will have any deterrent or preventative effect at all. It would seem that this scenario is a reality as illustrated by the cases noted above. It would seem that funds of this nature could be

⁴² *Ibid.*

⁴³ In *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 87, Didcott J stated that the factors which discourage awards of punitive damages against the state will not necessarily apply to private persons. In the case of private violators, the deterrent effect of the award would be greatly increased due to the fact that the award would be paid directly from the violator and not from the public. On the other hand, when it comes to private violations of fundamental rights, the remedy of invalidation will often be meaningless, or will hardly constitute appropriate relief for the purpose of section 38 of the 1996 Constitution. Section 8(3) of the 1996 Constitution does not prescribe any particular type of relief for private violations of fundamental rights. Rather, it directs the court to existing legislation and the common law to find 'constitutional remedies' for the private violation of fundamental rights.

⁴⁴ *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 71. Kriegler J stated (para 102 – 103) that where there are systematic, pervasive and enduring infringements of constitutional rights, delictual relief compensating a particular plaintiff may not be adequate as a means of vindicating the Constitution and deterring future violations of it. See also *Tobani v Minister of Correctional Service NO* [2000] 2 ALL SA 318 (SE).

⁴⁵ 1997 3 SA 786 (CC) para 71.

better employed in structural ways to eliminate or substantially reduce the causes of the infringements.⁴⁶ While punitive awards may lead to systematic change, the process might be a slow one requiring a substantial number of such awards before change is induced, which change the State is reluctant to institute of its own accord. Equitable relief,⁴⁷ on the other hand, could achieve such change far more speedily and cheaply.

It is therefore evident that although there are arguments supporting the proposition of granting constitutional damages, there are equally as many arguments opposing the granting of such damages; both of these will be explored in this dissertation in greater depth⁴⁸.

It is hoped that this dissertation will, in the end result, be valuable to both law students and academic institutions alike as the diverse topic of constitutional damages is explored.

1.2. THE ISSUE: CONSTITUTIONAL RIGHTS AND DAMAGES IN SOUTH AFRICA

This section seeks to introduce the concept of constitutional rights and damages in the South African context with special emphasis on social security. In order to demonstrate the supremacy of the Constitution with regard to all issues effectively, the situation prior to the era of the supremacy of the Constitution are dealt with briefly in order to contrast the status of the individual citizen's current rights and obligations in the Republic of South Africa.

⁴⁶ *Supra* at para 72.

⁴⁷ Equitable relief is relief that cannot be provided by a monetary award, hence equitable relief is usually non-monetary relief. Equitable relief as addressed in *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) is relief that is also fair and reasonable and may be a specific performance award.

⁴⁸ Arguments supporting the proposition of granting constitutional damages are further explored in Section 6.2 of this dissertation. Arguments opposing the granting of constitutional damages are further explored in Section 6.3. of this dissertation.

Section 165(1) of the Constitution⁴⁹ contains a simple declaration. The exercise of judicial authority takes place when a court or tribunal which, acting under the authority of the Constitution, decides commandingly and conclusively, controversies between subjects of the State, or between the State and its subjects. The maxim *ubi ius ibi remedium* (where there is a right there is a remedy), expresses one of the most important principles of our law. This means that the existence of a legal right implies the existence of an authority with the power to grant a remedy if that right is infringed. A legal right will be incomplete if there is no remedy for enforcing it and, further, if no sanction attaches to a breach of that right. It is of primary importance to any constitutional system that it makes provision for an institution that will decide whether a right has been breached and what remedy to provide or sanction to impose. In South Africa the principle institution empowered to provide remedies and sanctions for a breach of a constitutional right or a common law right is the judicial authority of the Republic.⁵⁰

Prior to 1993 South Africa was not a constitutionally democratic society, but was rather a society based on Parliamentary sovereignty (which tended to succumb to the opinion of a particular minority). Consequentially, there was no inherent equality of rights before the law and the concept of fundamental rights was a concept which only truly came into existence with the codification and enactment of the 1996 Constitution. In contrast, at the beginning of the twenty-first century the 1996 South African Constitution⁵¹ is a beacon of hope in a world inundated by conflict, poverty and the failure of the State⁵² to perform the tasks for which they were elected. One of the most important functions of a modern constitution is to set limits on the exercise of public power. The Bill of Rights gives legal protection to the traditional liberal rights of equality, personal liberty, property, free speech, freedom of assembly and association, the civil and political rights. These are negative rights, which take power away from the State.⁵³ Positive rights, which impose obligations on the State, have

⁴⁹ Section 165(1) of the 1996 Constitution states that “The judicial authority of the Republic is vested in the courts”. Courts follow a two-stage approach to rights interpretation. First, there is an interpretation stage and secondly there’s a limitations stage. Iles, ‘Limiting Socio-economic Rights: Beyond the Internal Limitations Clauses’ (2004) 20 *SAJHR* 448, 453.

⁵⁰ Currie, and De Waal, *The New Constitutional and Administrative Law* Volume 1 (2001) 268.

⁵¹ And prior to the final Constitution (1996), the 1993 interim Constitution.

⁵² Currie, and De Waal, *Op cit* note 50 at 20.

⁵³ *Id* at 29.

also been included in the Bill of Rights.⁵⁴ Thus, rather than simply protecting members of society from the abuse of state power, it is thought that a constitution and a Bill of Rights should secure for all members of society a basic set of social goals.⁵⁵

The Supreme Court of Appeal delivered a landmark decision in the case of *Member of the Executive Council of the Department of Welfare v Kate*.⁵⁶ In this case⁵⁷ the constitutional breach was held to lie in denying Kate the process that is promised by section 33(1)⁵⁸ of the Constitution in that she was deprived of her constitutional right to a social grant for many months due to maladministration of the state department. Section 33(1) of the Constitution came into operation on the 4th of February 1997, it conferred on every person the right to lawful, reasonable and procedurally fair administrative action. Noting that the realization of substantive rights is dependant upon an administrative process, rights that protect that process, like those that are embodied in section 33(1) and section 237 of the Constitution and sections 8(1), and (2) and 6(1) of the Promotion of Administrative Justice Act⁵⁹ (hereinafter referred to as PAJA), are essential to the realization of those substantive rights. Without protection being given to the process, the substantive rights are capable of being denied. Failure to meet these process obligations denies to the beneficiaries their substantive right to social assistance. Hence, the Constitution is an important statute to this case and this dissertation.⁶⁰

The issue of constitutional rights and damages in South Africa is pertinent and relevant to our legal foundation at this stage of our democracy due to the growing number of cases pertaining to the infringement or deprivation of individual's constitutional rights, specifically social security rights, as a result of the maladministration of the relevant State structures appearing before our judiciary. The aforementioned re occurring infringements, that vulnerable members of our society have been subjected to; have provided the relevance of this study and the resulting

⁵⁴ Currie, and De Waal, *The New Constitutional and Administrative Law* Volume 1 (2001) 30.

⁵⁵ *Id* at 398.

⁵⁶ 2006 SCA 46 (RSA).

⁵⁷ *Supra*.

⁵⁸ Section 33 of the Constitution is outlined in footnote 6 above.

⁵⁹ Act 3 of 2000.

⁶⁰ 2006 SCA 46 (RSA). Especially sections 27, 38, 237 and 33 of the 1996 Constitution; further the Interim Constitution is noteworthy with regard to section 235 (8).

motivation for this dissertation. This research was initially prompted by the approach of the judgment in the case of *Member of the Executive Council of the Department of Welfare v Kate*⁶¹ to the extent that it provided a measure of constitutional damages to Kate for the infringement of her constitutional right to social assistance. The case has proven to be a benchmark case in this dissertation and indeed in relation to the provision of constitutional damages.

1.3. PURPOSE OF THE RESEARCH

The purpose and hence focus of this study is to explore the past and present state of the law relating to constitutional damages and, after analyzing the arguments in favour and opposed to the awarding of constitutional damages, to make recommendations in this regard.

The new constitutional dispensation has had a profound effect upon the common law of South Africa since the 1996 Constitution of South Africa was enacted; the two systems have had to discover how to function in unison. This dissertation will provide the reader with insight into the evolution of one phase in the protection of constitutional rights, as it becomes evident that delictual damages and constitutional damages operate in a synchronized fashion, essentially providing a new mechanism for providing damages.

This dissertation has the purpose of reviewing, analyzing and amalgamating relevant literature and specifically case law in this field, providing a relevant and succinct synopsis of the topic, something that is currently lacking in our law. The question of whether monetary damages are a just and equitable remedy in a constitutional state should shape our future thoughts and policies and indeed the way in which many recent judgments can be viewed.

This dissertation will endeavour to delve into and possibly answer the question as to whether monetary damages, normally in the form of interest as demonstrated by

⁶¹ *Supra.*

*Kate's case*⁶², is a just and equitable remedy for the breach of a social assistance right.⁶³

Over the past sixteen years there has been a plethora of case law making in-roads in this area of law, with many courts giving contradictory judgments and with varying *ratios* for such decisions furthering the contention. It seems to have become more acceptable to provide monetary damages for a breach of a constitutional right, specifically a social assistance right, as demonstrated in cases such as *Member of the Executive Council of the Department of Welfare v Kate*⁶⁴, *Mahambehlala v Member of Executive Council of Welfare, Eastern Cape*⁶⁵ and *Mbanga v Member of Executive Council of Welfare Eastern Cape*.⁶⁶ Prior to this latest era⁶⁷ there were equally as many cases in opposition⁶⁸ to 'throwing money at the problem,' as seen in the case of *Fose v Minister of Safety and Security*.⁶⁹

The question, put differently, is whether providing monetary damages for a breach of a social assistance right is not merely throwing money at the problem.⁷⁰ This approach could lead to bankruptcy of the State and no further solution to the clear and evident problem of disorganization within the organs of the State as illustrated by *Kate's case*.⁷¹

The Constitution provides in Chapter 2, section 7 for the democratic values of human dignity, equality and freedom.⁷² The question to be posed is "Are the rights of

⁶² *Supra*.

⁶³ Noting that interest is merely an example of one of the forms of constitutional damages to be explored and not the only form of constitutional damages provided by South Africa's judiciary.

⁶⁴ 2006 SCA 46 (RSA).

⁶⁵ 2002 1 SA 342; 2001 JDR 327 (SE).

⁶⁶ 2001 JDR 328.

⁶⁷ 2006 – 2008.

⁶⁸ *Tobani v Minister of Correctional Service NO* [2000] 2 ALL SA 318 (SE), and *Somyani v Minister of the Executive Council for Welfare, Eastern Cape, and Another* SECLD case 1144/01 unreported judgment undated. Refer to point 6.3.infra.

⁶⁹ 1997 3 SA 786 (CC).

⁷⁰ Whether the 'problem' is the social assistance system or the lack of administrative capacity.

⁷¹ 2006 SCA 46 (RSA).

⁷² Section 7 (1) of the 1996 Constitution states:

"This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

(2) "The state must respect, protect, promote and fulfill the rights in the Bill of Rights."

individuals being protected, respected and promoted by the State by providing monetary compensation for an infringement of such rights, if there is still no further guarantee that such infringement will not occur again?”

All of the aforementioned issues and questions will be explored in a structured manner in this study by utilizing relevant case law as the foundation for the answering of these pertinent questions which form the purpose and objective of this dissertation.

1.4. METHODOLOGY

The methodological approach of research refers to the techniques utilized by the researcher in conducting her research and obtaining the end result.

This dissertation is based on a theoretical study. The theoretical study consists of review research methodology which was conducted throughout this dissertation, in that relevant case law and authorities were scrutinized and reviewed, which review forms the basis for this dissertation and the resultant conclusions obtained. The research methodology utilized consists primarily of information gathering by exploring the secondary sources⁷³, as well as exploring the primary sources, in particular extensive use was made of case law and the *ratios* contained therein.⁷⁴

In particular, case law (refer to Annexure A annexed hereto) will be examined as it is pertinent to this area of research. In essence secondary sources of information will be used to direct the author to the pertinent primary sources, which will be scrutinized in terms of the research topic.

Administrative law will play an essential role in South Africa's immediate future. The government must bring economic development, housing, infrastructure, better education and health care, and numerous other services to the vast majority of the population whom apartheid laws victimized and who subsist at Third World level. It must engage in redistributive programs, such as land restitution and affirmative action. It must strongly enforce laws prohibiting discrimination on the basis of race, sex, and sexual orientation, Asimow, 'Administrative Law Under South Africa's Final Constitution: the Need for an Administrative Justice Act' (1996) 113 *SALJ* 613, 613.

⁷³ Secondary sources are statements about the law by legal experts which are non-binding.

⁷⁴ Primary sources consist of the books of law and statements of law by State institutions, courts and or the legislature.

The appropriate case law will be interpreted, as illustrated above, with reference to the rationale of the decision; contradicting decisions will be examined in terms of the judicial reasoning. Socio-economic factors surrounding the circumstances of a relevant case are explored in order to establish the context in which the decision was reached.⁷⁵

This dissertation does not exist in isolation, but has built upon what has been done previously in this area of law. Before embarking on this dissertation, the researcher has reviewed previous work produced in the field of constitutional damages, mainly consisting of case law (as detailed in Annexure A annexed hereto), this method is known as literature review and is a valid research method.

The preliminary research which was conducted to confirm the validity of this research included the analyzing of relevant case law with decisions relating to constitutional and delictual damages.

This dissertation consists of the analytical study of primary sources in the form of case law. In addition, secondary sources, in the form of books have been explored. Methodologically, the researcher has attempted to provide recommendations for methods of dealing with the amalgamation of constitutional and delictual damages although it is evident that concrete recommendations are not at hand.

Comparative and historical research was undertaken in this dissertation in that case law ratios within South Africa's history were compared and analyzed in order to determine the distinction between delictual and constitutional damages as well as the present amalgamation thereof.

Primary Sources:

This dissertation will consider *inter alia*, case law, the Constitution, Common Law and pieces of relevant legislation covering the area of research.

⁷⁵ Blanche and Durrheim (editors), *Research in Practice: Applied Methods for the Social Sciences* (2002) 17.

Secondary Sources:

These include literature in the area of delict and constitutional law and constitutional damages in particular in the form of books and articles.

World Wide Web:

The internet is utilized widely to access information, in particular articles, relating to the research arena.

In conclusion, it is evident that the research embarked upon is relevant and useful as there has to date been no steadfast pronouncement on the issue as judgments conflict. Hence the topic at hand is contentious and deserves exploration.

1.5. LITERATURE REVIEW

Leading opponents and proponents of constitutional damages will be analyzed in the context of the above research question as this research dissertation does not exist in isolation and hence must build upon what has been done previously. Therefore, before embarking on this dissertation a review of case law and previous work in this field was necessary. A literature review involves the identification and analysis of literature related to one's research.

The works analyzed and utilized in this dissertation are detailed in the Table of Cases, Table of Statutes and Bibliography.

As case law provides the foundation of this dissertation a synthesis of the relevant case law and the outcome of such is provided in the form of Annexure A annexed to this dissertation. It should be noted that the scope of cases presented in Annexure A has been limited as other cases may have emerged more recently, which have not been explored.

The case law synthesis in Annexure A has been placed in chronological order in order for the reader to clearly observe the timeline and trend developing with regards to the awarding of monetary damages for a constitutional breach.

1.5.1. RELEVANT SECTIONS FROM THE CONSTITUTION

This dissertation explores a few relevant sections of the Constitution and as such this section contains an exposition of some relevant sections of the Constitution which lay the foundation for exploring the possibility of the amalgamation of constitutional and delictual damages in the Chapters which follow.

Firstly, section 2 of the Constitution indicates the supremacy of the Constitution, stating that: “This Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”⁷⁶

Secondly, section 8 of the Constitution outlines to whom the Bill of Rights applies and what factors are to be taken into account in determining to what extent the provisions apply. Section 8(3)(a) and (b) are pertinent to Chapter five as it indicates that in order to give effect to a right in the Bill, a court must apply, or if necessary develop, the common law (which will be explored under Sections 5.2. and 5.3. below) to the extent that legislation does not give effect to that right.⁷⁷

Thirdly, section 38 of the Constitution lists the persons who have a right to approach a court with regards to alleged infringement of a right in the Bill of Rights.⁷⁸

⁷⁶ Section 2 of the 1996 Constitution.

⁷⁷ Section 8 of the Bill of Rights states that:

“(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

(2) A provision of the Bill of Rights binds the natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of (2), a court –

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the right and the nature of that juristic person.”

⁷⁸ Section 38 of the 1996 Constitution states that “Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:

(a) anyone acting in their own interest;

(b) anyone acting on behalf of another person who cannot act in their own name;

(c) anyone acting as a member of, or in the interests of, a group or class of persons;

(d) anyone acting in the public interest; and

Section 39 of the Constitution is an important section to this dissertation, as the rights in the Bill of Rights are interpreted in terms of this section, which indicates that when interpreting legislation and developing the common law the spirit and intention of the Bill of Rights *must* be taken into account.⁷⁹

It should be noted that judicial authority is exercised in terms of section 165 of the Constitution.⁸⁰

The constitutional sections outlined here should be borne in mind throughout this dissertation as we move to explore the delictual principles and ultimately the amalgamation of the delictual and constitutional concepts.

1.6. DIVISION OF CHAPTERS

This dissertation consists of the following eight Chapters:

Chapter 1: Introduction

The topic of this dissertation is introduced with specific reference to constitutional rights and damages in South Africa. Thereafter, the purpose of the study is explored together with the research methodology followed in this study being explored.

(e) an association acting in the interest of its members.”

⁷⁹ Section 39 of the 1996 Constitution states that:

- “(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.”

⁸⁰ Section 165 of the 1996 Constitution states:

- (1) “The judicial authority of the Republic is vested in the courts.
- (2) The courts are independent and subject *only* [emphasis supplied] to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
- (3) No person or organ of state may interfere with the functioning of the courts.
- (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
- (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.”

Chapter 1 also provides the reader with a literature review encompassing the relevant sections from the Constitution, followed by the essential definitions utilized in this dissertation.

Chapter 2: The Social Security System as an example of where compensation has been awarded for a breach of a Constitutional right

Case law relating to the compensation for breaching constitutional rights, specifically those relating to section 27 of the Constitution (social security), is provided and analyzed to illustrate how at present the South Africa judiciary is choosing to compensate individuals for the breach of their fundamental constitutional rights.

Chapter 3: The approach to the provision of damages for the infringement of rights prior to the Constitution

Chapter three grapples with the substance of this dissertation as the old dispensational approach to damages is explored with regard to the common law. This Chapter consists mainly of an exposé and analysis of Roman-Dutch common law concepts of delictual damages and compensation.

Chapter 4: The concepts of constitutional rights and damages in South Africa and the 'new' approach to constitutional damages under the Constitution

Chapter four consists of two sections as follows:

Section 4.2: *The concept/s of constitutional rights and damages in South Africa*

Section 4.2. of Chapter four takes an analytical approach to constitutional rights and damages in South Africa and analyzes these two concepts extrapolating section 4.2. of Chapter four.

Section 4.3.: Section 4.3. entitled “*The 'new' approach to the provision of constitutional damages under the Constitution*” of this Chapter stands in juxtaposition to Chapter three, in that it evaluates and expands upon the constitutional approach to the provision of monetary damages as analyzed in section 4.2.

Chapter 5: The amalgamation of delictual and constitutional damages

Chapter five combines concepts from Chapter three and Chapter four and analyzes the application of the common law in a constitutional framework with regard to damages. This Chapter explores the concept of monetary damages in relation to the doctrine of separation of powers as well as to the concept of the utilization of the taxpayer's money in order to compensate the claimants for the mal-performance of the State. This Chapter evaluates how the courts have dealt with the inundation of claims relating to the infringement of constitutional rights since the enactment of the Constitution together with the further challenges that the Constitution and common law provide.

Chapter 6: Arguments in favour of and opposing the awarding of monetary damages in the constitutional context

The arguments, arising out of case law, in favour of monetary damages are analyzed in Chapter six. This Chapter expands upon the arguments extrapolated from case law in opposition to providing monetary damages for a breach of a constitutional right. In this Chapter the *ratio* of the cases are scrutinized.

Chapter 7: The concept of remedies in general and alternative remedies to monetary damages

Chapter seven outlines the various alternatives to providing monetary damages for a breach of a constitutional right and the consequences of such alternatives.

Chapter 8: Conclusions

Chapter eight seeks to predict the future of constitutional and delictual damages in South Africa by drawing the timeline from whence we have journeyed to the present position. This Chapter ends with a brief conclusion of what has been found in terms of Chapters two to seven. Hence, the findings of this dissertation will be provided in a succinct format.

1.7. A NOTE ON THE USE OF CERTAIN EXPRESSIONS

It has become apparent that within the essence of the topic of this dissertation there is uncertainty, for the usage of words and the determination of accurate terminology is unclear and becomes part of this research. It is therefore appropriate to provide a brief section to ensure understanding of certain imperative terms or phrases related to the topic, *as used in this dissertation*.

The expression *constitutional delict* refers to the infringement or breach of an individual's constitutional right, being a right framed within the Constitution, by another individual, juristic person or the State.⁸¹ There is some debate regarding the correctness of the aforementioned term.

The expression *constitutional damages* in this dissertation refers to the compensation for the breach or infringement of a constitutional delict (in other words the infringement of a constitutional right), which may be in the form of interest or patrimonial compensation; in other words, monetary damages. This definition is evident from various recent judgments of the Constitutional Court and Supreme Court of Appeal.⁸²

Similarly, the expression *common law delict* refers to a wrongful, culpable act by a person that causes harm to another, whether the harm causes patrimonial or non-patrimonial loss.⁸³

Delictual damages, is the monetary equivalent of loss, and is awarded to a person with the object of eliminating, as fully as possible, his past as well as future patrimonial and, where applicable, non-patrimonial loss. Money is thus intended as an equivalent to damage.⁸⁴

⁸¹ Neethling, Potgieter, and Visser, *Law of Delict*, 6th edition (2010) 20.

⁸² 2006 SCA 46 (RSA); 1997 3 SA 786 (CC). The term 'constitutional delict' is also explored at pages 34, 48, 84, 99 and 168.

⁸³ Neethling *et al Op cit* note 81 at 3.

⁸⁴ *Id* at 195.

Finally, the expression *damage (damnum)* is an ancient concept in legal terminology. Although it is not absolutely clear how damage should be defined, for the purpose of this dissertation, damage is the detrimental impact upon any patrimonial or personality interest deemed worthy of protection by the law.⁸⁵ The law of damages deals with the content of obligations for the payment of damages (including satisfaction) for the loss caused. The law of damages is that part of the law which indicates how the existence and extent of damage as well as the proper amount of damages or satisfaction are to be determined in the case of delict, breach of contract and other legal principles providing for the payment of damages.⁸⁶

⁸⁵ Neethling, *et al Op cit* note 81 at 212.

⁸⁶ Visser and Potgieter, *Law of Damages*, 2nd edition (2003)1.

CHAPTER 2

**THE SOCIAL SECURITY SYSTEM AS AN EXAMPLE OF WHERE
COMPENSATION HAS BEEN AWARDED FOR BREACH OF A
CONSTITUTIONAL RIGHT**

2.1. INTRODUCTION

This Chapter will explore case law and legislation relating to compensation for breach of a constitutional right, specifically those contained in section 27 of the Constitution.⁸⁷ The analysis will attempt to provide the courts' present approach to compensation for the infringement of an individual's fundamental constitutional right to social assistance, as a specific area of social security because, as noted earlier, this area is rife with violations of constitutional rights.

It is evident that South Africa is suffering under the burdens of high unemployment, lack of sufficient funds, and the inefficient administration of available funds. In addition to the aforementioned, the AIDS pandemic is likely to increase dramatically the demand for disability benefits, dependants' benefits, foster care and adoptive care for children orphaned by AIDS.⁸⁸ In this context it is interesting to note that none of the International Labour Organization conventions that deal specifically with social security actually define the term. The conventions focus rather on the various contingencies and on the benefits that must be provided in respect of these contingencies. The omission was probably intentional, as it would have been extremely difficult to define social security in globally acceptable terms in these international instruments.⁸⁹ With the aforementioned context of social security as a foundation to this Chapter we move now to defining social security.

2.2. DEFINING SOCIAL SECURITY

The International Labour Organization has attempted to define social security in its publications dealing with the subject. In a publication entitled *Introduction to Social Security* (3rd edition) the Organization defines social security as follows:

⁸⁷ The social security provision of 1996 Constitution.

⁸⁸ Strydom (Ed), Le Roux, Landman, Christianson, Dupper, Myburgh, Barker, Garbers, and Basson, *Essential Social Security Law* (2001) 3.

⁸⁹ *Id* at 4.

‘... it can be taken to mean the protection which society provides for its members, through a series of public measures, against the economic and social distress that otherwise would be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age and death, the provision of medical care, and the provision of subsidies for families with children’.⁹⁰

The International Labour Organization’s definition of social security defines what, in essence, social security seeks to achieve in the broad sense and does not itself define social security, but rather its objectives. It is also apparent that the aforementioned definition is provided in the broad sense without any provision for qualifications for such protection. The right to social security and an adequate standard of living are also addressed in international human rights instruments, among these are the *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

Due process has proven to be an effective means of protecting the recipients of social security benefits in many foreign and international regimes and hence it is evident that the economic and social restructuring of South Africa is fundamental to the process of transformation in order to protect vulnerable citizens from unreasonable infringements of their rights, especially their rights pertaining to social security.⁹¹

With the above understanding of the context in which social security rights operate in South Africa together with the definition of social security we turn to explore the codification of the right to social security in the Constitution.

2.3. SECTION 27 OF THE 1996 CONSTITUTION

Section 27 of the Constitution provides the right to have access to health care services, including reproductive health care, sufficient food and water, and *social security, including, if they are unable to support themselves and their dependants,*

⁹⁰ *Ibid.*

⁹¹ The 1996 Constitution, section 27 provides that “Everyone has the right to have access to – social security, including, if they are unable to support themselves and their independents, appropriate social assistance.” Section 27 (3) of the Constitution provides “No one may be refused emergency medical treatment.” Devenish, *A commentary on the South African Bill of Rights* (1999) 367 – 368.

appropriate social assistance. The State is obliged to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. Finally, no person may be refused emergency medical treatment.⁹²

Social assistance was the first of the various strands of present-day social security to develop, often in the form of so-called ‘poor laws’.⁹³ The social security system that the African National Congress (ANC) inherited when it came into power in 1994 was a fairly complex and expensive system. Social security was regulated through a number of statutes, such as the Social Assistance Act⁹⁴, the Compensation for Occupational Injuries and Disease Act⁹⁵, the Unemployment Insurance Act⁹⁶ and labour statutes such as the Basic Conditions of Employment Act.⁹⁷ The State has tackled the restructuring of the current social security system in a number of ways, the prominent example being the entrenchment of the right to social security in section 27(1)(c) of the Constitution.⁹⁸ The Constitution also provides for equality before the law and equal protection and benefit of the law as a basic human right thereby enforcing all other rights enshrined in the Bill of Rights.⁹⁹

⁹² *Id* at 365.

⁹³ Strydom (Ed), Le Roux, Landman, Christianson, Dupper, Myburgh, Barker, Garbers, and Basson, *Essential Social Security Law* (2001) 7.

⁹⁴ Act 59 of 1992.

⁹⁵ Act 130 of 1993.

⁹⁶ Act 30 of 1966.

⁹⁷ Act 3 of 1983.

⁹⁸ “Everyone has the right to have access to – social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.”

⁹⁹ Strydom (Ed), Le Roux, Landman, Christianson, Dupper, Myburgh, Barker, Garbers, and Basson, *Essential Social Security Law* (2001) 20. The 1996 Constitution, section 9 provides “Everyone is equal before the law and has the right to equal protection and benefit of the law.

- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

Section 27 of the Constitution has resulted in changes¹⁰⁰ to the Social Assistance Act as well as the manner in which the social security right is provided to the ordinary individual.

2.4. THE SOCIAL ASSISTANCE ACT 59 OF 1992

The Social Assistance Act¹⁰¹ does away with the social assistance regime that was in place prior to the establishment of the new constitutional order in 1994. The Act provides for a regime that applies throughout the Republic of South Africa on a non-discriminatory basis and, together with the regulations published in terms of the Act, makes provision for the payment of various grants, and sets out the conditions under which a grant may be payable, to whom it may be payable, and when it will cease to be payable.¹⁰²

Social assistance in South Africa is financed out of general tax revenues, mostly through the budgets of provincial departments of welfare. Social assistance constitutes the biggest element of the so-called ‘welfare expenditure’ item of the budget, which in turn, together with health and education, forms part of the broader ‘social services’ category in the budget. Welfare expenditure has increased quite significantly over the past decade – even more so than either health or education, pointing to the dire need of many people in South Africa for social assistance.¹⁰³

For all the best endeavours to regulate social security by law, and for all the most enlightened principles embodied in those laws¹⁰⁴, the intended benefits cannot be achieved without effective implementation. The administration of social security is about the translation of principle into practice, about transforming the promise of the law into results. After all, the principle task of any social security scheme is ‘to

¹⁰⁰ The changes to the Social Assistance Act 59 of 1992 will be explored below under Section 2.6.

¹⁰¹ Act 59 of 1992.

¹⁰² Sections 2 to 4 of Act 59 of 1992. Strydom *et al Op cit* note 99 at 31.

¹⁰³ *Id* at 194.

¹⁰⁴ Promotion of Administrative Justice Act 3 of 2000, Compensation for Occupational injuries and disease Act 130 of 1993, Social Assistance Act 59 of 1992, Social Assistance Act 13 of 2004, Social Security Agency Act 9 of 2004, and Unemployment Insurance Act 30 of 1966.

provide prompt, accurate and efficient payment of benefits to members of the scheme. Everything else which the organization does is subordinate to that task.’¹⁰⁵

Despite the lofty ideals underlying social security schemes, evasion and attempted evasion of responsibility and liability under these schemes is a fact of life. It is therefore not surprising that as most public social security schemes, particularly social insurance schemes that are dependant upon contributions¹⁰⁶, are regulated by legislation which provides for mechanisms to ensure compliance¹⁰⁷. To the extent that compliance orders and discovery of malpractice are not sufficient to ensure compliance, legislation also provides for the civil recovery of arrear contributions and the criminalization of non-compliance. Despite this, budget and logistical constraints often prevent compliance procedures from being effective in the face of large scale evasion, especially by the smaller and less visible employers, for example.¹⁰⁸ The first challenge to the administration of social security is that of efficiency (in other words - speed). It is also imperative that the system of payments is not susceptible to fraud.¹⁰⁹

The old age grant was first introduced in South Africa in 1928, but was initially confined to the white population. Some black people began qualifying for the grant in 1943.¹¹⁰ In Europe, the industrial revolution served as the impetus for income-protection schemes as it not only brought new working conditions and urbanization, but also solidarity and state-interference. Two broadly distinct approaches initially developed, namely, the Bismarckian approach¹¹¹ and the Beveridge approach.¹¹² The

¹⁰⁵ ILO *Administration of Social Security* 1998 13.

¹⁰⁶ Refer to Annexure B for particulars on contributors to social insurance schemes.

¹⁰⁷ *Ibid.*

¹⁰⁸ Strydom *et al*, *Essential Social Security Law* (2001) 216.

¹⁰⁹ *Id* at 217.

¹¹⁰ Olivier *et al*, *Social Security Law: General Principles* (1999) 274.

¹¹¹ THE EUROPEAN OBSERVATORY ON HEALTH SYSTEMS AND POLICIES, *Glossary, Bismarckian System* (2008) 1. The Bismarckian approach is a system of national social security and health insurance introduced into the 19th century German empire under the then Chancellor Bismarck. This system is a legally mandatory system for the majority or the whole population to obtain health insurance with a designated third-party payer through non-risk related contributions which are kept separate from taxes or other legally mandated payments. The scheme represented a principle means of avoiding the adverse impact of unemployment, poverty and sickness affecting large sections of the population. Besides Germany, typical countries with a Bismarckian system, a mandatory health insurance system with contributions unrelated to risk, include Austria, the Netherlands, France and Belgium (THE EUROPEAN OBSERVATORY ON HEALTH SYSTEMS AND POLICIES, *Glossary, Bismarckian System* (2008) 1).

formal social assistance system in South Africa has in recent years to some extent been modified in order to reach more poor and needy people. The social assistance system has provided parity between the Black and non-Black beneficiaries of the means-tested old age grant since 1993.¹¹³

Having analyzed the right to social security in isolation we, in the next section, now explore the right to social security in action or inaction, as the case may be, in South African case law.

2.5. MEMBER OF THE EXECUTIVE COUNCIL OF THE DEPARTMENT OF WELFARE v KATE 2006 SCA 46 (RSA)

2.5.1. BACKGROUND

A case pertinent to this Chapter is the landmark case of *Member of the Executive Council of the Department of Welfare v Kate*.¹¹⁴

A brief history of the case sets the scene. Kate, the respondent in the case¹¹⁵, lives in the Govan Mbeki settlement near Port Elizabeth. She was fifty four (54) years old and disabled when the Social Assistance Act¹¹⁶ came into operation in 1992 and she had no means of support at that time. On the 16th of April 1996, soon after the Act¹¹⁷

¹¹² Olivier *et al Social Security Law: General Principles* (1999) 222. THE EUROPEAN OBSERVATORY ON HEALTH SYSTEMS AND POLICIES, *Glossary, Beveridge System* (2008) 1. The system of social security and health services arising out of the Beveridge report in England and Wales, first published in 1943. This report recommended provision of health care for all people through central taxation and other compulsory financial contributions and that a system of universal benefits should give support during unemployment or sickness and after disability and retirement. The National Health Service Act of 1946 established the provision of services, free-of-charge, for the prevention, diagnosis and treatment of disease. A Beveridge system includes a substantial proportion of public providers, which are often salaried staff. Besides the United Kingdom, typical Beveridge system type countries, providing free-of-charge services with mainly public providers for the prevention, diagnosis and treatment of disease, are Sweden, Denmark, Finland and Italy.

¹¹³ *Id* at 40.

¹¹⁴ 2006 SCA 46 (RSA).

¹¹⁵ *Supra*.

¹¹⁶ Act 59 of 1992. Social Assistance as a scheme is generally financed from the general revenue of the State rather than individual contributions with statutory scales of benefits adjusted according to a person's means. Before an individual is entitled to such assistance a means test is conducted to determine the person's need. Olivier *et al Social Security Law: General Principles* (1999) 15.

¹¹⁷ *Ibid*.

came into operation, she applied for a disability grant according to the prescribed procedures. Kate's application had been unreasonably delayed and there was no explanation provided for such delay. The application took approximately forty months to be processed and Kate was advised in August 1999 that her disability grant had been approved. Once Kate was notified in August 1999, she was thereafter paid her monthly grant, but by that date an amount had accrued to her from the date of her application, leaving a balance that was still payable. No explanation was given for the shortfall not being paid.¹¹⁸

In March 2003 Kate consulted with an advice officer of the Centre of Human Rights, where she was made aware that money was owing to her. Subsequently, on the 19th of March 2003 her attorney wrote to the Regional Director of the Department of Welfare demanding payment of the shortfall with *interest on the accrual* from the 16th of April 1996. Receipt of the demand was formally acknowledged, but there was no further response.¹¹⁹ On the 15th of October 2003 an application was launched in the High Court at Port Elizabeth, where declaratory relief was sought together with orders for the recovery of the balance of the accrual being the recovery claim, and interest on that amount being the interest claim.¹²⁰ The orders were granted in the High Court. The outstanding balance of the accrual amounting to R13015 was paid in January 2004.

The principal dispute that remained was whether Kate was entitled to the interest on the accrual as she had claimed.¹²¹ The Department appealed to the Supreme Court of Appeal against the order to pay interest to Kate.

2.5.2. ISSUES

An issue which initially arose within *Kate's case*¹²² was to determine what a reasonable period of time was for an administrator to process and approve or reject an

¹¹⁸ 2006 SCA 46 (RSA) para 11.

¹¹⁹ *Supra* at para 12.

¹²⁰ 2006 SCA 46 (RSA) para 13.

¹²¹ *Supra* at para 14.

¹²² *Supra*.

application. This depended on the enquiries that needed to be made, the volume of similar applications that needed to be dealt with, the administrative capacity that was available for processing such applications, and other matters of such a nature. This related to what ought reasonably to be expected of the administration. The real dispute in the present appeal, which the parties regarded as a test case, related to the remainder of the interest on the accrual that was awarded by the court *a quo*. That is, the interest during the period from the date the application was made to the date that Kate was notified that it had been approved.¹²³

2.5.3. SECTION 33 OF THE 1996 CONSTITUTION

Legislation in South Africa ensures social assistance for some categories of persons who cannot support themselves and or their families.¹²⁴ The Social Assistance Act¹²⁵ is the most important instrument, as it regulates the payment of social assistance grants and other relief measures.¹²⁶ In *Kate's* case¹²⁷ the constitutional breach was held to lie in denying Kate the process that is promised by section 33(1) of the Constitution. On the other hand, to view the procedural aspect of the process that is promised by section 33(1) of the Constitution in isolation from the provision of the substantive right for which the procedural aspect is imperative is to approach the matter too narrowly. Section 33(1)¹²⁸ came into operation on the 4th of February 1997; it conferred on every person the right to lawful, reasonable and procedurally fair administrative action. Noting that the realization of substantive rights is dependant upon an administrative process, rights that protect that process, like those that are embodied in section 33(1) and section 237 of the Constitution and in the PAJA¹²⁹ are essentially ancillary to the realization of those substantive rights.

¹²³ As referred to at the commencement of this chapter, it is imperative to note the change of the Social Assistance Act as the Act determines what period is reasonable for the administration of the grant.

¹²⁴ Olivier *et al Introduction to Social Security: General Principles* (2004) 222. Regulations Regarding Grants, Social Relief of Distress and Financial Awards in Terms of the Social Assistance Act, promulgated under Government Notice R.373 in Gazette number 17016, dated the 1st of March 1996 are applicable to this case. It should be noted that the Social Assistance Act 59 of 1992 in effect at the time of the case at hand has since been updated to that of Act 13 of 2004.

¹²⁵ *Ibid.*

¹²⁶ Olivier *et al Introduction to Social Security: General Principles* (2004) 38.

¹²⁷ 2006 SCA 46 (RSA).

¹²⁸ The 1996 Constitution.

¹²⁹ Act 3 of 2000.

Without protection being given to the process, the substantive rights are capable of being denied. The realization of the substantive right to social assistance is dependant upon lawful and procedurally fair administrative action and the diligent and prompt performance by the State of its constitutional obligations. Failure to meet those process obligations denies to the beneficiary his or her substantive right to social assistance.

2.5.4. ARGUMENTS WITHIN KATE'S CASE

Counsel for Kate in *Kate's case* averred that her case¹³⁰ was centered on the unreasonable delay in considering her application, which deprived her during that period of her constitutional right to receive a social grant and for that deprivation she sought to be recompensed by an order for damages. The appellant claimed that during the period in dispute, interest did not accrue to Kate on ordinary principles, because the debt was not yet payable. Further, counsel for the appellant submitted that Kate had delictual remedies that were sufficiently restorative of any loss that was caused to her due to the failure of the administration to perform its constitutional duties and that, in those circumstances, a remedy of constitutional damages was not required. This submission did not succeed and interest during that period was claimed and awarded as a measure of damages for the unreasonable delay that Kate had to endure¹³¹.

The question that is now in issue is whether Kate became entitled to 'constitutional damages'. Froneman J followed earlier decisions of that court per Leach J in the *Mahambehlala*¹³² and *Mbanga*¹³³ cases, which were heard simultaneously in 2002. In the *Mahambehlala*¹³⁴ case, Leach J held that the delay resulted in an unlawful and unreasonable infringement of the applicant's fundamental right to just administrative action as set out in section 33(1) of the Constitution. Leach J awarded damages equivalent to interest for the period of delay. This was done in order to place the

¹³⁰ 2006 SCA 46 (RSA).

¹³¹ 2006 SCA 46 (RSA) para 17 and 26.

¹³² 2002 1 SA 342; 2001 JDR 327 (SE).

¹³³ 2001 JDR 328 (SE).

¹³⁴ *Supra*.

applicant in the position in which she would have been had her constitutional right not been breached by the tardy manner in which her application for a social grant was processed. A similar order was granted on the same grounds in the case of *Mbanga*.¹³⁵ It is common cause that the PAJA¹³⁶ had no application in *Kate's* case¹³⁷, as the Act¹³⁸ only came into operation on the 30th of November 2000.

Section 27 of the Constitution obliges the State to achieve the progressive realization of the right that everyone has to social security according to available resources. Section 235(8) of the interim Constitution provided for the administrative capacity to administer the Social Assistance Act,¹³⁹ because the duty was permitted only if that capacity existed, hence obliging the provincial government to make social grants to disabled persons, amongst others. Without protection being given to the process the substantive rights are capable of being denied. What had been denied to Kate was not merely the enjoyment of a process in the abstract, but through the denial of that process she had been denied her right to social assistance, which was dependant for its realization upon an effective process.

