CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 136/20

In the matter between:

THE RESIDENTS OF INDUSTRY HOUSE, 5 DAVIES STREET, NEW DOORNFONTEIN, JOHANNESBURG	First Applicant
THE RESIDENTS OF ROSANO MODES, 32 AND 34 DAVIES STREET, NEW DOORNFONTEIN, JOHANNESBURG	Second Applicant
THE RESIDENTS OF 36 DAVIES STREET, NEW DOORNFONTEIN, JOHANNESBURG	Third Applicant
THE RESIDENTS OF 39-41 DAVIES STREET, NEW DOORNFONTEIN, JOHANNESBURG	Fourth Applicant
THE RESIDENTS OF WELLINGTON COURT, 34 LEYDS STREET, JOUBERT PARK, JOHANNESBURG	Fifth Applicant
THE RESIDENTS OF REMINGTON COURT, CNR NUGGET AND JEPPE STREETS, JOHANNESBURG	Sixth Applicant
THE RESIDENTS OF WEMMER SHELTER, TURFONTEIN, JOHANNESBURG	Seventh Applicant
THE RESIDENTS OF ERVERN 87 AND 88, BEREA, JOHANNESBURG	Eighth Applicant
THE RESIDENTS OF 20 JANIE STREET, JEPPESTOWN, JOHANNESBURG	Ninth Applicant
THE RESIDENTS OF 50, 52 AND 54 SOPER ROAD, BEREA, JOHANNESBURG	Tenth Applicant

THE RESIDENTS OF 1 DELVERS STREET, MARSHALLTOWN, JOHANNESBURG	Eleventh Applicant
and	
MINISTER OF POLICE	First Respondent
CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	Second Respondent
MINISTER OF THE DEPARTMENT OF HOME AFFAIRS	Third Respondent
DIRECTOR-GENERAL, DEPARTMENT OF HOME AFFAIRS	Fourth Respondent
MEMBER OF THE EXECUTIVE COUNCIL, ROADS AND TRANSPORT, GAUTENG	Fifth Respondent
MZAMANI ERIC NKUNA N.O.	Sixth Respondent
DELIWE SUZAN DE LANGE N.O.	Seventh Respondent
HERMAN MASHABA N.O.	Eight Respondent
ALBERT MATSAUNG N.O.	Ninth Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICES	Tenth Respondent

Neutral citation:	*Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg and Others v Minister of Police and Others* [2021] ZACC 37
Coram:	Mogoeng CJ, Jafta J, Madlanga J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ
Judgments:	Mhlantla J (majority): [1] to [126] Jafta J (concurring): [127] to [161] Victor AJ (dissenting in part): [162] to [222]

Heard on: 24 November 2020

Decided on: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Constitutional Court website and release to SAFLII. The date and time for hand-down is deemed to be 12h00 on 22 October 2021

Summary: South African Police Service Act 68 of 1995 — constitutionality of section 13(7)(c) — order of constitutional invalidity confirmed — right to privacy — constitutional damages — interdict

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ORDER

On appeal from, and in an application for confirmation of an order of constitutional invalidity of the High Court, Gauteng Local Division, Johannesburg:

1. The declaration of invalidity issued by the High Court in respect of section 13(7)(c) of the South African Police Service Act 68 of 1995 (SAPS Act) is confirmed but its order is varied in the terms set out in paragraph 2.
2. The portion of section 13(7)(c) that authorises warrantless searches is severed and the section is now deemed to read as follows, with the underlining denoting an insertion: "Upon receipt of the written authorisation referred to in paragraph (a), any member may cordon off the area concerned or part thereof, and may, where it is reasonably necessary in order to achieve the object specified in the written authorisation <u>and within the cordoned-off area, search any person, premises or vehicle, or any receptacle or object of whatever nature in terms of sections 21 and 22 of the Criminal Procedure Act 51 of 1977</u> and seize any article referred to in section 20 of the Criminal Procedure Act 51 of 1977, found by him or her in the possession of such person or in that area or part thereof: Provided that a member executing a search under this paragraph shall, upon demand of any person whose rights are or have been affected by the

search or seizure, exhibit to him or her a copy of the written authorisation."

3. Leave to appeal directly against the orders of the High Court is granted.
4. The appeal against the order of the High Court dismissing a constitutional challenge against paragraphs (a) and (b) of section 13(7) of the SAPS Act is dismissed.
5. The appeal in respect of the claim for constitutional damages is dismissed.
6. The appeal in respect of the claim for a final interdict is upheld only in respect of the seventh and eleventh applicants.
7. The order of the High Court dismissing the claim for a final interdict in respect of the seventh and eleventh applicants is set aside.
8. The City of Johannesburg, the Minister of Home Affairs and the Director-General of the Department of Home Affairs (second, third and fourth respondents) are interdicted and restrained from raiding, searching, inspecting, seizing any person or item, or otherwise interfering with the seventh and eleventh applicants' peaceful and undisturbed possession of their homes, except on the authority of an order of court, a warrant granted by a Magistrate or Judge in terms of any applicable law, or in terms of section 22 of the Criminal Procedure Act.
9. The Minister of Police must pay the applicants' costs, including the costs of two counsel.

JUDGMENT

MHLANTLA J (Mogoeng CJ, Jafta J, Madlanga J, Mathopo AJ, Theron J and Tshiqi J concurring):

Introduction

[1] A home is more than brick and mortar, it is often a place of comfort, safety, and the keystone of a functional society. The background to this application illuminates, in living colour and grim reality, the lived experiences of the applicants, for whom this comfort and safety was disregarded through a sustained search and seizure campaign by the respondents. The applicants, who are poor and vulnerable people, were subjected to cruel, degrading and invasive raids, which were conducted without any warrants. The duration of the search and seizure campaign lasted approximately a year. The true purpose of the raids was not only to seek out and arrest undocumented immigrants but also to frighten and harass the applicants into leaving their homes.

[2] The central question to this application is whether section 13(7) of the South African Police Service Act[1] (SAPS Act) is constitutional. There are two aspects to it. The first is an application for the confirmation of an order of invalidity of section 13(7)(c) of the SAPS Act issued by the High Court of South Africa, Gauteng Local Division, Johannesburg (High Court).[2] The second is an application for leave to appeal against the High Court's refusal to find paragraphs (a) and (b) of section 13(7) constitutionally invalid, as well as its refusal to grant the applicants constitutional damages; and an interdict preventing future searches of their homes. To understand the issues, it is apposite at this stage to set out the factual background.

Background

[3] The applicants are 2 852 persons who reside in 11 properties in the Johannesburg inner city.[3] They are represented by the Socio-Economic Rights Institute of South

[1] 68 of 1995.

[2] *Residents of Industry House v Minister of Police* 2021 (2) SA 220 (GJ) (High Court judgment).

[3] The first applicants are the residents of 5 Davies Street, New Doornfontein. The second applicants are the residents of Rosano Modes, 32 and 34 Davies Street, New Doornfontein. The third applicants are the residents of 36 Davies Street, New Doornfontein. The fourth applicants are the former residents of 39 to 41 Davies Street, New Doornfontein. The fifth applicants are the residents of Wellington Court, 34 Leyds Street, Joubert Park. The sixth applicants are the residents of Remington Court, corner of Nugget and Jeppe Street. The seventh applicants are the residents of the Wemmer Shelter, 1 Glenluce Road, Turffontein. The eighth applicants are the residents of Kiribilly, Erven 87 and 88 Berea, corner of Soper Road and Fife Avenue, Berea, Johannesburg. The ninth

Africa (SERI). Four of the respondents are participating in these proceedings. They are the Minister of Police (first respondent), Lieutenant-General Nkuna (sixth respondent), Lieutenant-General De Lange (seventh respondent)[4] and the National Commissioner of the South African Police Service (tenth respondent). For convenience, I will collectively refer to them as the respondents. The remaining respondents[5] have not participated.

[4] Between June 2017 and May 2018, the homes and possessions of the applicants were searched in a series of operations conducted by the members of the South African Police Service acting within the course and scope of their employment. All but two of the searches were conducted in terms of written authorisations issued by the sixth and seventh respondents in terms of section 13(7) of the SAPS Act. Members of the police[6] were assisted by the Johannesburg Metropolitan Police Department and immigration officials from the Department of Home Affairs.

[5] Each of the searches was conducted in virtually the same manner. The occupants of the premises were forced outside onto the street, searched, fingerprinted and members of the police and Johannesburg Metropolitan Police Department officials demanded copies of their identity documents or passports. Anyone not in possession of a South African identity document or passport, a foreign passport, visa, or an asylum seeker permit was detained in terms of the Immigration Act.[7] While this occurred, members of the police and Johannesburg Metropolitan Police Department officers entered the buildings, broke down the doors to each unit and searched each of the

applicants are the residents of 20 Janie Street, Jeppestown. The tenth applicants are the residents of 50, 52 and 54 Soper Road, Berea. The eleventh applicants are the residents of 1 Delvers Street, Marshalltown.

[4] The sixth and seventh respondents were Provincial Commissioners of the South African Police Service when the raids took place.

[5] These are the City of Johannesburg Metropolitan Municipality (second respondent), the Minister of Home Affairs (third respondent), Director-General of the Department of Home Affairs (fourth respondent), the Member of the Executive Council: Roads and Transport (fifth respondent), Herman Mashaba (eighth respondent), and Albert Matsaung (ninth respondent).

[6] I refer to those under the employ of the South African Police Service as "members of the police".

[7] 13 of 2002.

applicants' possessions. The applicants were not given a warrant or any other written authority for the searches of their homes. Once the searches were over, those applicants who had not been detained were allowed to re-enter their homes and often found their possessions in disarray and items of value missing. What follows is a summary of each raid in respect of each of the applicants.