*Fose v Minister of Safety and Security*¹⁴⁰ recognized that, in principle, monetary damages are capable of being awarded for a constitutional breach. 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.

It is submitted that the ultimate solution lies in the administration 'getting its house in order' so that all applications are dealt with expeditiously rather than encouraging yet more litigation. It is evident that the *only* appropriate remedy in the circumstances surrounding *Kate's* case¹⁴¹ and similar cases is to award constitutional damages¹⁴² to

¹³⁵ *Supra*.

¹³⁶ Act 3 of 2000.

¹³⁷ 2006 SCA 46 (RSA).

¹³⁸ Act 3 of 2000.

¹³⁹ Act 59 of 1992.

¹⁴⁰ 1997 3 SA 786 (CC).

¹⁴¹ 2006 SCA 46 (RSA).

recompense people in the position similar to that of Kate for the breach of their constitutional right/(s).

What remains is how to measure the loss in monetary terms. It was not shown that Kate suffered direct financial loss and it is most unlikely that she did, for the grant was destined to be consumed and not invested, but the loss was just as real as she suffered immensely due to not having the grant.

2.6. AMENDMENTS TO THE SOCIAL ASSISTANCE ACT 59 OF 1992

We noted earlier in Section 2.4. of this dissertation that there have been amendments to the social assistance legislation in South Africa since the enactment of the Constitution, although we did not explore such amendments. We turn now to explore these amendments.

The recent amendments to the Social Assistance Act of 1992¹⁴³ as effected in the Social Assistance Act 13 of 2004 made an important adjustment of the date of application of grants to the date on which the application was made as opposed to when the application was granted as was the case prior to the amendments to the Social Assistance Act. This has implications for the date of accrual, which was also altered to the date of application, as opposed to the date of approval of the grant, and has been limited to a maximum of three months. These measures represent an attempt to improve the administrative time frames in processing grants, and to avoid unfair limitations in back payment as experienced in *Kate's* case.¹⁴⁴

2.7. ADMINISTRATION OF SOCIAL SECURITY SCHEME

South Africa has some arrangements in place solely for the purpose of affording a remedy to those individuals and, or groups of persons aggrieved by the manner in which they have been treated in the process of acquiring or enjoying social assistance

¹⁴² As defined in Chapter 1 of this dissertation. Constitutional damages refers to the compensation for a constitutional delict, which may be in the form of interest or patrimonial compensation; in other words, monetary damages.

¹⁴³ Act 59 of 1992.

¹⁴⁴ 2006 SCA 46 (RSA). Olivier *et al Social Security Law: General Principles* (1999) 356.

benefits. The applicable international standard requires that anybody who claims a benefit be afforded the right to appeal if his or her application is rejected, or if a conflict arises because of the quality or quantity of the benefit. Dispute resolution in the South African social assistance system is regulated by means of both the statutory law and the common law. Statutory social assistance dispute resolution mechanism and remedies can be found in a number of social assistance statutes. In the event that no or inadequate provision is made for dispute resolution in the social assistance legislation, an aggrieved party may approach the court of law on a common law basis.¹⁴⁵ The South African social assistance system is characterized by a host of contradictory and overlapping dispute resolution routes and mechanisms that are spread over all the social assistance statutes.¹⁴⁶

All institutions, whether public or private, entrusted with the administration of social security schemes are under an obligation to abide by the Constitution of the Republic of South Africa. This duty originates from the supremacy of the Constitution¹⁴⁷, which obliges the State to respect, protect, promote and fulfill the rights enshrined in the Bill of Rights from the binding effect of the Bill of Rights on all organs of state¹⁴⁸ and from the binding effect of the provisions contained in the Bill of Rights on natural and juristic persons.¹⁴⁹

In view of the foregoing, it follows that social security institutions have an obligation to abide by section 33 of the Constitution, and in particular section 33 of the Constitution obliges the State to:

- a) enact national legislation, in order to give effect to the rights contained therein
- b) to provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal.

Section 33 of the Constitution further imposes a duty on the State to give effect to the rights in subsections (1) and (2) and to promote effective administration.

¹⁴⁵ *Id* at 231.

¹⁴⁶ Olivier *et al Op cit* note 144 at 232.

¹⁴⁷ Section 1(c) and 2 of the 1996 Constitution.

¹⁴⁸ Section 8(1) and section 239 of the 1996 Constitution.

¹⁴⁹ Section 8(2) of the 1996 Constitution.

2.8. THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT 3 OF 2000

Section 33 of the Constitution gave rise to the Promotion of Administrative Justice Act (hereinafter referred to as PAJA).¹⁵⁰

PAJA¹⁵¹ is aimed at the promotion of efficient administration and good governance, as well as the creation of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function, by giving effect to the right to just administrative action.¹⁵² Given the objectives of PAJA¹⁵³ it can be said that it conforms with the basic values and principles governing public administration, as stipulated in the Constitution, as well as with the eight principles of *Batho Pele*.¹⁵⁴

Poor social security administration and disappointing levels of service delivery has proven to be the major criticism against the South African social security administration. The brunt of this unfortunate situation is always felt by the poorest and the most vulnerable component of the South African society, resulting in an unacceptable situation of poor service delivery within our constitutional framework. A great obstacle awaits the country to correct this state of affairs, and it is submitted

¹⁵⁰ Act 3 of 2000.

¹⁵¹ *Ibid.*

¹⁵² Preamble to the Promotion of Administrative Justice Act 3 of 2000.

¹⁵³ Act 3 of 2000.

¹⁵⁴ Olivier *et al Social Security Law: General Principles* (1999) 58; 400- 401. *Batho Pele* is Sotho for 'putting the people first'. The eight principles of *Batho Pele* can be identified as:

- a) Consultation: which means that customers should be consulted about the level and quality of the public services they receive and,
- b) wherever possible, should be given a choice about the services that are offered.
- c) Service standards: which means that customers should be told what level and quality of public services they will or should receive so that they are aware of what to expect.
- d) Access: means that all customers should have equal access to the services to which they are entitled.
- e) Courtesy: customers should be treated with courtesy and consideration.
- f) Information: means that customers should be given full and accurate information of public services they are entitled to receive.
- g) Openness and transparency: customers should be told how national and provincial departments are run, how much they cost and who is in charge.
- h) Redress: means that if the promised standards of services are not delivered, customers should be offered an apology, a full explanation and a speedy and effective remedy. When complaints are made, customers should receive an empathetic and correct response.
- i) Value for money: public service should be provided economically and efficiently in order to give customers the best possible value for money.

The officials who provide social assistance must abide by the abovementioned fundamental principles in customer services at all times when rendering services.

that it will take more than the outsourcing of some or all of the social security services, *Batho Pele* and the replacement of inefficient and corrupt personnel, for the South African social security administration to finally attain an acceptable level of service.¹⁵⁵

The purpose of PAJA therefore is to provide the mechanism by which the substantive rights framed within the Constitution, especially section 27 of the Constitution, are realized through the lawful, reasonable and procedurally fair administrative action of the substantive right. The purpose of PAJA is far reaching and ambitious and should provide the ultimate solution to the failure of the State to perform in terms of the provision of the right to social assistance to individuals, however, PAJA is not always achievable as will be viewed in subsequent Chapters of this dissertation.

2.9. THE IMPACT OF THE 1996 CONSTITUTION ON SOCIAL SECURITY

There are various reasons why it is necessary to have regard to the impact of the South African Constitution¹⁵⁶ on social security. Firstly, the Constitution itself makes it¹⁵⁷ abundantly clear that it is the supreme law of the country as mentioned above¹⁵⁸, while the Bill of Rights contained in Chapter 2 thereof is said to apply to all law and to bind the legislature, the executive, the judiciary, and all organs of the State. Secondly, the Constitution enjoins every court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation and when developing the common law.

2.9.1. SOCIAL SECURITY RIGHTS

It is sometimes argued that social security rights are second generation or socio-economic rights and that they place a duty upon the State to act in a positive manner. Socio-economic rights have to be contrasted with rights that protect an individual

¹⁵⁵ *Id* at 68.

¹⁵⁶ The 1996 Constitution.

¹⁵⁷ Olivier *et al Social Security Law: General Principles* (1999) 117.

¹⁵⁸ Section 2 of the 1996 Constitution and explored in Section 4.2. of Chapter 4 of this dissertation.

against undue interference by the State.¹⁵⁹ Due to the peculiar nature of social security rights, it is said that these rights cannot be enforced by the courts without intruding upon the terrain of the legislature and or the executive branch of the government.¹⁶⁰ It has become evident that these rights are capable of enforcement, if only the legislature or executive is ordered to take action or is sent back to the drawing board to arrange for a more equal distribution.¹⁶¹ The Constitution further adopts an innovative approach by placing a specific duty on the State to take positive measures in order to give effect to (some of) these rights.¹⁶² The Constitutional Court is specifically empowered to decide that Parliament, or the President, has failed to comply with a constitutional duty¹⁶³. The question is how far will the court go? The court may require the State to review programs and policies, but it is doubtful whether it may be prepared to order a specific distribution of financial and other sources¹⁶⁴.

In certifying the text of the 1996 Constitution, the Constitutional Court stressed that the socio-economic rights contained in the Constitution are justiciable, even though the inclusion of the rights may have direct financial and budgetary implications.¹⁶⁵

2.9.2. THE DUAL TEST

The Constitutional Court adopted a relatively cautious approach by invoking the dual test of

- a) rationality, and
- b) *bona fides* as the yardstick in this regard.

The Constitutional Court opined: “A court must be slow to interfere with rational decisions taken in good faith by the political organs and authorities whose responsibility it is to deal with such matters.”¹⁶⁶ The Constitutional Court has acknowledged on several occasions that socio-economic rights are in fact justiciable.

¹⁵⁹ Olivier *et al Social Security Law: General Principles* (1999) 118.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² Olivier *et al, Introduction to Social Security* (2004) 118.

¹⁶³ *Id* at 118 – 119. Section 167(4)(e) of the Constitution.

¹⁶⁴ Olivier *et al Social Security Law: General Principles* (1999) 118.

¹⁶⁵ *Ex parte Chairman of the Constitutional Assembly: In re: Certification of the constitution of the Republic of South Africa*, 1996 4 SA 744 (CC) 800 D – F (para 77). *Ibid.*

¹⁶⁶ *Soobramoney v Minister of Health (KwaZulu – Natal)* 1998 1 SA 765 (CC) para 29.

The question that remains unanswered is how these rights can be enforced.¹⁶⁷ When the obligation imposed on the State in terms of section 27(2)¹⁶⁸ is read in conjunction with section 2, the assumption can be made that the fundamental right to access to social security is enforced, because section 2 explicitly states that duties imposed by the Constitution must be performed.¹⁶⁹

In answering the question as to how far the court will be prepared to go, in the first certification judgment the Constitutional Court remarked:

“ It is true that the inclusion of socio-economic rights may result in the courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers.”¹⁷⁰

According to the court, effective implementation requires at least adequate budgetary support by national government. It is hence essential for a reasonable part of the national budget to be devoted to the granting of relief to those in desperate need. The precise allocation in this regard is for national government to decide itself. The court must be slow to interfere with rational decisions taken in good faith by the political organs. There are instances where the larger needs of society, as opposed to the specific needs of particular individuals, may have to be given priority.¹⁷¹

The court in *Minister of Health v Treatment Action Campaign*¹⁷² refused to hold that the granting of a mandatory order, as opposed to a mere declaratory order, would amount to an unwarranted infringement of the separation of powers. In fact, the court

¹⁶⁷ Olivier *et al Social Security Law: General Principles* (1999) 119.

¹⁶⁸ The 1996 Constitution.

¹⁶⁹ Olivier *et al Op cit* note 167 at 125.

¹⁷⁰ *Ex parte Chairman of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa*, 1996 4 SA 744 (CC) 800 D – F par 77. *Id* at 128.

¹⁷¹ Olivier *et al Social Security Law: General Principles* (1999) 128.

¹⁷² 2002 5 SA 721 (CC).

enunciated that it indeed retains the power to exercise some form of supervisory jurisdiction, in order to ensure that its orders are implemented.¹⁷³

Courts have the power to enforce socio-economic rights and in particular the right to access to social security. Wide-ranging remedies are at the disposal of the courts in this regard. This may result in courts making orders which have direct implications for budgetary matters.¹⁷⁴ The Constitution in sections 27(2) and section 36 read together requires the devising, formulation, funding and implementing, as well as the constant review, within the resources available, of a comprehensive and co-ordinated programme with well-targeted policies. These have to be reasonable both in their conception and their implementation, and must be implemented by the executive and through legislative intervention. Provided that the measures adopted are reasonable, the Constitutional Court will, generally speaking, also uphold a social security programme which institutionalizes social security provisions. It will be discussed in Chapter four that the courts are empowered, whenever they decide on any issue involving the interpretation, protection and enforcement of a fundamental right contained in the Constitution, to make any order that is just and equitable and may grant “appropriate relief.”

In *Fose v Minister of Safety and Security*¹⁷⁵ appropriate relief is described as follows:

“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 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 fashion new remedies to secure the protection and enforcement of these important rights.”¹⁷⁶

¹⁷³ *Minister of Health and Others v Treatment Action Campaign* 2002 5 SA 721 (CC) para 104. Olivier *et al Op cit* note 171 at 130.

¹⁷⁴ *Id* at 131.

¹⁷⁵ 1997 3 SA 786 (CC).

¹⁷⁶ *Grootboom and Others v Oostenberg Municipality and Others* 2000 3 BLLR 277 (C).

2.10. CONSTITUTIONAL REMEDIES

The Constitution provides specific constitutional remedies which include the following:

- a) orders of invalidity,
- b) the development of the common law to give effect to the constitutional rights,
- c) the creation of procedural mechanisms necessary for the protection and enforcement of constitutional rights, and
- d) procedural remedies derived from some of the substantive rights¹⁷⁷.

Where parliament or the provincial legislature fails to comply with a constitutional obligation that requires positive State action the Constitutional Court or the High court may grant appropriate relief. In such circumstances appropriate relief will be to make a declaratory order, where the relevant organ of state fails to act in compliance with the provisions regarding the specific right. It may also include mandatory or injunctive relief.¹⁷⁸

Supervisory jurisdiction is a new manner of addressing the problem of enforcing social security rights. This entails the courts directing the legislative and executive branches of government to bring about reform as defined in terms of their objectives and then to retain such supervisory jurisdiction as to ensure the implementation of those reforms. This is to a large extent the impact of the order given by the Constitutional Court in *Government of the Republic of South Africa v Grootboom*¹⁷⁹ where the court ordered (national and provincial) government to redraft its housing policy and programme in such a way as to make provision for those without any form of temporary housing.¹⁸⁰

In the past, the courts merely pronounced that non-compliance with the principles of administrative justice, particularly in the area of social assistance, was a reflection of

¹⁷⁷ Section 172(1)(a), 173, 8(3), 32(10), 33(2) and 34 of the Constitution. Currie, and de Waal, *The Bill of Rights Handbook*, 5th edition (2005) 199 - 218.

¹⁷⁸ *Minister of Health and Others v Treatment Action Campaign and Others* 2002 BCLR 1033 (CC) para 96 – 107. Olivier *et al Social Security Law: General Principles* (1999) 134.

¹⁷⁹ 2001 1 SA 46 (CC), 2000 11 BCLR 1169 (CC).

¹⁸⁰ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), 2000 11 BCLR 1169 (CC) para 39, 66, 68, 52 and 69. Olivier *et al Loc cit* note 178.

poor and inefficient administration and of a flagrant disregard for basic legal tenets. More recently, however, the courts do not hesitate to intervene and to assist beneficiaries where statutory entitlements to, for example, social assistance grants, have not been complied with or where administrative law principles or constitutional prerequisites have not been adhered to.¹⁸¹ In some cases, the courts have made it clear that the grant must be made within a reasonable time of application. In one case the court awarded *punitive 'interest'* against the State respondents as a result of the unacceptable manner in which the respondents dealt with the applicant's application for a social grant.¹⁸² Hence, it is evident that the courts have moved from merely pronouncing that non-compliance by the departments of welfare is unacceptable to now actively intervening to provide some form of relief to those individuals who are negatively affected.

The question remains whether a constitutional remedy should be granted at all. The infusion of constitutional normative values into delictual principles itself plays a role in protecting constitutional rights, albeit indirectly. Delictual principles are capable of being extended to encompass state liability for the breach of constitutional obligations, but the relief permitted by sections 38 of the Constitution is not a remedy of last resort, as noted above.¹⁸³ There will be cases in which a direct assertion and vindication of constitutional rights is required (such as a direct section 38 remedy). It is evident that the breach in *Kate's*¹⁸⁴ case warranted vindication directly for two reasons. Firstly, there is no reason why a direct breach of a substantive constitutional right (as opposed to merely a deviation from a constitutionally normative standard) should be remedied indirectly. Secondly, the prevalent breach of rights that is now in issue justifies the clear assertion of the independent existence of these rights.

¹⁸¹ Olivier *et al* Social Security Law: General Principles (1999) 510.

¹⁸² *Mahambehlala v MEC for Welfare, Eastern Cape, and Another* 2002 1 SA 342 (E). Olivier *et al* Social Security Law: General Principles (1999) 510.

¹⁸³ Referred to in Chapter 4 of this dissertation.

¹⁸⁴ 2004 6 SA 40 (SCA).

2.11. CONCLUSION

This Chapter has defined Social Security, explored section 27 of the Constitution, extrapolated essential concepts from the Social Assistance Act¹⁸⁵, analyzed the case of *Kate v Member of Executive Council of Welfare*¹⁸⁶, identified amendments to the Social Assistance Act¹⁸⁷, explored the administration of the social security system, discussed how PAJA¹⁸⁸ contributes to the implementation of social assistance, explored the impact of the Constitution on social assistance, and identified Constitutional remedies.

Whether an award of monetary damages is an appropriate remedy for an admitted constitutional breach remains a contentious issue, but monetary damages for a constitutional breach have since been awarded by the Supreme Court of Appeal and endorsed by the Constitutional Court in *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd.*¹⁸⁹ Whether relief in that form is appropriate in a particular case must be determined casuistically with due regard to, *inter alia*, the nature and importance of the rights in issue, the alternative remedies available to assert and vindicate them, and the consequences of the breach for the claimant concerned.

The conclusion can be reached that the protection and enforcement of the right to access to social security and social assistance will require the development of new remedies by the courts. Developing current and new remedies will require the courts to act proactively and in an inquisitorial fashion.¹⁹⁰

We turn now in the next Chapters to examine the common law approach to damages, the constitutional approach to damages and ultimately the possible amalgamation thereof.

¹⁸⁵ Act 59 of 1992.

¹⁸⁶ 2005 1 SA 141 SECLD, 2006 SCA 46 (RSA).

¹⁸⁷ Act 13 of 2004.

¹⁸⁸ Act 3 of 2000.

¹⁸⁹ 2005 5 SA 3 (CC).

¹⁹⁰ Olivier *et al Social Security Law: General Principles* (1999) 135.

CHAPTER 3

THE APPROACH TO THE PROVISION OF DAMAGES FOR THE INFRINGEMENT OF RIGHTS PRIOR TO THE CONSTITUTION

3.1. INTRODUCTION

South African law is essentially based on an uncodified civil law¹⁹¹ system with Roman-Dutch law, and originally Roman law, as its major formative element. Since the beginning of the nineteenth century a strong thread of English law has been woven into the fabric of that system.¹⁹²

This Chapter will provide an overview of the common law approach to damage and compensation within the topic of delict. The approach of our common law to the concept of awarding damages prior to the inception of the 1996 Constitution will be explored with a view to identifying which interests were protected and awarded damages, what form the damages took and how this system has developed. Since this is not the primary task of this dissertation, the entire history of South Africa's common law cannot be considered. For illustrative purposes this Chapter will focus on the Aquilian action.

3.2. THE CONCEPTS OF DELICT AND DAMAGES IN SOUTH AFRICA

Since the topic of this dissertation is the awarding of patrimonial damages, normally in the form of interest, the most closely corresponding common law remedy, that of the *actio legis Aquiliae*, has been chosen for closer examination. After the concept of a delict has been defined, the history of this remedy will be explored, the competing casuistic approach and the generalizing approach examined and finally the notion of damages will be defined.

¹⁹¹ Hanks (editor), *Collins Dictionary of the English Language* (1979) 276. The law of a state relating to private and civilian affairs, also known as the body of law in force in ancient Rome, especially the law applicable to private citizens. Civil law is also known as any system of law based on the Roman system as distinguished from the common law and canon law.

¹⁹² Zimmermann and Visser, *Civil Law and Common Law in South Africa* (1996) 141.

A delict is the act of a person that in a wrongful and culpable way causes harm to another or it is the infringement of another's interests. The second description of a delict is misleading. On the one hand, there is an omission to state fault as a general delictual requirement [statutory and common law exceptions of no fault or strict liability aside], and on the other hand, the erroneous impression is created that all individual interests, and not only those that are legally recognized and protected, are relevant in this regard.¹⁹³ All five requirements or elements, namely: act, wrongfulness, fault, harm and causation must be present before the conduct complained of may be classified as a delict.¹⁹⁴ From the aforementioned it flows that the question of delictual liability is governed by a 'generalized approach'. It is self-evident that a legal system embracing general principles of delictual liability is able to accommodate changing circumstances and new situations more easily than one that adopts the casuistic approach. One definition of a delict relates to the infringement of a legally recognized right. A right currently framed within the Constitution (specifically within Chapter 2) is codified and therefore it is conceivable that an infringement of a right that is protected within the Constitution which causes patrimonial damage may be compensated with patrimonial damages by utilizing the remedy of the *actio legis Aquiliae*¹⁹⁵, provided of course that all the elements of a delict¹⁹⁶ are present. Law is a form of social engineering. This is particularly true of the law of delict, which operates close to the core problem faced by a legal system of balancing individual freedoms against collective security. Delict seeks to achieve this balance by tempering broad principles of liability with limiting interpretations of wrongfulness, fault and causation. It follows that a proposed legal rule should never

¹⁹³ *Ibid.*

¹⁹⁴ Neethling *et al Op cit* note 81 at 3 – 4.

¹⁹⁵ Neethling, Potgieter and Visser, *Law of Delict*, 6th edition (2010) 18 – 19. The entrenchment of fundamental rights in the Bill of Rights enhances their protection and gives them a higher status in that all law, state actions, court decisions and even the conduct of natural and juristic persons may be tested against them, taking into account that any limitation of a fundamental right must be in accordance with the limitation clause of the 1996 Constitution. In exercising this value judgment, the general principles which have already been crystallised in our law with regard to the reasonableness or *boni mores* criterion for delictual wrongfulness may serve as *prima facie* indications of the reasonableness of a limitation in terms of the Bill of Rights. In the case of an infringement of or a threat to a fundamental right, a prejudiced or threatened person is entitled to approach a competent court for appropriate relief. In this respect there is the possibility of developing a "constitutional delict", in other words, that the infringement of a fundamental right *per se* constitutes a "delict". Further discussed in chapter 5 below.

¹⁹⁶ Neethling, Potgieter and Visser, *Law of Delict*, 6th edition (2010) 4 defines a delict "A delict is the *act* of a person that in a *wrongful and culpable way causes harm* to another".

be propounded without due regard to its social implications, and that the merits of a rule depend on its functional effects rather than the purity of its origin.¹⁹⁷

The casuistic approach stands in juxtaposition to that of the generalizing approach to the law of delict. According to the casuistic approach the law of delict consists of a group of separate delicts, each with its own set of guidelines, hence in order to render a wrongdoer liable for a delict within the casuistic approach an aggrieved party will have to satisfy the court that the wrongdoer's action or conduct satisfies all the requirements of a specific delict¹⁹⁸. The South African law of delict, unlike the English law of torts, is based on the generalizing approach and is therefore able to recognize and protect individual interests which have only come to the fore in recent times in that the generalizing approach recognizes delict which comply with general requirements.¹⁹⁹ The generalized approach is subject to an important qualification in our law. A distinction is made in principle between delicts that cause patrimonial damage (*damnum iniuria datum*) and those that cause injury to personality (*iniuria*). These two ground the actions which form two of the pillars of the law of delict, namely the *actio legis Aquiliae* in terms of which damages for the wrongful and culpable causing of patrimonial damage are claimed and the *actio iniuriarum* which is directed at satisfaction (*solatium* or sentimental damages) for the wrongful and intentional injury to personality.²⁰⁰

Damage (*damnum*) is an ancient concept in legal terminology. Although it is not absolutely clear how damage should be defined, the following definition is generally accepted: damage is the detrimental impact upon any patrimonial or personality interest deemed worthy of protection by the law.²⁰¹ It stands to reason that the rights encompassed in the Bill of Rights²⁰² are interests deemed worthy of protection by the law. The word '*damnum*' entered into legal terminology with the *lex Aquilia* in 287

¹⁹⁷ Boberg, *The Law of Delict*, Volume 1 (1984) 26 - 27.

¹⁹⁸ Koch, *Damages for lost income* (1984) 1.

¹⁹⁹ *Id* at 4 - 500

²⁰⁰ *Ibid*. A third pillar of the law of delict, which is not relevant here, but noted for completeness sake, is the action for pain and suffering by which compensation for injury to personality as a result of the wrongful and negligent (or intentional) impairment of bodily or physical-mental integrity is claimed.

²⁰¹ Koch, *Damages for lost income* (1984) 196. Visser and Potgieter, *Law of Damages*, 2nd edition (2003) 24 defines 'Damage' as the diminution, as a result of a damage-causing event, in the utility or quality of a patrimonial or personality interest in satisfying the legally recognized needs of the person involved.

²⁰² Chapter 2 of the 1996 Constitution.

BC. Since then it has developed into a complex concept involving numerous principles. The concept of damage plays a role in many branches of law. The origin of the modern concept of patrimonial damage can be traced back to the treatise of the prominent German jurist Mommsen in 1855²⁰³. According to Mommsen, damage (*interesse*) is the difference between the present patrimony of the plaintiff and the patrimonial position which would presently have existed if the damage-causing event had not occurred²⁰⁴. This approach, known as the sum-formula approach²⁰⁵, which was confirmed by the case of *Transnet Limited v Sechaba Photoscan (Pty) Ltd*²⁰⁶ was taken over as the measure of damages in our law on the authority of Windscheid and Gruber²⁰⁷. This is not a satisfactory definition of damage but rather a comparative method or standard by which the extent of patrimonial loss may be assessed or measured. The concept of damage in our law has developed in the context of delictual and contractual liability and it should also be noted that our law accepts a wide concept of damage which includes both patrimonial and non-patrimonial loss.²⁰⁸

Erasmus and Guantlett²⁰⁹ hold the view that an accurate understanding of the hybrid nature of our law of damage is necessary for the correct approach to problems encountered in this field of law. The hybrid nature of our law of damage demonstrates that our law is composed of elements of both Roman-Dutch law and English common law (as mentioned at the commencement of this Chapter), but that the relative importance of these two component elements has fluctuated at different times in history. One's view on the history of the law of damage is of course determined by what one actually accepts to be the content of the law of damage.²¹⁰ The principles and terminology of the English law of damage could not displace Roman-Dutch law completely and especially since 1910 the Appellate Division in

²⁰³ Lee, RW, *Cupidae Legum Juventuti The Elements of Roman Law with a translation of the Institutes of Justinian* 3rd edition (1952) 20 – 21.

²⁰⁴ McKerron, RG, *The Law of Delict*, 6th Edition (1965) 109 – 110.

²⁰⁵ Van der Walt 1980 *THRHR* 4, *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657.

²⁰⁶ *Transnet Limited v Sechaba Photoscan (Pty) Ltd* 2005 1 SA 299 (SCA), (reportable) case number 98/03 SCA the court declared: "It is now beyond question that damages in delict (and contract) are assessed according to the comparative method."

²⁰⁷ *Lex Aquilia: The Roman Law of Damage of Property* (1886) 269. Visser, and Potgieter, *Law of Damages* (1993) 24.

²⁰⁸ *Ibid.* Koch, *Damages for lost income* (1984) 20.

²⁰⁹ Erasmus and Guantlett 7 *LAWSA* 4 state that 'a knowledge and appreciation of the historical perspective is therefore of considerable assistance in evaluating decided cases dating from different periods'.

²¹⁰ Visser, and Potgieter, *Law of Damages* (1993) 8 - 9.

South Africa has placed more emphasis on Roman-Dutch law.²¹¹ It was especially in the area of delictual damages that English influence waned in that our courts stressed certain basic principles related to Roman-Dutch law such as the compensatory nature of the *actio legis Aquiliae* and the requirement of actual patrimonial loss. It would seem that this development has not yet succeeded in finally banishing the idea of nominal damages from modern law. The clear distinction between the *actio legis Aquiliae* and the *actio iniuriarum* had again been accepted and it was appreciated that there is a difference between the *actio iniuriarum* and English torts for which punitive damages could be recovered.²¹²

The synthesis of civil and common law elements in the South African law of damages was facilitated by the fact that during the nineteenth century the two systems had adopted a similar governing rule for assessing the measure of damages in that the plaintiff is to be placed in the position he or she would have been in but for the commission of the wrongful act. It is interesting to note that when the South African courts adopted the rule during the early years of the twentieth century, they derived it in the case of delict from the Roman-Dutch law and in the case of contract from the English common law.²¹³ It is in all probability correct to conclude that a distinctive South African law of damages has evolved, which does in a sense have a hybrid nature but which consists of more than merely the sum of its historical components. In the current South African law of damages there is a tendency to try to remove the shortcomings in the doctrine of damages through individualization, objectivication or by replacing the object of damage by other objects. According to Van der Walt²¹⁴, the search to solve problems in the field of the law of damages has always followed an *ad hoc* approach.²¹⁵

²¹¹ *Id* at 13.

²¹² Erasmus 1975 *THRHR* 366 -7. Visser, and Potgieter, *Law of Damages* (1993) 14.

²¹³ *Id* at 14 – 15. Erasmus 1975 *THRHR* 369.

²¹⁴ Van der Walt, *Sommeskadeleer* 284, 3 – 5.

²¹⁵ Visser, and Potgieter, *Law of Damages* (1993) 14. - 15.

3.2.1. EXTENDING THE AQUILIAN ACTION IN ROMAN LAW AND ROMAN-DUTCH LAW

The common law delictual Aquilian remedy underwent much growth and adaptation in Roman Law and Roman-Dutch Law in South Africa.

Liability for patrimonial damage (*damnum iniuria datum*) is one of the most important sections of Roman law that still exists in our law, although time has produced many changes and extensions thereto. Roman law relating to the liability for patrimonial damage was based on an Act (*plebiscitum*) from 287 BC known as the *lex Aquilia*, which was originally only applicable to certain forms of damage to tangible assets, for example it dealt only with the killing or wounding of a slave or four-footed animal, and the burning, breaking and destroying of other tangible assets, and was only available to the owner of the damaged property²¹⁶. With the progression of time the field of application of the Aquilian action was extended considerably as a result of the extensive interpretation of the *lex* and the granting of *actiones utiles* and *in factum*. Consequently, Aquilian liability could ensue after any kind of physical infringement of a tangible asset and not only after infringement of an asset with a specific and defined nature²¹⁷.

A further important development in Roman liability for the law of patrimonial damages was that the wrongdoer had to compensate the wronged individual not only for the damage that had been caused to the ‘thing’ or tangible asset itself but also for all patrimonial damage which resulted from his wrongful act (*id quod interest*). In Justinian’s time, the extension was such that apart from the owner, other holders of real rights were also protected against damage to property.²¹⁸ In addition to damage to property, the *actio legis Aquiliae* was made applicable to two further instances of patrimonial loss resulting from bodily injury. Nevertheless, the general opinion seems to be that although interests other than ownership were also protected, a perceptible, physical infringement of a tangible asset or the body of a person was still

²¹⁶ Lee, RW, *Cupidae Legum Juventuti The Elements of Roman Law with a translation of the Institutes of Justinian* 3rd edition (1952) 5 and 41. Neethling, Potgieter, and Visser, *Law of Delict*, 6th edition (2010) 8.

²¹⁷ Mc Kerron RG, *The Law of Delict*, sixth edition (1965) 7, 8, 9 – 10. *Id* at 8.

²¹⁸ *Ibid.* Neethling, *et al Op cit* note 216 at 8 – 9.

required²¹⁹. The reasons for this are probably two-fold. Firstly, the *lex Aquilia* was initially only applicable to certain physical infringement of tangible legal interests. It is therefore understandable that the extension by analogy of Aquilian liability was still connected to physical infringements. Secondly, the wrongfulness of a physical infringement was readily apparent to the less sophisticated mind²²⁰.

In Roman-Dutch law the proportions of Aquilian liability under-went very important extensions, going beyond the limits of Roman law²²¹. Firstly, there were definite indications that the requirement of physical impairment of a thing or tangible asset was no longer required. Secondly, damages could be claimed with the Aquilian action for patrimonial damage resulting from any injury to personality and not only, as was the case in Roman law, for an injury to personality in the form of bodily injury. Thirdly, Roman-Dutch law went much further than Roman law in granting an action to the holder of a personal right in respect of a thing. The availability of the Aquilian action was extended to the borrower, the *fullo* and the lessee of the services of a slave or servant. Lastly, the *actio legis Aquilia* in Roman-Dutch law was also available to the dependants of a free person who had been killed.²²²

It is true to say that the *actio legis Aquiliae* underwent a process of adaptation by which it was extended far beyond the limited scope of the first and third chapters of the original *lex*. The first chapter provided that the wrongful killing of somebody else's slave rendered the wrongdoer liable to pay damages to the owner equal to the highest value of that object during the previous year.²²³ The third chapter imposed liability for wrongful damage to property; here the wrongdoer had to pay the highest value of the object in question within the preceding thirty days. The process of extension commenced with the interpretation of the *lex Aquilia* by Roman lawyers throughout the classical period and down to the days of Justinian. Through extensive interpretation of the words of the *lex*, and by the granting of *actiones in factum* and

²¹⁹ *Ibid.*

²²⁰ Neethling, Potgieter, and Visser, *Law of Delict*, 6th edition (2010) 8 – 9.

²²¹ Explored above at pages 50 – 51.

²²² Grotius, H, *The Jurisprudence of Holland* (translated by Lee RW) First Edition Volume 1 (1926) 469.

²²³ Lee, RW, *Cupidae Legum Juventuti The Elements of Roman Law with a translation of the Institutes of Justinian* 3rd edition (1952) 386. Zimmermann, and Visser, *Civil Law and Common Law in South Africa* (1996) 559.

actiones utiles in situations not covered by the provisions of the enactment itself, the Romans brought about a situation where a remedy was available in all cases of wrongful damage to corporeal property, as well as for injuries to slaves and freemen, by means of which the wrongdoer was held liable for *id quod interest*, in other words, including consequential damages, to the owner of the object damaged or to the person injured. In a limited number of cases immaterial damage was covered and occasionally the action was also granted to non-owners.²²⁴

3.2.2. *AQUILIAN ACTION DEVELOPMENT IN SOUTH AFRICAN LAW – A SUMMARY*

This chapter provides the reader with a foundation from which to view the law of damage by observing how the common law has developed. The fact that the common law is capable of development and change is key to the proposition of this dissertation. This will become even more apparent later in the dissertation when we consider the concurrent operation of the common law of delict and the Constitution.

It is not necessary providing a summary of the development of the Aquilian action to commence before the seventeenth century. This is so because during the course of the seventeenth century the *actio legis Aquiliae* was transplanted to the Cape of Good Hope as a part of the Roman-Dutch law brought by the settlers of the Dutch East India Company.

By the seventeenth century the *actio legis Aquiliae* had developed to embrace general principles of liability for patrimonial loss to person or property wrongfully and culpably caused. It had lost its penal nature and become purely compensatory, which was reflected in the rules governing its transmissibility.²²⁵

At the beginning of the twentieth century the South African courts seemed poised finally to round off the long process of historical development of the Aquilian action

²²⁴ *Id* at 560.

²²⁵ Lee, RW, *Cupidae Legum Juventuti The Elements of Roman Law with a translation of the Institutes of Justinian* 3rd edition (1952) 394. Zimmermann, and Visser, *Civil Law and Common Law in South Africa* (1996) 561.

by accepting the simple, general proposition that all damage caused intentionally or negligently is actionable, unless it can be justified.²²⁶

When the twentieth century drew to a close the Aquilian liability was very much closer to reaching the logical end point of its long process of historical development. Dramatic developments, particularly over the past two decades have opened the door in principle to liability for negligent omissions, negligent misstatements, and for negligently inflicted loss of a purely economic nature²²⁷. The key to these developments has been the revitalization of the old requirement of *iniuria*, in its new appearance of wrongfulness as a criteria for liability. This requirement, distinct from and logically anterior to that of fault, provides a place for the open consideration of policy factors in the development of liability for negligent conduct, and hence has come to perform a vital role as a mechanism of control over the gradual expansion of Aquilian liability in South African law. Some have stated that it substitutes ‘discretion for principle’, but its positive impact on our law is undeniable.²²⁸ However, armed with this discretionary tool, the courts have boldly ventured into territory previously thought too hazardous²²⁹, secure in the knowledge that they can always retreat if the danger of expanding the Aquilian liability or making the wrong decision becomes too great. Significant as these developments are, the stage has not yet been reached where it can be said that all financial harm culpably caused is *prima facie* wrongful and therefore actionable. That is certainly true in the field of omissions, where the *boni mores* do not require one to take positive action whenever a failure to do so would foreseeably cause harm to another; and it seems also still to be true in the case of purely economic loss.²³⁰

²²⁶ *Ibid.*

²²⁷ Zimmermann, and Visser *Op cit* note 225 at 634. Neethling, Potgieter, and Visser, *Law of Delict*, 6th edition (2010) 9. *Matthews v Young* 1922 AD 492 504.

²²⁸ *Ibid.* Neethling, Potgieter, and Visser, *Law of Delict*, 6th edition (2010) 11. *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A) 503 – 504 states that South African law approaches the matter in a more cautious way ...and does not extend the scope of the Aquilian action to new situations unless there are positive policy considerations which favour such an extension.

²²⁹ Examples in case law are *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), 2000 11 BCLR 1169 (CC), and *Soobramoney v Minister of Health, KwaZulu Natal* 1998 1 SA 765 (CC).

²³⁰ Zimmermann, and Visser, *Civil Law and Common Law in South Africa* (1996) 634.

If Aquilian liability is to be reduced to one general principle today, that principle would have to be that all patrimonial loss caused wrongfully and culpably is actionable, which is essentially what Watermeyer J stated in *Perlman v Zoutendyk*.²³¹ In expressing South African law this extensively the learned Judge emphasizes its inherently civilian nature and makes it look very different to that of England. Outward appearances can however sometimes be misleading²³²

There is no deficiency of decisions²³³ highlighting the viewpoint that the Aquilian action has in fact reached its logical end development in South African law. In contradistinction to earlier cases²³⁴ which require physical injury to person or property to found Aquilian liability, it is today established law that compensation for so-called “pure” economic loss may in principle be claimed *ex lege Aquilia*. In *Coronation Brick (Pty) Ltd v Stachan Construction Co (Pty) Ltd*²³⁵, Booysen J clearly stated that the legal basis of the plaintiff’s claim is that of the *lex Aquilia*. In essence the Aquilian action lies for patrimonial loss caused wrongfully and culpably. Although the contrary view had long been held by many authorities²³⁶, it seems clear that the fact that the patrimonial loss suffered did not result from physical injury to the corporeal property or person of the plaintiff, but was purely economic, is not a bar to the Aquilian action.²³⁷

It may be concluded that despite a few decisions²³⁸ to the contrary, there is a very strong tendency in case law to recognize Aquilian liability for all patrimonial loss caused wrongfully and culpably. It is in any event apparent that the extent of this liability has increased a great deal in modern law and can still be expanded.²³⁹ Our courts tend to adopt a conservative approach to the expansion of the Aquilian action

²³¹ 1934 CPD at 151.

²³² Zimmermann, and Visser *Op cit* note 230 at 635.

²³³ Lillicap, Wassenaar and Partners v Pilkington Brothers South Africa Proprietary Limited 1985 1 SA 475 (A).

²³⁴ *Combrinck Chiropraktiese Kliniek (Edms) Bpkv Datsun Motor Vehicle Distributors (Pty) Ltd* 1972 4 SA 185 (T) at 191 - 192, *Union Government v Ocean Accident and Guarantee Corporation Ltd* 1956 1 SA 577 (A) at 585 - 586.

²³⁵ 1982 4 SA 371 (D) para 377.

²³⁶ *Supra*.

²³⁷ Neethling, Potgieter, and Visser, *Law of Delict*, 6th edition (2010) 9 – 10.

²³⁸ *Combrinck Chiropraktiese Kliniek (Edms) Bpkv Datsun Motor Vehicle Distributors (Pty) Ltd* 1972 4 SA 185 (T) at 191 - 192, *Union Government v Ocean Accident and Guarantee Corporation Ltd* 1956 1 SA 577 (A) at 585 - 586.