Raids of first applicants' homes (Industry House)

[6] Approximately 428 men, women and children reside at Industry House. In total, the first applicants experienced five separate raids. The first raid occurred on 30 June 2017 at around 18h00. About 80 members of the police and Johannesburg Metropolitan Police Department officers arrived at Industry House and ordered all the residents to leave their rooms. They then took their fingerprints and members of the police conducted body searches and demanded that the first applicants provide their identity documents. Those residents who were unable to produce identification were arrested. Members of the police went into the building and searched every room. The search lasted approximately two hours. The residents asked for, but were not provided with, documentation that authorised the search. Later, SERI was informed that the raid was conducted pursuant to a written authorisation issued by the sixth respondent in terms of section 13(7) of the SAPS Act.

[7] The second raid of the first applicants' homes took place two weeks later on 14 July 2017 at around 16h00. This raid was conducted by members of the police and the officers of the Johannesburg Metropolitan Police Department, together with officials from the Department of Home Affairs. These officers entered the building and instructed everyone to leave the building with their identity documents and wait outside. During the raid, a great deal of the first applicants' property was seized. On 24 August 2017, a third raid was conducted on the authority of the seventh respondent, in terms of section 13(7) of the SAPS Act.

[8] A fourth raid was conducted on 24 January 2018. Once again, their homes and possessions were searched and everyone was fingerprinted. This raid was also

conducted on the written authorisation of the seventh respondent in terms of section 13(7) of the SAPS Act. The last raid was on 3 May 2018 at 02h50. The officers arrived when the residents were asleep. In instances where the doors were not opened immediately after knocking, they broke down the doors to gain access to the rooms. The residents were ordered to go outside and the officers searched the rooms. Fifty of the residents were arrested by members of the police on suspicion that they were "illegal immigrants".[8]

Raids of second applicants' homes (Rosano Modes)

[9] Two raids were conducted in respect of the second applicants. Rosano Modes is made up of two buildings in which approximately 354 people live in 168 rooms. The first raid took place on 14 July 2017 at 14h00. Approximately 80 members of the police and Johannesburg Metropolitan Police Department officers arrived at Rosano Modes. They were accompanied by a private security company. Once again, the officers broke down doors, searched people's homes and arrested those of the second applicants who could not produce documentation to prove that they were lawfully residing in South Africa. Later, SERI was informed that this raid was authorised by the seventh respondent in terms of section 13(7) of the SAPS Act. The second raid took place on 21 November 2017 at 08h00 in a similar manner as the first one, and was also authorised by section 13(7) of the SAPS Act.

Raids of the third applicants' homes (36 Davies Street)

[10] Two raids were conducted on 36 Davies Street, which has 62 rooms and is home to approximately 102 people. The longest-standing resident of the property has lived there for 16 years. The first raid took place on 14 July 2017. It was conducted by members of the police and Johannesburg Metropolitan Police Department officers together with officials from the City of Johannesburg's "Group Forensics" division and Emergency Management Services division. They searched the rooms on the ground

[8] Where "illegal immigrants" is used in this judgment to refer to non-citizens, it reflects the language used in the application.

floor of the building and everyone on the ground floor was fingerprinted. The second raid took place on 21 November 2017 at around 09h00. The residents were barred from entering the building during the raids and locked doors were broken down. Both raids were authorised by the seventh respondent in terms of section 13(7) of the SAPS Act.

Raid of fourth applicants' homes (39 to 41 Davies Street)

[11] The fourth applicants are 145 persons who reside in 59 rooms on the property at 39 to 41 Davies Street. On 14 July 2017, members of the police and Johannesburg Metropolitan Police Department officers searched all the rooms on the property. Members of the police arrested residents that could not produce evidence of their immigration status or South African citizenship. SERI was later informed that this raid was also conducted on the authority of a written authorisation issued by the seventh respondent in terms of section 13(7) of the SAPS Act.

Raid of fifth applicants' homes (Wellington Court)

[12] Wellington Court is home to approximately 102 people in over 38 households. The longest-standing resident has lived in the building for over 22 years and about half of the units are owner-occupied. The raid took place on 21 September 2017, between 13h00 and 14h00. Members of the police, Johannesburg Metropolitan Police Department officers and Department of Home Affairs officials arrived at the property. They stated that they were there to obtain and collate the details of the residents because the residents were occupying a "hijacked" building.[9] Despite the residents informing members of the police that they were legally represented by SERI, they entered the building and ordered everyone to sit outside. They searched the rooms, kicked down locked doors and fingerprinted those of the fifth applicants who were present. Members of the police also arrested two South Africans who were in the building to visit one of the residents on the basis that they did not have their identity documents and were therefore suspected of being "illegal immigrants". Residents who looked "too dark" to

[9] "Hijacked" building refers to buildings where the control has been wrested away from the owner and is being occupied unlawfully. In certain instances rent is collected unlawfully from those who occupy the properties.

be South African citizens, according to members of the police or officials from the Department of Home Affairs, or who had foreign accents, were arrested. This raid was also conducted on the authority of a written authorisation issued by the seventh respondent in terms of section 13(7) of the SAPS Act.