²³⁹ *Supra*.

and will therefore, according to *Lillicrap, Wassenaar and Partners v Pilkington Brothers South Africa Proprietary Limited*²⁴⁰ only allow such an extension if it is justified by policy considerations: “South African law approaches the matter in a more cautious way. . . and does not extend the scope of the Aquilian action to new situations unless there are positive policy considerations which favour such an extension”.²⁴¹

3.3. PATRIMONIAL LOSS, EXPECTATIONS AND INTEREST

This subsection of paragraph three will discuss firstly the definition of patrimonial loss as a subdivision of damage, secondly, the concept of an expectation and finally, the notion of interest.²⁴²

Patrimonial loss (as a subdivision of damage) is defined as the diminution in the utility of a patrimonial interest in satisfying the recognized needs of the person entitled to such interest.²⁴³ It may also be defined as the loss or reduction in value of a positive asset in someone’s patrimony or the creation or increase of a negative element of his patrimony, such as a patrimonial debt.²⁴⁴ An expectation of benefits, as in the case of an expectation for a social assistance grant, is the legally recognized expectation of a person to acquire patrimonial rights or benefits in the future (through which his patrimony will be enhanced) or the *recognized expectation* that his patrimony will not diminish. Such an expectation may be so ‘convincing’ that the law recognizes and protects it by awarding damages if it has been infringed.²⁴⁵

An expectation must meet certain *general requirements* before it can be said to form part of someone’s estate or patrimony, which are:

²⁴⁰ 1985 1 SA 475 (A) at 500.

²⁴¹ Neethling, *et al Op cit* note 237 at 11.

²⁴² Interest here is referred to as the compensation provided to an individual who has foregone a benefit due to an infringement of his or right. The writer is not referring to interest as *interesse* or a patrimonial interest.

²⁴³ Neethling, *et al Op cit* note 237 at 42.

²⁴⁴ *Ibid.*

²⁴⁵ Visser, and Potgieter *Op cit* note 215 at 48.

Firstly, that the law must in principle recognize the type of expectation as worthy of protection; secondly, that there must be a sufficient degree of probability or possibility that the expectation would be realized; thirdly, that the expectation must have a monetary value; and fourthly, that the expectation, though recognized in principle, must not contain an illegal element.²⁴⁶

Interest is relevant in the law of damages in the discounting of damage for prospective loss and as a measure of damages which is sustained on account of the non-possession of money. The present discussion is mainly concerned with damage caused by a delay in the possession of 'damages' as an amount of money which is due to the plaintiff. In general, a debtor, in the absence of an agreement to the contrary, is required to pay interest on the amount of money owed by him from the moment he is in *mora* (delay). This also applies in regard to a liquidated amount of damages or satisfaction and the interest becomes part of the compensation. In a claim for unliquidated damages²⁴⁷ the defendant is not liable to pay interest in the absence of an agreement as to such *quantum* unless the amount has been assessed. If the damage is capable of prompt and ready ascertainment and of speedy proof, such damage is liquidated and interest will commence to run from the moment of delay.²⁴⁸

In the meantime the legislature has stepped in by providing section 2A of the Prescribed Rate of Interest Act 55 of 1975, which provides for the granting of *mora* interest on an unliquidated debt which at common law was not possible until the debt had been liquidated either by way of an agreement between the parties or by a court of law or arbitrator. Section 2A(2)(a) of this Act provides that subject to any other agreement between the parties the interest contemplated in subsection (1) shall run from the date on which payment of the debt is claimed by the service on the debtor of a demand or summons, whichever date is the earlier. In terms of Section 2A(5) of the Act a court of law may make such order as appears just in respect of the payment of interest on an unliquidated debt, the rate at which interest shall accrue and the date from which interest shall run.²⁴⁹

²⁴⁶ *Id* at 49 -50.

²⁴⁷ Where the precise amount is to be determined through a long and complex investigation.

²⁴⁸ Visser, and Potgieter *Op cit* note 215 at 164 – 165.

²⁴⁹ Prescribed Rate of Interest Act 55 of 1975.

3.4. CONCLUSION

From the uncodified nature of the South African civil law, based on Roman Dutch law and English law, arises the benefit of flexibility, a legal system, which allows for flexibility regards:

- a. Interests that are to be legally protected and consequently
- b. Those parties to whom damages can be awarded

Development of the law of delict, especially the Aquilian action, in relation to the expansion of the base of potential claimants has been incremental and responsive to the changes in the *boni mores* of society. This flexibility and development potential is at the core of the generalized approach to damages explored above.

This Chapter has explored how an individual's legally recognized expectation of a benefit (patrimonial) is protected by the awarding of damages in the form of interest should such expectation be infringed. In this regard interest is regulated by the Prescribed Rate of Interest Act.²⁵⁰

The generalized approach also forms the foundation or starting point of the new approach to damages in the constitutional era of South African law to be discussed in the next Chapter.

²⁵⁰ Act 55 of 1975.

CHAPTER 4

THE CONCEPTS OF CONSTITUTIONAL RIGHTS AND DAMAGES IN
SOUTH AFRICA AND THE ‘NEW’ APPROACH TO CONSTITUTIONAL
DAMAGES UNDER THE CONSTITUTION

4.1. INTRODUCTION

Chapter four takes an analytical approach to constitutional rights and damages in South Africa and unpacks these two concepts. This Chapter will thereafter evaluate and expand upon the constitutional approach to the provision of monetary damages in South Africa.

This Chapter will seek to introduce the concept of constitutional rights and damages in the context of South Africa, illuminating the applicable legislation and the supremacy of the Constitution with regards to all issues. In order to do this effectively the situation prior to the supremacy of the Constitution will be dealt with briefly in order to establish the status of an individual citizen’s current rights and obligations in the Republic of South Africa. Specifically, it will be noted that the right to just administrative action in relation to our social assistance rights will be used as an example of a constitutional right and the consequences that flow from this right will be explored.

4.2. THE CONCEPT/S OF CONSTITUTIONAL RIGHTS AND DAMAGES IN SOUTH AFRICA

As with the common law principles and the necessity of exploring same, the constitutional principles are explored hereunder to provide the basis for further argument and discussion below and in the Chapters to follow.

In *Baloro v University of Bophuthatswana*²⁵¹ the court, per Friedman JP, held that the courts should play a proactive role in changing society in accordance with the aims and spirit of the Constitution. Furthermore, the learned judge stated that a court is entitled to have regard to the circumstances and events leading up to the adoption of the Constitution and the human, social and economic impact that any decision of the court will have on society as a whole. This is a progressive approach that reflects judicial activism.²⁵²

The supremacy clause²⁵³, which introduces a break with our constitutional experience since 1910, must be read with section 8, the application provision of the 1996 Constitution. The former confirms that a new *grundnorm* has come into existence, which requires a paradigmatic shift in jurisprudential theory in South Africa. This *grundnorm* introduces the philosophy of constitutionalism and everything that it entails into our legal system. Parliamentary sovereignty and its concomitant executive aggrandizement of power or authority are now part of our history.²⁵⁴

The Bill of Rights consisting of thirty three sections is contained in Chapter 2 of the 1996 Constitution. Twenty-seven of the sections list the protected rights themselves. The remaining six sections are ‘operational provisions’. These provisions govern the manner in which the Bill of Rights operates and the manner in which it can be enforced by the courts.²⁵⁵

According to the Constitution²⁵⁶, the High Court’s power of judicial review of decisions of inferior courts is no longer limited to situations falling within section 24

²⁵¹ 1995 8 BCLR 1018 (B) para 239 and 246.

²⁵² Devenish, *A Commentary on the South African Bill of Rights* (1999) 574.

²⁵³ Section 2 of the 1996 Constitution.

²⁵⁴ Devenish *Op cit* note 252 at 19.

²⁵⁵ Currie, and De Waal, *The New Constitutional and Administrative Law* Volume 1 (2001) 319 - 320.

²⁵⁶ 1996 Constitution, sections 169 states that:

“A High Court may decide –

- (a) any constitutional matter except a matter that –
 - (i) only the Constitutional Court may decide; or
 - (ii) is assigned by an Act of Parliament to another court of a status similar to a High Court; and
- (b) any other matter not assigned to another court by an Act of Parliament.”

Section 172 of the 1996 Constitution:

“(1) When deciding a constitutional matter within its power, a court –

- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(1) of the High (Supreme) Court Act²⁵⁷, it is now determined by the provisions of the Constitution. Therefore, the High Court may indeed grant appropriate relief where a decision of an inferior court has the effect of infringing a fundamental right.²⁵⁸

-
- (b) may make any order that is just and equitable, including –
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.
 - (2) (a) The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.
 - (b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.
 - (c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.
 - (d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.”

Section 173 of the 1996 Constitution: “The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.”

²⁵⁷ Act 59 of 1959, which states that:

- “(1) The grounds upon which the proceedings of any inferior court may be brought under review before a provincial division, or before a local division having review jurisdiction, are—
- (a) absence of jurisdiction on the part of the court;
 - (b) interest in the cause, bias, malice or the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, on the part of the presiding judicial officer;
 - (c) gross irregularity in the proceedings; and
 - (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.”

Section 167(3) of the 1996 Constitution:

“The Constitutional Court –

- (a) is the highest court in all constitutional matters;
- (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and
- (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.
- (4) Only the Constitutional Court may –
 - (a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;
 - (b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances in section 79 or 121;
 - (c) decide applications envisaged in section 80 or 122;
 - (d) decide on the constitutionality of any amendment to the Constitution;
 - (e) decide that Parliament or the President has failed to fulfill a constitutional obligation; or
 - (f) certify a provincial constitution in terms of section 144.
- (5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act

or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.”

4.2.1. INTERPRETATION AND APPLICATION OF THE BILL OF RIGHTS

An important issue in relation to this dissertation is the nature of the cause of action envisaged in section 8(2) and (3) of the Constitution, and the remedies that flow from such cause. Much will depend on the circumstances of the case in question. It is submitted that in each case, although the Constitution will inform such cause and remedy, such a cause of action will be couched in the terms and language of the common law, which must be developed in accordance with section 8(2) and (3) of the Constitution, and consequently the remedy will emerge therefrom. The inherent flexibility of the common law should empower the courts to effect a harmony between it and the Constitution.²⁵⁹

The precise manner in which the Bill of Rights is enforced is best understood by describing the manner in which litigation which involves an alleged violation of the Bill of Rights is conducted.

It is required that a limitation of a fundamental right must find expression in ‘law of general application’. This is obviously intended to give expression to the concepts found in the rule of law. The limitation clause²⁶⁰ plays an important role in the

Section 168(3) of the 1996 Constitution:

“The Supreme Court of Appeal may decide appeals in any matter. It is the highest court of appeal except in constitutional matters, and may decide only –

- (a) appeals;
- (b) issues connected with appeals; and
- (c) any other matter that may be referred to it in circumstances defined by an Act of Parliament.”

Section 170 of the 1996 Constitution:

“Magistrates’ Courts and all other courts may decide any matter determined by an Act of Parliament, but a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.”

²⁵⁸ Devenish, *A Commentary on the South African Bill of Rights* (1999) 4.

²⁵⁹ *Id* at 31.

²⁶⁰ 1996 Constitution, section 36 states:

- “(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

interpretation and application of the Bill of Rights and is fundamental to the kind of constitutional review involving the principle of proportionality, set out in the leading Canadian case of *R v Oakes*²⁶¹, involving a two stage process.²⁶²

The first stage involves asking the question: “has there been an infringement of a right protected by the Bill of Rights?” The nature and content of the fundamental right must be interpreted according to the principle of constitutional interpretation, as set out in section 39 of the Constitution²⁶³, in which democratic values and social policy play a crucial role. The definition of the scope of the right is the privilege of the judiciary. This scope is increased by the value-based method of interpretation authorized by section 39(2) of the Constitution.²⁶⁴ A limitation, unless there is an internal modifier, should be addressed separately under the second stage of the inquiry.²⁶⁵

The Constitution of South Africa is the supreme law of this country, and thus any conduct or law which is inconsistent with it, is invalid. Certain fundamental rights, to which juristic persons are also entitled, are entrenched in Chapter 2 of the Constitution. Chapter 2 is applicable to all law, therefore also to the law of delict, and does not only vertically bind the State (the legislature, the executive, the judiciary and all organs of the State), but also horizontally all natural and juristic persons.²⁶⁶ There is one main difference between constitutional law and private law, which is that private law deals with the relations between individuals in a state whereas, constitutional law is concerned with the relations between the individual and the State

²⁶¹ 1986 26 DLR 4th 200.

²⁶² Devenish *Op cit* note 258 at 543.

²⁶³ Section 39 of the 1996 Constitution states:

- “(1) When interpreting the Bill of Rights, a court, tribunal or forum –
- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law; and
 - (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
- (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.”

²⁶⁴ Devenish *Op cit* note 258.at 544.

²⁶⁵ *Ibid.*

²⁶⁶ Neethling *et al*, *Law of Delict*, 6th edition (2010) 16.

as well as the relationships between individuals within the state.²⁶⁷ The fundamental rights are not absolute rights as noted above. In determining the lawfulness of a limitation, all relevant factors must be taken into account, including the nature of the limitation, the relation between the limitation and its purpose, and less restrictive means of achieving this purpose.²⁶⁸ The vertical and horizontal application of the Constitution can take place in a direct as well as an indirect manner, although because of unavoidable overlaps a clear-cut distinction cannot be made between them.

The second stage of the enquiry, which only becomes operative if there has been an infringement of the relevant fundamental right, involves first asking whether the policy underlying the act or omission which caused the infringement is reasonable and justifiable in a free and open democratic society, and second, whether an acceptable method has been used for its implementation.²⁶⁹

There is a final stage in which the question of an appropriate remedy is considered. The Constitutional Court has dealt with the issue of apportionment of onus or burden of proof explicitly only in respect of the interpretation and limitation sub-stages. It held that “the task of interpreting the . . . fundamental rights rests, of course, with the courts, but it is for the applicants to prove the facts upon which they rely for the claim infringement of the particular right in question”.²⁷⁰ It is for the legislature or the party relying on the legislation to establish this justification (in terms of the limitation clause), and not for the party challenging it, to show that it was not justified.²⁷¹

4.2.1.1. DIRECT AND INDIRECT APPLICATION OF THE BILL OF RIGHTS

Before proceeding to explore the concept of constitutional rights further it is imperative to grasp the concept of direct and indirect application of the Bill of Rights.

²⁶⁷ Cockram, *Constitutional Law in the Republic of South Africa* (1975) 1. Controlling the relationships between individuals is the horizontal application of the Bill of Rights as opposed to the vertical application of the Bill of Rights, which is the controlling of the relationship between the State and individuals. The vertical application of the Bill of Rights implies a downward flow of power and authority.

²⁶⁸ Neethling, *et al Op cit* note 266 at 19. Section 36 of the 1996 Constitution.

²⁶⁹ Devenish, *A Commentary on the South African Bill of Rights* (1999) 545.

²⁷⁰ Currie, and De Waal, *The New Constitutional and Administrative Law* Volume 1 (2001) 320.

²⁷¹ *Ibid.*

Direct vertical application of the Bill of Rights means that the State must respect the fundamental rights of individuals and may therefore not infringe them except insofar as such infringement is reasonable and justifiable according to the limitation clause.²⁷²

Direct horizontal application entails that the courts must give effect to an applicable fundamental right by applying and, where necessary, developing the common law insofar as legislation does not give effect to that right, except where it is reasonable and justifiable to develop the common law to limit the right in accordance with the limitation clause. The fundamental rights relevant to the law of delict must in this manner find application.²⁷³ The entrenchment of fundamental rights in the Bill of Rights enhances their protection and gives them a higher status in that all law, state actions, court decisions and even the conduct of natural and juristic persons may be tested against them, taking into account the fact that any limitation of a fundamental right must be in accordance with the limitation clause of the Constitution. It is submitted that in exercising this value judgment, the general principles, which have already been entrenched in our law with regard to the reasonableness or *boni mores* criterion for delictual wrongfulness may serve as *prima facie* indications of the reasonableness of a limitation in terms of the Bill of Rights. In the case of an infringement of or threat to a fundamental right, a prejudiced or threatened person is entitled to approach a competent court for appropriate relief.²⁷⁴

The indirect operation of the Bill of Rights means that all private law rules, principles or norms – including those regulating the law of delict – are subjected to, and must therefore be given content in the light of the basic values of Chapter 2 of the Constitution.²⁷⁵ This promoting of the spirit, purport and objects of the Bill of Rights will in all probability deliver the same results as the direct application of the Bill of Rights, and applies in particular to the so-called open-ended or flexible delictual principles, and the *boni mores* test for wrongfulness, the imputability test for legal causation, and the reasonable person test for negligence.²⁷⁶

²⁷² Section 36 of the 1996 Constitution.

²⁷³ Neethling, *et al*, *Law of Delict*, 6th edition (2010) 17.

²⁷⁴ *Id* at 19 - 20.

²⁷⁵ The 1996 Constitution.

²⁷⁶ Neethling *et al*, *Law of Delict*, 6th edition (2010) 20.

In addition to the applicant's onus at the substantive stage of litigation, the applicant must also show at the preliminary (procedural) stage of litigation that the Bill of Rights applies to the challenged law or conduct, that the issue is justiciable, that he or she has standing, and that he or she is in the right forum to obtain the desired relief²⁷⁷. Only once these issues have been decided in the applicant's favour, and a violation of the Bill of Rights is found, will the party relying on the validity of the challenged decision or legislation be called upon to justify it in terms of section 36 of the Constitution, the limitation clause.²⁷⁸

As far as the retrospective application of the Bill of Rights is concerned, it must be noted that neither the Interim nor the 1996 Constitution provides for this. This rule does not inhibit the courts from applying the Bill of Rights indirectly to the law, for instance, by developing the common law or reading a statute down, even if the statute arose before the commencement of the Constitution.²⁷⁹ In *Zimbabwe Township Developers v Lou's Shoes* 1984 2 SA 778 (ZSC) at 783 Georges CJ states as follows:

“Clearly a litigant who asserts that an Act of Parliament or a regulation is unconstitutional must show that it is. In such a case the judicial body charged with deciding the issue must interpret the constitution and determine its meaning and thereafter interpret the challenged piece of legislation to arrive at a conclusion as to whether it falls within that meaning or it does not. That challenged piece of legislation may, however, be capable of more than one meaning. If that is the position, then, if one possible interpretation falls within the meaning of the constitution and the others do not, then the judicial body will presume that the lawmakers intended to act constitutionally and uphold the piece of legislation so interpreted ... One does not interpret in a restricted manner in order to accommodate the challenged legislation. The constitution must be properly interpreted, adopting the approach accepted above. Thereafter the challenged legislation is examined to discover whether it can be interpreted to fit into the framework of the constitution.”²⁸⁰

²⁷⁷ Currie, and De Waal, *The New Constitutional and Administrative Law* Volume 1 (2001) 321.

²⁷⁸ *Ibid.*

²⁷⁹ Currie, and De Waal, *The New Constitutional and Administrative Law* Volume 1 (2001) 27 - 28.

²⁸⁰ *Zimbabwe Township Developers v Lou's Shoes* 1984 2 SA 778 (ZSC) at 783. Currie, and De Waal, *The New Constitutional and Administrative Law* Volume 1 (2001) 326.

The question of who bears the onus when considering the appropriate relief for unconstitutional legislation or conduct is more complicated. When the Bill of Rights is indirectly applied, an ordinary legal remedy is granted and the ordinary legal rules apply in respect of the burden of proof. When the Bill of rights is directly applied, the remedy which flows from a finding of inconsistency between the Bill of Rights and law or conduct is for the court to invalidate the offending law or conduct. A party proposing a variation of this form of relief in terms of section 172(1)(b)(i) and (ii) of the Constitution²⁸¹ or additional relief must justify such a request.²⁸²

It must be stated that in practice the indirect application of the Bill of Rights to the law must always be considered before its direct application to law or conduct²⁸³. The reason for this is the principle, laid down by the Constitutional Court in an early decision, that where it is possible to decide a case without reaching a constitutional issue, that is the course that should be followed.²⁸⁴ Where a legal dispute cannot be resolved without reference to the Constitution, the principle clearly prefers indirect application of the Bill of Rights over direct application²⁸⁵. The Bill of Rights contains a set of values that must be respected whenever ordinary law is interpreted, developed or applied²⁸⁶. This form of application is termed the indirect application of the Bill of Rights. When indirectly applied, the Bill of Rights does not override ordinary law or generate its own remedies; nevertheless, being part of the Constitution legal remedies must conform to it²⁸⁷. The special rules contained in the Constitution that handle the procedural issues of standing and the jurisdiction of the courts are also irrelevant. Rather, the Bill of Rights respects the procedural rules and remedies of ordinary law, but demands furtherance of the values of the Bill of Rights through the operation of ordinary law.²⁸⁸

De Waal, Currie and Erasmus²⁸⁹ identify that the indirect application of the Bill of Rights to the common law can take many forms:

²⁸¹ The 1996 Constitution.

²⁸² Currie, and De Waal, *The New Constitutional and Administrative Law* Volume 1 (2001) 322.

²⁸³ De Waal, Currie, and Erasmus, *The Bill of Rights Handbook*, 4th edition (2001) 37.

²⁸⁴ *S v Mhlungu* 1995 3 SA 867 (CC) para 59.

²⁸⁵ De Waal *et al Loc cit* note 283.

²⁸⁶ *Ibid.*

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid.*

²⁸⁹ De Waal, Currie, and Erasmus, *The Bill of Rights Handbook*, 4th edition (2001) 75.

- a) The first method is to argue for a change in the existing principles of the common law so that the law gives improved effect to the Bill of Rights. This argument has been made in the areas of defamation and restraint of trade.²⁹⁰ The Supreme Court of Appeal has now revised its approach to defamation in cases involving the media and the press, albeit with little reference to the Bill of Rights in *National Media Ltd v Bogoshi*.²⁹¹
- b) The second method is to ‘apply’ the common law with due regard to the Bill of Rights. As Currie *et al* have observed, this method was employed by Davis AJ in *Rivett-Carnac v Wiggins*.²⁹² In that case, Davis AJ declined to consider the constitutionality of the presumption relating to *animus iniuriandi* in defamation cases, but clearly took the Bill of Rights into account in reaching the conclusion that the statements made in the case were not defamatory.²⁹³ Section 35(3) of the interim Constitution provided that in the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of the Bill of Rights. In the new section 39 (2)²⁹⁴ reference to the application of the common law is omitted but the provision for development of the common law is retained.²⁹⁵ In the *Rivett-Carnac* case²⁹⁶ Davis AJ, it seems, applied the common law with due regard to the Bill of Rights and the question is posed as to whether this approach is still permissible under the 1996 Constitution²⁹⁷. The answer is that there is no difference between ‘a development’ and ‘an application’ of the common law. Every development presupposes an application and almost every application results in a development. Under the 1996 Constitution, the approach of Davis

²⁹⁰ See *Potgieter v Killian* 1996 (2) SA 276 (N) and *Rivett-Carnac v Wiggins* 1997 (3) SA 80 (C). De Waal, Currie, and Erasmus, *The Bill of Rights Handbook*, 4th edition (2001) 75.

²⁹¹ 1998 4 SA 1196 (SCA). In this case, the defence by the newspaper was two-fold: firstly, that the application was not unlawful and was constitutionally protected and, secondly, that the distributor and printer were unaware of the defamatory nature of the article. The Court held that it had not applied the Constitution indirectly – through section 35(3) of the interim Constitution (now section 39(2)) but that it nevertheless regarded the conclusion it had reached to conform with the Constitution.

²⁹² 1997 3 SA 80 (C) at 573D. De Waal, Currie, and Erasmus, *The Bill of Rights Handbook*, 4th edition (2001) 76.

²⁹³ De Waal, Currie, and Erasmus, *The Bill of Rights Handbook*, 4th edition (2001) 76.

²⁹⁴ The 1996 Constitution.

²⁹⁵ De Waal *et al Loc cit* note 293.

²⁹⁶ 1997 3 SA 80 (C).

²⁹⁷ De Waal *et al Loc cit* note 293.

AJ will therefore meet the criteria as a permissible development of the common law in terms of section 39(2) of the Constitution.²⁹⁸

- c) The third method, which is closely related to the second, is to give content to vague and open-ended common-law concepts, such as ‘public policy’ or ‘contra *bonos mores*’ or ‘unlawfulness’.²⁹⁹ This concept was explained in *De Klerk v Du Plessis*³⁰⁰ by Van Dijkhorst J as follows:
- “Section 35(3)[IC] is intended to permeate our judicial approach to interpretation of statutes and the development of the common law with the fragrance of the values in which the Constitution is anchored. This means that whenever there is room for interpretation or development of our virile system of law that is to be the point of departure. When in future the unruly horse of public policy is saddled, its rein and crop will be that value system.”³⁰¹
- d) The fourth and final method is that in the case of contracts, to interpret contracts with reference to the values entrenched in the Bill of Rights. This method is confined to contracts.³⁰² For example in *Farr v Mutual and Federal Insurance*³⁰³ Louw J interpreted the word ‘family’ to include members of a permanent homosexual relationship in which the partners lived together.

In respect of common-law disputes, the direct application of the Bill of Rights makes little sense. A Constitutional Court declares legislation unlawful because it is the role of the legislature and not the courts to remedy the defect in the legislation. But the correction of the common law is the role of the courts. Therefore, rather than strike down an unconstitutional provision of the common law, the court will reformulate it. Whenever a rule of the common law is inconsistent with the Bill of Rights the rule needs to be changed, or developed. And, as far as common law disputes are concerned, there seems little difference between the indirect application of the Bill of

²⁹⁸ De Waal, Currie, and Erasmus, *The Bill of Rights Handbook*, 4th edition (2001) 76.

²⁹⁹ *Ibid.*

³⁰⁰ 1995 2 SA 40 (T).

³⁰¹ *De Klerk v Du Plessis* 1995 2 SA 40 (T) at 127. De Waal, Currie, and Erasmus, *The Bill of Rights Handbook*, 4th edition (2001) 76 - 77.

³⁰² De Waal *et al Op cit* note 298 at 77.

³⁰³ 2000 3 SA 684 (C). *Ibid.*

Rights to the common law in terms of section 172(1)³⁰⁴ and, for that matter, the direct application of the Bill of Rights to private or state conduct. In each case a common-law remedy needs to be fashioned to cater for the infringement of a fundamental right.³⁰⁵ In most cases, this will mean that an existing common law remedy is extended to apply to a new set of circumstances; but in some cases a court will be asked to develop a completely new remedy as will be illustrated with regards to constitutional damages in Section 4.3.3. below. The question is then whether there are any limits on the indirect application of the Bill of Rights to the common law.³⁰⁶

We turn now to compare and contrast the horizontal and vertical applications of the Bill of Rights.

4.2.1.2. HORIZONTAL AND VERTICAL APPLICATION OF THE BILL OF RIGHTS

This section will firstly discuss the horizontal application of the Bill of Rights, followed by the vertical application of the Bill of Rights.

The extent and nature of the horizontal application is a matter of profound jurisprudential controversy. In this regard there are two antithetical views as presented by Devenish and expressed respectively by Mahomed DP and Kriegler J in the contentious judgment of the Constitutional Court in *Du Plessis v De Klerk*.³⁰⁷ Firstly, there is the approach of Mahomed DP, who adopts the view that all conduct by persons in contemporary society is underpinned by law and consequently a horizontal application of the Bill of Rights must indeed impact on all private relationships between persons³⁰⁸. Second, there is the standpoint of Kriegler J, who proposes that there is indeed an area of private conduct into which the law does not encroach, and consequently even a horizontal application of the Bill of Rights would have no relevance or impact in relation to such an area of conduct.³⁰⁹

³⁰⁴ *Supra* at 228.

³⁰⁵ De Waal *et al Loc cit* note 302.

³⁰⁶ *Id* at 78.

³⁰⁷ 1996 3 SA 850 (CC) para 45, 49, 57 and 62

³⁰⁸ Devenish, *A Commentary on the South African Bill of Rights* (1999) 20.

³⁰⁹ *Ibid*.

The Constitutional Court may find that statutory bodies are bound by Chapter 2 of the Constitution. The problem arises with regards to completely private bodies that have no statutory basis. Here the Constitutional Court may find that the conduct of these bodies is wholly or partly exempted from the application of Chapter 2 of the Constitution. Each case in which the horizontal application of fundamental rights is claimed by an individual will have to be examined and decided according to the circumstances and merits of the particular case.³¹⁰

Since the Bill of Rights does not provide for a hierarchy of fundamental rights, the Constitutional Court will have to decide which particular right would apply in the event of a conflict between two rights, flowing from the horizontal application of the Bill of Rights.³¹¹ The horizontal application of fundamental rights in appropriate circumstances must indeed have a significant impact on our jurisprudence. This is part of the paradigmatic shift that the 1996 Constitution and its justiciable rights must inevitably produce.³¹²

Section 8 (1)³¹³ stipulates that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and *all organs of state*.³¹⁴ Therefore, since the Bill of Rights applies to all law, it applies to legislation, common and indigenous law that impacts and regulates private relationships.³¹⁵ It is clear that section 8 (1)³¹⁶ applies to all law in all its forms. Section 8 (2) of the Constitution stipulates that the Bill of Rights binds natural and juristic persons if and to the extent that it is applicable, taking into account the nature of the right and the duty imposed by the right. A careful consideration of all the jurisprudential and semantic factors indicates that the purpose of section 8(2) of the Constitution is to extend the application of Chapter 2 beyond the ambit of public law into the realm of the conduct of private persons. In effect it is submitted that section 8(2) of the Constitution mandates a court

³¹⁰ Devenish *Op cit* note 308 at 24.

³¹¹ *Id* at 26. Although the Bill of Rights does not provide for a hierarchy of fundamental rights, it does provide that some rights are non-derogable, such as those encompassed in sections 37, 30 and 31 of the 1996 Constitution.

³¹² Devenish, *A Commentary on the South African Bill of Rights* (1999) 27.

³¹³ The 1996 Constitution.

³¹⁴ *Supra* Chapter 2. Indicating the inclusion of the Social Welfare Department.

³¹⁵ Devenish *Op cit* note 312 at 28.

³¹⁶ The 1996 Constitution.

of law to examine all private relationships to determine whether a constitutional principle is applicable to such a relationship.³¹⁷

The purpose of section 8(3)³¹⁸ is to guarantee that when an explicit rule of the common law exists to address a relationship to which a Chapter 2 right applies, the court concerned should regard the common law rule as a starting point and then develop it to give effect to the right concerned. In so doing, the court may restrict the ambit of the right in accordance with the prescriptions of the limitation test, as set out in section 36(1) of the Constitution. One of the distinctive characteristics of the common law system is that it is dynamic in character and is therefore able to adapt to changing circumstances.³¹⁹

4.2.2. NEGATIVE AND POSITIVE RIGHTS

Prior to 1993, South Africa was not a constitutionally democratic society, but rather a society based on parliamentary sovereignty. Democracy tended to succumb to the opinion of a particular minority³²⁰. Consequentially, there was no equality before the law and the concept of fundamental rights was a distant dream. At the beginning of the twenty first century the 1996 South African Constitution is a beacon of hope in a world inundated with conflict, poverty and the failure of governments to perform the tasks for which they were elected.³²¹

One of the most important functions of a modern constitution is to set limits on the exercise of public power. A constitution should give a government enough power to govern, but should not allow it to abuse such power. The Bill of Rights gives legal protection to the traditional liberal rights of equality, personal liberty, property, free speech, assembly and association, and the civil and political rights. These are negative rights, which take power away from government.³²²

³¹⁷ Devenish, *A Commentary on the South African Bill of Rights* (1999) 30.

³¹⁸ The 1996 Constitution.

³¹⁹ Devenish, *A Commentary on the South African Bill of Rights* (1999) 31.

³²⁰ Currie, and De Waal, *The New Constitutional and Administrative Law* Volume 1 (2001) 20.

³²¹ *Ibid.*

³²² Currie *et al Op cit* note 320 at 29.

Positive rights, which impose obligations on the State, have also been included in the Bill of Rights.³²³ Thus, rather than simply protecting members of society from the abuse of state power, it is thought³²⁴ that a constitution and a Bill of Rights should secure for all members of society a basic set of social goods. There is the argument that such socio-economic rights³²⁵ are non-justiciable and therefore should not be enforceable against the State by the judiciary since the judiciary is a privileged, undemocratically appointed branch of the State, thus making the judiciary an unsuitable institution to determine the manner in which the Executive utilizes the State's resources.³²⁶ This is indicative of the argument relating to the separation of powers, which will be discussed below under Section 5.6 *infra*.

4.2.2.1. SOCIO-ECONOMIC RIGHTS

Socio-economic rights are positive rights and include the right to social security, which is the focus of this dissertation.

Traditionally, socio-economic rights are distinguished from civil and political rights. Rather than being prohibitory, socio-economic rights oblige the State to (within its available resources) secure a basic set of social goals. It is stated by Currie and De Waal in their work, *The New Constitutional and Administrative Law*³²⁷, that it has been argued that since these are positive rights and that their application requires the courts to direct the way in which the government distributes the State's resources, they are beyond the proper scope of the judicial function. Such actions so the argument goes are beyond the judiciary's traditional function in that such function is not to direct how the State's resources are to be utilized, but, rather, to ensure that the enacted law is correctly interpreted and applied. However, the fact is that in South Africa, socio-economic rights are expressly included in the Bill of Rights³²⁸ and there is no indication in the text itself that they are non-justiciable.

³²³ *Id* at 30.

³²⁴ *Ibid*.

³²⁵ Socio-economic rights include the rights to housing (section 26 of the Bill of Rights), healthcare, food, water and social security (section 27 of the Bill of Rights).

³²⁶ Currie *et al Op cit* note 320 at 321.

³²⁷ *Id* at 398.

³²⁸ Refer to footnote 311 above.

As the Constitutional Court held in *Government of the Republic of South Africa v Grootboom*³²⁹, socio-economic rights cannot exist on paper only, the courts must be enabled to enforce them. The question is how to enforce them.³³⁰ It has been argued that their application requires the courts to direct the way in which the State distributes the State's resources and is thus beyond the scope of the judicial function. This is because the judiciary is usually an elite and undemocratically appointed branch of the State. Therefore, it lacks the democratic legitimacy due to the separation of powers necessary to decide on the division of social resources between factions, groups, and communities in society.³³¹

However, the enforcement of these rights may also have an influence on the development of the common law applicable to disputes between private parties.³³² Section 38³³³ confers standing on a broad range of individuals and groups to approach courts for 'appropriate relief', alleging that a right in the Bill of Rights has been infringed or threatened. In terms of section 172(1) of the Constitution, the courts have broad remedial powers in constitutional matters, including the power to declare any law or conduct that is inconsistent with the Constitution invalid and to make 'any order that is just and equitable'.³³⁴

The Bill of Rights was conceived and designed to protect individuals against abuse of state power. The relationship between the individual and the State is not one of equality, since the State is obviously more powerful and has far more resources than any individual.³³⁵ It is clear that Chapter 2³³⁶ applies to all law in force, which must of necessity, include the common law, such as the law of property, the law of succession, the law of contract and customary or indigenous law. Furthermore, the phrasing of many specific provisions of the Bill of Rights, such as those that address

³²⁹ 2001 1 SA 46 (CC), 2000 11 BCLR 1169 (CC).

³³⁰ Currie, and De Waal *Loc cit* note 326.

³³¹ Currie, and De Waal, *The New Constitutional and Administrative Law* Volume 1 (2001) 30. See separation of powers discussed *infra* under Section 5.6.

³³² Andrews, and Ellmann, (Editors), *The Post Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 426.

³³³ The 1996 Constitution.

³³⁴ Andrews, and Ellmann *Loc cit* note 332.

³³⁵ Devenish, *A Commentary on the South African Bill of Rights* (1999) 24.

³³⁶ The 1996 Constitution.

children and labour relations, indicates clearly that they have a horizontal application.³³⁷

Generally speaking, socio-economic rights can at least be negatively enforced. They prohibit the State from adopting ‘deliberately retrogressive measures’ such as, for instance, depriving citizens of existing rights.³³⁸ The positive dimension of socio-economic rights requires the State to adopt reasonable measures to fulfill the socio-economic rights.³³⁹ Even though a considerable margin of discretion is given to the State in this regard, a court may still evaluate the reasonableness of the measures implemented. In *Government of the Republic of South Africa v Grootboom*³⁴⁰ the Constitutional Court found the measures of the State to provide housing to be unreasonable³⁴¹ since they made no provision for temporary shelter for homeless people. This omission was unreasonable since it ignored those who are most in need. The requirement of reasonableness also means that the courts can require an explanation from the State of the measures chosen to fulfill the socio-economic rights or they can require the State to give an account of its progress in implementing such measures.³⁴² The State, in essence, has an obligation to justify the means it chooses to fulfill its obligation to realize socio-economic rights. The positive dimension of the socio-economic rights is qualified by the use of the phrase employed in section 26(2) and 27(2) of the Constitution obliging the State to take those steps ‘within its available resources, to achieve the progressive realization of ... [the] right’. Despite these qualifications, the central question remains, namely, whether the State has acted reasonably.³⁴³ In answering this question, the words ‘progressively realize’ afford some flexibility to the State, but should not be read to detract from the obligation to move as expeditiously and effectively as possible towards the goal of realizing the socio-economic rights. A genuine absence of resources is a reasonable excuse for not

³³⁷ Devenish *Op cit* note 335 at 25.

³³⁸ *Ibid.* A negative violation of the right to housing would be, for example, to create homelessness through forced eviction without provision of alternative accommodation. In 1996, South Africa took the bold step of including directly enforceable socio-economic rights in its new Constitution, Wesson, ‘Grootboom and Beyond: Reassessing the Socio-economic Jurisprudence of the South African Constitutional Court’ (2004) 20 *SAJHR* 284.

³³⁹ *Ibid.*

³⁴⁰ 2001 1 SA 46 (CC), 2000 11 BCLR 1169 (CC).

³⁴¹ Currie, and De Waal, *The New Constitutional and Administrative Law* Volume 1 (2001) 398 - 399.

³⁴² *Id* at 399.

³⁴³ Currie, and De Waal *Loc cit* note 341.

fulfilling the rights, but only if the State is able to justify its use of those resources at its disposal.³⁴⁴

Despite the strong statements of the Constitutional Court in *Government of the Republic of South Africa v Grootboom*³⁴⁵ about the justiciability of socio-economic rights, it remains difficult to envisage effective judicial remedies for their enforcement. In so far as the negative aspect of the right is infringed, the appropriate remedy would in most cases be a declaration of invalidity of the infringing measure. In respect of a failure to fulfill a positive measure, more innovative measures will have to be developed to vindicate the Constitution. So far, the structural interdict and declaratory relief have been granted³⁴⁶. More effective forms of relief are likely to be granted in the future³⁴⁷, as has been indicated by the progressive granting of constitutional damages.

4.2.3. ADMINISTRATIVE ACTION – SECTION 33 OF THE CONSTITUTION

Under the common law, where a duty lies with the administrative authority to perform some or other action, the authority cannot refuse to do so.³⁴⁸ Any such refusal or failure to act by the administrative authority within a reasonable time would allow an individual who is adversely affected to launch an application for a *mandamus* to force the authority to act positively. The use of this ground of review was confirmed after the adoption of the 1993 Constitution. Section 24(a)³⁴⁹ entitled every person to lawful administrative action where any of his or her rights or interests were affected or threatened. The dominant approach has been followed in so far as section 33(1) of the 1996 Constitution³⁵⁰ is concerned³⁵¹.

³⁴⁴ *Ibid.*

³⁴⁵ 2001 1 SA 46 (CC), 2000 11 BCLR 1169 (CC).

³⁴⁶ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC), 2000 11 BCLR 1169 (CC). Currie, and De Waal, *The New Constitutional and Administrative Law* Volume 1 (2001) 399.

³⁴⁷ Currie, and De Waal, *The New Constitutional and Administrative Law* Volume 1 (2001) 399.

³⁴⁸ *Ibid.*

³⁴⁹ Act 59 of 1959. *Supra* 229.

³⁵⁰ *Supra* 3.

³⁵¹ De Ville, *Judicial Review of Administrative Action in South Africa*, revised 1st edition (2005) 184.