Raids of sixth applicants' homes (Remington Court)

[13] Two raids took place at Remington Court, which is home to approximately 517 people. The longest-standing resident at Remington Court has resided there for 25 years. On 25 July 2017, approximately 60 members of the police and Johannesburg Metropolitan Police Department officers entered the building and searched the rooms that were occupied. They informed the occupiers that they wanted to search the building because it was "hijacked". Members of the police took the names and fingerprints of all those who were present, under the pretence that they would receive alternative accommodation. The second raid took place on 21 September 2017 by members of the police and the Johannesburg Metropolitan Police Department officers in a similar manner as the first. These raids were also conducted on the authority of a written authorisation issued by the seventh respondent in terms of section 13(7) of the SAPS Act.

Raid of seventh applicants' homes (Wemmer Shelter)

[14] The seventh applicants reside in rooms at Wemmer Shelter or in tents erected around it. The property and tents are home to approximately 200 people. On 20 October 2017, officials of the Department of Home Affairs and the Johannesburg Metropolitan Police Department arrived at Wemmer Shelter at 11h00. The residents were forced to leave the building and tents. They were informed that the Department of Home Affairs was there to verify their immigration status. The "verification" process took around five hours. All those who could not produce South African identity documents or documents verifying their immigration status, were arrested. There was no warrant or other authority that authorised this search.

Raids of the eighth applicants' homes (Erven 87 and 88 Berea)

[15] The property at Erven 87 and 88 Berea, which is subdivided into 180 rooms, is home to approximately 450 people. The longest-standing resident has lived in the building for over 25 years. A total of three raids took place on the property. The first raid took place on 16 November 2017. Members of the police and Johannesburg Metropolitan Police Department officers arrived at the property at around 14h00, broke down the doors of any locked flats and searched the flats. The second and third raids took place on 24 January 2018 and 15 February 2018, respectively. The applicants' rooms were again broken into and their homes and possessions were searched. Everyone at the property was fingerprinted. All three raids were authorised in terms of section 13(7) of the SAPS Act.

The raid of the ninth applicants' homes (20 Janie Street)

[16] The property at 20 Janie Street is home to approximately 371 people. On 2 November 2017, members of the police and Johannesburg Metropolitan Police Department officers arrived at the building together with officials from the City of Johannesburg Metropolitan Municipality. They conducted an inspection of the building, broke into and searched the rooms on the ground floor. This raid was also conducted on the instruction of the seventh respondent in terms of section 13(7) of the SAPS Act.

The raid of the tenth applicants' homes (50, 52 and 54 Soper Road)

[17] The houses at 50, 52 and 54 Soper Road are home to approximately 80 people. On the afternoon of 31 August 2017, a large contingent of members of the police and Johannesburg Metropolitan Police Department officers arrived at the property together with officials from the City and the Department of Home Affairs. Members of the police searched the applicants' rooms and fingerprinted everyone present. SERI was later informed that this search was also conducted on the authority of a written authorisation issued by the seventh respondent in terms of section 13(7).

The raid of the eleventh applicants' homes (1 Delvers Street)

[18] The property at 1 Delvers Street accommodates 176 people. On 9 November 2017, a large contingent of members of the police, Johannesburg Metropolitan Police Department officers, Department of Home Affairs officials and City officials arrived at the property. They entered the property and ordered everyone out of the building in order to take their fingerprints. They searched all of the eleventh applicants' homes and broke into the rooms of those who were absent at the time. No search warrant was produced nor was SERI provided with written authorisation in terms of section 13(7) of the SAPS Act for this search.

Litigation history

[19] As a result of these raids, the applicants launched an application in the High Court for an order declaring section 13(7) of the SAPS Act unconstitutional on the basis that it encroached on the rights to dignity and privacy. The applicants further sought compensation for the infringement of their constitutional rights to dignity and privacy. They also sought an interdict restraining the officers from conducting similar searches on their properties and on their person in the future; and a declaratory order that the searches they were subjected to, including the searches conducted without authorisations, were unlawful. The High Court considered each of these claims as set out below.

[20] The High Court held that paragraphs (a) and (b) of section 13(7) were constitutionally valid. It held that neither of these provisions infringes on the section 14 right to privacy.[10] The High Court reasoned that the power to cordon-off an area as envisaged in section 13(7)(a) is an important legislative mechanism that enables the police service to discharge its constitutional mandate effectively.[11] Although it accepted that paragraphs (a), (b) and (c) of section 13(7) should be read as a whole, it concluded that "there was no justifiable reason to declare the entire section

[10] High Court judgment above n 2 at para 21.

[11] Id at para 22.

constitutionally invalid, when only one of its parts [section 13(7)(c)], infringes on a constitutional right".[12]

[21] The High Court held that section 13(7)(c), which it considered an ancillary power to the power to cordon off an area, infringed the right to privacy. The Court undertook a limitations analysis to determine whether the limitation on the right to privacy caused by section 13(7)(c) was reasonable and justifiable.[13] The High Court held that section 13(7)(c) does not differentiate between the types of premises that may be searched for purposes of section 13(7). The language is also "so sweeping" that it permits warrantless searches by members of the police into private homes and rifling through intimate possessions, which intrudes on the most protected inner sanctum of the person.[14]

[22] Much as it accepted the importance of the role played by the police to prevent, combat and investigate crime, and maintain public order, the High Court held that section 13(7)(c) gave members of the police carte blanche to enter any home within the cordoned-off area and to search every square inch of the home including the most private spheres of those living there. According to the High Court, this invasion of the inner sanctum of a person is disproportionate to its public purpose. Thus, it concluded that "section 13(7)(c) is overbroad, first in its reach, and second in leaving police officials without sufficient guidelines with which to conduct the searches within legal limits".[15]

[12] Id.