Relating to the example of administrative law, the Draft Bills of the Promotion of Administrative Justice Act³⁵² of the South African Law Commission from 1986 to 1994 did not contain an express provision relating to a refusal or failure to take a decision although it could be seen to have been included in the catchall phrase ‘that the decision is otherwise contrary to law.’³⁵³ The Draft Bill of the Project Committee of the South African Law Commission in January 1999 similarly did not include an express reference to this ground of review. The definition of administrative action, providing that it ‘means any act performed, decision taken or rule or standard made, or which should have been performed, taken or made,’ was wide enough to include a failure or refusal to act. One of the remedies provided for in the Draft Bill was ‘directing the organ of state or natural or juristic person concerned to act.’ Express provision for a refusal or failure to take a decision as a ground of review, was made during the committee stage of the drafting process.³⁵⁴

During the second reading debate of the Bill, Adv JH de Lange stated that the express inclusion of the provision for a refusal or failure to take a decision as a ground of review stems from submissions made by churches and the Black Sash concerning members’ and clients’ experiences with state departments, specifically the inordinate delays in the processing of applications for benefits.³⁵⁵ This provision in the Bill, would particularly advantage ‘the rural poor and the disadvantaged’. The statement of de Lange that ‘[w]e have now created, for the first time in this country, a special review, according to which there is a duty on someone to take a decision within a reasonable period – they must do so’³⁵⁶ is somewhat of an overstatement. This ground of review is not completely new to administrative law.³⁵⁷

³⁵² Act 3 of 2000.

³⁵³ Clause 3(1)(h) of the November 1992 Draft Bill and clause 3(1)(i) of the 1994 Draft Bill.

³⁵⁴ De Ville, *Judicial Review of Administrative Action in South Africa*, revised 1st edition (2005) 184 - 185.

³⁵⁵ De Ville, *Judicial Review of Administrative Action in South Africa*, revised 1st edition (2005) 184.

³⁵⁶ *Hansard* Tuesday 25 January 2000 279 at 287.

³⁵⁷ De Ville, *Judicial Review of Administrative Action in South Africa*, revised 1st edition (2005) 184 - 185.

4.2.3.1. ADMINISTRATIVE ACTION AS A LENS FOR EXAMINING CONSTITUTIONAL DAMAGES

An important question is whether challenges to administrative action which infringes fundamental rights are to take place in terms of section 6(2)(i) of the PAJA³⁵⁸, or in terms of the Constitution.

Currie and Klaaren³⁵⁹ point out that if infringements of fundamental rights are to be challenged in terms of PAJA, all the remedial and procedural requirements of the Act³⁶⁰ would be applicable to such challenges. They advise against such an interpretation of PAJA.

“Legislation giving effect to section 33³⁶¹ should not overreach itself and seek to control (and, through procedural provisions such as s7 (1)³⁶², to limit) any constitutional challenge to administrative action. PAJA provides statutory causes of action substituting for direct constitutional challenges within the scope of application of the right to administrative justice³⁶³.”

Should section 7 of PAJA be interpreted in line with the Constitution or declared invalid in so far as it conflicts therewith, the Constitution empowers PAJA. PAJA is not independent from section 33 of the Constitution. Administrative action which is conflicting with the Constitution would then also be invalid in terms of section 6(2) of PAJA.³⁶⁴

³⁵⁸ Section 6(2)(i) of PAJA states:

“(2) A court or tribunal has the power to judicially review an administrative action if –
i) the action is otherwise unconstitutional or unlawful.”

³⁵⁹ Currie and Klaaren *The Promotion of Administrative Justice Benchbook* (2001) 174.

³⁶⁰ The procedural and remedial requirements of Act 3 of 2000 are envisaged in sections 3, 6, 7 and 8.

³⁶¹ The 1996 Constitution.

³⁶² Section 7(1) of Act 3 of 2000 states:

“(1) Any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date-
a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or
b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.”

³⁶³ Currie and Klaaren *The Promotion of Administrative Justice Benchbook* (2001) 174.

³⁶⁴ De Ville, *Judicial Review of Administrative Action in South Africa*, revised 1st edition (2005) 192 - 193. Section 6(2) of PAJA states:

“(2) A court or tribunal has the power to judicially review an administrative action if-

PAJA nevertheless appears to contain various provisions which place an *onus* on the authority in relation to challenges to the validity of administrative action. When a public authority fails to furnish adequate reasons for a decision in circumstances required to do so, the *onus* will be on the public authority to show that the decision falls within ‘good reason’.³⁶⁵

Under the Bill of Rights the infringement of a fundamental right by administrative action would have to be authorized by a law of general application in terms of section 36 of the Constitution. If it is not, such infringement would be invalid. Where the infringement of a fundamental right is authorized by legislation which has passed constitutional scrutiny, the administrative action can still be challenged³⁶⁶ in that the infringement does not comply with the requirement of proportionality (or that any of the grounds of review in section 6 (2) of PAJA³⁶⁷, are present). Case law supports the argument that where an infringement of a fundamental right is alleged to have taken place, the person affected will have to prove the facts indicating an infringement of

-
- a) the administrator who took it-
 - i) was not authorized to do so by the empowering provision;
 - ii) acted under a delegation of power which was not authorized by the empowering provision; or
 - iii) was biased or reasonably suspected of bias;
 - b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
 - c) the action was procedurally unfair;
 - d) the action was materially influenced by an error of law;
 - e) the action was taken-
 - i) for a reason not authorized by the empowering provision;
 - ii) for an ulterior purpose or motive;
 - iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
 - iv) because of the unauthorized or unwarranted dictates of another person or body;
 - v) in bad faith; or
 - vi) arbitrarily or capriciously;
 - f) the action itself-
 - i) contravenes a law or is not authorized by the empowering provision; or
 - ii) is not rationally connected to-
 - aa) the purpose for which it was taken;
 - bb) the purpose of the empowering provision;
 - cc) the information before the administrator; or
 - dd) the reasons given for it by the administrator;
 - g) the action concerned consists of a failure to take a decision;
 - h) the exercise of the power or the performance of the function authorized by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or
 - i) the action is otherwise unconstitutional or unlawful.”

³⁶⁵ De Ville, *Judicial Review of Administrative Action in South Africa*, revised 1st edition (2005) 315.

³⁶⁶ *Ibid.*

³⁶⁷ Act 3 of 2000.

that fundamental right or showing that they are entitled to exercise the right. The onus of proof will be on the party attempting to uphold the validity of the administrative action to prove the facts showing the absence of a ground of review. The above would also apply in the case where a final or temporary interdict is sought.³⁶⁸

4.2.4. THE EMERGENCE OF CONSTITUTIONAL DAMAGES

The case of *Mahambehlala v Member of the Executive Council for Welfare, Eastern Cape Province Government and Another*³⁶⁹ provides our starting point in the emergence of constitutional damages.

The applicant in this case had applied for a disability social grant on the 7th of March 2000. By October of the same year her application had still not been considered and she therefore brought an application to court for a *mandamus*. On the date of the hearing the State consented to an order that the department concerned consider her application within fifteen days. On the day following the court order, her application was granted. In December the matter was heard again to determine the date from which the grant would be payable. Leach J stated that the nature of the application was such that a period of three months to consider whether or not it should be granted could be regarded as a reasonable amount of time. The failure to consider the application within this time-period constituted an infringement of the applicant's right to lawful and reasonable administrative action. The applicant was therefore entitled to back payment from the 7th of June 2000. Interest on arrears would be payable to the applicant from the date on which the application should have been granted to date of payment.³⁷⁰ The competency of a court to grant this form of relief has now been called into question by the Supreme Court of Appeal.

³⁶⁸ De Ville *Op cit* note 365 at 320.

³⁶⁹ 2001 9 BCLR 899 (SE), 2002 1 SA 342 (SE).

³⁷⁰ 2001 9 BCLR 899 (SE) 909D-E, 2002 1 SA 342 (SE) 354. De Ville *Op cit* note 356 at 185.

In *Jayiya v MEC for Welfare, Eastern Cape Provincial Government and Another*³⁷¹, Conradie JA for the Supreme Court of Appeal held that an award (in a lump sum) of back payment and interest thereon (in circumstances similar to those in *Mahambehlala v Member of the Executive Council for Welfare, Eastern Cape Province Government and Another*³⁷²) was not a competent form of relief under section 8 of PAJA. He pointed out that PAJA instead provides for compensation³⁷³ to be awarded in exceptional circumstances. It is not clear from the judgment whether an award for back payment and interest would qualify as ‘compensation’. A finding that this form of relief is not competent under section 8 effectively ignores the introductory words of section 8 (1), providing that a court may grant ‘any order that is just and equitable.’ It is submitted that an award as in the *Mahambehlala’s* case³⁷⁴ should in appropriate circumstances be competent under section 8 of PAJA as the order provided is the only ‘just and equitable’ order that can be made in the circumstances.³⁷⁵

According to Kriegler J in *Fose’s* case³⁷⁶, as is the case with the common law, constitutional rights and remedies are complementary. The nature of a remedy is determined by its object. The harm caused by violating constitutional rights is a harm to society as a whole. The violation impedes the realization of the constitutional project of creating a just and democratic society. Therefore the object in awarding a remedy should be, at least, to vindicate the Constitution and deter future infringements. Vindication is necessary because harm to constitutional rights, if not addressed, will diminish the public’s confidence in the Constitution.³⁷⁷

The judiciary therefore bears the burden of vindicating rights by striking effectively at the source of their infringement.³⁷⁸

³⁷¹ 2003 2 ALL SA 223 (SCA) para 9, 16 - 18.

³⁷² 2001 9 BCLR 899 (SE), 2002 1 SA 342 (SE).

³⁷³ Section 8 (1) (c) (ii) (bb) of Act 3 of 2000.

³⁷⁴ 2002 1 SA 342; 2001 JDR 327 (SE).

³⁷⁵ De Ville *Op cit* note 365 at 186.

³⁷⁶ 1997 3 SA 786 (CC) para 96.

³⁷⁷ 1997 3 SA 786 (CC) paras 19, 87, 94, 96, and 98 – 99.

³⁷⁸ De Waal, Currie, and Erasmus, *The Bill of Rights Handbook*, 4th edition (2001) 173.

4.3. THE ‘NEW’ APPROACH TO THE PROVISION OF CONSTITUTIONAL DAMAGES UNDER THE CONSTITUTION

4.3.1. CONSTITUTIONAL CONCEPTS

Section 165(1) of the Constitution contains a simple declaration. The Section states that judicial authority of the republic vests in the courts. The exercise of judicial authority takes place when a tribunal, which acting under the authority of the State, decides commandingly and conclusively, controversies between subjects of the State, or between the State and its subjects.

The maxim *ubi ius ibi remedium* – where there is a right there is a remedy - expresses one of the most important principles of our law. This means that the existence of a legal right implies the existence of an authority with the power to grant a remedy if that right is infringed. A legal right will be incomplete if there is no remedy for enforcing it and, further, if no sanction attaches to a breach of that right. It is therefore of primary importance to any constitutional system that it makes provision for an institution that will decide whether a legal right has been breached and what remedy to provide or sanction to impose. In South Africa, the principal institution empowered to provide remedies and sanctions for a breach of the Constitution or the ordinary law is the judicial authority of the Republic, consisting of the courts and the judiciary which staffs them.³⁷⁹

From the outset it should be clear that the need for an effective remedy that achieves its purpose must be counterbalanced by the deference that a court owes to the other branches of government. As will be seen under Section 5.6. below, that this deference flows from the doctrine of separation of powers, which dictates that a court should be careful not to trespass onto the terrain of the legislature or the executive. Apart from budgetary implications, which loom large at the remedial stage of analysis, there are

³⁷⁹ Currie, and De Waal, *The New Constitutional and Administrative Law* Volume 1 (2001) 268.

questions of timing and of resistance or evasion.³⁸⁰ Any monetary award ordered by the courts envisages a budgetary implication to the state department which has to implement the award, although as commonly witnessed the state department may resist the award or just avoid it through sheer disobedience³⁸¹.

From our discussion in Section 4.2. of this Chapter it appears that an award of constitutional damages will only be regarded as appropriate relief if no other effective compensatory remedy is available. If such a remedy is available – and here delictual remedies in particular can often play an important part – the remedy will be regarded as appropriate constitutional relief if it effectively vindicates the relevant fundamental right and deters future infringements thereof³⁸². In this respect mention should be made of the possibility of the development of a ‘constitutional delict’, that is to say, where the infringement of a fundamental right *per se* constitutes a delict. It is submitted by Neethling *et al* that a clear distinction should be made between such a constitutional wrong and a delict.³⁸³ Even though these two concepts may overlap, the requirements for a delict and those for a constitutional wrong are essentially different.³⁸⁴ As a result, not every delict is necessarily also a constitutional wrong and *vice versa*. Contrasting a delictual remedy which is aimed at compensation, a constitutional remedy, even in the form of damages, is directed at affirming, enforcing, protecting, and vindicating a fundamental right and at preventing or deterring future violations of Chapter 2 rights.³⁸⁵ A constitutional wrong and a delict or their remedies should therefore not be treated alike.³⁸⁶

The purpose of section 8 (3) of the Constitution³⁸⁷ is to guarantee that when an explicit rule of the common law exists to address a relationship to which a Chapter 2 right applies, the court concerned should regard the common law rule as a starting

³⁸⁰ *Id* at 289.

³⁸¹ The government was called to Court in the case of *Nyathi v Member of the Executive Council for the Department of Health, Gauteng and Minister of Justice and Constitutional Department with the Centre for Constitutional Rights* CCT 19/07 [2008] ZACC 8; 2008 5 SA 94 (CC); 2008 9 BCLR 865 (CC) for disobedience to a court order. In *Kate v Member of Executive Council of Welfare* 2005 1 SA 141 SECLD the government resisted an order; see also *Welfare Department v Kate* 2006 SCA 46 (RSA).

³⁸² Neethling, *et al*, *Law of Delict*, 6th edition (2010) 19 - 20.

³⁸³ *Ibid*.

³⁸⁴ *Ibid*.

³⁸⁵ The 1996 Constitution. As clarified in Chapters 1, 3 and 4.

³⁸⁶ Neethling, *et al* *Loc cit* note 382.

³⁸⁷ The 1996 Constitution.

point and then develop it to give effect to the right concerned. In so doing, the court may restrict the ambit of the right in accordance with the prescriptions of the limitation test, as set out in section 36 (1) of the Constitution. One of the distinctive characteristics of a system of common law is that it is dynamic in character and is therefore able to adapt to changing circumstances.³⁸⁸

As Devenish³⁸⁹ has observed, the High Courts and, on one occasion, the Supreme Court of Appeal, have awarded ‘constitutional damages’³⁹⁰ in circumstances where no other form of relief seemed effective or appropriate. These cases deal with maladministration of social assistance grants and the failure to evict squatters from private property. We first consider the general approach to constitutional damages set out by the Constitutional Court in *Fose v Minister of Safety and Security*.³⁹¹ Thereafter, we briefly outline the development of new claims for damages through the indirect application of the Bill of Rights. In this area the Constitutional Court has led the way with the ground-breaking decision of *Carmichele v Minister of Safety and Security*³⁹², and with a number of judgments following suit, thus considerably expanding the liability of the State for personal injuries resulting from negligent conduct.³⁹³ However, a similar expansion in respect of pure economic loss for negligent administrative decision-making has been blocked by the Supreme Court of Appeal,³⁹⁴ thus resulting in a difference between the way the law of damages resulting in personal injury and pure economic loss has developed.

In *Fose’s* case³⁹⁵, the plaintiff sued the Minister for damages suffered as a result of an alleged assault and torture at the hands of the police. The plaintiff claimed under the usual delictual heads of damage: pain and suffering, loss of amenities of life and shock, *contumelia* and past and future medical expenses. However, in addition to these damages, the plaintiff sought ‘constitutional damages’ for the infringement of

³⁸⁸ Devenish, *A Commentary on the South African Bill of Rights* (1999) 31. Currie, and De Waal, *The Bill of Rights Handbook*, 5th edition (2005) 164, and 222.

³⁸⁹ *Ibid.*

³⁹⁰ *Kate v Member of Executive Council of Welfare* 2005 1 SA 141 SECLD; *Welfare Department v Kate* 2006 SCA 46 (RSA).

³⁹¹ 1997 3 SA 786 (CC).

³⁹² 2001 4 SA 938 (CC).

³⁹³ Currie, and De Waal, *The Bill of Rights Handbook*, 5th edition (2005) 220.

³⁹⁴ *Ibid.*

³⁹⁵ 1997 3 SA 786 (CC).

his constitutional right to dignity and the right not to be tortured³⁹⁶. Exception was taken to this aspect of the claim [the section of the claim wherein the plaintiff sought constitutional damages for the infringement of his constitutional right to dignity and the right not to be tortured], and the issue reached the Constitutional Court as an appeal against the upholding of the exception by the Supreme Court of Appeal. In its decision, the Constitutional Court stressed that it only had to decide the appeal before it, which was whether the constitutional damages claimed by the plaintiff would constitute ‘appropriate relief’ in the circumstances. It held that, in this case, an award of constitutional damages in addition to delictual damages would not be appropriate. Delictual damages were considered by the court to be an adequate vindication of the plaintiff’s constitutional rights. On the issue of punitive damages, it held that it was not persuaded that such damages would effectively deter the police from torturing suspects in the future. The court went on to state that in a country where there is a great demand on scarce public resources, it was inappropriate to use them to pay punitive damages to plaintiffs who were already compensated by delictual damages from the injuries caused to them. The funds could be better employed in structural and systemic ways to eliminate or substantially reduce the cause of infringements (possibly through structural interdicts the use of which has increased in recent cases).³⁹⁷

4.3.2. INDIRECT APPLICATION OF THE BILL OF RIGHTS AND THE DEVELOPMENT OF A NEW DAMAGES CLAIM

4.3.2.1. COMMON LAW: DELICT

³⁹⁶ Currie, and De Waal, *The Bill of Rights Handbook*, 5th edition (2005) 220.

³⁹⁷ *Id* at 221. Bearing in mind that compensation is the normal form of delictual damages, thus compensation is merely the calculation of the economic loss experienced by the affected individual. Punitive damages on the other hand are financial damages in addition to the normal compensation. Punitive damages have been experienced in administrative law. For further discussion on punitive and compensation calculation refer to chapter 3 above. Structural interdicts were used in *Strydom v Minister of Correctional Services* 1999 3 BCLR 342 (W) and in *Grootboom v Oostenberg Municipality* 2000 3 BCLR 277 (C); *City of Cape Town v Rudolph* 2004 5 SA 39 (C) and in *Rail Commuter Action Group v Transnet Ltd t/a Metrorail* 2003 5 SA 518 (C); *Treatment Action Campaign v Minister of Health* 2002 4 BCLR 356 (T).

The development of the common law of delict has resulted in a situation where almost any negligent State conduct or omission resulting in personal injury will attract liability³⁹⁸.

A more cautious approach has been adopted in claims for pure economic loss resulting from negligent administrative decision-making. The Supreme Court of Appeal has rejected a claim for loss of profit resulting from the alleged negligent award of a tender to another and a claim for damages resulting from delay caused by an unlawful land-use planning decision.³⁹⁹ Compensation for loss of profit has, however, been awarded in a case where a tenderer had been fraudulently prevented from winning a tender.⁴⁰⁰ For the moment this seems to be the dividing line (in other words it is necessary to show bad faith), at least as far as claims for loss of profit are concerned.⁴⁰¹ Out-of-pocket expenses (the costs of the materials and resources utilized) are usually minimal in this type of situation, where the complainant applied for permission to obtain the contract for work or tendered for state work and negligent administrative decision-making caused him or her to fail. A claim for out-of-pocket expenses may succeed⁴⁰². Therefore, there appears to be room for continued growth and development in the area of damages in the common law.

We turn now to explore the Promotion of Administrative Act and compensation in relation to the above discussion.

4.3.2.2. PROMOTION OF ADMINISTRATIVE JUSTICE ACT (PAJA) AND COMPENSATION

PAJA⁴⁰³ allows a court in review proceedings, in exceptional cases and in addition to setting aside a decision, to direct an administrator or any party to the proceedings to

³⁹⁸ Currie, and De Waal, *The Bill of Rights Handbook*, 5th edition (2005) 222.

³⁹⁹ *Premier, Western Cape v Fair Cape Property Developers (Pty) Ltd* 2003 6 SA 13 (SCA). There has not been a similar development on the horizontal level. In other words, the common law liability of private persons has not been expanded. *Olitzki Property Holdings v State Tender Board* 2001 3 SA 1247 (SCA)

⁴⁰⁰ *Transnet Limited v Sechaba Photoscan (Pty) Ltd* 2005 1 SA 299 (SCA).

⁴⁰¹ *Telimatrix (Pty) Ltd v Advertising Standards Authority of SA* [2005] 2 ALL SA 97 (W).

⁴⁰² Currie, and De Waal, *The Bill of Rights Handbook*, 5th edition (2005) 222.

⁴⁰³ Act 3 of 2000.

pay ‘compensation’.⁴⁰⁴ The provision is somewhat unusual as the intention was not to replace the common law delictual action for damages.

It is difficult to imagine how the provision could find application if the requirements for that action (unlawfulness, causality and fault) are not present. Predictably it has not featured in litigation. Instead, as we saw above, those aggrieved by unlawful administrative acts have elected to sue in delict, mostly unsuccessfully⁴⁰⁵, as it appears.⁴⁰⁶

We turn to explore damages claims derived directly from the Constitution.

4.3.3. DAMAGES CLAIMS DERIVED DIRECTLY FROM THE CONSTITUTION

It appears that two types of claims for damages have been derived directly from the Constitution.

In *Modderklip Boerdery (Edms) Bpk v President of the RSA*⁴⁰⁷, a large group of people illegally occupied a portion of a farm. By the time the land owner was granted an eviction order the numbers of occupiers had grown to thirty six thousand, and the sheriff insisted on payment of a deposit of 1, 8 million Rand to execute the eviction as the sheriff required the assistance of private contractors. The State refused to contribute to the cost of eviction. The High Court granted a structural interdict, ordering the State to produce a plan to end the unlawful occupation and find alternative accommodation for the squatters. The Supreme Court of Appeal produced a more imaginative order, declaring that the fundamental rights of both the land owner (property in terms of section 25 of the Constitution) and the squatters (housing in terms of section 26 of the Constitution) had been impaired, that the squatters were entitled to remain on the land until alternative accommodation was made available for

⁴⁰⁴ Section 8 (1) (c) (ii) (bb) of Act 3 of 2000.

⁴⁰⁵ *Olitzki Property Holdings v State Tender Board* 2001 3 SA 1247 (SCA); *Telimatrix (Pty) Ltd v Advertising Standards Authority of SA* [2005] 2 ALL SA 97 (W); and *Knop v Johannesburg City Council* 1995 2 SA 1 (A).

⁴⁰⁶ Currie, and De Waal, *The Bill of Rights Handbook*, 5th edition (2005) 222.

⁴⁰⁷ 2003 6 BCLR 638 (T).

them by the local government. Moreover, the landowner was entitled to constitutional damages, calculated in terms of the Expropriation Act⁴⁰⁸ for the loss of the use of the land during the period in which it had been occupied and that the State had failed to provide alternative land for the occupiers.⁴⁰⁹

The rights of access to adequate housing and to protection from arbitrary evictions have been developed in tandem with each other, and have significantly qualified the normality assumption, as courts have begun to refuse to grant eviction orders which could lead to homelessness. In short, the *Modderklip* case⁴¹⁰ is authority both for the proposition that evictions which lead to homelessness are a violation of section 26(1) of the Constitution and that an unreasonable failure to give effect to the obligation to provide at least basic temporary alternative shelter for unlawful occupiers, resulting in the loss of the owner's use and enjoyment of the land, may give rise to an action for constitutional damages. The *Modderklip* case⁴¹¹ attracted a great deal of commentary. The case certainly featured a novel and interesting remedy for the clash between property rights and the right of access to adequate housing. The Supreme Court of Appeal's order (which survived an appeal to the Constitutional Court) effectively required the State to hold the balance between these the two competing rights of access to housing and freedom of use and enjoyment of one's property by providing access to alternative shelter. By providing for constitutional damages, the order held the State to account for its failure to do so.

The second line of cases (resulting in the second type of damages claims derived directly from the Constitution) emerged as a result of delays in the processing of social assistance grants under the Social Assistance Act.⁴¹² By the mid-1990's corruption amongst officials and applicants for grants was prominent in the provinces of the Eastern Cape and KwaZulu Natal. The decision of the Supreme Court of Appeal in *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuzza*⁴¹³ arose as a result of the Eastern Cape government's attempt to remove 'ghost'

⁴⁰⁸ Act 63 of 1975, Sections 2 and 10.

⁴⁰⁹ 2003 6 BCLR 638 (T) para 44 and 51. Currie, and De Waal, *The Bill of Rights Handbook*, 5th edition (2005) 223.

⁴¹⁰ 2003 6 BCLR 638 (T) para 44 and 51. 2003 6 BCLR 638 (T).

⁴¹¹ *Supra*.

⁴¹² Act 59 of 1992.

⁴¹³ 2001 4 SA 1184 (SCA).

beneficiaries from their system by suspending the payment of grants and requiring every recipient to re-register before their benefits would be reinstated.

In this case⁴¹⁴ and a number of others⁴¹⁵, beneficiaries successfully challenged the termination of their grants in the High Court on the basis that their grants had been terminated without affording them a hearing. A flood of litigation followed. Faced with increasing numbers of applicants for welfare grants, tens of thousands of new applications every month, the two provinces soon started to fall behind with the processing of the applications.⁴¹⁶ This generated the second phase of litigation. The usual remedy for compelling the State to act by way of an interdict ordering the appropriate administrator to consider making a decision appeared ineffective, so the courts started to substitute their own decisions for those of the State on a wider scale.⁴¹⁷ If a decision was not made within a reasonable time, the High Courts were prepared, as a form of ‘constitutional relief’, to approve social assistance grants themselves.⁴¹⁸ In addition, the State was ordered to make available back-payment and interest calculated on the basis that the applications should have been assessed within a reasonable time.⁴¹⁹ For such purposes, a period of three months was considered reasonable time. To an extent, the courts became an alternative forum for the processing of social assistance grants. This approach was criticized by the Supreme Court of Appeal, per Conradie JA, in *Jayiya v Member of Executive Council for Welfare, Eastern Cape*⁴²⁰, albeit in an *obiter dictum*, on the basis that these orders ignored the provisions of the PAJA,⁴²¹ which only provides for compensation to be awarded in exceptional circumstances.

The next difficulty that arose in a number of cases was that the Eastern Cape and KwaZulu Natal provincial governments failed to pay the awards of constitutional damages that had been ordered. This generated another phase of litigation, dealing

⁴¹⁴ *Supra*.

⁴¹⁵ *Jayiya v Member of Executive Council for Welfare, Eastern Cape Provincial Government* Case number 264/02 Case [2003] SCA (unreported), *Mahambehlala v Member of Executive Council of Welfare, Eastern Cape* 2002 1 SA 342; 2001 JDR 327 (SE).

⁴¹⁶ Currie, and De Waal *Loc cit* note 409.

⁴¹⁷ Currie, and De Waal, *The Bill of Rights Handbook*, 5th edition (2005) 224.

⁴¹⁸ *Ibid*.

⁴¹⁹ *Mahambehlala v Member of Executive Council for Welfare, Eastern Cape* 2002 1 SA 342 (SE); *Mbanga v Member of Executive Council for Welfare, Eastern Cape* 2002 1 SA 359 (SE); *Bacela v Member of Executive Council for Welfare (Eastern Cape Provincial Government)* [1998] 1 All SA 525 (E). *Ibid*.

⁴²⁰ 2004 2 SA 611 (SCA) para 8, 9, 10, and 19 – 22.

⁴²¹ Act 3 of 2000.

with contempt of court. The Constitutional Court has not pronounced on these developments. In both the *Modderklip* case⁴²² situation and that of the social assistance cases, the choice is essentially one between awarding constitutional damages to individual litigants on the one hand and structural relief on the other, aimed at addressing the systemic problem that caused the infringements. The former may appear to be an effective short-term remedy from a litigant's perspective, but it does not abide well with the purpose of constitutional relief, which is forward-looking and community orientated. In the view of Currie and De Waal, the Constitutional Court is more likely to support an approach aimed at restoring capacity where there is systemic failure by way of positive interdicts or declarators, rather than one that attempts to persuade the wrongdoer state institution to reform by way of awards of damages.⁴²³

As far as court orders for the payment of money are concerned, the common law position is that a judgment debtor may not be held in contempt of court for failing to comply with an order to pay money.⁴²⁴ In the social assistance cases in the Eastern Cape, the judiciary had 'developed' this part of the common law to provide for a contempt of court remedy in cases where the provincial government did not comply with monetary orders.⁴²⁵ This development was overturned by the Supreme Court of Appeal in *Jayiya v Member of Executive Council for Welfare, Eastern Cape*⁴²⁶, *inter alia*, on the basis that the courts cannot retrospectively develop a new criminal offence and that it would be unfair to hold a State official in contempt of court for failing to pay the State's debts while the same person cannot be held in contempt for failing to pay his or her personal debts.⁴²⁷ The State Liability Act⁴²⁸ precludes execution against State assets because of the disruption it may cause to the performance of State functions. Unless another manner of holding State officials accountable, such as utilizing the provisions of the Public Finance Management Act⁴²⁹

⁴²² 2003 6 BCLR 638 (T).

⁴²³ Currie, and De Waal, *The Bill of Rights Handbook*, 5th edition (2005) 224.

⁴²⁴ *Mjeni v Minister of Health & Welfare, Eastern Cape* 2000 4 SA 446 (Tk); *East London LTC v MEC for Health, Eastern Cape* 2001 3 SA 1133 (CK).

⁴²⁵ *Mjeni v Minister of Health & Welfare, Eastern Cape* 2000 4 SA 446 (Tk).

⁴²⁶ 2004 2 SA 611 (SCA) para 14 - 17.

⁴²⁷ Currie, and De Waal, *The Bill of Rights Handbook*, 5th edition (2005) 225.

⁴²⁸ Act 20 of 1957.

⁴²⁹ Act 1 of 1999.

and the Municipal Finance Management Act⁴³⁰ to discipline or prosecute those responsible for failing to comply with court order, is devised, an attack on the constitutionality of the State Liability Act⁴³¹ seems inevitable.⁴³²

The looming showdown between the executive and the judiciary may not materialize as the delivery of social benefits is about to be privatized and the new South African Social Security Agency Act⁴³³ came into force on the 15th of November 2004. The purpose of this Act⁴³⁴ is, *inter alia*, to ensure that national standards are set for the efficient, economic and effective use of the limited resources available to the State for social security. In terms of this Act⁴³⁵, the South Africa Social Security Agency is established, which will become the service provider in respect of the administration of social assistance. The shift of accountability and liability to external agents is pending, however it remains questionable as to whether this shift will result in an improvement of service delivery for the public or whether this shift will result in the same complacency but merely from a different agent.

4.3.4. CONCLUSION

In conclusion of both sections 4.2. and 4.3. of this Chapter it is once again emphasized that the Constitution is the supreme law of the land. However, because South Africa's common law is flexible, harmony can be achieved between the Constitution and the common law as the common law can develop and adapt and therefore is not declared null and void by the Constitution.

In exploring constitutional rights and damages in South Africa it was established that there are three stages of Constitution litigation. Firstly, it must be established if an infringement of a fundamental right has occurred. Secondly, it must be established whether or not the infringement is protected by the limitation provided for in section

⁴³⁰ Act 56 of 2003.

⁴³¹ Act 20 of 1957.

⁴³² Currie, and De Waal *Op cit* note 427 at 128. *York Timbers v Minister of Water Affairs and Forestry* 2003 4 SA 477 (T).

⁴³³ Act 9 of 2004.

⁴³⁴ *Ibid.*

⁴³⁵ *Ibid.*

36 of the Constitution (the limitation clause). The infringement is protected if the limitation of the fundamental right is reasonable, justifiable and if an acceptable method of the implementation of the limitation has been utilized. Thirdly, it must be established that the remedy provided for the infringement is ‘appropriate’ in the circumstances.

The Bill of Rights finds horizontal, vertical, direct and indirect application in South Africa. It is established that the Bill of Rights must in all circumstances be applied indirect first before direct application is considered. The indirect application of the Bill of Rights takes four forms. Firstly, the common law can be changed. Secondly, the common law can be applied with regards to the Bill of Rights. Thirdly, content is given to the common law’s vague terms or concepts and fourthly, contracts are interpreted with regards to the Bill of Rights.

In exploring the constitutional approach to the provision of monetary damages in South Africa it was established in this Chapter that the object of constitutional damages is to vindicate the Constitution and deter future infringements. There have been two types of damages claims derived directly from the Constitution, which have been discussed above. Namely, the form of damages provided in the case of *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)*⁴³⁶ firstly and secondly the form of damages provided in *Kate v Member of Executive Council of Welfare*.⁴³⁷

The cases of *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies intervening)*⁴³⁸, *Kate v Member of executive Council of Welfare*⁴³⁹ and others will be discussed in Chapter 5 below.

It is apparent that although South African law has developed immensely since the inception of the 1996 Constitution, South Africa’s ‘rights conscious culture’ is still developing. If American history is any guide, the only certainty may be that South

⁴³⁶ 2004 6 SA 40.

⁴³⁷ 2005 1 SA 141 SECLD; *Welfare Department v Kate* 2006 SCA 46 (RSA).

⁴³⁸ 2001 4 SA 938 (CC) 962 - 963.

⁴³⁹ 2005 1 SA 141 SECLD; *Welfare Department v Kate* 2006 SCA 46 (RSA).

Africa will soon encounter further problems, and consequently devise solutions that will respond to exigencies the framers did not foresee. If the Constitution is a success, the rights it protects and the institutions it establishes should continue to govern the nation for years and generations to come.⁴⁴⁰

⁴⁴⁰ Andrews, and Ellmann (Editors), *The Post Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001) 18.

CHAPTER 5

**THE AMALGAMATION OF DELICTUAL AND CONSTITUTIONAL
DAMAGES**

5.1. INTRODUCTION

This Chapter seeks to combine concepts from Chapter 3 and Chapter 4 of this dissertation and analyze the application of the common law in a constitutional state with regard to monetary damages as a remedy for a constitutional breach. The Chapter will further evaluate how the courts have dealt with the inundation of claims relating to the breach of constitutional rights since the enactment of the Constitution together with the further changes that the Constitution has brought to the common law. The primary question that this dissertation, and specifically this Chapter endeavours to explore and answer is: “Can delictual remedies be sufficiently expanded upon and revolutionized in order to vindicate a constitutional right?”

This Chapter will commence with an examination of the general principles of delict. It will conclude with an exploration of the possibility of combining constitutional and delictual principles (as remedies for breach of a constitutional right).

The relevant sections of the Constitution applicable to this Chapter have been provided above in Section 1.5.1 and the reader is requested to refer to this Section as he or she proceeds to read this Chapter.

5.2. RELEVANT COMMON LAW DELICTUAL PRINCIPLES

It was noted in Chapter 3 of this dissertation at Section 3.2. that the definition of a delict is misleading in that it omits to state fault as a general delictual requirement and creates the erroneous impression that all individual interests, and not only those that are *legally recognized and protected*, are relevant.⁴⁴¹

⁴⁴¹ Neethling *et al*, *Law of Delict*, 6th edition (2010) 3.

When reference is made to legally recognized and protected rights one is, in the context of this dissertation, referred to the Constitution and the fact that the Constitution indicates the rights which are legally recognized and protected by our State in codified format. It is noted further in Chapter 3 that all five requirements of a delict⁴⁴² must of necessity be present before the conduct complained of may be classified as a delict.⁴⁴³ It is pertinent to note that the question of delictual liability is governed by the ‘generalized approach’, which provides delict the ability to adapt and provide for the changing environment. The common law remedy of delict as shown in Chapter 3 may adopt a flexible approach with regard to the Constitution, which is the supreme law of the land.⁴⁴⁴

Damage (*damnum*) is said to be the detrimental impact upon any *patrimonial or personality interest deemed worthy of protection by the law*.⁴⁴⁵ The inference can therefore be drawn that law encompasses the many sources of law that South Africa has developed over the years including the common law, customary law and the Constitution.⁴⁴⁶

It has also been noted in Chapter 3 *supra* that the awarding of damages for patrimonial loss, if in the form of interest, is achieved through the *actio legis Aquiliae*. It is noted that within the definition of a delict reference is made to the infringement of a legally recognized right. Therefore, it is conceivable that any right protected under the Constitution which is infringed, is equally protected and compensated by the use of a common law remedy, that is, the *actio legis Aquiliae* provided that the elements of delict are proven. It is pertinent to note that the requirements of the delictual remedy must be met in order for the remedy to be awarded. This course is possible due to the fact that South Africa utilizes the generalized approach which allows the adaptation and growth of the common law remedies to provide for

⁴⁴² Which refers to the act or omission, wrongfulness, fault, harm and causation. *Ibid*.

⁴⁴³ Neethling *et al*, *Law of Delict*, 6th edition (2010) 3 - 4.

⁴⁴⁴ The 1996 Constitution. The casuistic approach is outlined in Chapter 3 *supra*.

⁴⁴⁵ Neethling, *et al*, *Law of Delict*, 6th edition (2010) 212. Visser and Potgieter state that the term ‘damage’, however, is wide enough to include compensation and satisfaction for both patrimonial loss and non-patrimonial loss, Visser PJ, and Potgieter JM, *Law of Damages*, 2nd edition (2003) 1. Van der Walt JC, and Midgley JR, *Principles of Delict*, 3rd edition (2005) 1.

⁴⁴⁶ *Ibid*. Refer to Chapter 1.

changing circumstances. Without this reformation being possible, one would have to envisage a total overhaul of our legal system in order to accommodate the changes that South Africa has experienced in the past fourteen years.⁴⁴⁷

An example of an overlap of conduct which constitutes both a delict and an infringement of a constitutional right and thereby contains all the requirements of a delict and constitutional right infringement is an intentional infringement of the right to privacy which constitutes both a delict as well as a constitutional wrong. For this purpose the Constitutional Court in *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies intervening)*⁴⁴⁸ stated that the net of delictual liability should be cast wider by emphasizing its objective and by defining it more widely in order to provide enhanced protection to, *inter alia*, recognized fundamental rights. The court was also of the opinion that fault and legal causation should fulfill a more important role in limiting liabilities. A proper application of the delictual elements should dispel the fear of opening the floodgates of liability without limits⁴⁴⁹.

The validity of all law, state action, court decisions and the conduct of natural and juristic persons is tested against the Constitution and Bill of Rights in particular, taking into account that any limitation of a fundamental right must be in accordance with the limitation clause.⁴⁵⁰ The entrenchment of fundamental rights in the Bill of Rights, as noted at the commencement of this Chapter, enhances their protection and raises them to a higher status.

In exercising this value judgment [determining whether law is valid as tested against the Bill of Rights], the general principles which have already been crystallized in our common law with regard to the reasonableness or *boni mores* criterion for delictual wrongfulness may serve as *prima facie* indication of the reasonableness of the limitation in terms of the Bill of Rights.⁴⁵¹ In the case of an infringement of or a threat to a fundamental right a prejudiced person is entitled to approach a competent court for appropriate relief. In this respect there is the possibility of developing a

⁴⁴⁷ Neethling, *et al*, *Law of Delict*, 6th edition (2010) 3- 5.

⁴⁴⁸ 2001 4 SA 938 (CC) 962 - 963.

⁴⁴⁹ 2001 4 SA 938 (CC) 962 – 963. Neethling, *et al*, *Law of Delict*, 6th edition (2010) 20.

⁴⁵⁰ Section 36 of the 1996 Constitution.

⁴⁵¹ Neethling, *et al*, *Law of Delict*, 6th edition (2010) 19.

‘constitutional delict’, in other words, that the infringement of a fundamental right *per se* constitutes a delict and would entitle the injured person to an appropriate delictual remedy. This may result in the overlapping of the remedy for a common law delict and infringement of a constitutional right.⁴⁵² The requirements for a delict and those of a constitutional wrong differ materially, as a result not every delict is necessarily also a constitutional wrong entitling the injured person to a constitutional remedy, and *visa versa*. Besides, unlike a delictual remedy, which is aimed at compensation, a constitutional remedy, even in the form of damages, is directed at affirming, enforcing, protecting and vindicating fundamental rights and preventing or deterring future violations of the Bill of Rights.⁴⁵³

5.3. DEVELOPING THE COMMON LAW (GENERALIZED APPROACH)

The cohesion between the Constitution and the common law is quite evident and one must take cognizance of the fact that although the common law was present before the Constitution, the Constitution now takes precedence over the common law in all areas and where the common law is in conflict with the Constitution the Constitution prevails. There is however no need to prefer constitutional remedies above common law remedies where common law remedies do not contradict the Constitution.⁴⁵⁴

The law of delict is closely related to the core problem of balancing individual freedoms against collective security, a balance that is ultimately to be achieved by tempering broad principles of liability with a limited interpretation of wrongfulness. In Chapter 4 of this dissertation it was noted that constitutional remedies are forward looking and community orientated thereby seeking to always benefit the community over the individual. This possible contradiction in the distinct purposes of common law remedies versus constitutional remedies may affect the availability of common law remedies to constitutional infringements. It was however noted in Chapter 3 *supra* that although there have been significant advances in the development of the Aquilian action in South African law, the remedy has not developed to the point

⁴⁵² *Ibid.*

⁴⁵³ *Ibid.*

⁴⁵⁴ However, noting further that the constitutional remedies are not remedies of last resort. Section 38 of the 1996 Constitution.

where it can be said that all financial harm culpably caused is *prima facie* wrongful and actionable.

An example of this lack of extension of the common law remedy is in the field of omissions, where the *boni mores* of society do not require one to take positive action whenever a failure to do so would inevitably cause harm to another.⁴⁵⁵ Further, it seems still to be true that there is a lack of extension of the common law remedy in the case of pure economic loss. It is evident with regards to the research question at hand that damages, normally in the form of interest as demonstrated by *Kate's case*⁴⁵⁶, are a just and equitable remedy for the breach of a social assistance right.⁴⁵⁷ We are exploring the pure economic loss of an individual due to the lack of attainment of an economic benefit at the time when the economic benefit should have been granted [i.e. a social grant].⁴⁵⁸ In terms of damages, interest on the amount which should have been granted at the appropriate time would be awarded in order to compensate the individual for the delay in providing the economic benefit.⁴⁵⁹ It is clear that the gradual expansion of the Aquilian action in South African law has not quite reached the desired end. As mentioned above, our law is amenable to change and reform and therefore such desired end may be reached in due course.

Our courts tend to adopt a conservative approach to the expansion of the Aquilian action and will only allow such an extension if it is justified by policy considerations which favour such extension. It will be essential to determine policy considerations which will justify extension of the Aquilian action to provide a remedy in the cases of pure economic loss as outlined in this dissertation.⁴⁶⁰

⁴⁵⁵ Zimmermann, and Visser, *Civil Law and Common Law in South Africa* (1996) 634.

⁴⁵⁶ 2006 SCA 46 (RSA).

⁴⁵⁷ Noting that interest is merely an example of one of the forms of constitutional damages to be explored and not the only form of constitutional damages provided by South Africa's judiciary.

⁴⁵⁸ Zimmermann, and Visser, *Civil Law and Common Law in South Africa* (1996) 634.

⁴⁵⁹ Visser, and Potgieter, *Law of Damages* (1993) 164 – 165. *Kate v Member of Executive Council of Welfare* 2005 1 SA 141 SECLD; *Welfare Department v Kate* 2006 SCA 46 RSA.

⁴⁶⁰ Such loss which could be occasioned by the infringement of a constitutional right, specifically those enshrined in the 1996 Constitution with relation to socio-economic rights and the social security benefits at section 27 of the 1996 Constitution, *Supra* Chapter 3. Another example, the infringement of the right to dignity which causes pure economic loss by the loss of a contract or tender.

5.4. SOCIAL SECURITY

It is common logic that a proposition should never be made without due regard to the consequent social implications. In Chapter 2 above we discussed that social assistance in South Africa is financed out of general revenues, mostly through the budget of the Provincial Departments of Welfare. The question to be posed is: where will the finances for a breach of the social assistance rights in terms of section 27⁴⁶¹ be paid from?

If the breach of such a right is to be compensated by interest and monetary damages by the use of a new constitutional remedy or the adaptation of the common law Aquilian remedy, the funds for such compensation would have to be sought by the relevant provincial department. One is led to believe that such money would come out of such department's welfare budget. If this be the case, then the remedy would not be directly linked to the purpose of constitutional remedies. The argument is submitted that a remedy which grants money from a welfare budget for the breach of a specific individual's social security right cannot be said to be community orientated, and forward looking since the community would then be left with less available finances to be distributed amongst themselves. Although this argument is beyond the scope of this dissertation, it is recognized that the argument is limited to the extent that the community is comprised of individuals and hence a welfare grant provided to an individual in the community would benefit the 'community' in the general sense.

Although there is the possibility of the cohesion or possible development of the constitutional as well as the common law remedies to a point where there is an overlapping of remedies, it is still seen at this stage in our law that the requirements or purpose of constitutional remedies must at all times be met and the requirements of a delictual remedy must also at all times be met individually. Bearing in mind that the Constitution is the supreme law of the land, the common law should be open to adaptation and forward development in providing a relevant remedy, as discussed above under 5.3.⁴⁶² Constitutional rights should be protected or compensated by a

⁴⁶¹ The 1996 Constitution, *Supra* Chapter 2.

⁴⁶² Section 2 of the 1996 Constitution.

relevant and effective remedy. Therefore, it is submitted that the criteria for the new era of the movement towards a relaxed approach should be that the remedy must:

- a) be relevant and effective,
- b) provide for the infringed person's needs, and
- c) simultaneously provide for the requirements of the common law or the constitutional law requirements respectively.

Bearing in mind the above three criteria for the new era of the movement towards the relaxed approached remedy we turn to apply the principles already detailed to relevant case law.

5.5. RELEVANT CASE LAW

In the case of *Member of the Executive Council of the Department of Welfare v Kate*⁴⁶³ the appellant claimed that during the period in dispute, interest did not accrue to Kate on ordinary principles, because the debt was not repayable and that the interest did not accrue to Kate in the ordinary sense.⁴⁶⁴ This was in essence a reference to the common law definition of interest and damages which we discussed in Chapter 3 *supra*, thus linking the idea that in order for a remedy to be granted the remedy must meet the requirements necessitated by the purpose of the remedy⁴⁶⁵. It was noted further by counsel for the appellant that Kate had delictual remedies that were sufficiently restorative of any loss that was caused to her due to the failure of the administration to perform its constitutional duties and that, in those circumstances, the remedy of constitutional damages was not required⁴⁶⁶. This submission did not succeed and interest as claimed, was awarded as a measure of damages for the unreasonable delay that Kate had endured. This indicates that constitutional remedies, specifically in the form of the new constitutional damages, are not a remedy of last resort.⁴⁶⁷ It is suggested that the remedy of constitutional damages is similarly

⁴⁶³ 2006 SCA 46 (RSA).

⁴⁶⁴ *Supra* at page 9.

⁴⁶⁵ *Supra* at page 14.

⁴⁶⁶ *Supra* at page 15.

⁴⁶⁷ Section 38 of the 1996 Constitution.

associated with the new expanded version of the Aquilian action. Pausing here we may ask the question: “is the granting of constitutional damages a revolutionized form of the Aquilian action?”

It was recognized in *Fose v Minister of Safety and Security*⁴⁶⁸ that, in principle, monetary damages are capable of being awarded for a constitutional breach. 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, indirect means of asserting and vindicating constitutional rights. The judges now have the option of utilizing the common law remedy of the Aquilian action or the remedies encompassed in section 38 of the Constitution for the vindication of a breach of a constitutional right. Bearing in mind that the remedy provided must be the remedy that is appropriate and equitable in the circumstances in order to provide an effective and efficient remedy, it is pointless to provide a remedy that is merely a façade, which does not in substance provide that relief which the infringed person requires in order to restore himself or herself to the position in which he or she would have been in had the damage-causing event not occurred.⁴⁶⁹

The court, in *Minister of Health v Treatment Action Campaign*⁴⁷⁰, refused to acknowledge that the granting of a monetary order, as opposed to a mere declarative order, would amount to an unwarranted infringement of the separation of powers. In fact the court enunciated that it indeed retained the power to exercise some form of supervisory jurisdiction in order to ensure that its orders are implemented.⁴⁷¹ In one case the court awarded punitive interest against state respondents as a result of the unacceptable manner in which the respondents dealt with the applicant’s application for a social grant.⁴⁷²

⁴⁶⁸ 1997 3 SA 786 (CC).

⁴⁶⁹ This reference is obviously pointing to a delictual claim within a constitutional framework.

⁴⁷⁰ 2002 5 SA 721 (CC).

⁴⁷¹ 2002 BCLR 10 1033 (CC) para 25, 26 – 39, 68 and 98 – 112. Olivier, Okpaluba, Smit, and Thompson (Ed’s), du Toit, Greyling, Jansen van Rensburg, Liffmann, Ogunrombi, and Porter, *Social Security Law: General Principles* (1999) 130.

⁴⁷² *Mahambehlala v MEC for Welfare, Eastern Cape, and another* 2002 1 SA 342 (E).

It is submitted that the remedy that was granted in *Mahambehlala v Minister of the Executive Council of Welfare, Eastern Cape and another*⁴⁷³ was in terms of punitive interest whereas the common law remedy of an Aquilian action has moved away from its punitive nature towards a purely compensatory nature. There is a possible contradiction if one is to utilize the common law Aquilian action to provide punitive interest due to an individual whose constitutional right has been infringed. In such a case a constitutional remedy would be more appropriate as it would comply with the requirements of a constitutional remedy as discussed above whereas the requirements of a common law remedy are in contradiction to what is being provided. The question remains whether a constitutional remedy should be granted at all. The infusion of constitutional values into delictual principles itself plays a role in protecting constitutional rights, albeit indirectly. Delictual principles are capable of being extended to encompass state liability for the breach of a constitutional obligation, but the relief permitted by section 38 of the Constitution is not a remedy of last resort, as noted above. There will be cases in which direct vindication of a constitutional right is appropriate, such as a direct section 38 remedy. Our Constitution clearly empowers courts to be the guardians of the Constitution and to ensure that the State respects, protects, and promotes the Bill of Rights⁴⁷⁴.

In *Mahambehlala v Minister of the Executive Council for Welfare, Eastern Cape and another*⁴⁷⁵ it was held that failure to consider the applicant's application within the reasonable time of three months and the consequent delay of five months resulted in an unlawful and unreasonable infringement of the applicant's fundamental right to just administrative action in terms of section 33(1) of the Constitution. As the common law remedies were not adequate to remedy the infringement of the applicant's right, Elite J held that it was necessary to fashion an appropriate remedy and that his power to do so was to be found in section 38 of the Constitution. He held:⁴⁷⁶

“In the determination of appropriate relief, it is important to bear in mind that, although constitutional remedies will often be forward looking to ensure that the future exercise of

⁴⁷³ *Supra*.

⁴⁷⁴ 1996 Constitution, section 165, 172, and 173.

⁴⁷⁵ 2002 1 SA 342 (SE).

⁴⁷⁶ *Supra* at 355 J – 356 D.

public power is in accordance with the principal of legality . . . they may also be backward looking. Moreover, in my respectful view, in order to vindicate the Constitution one should have regard to the basic values and principles enshrined therein. In this regard section 195(1) of the Constitution is of importance. It provides that public administration should be governed by the democratic values and principles enshrined in the Constitution, including the maintenance of the high standard of professional ethics, the provision of services impartially, fairly, equitably and without bias, and the necessity to respond to the needs of the people. Bearing in mind the observation of Krieger J in Fose's case . . . that appropriate relief means that which is 'specifically fitted or suitable', it seems to me that it would be just and equitable for an aggrieved person in the position of the applicant to be placed in the same position which she would have been had her fundamental right to lawful and reasonable administrative action not been unreasonably delayed, and that relief placing her in such a position would be appropriate as envisaged by the Constitution."

A particularly bizarre defence raised by the respondents was that they were not obliged to pay interest because the department had not budgeted for interest on grants. Elite J disposed of this defense by holding that "the fact that the department of welfare has not budgeted for the payment of interest on social grants cannot excuse it from its obligation to pay if such interest is legally due".⁴⁷⁷ As in *Mahambehlala*⁴⁷⁸, Elite J in *Mbanga*⁴⁷⁹ arrived at the conclusion that at common law no claim for interest had been established by the applicant but that interest on the arrears due to him was appropriate relief for the infringement of the applicant's fundamental right to just administrative action. He held that:

"Although the ultimate approval of the applicant's application for a social grant resulted in it accruing to him with effect from the date upon which he had applied for it, if the period of thirty two months it took the second respondent to approve the application was unreasonable and constituted a breach of the applicant's constitutional right to lawful and reasonable administrative action, it would be just and equitable (as envisaged by section 172(1) of the Constitution) for the applicant to be placed in the same position in which he would have been had his application been dealt with within a reasonable time and that an order designed to do so would be 'appropriate' relief as envisaged by section 38 of the Constitution".⁴⁸⁰

⁴⁷⁷ 2002 1 SA 342 (SE) para 365C - 365D.

⁴⁷⁸ 2002 1 SA 342; 2001 JDR 0327 (SE).

⁴⁷⁹ *Mbanga v Member of Executive Council of Welfare Eastern Cape* 2001 JDR 328.

⁴⁸⁰ *Supra* at 368I - 369B.

In *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies intervening)*⁴⁸¹, the court warned against ‘overzealous judicial reform’, and emphasized that development of the common law must take place ‘within its own parameters’. An alleged infringement of a fundamental right can in principle be evaluated in a dual enquiry: firstly enquiring whether there was a *prima facie* infringement of the relevant right; and secondly, whether the infringement can be justified by use of the limitation clause.⁴⁸² The person who alleges the infringement bears the onus of proving it.

The warning in *Bernstein v Bester*⁴⁸³ is to the effect that common law principles cannot, as a matter of course, be applied to the interpretation of fundamental rights and their limitation. In terms of section 38 of the Constitution it appears that an award of constitutional damages will only be regarded as appropriate relief if no other effective compensatory remedy is available.⁴⁸⁴ If such a remedy is available, and here delictual remedies in particular can often play an important role, the remedy will be regarded as appropriate constitutional relief if it effectively vindicates the relevant fundamental right and deters future infringements thereof.⁴⁸⁵ It is important to note that the courts will not, mainly for reasons of public policy, readily order a compensatory remedy in circumstances where another effective remedy is available to the prejudiced person as appropriate relief.⁴⁸⁶ An effective remedy can include amending a statute, judicial review of an administrative decision, an appeal against an administrative decision, a declaratory order and an interdict (*mandamus*). It is apparent that many of the so-called ‘effective’ remedies may be of no practical use to an individual whose right has been infringed.

A further inconsistency between the granting of constitutional damages and damages in terms of the common law Aquilian action is that in terms of the common law in order to grant interest the amount must be a liquidated amount whereas in terms of the

⁴⁸¹ 2001 4 SA 938 (CC) at 962.

⁴⁸² In terms of section 36(1) of the 1996 Constitution.

⁴⁸³ 1996 2 SA 751 (CC) at 790.

⁴⁸⁴ *Dendy v University of Witwatersrand Johannesburg* 2005 5 SA 357 (W) 369; *Modderklip Squatters, Greater Benoni City Council; President of the Republic of South Africa vs Modderklip Boerdery (Pty) Ltd.* 2004 6 SA 40 (SCA) at 62.

⁴⁸⁵ *Fose v Minister of Safety and Security* 1996 2 BCLR 232 (W).

⁴⁸⁶ *Supra*.

granting of constitutional damages the amount does not need to be liquidated. The legislature has, however, stepped in and section 2A of the Prescribed Rate of Interest Act 55 of 1975 also provides for the granting of *mora* interest on an unliquidated debt which at common law was not possible until the debt had been liquidated by either agreement between the parties, by a court of law or an arbitrator.⁴⁸⁷

5.6. THE EFFECT OF THE SEPARATION OF POWERS

We turn now to examine the effect of the separation of powers on the amalgamation of the delictual and constitutional damages. The doctrine of separation of powers requires the functions of the State to be classified as either: legislative, executive or judicial, and requires each function to be performed by separate branches of government.⁴⁸⁸

In other words the functions of making law, executing the law and resolving the disputes through the application of law should be kept separate and, in principle, they should be performed by different institutions and persons. The purpose of separating functions and persons in this manner is to prevent the excessive concentration of power in a single person or body.⁴⁸⁹ In this regard some judges of the Constitutional Court have recognized that a delicate balance must be developed between the need, on the one hand, to control the State by separating powers and, on the other, to avoid defusing powers so completely that the State is unable to take timely measures in the public interest.

A court's approach to the application, interpretation and limitation of the Bill of Rights and particularly to remedies for the violation of the Bill of Rights may have serious implications for the doctrine of separation of powers. Since the courts make the final determination on the scope of their own powers, they have therefore developed several mechanisms of self-restraint, which serve to prevent them from interfering with the functions of the other branches of government. For example, in

⁴⁸⁷ Visser, and Potgieter, *Law of Damages*, 2nd edition (2003) 183. Refer to Section 3.3 above.

⁴⁸⁸ Section 8 of the 1996 Constitution.

⁴⁸⁹ Currie, and De Waal, *The Bill of Rights Handbook*, 5th edition (2005) 568 - 569.

*Soobramoney v Minister of Health, KwaZulu Natal*⁴⁹⁰ the Constitutional Court refused to order the State to provide treatment to keep a critically ill patient alive. In the matter of *Minister of Health v Treatment Action Campaign (2)*⁴⁹¹ on the other hand, the Constitutional Court demonstrated that it will not hesitate to order monetary relief which affects policy and has manifest cost considerations, when it reaches the conclusion that the State has not performed its constitutional obligations diligently and *without delay*. In respect of state actors, the Bill of Rights applies directly to:

1. the common law and to legislation of the central, provincial and local government legislators as well as to non-legislative conduct of these legislators⁴⁹²,
2. administrative action which must, in addition, comply with the criteria listed in the just administrative action right in section 33 of the Constitution and in PAJA⁴⁹³,
3. conduct of the organs of state as defined in section 239 of the Constitution,
4. conduct of the executive (deference will however be shown to political decisions taken by the executives, particularly when exercising the constitutional executive and Head of State powers)⁴⁹⁴, and
5. non-lawmaking conduct of the judiciary (the conducting of trials, administrative action).⁴⁹⁵

Under the Bill of Rights the infringement of a fundamental right by an administrator's action would have to be authorized by legislation, if it is not, such an infringement would be invalid. Where the infringement of a fundamental right is authorized by legislation it would then pass constitutional scrutiny. Nevertheless, the administrator's action could still be challenged⁴⁹⁶ on the basis that the infringement

⁴⁹⁰ 1998 1 SA 765 (CC).

⁴⁹¹ 2002 5 SA 721 (CC).

⁴⁹² Currie, and De Waal *Op cit* note 489 at 49.

⁴⁹³ Act 3 of 2000.

⁴⁹⁴ Currie *et al Loc cit* note 489.

⁴⁹⁵ *Ibid.*

⁴⁹⁶ De Ville, *Judicial Review of Administrative Action in South Africa*, revised 1st edition (2005) 319.

did not comply with the requirement of proportionality.⁴⁹⁷ Case law supports the contention that where it is alleged that an infringement of a fundamental right has taken place, the person affected has to prove the infringement of that fundamental right.⁴⁹⁸ The onus of proof will fall to the party attempting to uphold the validity of the administration action to prove the facts and show absence of a ground of review.⁴⁹⁹

Section 38 of the Constitution governs remedies in cases of direct application of the Bill of Rights. It does so in very general terms by simply providing that a court may grant appropriate relief for the violation or threat to fundamental rights. The source of constitutional remedies may be found in legislation, the common law or the Constitution itself. As has been found, when the target of the remedy is private or state conduct, the source of the remedy will usually be found in the common law, whereas when the law itself is challenged, the remedy will be derived from the Constitution.⁵⁰⁰ Whereas the validity of conduct may be tested against the law including the Constitution, the validity of the law itself is only tested against the Constitution. Like their common law counterparts, constitutional rights and their remedies are complementary.

The nature of a constitutional remedy is determined by its objects. The harm caused by violating constitutional rights is not merely harm to an individual applicant, but to society as a whole since the violation impedes the realization of the constitutional project of creating a just and democratic society. The object of awarding a remedy should be, at least, to vindicate the Constitution and deter future infringements. The vindication is necessary because harm to constitutional rights, if not addressed, tends to diminish the public's confidence in the Constitution. The judiciary bears the burden of vindicating rights by striking effectively at the source of the infringement. The object is to make reality more consistent with the Bill of Rights. In general,

⁴⁹⁷ Or that any of the grounds of review in Section 6 (2) of Promotion of Administrative Justice Act 3 of 2000 are present.

⁴⁹⁸ *Larbi –Odam and Others v Member of the Executive Council for Education and Another* 1996 12 BCLR 1612 (B) 1620I; [1996] 4 All SA 185 (B) 194a – b. *Minister of Education v Harris* 2001 11 BCLR 1157 (CC); 2001 4 SA 1297 (CC). *City Council of Pretoria v Walker* 1998 3 BCLR 257 (CC); 1998 2 SA 363 (CC).

⁴⁹⁹ De Ville *Op cit* note 496 at 320.

⁵⁰⁰ This concept relates to the direct and indirect application of the Bill of Rights, which is explored further in Chapter 4 of this dissertation.

constitutional remedies are forward looking, community orientated and structural rather than backward looking, individualistic or retributive. As the Constitutional Court held in the *Metro-rail* case⁵⁰¹, private law damages claims are not always the most appropriate method of enforcing constitutional rights. Private law remedies tend to be retrospective in effect, seeking to remedy loss caused rather than preventing loss in the future. Moreover, the use of common law remedies to claim damages to vindicate an individual may place heavy financial burdens on the State as previously explored.⁵⁰²

5.7. CONCLUSION

Section 8 (3) of the Constitution lays down guidelines to be followed by the courts when the Bill of Rights is directly applied to private conduct but does not prescribe any particular type of relief for private violations of fundamental rights. Rather, the section directs the court to consider existing legislation and the common law to find constitutional remedies for the private violation of fundamental rights. Section 8 (3) of the Constitution provides that when applying the Bill of Rights to private conduct the court must apply, or if necessary, develop the common law to the extent that legislation does not give effect to a particular right.⁵⁰³ In addition, the court may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 of the Constitution. This subsection⁵⁰⁴ clearly envisages that a court must first seek a constitutional remedy for the private infringement of a fundamental right in legislation, failing which the court must seek the remedy in the existing law, failing which the court must develop the common law to give effect to the right. In other words, section 8 (3) of the Constitution directs a court to look for a constitutional remedy in the ordinary law and if there is none, to develop one.⁵⁰⁵ The process is therefore as follows:

⁵⁰¹ *Rail Commuters Action Group v Transnet Limited t/a Metro-Rail* 2005 2 SA 359 (CC). Currie, and De Waal, *The Bill of Rights Handbook*, 5th edition (2005) 196.

⁵⁰² As previously explored under 5.4. above. *Re: The National Education Policy Bill No. 83 of 1995* 1996 3 SA 289 (CC) para 16; *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC) paras 17, 59; *Rail Commuters Action Group v Transnet Limited t/a Metro-Rail* 2005 2 SA 359 (CC) para 106.

⁵⁰³ Currie, and De Waal, *The Bill of Rights Handbook*, 5th edition (2005) 226.

⁵⁰⁴ Section 8 (3) of the 1996 Constitution.

⁵⁰⁵ Currie, and De Waal, *The Bill of Rights Handbook*, 5th edition (2005) 190, 194, and 226.

- a) the first question to be posed is always whether the statutory or common law remedies sufficiently address the violation of a fundamental right;
- b) if not, section 8 (3) of the Constitution requires that a court must first look for a constitutional remedy in existing legislation:
 - a. The starting point is to look for statutes that specifically give effect to fundamental rights and are not unconstitutional. If there is such a statute, and the statutory provision is appropriate to vindicate the fundamental right and deter its further infringement, there is no room for development of any constitutional remedy. The ordinary statutory remedy then also serves as an appropriate constitutional remedy;
- c) if there is no statute that gives effect to the fundamental right, then section 8 (3) directs the court to look to existing common law principles for a constitutional remedy that does give effect to the right. If this cannot be found in common law principles, then the common law must be developed to give effect to the fundamental right. This in effect means that new common law remedies must be created to address the private violations of fundamental rights⁵⁰⁶.

In seeking a constitutional remedy for a violation of a fundamental right between two individuals (horizontal violation), a court must first look at legislation, then turn to existing common law and finally, if all else fails, develop a new common law remedy. In awarding remedies for breach of constitutional rights, the court in effect constitutionalizes that part of the statute, or existing common law, since, to the extent that the statute or common law principle gives affect to the Constitution, it is to that extent, constitutionalised. This does not mean that statutory remedies cannot be abolished by the legislator. The legislator may do so, but it must then replace the remedy with another appropriate constitutional remedy, failing which the courts will have to do so.⁵⁰⁷

⁵⁰⁶ *Id* at 227.

⁵⁰⁷ De Ville, *Judicial Review of Administrative Action in South Africa*, revised 1st edition (2005) 325. Currie, and De Waal, *The Bill of Rights Handbook*, 5th edition (2005) 227.

It is evident that in order for common law remedies to be applicable in terms of constitutional infringements, a relaxed approach to the fulfillment of the requirements of a constitutional infringement as well as a common law delict is required. It requires that the purpose and substance of the remedy be sought as opposed to the procedural correctness.

It is apt to conclude this Chapter with a thought from Boberg that “the merit of a rule depends on its functional effect rather than the purity of its ancestry.”⁵⁰⁸

⁵⁰⁸ Boberg, *The Law of Delict*, Volume 1 (1984) 26 - 27.

CHAPTER 6

ARGUMENTS IN FAVOUR OF AND OPPOSING THE AWARDING OF MONETARY DAMAGES IN THE CONSTITUTIONAL CONTEXT

6.1. INTRODUCTION

This Chapter seeks to introduce the arguments in favour of and opposing the provision of monetary damages for constitutional breaches. The rationale for certain judgments in favour of constitutional damages as well as those opposing same will be explored. Non-payment of social grants, including inadequate implementation of a social security system in South Africa, is one of the more vicious breaches of the Constitution and which has complainants proposing arguments in favour of monetary damages; this will be explored further in the subsequent Chapter.⁵⁰⁹

We firstly turn to the exploration of arguments in favour of monetary damages for breach of a constitutional right.

6.2. ARGUMENTS IN FAVOUR OF MONETARY DAMAGES FOR BREACH OF A CONSTITUTIONAL RIGHT

A case at hand pertinent to the research topic of this dissertation is the landmark case of *Member of the Executive Council of the Department of Welfare v Kate*⁵¹⁰, which has been outlined in detail in Chapter 2 *supra*.

The real dispute in *Kate's*⁵¹¹ appeal relates to the remainder of the interest. Interest during the period of delay in processing *Kate's* application for a grant was claimed and awarded as a measure of constitutional damages for the unreasonable delay that *Kate* was forced to endure.⁵¹² Monetary damages for a constitutional breach have

⁵⁰⁹ Deneys Reitz Attorneys: Legal Update no. 7, *Duty To Pay Social Grant-Arrears* (2008) 1.

⁵¹⁰ 2006 SCA 46 (RSA); case 580/04 pages 7 - 8.

⁵¹¹ *Supra*.

⁵¹² Within *Kate's case* 2004 6 SA 40 (SCA) at paragraph 69 the Court recognized that in principle monetary damages are capable of being awarded for a breach of constitutional right. The High Court granted certain declaratory relief and ordered the appellant to pay the interest that had been claimed, reported as *Kate v Member of the Executive Council for the Department of Welfare, Eastern Cape* 2004 6 SA 40 (SCA), being the case in the court *a quo*.

been awarded by the Supreme Court of Appeal, and been endorsed by the Constitutional Court in *President of the Republic of South Africa v Modderklip Boerdery (Pty)(Ltd)*.⁵¹³ A further case in point is that of *Jayiya v Member of the Executive Council, Eastern Cape Provincial Government*⁵¹⁴, which makes reference to state liability for the delay in paying of social grants.

There is nothing in the Constitution itself that prevents a court from awarding damages as a remedy for the violation of fundamental rights.⁵¹⁵ The jurisprudence of the courts, more specifically that of the Constitutional Court, is not encouraging. Constitutional remedies should in principle be forward looking, community orientated and structural as observed from case law.⁵¹⁶ An award of damages is historically not a particularly forward-looking remedy. On the contrary, it is a remedy, which requires a court to look back to the past in order to determine how to compensate the victim⁵¹⁷ Despite the uneasy relationship between damages and the purpose of constitutional remedies, there is nevertheless room for the development of damages as a remedy for certain violations of fundamental rights. This is so for at least two reasons:

First, there are some situations where a declaration of invalidity or an interdict makes little sense and an award of damages is then the only form of relief which will vindicate the fundamental right and deter future infringements, and Secondly, substantial awards of damages may encourage victims to be willing to litigate, something which may serve to vindicate the Constitution and to deter further infringements.

In *Njongi v Minister of the Executive Council, Department of Welfare, Eastern Cape*⁵¹⁸ Njongi, the applicant, received a state disability grant until November 1997, when it was terminated without explanation by the relevant provincial government. Njongi re-applied for the grant and payment of the grant resumed in July 2000,

⁵¹³ 2004 6 SA 40 (SCA) para 43; 2005 5 SA 3 (CC) paras 65 -66; case 580/04 page 13 para 24.

⁵¹⁴ Case number 264/02 [2003] SCA, unreported.

⁵¹⁵ Case number 580/04 page 15, unreported.

⁵¹⁶ *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC); 1997 17 BCLR 851.

⁵¹⁷ Currie, and De Waal, *The Bill of Rights Handbook*, 5th edition (2005) 219.

⁵¹⁸ 2008 4 SA 237 (CC).

together with a part back-payment. Four years later Njongi approached the High Court for an order setting aside the decision to terminate her grant payment, and for payment of the balance of arrears still owed to her. The provincial government argued that Njongi's claim had prescribed.

The general principle is that a debt must be immediately enforceable before it can be claimed. In this case prescription should begin to run as soon as the provincial government indicated that it will not rely on the relevant administrative action of the termination of the grant, as from that moment the debt was immediately enforceable. Full reinstatement of the grant may well have indicated that the State conceded that its decision to terminate the grant was unlawful. Njongi's grant was never fully reinstated, which in turn suggested that the State was still relying on the administrative decision, which in turn indicated that prescription had not commenced. With that being said, it is doubtful whether prescription could ever run against a debt that is a social grant, where the debt is in respect of an obligation which the State must perform in terms of the Constitution and where non-performance by the State represents conduct that is in breach of the Constitution. The Constitutional Court reinstated the grant from November 1997, with interest, and ordered the State to pay the costs on an attorney and client scale in the High Court, Full Bench appeal, Supreme Court of Appeal and Constitutional Court.⁵¹⁹

In *Fose's case*⁵²⁰, the Court⁵²¹ envisaged an amount of damages for the breaching of a victim's fundamental rights amongst the components of the plaintiff's common law claim and was satisfied that an award of this amount gave sufficient effect to the values contained in the Bill of Rights.⁵²²

In *Mjeni v Minister of Health and Welfare, Eastern Cape*⁵²³ Jafta J held that committal for contempt of court is competent in cases against the State, even where the order ignored was for the payment of money, because section 3 of the State

⁵¹⁹ 2008 4 SA 237 (CC). at para 22, 28, 30, 37, and 56.

⁵²⁰ 1997 3 SA 786 (CC) page 798.

⁵²¹ Currie, and De Waal *Loc cit* note 517.

⁵²² *Id* at 298. 1997 3 SA 786 (CC) page 798.

⁵²³ 2000 4 SA 446 (Tk).

Liability Act⁵²⁴ forbids ‘execution, attachment or like process’, contempt proceedings are the only means available to compel compliance.⁵²⁵ A contrary interpretation, Jafta J observed, would mean that ‘courts would be condoning and encouraging deliberate disobedience of their order or even conduct which holds such orders in utter contempt’. Jafta J remarked on the paucity of authority on contempt of court against the State, saying that this:

“...may indicate that until recently government departments complied with orders issued by courts of law. Therefore, in the past it ... [had not been] necessary for the courts to decide the matter. However, the attitude of State departments towards courts’ orders has changed lately. The number of similar applications brought before this Court has risen at an alarming rate and regrettably that is a cause for concern”.⁵²⁶

Leave to appeal was refused in this matter, as was a petition for leave to the Supreme Court of Appeal. Despite this, *Mjeni’s* case was held, albeit obiter, by the Supreme Court of Appeal in *Jayiya v Minister of the Executive Council for Welfare, Eastern Cape and Another*⁵²⁷ to have been wrongly decided. Conradie JA held that the development of the common law to provide that organs of state who fail or refuse to comply with orders to pay money may be committed for contempt of court, was a ‘novel’ response by the courts of the Eastern Cape to the ‘[w]holesale non-compliance’ with court orders on the part of the Welfare Department and to the ‘laziness and incompetence which is the root of the malaise in the Eastern Cape Department of Welfare’, but was misconceived.⁵²⁸ What the Supreme Court of Appeal did not do was to consider the need to interpret the State Liability Act⁵²⁹ in conformity with the spirit, purport and objects of the Bill of Rights, as Jafta J had done in *Mjeni’s*⁵³⁰ case. There is not a single word in the Supreme Court of Appeal’s judgment about the possibility that its approach may place the State above the law when it has been ordered to pay money. Nor does it display any real understanding of or concern for those who are the victims of the laziness and incompetence that

⁵²⁴ Act 20 of 1957.

⁵²⁵ However, note that this principle has now been changed by *Nyathi v Member of the Executive Council for the Department of Health, Gauteng and Minister of Justice and Constitutional Development with the Centre For Constitutional Rights* 2008 5 SA 94 (CC); 2008 9 BCLR 865 (CC).

⁵²⁶ Plasket, ‘Administrative Justice and Social Assistance’ (2003) 120 *SALJ* 494 519.

⁵²⁷ 2004 2 SA 611 (SCA).

⁵²⁸ *Jayiya v Member of Executive Council for Welfare, Eastern Cape* 2004 2 SA 611 (SCA) para 18.

⁵²⁹ Act 20 of 1957.

⁵³⁰ 2000 4 SA 446 (Tk).

Conradie JA rightly criticized.⁵³¹ Harsh words of condemnation do not constitute a remedy in terms of section 172 of the Constitution. It would be cold comfort to litigants with useless orders against the State that the common law has been “preserved in amber”.⁵³² The damage that this judgment does to the cause of human rights goes beyond this issue.⁵³³

The *first possible argument* in favour of the awarding of monetary damages for the infringement of a constitutional right would be the possibility of the consequence of the award leading to greater accountability in the future by the respondent. In the case of the respondent being a state department, the hope is that the award would be a deterrent for future behaviour being the same, bearing in mind that a constitutional remedy should be forward looking. The awarding of monetary damages, to rephrase, could provide the motivation that is required in order to launch the State into action (as opposed to the evident inaction) towards performing their tasks with the necessary skill and speed that would result in a reduced number of infringements of individuals’ constitutional rights. This motivation may be stirred further by the realisation of those that are *batho pele*⁵³⁴ orientated that by utilising scarce resources for the payment of monetary damages, the amount of resources remaining for the granting of necessary grants is severely diminished thereby further prejudicing the poor and underprivileged of our society who in effect should be protected by the rule of law.⁵³⁵

Secondly, it can be argued that the granting of monetary damages would restore the harmonious balance of interest referred to in Chapter 3.⁵³⁶ It is argued that the infringement of an individual’s constitutional right causes a disturbance in the harmonious balance of interests which then requires a remedy to restore the balance.⁵³⁷

⁵³¹ Plasket, ‘Administrative Justice and Social Assistance’ (2003) 120 *SALJ* 494: 525. *Jayiya v Member of Executive Council for Welfare, Eastern Cape* 2004 2 SA 611 (SCA) para 18.

⁵³² *Ibid.*

⁵³³ *Ibid.*

⁵³⁴ Refer to Chapter 2 of this dissertation at footnote 154.

⁵³⁵ Currie, and De Waal *The Bill of Rights Handbook*, 5th edition (2005) 219.

⁵³⁶ In particular, it is the role of the law of delict to indicate which interests are recognized by the law, under which circumstances they are protected against infringement and how such a disturbance in the harmonious balance of interests may be restored. Neethling, Potgieter, and Visser, *Law of Delict*, 6th edition (2010) 3.

⁵³⁷ Currie, and De Waal *The Bill of Rights Handbook*, 5th edition (2005) 219.

Thirdly, it can be argued that the remedy of provision of monetary damages as opposed to the granting of an interdict or an order of invalidity is vastly more appropriate to the individual (as opposed to the community) who has had his or her right infringed. The aforementioned orders, although appropriate in certain circumstances, may in many cases fail to remedy the situation or provide substantial relief to the individual who has had his or her right infringed. An order for monetary damages goes beyond an interdict or an order of invalidity. If the essence of the provision of a constitutional remedy relates to its effectiveness based on the notion of appropriateness, it is evident that in certain circumstances the granting of monetary damages would stand as the only appropriate and effective relief or remedy for the victim.⁵³⁸

Fourthly, the progress towards the provision of monetary damages is necessary in that in certain circumstances the provision of any other remedy may be inappropriate. Any remedy granted by the Constitutional Court must be ‘just and equitable’ and the provision of monetary damages is at present in certain circumstances the only just and equitable award available.⁵³⁹

Fifthly, it is argued that the remedies provided for in section 38 of the Constitution are not remedies of last resort and hence should be utilized where necessary and where it is just and equitable to do so, hence promoting the use of direct constitutional remedies.

With reference to Chapter 2 of this dissertation it is clear that there are two further reasons for the provision of monetary damages:

- a) there is no reason why a direct breach of a substantive constitutional right should be remedied indirectly, and
- b) there is an endemic breach of rights that are now in issue and this justifies the clear assertion of the independent existence of these rights.

⁵³⁸ *Ibid.*

⁵³⁹ *Ibid.*

We now turn to arguments opposing monetary damages for the breach of a constitutional right.

6.3. ARGUMENTS OPPOSING MONETARY DAMAGES FOR BREACH OF A CONSTITUTIONAL RIGHT

Although there may be arguments in favour of the provision of monetary damages as a remedy for the breach of a constitutional right, there are equally as many arguments opposing the provision of monetary damages which the writer has identified and extrapolated hereunder.

Firstly, the author identifies that there is the concern relating to the calculation of the amount to be provided to the individual whose right has been infringed. The provision of monetary damages may amount to an inconsistency in the amounts awarded, unless a method of calculating the amount to be awarded to the individual is established. At present each award is based on the judge's discretion leading to an inconsistency in the amounts of the awards. In terms of a constitutional remedy the Constitutional Court has determined that the remedy should be forward looking and community orientated. It can be argued that the provision of monetary damages is traditionally in terms of delict not forward looking, but backward looking and the provision of monetary damages to an individual cannot be said to be community orientated, for the remedy is aimed at providing retribution to an individual. On the other hand, it can be argued that an award to an individual may have an impact on the community as a whole and a deterrent value and thereby serves the values of the Constitution. The origin of the modern concept of patrimonial damage can be traced back to the treatise of the prominent German jurist Mommsen in 1855.⁵⁴⁰

According to Mommsen, damage (*interesse*) is the difference between the present patrimony of the plaintiff and the patrimonial position which would presently have existed if the damage-causing event had not taken place.

⁵⁴⁰ Chapter 3 of this dissertation.

The *second argument* opposing the provision of monetary damages for the infringement of an individual's constitutional right is the possible trivialization of the harm inflicted on the individual by equating and relating such in monetary terms. This refers back to the first opposing argument wherein the concept of how the calculation of the amount to be awarded would be determined. A solid basis for the calculation would need to be established in order for the award to be justifiable and meaningful to the victim. The determination of the monetary damages should not result in a windfall for individuals in certain cases and nominal damages to others in similar situations. Bearing in mind that in cases where state departments are defendants or respondents, the award of monetary damages would not have the desired impact on the state department officials for they are not individually forced to part with their money. The payment of the monetary damages would be paid from the respective department's budget, hence the remedy may not indeed be punitive to the department but rather to the community who are now further deprived of the much needed finance for the processing of further grants.

On the contrary where an individual has infringed another individual's constitutional right, the awarding of monetary damages may indeed provide the retributive effect desired by the remedy. If the infringer has a large cash flow base available the desired effect may not be felt as desired, as those who are rich would not hurt to part with a little. It could be argued that the infringer's relative wealth should be taken into account in order that the award would provide the desired result in that the infringer would be adequately 'punished'. If this be the case it would clearly result in a further anomaly in the amounts awarded to the victim based on the financial viability of the infringer. This would leave the infringed individual begging the question, "why is my right worth less than another's right?"

The *third opposing argument* relates to delict and poses the question 'does a monetary award cancel out the wrongfulness of the act performed by the infringer in the delictual sense, since monetary awards have emanated from our common law remedies?' Once the community is led to believe that wrongfulness is cancelled out by wealth, lawlessness will rule and the rule of law will become futile. The judiciary will be left powerless but to award even larger *quantums* of damages.