[13] Id at para 25.

[14] Id at para 34. See also *Minister of Police v Kunjana* [2016] ZACC 21; 2016 (2) SACR 473 (CC); 2016 (9) BCLR 1237 (CC) (*Kunjana*) at para 17; and *Bernstein v Bester N.O.* [1996] ZACC 2; 1996 (2) SA 751 (CC);1996 (4) BCLR 449 (CC) at para 67.

[15] High Court judgment above n 2 para 40. The High Court relied on *Mistry v Interim National Medical and Dental Council* [1998] ZACC 10; 1998 (4) SA 1127 (CC); 1998 (7) BCLR 880 (CC) at para 28-30*; Magajane v Chairperson, North West Gambling Board* [2006] ZACC 8; 2006 (5) SA 250 (CC); 2006 (10) BCLR 1133 (CC) at para 71; and *Kunjana* above n 14 at paras 21-3.

[23] The High Court then considered whether there were less restrictive means to achieve the purpose, specifically whether the limitation to the right to privacy caused by section 13(7)(c) is proportional to the legislative purpose of the provision.[16] It held that, apart from the warrantless searches of a private home and its occupants without there being reasonable grounds for believing that an article in section 20 of the Criminal Procedure Act[17] would be found in the home,[18] section 13(7) could not achieve its purpose if it required a warrant before searches are conducted in cordoned-off areas to restore public order.[19]

[24] The High Court held that the searches permitted by paragraph (c), which allow members of the police to reach into a person's inner sanctum, weighed strongly against the reasonableness and justifiability of that specific provision, and that section 13(7) could have achieved its ends through other means, less damaging to the right to privacy.[20] Therefore, the High Court held that section 13(7)(c) is overbroad and does not pass constitutional muster, and declared it constitutionally invalid.[21] The declaration of invalidity was prospective and suspended for 24 months to allow the Legislature to remedy the defect.[22] The High Court, however, provided an interim reading-in and this excludes the words "any private home and/or any person inside such private home" from the ambit of section 13(7)(c). In addition, it read in the requirement

[16] High Court judgment id at para 43.

[17] 51 of 1977.

[18] Section 20 of the Criminal Procedure Act reads as follows:

> "The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article)—
>
> (a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere;
>
> (b) which may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere; or
>
> (c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence."

[19] High Court judgment above n 2 at para 43.

[20] Id at para 44.

[21] Id at para 47.

[22] Id at paras 48 and 50.

that any searches of a private home or person inside such home must be compliant with the provisions of sections 21 and 22 of the Criminal Procedure Act.[23]

[25] The High Court held that the decisions taken to issue the section 13(7) authorisations contravened section 13(7) of the SAPS Act because the authorisations did not comply with the requirement that such authorisation must be granted "where it is reasonable to restore public order or to ensure the safety of the public in a particular area".[24] The decisions, therefore, failed to comply with the mandatory condition set out in section 13(7)(b) and were exercised for an ulterior motive – the arrest of "illegal immigrants",[25] and to enable the city to survey the occupants of the buildings occupied by the applicants and audit the "hijacked" buildings.[26] Therefore, these were set aside in terms of the Promotion of Administrative Justice Act (PAJA).[27] The respondents have not challenged any of these findings before this Court.

[26] In so far as the claim for an interdict is concerned, the High Court, although it accepted that the applicants had made out a case for the relief sought, exercised its discretion against granting the interdict.[28] This was on the grounds that the interim

[23] Id at para 119(d). The reading-in remedy reads as follows:

> "Upon receipt of the written authorisation referred to in paragraph (a), any member may cordon off the area concerned or part thereof, and may, where it is reasonably necessary in order to achieve the object specified in the written authorisation, without warrant, search any person, premises, *except any private home and/or any person inside such private home*, or vehicle, or any receptacle or object of whatever nature, in that area or part thereof and seize any article referred to in section 20 of the Criminal Procedure Act, 1977 (Act 51 of 1977), found by him or her in the possession of such person or in that area or part thereof: Provided that a member executing a search under this paragraph shall, upon demand of any person whose rights are or have been affected by the search or seizure, exhibit to him or her a copy of the written authorisation; *Provided further that the provisions of section 21 with the exceptions provided for in section 22 of the Criminal Procedure Act 51 of 1977 shall apply to the search in terms of this subsection of any private home and/or any person inside such private home within the cordoned off area, and the seizure of any article contemplated in this subsection found in any such private home or in the possession of any person inside such private home*."

[24] Id at para 66.

[25] Id at para 67.

[26] Id at para 69.

[27] 3 of 2000. The sections fell afoul of sections 6(2)(b) and 6(2)(e)(1) of the PAJA.

[28] High Court judgment above n 2 at para 106-7.

relief was sufficient to protect the applicants from any unconstitutional searches that infringe upon privacy rights.[29]

[27] The claim for constitutional damages in the amount of R1 000 for each applicant in respect of each raid, was dismissed. The High Court held that there was no primary evidence from each of the approximately 3 000 applicants concerning the search of their homes, and how the applicants were treated by members of the police during the search. In addition, the Court found that, on the evidence, not every room or floor was searched in each building but each applicant claimed constitutional damages. The High Court, therefore, concluded that it would not be appropriate to grant a blanket order for constitutional damages.[30]

[28] This matter is now before us for confirmation proceedings and for leave to appeal directly to this Court against the other findings of the High Court.

In this Court

Issues

[29] This Court has to consider the following issues:

(a) Whether section 13(7) of the SAPS Act is unconstitutional and thus invalid;

(b) If so, whether the declaration of invalidity should be retrospective and suspended;

(c) If the declaration of invalidity is suspended, whether an interim reading-in should be given;

(d) Whether the High Court had the discretion to refuse the application for a final interdict and, if not, whether a final interdict is appropriate relief; and

[29] Id.

[30] Id at paras 117-8.

(e) Whether the High Court was correct in refusing to grant constitutional damages in favour of the applicants.

Jurisdiction and leave to appeal

[30] In terms of section 172(2)(a)[31] of the Constitution, an order of constitutional invalidity has no force unless it has been confirmed by this Court. As section 13(7)(c) was declared constitutionally invalid by the High Court, this Court has jurisdiction and must determine whether the declaration of invalidity ought to be confirmed.

[31] Regarding the interpretations of section 13(7)(a) and (b), this Court has jurisdiction to entertain the application for direct leave to appeal. Paragraphs (a) and (b) are concerned with the exercise of public power in pursuit of a constitutional obligation or duty. Therefore, the interpretation of these paragraphs to determine whether they are constitutionally compliant engages this Court's jurisdiction. In addition, paragraphs (a) and (b) are concerned with the same state purpose as section 13(7)(c). When considering whether to grant leave, there are also the interests of justice, which take into account the fact that the applicants are members of a vulnerable community. Lastly, the matters are so interlinked with the confirmation application that to refuse leave would lead to needless duplication of legal resources. This sways the Court towards granting leave for a direct appeal.

[32] The application for direct leave to appeal against the High Court's refusal to grant the applicants a final interdict and constitutional damages also engages this Court's jurisdiction as the disputes concern the constitutional issues raised by the applicants relating to section 13(7). In *Fose*,[32] this Court established constitutional

[31] Section 172(2)(a) reads as follows:

> "The Supreme Court of Appeal, the High Court of South Africa 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."

[32] *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 60.

damages as a remedy that flows directly from the Constitution itself. The purpose of such damages is to provide "effective relief to those affected by a constitutional breach".[33] The granting or refusal to grant constitutional damages, therefore, raises a constitutional issue and engages this Court's jurisdiction. In addition, both issues are linked to the confirmation application being considered by this Court and it is trite that piecemeal litigation should be avoided.[34] Therefore, direct leave to appeal should be granted in respect of these issues as well.

Constitutionality of the impugned provisions

[33] Section 13(7) provides:

> "(a) The National or Provincial Commissioner may, where it is reasonable in the circumstances in order to restore public order or to ensure the safety of the public in a particular area, in writing authorise that the particular area or any part thereof be cordoned off.
>
> (b) The written authorisation referred to in paragraph (a) shall specify the period, which shall not exceed 24 hours, during which the said area may be cordoned off, the area or part thereof to be cordoned off and the object of the proposed action.
>
> (c) Upon receipt of the written authorisation referred to in paragraph (a), any member may cordon off the area concerned or part thereof, and may, where it is reasonably necessary in order to achieve the object specified in the written authorisation, without warrant, search any person, premises or vehicle, or any receptacle or object of whatever nature, in that area or part thereof and seize any article referred to in section 20 of the Criminal Procedure Act, 1977 (Act 51 of 1977), found by him or her in the possession of such person or in that area or part thereof: Provided that a member executing a search under this paragraph shall, upon demand of any person whose rights are or have been affected by the search or seizure, exhibit to him or her a copy of the written authorisation."

[33] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) (*Modderklip (CC)*) at para 20.

[34] *South African Informal Traders Forum v City of Johannesburg* [2014] ZACC 8; 2014 (4) SA 371 (CC); 2014 (6) BCLR 726 (CC) at para 20(g).

[34] The applicants submit that section 13(7) is unconstitutional in its entirety. According to them, section 13(7) consists of "three sets of integrated jurisdictional requirements" and each of these requirements is dependent on the other two for its meaning and effect. Therefore, they assert that the purpose of the powers provided for in paragraphs (a) and (b) is to provide a framework for the warrantless searches provided for in paragraph (c). They argue that if it is accepted, as it was by the High Court, that the power to search any person, premises or vehicle, or any receptacle or object of whatever nature without a warrant in a cordoned-off area provided in paragraph (c) is unconstitutional, then all that section 13(7) would be left with is the bare power to cordon off an area. The applicants submit that this power is inchoate without the power to search or do something necessary to ensure the safety of the public or restore public order and that it would be used for nefarious purposes such as showing force or intimidation.