The *fourth opposing argument* for the provision of monetary damages is the possible consequence that this forward movement of the provision of such awards may have on awards in the future. In a sense the provision of monetary damages as a remedy for a constitutional breach would open the door for the provision of monetary damages for the breach of a right which did not result in patrimonial loss, resulting in further questions related to the valuing of one's rights. An expectation of benefits, as for example the benefit of a social assistance grant, is the legally recognized expectation of a person to acquire patrimonial rights or benefits in the future (through which his patrimony will be enhanced, in other words once his or her application for the social assistance grant has been approved) or the recognized expectation that his patrimony will not diminish. Such an expectation may be so 'convincing' that the law recognizes and protects it by awarding damages if it has been infringed, such as in the delay of receiving a social assistance grant.⁵⁴¹ An expectation must meet certain general requirements, which were explored *supra* at Section 3.3.⁵⁴²

The *fifth opposing argument* begs the question that the judiciary will be required to answer in the future when the financial well is depleted and claims for damages become exceedingly inflated is "Where will the line be drawn?" The provision of monetary damages tends towards the reviving of the penal nature of awards as opposed to the compensatory nature for which the award is required. The awarding of constitutional damages is traditionally, as per the Constitutional Court⁵⁴³, compensatory in nature and not penal. The answer to the above question will be based on the calculation referred to in the first opposing argument. As discussed earlier, the provision of monetary damages is at present left to the discretion of the judges. This is a powerful tool which at present is open to potential abuse until such time as constraints and checks and balances are provided to counteract the power of

⁵⁴¹ Visser, and Potgieter, *Law of Damages* (1993) 48.

⁵⁴² *Id* at 50 -51. From the above general requirements of an expectation it is evident that the applicant in *Kate's* case 2005 1 SA 141 SECLD; *Welfare Department v Kate* 2006 SCA 46 RSA had a legitimate expectation of additional patrimony in her estate by the granting of a social grant as do many other applicants who seek a social grant from the government in that the law provides for the expectation of a social grant, the applicant complies with the requirements for a social grant thereby providing a sufficient degree of probability that the expectation of a social grant would be realised, the social grant has a monetary value and the expectation of a social grant does not contain an illegal element.

⁵⁴³ *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 6 SA 40; *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 4 SA 237 (CC).

the discretion currently available. As noted above, the tool of a formula to calculate the amount to be awarded could act as a check to the unrestricted power of the judges.

The awarding of monetary damages by the judiciary, particularly in the Constitutional Court, directing the executive to distribute finances in a specific manner results in the judiciary directing the way in which the executive distributes state resources and is thus beyond the scope of the judicial function and thereby threatens the separation of powers specifically provided for in the Constitution. The judiciary is usually an elite and undemocratically appointed branch of the State and lacks the democratic legitimacy required to decide social resource division.⁵⁴⁴

The *sixth opposing argument* indicates that the judiciary could compromise the separation of powers by providing monetary damages, which is the function of the executive, and thereby jeopardizing the legitimacy of South Africa's democracy.

The *seventh opposing argument* analyses the awarding of a department's valuable scarce resources to an individual for an infringement of his or her constitutional right, which *may* result in less available resources for the community in general and *may not* necessarily answer the dire problem of continued infringement of constitutional rights by the State. The provision of monetary damages may in fact merely result in squandering valuable resources with no guarantee that further infringements will not occur as the administration is not compelled to 'get its house in order'.⁵⁴⁵

The *eighth opposing argument* to the provision of monetary damages is that the State may in fact be unable to pay the damages or may be unwilling to pay such damages, leaving the applicant in a situation where he or she would be compelled to proceed further against the defendant or respondent in order to vindicate his or her right.⁵⁴⁶

In *Somyani v Minister of the Executive Council for Welfare, Eastern Cape, and Another*⁵⁴⁷ Froneman J commenced his judgment by observing that there were forty-one cases on the motion court roll in which the failure of officials of the Department

⁵⁴⁴ Refer to Chapter 4 of this dissertation.

⁵⁴⁵ *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC); 1997 7 BCLR 851.

⁵⁴⁶ Refer to 7.1.5. below for a further discussion on proceeding against the State.

⁵⁴⁷ SECLD case 1144/01 unreported judgment undated.

of Welfare to do their work was the main issue. While most, he said, ‘had to do with the lack of giving proper attention to the consideration of social grants’, three of the cases had ‘proceeded to the point where the respondents were called upon to show cause why they should not be committed to prison for contempt of court because of their failure to give heed to court orders’. Of these, agreements had been reached on how to proceed in two, but in *Somyani’s* case⁵⁴⁸ no agreement had been reached. Froneman J described the case as not being an isolated incident of maladministration, stating that other courts had commented ‘on the provincial administration’s tardiness in complying with its constitutional and legislative duties’. Froneman J held that if the State chose to flout the rule of law by disobeying court orders, ‘there is not much that the courts can do about it, except to continue to act in terms of the Constitution. But those who disregard court orders must then know that they are destroying the constitutional democracy that enables them to govern’.⁵⁴⁹

Froneman J commented again on the failure of the respondent to obey an order in *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuzza*.⁵⁵⁰ In this case Froneman J had earlier ordered the respondents to reinstate the disability grants of three applicants with effect from the date of cancellation, to pay them within two weeks and to pay interest. They had complied with most of the order, but refused to pay interest of about R250.00. Shortly before Froneman J was to deal with the issue, the respondents’ counsel and their attorney paid the interest from their own pockets, thus saving their clients from exposure to committal for contempt of court. Froneman J stated that obedience to court orders is ‘fundamental to any constitutional democracy of the kind we aspire to’.⁵⁵¹

The cases that have dealt with the failure of officials to comply with court orders, and those that contain adverse comments on the inefficiency of those who are required to administer the social assistance system, raise two sets of opposing issues. The failure to comply with court orders raises squarely the responsibility of the judiciary to ensure that the Constitution is not relegated to the status of an interesting but useless

⁵⁴⁸ *Supra*.

⁵⁴⁹ SECLD case 1144/01 unreported judgment undated at para 3, 20, and 26. Plasket, ‘Administrative Justice and Social Assistance’ (2003) 120 *SALJ* 494 520.

⁵⁵⁰ 2001 4 SA 1184 (SCA).

⁵⁵¹ 2001 4 SA 1184 (SCA) at paragraphs 2, and 10.

manifesto of aspirations separated from reality. The most immediate challenges set before the judiciary by the cases discussed, and their like in the future, lie, first in the development of appropriate remedies that will ensure that the rights of individuals are, in fact respected, protected, promoted and fulfilled; and secondly, in displaying the necessary courage to strike effectively at constitutional infringements, even if that may involve crossing swords with the executive from time to time. Nothing less should be expected of courts empowered by the Constitution, they are, after all, meant to act as “buttresses between the executive and its subjects”.⁵⁵²

In *Nyathi v Member of the Executive Council, Department of Health, Gauteng and Another*⁵⁵³ the applicant sought a declaratory order that section 3 of the State Liability Act⁵⁵⁴ is inconsistent with the Constitution of the Republic of South Africa. It was held that section 3 of the State Liability Act⁵⁵⁵ was incompatible with sections 34, 165 (5) and 195 (1) (f) of the Constitution. Section 3 of the Act was unconstitutional in placing the State and its officials above the law and beyond the very orders which should bind it or hold it accountable. The blanket ban contained in section 3 of the Act constituted a material limitation of the right of access to the courts and the consequent right to have the effects of such successful access implemented. The court accordingly issued the declarator sought.

The judgment by Davis J was prompted by the dire situation of Nellmapius resident Dingaani Nyathi, who was embroiled in a legal battle with the Gauteng Member of the Executive Council of Health. Nyathi was claiming R1.4 million in damages after a central venous line was incorrectly inserted into his artery when he was admitted to the Pretoria Academic Hospital in August 2002 with burn wounds after a burning paraffin stove was thrown at him. Nyathi, who suffered burns to his thorax, abdomen, both forearms and legs, was admitted to the hospital for treatment, where a central venous line was incorrectly inserted. He was transferred to the Kalafong Hospital

⁵⁵² Plasket, ‘Administrative Justice and Social Assistance’ (2003) 120 *SALJ* 494 523.

⁵⁵³ 2008 5 SA 94 (CC); 2008 9 BCLR 865 (CC).

⁵⁵⁴ Section 3 of Act 20 of 1957 states: “No execution, attachment or like process shall be issued against the defendant or respondent in any such action or proceedings or against any property of the State, but the amount, if any, which may be required to satisfy any judgment or order given or made against the nominal defendant or respondent in any such action or proceedings may be paid out of the National Revenue Fund or a Provincial Revenue Fund, as the case may be.

⁵⁵⁵ *Ibid.*

where there was a failure to timeously diagnose the incorrect insertion of the central venous line. As a result of both the incorrect insertion of the central venous line and the subsequent omission by the medical personnel at the two hospitals, he suffered a stroke and became paralyzed on the left side of his body. The Member of the Executive Council initially denied liability, but later conceded the merits of the case. The court initially ordered that the Member of the Executive Council make an interim payment of R317 000 to Nyathi so that he could pay his medical and other expenses. In spite of promises to pay, no money was forthcoming. The State attorney, shortly before the court proceedings, again promised to pay, but failed on this promise. Despite being notified about the application, the State failed to be at court to defend the matter. Davis J stated in his judgment that the State had a “moral obligation” regarding public administration. The learned judge stated in this case the State failed in aiding the applicant to prepare for the second leg of his court action. It had thus prejudiced his rights to access the courts as enshrined in the Constitution. The Constitution also stipulated that court orders bind people and organs of state. “It is thus clear that the State Liability Act⁵⁵⁶ is inconsistent with the Constitution,” Davis J said. Davis J stated that the State disregarded a court order and deserved a punitive costs order against it, which he awarded.⁵⁵⁷

On the 2nd of June 2008 the Constitutional Court confirmed that section 3⁵⁵⁸ of the State Liability Act⁵⁵⁹ is inconsistent with the Constitution. The majority of the Constitutional Court found that the section unjustifiably limits the right to equal protection of the law and is inconsistent with the Constitutional protection of dignity and the right of access to Courts. It also violated the principles of judicial authority and the principle that public administration be held accountable. The Court suspended the order for twelve months to allow Parliament to pass legislation to provide an effective means of enforcement of money judgments against the State.⁵⁶⁰

⁵⁵⁶ *Ibid.*

⁵⁵⁷ Case CCT 19/07 [2008] ZACC 8 para 7 - 10. Media Summary, *Nyathi v MEC, Department of Health, Gauteng & another* [2007] JOL 19612 (T), [dated: 30 March 2007], page 1.

⁵⁵⁸ *Nyathi v Member of the Executive Council for the Department of Health, Gauteng & another* [2008] ZACC 8 (CCT19/07) para 53 – 60, and 79. Section 3 of the State Liability Act 20 of 1957 prohibits execution against, or attachment of State property to satisfy judgments debts of the State.

⁵⁵⁹ Act 20 of 1957.

⁵⁶⁰ The Court was also critical of the fact that the State had not settled approximately 200 judgment debts outstanding and ordered the State to provide details of all outstanding judgment debts and a plan

In a dissenting judgment, Langa CJ and Mpati AJ concurring, Nkabinde J held that section 3 of the Act⁵⁶¹ does not violate the right of access to courts. Regarding the equality challenge, she concluded that the differentiation in section 3 of the Act⁵⁶² is rationally related to the important governmental purpose of preventing disruption of public service and thus that section 9 (1) of the Constitution was not infringed. She found that, although the applicant contended that there was nothing he could lawfully do to enforce compliance with the judgment debt, the common law remedy of *mandamus*⁵⁶³ was available to him. While Nkabinde J stressed that the non-compliance by state officials with court orders is unacceptable and cannot be tolerated, she commented that such non-compliance cannot be said to have had the effect that the impugned section rendered them immune from complying with their constitutional injunctions. She said that the problem was due to the public administration's inefficiency and mismanagement which could not be resolved by striking down the provision. Accordingly, she would have refused to confirm the declaration of constitutional invalidity but would support the further relief suggested by Madala J.⁵⁶⁴

In the end result, the following order was handed down by Madala J:

- a) the order of constitutional invalidity made by the Pretoria High Court was confirmed in the following terms:

Section 3 of the Act⁵⁶⁵ is declared to be inconsistent with the Constitution to the extent that it does not allow for execution or attachment against the State and that it does not provide for an express procedure for the satisfaction of judgment debts.

for speedy settlement thereof. Media Summary, *Nyathi v MEC, Department of Health, Gauteng & another* [2007] JOL 19612 (T), [dated: 30 March 2007], page 1.

⁵⁶¹ Act 20 of 1957.

⁵⁶² *Ibid.*

⁵⁶³ A mandatory interdict is where one seeks to force an administrator to perform a statutory duty or to cure a state of affairs brought about by illegal actions. The remedy of *mandamus* has the capacity to be effective where there is a breach by a public official of a duty that is imposed by a statute or the Constitution. In most cases that is sufficient without an additional remedy of damages. The courts have also introduced the use of structural interdicts – compelling the violator to perform in a structured manner and to report intermittently to an appointed authority. This remedy is more difficult to enforce than the prohibitory interdict.

⁵⁶⁴ Case CCT 19/07 [2008] ZACC 8 para 117 – 122 and 152.

⁵⁶⁵ Act 20 of 1957.

- b) the declaration of invalidity was suspended for a period of twelve months to allow Parliament to pass legislation that provides for the effective enforcement of court orders.⁵⁶⁶

Opposing argument number nine poses the question ‘from where will the monetary damages be financed?’ The logical answer would be from the tax payer’s money, in order to pay the damages the necessity may arise for the increase of tax resulting in the poor being further deprived.

In light of the nine opposing arguments outlined above, it is evident that there are numerous arguments opposing the granting of monetary damages. Bearing this in mind, it would be sensible to look to other delictual remedies which are currently available before utilizing the monetary damages remedy, bearing in mind the time constraints on proceeding against the State.⁵⁶⁷

The public law action for constitutional damages has the following objectives in addition to the objective of compensation of the victim. Firstly, the vindication of the fundamental right itself so as to promote the values of an open and democratic society based on freedom and equality and respect for human rights. Secondly, the deterrence and prevention of future infringements of fundamental rights by the legislative and executive organs of state at all levels of government and finally, the punishment of those organs of state whose officials have infringed fundamental rights in a particularly erroneous fashion.⁵⁶⁸

⁵⁶⁶ Case CCT 19/07 [2008] ZACC 8 para 91.

⁵⁶⁷ In *Madinda v Minister of Safety and Security* 2008 4 SA 312 (SCA) Madinda alleged that she was unlawfully arrested, detained and assaulted by unidentified members of the South African Police Service on 11 September 2004. Section 3(2)(a) of the Institution of Legal Proceedings Against Certain Organs of State Act, 2002 required that a notice be sent to the National Commissioner of Madinda’s intention to sue the State by 11 March 2005. The notice was only sent on the 19th of August 2005. The notice was rejected as not complying with the Act. Madinda then sought condonation of her failure to have served the notice timeously.

The phrase “if the court is satisfied” in section 3(4)(b) of the Act does not require proof on a balance of probabilities, but rather the overall impression made on a court which brings a fair mind to the facts set up by the parties. “Good cause” means that all the factors must be considered which bear on the proper administration of justice. These factors include the prospects of success in the proposed litigation, the reasons for the delay, the sufficiency of the explanation offered, the bona fides of the applicant, any contribution by other persons to the delay, and the applicant’s own responsibility for the delay. The court applied these factors to the specific facts of the case and granted condonation.

⁵⁶⁸ De Waal, Currie, and Erasmus, *The Bill of Rights Handbook*, 4th edition (2001) 190.

In light of *Fose's case*⁵⁶⁹, it is submitted that the following is the position in respect of damages in constitutional cases. In cases where the violation of constitutional rights entails the commission of a delict against the victim, a claim for delictual damages will be available. A claim for damages in addition to those available under the law of delict (delictual claim) does not automatically flow from a breach of constitutional rights. Such constitutional damages will have to be an appropriate remedy. As with all other constitutional remedies, an appropriate remedy is one suitable to vindicate the constitutional right infringed and deter future violations. It appears from *Fose's case*⁵⁷⁰ that the court is unlikely to award punitive damages for the violation of fundamental rights. Ackerman J stated, for the majority, that 'an appropriate remedy must mean an effective remedy'. He added that in a country where⁵⁷¹ so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated.

The aforementioned statements are overshadowed by the negative attitude toward punitive damages that permeates the rest of the majority opinion. Even in circumstances where delictual damages are not available, constitutional damages will not necessarily be awarded for a violation of human rights.⁵⁷²

Even the most ardent supporters of constitutional remedies draw attention to inconsistent and unsatisfactory features of a constitutional damages remedy aimed at punishment or deterrence. It has been suggested that to give punitive damages the primary focus runs counter to the Anglo-Canadian tradition, which favours calculated compensatory damages. The deterrent effect of any damage award is difficult to assess, since the empirical evidence of the deterrent impact is only evident by its absence.⁵⁷³ Where punitive damages are awarded against the State it is almost inevitable that the costs involved will be shifted to the public at large.⁵⁷⁴

⁵⁶⁹ 1997 3 SA 786 (CC).

⁵⁷⁰ *Supra*.

⁵⁷¹ *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC); 1997 7 BCLR 851 para 72, 69 and 71. De Waal *et al Loc cit* note 568.

⁵⁷² De Waal *et al Op cit* note 568 at 191. *Supra* Chapter 1 of this dissertation.

⁵⁷³ De Waal, Currie, and Erasmus, *The Bill of Rights Handbook*, 4th edition (2001) 169.

⁵⁷⁴ 1997 3 SA 786 (CC) para 65.

Nothing has been produced or referred to within *Fose's* case or elsewhere which tends to lead to the conclusion that punitive damages against the State will serve as a significant deterrent against individual or general repetitions of the infringements.⁵⁷⁵ Nothing in South Africa's recent history, where substantial awards for death and brutality in detention were awarded or agreed to, suggests that this had any preventative effect. Further, to make nominal punitive awards will, if anything, trivialize the right involved and hence for awards to have any conceivable deterrent effect against the State they will have to be very substantial and, the more substantial they are the greater the anomaly that a single plaintiff receives a windfall of such a magnitude.⁵⁷⁶ While punitive awards may lead to systematic change, the process might well be a slow one requiring a substantial number of such awards before change is induced, which the State is reluctant to institute of its own accord; equitable relief on the other hand could achieve such change far more speedily and cheaply.⁵⁷⁷

6.4. CONCLUSION

This Chapter has explored the five arguments in favour of monetary damages for breach of a constitutional right as well as the nine arguments opposing the provision of monetary damages for breach of a constitutional right.

While officials of the Department of Welfare in the Eastern Cape are not the only officials who are ignoring court orders, they appear to lead the way in ignoring or failing to comply with court orders. This disturbing state of affairs has been commented on by various judges in the province and has been explored in depth in Chapter two above. The extent of the problem is illustrated by the fact that in one matter in the Eastern Cape Division orders to commit the Member of the Executive Council for Welfare, her Permanent Secretary, her legal advisor and one other official were sought in respect of non-compliance with 43 orders.⁵⁷⁸ In the South Eastern Cape Local Division, orders have been granted to direct the political or administrative

⁵⁷⁵ 1997 3 SA 786 (CC); 1997 7 BCLR 851 para 58, 60, 68, and 74.

⁵⁷⁶ *Ibid.*

⁵⁷⁷ 1997 3 SA 786 (CC); 1997 7 BCLR 851 para 58, 60, 68, and 74.

⁵⁷⁸ *Booi v Jajula; Mnto v Jajula* ECD cases 431/99 and 433/99 unreported judgment undated. These matters were settled when the respondents eventually purged their contempt.

heads of the Departments of Welfare to show cause why they should not be committed for contempt in 69 matters between April 2001 and 20 February 2002.⁵⁷⁹ Usually, committal for contempt of court is not a competent remedy for the failure or refusal of a party to comply with an order for the payment of money. In such cases the aggrieved party's remedy is to execute against the debtors property. Committal for contempt of court is a competent remedy when the order that has not been obeyed is for the doing of an act or the prohibition of the doing of an act.⁵⁸⁰

From this Chapter it is evident that although there are positive arguments to the proposition of granting constitutional damages, there are equally as many negative arguments opposing the granting of such damages. In this regard, it is submitted that it is useful to consider the following elements when determining which appropriate, effective, just and equitable remedy to award:

- a) the nature and importance of the right in issue,
- b) the alternative remedies available, and
- c) the consequences of the breach for the claimant.

Monetary damages in the form of delictual common law damages are available for the breach of a constitutional right provided the infringement complies with all the requirements of a delictual remedy and is not granted in addition to another remedy. However, as to whether such a remedy is appropriate, just, equitable and effective will only be determined by considering points a) to c) above in each circumstance.

⁵⁷⁹ Plasket, 'Administrative Justice and Social Assistance' (2003) 120 *SALJ* 494 517 - 518.

⁵⁸⁰ *Id* at 518.

CHAPTER 7

**THE CONCEPT OF REMEDIES IN GENERAL AND ALTERNATIVE
REMEDIES TO MONETARY DAMAGES**

This Chapter will firstly discuss the concept of remedies in general before providing an overview of possible rational alternative remedies to monetary damages for constitutional breaches and will examine the possible consequences of such alternatives.

7.1. THE CONCEPT OF REMEDIES IN GENERAL

7.1.1. DIRECT AND INDIRECT APPLICATION OF THE BILL OF RIGHTS

We commence this Section with a brief recapping of the direct and indirect application of the Bill of Rights as more fully discussed in Section 4.2.1.1 above.

The ‘indirect application’ of the Bill of Rights entails the resolving of a dispute by interpreting a statute or developing the common law so as to promote the spirit, purport and objects of the Bill of Rights.⁵⁸¹ When the Bill of Rights is applied directly, the question is whether there is any inconsistency between the Bill of Rights and the law or conduct which governs the issue in question. If there is inconsistency between the Bill of Rights and the law or conduct, the law or conduct unjustifiably violates the Bill of Rights and a ‘constitutional remedy’ must be given to the applicant. Section 38 of the Constitution governs remedies in cases of direct application of the Bill of Rights and it does so in a general sense.⁵⁸²

From the outset it is imperative to emphasize the consequences of the principle⁵⁸³ that, wherever possible, constitutional issues should be avoided. A consequence of the principle is that ordinary (non-constitutional) legal remedies must be exhausted before constitutional relief may be sought. This means that the indirect application of the Bill of Rights must be considered before direct application is considered in any given circumstance. This further explains why constitutional arguments usually feature

⁵⁸¹ De Waal, Currie and Erasmus, *The Bill of Rights Handbook* 4th edition (2001) 167.

⁵⁸² *Ibid.*

⁵⁸³ As noted above in Chapter 4 of this dissertation.

little in areas where the principles of common law are well developed and flexible, as for example, in most areas of private law.⁵⁸⁴ If development of the law is necessary, the indirect application of the Bill of Rights would usually be the appropriate mechanism to ensure that the law gives proper effect to the values contained in the Bill of Rights. Direct application of the Constitution is more significant where the common law is underdeveloped, or unmistakably unconstitutional.⁵⁸⁵

Although the principle of avoidance of constitutional issues favours indirect over direct application, it should be borne in mind that the aim of indirect application differs from direct application. The purpose of indirect application is to give effect to the values of the Bill of Rights through the interpretation of legislation or the development of the common law in a manner that gives effect to the rights protected and enshrined in the Bill of Rights. Indirect application is thus an attempt to enforce the Bill of Rights through the common law and by way of ordinary legal remedies. It is apparent that ordinary legal remedies may not always be appropriate to enforce the Bill of Rights.⁵⁸⁶

7.1.2. AVAILABILITY OF REMEDIES

The availability of constitutional remedies is firstly a matter of jurisdiction. The Constitution limits the subject-matter competence and the remedial competence of some courts. For example, not all courts are competent to grant the remedies listed in section 172 of the Constitution. Generally speaking, the Magistrate's courts and other statutory courts have limited jurisdiction to apply the Bill of Rights directly and have limited jurisdiction to grant constitutional remedies.⁵⁸⁷

⁵⁸⁴ De Waal *et al Op cit* note 581 at 168.

⁵⁸⁵ *Ibid*, such as parts of the pre-1994 law of criminal procedure.

⁵⁸⁶ *Ibid*.

⁵⁸⁷ De Waal, Currie and Erasmus, *The Bill of Rights Handbook* 4th edition (2001) 196. Sections 167(3), 168(3), 169, 172 and 173 of the 1996 Constitution referred to *Supra* in footnote 248.

Section 170 of the 1996 Constitution:

“Magistrates’ Courts and all other courts may decide any matter determined by an Act of Parliament, but a court of a status lower than a High Court may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.”

In *Sanderson v Attorney-General, Eastern Cape*⁵⁸⁸, Kriegler J stated, “Our flexibility in providing remedies may affect our understanding of the right”.⁵⁸⁹ This statement means that, because South African courts have a wide discretion to fashion an appropriate constitutional remedy, they are less likely to be deterred from finding a violation of the right. Courts would be more hesitant to find a violation of a right in situations where there is no appropriate remedy for the violation, or where the Constitution dictates an inappropriate remedy for the violation of a fundamental right.

7.1.3. STAGES OF FUNDAMENTAL RIGHTS LITIGATION

Kriegler J’s statement in the *Sanderson* case⁵⁹⁰ discussed under Section 7.1.2. above further indicates that similar considerations are sometimes taken into account at various stages of fundamental rights litigation, in other words the appropriateness of the remedy.

The following are the stages of fundamental rights litigation:

1. Firstly, ‘application’ is about whether and how the rights in the Bill of Rights apply in legal disputes⁵⁹¹
2. Secondly, ‘interpreting’ or defining the rights in the Bill of Rights is the task of describing what the rights mean in an open and democratic society based on human dignity, freedom and equality, and
3. Thirdly, limiting rights is determining which deviations from the standards set by the Bill of Rights for law and conduct are justified in the circumstances, and
4. Lastly, ‘remedies’ are about what can be done if an unjustifiable violation of rights has occurred.⁵⁹²

⁵⁸⁸ 1998 2 SA 38 (CC).

⁵⁸⁹ *Supra* para 27.

⁵⁹⁰ *Sanderson v Attorney-General, Eastern Cape* 1998 2 SA 38 (CC).

⁵⁹¹ De Waal, Currie and Erasmus, *The Bill of Rights Handbook* 4th edition (2001) 196.

⁵⁹² *Id* at 170.

As Kriegler J again stated in *Fose's* case⁵⁹³, when the courts award a remedy in constitutional cases, they ‘attempt to synchronize the real world with the ideal construct of the constitutional world created in the image of [the supremacy clause]’.⁵⁹⁴ The 1996 Constitution is premised on the principles of constitutional supremacy and justiciability, law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled. *Ubi ius ibi remedium*⁵⁹⁵ – poses the question, “what remedies are there for a breach of the supreme law, or a failure to fulfill the obligations imposed by it?”⁵⁹⁶

Firstly, a government that disobeys the Constitution may be exposed to political sanctions – it may suffer a loss of popularity and may ultimately be voted out of office. A justiciable Constitution provides an additional and more immediate legal sanction: the government may be taken to court. It may be prohibited from undertaking the unconstitutional conduct or mandated to correct a failure to carry out constitutional obligations. A law that breaches the Constitution can be declared invalid and unenforceable.⁵⁹⁷

An allegation of inconsistency between law or conduct and the Constitution provides the cause of action in all constitutional cases. Without such an allegation, there is no constitutional issue that arises in the case. The courts resolve disputes between the parties before it and award constitutional remedies. While the cause of action is always found in the violation of a provision of the Constitution, constitutional remedies may be found in the Constitution itself, in other legislation, statutes, or the common law. When the target of the remedy is private or state conduct, the source of the remedy will often be found in the common law. When legislation is challenged, on the other hand, the Constitution itself usually provides the most suitable remedies.⁵⁹⁸ Despite their disparate sources, there are only four major types of constitutional remedies. These are, firstly, a declaration of invalidity, secondly, a prohibitory interdict, thirdly, a mandatory interdict and fourthly, an award of

⁵⁹³ 1997 3 SA 786 (CC).

⁵⁹⁴ *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC); 1997 7 BCLR 851 para 94. De Waal *et al Op cit* note 591 at 171.

⁵⁹⁵ Literally meaning: ‘where there is a right there must be a remedy’.

⁵⁹⁶ Currie, and De Waal, *The New Constitutional and Administrative Law* Volume 1 (2001) 286.

⁵⁹⁷ *Ibid.*

⁵⁹⁸ *Ibid.*

damages. Of the four, a declaration of invalidity is unusual in the sense that it is not a discretionary remedy. The consequence of constitutional supremacy is that law or conduct inconsistent with the Constitution is invalid. Section 172(1) of the Constitution provides that when deciding a constitutional matter a court must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.⁵⁹⁹

While it is mandatory, the declaration of invalidity is not the only remedy that a court may give. Section 172 of the Constitution goes on to provide that, in addition to the mandatory declaration of invalidity, a court ‘may make any order that is just and equitable’.⁶⁰⁰ In addition thereto, section 38 of the Constitution provides that a court may award ‘appropriate relief’ for a violation of the Bill of Rights.⁶⁰¹ This is because, to correct inconsistencies between law or conduct and the Constitution, a declaration of invalidity may not be enough, or may even be inappropriate. It is often also necessary to control the effects of invalidity. Occasionally, it may be necessary to add to the effects of invalidity and on other occasions to subtract from them. An interdict as well as damages may be awarded in addition to a declaration of invalidity, and the effect or impact of a declaration of invalidity may be controlled in a number of ways.⁶⁰²

It is imperative to explore the recent advances and judgments handed down that affect the possible remedies available to a litigant for the infringement of their constitutional

⁵⁹⁹ Currie, and De Waal, *The New Constitutional and Administrative Law* Volume 1 (2001) 287.

⁶⁰⁰ The 1996 Constitution.

⁶⁰¹ *Ibid.*

⁶⁰² Currie, and De Waal, *The New Constitutional and Administrative Law* Volume 1 (2001) 287. Supremacy of the 1996 Constitution means that laws or conduct inconsistent with the Constitution are invalid and that the courts must declare them to be so. But constitutional supremacy does not require the invalidation of provisions in a statute that are constitutional and valid if they can be severed from the unconstitutional and invalid provisions. Nor does it require immediate invalidation if the resulting situation would be more unconstitutional than the existing one. This is why the courts are granted powers ‘to regulate the impact of a declaration of invalidity.’ This is achieved by: severing the unconstitutional provisions in legislation from the constitutional ones; by reading in words into legislation; by controlling the retrospective effects of a declaration of invalidity and by temporarily suspending a declaration of validity. Section 172 of the 1996 Constitution states that:

“(1) When deciding a constitutional matter within its power, a court –

- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
- (b) may make any order that is just and equitable, including –
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”

rights. Therefore, under Sections 7.1.4. and 7.1.5. below we explore the decision of *Nyathi v Member of the Executive Council for the Department of Health, Gauteng, Minister of Justice and Constitutional Development with the Centre for Constitutional Rights*⁶⁰³ relating to the declaration of invalidity of section 3 of the State Liability Act⁶⁰⁴ and the procedure to follow when proceeding against the State.

7.1.4. NYATHI v MEMBER OF THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF HEALTH, GAUTENG, MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT WITH THE CENTRE FOR CONSTITUTIONAL RIGHTS⁶⁰⁵

Madala J for the Constitutional Court states that Davis AJ sitting in the Pretoria High Court made the following order in favour of the applicant on the 30th of March 2007:

1. The following portion of section 3 of the State Liability Act⁶⁰⁶ is declared inconsistent with the Constitution and therefore invalid: “No execution, attachment or like process shall be issued against a defendant or a respondent in any such action or proceedings or against the property of the State... [But the amount, if any, which may be required to satisfy any judgment or order given or made against the nominal defendant or respondent in any such action or proceedings may be paid out of the National Revenue Fund or a Provincial Revenue Fund as the case may be].”
2. The first respondent is ordered to pay the costs of the application on the scale as between attorney and client, such costs to include the costs of two counsel.⁶⁰⁷

In terms of section 172(2) (a) of the Constitution, an order of constitutional invalidity in the High Court or Supreme Court of Appeal has no force or effect unless it has

⁶⁰³ 2008 5 SA 94 (CC); 2008 9 BCLR 865 (CC).

⁶⁰⁴ Act 20 of 1957.

⁶⁰⁵ 2008 5 SA 94 (CC); 2008 9 BCLR 865 (CC); Case CCT 19/07[2008] ZACC 8.

⁶⁰⁶ 2008 5 SA 94 (CC); 2008 9 BCLR 865 (CC); Case CCT 19/07[2008] ZACC 8 para 1. Act 20 of 1957.

⁶⁰⁷ 2008 5 SA 94 (CC); 2008 9 BCLR 865 (CC); Case CCT 19/07[2008] ZACC 8 para 1.

been confirmed by the Constitutional Court and therefore the confirmation of the abovementioned order was sought by the applicant in the Constitutional Court.⁶⁰⁸

At the time the application was made, the applicant was permanently disabled and unemployed. The applicant died on the 4th of July 2007, before the matter was heard on an urgent basis in the Constitutional Court.⁶⁰⁹

7.1.4.1. FACTUAL BACKGROUND

The facts giving rise to the application and judgment of the Constitutional Court are set out above at pages 125 to 128.

The failure of the applicable state department to comply with the court order compelled the applicant to lodge an application before the High Court on the 21st of February 2007. The application was in compliance with the provisions of Uniform Rule 10A of the High Court⁶¹⁰, in which the applicant joined the Minister of Justice and Constitutional Development. An order was sought in the following terms:

1. (It) is declared that section 3 of the State Liability Act⁶¹¹ is inconsistent with the Constitution of the Republic of South Africa.
2. First respondent is ordered to comply with the court order dated the 22nd of November 2006 within three days of the order, failing which the applicant may approach this Court on these same documents, amplified where necessary, for an order declaring the first respondent to pay in contempt of court an order committing the first respondent to jail for a period of ninety days.

⁶⁰⁸ *Supra* para 2.

⁶⁰⁹ 2008 5 SA 94 (CC); 2008 9 BCLR 865 (CC); Case CCT 19/07[2008] ZACC 8 para 4.

⁶¹⁰ Rule 10A of the Uniform Rules of Court state “if in any proceedings before the court, the constitutional validity of a law is challenged, the party challenging the validity of the law shall join the provincial or national executive authorities responsible for the administration of the law and the proceedings.”

⁶¹¹ Act 20 of 1957.

3. Costs of suit on a scale as between attorney and own client.⁶¹²

The High Court stated that as the judgment for interim payment in favour of the applicant was one sounding in money, the appropriate remedy would have been to levy execution and not proceed with contempt proceedings. The court pointed out that this was precluded by section 3 of the Act.⁶¹³ Madala J for the Constitutional Court added that the section would perhaps only apply for declaration of unlawfulness or a finding of contempt but with no real further enforceability, such as committal. Madala J considered the Crown Liabilities Act⁶¹⁴, the predecessor of the State Liability Act⁶¹⁵, and also considered the relevant case law. He found the case law to be equally applicable to the Act⁶¹⁶ and held that both pieces of legislation merely placed a moral obligation on the State to satisfy judgment debts.⁶¹⁷

The High Court found that section 34, 165(5) and 195(1) (F) of the Constitution had been violated. It observed that the blanket ban on State liability in section 3 of the Act⁶¹⁸ constitutes a material limitation of the right to access to courts and the consequent right to have the effects of successful access implemented.⁶¹⁹

Madala J notes that Davis J relied on the reasoning of Froneman J in *Kate's*⁶²⁰ case, namely, that section 3 of the State Liability Act⁶²¹ forbids orders ensuring compliance of the State with court orders, effectively this ensures that this section⁶²² places the State above the law insofar as the binding nature of court orders are concerned. Such a reading would make section 3⁶²³ unconstitutional and a clear violation of section 165(5) of the Constitution.⁶²⁴

⁶¹² 2008 5 SA 94 (CC); 2008 9 BCLR 865 (CC); Case CCT 19/07[2008] ZACC 8 para 19.

⁶¹³ Act 20 of 1957.

⁶¹⁴ Act 1 of 1910. 2008 5 SA 94 (CC); 2008 9 BCLR 865 (CC); Case CCT 19/07[2008] ZACC 8 para 16, 23 and 107.

⁶¹⁵ Act 20 of 1957.

⁶¹⁶ *Ibid.*

⁶¹⁷ 2008 5 SA 94 (CC); 2008 9 BCLR 865 (CC); Case CCT 19/07[2008] ZACC 8 para 16, 23 and 107.

⁶¹⁸ *Ibid.*

⁶¹⁹ *Nyathi v MEC for the Department of Health, Gauteng and Another*, 26014/2005 TPD, 20 March 2007 (unreported), [2007] JOL 19612 (T) para 13 and 19. 2008 5 SA 94 (CC); 2008 9 BCLR 865 (CC); Case CCT 19/07[2008] ZACC 8 page 11.

⁶²⁰ 2006 SCA 46 (RSA).

⁶²¹ Act 20 of 1957.

⁶²² Section 3 of Act 20 of 1957.

⁶²³ *Ibid.*

⁶²⁴ 2008 5 SA 94 (CC); 2008 9 BCLR 865 (CC); Case CCT 19/07[2008] ZACC 8 para 24.

As the order of the High Court declared invalid a provision of an Act of parliament the applicant approached the Constitutional Court for confirmation of that order. The applicant's main submission was that section 3 of Act 20 of 1957 was unconstitutional because it prevented the attachment of assets of the State despite a court order and therefore should be struck down as being invalid. The applicant also submitted that it was not appropriate or effective to enforce a contempt order against a nominal defendant. It was asserted that execution is the most appropriate and effective remedy. In terms of the attachment of assets of the State, the applicants submitted that concerns about the attachment of essential assets of the State would be allayed by the fact that there would be mechanisms put in place to ensure that essential assets are not attached.⁶²⁵

7.1.4.2. THE CONSTITUTIONAL COURT'S FINDINGS

The first respondent submitted in their defence that section 3⁶²⁶ did not violate the constitutional principle and that orders and decisions of court bind all persons including organs of state. The section only provided that the normal means of execution were not applicable to cases where the provincial or the national government was a judgment creditor. They [the respondents] submitted further that it would be highly prejudicial to the public interest should the assets of the State be attached or sold in execution of a judgment debt. The respondents further submitted that section 3⁶²⁷ had to be read together with the Public Finance Management Act (as amended)⁶²⁸, which was designed to regulate financial management in the national and provincial government together with treasury instructions, which represented an important statutory recognition of the need for the national and provincial governments to comply with court orders promptly. They submitted that section 3⁶²⁹ expressly authorized payment of a judgment debt sounding in money out of the national funds, and further, that in any event, there were other remedies available to

⁶²⁵ 2008 5 SA 94 (CC); 2008 9 BCLR 865 (CC); Case CCT 19/07[2008] ZACC 8 para 25.

⁶²⁶ Act 20 of 1957.

⁶²⁷ *Ibid.*

⁶²⁸ Act 1 of 1999.

⁶²⁹ Act 20 of 1957.

an aggrieved applicant such as monetary orders, committal for contempt of court and a claim for damages. They further argued that in the event of non-compliance of a court order by an organ of state such non-compliance could be reported to the Auditor General or the Public Protector who had powers to investigate complaints regarding any alleged mal-administration or improper conduct or undue influence by persons performing a public function.⁶³⁰ The Constitutional Court's finding is indicated above under 7.1.4.1. and judgment was ordered after consideration of the respondent's argument which is outlined here.⁶³¹

Madala J notes that in *De Lange v Smuts NO & others*⁶³², Ackerman J stated the following concerning the obligation of the State to assist persons to enforce civil claims against debtors:

“In a constitutional democratic state, which ours now certainly is, and under the rule of law (to the extent that this principle is not entirely subsumed under the concept of the constitutional state) citizens as well as non-citizens are entitled to rely upon the State for the protection and enforcement of their rights. The State therefore assumes the obligation of assisting such persons to enforce their rights, including the enforcement of their civil claims against debtors.”⁶³³

The courts have referred to the obligations of the State to pay its debt as a moral obligation and one which should, as a consequence of being elected to power, be exercised in the interests of maintaining confidence in its rule. This reliance on the moral obligation of the State to pay its debts is no longer acceptable, as it has proven to be unproductive and has revealed the State's inability or refusal to abide by its own moral standards. Hence, we need legislative measures that will provide an effective way in which judgment orders may be satisfied, and mechanisms that will inform the litigants in detail on the procedures that they will need to follow regarding payment of court orders against the State. It has become necessary for this court to oversee its process of compliance with court orders and to ensure ultimately that compliance is

⁶³⁰ 2008 5 SA 94 (CC); 2008 9 BCLR 865 (CC); Case CCT 19/07[2008] ZACC 8 page 15.

⁶³¹ 2008 5 SA 94 (CC); 2008 9 BCLR 865 (CC); Case CCT 19/07[2008] ZACC 8 para 28 – 30.

⁶³² [1998] ZACC 6; 1998 3 SA 785 (CC); 1998 7 BCLR 779 (CC) para 31.

⁶³³ 2008 5 SA 94 (CC); 2008 9 BCLR 865 (CC); Case CCT 19/07[2008] ZACC 8 at para 43.

both lasting and effective. The legislator is mandated to ensure the impartiality and efficiency of the courts and their accessibility via legislative measures.”⁶³⁴

It is apparent from the facts and history of this case that the legislator and executive have not taken measures, legislative or otherwise to ensure that orders of the court are obeyed. What is required in this matter is for the State to take heed of the orders made by the Constitutional Court and change the manner in which it deals with the satisfaction of judgment debts. This is in line with the constitutional duty placed on it.

7.1.5. PROCEEDING AGAINST THE STATE

When contemplating proceeding legally against the State one must take cognisance of certain legislation which is specifically applicable to proceedings against the State and which has of late come under review and amendment

Section 11(d) of the Prescription Act⁶³⁵ provides the periods of prescription of debts, stating specifically that save where an Act of parliament provides otherwise, the debt shall prescribe within three years. In terms of section 12(1) of the Prescription Act⁶³⁶, prescription begins to run as soon as the debt is due, but this is subject to the other provisions of section 12⁶³⁷, which deal, *inter alia*, with the situation in which the creditor has no knowledge of the identity of the debtor or of the facts from which the debt arose. Prior to the coming into operation of the interim Constitution, the running of prescription was regulated by a range of other statutory provisions, most of which

⁶³⁴ 2008 5 SA 94 (CC); 2008 9 BCLR 865 (CC); Case CCT 19/07[2008] ZACC 8 page 39 para 83 and 84. *Minister of Finance v Barberton Municipal Council* 1914 AD 335 at 353-355.

⁶³⁵ Act 68 of 1969.

⁶³⁶ *Ibid.*

⁶³⁷ Prescription Act 68 of 1969. Section 12 (2) of the Prescription Act 68 of 1969 states that: “If the debtor willfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.” (3) “A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.” (4) “Prescription shall not commence to run in respect of a debt based on the commission of an alleged sexual offence as contemplated in sections 3, 4, 17, 18 (2), 20 (1), 23, 24 (2), 26 (1) and 71 (1) or (2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, during the time in which the creditor is unable to institute proceedings because of his or her mental or psychological condition.”

provided shorter prescriptive or limitation periods for the institution of legal action to enforce a debt, particularly one alleged to exist against the State, and for the giving of notice of the claim as an essential pre-requisite to the initiation of legal proceedings.⁶³⁸

Typical of a number of those provisions was section 113(1) of the Defence Act⁶³⁹, which provided that no civil action would be capable of being instituted against the State or any person or in respect of anything done or omitted to be done in pursuance of that Act⁶⁴⁰ unless a period of six months had elapsed since the date on which the cause of action arose, and that notice in writing of any such civil action and of the cause of it had been given to the defendant at least one month before the commencement of such action. The question arose⁶⁴¹ whether that provision, and others like it, were unconstitutional in the light of section 22 of the interim Constitution, which provided that every person had the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum. The corresponding provision in the Constitution is section 34, which states that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum.

Turning to consider the constitutionality of section 113(1) of the Defence Act⁶⁴², the Constitutional Court, in *Mohlomi v Minister of Defence*⁶⁴³, remarked that the disparity between section 113(1)⁶⁴⁴ and the comparable provision of the Prescription Act⁶⁴⁵ had to be viewed against the background depicted by the state of affairs prevailing in South Africa, a land where poverty and illiteracy abounded and differences of culture

⁶³⁸ For example section 113(1) of the Defence Act 44 of 1957 and sections 32(1) and 57 of the South African Police Service Act 68 of 1995.

⁶³⁹ Act 44 of 1957.

⁶⁴⁰ *Ibid.*

⁶⁴¹ *Qokose v Chairman, Ciskei Council of State* 1994 2 SA 198 (Ck); *Mbuyisa v Minister of Police, Transkei* 1995 2 SA 362 (Tk), 366C; *Zantsi v Chairman, Council of State, Ciskei* 1995 2 SA 534 (Ck), 566E.

⁶⁴² Act 68 of 1969.

⁶⁴³ 1997 1 SA 124 (CC), 1996 12 BCLR 1559.

⁶⁴⁴ Act 68 of 1969.

⁶⁴⁵ *Ibid.*

and language were prominent. Section 113(1)⁶⁴⁶ had the effect that many of the claimants were not afforded an adequate and fair opportunity to seek judicial redress for wrongs allegedly done to them. The claimants were thus left with too short a time within which to give the requisite notices in the first place and to sue in the second place. Their rights in terms of section 22 of the interim Constitution were thus infringed.

The question which then arose was whether section 113(1)⁶⁴⁷ could be saved by the limitation clause of the Constitution.⁶⁴⁸ That depended, in the first place, on its passing the test of reasonableness and justifiability that is set out in the limitation clause.⁶⁴⁹ The competing interests and values that were, respectively, impaired and promoted had to be weighed against one another for an appraisal of their proportionality. When section 113(1)⁶⁵⁰ was compared to section 57(1) of the South African Police Service Act⁶⁵¹, which at the time provided for a period of twelve calendar months after the date on which the claimant became aware of the alleged act or omission on which a claim against the police was based, or after the date on which the claimant might reasonably have been expected to have become aware of that act or omission, it was immediately apparent that the time allowed by the latter provision for the start of any action was twice as long as that fixed by section 113(1).⁶⁵² Furthermore, prescription began to run, in terms of section 57⁶⁵³, not from the date on which the cause of action arose, but from the date when both the conduct in question and the identity of its perpetrator became or should reasonably have become known to the claimant. Section 57(5)⁶⁵⁴ allowed a court of law to dispense with the requirements contained in section 57(1)⁶⁵⁵ where the interests of justice so required. For this reason also, section 57⁶⁵⁶ was much less stringent and detrimental to the

⁶⁴⁶ *Ibid.*

⁶⁴⁷ *Ibid.*

⁶⁴⁸ Section 36 of the 1996 Constitution.

⁶⁴⁹ *Ibid.*

⁶⁵⁰ Act 68 of 1969.

⁶⁵¹ Act 68 of 1995.

⁶⁵² Act 68 of 1969.

⁶⁵³ Act 68 of 1995.

⁶⁵⁴ *Ibid.*

⁶⁵⁵ *Ibid.*

⁶⁵⁶ *Ibid.*

interests of claimants than section 113(1).⁶⁵⁷ Therefore, section 113(1)⁶⁵⁸ fell by the wayside, being declared inconsistent with section 22 of the interim Constitution and invalid for that reason.⁶⁵⁹

After the final Constitution had come into operation, the Constitutional Court in *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development intervening (Womans Legal Centre as amicus curiae)*⁶⁶⁰ also struck down section 2(1)(a) of the Limitation of Legal Proceedings Act⁶⁶¹, which had required a person instituting a civil claim against a provincial or local authority to give notice of the claim within ninety (90) days of the date upon which the claim arose. Somyalo AJ, writing for the court, held that that provision⁶⁶² indeed constituted a material limitation of an individual's right of access to a court of law under section 34 of the Constitution. On an application of the criteria set out in the limitation clause⁶⁶³ of the Constitution, the protection of the rights created by section 34⁶⁶⁴ without the restriction created by section 2(1) (a) of the Limitation of Legal Proceedings Act⁶⁶⁵ outweighed the governmental interest that section 2(1) (a)⁶⁶⁶ sought to protect. An order made by the High Court declaring section 2(1) (a)⁶⁶⁷ constitutionally invalid was accordingly confirmed; thereby resulting in parliament seeking to remedy the legislation by enacting the Institution of Legal Proceedings against Certain Organs of State Act⁶⁶⁸, which came into force on the 28th of November 2002. This Act⁶⁶⁹ seeks to introduce uniformity by, regulating actions for damages against the national, provincial and local levels of government, as well as other statutory institutions and functionaries defined in section 1(1) of the Act.⁶⁷⁰

⁶⁵⁷ Act 68 of 1969.

⁶⁵⁸ *Ibid.*

⁶⁵⁹ *Mohlomi v Minister of Defence* 1997 1 SA 124 (CC) para 12.

⁶⁶⁰ 2001 4 SA 491 (CC), 2001 8 BCLR 765.

⁶⁶¹ Act 94 of 1970.

⁶⁶² Section 2(1) (a) of the Limitation of Legal Proceedings Act 94 of 1970.

⁶⁶³ Section 36 of the 1996 Constitution.

⁶⁶⁴ Of the 1996 Constitution.

⁶⁶⁵ Act 94 of 1970.

⁶⁶⁶ *Ibid.*

⁶⁶⁷ *Ibid.*

⁶⁶⁸ Act 40 of 2002.

⁶⁶⁹ *Ibid.*

⁶⁷⁰ *Ibid.*

We turn now to explore the general remedies available to a litigant for the infringement of his or her constitutional right.

7.2. ALTERNATIVE REMEDIES TO MONETARY DAMAGES

7.2.1. DECLARATORY ORDERS

The first remedy we explore that is available to a litigant is that of the declaratory order.

Before the enactment of the 1993 Constitution, declaratory orders were often granted as supervisory remedies, in circumstances similar to where a court reviews a decision and sets it aside. Consequential relief was also often granted in these instances.⁶⁷¹ The Constitution distinguishes between a declaration of rights and a declaration of invalidity. Whereas a declaration of rights may be issued only in so far as it is alleged that the rights in the Bill of Rights are infringed or threatened, declarations of invalidity must⁶⁷² be declared in all instances where a court finds that law or conduct is inconsistent with the Constitution. A court will however refuse to hear an academic or hypothetical inconsistency where a declaration of invalidity ‘can produce no concrete or tangible result . . . beyond the bare declaration’.⁶⁷³ The declaratory order provided for in the Constitution has been said to be a unique remedy. In determining whether or not an issue is academic, the court must consider whether the issue is one which is necessary in terms of public interest to be resolved.

The Constitution itself provides very little guidance on constitutional remedies. Section 172(1)(b) of the Constitution simply requires a court deciding a constitutional matter to make an order, which is ‘just and equitable’ and contains some provisions which allow a court to control the effects of a declaration of invalidity.⁶⁷⁴ As far as a violation of the Bill of Rights is concerned, section 38 of the Constitution refers

⁶⁷¹ De Ville, *Judicial Review of Administrative Action in South Africa*, revised 1st edition (2005) 338.

⁶⁷² *Id* at 339.

⁶⁷³ De Ville *Op cit* note 671 at 340.

⁶⁷⁴ Referred to at footnote 256 of this dissertation.

simply to ‘appropriate relief’ and, with the exception of a declaration of rights, does not describe the specific types of relief available for the infringement or threat to a right in the Bill of Rights.⁶⁷⁵ According to the Constitutional Court in *Fose v Minister of Safety and Security*⁶⁷⁶, ‘[i]t is left to the courts to decide what would be appropriate relief in any particular case’.⁶⁷⁷ This means that the Constitution permits a flexible approach to the provision of remedies.⁶⁷⁸

However flexible the approach may be, it stands to reason that the nature of a judicial remedy should be determined by its purpose in order to fulfill the reason for its existence and thereby subsisting as an ‘effective remedy’. A remedy cannot be said to be effective if it does not fulfill the purpose for which it exists, which in general would be to remedy the defect or the unjust conduct or result. According to the Constitutional Court⁶⁷⁹, the purpose of constitutional remedies is to vindicate the Constitution and deter future infringements. Deterrence speaks for itself, but what is meant by vindication? In subsequent cases⁶⁸⁰ the Constitutional Court has emphasized the need for effective remedies. Not only must the court’s order afford effective relief to the successful claimants, but to all similarly situated people. The remedy must operate generally to eradicate inconsistencies between law or conduct and the Constitution.⁶⁸¹ In principle, constitutional remedies are forward-looking, community-orientated and structural as opposed to backward looking, individualistic and corrective or retributive.⁶⁸²

The deterrent effect of some remedies, such as constitutional damages, may differ considerably depending on whether the violator of the Constitution is public or private body or person. As in *Fose’s case*⁶⁸³ Didcott J stated that the factors which militate against awards of punitive or constitutional damages against the State, do not necessarily apply to private persons. In the case of private violators, the award would

⁶⁷⁵ *Ibid.*

⁶⁷⁶ 1997 3 SA 786 (CC).

⁶⁷⁷ Currie, and De Waal, *The New Constitutional and Administrative Law* Volume 1 (2001) 287. *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 19, 96, and 98 – 99.

⁶⁷⁸ *Id* at 288.

⁶⁷⁹ *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 96.

⁶⁸⁰ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 65.

⁶⁸¹ *Supra.*

⁶⁸² Currie, and De Waal, *The New Constitutional and Administrative Law* Volume 1 (2001) 287.

⁶⁸³ 1997 3 SA 786 (CC).

not be paid out of public treasury and the deterrent effect of the remedy would be appreciably enhanced.⁶⁸⁴ Closely related to the identity of the violator, the nature of the violation must be considered. Systematic violations of fundamental rights – as opposed to isolated violations – call for structural remedies, with appropriate institutions to supervise their implementation.⁶⁸⁵

The need for an effective remedy that achieves its purpose must be counterbalanced by the deference that a court owes to the other branches of government. This deference flows from the doctrine of separation of powers. Apart from budgetary implications, which loom large at the remedial stage of analysis, there are questions of timing and of resistance or evasion.⁶⁸⁶

A declaration of rights is an essential remedial and corrective remedy, it can promote a non-coercive dialogue between the courts and the Executive, but only if governments and officials comply with them voluntarily, promptly and in good faith.⁶⁸⁷ A court, in granting a declaration of rights, would simply declare whether the right or duty exists and or what the scope of the duty is. Under the common law it was necessary for an actual infringement of rights to have taken place before the order could be granted. A declaratory order could also only be granted where consequential relief could be claimed upon the determination by the court of the right concerned.⁶⁸⁸ The conduct of the administration that was complained of in *Kate's case*⁶⁸⁹ was constitutionally unlawful. The High Court had all but exhausted its dictionary of epithets in its attempts to make that point known; therefore there would have been no purpose for another pronouncement to the same effect.⁶⁹⁰ A public functionary who fails to fulfill an obligation that is imposed upon him or her by law is open to proceedings for a *mandamus* compelling him or her to do so. That remedy is against a functionary upon whom the statute imposes the obligation, and not against the provincial government itself. A public official who ignores a court order is liable to

⁶⁸⁴ Currie *et al* *Loc cit* note 682.

⁶⁸⁵ *Ibid.*

⁶⁸⁶ Currie, and De Waal *Op cit* note 682 at 289.

⁶⁸⁷ *Kate v Member of executive Council of Welfare* 2005 1 SA 141 SECLD; *Welfare Department v Kate* 2006 SCA 46 (RSA) para 28.

⁶⁸⁸ De Ville, *Judicial Review of Administrative Action in South Africa*, revised 1st edition (2005) 348.

⁶⁸⁹ 2006 SCA 46 (RSA) para 28.

⁶⁹⁰ *Supra* at para 29.

be committed for contempt in accordance with ordinary principles of law.⁶⁹¹ The remedy of *mandamus* has the capacity to be effective where there is a breach by a public official of a duty that is imposed by a statute or the Constitution. In most cases that is sufficient without the additional remedy of damages. There are two considerations that militate against confining *Kate* to that preventative remedy; firstly it would be unrealistic to expect the remedy to be effective in her hands. Secondly, the problem that was faced by *Kate* is prevalent in the Eastern Cape⁶⁹² and the possibility of even more litigation is undesirable. Hence, in briefly analyzing *Kate's* case⁶⁹³ and the possible appropriate remedies, it is clear that the only appropriate remedy in the circumstances was to award constitutional damages to recompense *Kate* for the breach of her right.

7.2.2. ADMINISTRATIVE LAW REMEDIES

It must be noted for the purpose of completeness that there are alternatives to the constitutional law remedies discussed above, which can be found in administrative law in that PAJA expanded upon the available constitutional remedies albeit still being based on the Constitution.

These remedies include the exclusion of evidence, severance, and reading-in. Section 8 of the PAJA⁶⁹⁴ makes provision for a wide range of remedies to be granted in review proceedings upon a finding that a ground of review is present. In addition to the numerous remedies mentioned above, a complainant may seek a cost order against the violator. This is an expressed form of a general power to 'grant any order that is just and equitable' followed by a list of more specific orders, corresponding to a large extent with the courts' powers under the common law.⁶⁹⁵ Although the common law administrative action remains relevant and will often be suitable, one should be careful not to simply apply remedies in section 8 of PAJA with those that existed

⁶⁹¹ *Supra* at para 31.

⁶⁹² *Jayiya v Member of Executive Council for Welfare, Eastern Cape* 2004 2 SA 611 (SCA); *Mahambehlala v Member of Executive Council of Welfare, Eastern Cape* 2002 1 SA 342; 2001 JDR 327 (SE); *Mbanga v Member of Executive Council of Welfare Eastern Cape* 2001 JDR 328;

⁶⁹³ *Supra*.

⁶⁹⁴ Act 3 of 2000.

⁶⁹⁵ Under the common law the granting of a remedy is a discretionary power of the court.

under the common law. The remedies found in section 8 of PAJA may firstly have to be developed by the courts as contemplated in section 39(2) of the Constitution. Secondly, the broad language in section 8(1) of PAJA clearly indicates that new remedies may be fashioned by the courts. The approach of the Constitutional Court to the granting of remedies in the case of violations of fundamental rights is therefore highly relevant in providing the nature of the remedies provided for in section 8 of PAJA. In *Fose v Minister of Safety and Security*⁶⁹⁶ Kriegler J pointed out that the object of remedies under section 7(4) (a) of the 1993 Constitution (the predecessor to section 38⁶⁹⁷) ‘differs from the object of remedies provided at common law’. The harm caused by violating the Constitution, he said, is harm to the society as a whole, even where the direct implications of the violation are directed towards an individual. The rights violator not only harms the particular person, but impedes the fuller vision of our constitutional promise. The remedies granted under the Constitution, according to Kriegler J, have the primary aim to vindicate the Constitution and to deter future infringements – the general power granted under section 8 of PAJA gives expression to section 38 of the Constitution, it allows a court, in the event of the infringement of a fundamental right, to ‘grant suitable relief’ and section 172(1) (b)⁶⁹⁸ to ‘make any order that is just and equitable’ although the remedies provided by PAJA and the Constitution are not separate remedies.

In *Fose v the Minister of Safety and Security*⁶⁹⁹ Kriegler J gave the following interpretation to ‘appropriate relief’, stating that when something is appropriate it is ‘specially fitted or suitable’. Suitability in this context is ensured by the extent to which a particular form of relief vindicates the Constitution and deters against further violations of rights enshrined in chapter 3.⁷⁰⁰ In pursuing this enquiry or considering the nature of the infringement and the probable impact of a particular remedy, the facts surrounding a violation of rights will determine what form of remedy is appropriate.⁷⁰¹ The same commitment to flexibility in the granting of remedies is evident in the remarks of Ackermann J in *Fose’s* case⁷⁰² regarding the nature of

⁶⁹⁶ 1997 3 SA 786 (CC).

⁶⁹⁷ The 1996 Constitution.

⁶⁹⁸ *Ibid.*

⁶⁹⁹ 1997 7 BCLR 851 (CC); 1997 3 SA 786 (CC) para 97.

⁷⁰⁰ Chapter 2 of the 1996 Constitution.

⁷⁰¹ De Ville, *Judicial Review of Administrative Action in South Africa*, revised 1st edition (2005) 325.

⁷⁰² 1997 3 SA 786 (CC).

appropriate relief. He pointed out 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 interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution⁷⁰³ 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 imperative rights. It would appear that the Constitutional Court has been very inventive in devising an effective remedy where legislation which authorizes administrative action was declared invalid. Such a declaration (especially where it is suspended) is usually combined with an order relating to administrative action to be taken in terms of the legislation in future. In this regard the court often issues a *mandamus* (directing the way in which action is to be taken in future) and or a prohibitory interdict. In devising its order the court has adopted the approach that the remedy devised must be to the benefit not only of the successful litigant, but also of similarly-situated people.⁷⁰⁴ When the validity of administrative action itself has been successfully challenged under the administrative-justice clause, the existing common law remedies have mostly proved adequate. Several remedies have been developed whereas some existing remedies such as declarations of invalidity have gained in importance.⁷⁰⁵

The courts have also been willing to grant structural interdicts.⁷⁰⁶ The Constitutional Court has, with reference to the supremacy clause in the Constitution adopted the approach that law or conduct which are in conflict with the Constitution are invalid. In *Ferreira v Levin No and Others*⁷⁰⁷ Ackermann J proclaimed with reference to section 4(1) and section 98(6) (declarations of invalidity) of the 1993 Constitution that '[t]he Court's order does not invalidate the law, but the Constitution declares it invalid'. He was also of the opinion that 'a law which is inconsistent with the Constitution ceases to be of effect'.⁷⁰⁸

⁷⁰³ *Ibid.*

⁷⁰⁴ De Ville, *Judicial Review of Administrative Action in South Africa*, revised 1st edition (2005) 326.

⁷⁰⁵ *Ibid.*, such as structural interdicts and monetary damages.

⁷⁰⁶ *Ibid.*

⁷⁰⁷ 1996 1 BCLR 1 (CC); 1996 1 SA 984 (CC) para 27.

⁷⁰⁸ De Ville *Op cit* note 704 at 829.

The Constitutional Court has applied the principle that when a court declares administrative or executive action to be invalid it is not the declaration itself that renders the conduct unconstitutional as the declaration is merely descriptive of a pre-existing state of affairs in the administrative-law context.⁷⁰⁹ In *President of the Republic of South Africa and Others v South Africa Rugby Football Union and Others*⁷¹⁰ the court held that there was insufficient proof for the allegation that the President had abdicated or delegated his powers of appointing a commission of enquiry and of making the provisions of the Commissions Act⁷¹¹ applicable to the commission of enquiry so appointed, to the Minister of Sport. The court furthermore held, that even should he have done so, such an abdication or delegation of powers (before the actual exercise of the power)⁷¹² would have been invalid (as the President had to exercise this power himself in terms of the Constitution), and therefore a nullity. In other words the delegation of powers would have had no legal effect and could be revoked at any time. The judgment raises, but does not clearly answer, the question whether an administrator may always revoke an invalid decision. The statements of principle expressed above would seem to support such a contention, seeing that such an exercise of power would be invalid and thus have no legal effect. Such an approach would conflict with other important principles.⁷¹³

The above statements of principle by the Constitutional Court are deeply problematical. On a political-ethical level, it can be said to speak of a ‘denial of judicial choice and responsibility’⁷¹⁴. In other words, it creates the impression that invalidity is there for everyone to see without the need for interpretation or court intervention. Rather, invalidity is brought about after interpretation and a consideration of issues such as standing, ripeness, mootness and jurisdiction by a court’s authoritative announcement. As a matter of principle, these statements are juxtaposition with the approach of the Constitutional Court with respect to the granting of remedies, specifically in limiting orders of retrospectivity where legislation is found to be unconstitutional (such orders are, as a rule, made prospective only, however this would not assist a litigant who would have to look backwards in

⁷⁰⁹ *Id* at 330.

⁷¹⁰ 1999 10 BCLR 1059 (CC); 2000 1 SA 1 (CC) para 42 – 45.

⁷¹¹ Act 8 of 1947.

⁷¹² De Ville, *Judicial Review of Administrative Action in South Africa*, revised 1st edition (2005) 829.

⁷¹³ *Ibid.*

⁷¹⁴ *Ibid.*

order to quantify his or her damages).⁷¹⁵ Surely if invalidity follows irrespective of a court judgment, the court would have been more willing to issue retrospective orders of invalidity. Instead, the courts have been taking account of a variety of contextual considerations in deciding on a proper remedy under the circumstances.⁷¹⁶

It should be noted that the PAJA⁷¹⁷ was recently amended to introduce a new liability provision, being that of section 10A, which states that a person exercising a power or performing a duty under the Act or its rules is indemnified from any criminal or civil liability if done in good faith.⁷¹⁸

7.2.3. INTERDICTS

The further remedy of interdicts deserves exploration. Since interdicts are always directed at future events, they fit the mould for constitutional remedies, which are to be forward looking as opposed to awards of monetary compensation which are historically backward looking. Interdicts are of either a prohibitory or a mandatory nature.

A prohibitory interdict is where one seeks to prevent the continued or threatened performance of an illegal action interfering with one's rights. A mandatory interdict (otherwise known as a *mandamus*) is where one seeks to force an administrator to perform a statutory duty or to cure a state of affairs brought about by illegal actions. The distinction is not of much practical value as the requirements for both interdicts are the same. In exercising its discretion whether or not to grant a *mandamus* a court must take account of the fact that this remedy is more difficult to enforce than a prohibitory interdict. Mandatory and prohibitory interdicts can be either interim or final in nature.⁷¹⁹ On closer examination it is noted that each is directed at preventing a person from acting wrongfully. The interdict thus has a preventative function. Since the interdict is directed at the prevention of a wrongful act, and not at

⁷¹⁵ *Ibid.*

⁷¹⁶ *Ibid.*

⁷¹⁷ Act 3 of 2000.

⁷¹⁸ Dendy, M, Prescription and Limitation Periods (2009). *De Rebus*, April 2009, 47 – 48.

⁷¹⁹ De Ville, *Judicial Review of Administrative Action in South Africa*, revised 1st edition (2005) 363.

retribution for wrongfulness already committed, there is no reason why fault on the part of the wrongdoer should be a requirement for the granting of an interdict. Fault is correctly not stated as a requirement in this regard in either our common law or case law.⁷²⁰

The Constitutional Court has expressed enthusiasm for the interdict as a constitutional remedy on several occasions. An example of such an occasion is in *City Council of Pretoria v Walker*.⁷²¹ The Court found that the selective institution of legal proceedings for recovery of rates arrears by the City Council of Pretoria amounted to a breach of the respondent's constitutional right against unfair discrimination. The court nevertheless did not consider an order for absolution from the instance to be 'appropriate relief' in the circumstances but rather recommended a declaration of rights or a *mandamus* in order to vindicate the breach of the right to equality.⁷²² The High Courts seem to apply the usual procedures and rules⁷²³ pertaining to the granting of interim interdicts, and final interdicts in the constitutional context. These requirements should not be permitted to undermine the flexible approach to constitutional relief sanctioned by the Constitution. In any event, they were not referred to by the Constitutional Court in *August v Electoral Commission*⁷²⁴ when it directed the Electoral Commission to make the necessary arrangements to enable prisoners to vote. Instead it used the so-called structural interdict, which directs the violator to rectify the breach of fundamental rights under court supervision.⁷²⁵

7.2.4. COMMON LAW DELICTUAL REMEDIES

After outlining the available remedies within the constitutional law and administrative law arenas and further determining that the Constitutional Court is accustomed to applying common law remedies to the Constitution, we turn in point to the common

⁷²⁰ Neethling, Potgieter and Visser, *Law of Delict*, 6th edition (2010) 254 – 255.

⁷²¹ 1998 2 SA 363 (CC) para 96.

⁷²² 1998 2 SA 363 (CC) para 96. Currie and De Waal, *The New Constitutional and Administrative Law* Volume 1 (2001) 298.

⁷²³ The courts ascertain that there is a clear right, no alternative relief, and the balance of convenience etc.

⁷²⁴ 1999 3 SA 1 (CC).

⁷²⁵ See also the use of structural interdict in *Strydom v Minister of Correctional Services* 1999 3 BCLR 342 (W). Currie and De Waal *Loc cit* note 722.

law delictual remedies, which have been detailed in Chapter 3 of this dissertation, where it is established that the South African law of delict rests on three pillars: the *actio legis Aquiliae*, the *actio iniuriarum* and the action for pain and suffering.

Notwithstanding the fact that the *actio legis Aquiliae*, the *actio iniuriarum* and the action for pain and suffering are based on general delictual principles and, as such, cover almost the whole area of delictual liability, there are still a few other actions which originated in Roman-Dutch law and are applicable to specific situations. These actions are, on the one hand, those that are based on liability without fault, *inter alia*, the actions for damage caused by animals (the *actio de pauperie*, the *actio de pastu* and the *actio de feris*), those for damage caused by objects poured or thrown out of or falling from a building (the *actio de effuses vel deiectis* and the *actio positi vel suspensi*), the action for damage caused by the loss of a stolen thing (the *condictio furtiva*); and those for damage caused by owners of neighbouring property.⁷²⁶

The delictual actions are directed at compensation for patrimonial damage or impairment of personality. The same action may in principle give rise to several - different or alternative remedies. An act from which various claims arise, each of which places a distinctive action at the plaintiff's disposal, gives rise to different remedies.⁷²⁷ The *actio legis Aquiliae*, the *actio iniuriarum* and the action for pain and suffering concur in the following ways:

The *actio legis Aquiliae* and the *actio iniuriarum* concur in circumstances where an *iniuria* also causes patrimonial damage, such as an assault which brings about hospital and medical expenses, or a doctor or an attorney losing patients or clients as a result of defamation. In principle the plaintiff must then institute the *actio iniuriarum* for satisfaction and the Aquilian action for patrimonial damages.⁷²⁸

The concurrence of the *actio legis Aquiliae* and the action for pain and suffering takes place where a culpable infringement of physical-mental integrity causes patrimonial damage, such as bodily injuries, which bring about medical expenses. Obviously this

⁷²⁶ Neethling, Potgieter and Visser, *Law of Delict*, 6th edition (2010) 253.

⁷²⁷ *Id* at 236 - 237.

⁷²⁸ Neethling *et al Op cit* note 726 at 256.

type of concurrence is the one most often encountered in practice. The plaintiff must then claim damages for patrimonial loss under the Aquilian action and damages under the action for pain and suffering.⁷²⁹

Lastly, attention must be given to the concurrence of the *actio iniuriarum* and the action for pain and suffering. According to Van der Merwe and Olivier however, these two actions (the *actio iniuriarum* and the action for pain and suffering) cannot concur. They argue that in the case of assault the action for pain and suffering loses its meaning and is replaced by the *actio iniuriarum* with which full compensation may be claimed. This view cannot be accepted. Since the object or function of the *actio iniuriarum* (satisfaction) differs from that of the action for pain and suffering (compensation), the actions cannot be treated similarly with regards to assault. Both actions are thus in principle available for a wrongful and intentional infringement of physical-mental integrity. This view is by implication also apparent from the case law⁷³⁰ where in principle a distinction is made between satisfaction for *contumelia* (*iniuria*) and compensation for physical pain and suffering.⁷³¹

In *Fose's* case⁷³², the court observed that the South African law of delict is flexible and will, in most cases, be broad enough to provide relief in the form of damages where this would be 'appropriate' for a breach of constitutional rights. In cases where forward-looking remedies do not make sense, damages may well be the only appropriate remedy.⁷³³

7.3. CONCLUSION

Chapter 7 commenced with a discussion of the concept of remedies in general under the headings of Direct and Indirect Application of the Bill of Rights, Availability of

⁷²⁹ *Ibid.*

⁷³⁰ For example *Radebe v Hough* 1949 1 SA 380 (A) 384 – 385; *Magqabi v Mafundityala* 1979 4 SA 106 (E) 110; and *N v T* 1994 1 SA 862 (C) 854 – 865.

⁷³¹ Neethling *et al.*, *Law of Delict*, 6th edition (2010) 238 – 239. Van der Merwe and Olivier, *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1989) 465.

⁷³² 1997 3 SA 786 (CC).

⁷³³ Currie and De Waal, *The New Constitutional and Administrative Law* Volume 1 (2001) 298. Refer to Annexure C of this dissertation to view alternative remedies in tabular format.

Remedies, Stages of Fundamental Rights Litigation, *Nyathi v Member of the Executive Council for Department of Health, Gauteng*⁷³⁴ and Proceeding against the State.

Thereafter, Chapter 7 in the broad sense has ascertained that there are the following alternate remedies available to an applicant:

- declaratory orders,
- administrative law remedies,
- interdicts, and
- common law delictual remedies.

The writer is leaning towards favouring this last remedy as the best alternative to the dilemma raised in this thesis, namely being the provision of damages for the breach of a constitutional right, in particular the social assistance right, as the common law is open to development and is flexible - allowing for changing circumstances.

Chapter 7 also identified that proceedings against the State require a litigant to be aware that the procedure to be followed is not the same procedure that one utilizes when proceeding against another individual. The fundamental difference when proceeding against the State is to be aware of the Institution of Legal Proceedings Against Certain Organs of State Act⁷³⁵, which outlines the process to be followed. The Institution of Legal Proceedings Against Certain Organs of State Act⁷³⁶ provides that a notice must be issued to the State within the required time frame containing the details of the claim before proceeding further with the necessary litigation. The relevant stages of litigation are outlined under Section 7.1.3 above.

⁷³⁴ 2008 (5) SA 94 (CC).

⁷³⁵ Act 40 of 2002.

⁷³⁶ *Ibid.*

CHAPTER 8

CONCLUSIONS

This Chapter will attempt to predict the future of constitutional damages in South Africa by summarizing the historical and chronological development of constitutional damages in South Africa. This Chapter will thereafter briefly conclude by summarizing the findings of Chapters two to seven of this dissertation.

This dissertation commenced with the introduction of the topic of this dissertation and the dominant fields of research related thereto, being delict and constitutional damages. The context and issues pertaining to this dissertation relate to the concept of constitutional rights and damages in the South African with special emphasis on social security. The purpose and focus of this dissertation was to explore the past and present state of the law relating to constitutional damages, arguments in favour of and opposing the awarding of constitutional damages were therefore discussed with the view to providing recommendations on the way forward in this area of the law.

This dissertation has therefore served the purpose of reviewing, analyzing and amalgamating relevant literature and specifically case law in the field of constitutional damages, and thereby providing a relevant and succinct synopsis of the topic.

The ultimate research question of this dissertation was “Are monetary damages for the breach of a fundamental right a just and equitable remedy in a constitutional state?” The answer to this question is complex and inter related with a number of governing factors, which are discussed below. However, the simplistic answer to this question is in the affirmative provided the right circumstances are present for the provision of monetary damages and provided same does not cause a duplication of remedies

The methodology utilized within this dissertation in order to arrive at the above conclusion was that of review methodology. Comparative and historical research was undertaken in that case law ratios within South Africa’s history were compared and analyzed in order to determine the distinction between delictual and constitutional damages as well as the present amalgamation thereof

8.1. THE POSITION THUS FAR

8.1.1. CONSTITUTIONAL SUPREMACY

The cases examined here and elsewhere in this dissertation⁷³⁷ represent a body of case law that has provided increasingly detailed interpretations of the provisions of the Social Assistance Act⁷³⁸, its regulations and related legislation within the context of the Constitution. They have focused especially on the lack of commitment to social justice, the request of fundamental rights and requirements that every exercise of public power must be capable of objective justification. In this sense, these cases have contributed both to the development of the new administrative law based on section 33 of the Constitution and the PAJA⁷³⁹, as well as to the development of a social assistance law. The principle embedded in these cases is that people in need of social assistance are human beings to whose needs a response must be found, rather than as objects who are probably the causes of their own misfortune.⁷⁴⁰

It may be appropriate to quote the words of Brennan J in *Goldberg v Kelly*⁷⁴¹, even though these words were expressed in a constitutional context that, unlike its South African counterpart, does not expressly protect human dignity:

“... from its founding the nation’s basic commitment has been to foster the dignity and well being of all persons within its borders. We have come to recognize that forces not within the control of the poor contributed to their poverty. This perception, against the background of our traditions, has significantly influenced development of the contemporary public system. Whilst they, by meeting the basic needs of the sub-systems, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the

⁷³⁷ *Supra* in Chapter 2 of this dissertation, particularly referring to *Somyani v MEC for Welfare, Eastern Cape, and Another* SECLD case 1144/01 unreported judgment undated, *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuzo* 2001 4 SA 1184 (SCA), *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 4 SA 237 (CC), *Mbanga v Member of Executive Council of Welfare Eastern Cape* 2001 JDR 328, *Mahambehlala v Member of Executive Council of Welfare, Eastern Cape* 2002 1 SA 342; 2001 JDR 327 (SE), and *Kate v Member of Executive Council of Welfare* 2005 1 SA 141 SECLD; *Welfare Department v Kate* 2006 SCA 46 (RSA).

⁷³⁸ Act 59 of 1992; Act 13 of 2004.

⁷³⁹ Act 3 of 2000.

⁷⁴⁰ Dendy, ‘Administrators, Justice and Social Assistance’ (2008) *SALJ* 524.

⁷⁴¹ 397 US 254 1970.

life of the community. Public assistance then, is not mere charity but a means to ‘promote the general welfare, and to secure blessings of liberty to ourselves and our prosperity’.”⁷⁴²

From the preceding quotation from Brennan J, it is clear that social grants in South Africa should be seen as not merely a means of charity, but rather, as an essential means of promoting liberty and thereby balancing the scales of equality amongst all citizens. The right to social assistance therefore requires protection for those who are entitled to the right and the assurance that such right will not be infringed.

The enactment of the Constitution of the Republic of South Africa⁷⁴³ ushered in not only a political era of a democratic government based upon universal adult franchise but also a new legal era of justification and accountability as opposed to mere authority. The primary reason for the latter change was the introduction into our legal system of a Bill of Rights, incorporated as Chapter 3 of the interim Constitution and Chapter 2 of the final Constitution.⁷⁴⁴

What has not always been appreciated especially at first is that the interim and final Constitutions have affected profoundly not only constitutional law in South Africa, but every other branch of law as well, including the law of delict, as is evident from this dissertation. Our post-apartheid Constitution is omnipresent and does not allow our courts or the legal representatives who appear in them to continue in the same manner as they had prior to the enactment of the Constitution. Those constitutions have influenced, and the final Constitution continues to impact on, the development of our substantive law, not only in the sphere of public law but also amongst others in the fields of private law⁷⁴⁵, and our procedural law,⁷⁴⁶ which are of particular relevance to this dissertation.

⁷⁴² *Supra* at para 261 – 263 and 272.

⁷⁴³ Act 200 of 1993 (the interim Constitution) and the 1996 Constitution of the Republic of South Africa (the final Constitution).

⁷⁴⁴ The late Mureinik in his leading article “A Bridge to Where? Introducing the interim Bill of Rights” (1994) 10 *SAJHR* 31 famously described the interim Constitution, with reference to the epilogue to it, as “a bridge way from a culture of authority ... to a culture of justification, a culture in which every exercise of power is expected to be justified”. Dendy, ‘Administrators, Justice and Social Assistance’ (2008) *SALJ* 524. The textual statements were analyzed in Chapter 4 *Supra*.

⁷⁴⁵ For example the application and evolution of the law of delict, the law of contract, property law, family law and the law of succession.

⁷⁴⁶ Dendy, ‘Administrators, Justice and Social Assistance’ (2008) *SALJ* 524.

It is evident from various provisions of the Constitution⁷⁴⁷ that the Constitution will override any legal rules or principles which are in conflict with it. This is so whether those rules or principles are of statutory or common law origin, and whatever the branch of law to which they relate, for the following reasons:

1. The notion of supremacy of the Constitution would be meaningless if laws inconsistent with the Constitution were to continue to be valid. Areas of law cannot, as it were, be shielded from the influence of the Constitution and applied as though not subject to constitutional audit. In summary, constitutional supremacy entails the influence of the Constitution on all law, including the common law (delict in this case) and not merely some of it;
2. The clauses of the Constitution that deal with constitutional supremacy are not restricted in their operation to certain fields of law or to the legal relationships between the State and its citizens only. The clauses likewise apply to relationships between subjects of the State, whether those subjects are human beings or juristic persons (referring to the horizontal and vertical application of the Bill of Rights as outlined in Chapter 4 above); and
3. Section 39(2)⁷⁴⁸ of the Constitution makes it clear that the Bill of Rights and, indeed, the constitutional norms underpinning it, apply to all legal relationships whatever the branch of law that regulates them.

8.1.2. DEVELOPING THE COMMON LAW

Even where the impact of the Bill of Rights is felt only through the influence of the Bill of Rights on common laws or other statutory law, the existing principles or rules of ordinary law must still be interpreted or developed with reference to the values contained in the Bill of Rights. In the application of statutory law, the courts must attempt to interpret in conformity with the Bill of Rights before considering striking

⁷⁴⁷ Section 7, 8, 39 and 36 of the 1996 Constitution, as discussed in Chapter 1 above.

⁷⁴⁸ Cited above at footnote 263.

that legislation down on the ground that it is in conflict with the Bill of Rights and where it cannot be saved from invalidation by the limitation clause.⁷⁴⁹

In relation to the common law the courts must develop the common law in conformity with the Bill of Rights as opposed to assessing whether the common law is in conflict with the Bill of Rights. Examples of the indirect influence of the Constitution upon the common law are provided by cases in which the element of wrongfulness in the Aquilian action of the law of delict has been held to depend on the norms and values of our society as embodied in the Constitution.⁷⁵⁰

8.1.3. THE DEVELOPMENT OF CONSTITUTIONAL DAMAGES

As already mentioned in this dissertation⁷⁵¹, an action in contract or delict is likely to be a more appropriate remedy than judicial review where an aggrieved person wants to recoup financial loss sustained as a result of wrongful administrative action. Nevertheless, the PAJA⁷⁵² recognizes that an award of damages may sometimes be justified in proceedings for judicial review for instance where an administrator has acted dishonestly. The Constitution, in turn, gives scope for the award of constitutional damages for the infringement of fundamental rights.⁷⁵³ Apart from compensating the victim, such awards may be useful in promoting respect for human rights, deterring future violations of rights and punishing public officials for their blatant disregard of rights.⁷⁵⁴ The Constitutional Court has so far adopted a cautious approach to such awards.⁷⁵⁵

⁷⁴⁹ Section 36(1) and Section 39(2) of the 1996 Constitution. Dendy, 'Administrators, Justice and Social Assistance' (2008) *SALJ* 524.