[35] The respondents do not oppose the application for confirmation of the order of invalidity. Instead, they oppose the application for leave to appeal against the orders of the High Court refusing to declare paragraphs (a) and (b) of section 13(7) of the SAPS Act unconstitutional. The respondents submit that the basis of the above is that section 13(7) serves a broader purpose and is not only limited to warrantless searches carried out in terms of paragraph (c). It authorises more than the search of private homes including other spaces within and outside buildings in the cordoned-off area. Hence, a declaration of constitutional invalidity in respect of the entire section would eviscerate its purpose.

[36] Concerning section 13(7), the respondents state that the powers of members of the police in executing the written authorisations are couched in discretionary terms.

As a result, the exercise of this discretion must accord with section 13(1)[35] and (3)[36] of the SAPS Act. These provisions require that when exercising their powers, officials must have due regard for the fundamental rights of every person and perform their duties in a manner that is reasonable in the circumstances. The respondents contend that the rights to dignity and privacy can be justifiably limited to restore public order and maintain public safety. They further submit that less intrusive measures are not sufficient to prevent, combat and investigate crime and maintain public order as required by section 205(3) of the Constitution.

Section 13(7)(c) of the SAPS Act

[37] The Constitution mandates a two-stage approach to determine whether there is a violation of a right in the Bill of Rights.[37] First, it must be considered whether the impugned legislation limits the right. If so, it must then be determined whether the infringement is reasonable and justifiable under section 36 of the Constitution.

[38] Section 14 of the Constitution grants everyone the right to privacy, which specifically includes the right not to have one's person or home searched. Section 14 provides:

> "Everyone has the right to privacy, which includes the right not to have—
>
> (a) their person or home searched;
>
> (b) their property searched;
>
> (c) their possessions seized; or
>
> (d) the privacy of their communications infringed."

[35] Section 13(1) provides that: "[s]ubject to the Constitution and with due regard to the fundamental rights of every person, a member may exercise such powers and shall perform such duties and functions as are by law conferred on or assigned to a police official."

[36] Section 13(3) reads as follows:

> "(a) A member who is obliged to perform an official duty, shall, with due regard to his or her powers, duties and functions, perform such duty in a manner that is reasonable in the circumstances.
>
> (b) Where a member who performs an official duty is authorised by law to use force, he or she may use only the minimum force which is reasonable in the circumstances."

[37] *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 21.

[39] Section 13(7)(c) authorises warrantless searches of any person, home, vehicle or any receptacle or object of whatever nature in a cordoned-off area. It also grants members of the police the power to seize any article referred to in section 20 of the Criminal Procedure Act found in the possession of a person or in the cordoned-off area. This undoubtedly infringes on the right to privacy as elucidated in section 14(a), (b) and (c) of the Constitution.

[40] What must now be considered is whether that infringement can nonetheless pass constitutional muster. This Court in *Walters*[38] held that this determination, which I deal with below—

> "requires a weighing-up of the nature and importance of the right(s) that are limited together with the extent of the limitation, as against the importance and purpose of the limiting enactment. Section 36(1) of the Constitution spells out the factors that have to be considered in making a proportional evaluation of all the counterpoised rights and interests involved."[39]

Nature of the right

[41] The right to privacy plays an important role in the overall constitutional scheme.[40] This Court has acknowledged and emphasised that our understanding of the right to privacy flows from the value placed on human dignity in the Constitution.[41] On this point, in *Khumalo*, this Court said:

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[38] *Ex Parte Minister of Safety and Security: In Re S v Walters* [2002] ZACC 6; 2002 (4) SA 613 (CC); 2002 (7) BCLR 663 (CC) (*Walters*).

[39] Id at paras 26-7. The Court further held that "both the rights and the enactment . . . must be interpreted as to promote the value system of an open and democratic society based on human dignity, equality and freedom".

[40] Currie and De Waal *The Bill of Rights Handbook* 6 ed (Juta & Co, Cape Town) at 164 state the following:

> "A court must assess what the importance of a particular right is in the overall constitutional scheme. A right that is of particular importance to the Constitution's ambition to create an open and democratic society based on human dignity, freedom and equality will carry a great deal of weight in the exercise of balancing rights against justifications for their infringement."

[41] *Investigating Directorate: Serious Economic Offences v Hyundai Motors Distributors (Pty) Ltd: In re Hyundai Motors Distributors v Smith* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (*Hyundai)* at para 18.