⁷⁵⁰ Dendy, 'In Light of the Constitution Part 1: the Supremacy of the Constitution' (2009). *De Rebus*, January / February 2009, Law Society of South Africa 60.

⁷⁵¹ *Supra* in Chapter 6 of this dissertation.

⁷⁵² Act 3 of 2000. Section 8 (1) (c) (ii) (bb)⁷⁵², which is coupled with the remedy of setting aside, states that 'in exceptional cases' the court may direct 'the administrator or any other party to the proceedings to pay compensation'.

⁷⁵³ Section 38 (Section 7(4) (a) in the interim Constitution) of the Constitution refers broadly to "appropriate relief", which could include an award of damages established in Chapter 5 of this dissertation and below in Section 8.1.4.

⁷⁵⁴ These were objectives suggested by the plaintiff in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 17.

⁷⁵⁵ *Olitzki Property Holdings v State Tender Board* 2001 3 SA 1247 (SCA). *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 17.

In *Olitzki Property Holdings v State Tender Board*⁷⁵⁶ the Supreme Court of Appeal demonstrated similar caution when it was asked to award a plaintiff damages arising out of the breach of his administrative justice rights.⁷⁵⁷ Cameron JA, however, rejected the claim, observing that there were “powerful reasons of policy” against it in this case.⁷⁵⁸ One reason against the granting of damages was that an alternative and even more effective remedy had been available to the plaintiff in delict. Another reason was that the plaintiff was really claiming a windfall, albeit one that had a constitutional dimension. The third reason against the granting of damages was that in order to have a reformatory effect on the conduct of public officials, an award of constitutional damages would have to be a large one – and, as Ackermann J stated in *Fose’s case*⁷⁵⁹, “the more substantial they are, the greater the anomaly that a single plaintiff receives a windfall of such a magnitude”, especially in a country with such limited resources.⁷⁶⁰

Judicial review, whether common law or under the Act⁷⁶¹, is generally an inappropriate remedy for an individual who has suffered loss as a result of administrative action. It is designed primarily for the setting aside of unlawful action rather than for compensating people who have been affected adversely by that action.⁷⁶² A superior remedy will usually lie in the law of delict, which is designed to compensate people by way of damages⁷⁶³ for harm caused by the wrongful and culpable acts and omissions of others, or alternatively in the law of contract.⁷⁶⁴ In general, delictual liability will not be imposed for a breach of administrative law

⁷⁵⁶ 2001 3 SA 1247 (SCA) para 31 as discussed in Chapter 4 of this dissertation.

⁷⁵⁷ 1997 3 SA 786 (CC) para 17. In this case the plaintiff (now the appellant) alleged that a tender had been awarded illegally, and claimed as damages the profit it asserted it would have made if it had been awarded the tender. The plaintiff argued that such an award would also have the beneficial effect of inhibiting mal-administration.

⁷⁵⁸ *Olitzki Property Holdings v State Tender Board* 2001 3 SA 1247 (SCA) para 42.

⁷⁵⁹ *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 71.

⁷⁶⁰ *Supra*. Currie (editor), and Hoexter with Lyster, *The New Constitutional and Administrative Law* Volume 2 (2002) 294 - 295. Dendy, ‘In Light of the Constitution Part 1: the Supremacy of the Constitution’ (2009). *De Rebus*, January / February 2009, Law Society of South Africa 61.

⁷⁶¹ Promotion of Administrative Justice Act 3 of 2000.

⁷⁶² *Ibid*. While the Act does envisage orders for compensation, these are confined to “exceptional” cases.

⁷⁶³ The Constitutional Court provided a general description of the nature and purpose of patrimonial and non-patrimonial damages in *Van der Merwe v Road Accident Fund* 2006 4 SA 230 (CC) para 36 – 41.

⁷⁶⁴ However, because the court will inevitably be drawn into a consideration of the statutory powers of the administrator and the legality of their exercise, suing an administrative body in delict or contract amounts in essence to an indirect way of obtaining a review of its decisions.

“unless convincing policy considerations point in another direction”, and it cannot be assumed that the breach of administrative law duties will necessarily translate into private law duties giving rise to delictual claims.⁷⁶⁵

A further basis for an award of damages, as discussed supra in this dissertation, is to be found in section 38 of the Constitution which enables the court to grant ‘appropriate relief’⁷⁶⁶ for the infringement of fundamental rights and thus gives scope for the award of various sorts of damages. These include compensatory (delictual) damages, which aim to compensate the victim for harm done or loss sustained⁷⁶⁷, constitutional damages, where the aim is generally to promote respect for human rights and deter future violations of rights, and punitive or exemplary damages, where the aim is essentially to punish public officials for their blatant disregard of rights.⁷⁶⁸

8.1.4. DAMAGES IN DELICT FOR VIOLATIONS OF CONSTITUTIONALLY ENTRENCHED RIGHTS

Section 38 of the Constitution provides that anyone listed in that section, including anyone acting in their own interest, has the right to approach a competent court

⁷⁶⁵ Hoexter, *Administrative Law in South Africa* (2007) 466 – 467.

⁷⁶⁶ What makes relief appropriate was explained by Ngcobo J in *Hoffmann v South African Airways* 2001 1 SA 1 (CC) para 45: “... the determination of appropriate relief ... calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be effected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case.”

⁷⁶⁷ In *Van der Merwe v Road Accident Fund* 2006 4 SA 230 (CC), per Moseneke DCJ para 37, the Constitutional Court described the primary purpose of damages as being “to place, to the fullest possible extent, the injured party in the same position in which she or he would have been in, but for the wrongful conduct”. Patrimonial special damages, for example past and future medical expenses, loss of income, loss of earning capacity and loss of support, aim to redress the actual or probable reduction of a persons patrimony as a result of the delict or breach of contract. The aforementioned damages are ordinarily calculable in money. Non-patrimonial or general damages are utilized to redress the deterioration of highly personal legal interests that attach to the body and personality of the claimant and may cover aspects of bodily integrity (such as pain and suffering), dignity and mental integrity, bodily freedom, reputation, privacy, feeling and identity. Although it may be difficult to calculate such damages in monetary terms, it is important to recognize that a claim for non-patrimonial damages ultimately assumes the form of a monetary award.

⁷⁶⁸ Hoexter, *Administrative Law in South Africa* (2007) 467.

alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.

The query raised in Chapter 1 of this dissertation is, ‘does *appropriate relief include an award of delictual damages?*’ or a question related thereto ‘is an award of monetary damages an appropriate remedy?’ And, if not, ‘can our law be developed so as to provide such a remedy, bearing in mind the injunction contained in section 39(2) of the Constitution that, when developing the common law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights?’

The first reported decision on the question as noted above in Chapter three of this dissertation is *Fose v Minister of Safety and Security*⁷⁶⁹, in which Ackermann J for the majority dismissed a claim for punitive damages for violations of the plaintiff’s constitutional rights in addition to compensatory damages. It would be inappropriate, it was held, to use scarce State resources to pay punitive constitutional damages to plaintiffs who were already fully compensated for the injuries they incurred⁷⁷⁰ with no real assurance that such payment would have any deterrent or preventive effect.⁷⁷¹ The *ratio decidendi* of *Fose’s case*⁷⁷² provides the principle that punitive damages will not be paid to plaintiffs in addition to compensatory damages in cases of breaches of constitutionally entrenched rights.⁷⁷³

In light of *Fose’s case*⁷⁷⁴, it is submitted that the following is the position and therefore possible conclusion of this dissertation in respect of damages in constitutional cases. In cases where the violation of constitutional rights entails the commission of a delict against the victim, a claim for delictual damages will be available. However, a claim for constitutional damages in addition to those available under the law of delict does not automatically occur from a breach of constitutional

⁷⁶⁹ 1997 3 SA 786 (CC), 1997 7 BCLR 851.

⁷⁷⁰ In *Fose’s case Supra* by means of police assault.

⁷⁷¹ 1997 3 SA 786 (CC) para 72.

⁷⁷² *Supra*.

⁷⁷³ Dendy, ‘In Light of the Constitution – 2: Damages in Delict for Violation of Constitutionally Entrenched Rights’ (2009). *De Rebus*, March 2009, Law Society of South Africa 48.

⁷⁷⁴ 1997 3 SA 786 (CC).

rights.⁷⁷⁵ To be entitled to constitutional damages the requirement of appropriateness will have to be proven. According to section 172 of the Constitution the remedy will have to be just and equitable in the circumstances. As with all other constitutional remedies, an appropriate remedy is one suitable to vindicate the constitutional right and deter future violations. Ackerman J stated in *Fose's case*⁷⁷⁶, for the majority, that 'an appropriate remedy must mean an effective remedy'. He added that in a country where⁷⁷⁷ so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. But these statements are overshadowed by the negative attitude toward punitive damages that permeates the rest of the majority opinion. Even in circumstances where delictual damages are not available, constitutional damages will not necessarily be awarded for a violation of human rights.

The question whether compensatory damages could be claimed for violations of such rights was raised *obiter* and Ackermann J opened the door to that possibility, on the basis that the concept of appropriate relief referred to in section 38 of the Constitution⁷⁷⁸ could include damage in delict. Ackermann J said:

"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 interdict, a *mandamus* or such other relief as may be required to ensure that the rights infringed of 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."⁷⁷⁹

On whether appropriate relief could take the form of an award of damages, Ackermann J stated that:

⁷⁷⁵ In order to be entitled to claim a specific remedy under delict or constitutional delict, the requirements for either, which are substantially different, must be met. The requirements to be satisfied to prove a delict are: a wrongful, culpable act by a person that causes harm to another. On the other hand the requirements to be satisfied in order to prove a constitutional delict are as follows: an infringement or breach of an individual's constitutional right, being a right framed within the 1996 Constitution, by another individual, juristic person or the State.

⁷⁷⁶ 1997 3 SA 786 (CC) para 69.

⁷⁷⁷ 1997 3 SA 786 (CC) para 69. De Waal, Currie, and Erasmus, *The Bill of Rights Handbook* 4th edition (2001) 190.

⁷⁷⁸ Prior to the final Constitution, Section 7(4) (a) of the interim Constitution.

⁷⁷⁹ Quoted with approval in *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others* 2005 3 SA 280 (CC), 2004 5 BCLR 445 para 74.

“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 constitutionally entrenched rights. Such awards are made to compensate persons who have suffered loss as a result of the breach of their 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.”⁷⁸⁰

Emphasizing the duty of the Constitutional Court to ensure that effective relief is granted for the infringement of any constitutionally entrenched right, Ackermann J added:

“In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to *forge new tools and shape innovative remedies* [emphasis supplied], if needs be, to achieve this goal.”⁷⁸¹

It was unnecessary in *Fose’s case*⁷⁸² for the Constitutional Court to decide whether or what damages could be claimed for breach of a Constitutional right which did not cause bodily injury or patrimonial loss to the plaintiff. In a concurring judgment in *Fose’s case*⁷⁸³, Kriegler J remarked that appropriate relief meant suitable relief, and suitability was measured by the extent to which a particular form of relief vindicated the Constitution and acted as a deterrent against future violations of it. There is no reason in principle why common law and statutory remedies could never be suitable for that purpose. Common law remedies, particularly delictual remedies, had been designed to protect personality interests such as dignity, which are central to the Bill of Rights. Where harm arising from a rights violation was highly restricted, a

⁷⁸⁰ *Supra* para 75.

⁷⁸¹ *Supra*.

⁷⁸² 1997 3 SA 786 (CC).

⁷⁸³ *Supra*.

common law remedy might well be appropriate, effectively vindicating the Constitution and deterring further violations of it.⁷⁸⁴

The next reported decision to consider the question of damages was the case of *Rail Commuters Action Group and Others v Transnet Ltd. t/a Metro-Rail and Others*⁷⁸⁵, where declaratory, mandatory and prohibitory relief rather than damages were claimed, in the context of the question whether Transnet Limited and the South African Rail Commuter Corporation Limited had a legal obligation to take reasonable measures to provide for the security of rail commuters making use of the rail transport services provided by those companies. In the course of a unanimous judgment granting declaratory relief recognizing such an obligation, O’ Regan J held expressly that there will be circumstances where delictual relief is appropriate for the infringement of constitutional rights. Earlier, O’ Regan J had stated that private law damages claimed will not always be the most appropriate method to enforce constitutional rights, and that private law remedies tended to be retrospective in effect, seeking to remedy loss caused rather than to prevent loss in the future. But those remarks should not be understood to suggest that delictual relief should not flow from the infringement of constitutional rights in appropriate circumstances.⁷⁸⁶

A further decision of relevance was *President of the Republic of South Africa and another v Modderklip Boerdery (Pty) Ltd (Agri SA and others, amicus curiae)*.⁷⁸⁷ There, after referring to paragraph 43 of the decision of the Supreme Court of Appeal in the matter⁷⁸⁸, Langa ACJ, for a unanimous bench, quoted with approval the passages reproduced above from *Fose’s* case.⁷⁸⁹ He stated that appropriate relief

⁷⁸⁴ 1997 3 SA 786 (CC) para 85, 93, 94 and 95.

⁷⁸⁵ 2005 2 SA 359 (CC) 2005 4 BCLR 301, which was mentioned in Chapter 5 *Supra*.

⁷⁸⁶ 2005 2 SA 359 (CC) 2005 4 BCLR 301 para 80 and 81. Dendy, ‘In Light of the Constitution – 2: Damages in Delict for Violation of Constitutionally Entrenched Rights’ (2009). *De Rebus*, March 2009, Law Society of South Africa 48.

⁷⁸⁷ 2005 5 SA 3 (CC), 2005 8 BCLR 786 para 20, 43, and 57 – 58. The aforementioned case is mentioned *Supra* at pages 5, 44, 88, 89, 91, 93, and 118.

⁷⁸⁸ Reported sub nom *Modderfontein Squatters, greater Benoni City Council v Modderklip Boerdery (Pty) Limited (Agri SA and Legal Resources Centre, amicus curiae)*, where it was held that the only appropriate relief in the circumstances of that case was constitutional damages, in other words damages attributable to the breach of a constitutionally entrenched right.

⁷⁸⁹ 1997 3 SA 786 (CC) para 60 and 69.

must necessarily be effective and remarked that constitutional damages could even be available to Modderklip.⁷⁹⁰

In delict, an award of damages is the primary remedy, aimed at affording compensation in respect of the legal right or interest infringed. The purpose of a constitutional remedy is to vindicate guaranteed rights and prevent or deter future violations.

A clear distinction should be drawn between delictual and constitutional wrongs. Conceptual difficulties will arise if one were to equate all infringements of fundamental rights with an ordinary delict.

Courts developing the common law under section 39(2) of the Constitution must guard against overzealous judicial reform, confining themselves to the incremental changes necessary to keep the common law in step with the evolution of our society and the ever changing nature of *bonos mores*.⁷⁹¹

On scrutinizing Boruchowitz J's comments in the case of *Dendy v University of the Witwatersrand, Johannesburg and Others*⁷⁹² the question is raised whether he may possibly have been too restrictive in his expansion of the common law in not allowing 'overzealous judicial reform' and confining the courts to incremental changes. As noted above courts developing the common law must do so in order to keep in step with the changing *bonos mores* of society, which may, in certain circumstances, not change incrementally but rather rapidly, which may then call for a zealous reform of the common law.

⁷⁹⁰ 2005 5 SA 3 (CC), 2005 8 BCLR 786. Modderklip was a company which had suffered loss arising from the illegal occupation of its land by squatters, owing to the failure of the State to comply with the constitutional obligations to bring a separate delictual action against the State.

⁷⁹¹ The decision of Boruchowitz J in *Dendy v University of the Witwatersrand, Johannesburg and Others* 2005 (5) SA 357 (W), [2005] 2 All SA 490, 2005 (9) BCLR 90 was upheld on appeal, in 2007 5 SA 382 (SCA), [2007] 3 ALL SA 1 and 2007 8 BCLR 910. Dendy, 'In Light of the Constitution – 2: Damages in Delict for Violation of Constitutionally Entrenched Rights' (2009). *De Rebus*, March 2009, Law Society of South Africa 48. The argument in the aforementioned case was advanced that deliberate violations of constitutionally entrenched rights constitute contemptuous or humiliating treatment of the rights holder, justifying an award of damages under the *actio injuriarum* – a remedy available for wrongful and intentional violations of personality rights.

⁷⁹² 2005 5 SA 357 (W), [2005] 2 All SA 490, 2005 (9) BCLR 90, which is mentioned previously on pages 106, 154, 161 – 164 of this dissertation.

8.2. THE WAY FORWARD

A question, although not the primary question of this dissertation, remains: “Should litigants in subsequent cases attempt to obtain an award of damages in delict for intentional violations of constitutionally entrenched rights, on the basis that such violations constitute an actionable *injuria* to the dignity of the rights holder?” It is suggested that, in the light of the dicta of the Constitutional Court in the cases surveyed above, and in spite of some of the remarks of Boruchowitz J in *Dendy’s case*⁷⁹³, the quest to introduce such a remedy into our law should not be abandoned.

Attempts to introduce such new remedies into our law of delict have previously failed on the first attempt⁷⁹⁴, but these decisions might well be departed from in the future on different facts or indeed with different judges. Indeed it has been shown in this dissertation that subsequent dicta, for example in *Minister of the Executive Council, Department of Welfare, Eastern Cape v Kate*⁷⁹⁵ and *Nyathi v Minister of the Executive Council for the Department of Health, Gauteng and Another*⁷⁹⁶ have provided further support for the view that common law remedies may constitute appropriate relief under section 38 of the Constitution and hence the common law remedy of damages through delict will be available for the infringement of a fundamental right.⁷⁹⁷

Therefore, those who support the notion that those who intentionally violate the constitutionally entrenched rights of others ought to be saturated in damages for doing so, even in the absence of physical harm or patrimonial loss, should persist that such a principle will one day be introduced, or, as Boberg noted in his preface to the *Law of Delict*, that “iconoclasm of today may be the law of tomorrow”.⁷⁹⁸

Even the most ardent supporters of constitutional remedies draw attention to inconsistent and unsatisfactory features of a constitutional damages remedy aimed at punishment or deterrence. It has been suggested that to give punitive damages the

⁷⁹³ 2005 5 SA 357 (W), [2005] 2 ALL SA 490.

⁷⁹⁴ Including the unsuccessful result in *Dendy’s case* 2005 5 SA 357 (W), [2005] 2 ALL SA 490.

⁷⁹⁵ 2006 4 SA 478 (SCA).

⁷⁹⁶ 2008 5 SA 94 (CC), 2008 9 BCLR 865.

⁷⁹⁷ Dendy, ‘In Light of the Constitution – 2: Damages in Delict for Violation of Constitutionally Entrenched Rights’ (2009). *De Rebus*, March 2009, Law Society of South Africa 48.

⁷⁹⁸ *Ibid.* Boberg, PQR, *The Law of Delict*, Volume 1 (1984).

primary focus runs counter to the Anglo-Canadian tradition, which favours calculated compensatory damages. The deterrent effect of any damage award is difficult to assess, since the empirical evidence of the deterrent impact is only evident by its absence.⁷⁹⁹ Where punitive damages are awarded against the State it is almost inevitable that the costs involved will be shifted to the public at large.⁸⁰⁰

Nothing has been produced or referred to which tends to lead to the conclusion that punitive damages against the State will serve as a significant deterrent or will have a preventative effect against individual or general repetitions of the infringements. Further, to make nominal punitive awards will, if anything, trivialize the right involved and hence for awards to have any conceivable deterrent effect against the State they will have to be very substantial and, the more substantial they are the greater the anomaly that a single plaintiff receives a windfall of such a magnitude.⁸⁰¹ While punitive awards may lead to systematic change, the process might well be a slow one requiring a substantial number of such awards before change is induced, which the State is reluctant to institute of its own accord; equitable relief on the other hand could achieve such change far more speedily and cheaply.

So, in conclusion and in answer to the question posed in Chapter 1 “is an award of monetary damages an appropriate remedy for breach of a constitutional right?” It is submitted that such an award is an appropriate remedy if, in the circumstances, it is, in terms of section 172 of the Constitution, a just and equitable remedy for the complainant. There, however, remains a tension between delictual damages and constitutional damages as highlighted throughout this dissertation. Hence, the question of appropriateness is dependent on whether the remedy is just and equitable, whereas the question of justice and equitability is likewise dependant upon the remedy being appropriate in the circumstances. Therefore, it appears as though the two concepts of appropriateness and justice and equitability are interrelated and hence where one of the concepts is missing the remedy will not meet the requirements necessary for the individual entitled to the remedy to obtain justice. This interrelated and co-dependent relationship may result in a ‘catch 22’ situation in that if the one

⁷⁹⁹ De Waal, Currie and Erasmus, *The Bill of Rights Handbook*, 4th edition (2001) 169.

⁸⁰⁰ *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 65.

⁸⁰¹ *Supra* para 71.

concept cannot be fulfilled the other will not be met and as such the remedy will be fruitless.

Monetary damages in the form of delictual common law damages are available for the breach of a constitutional right provided the infringement complies with all the requirements of a delictual remedy and is not granted in addition to another remedy. Thus, the delictual remedy of monetary damages is available for a 'constitutional delict' in that the common law is flexible and can adapt to the changing *bonos mores* of society, thus a new mechanism for awarding damages, which is submitted as a valid remedy to the problem posed in this dissertation.

The question as to "whether providing monetary damages for a breach of a constitutional right is not merely throwing money at the problem?" seems to be answered by the phrases 'appropriateness', 'justice', 'equity' and 'effectiveness'. Whereas it may appear to be throwing money at the problem, the providing of an award of monetary damages for the breach of a constitutional right is the only appropriate, just and equitable remedy in the circumstances canvassed and can be effective in vindicating the victim's rights and in deterring future violations of such constitutional rights.

ANNEXURES

ANNEXURE A:

SYNTHESIS OF KEY CASES DISCUSSED IN THIS DISSERTATION

<u>Parties</u>	<u>Citation (year)</u>	<u>Outcome</u>
<i>Fose v Minister of Safety and Security</i>	1997 3 SA 786	This was the first reported decision on the question of punitive damages for a constitutional breach. Ackermann J dismissed a claim for punitive damages for violations of the plaintiff's constitutional rights in addition to compensatory damages.
<i>Bacela v Member of the Executive Council for Welfare (Eastern Cape Provincial Government)</i>	1998 1 ALL SA 525 (E)	In this case the beneficiary was legally entitled to back payment to the date of application in terms of the applicable regulations, it was only the 'interest' on the back payment that was granted as a form of constitutional relief.
<i>Soobramoney v Minister of Health, KwaZulu Natal</i>	1998 1 SA 765 (CC)	The Constitutional Court refused to order the State to provide expensive dialysis treatment to keep a critically ill patient alive.
<i>Dawood v Minister of Home Affairs</i> 2000 (3) SA 936 (CC)	2000 3 SA 936 (CC)	Held that when a statutory provision confers a broad discretion upon officials it may inevitably be read down to narrow the discretion, but a court should be slow to do so if the result would leave officials untrained in law with discretionary power to limit fundamental rights without legislative guidance.
<i>Carmichele v Minister of Safety and Security</i>	2001 4 SA 938 (CC)	The Constitutional Court made it clear that the Constitution governs the decisions of the judiciary when it enforces and develops the common law regulating private power.
<i>Government of the</i>	2001 1 SA 46	The court merely stated that the government's

<i>Republic of South Africa v Grootboom</i>	(CC), 2000 11 BCLR 1169 (CC)	housing programme in the area of the Cape Metropolitan Area fell short of complying with its constitutional obligations.
<i>Mahambehlala v Member of Executive Council of Welfare, Eastern Cape</i>	2002 1 SA 342; 2001 JDR 0327 (SE)	Leach J held that the delay resulted in an unlawful and unreasonable infringement of the applicant's fundamental right to just administrative action as set out in section 33(1) of the Constitution. Leach J awarded damages equivalent to interest for the period of delay, this was done in order to place the applicant in the position in which she would have been had her constitutional right not been breached by the tardy manner in which her application for a social grant was processed. A similar order was granted on the same grounds in the case of <i>Mbanga</i> 2001 JDR 328 (SE).
<i>Jayiya v Member of Executive Council for Welfare, Eastern Cape Provincial Government</i>	2004 2 SA 611 (SCA)	This case criticized the courts becoming an alternative forum for the processing of social assistance grants. This case held further that State officials could not be held in contempt of court for non payment of court orders.
<i>Modderklip Boerdery (Edms) Bpk v President of the RSA</i>	2005 5 SA 3 (CC)	It was held that the only relief appropriate in the circumstances of this case was constitutional damages, i.e., damage attributable to the breach of a constitutionally entrenched right. Langa ACJ stated for the majority that the appropriate remedy must necessarily be effective, and remarked that it could even be open to Modderklip bringing a separate delictual action against the State.
<i>Dendy v University of Witwatersrand Johannesburg</i>	2005 5 SA 357 (W)	In this case the argument was advanced that deliberate violations of constitutionally entrenched rights constitute contemptuous or

		humiliating treatment of the rights holder, and hence a violation of the latter's dignity, justifying an award of damages under the <i>actio injuriarum</i> . In the end Boruchowitz J declined to recognize the violations complained of as actionable breaches.
<i>Nyathi v MEC for the Department of Health, Gauteng and Another,</i>	26014/ 2005 TPD, 20 March 2007 (unreported), [2007] JOL 19612 (T)	It was declared that section 3 of the State Liability Act, 20 of 1957, was inconsistent with the 1996 Constitution. Hence, an order of execution can now be issued against the State.
<i>Rail Commuters Action Group v Transnet Limited t/a Metro-Rail</i>	2005 2 SA 359 (CC)	Declaratory, mandatory and prohibitory relief (rather than damages) was claimed. In the unanimous judgment declaratory relief was granted and confirmation that Transnet Ltd and the South African Rail Commuter Corporation Ltd has a legal obligation to take reasonable measures to provide for the security of rail commuters making use of rail transport services provided by those companies was specified
<i>Kate v Member of executive Council of Welfare Department v Kate</i>	2006 SCA 46 RSA 2005 (1) SA 141 SECLD;	The Court ordered payment of the shortfall due to Kate with <i>interest on the accrual</i> from the 16 th of April 1996.

ANNEXURE B

SOCIAL INSURANCE STATUTES AND THE CONTRIBUTORS

Most public social security schemes, particularly social insurance schemes that depend on contributions, are regulated by legislation which provides for mechanisms to ensure compliance⁸⁰².

N o	Statute governing the insurance scheme	Who contributes to the scheme?
1.	Compensation for Occupational Injuries and Diseases Act 130 of 1993	Employer
2.	Unemployment Insurance Act 63 of 2001	Employee and Employer
3.	Pension Funds Act 24 of 1956	Employee and Employer
4.	Medical Schemes Act 131 of 1998	Employee and Employer
5.	Occupational Health and Safety Act 85 of 1993	Employer
6.	Occupational Diseases in Mines and Works Act 78 of 1973	Employer
7.	Mines, Health And Safety Act 29 of 1996	Employer
8.	Road Accident Fund Act 56 of 1996	Driver
9.	Long-Term Insurance Act 52 of 1998	Insured
10.	Short-Term Insurance Act 53 of 1998	Insured

⁸⁰² Chapter 2 of this dissertation refers at page 35.

ANNEXURE C

ALTERNATIVE REMEDIES TO MONETARY DAMAGES

An allegation of inconsistency between law or conduct and the Constitution provides the cause of action in all constitutional cases. While the cause of action is always found in the violation of a provision of the Constitution, constitutional remedies may be found in the Constitution itself, in other legislation, statutes, or the common law.

When the target of the remedy is private or state conduct, the source of the remedy will often be found in the common law. When legislation is challenged, on the other hand, the Constitution itself usually provides the most suitable remedies.

C1. CONSTITUTIONAL REMEDIES

<u>No.</u>	<u>Name of Remedy</u>	<u>Brief Explanation</u>
1.	Political Sanctions	The State is open to political sanctions for not complying with the Constitution. This would be effected through the vote of the people. This remedy appears to one of the weaker remedies available.
2.	Declaration of Invalidity	This remedy is not discretionary remedy, but mandatory if the conduct or legislation is in opposition to the Constitution and its principles. An interdict as well as damages may therefore be awarded in addition to a declaration of invalidity, and the effect or impact of a declaration of invalidity may be controlled in a number of ways. Constitutional supremacy does not require the invalidation of provisions in a statute that are constitutional and valid if they can be severed from the unconstitutional and invalid provisions. Nor

		<p>does it require immediate invalidation if the resulting situation would be more unconstitutional than the existing one. This is why the courts are granted powers in terms of section 172 of the Constitution ‘to regulate the impact of a declaration of invalidity.’ This is achieved by: severing the unconstitutional provisions in legislation from the constitutional ones; by reading in words into legislation; by controlling the retrospective effects of a declaration of invalidity and by temporarily suspending a declaration of validity, a court ‘may make any order that is just and equitable’</p>
3.	Declaration of Rights	<p>A declaration of rights may be issued only in so far as it is alleged that the rights in the Bill of Rights are infringed or threatened, declarations of invalidity must be declared in all instances where a court finds that law or conduct is inconsistent with the Constitution. A declaration of rights is an essential remedial and corrective remedy, it can promote a non-coercive dialogue between the courts and the State, but only if governments and officials comply with them voluntarily, promptly and in good faith. A court, in granting a declaration of rights, would simply declare whether the right or duty exists and or what the scope of the duty is.</p>
4.	Prohibitory Interdict: Interim or Final	<p>A prohibitory interdict is where one seeks to prevent the continued or threatened performance of an illegal action interfering with one’s rights.</p>
5.	Mandatory Interdict (<i>Mandamus</i> : directing the way in which action is	<p>A mandatory interdict is where one seeks to force an administrator to perform a statutory duty or to cure a state of affairs brought about by illegal</p>

	to be taken in future): Interim or Final	actions. The remedy of <i>mandamus</i> has the capacity to be effective where there is a breach by a public official of a duty that is imposed by a statute or the Constitution. In most cases that is sufficient without an additional remedy of damages. The courts have also introduced the use of structural interdicts – compelling the violator to perform in a structured manner and to report intermittently to an appointed authority. This remedy is difficult to enforce than the prohibitory interdict.
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C2. ADMINISTRATIVE LAW REMEDIES

There are various administrative law remedies provided in section 8 of the Promotion of Administrative Justice Act 3 of 2000 including the following: exclusion of evidence, severance, reading-in, and a cost order.

C3. COMMON LAW DELICTUAL REMEDIES

<u>No.</u>	<u>Name of Remedy</u>	<u>Brief Explanation</u>
1.	<i>Actio legis Aquiliae</i>	Available for damage of patrimonial loss. Patrimonial loss to person or property wrongfully and culpably caused. This remedy has lost its penal nature and is purely compensatory in nature.
2.	<i>Actio iniuriarum</i>	Available for satisfaction (emotional/mental integrity/personality interests). Defined as a wrongful intentional infringement of a person's <i>corpus</i> , <i>fama</i> or <i>dignitas</i> .
3.	Action for pain and suffering	Available for damages for physical pain and suffering and bodily disfigurement experienced (compensation).

BIBLIOGRAPHY

BOOKS

Anderson, P, and Poole, M, *Assignment and Thesis Writing*, 3rd edition (1998). Jacaranda Wiley Ltd: Australia

Andrews, P, and Ellmann, S (Editors), *The Post Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001). Witwatersrand University Press: Johannesburg

Arkes, H, *Beyond the Constitution* (1999). Princeton University Press: New Jersey

Bass, S, Reid, H, Satterthwaite, D, and Steele, P, *Reducing Poverty and Sustaining the Environment – the politics of local engagement* (2005). Earthscan: London

Blanche, M T and Durrheim, K (editors), *Research in Practice: Applied Methods for the Social Sciences* (2002). University of Cape Town Press: Cape Town

Boberg, PQR, *The Law of Delict*, Volume 1 (1984). Juta & Company Ltd: Cape Town

Burns, Y, *Administrative Law under the 1996 Constitution* (1999). Butterworths: Durban

Cockram, GM, *Constitutional Law in the Republic of South Africa* (1975). Juta and Company Limited: Cape Town

Currie I, and de Waal J, *The New Constitutional and Administrative Law* Volume 1 (2001). Juta Law: Lansdowne

Currie I (editor), and Hoexter, C with Lyster, R, *The New Constitutional and Administrative Law* Volume 2 (2002). Juta Law: Lansdowne

Currie I, and de Waal J, *The Bill of Rights Handbook*, 5th edition (2005). Juta and Company Limited: Lansdowne

Currie I, and Klaaren J, *The Promotion of Administrative Justice Benchbook* (2001). Siber Ink.

Devenish, Prof GE, *A Commentary on the South African Bill of Rights* (1999). Butterworths: Durban

De Ville, J R, *Judicial Review of Administrative Action in South Africa*, revised 1st edition (2005). Butterworths: Durban

De Waal J, Currie I, and Erasmus G, *The Bill of Rights Handbook*, 4th edition (2001). Juta and Company Ltd: Lansdowne

De Waal J, Currie I, and Erasmus G, *The Bill of Rights Handbook*, 5th edition (2005). Juta and Company Ltd: Wetton

De Wet, Dr E, *The Constitutional Enforceability of Economic and Social Rights* (1996). Butterworths: Durban

Duverger, M, *Modern Democracies: Economic Power versus Political Power*, translated by Markman, CL (1974). The Druyden Press: Illinois

Erasmus HJ, *Aspects of the history of the South African law of damages* (1975) 38 *THRHR* 104, 268, 362

Erasmus HJ, and Gauntlett JJ (revised by Visser PJ), *Damages*, 7 *LAWSA* 1 (1995) Butterworths: Durban

Grotius, H, *The Jurisprudence of Holland* (translated by Lee RW) First Edition Volume 1 (1926). Oxford: Clarendon Press.

Hanks, P (editor), *Collins Dictionary of the English Language* (1979). Collins: London

Hoexter C, *Administrative Law in South Africa* (2007). Juta and Co. Ltd.: Cape Town

Koch, RJ, *Damages for lost income* (1984). Juta & Company Ltd: Cape Town

Liebenberg, S, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010). Juta and Co Ltd: Claremont

Lee, RW, *Cupidae Legum Juventuti The Elements of Roman Law with a translation of the Institutes of Justinian*, 3rd edition (1952). Sweet & Maxwell, Limited: London.

Lex Aquilia: The Roman Law of Damage of Property (1886).

McKerron, RG, *The Law of Delict*, 6th Edition (1965). Juta & Co Limited: Cape Town.

McKerron RG, *The Law of Delict* (1971). Juta & Company Ltd: Cape Town

Moran, G, *A Practical Guide to Administrative Justice*, 1st edition (2002). Shereno Printers: South Africa

Neethling, J, Potgieter, JM, and Visser, PJ, *Law of Delict*, 5th edition (2006). LexisNexis Butterworths: Durban

Neethling, J, Potgieter, JM, and Visser, PJ, *Law of Delict*, 6th edition (2010). LexisNexis: Durban

Oloka-Onyango, J (Ed), *Constitutionalism in Africa: Creating opportunities, Facing challenges* (2001). Fountain Publishers: Kampala

Olivier MP, Smit N, Kalula ER, and Mhone GCZ, *Introduction to Social Security* (2004). LexisNexis Butterworths: Durban

Olivier MP, Okpaluba MC, Smit N, and Thompson M (Ed's), du Toit AM, Greyling E, Jansen van Rensburg L, Liffmann R, Ogunrombi SO, and Porter I, *Social Security Law: General Principles* (1999). Butterworths: Durban

Strydom, EML (ed), Le Roux, PAK, Landman, AA, Christianson, MA, Dupper, OC, Myburgh, P, Barker, FS, Garbers, CJ and Basson, *AC Essential Social Security Law* (2001). Juta Law: Lansdowne

Terre Blanche, M and Durrheim, K (Ed), *Research in Practice* (2002). University of Cape Town Press: Cape Town

Van der Merwe NJ and Olivier PJJ, *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1989). Juta & Company Ltd: Cape Town

Van der Walt JC, and Midgley JR, *Principles of Delict*, 3rd edition (2005). Butterworths: Durban

Van der Walt JC, and Midgley JR, '*Delict*' *Principles and Cases*, 2nd edition (1997). Butterworths: Durban

Visser, PJ, and Potgieter, JM, *Law of Damages* (1993). Juta & Company Ltd: Cape Town

Visser PJ, and Potgieter JM, *Law of Damages*, 2nd edition (2003). Juta & Company Ltd: Cape Town

Visser PJ, and Potgieter JM, *Law of Damages through the cases*, 3rd edition (2004). Juta Law: Lansdowne

Wallace, M, and Wray, A, *Critical Reading and Writing for Postgraduates* (2006). Sage Publications: London

Wiechers, M, *Administrative Law* (1985). Butterworths: Durban

Zweigert K and Kotz H, *Introduction to Comparative Law* (1998) 3rd edition revised (translated by Tony Weir). Clarendon Press: Great Britain

Zimmermann, R, and Visser, D, *Civil Law and Common Law in South Africa* (1996). Juta & Co Ltd: Cape Town

JOURNAL ARTICLES

Asimow, M, 'Administrative Law Under South Africa's Final Constitution: the Need for an Administrative Justice Act' (1996) 113 *SALJ* 613

Dendy, M, 'Administrators, Justice and Social Assistance' (2008) *SALJ* 524

Dendy, M, 'In Light of the Constitution Part 1: the Supremacy of the Constitution' (2009). *De Rebus*, January / February 2009, Law Society of South Africa: 60

Dendy, M 'In Light of the Constitution – 2: Damages in Delict for Violation of Constitutionally Entrenched Rights' (2009). *De Rebus*, March 2009, Law Society of South Africa: 48

Dendy, M, 'Prescription and Limitation Periods' (2009). *De Rebus*, April 2009, Law Society of South Africa: 48

Hansard Tuesday 25 January 2000 279

Iles, K, 'Limiting Socio-economic Rights: Beyond the Internal Limitations Clauses' (2004) 20 *SAJHR* 448

LA Dimatteo, A Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages (2001). 38 *Am Bus LJ* 633

Lex Aquilia: The Roman Law of Damage of Property (1886) 269. Oxford Press.

Love, JC, Damages: Remedy for the Violation of Constitutional Rights (December 1979). *California Law Review* (volume 67)

Mbana, P (LLB), Prohibition of Accumulation of Remedies (2008). *De Rebus*: December 2008: 22

Mureinik, E, 'A Bridge to Where? Introducing the interim Bill of Rights' (1994) 10 *SAJHR* 31

O'Regan, K 'Breaking Ground: Some thoughts on the seismic shift in our Administrative Law' (2004) 12 *SALJ* 424

Penfold, G, and Du Plessis, M, 'Interdicts seeking to preserve constitutional rights – of losing litigants, interim interdicts pending appeal, and lessons from Canada' (2008) 124.3 *SALJ* 557

Plasket, C 'Administrative Justice and Social Assistance' (2003) 120 *SALJ* 494

Pieterse, M 'Towards a Useful Role for section 36 of the Constitution in Social Rights cases? Residents of Bon Vista Mansions v Southern Metropolitan Local Council' (2003) 120 *SALJ* 41

Van der Walt 1980 *THRHR* 4

Van der Walt, *Sommeskadeleer* 284

Wesson, M 'Grootboom and Beyond: Reassessing the Socio-economic Jurisprudence of the South African Constitutional Court' (2004) 20 *SAJHR* 284

INTERNET REFERENCES

DUTY TO PAY SOCIAL GRANT-ARREARS

Deneys Reitz Attorneys: Legal Update no. 7, *Duty to Pay Social Grant-Arrears* (2008). Available at: www.deneysreitz.co.za. [Accessed: 16/01/2009]

RHODES UNIVERSITY WEBSITE

RU, *Magidimisi N.O and Premier of the Eastern Cape* (2006). Available at: www.ru.ac.za/academic/faculties/law/ecd/judgments/enforcement20of20judgments.pdf
[Accessed: 11/04/2007]

SUPREME COURT OF APPEAL

SCA, *781MEC Welfare v Kate* (2006). Available at: www.uovs.ac.za/apps/law/appeal/files/2006/1/781mec20welfare20kate
[Accessed: 11/04/2007]

THE EUROPEAN OBSERVATORY ON HEALTH SYSTEMS AND POLICIES,

Glossary, Bismarckian System (2008). Available at: www.euro.who.int/observatory/Glossary/TopPage?phrase=Bismarckian%20system
[Accessed: 18/ 11/2008]