> "It should . . . be noted that there is a close link between human dignity and privacy in our constitutional order. The right to privacy, entrenched in section 14 of the Constitution, recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human dignity."[42]

[42] The nature of the right, which is accepted not to be absolute, can be viewed as a continuum, in that the right is "more intense the closer it moves to the intimate personal sphere of the life of human beings and less intense as it moves away from that core".[43] That is not to say that the right is limited to one's personal space. In *Hyundai*, this Court confirmed that the right to privacy extends to beyond one's inner sanctum and said:

> "[T]he right, however, does not relate solely to the individual within his or her intimate space . . . when people are in their offices, in their cars or on mobile telephones, they still retain a right to be left alone by the state unless certain conditions are satisfied."[44]

[43] In *Prince*, this Court recently reasserted the position that the right to privacy extends beyond the confines of one's home.[45] It held that there was no persuasive reason why the High Court, in that case, confined its declaration of invalidity to the use or possession of cannabis at "home" or in a "private dwelling".[46] This Court was of the view that as long as the use or possession of cannabis by an adult occurred "in private and not in public", such use was protected by the right to privacy in section 14.[47] This Court reasoned that there are other places, other than the person's home or private dwelling, that are protected by the right to privacy.[48]

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[42] *Khumalo v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 27.

[43] *Hyundai* above n 41 at para 18. See also De Vos et al *South African Constitutional Law in Context* (Oxford Press, Cape Town 2014) at page 463.

[44] *Hyundai* id at para 16.

[45] *Minister of Justice and Constitutional Development v Prince* [2018] ZACC 30; 2018 (6) SA 393 (CC); 2018 (10) BCLR 1220 (CC) (*Prince*).

[46] Id at para 100.

[47] Id at para 108.

[48] Id.

[44] I agree with the applicants that the High Court did not consider the full scope of the right to privacy as set out in section 14 of the Constitution. Instead, it concerned itself with the warrantless search of only private homes and persons inside those homes, and declared section 13(7)(c) unconstitutional only to the extent that the warrantless searches were conducted in private homes and on persons inside those homes. That was an incorrect approach considering the nature and scope of the right.

Importance and purpose of the limitation

[45] A limitation of a constitutional right will not be justifiable unless there is a substantial state interest that requires the limitation.[49] Section 13(7) is a provision enacted for the specific purpose of restoring public order or ensuring the safety of the public in a particular cordoned-off area. The purpose of section 13(7) and the warrantless search provision in paragraph (c), is therefore aimed at specifically assisting the South African Police Service in achieving this goal. I agree with the respondents that search and seizure operations are important tools to prevent, combat and investigate crime efficiently. It is sometimes necessary for the maintenance of law and order for limitations to be placed on certain rights, and one such limitation is that of search and seizure.

[46] The SAPS Act and section 13(7) do not stipulate the nature or level of public disorder or danger to public safety that triggers the provisions of the section. Nonetheless, generally maintaining, ensuring and restoring public order and safety is one of the main responsibilities of any State. Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms recognises that everyone has the right to privacy with the caveat that—

> "[t]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of *national security*, *public safety* or the economic well-being of the

[49] *Magajane* above n 15 at para 65.

> country, for the *prevention of disorder or crime*, for the protection of health or morals, or for the protection of the rights and freedoms of others."[50] (Emphasis added.)

[47] Our Constitution sets out in no uncertain terms that the mandate of the South African Police Service is to, amongst other things, maintain public order and protect the inhabitants of the Republic.[51] This is a constitutional mandate and its importance ought not to be undermined in considering the constitutionality of a provision aimed at achieving that purpose.

[48] In *Bernstein*, this Court said that rights should not be construed absolutely or individualistically, in ways that deny that all individuals are members of a broader community and are defined in significant ways by that membership.[52] The rights of the community must therefore also be taken into account in considering the importance of the limitation. There is no doubt that all South Africans have a vested interest in the maintenance of public order and safety in their communities.

The nature and extent of the limitation

[49] Section 13(7)(c) is broad as to the method of conducting searches. Firstly, paragraph (c) provides "no differentiation as to the nature of the search or the nature of the premises searched".[53] In fact, it specifically provides that any premises, person, vehicle or any receptacle or object of whatever nature in the cordoned-off area may be searched. This includes not only a person's home – their inner sanctum, central of their right to privacy – but their person, vehicle and personal items such as handbags. This means that a person and her personal items can be searched without a warrant or reasonable suspicion that she has committed an offence, even if she is not in her home

[50] European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No. 14, 3 September 1953.

[51] Section 205(3) of the Constitution.

[52] *Bernstein* above n 14 at para 67. See also *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) (*National Coalition*) at para 31, discussing *Bernstein*.

[53] *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd* [2014] ZACC 3; 2014 (3) SA 106 (CC); 2014 (4) BCLR 373 (CC) (*Estate Agency*) at para 40.

but simply walking or driving in the cordoned-off area. These are certainly substantial interferences by the state in one's "personal life."[54]

[50] Secondly, section 13(7)(c) does not specify the time searches may occur. This means that searches may occur unexpectedly and without a warrant in the middle of the night – an extremely intrusive measure. This was the case in one of the searches of the applicants' homes which began in the early hours of the morning at 02h50, when most residents were asleep. Ordinarily, a warrant would indicate what time and for how long the search of their premises may last.

[51] In *Gaertner*, this Court considered the constitutionality of section 4 of the Customs and Excise Act.[55] It held that the provisions of the section were far-reaching in that they allowed the searches to be "conducted in private dwellings at any time, and officials may not only break in at the dwellings but, once inside, they may even break up floors. And they do not need a warrant to do all this."[56] This Court held that the provision was unconstitutionally overbroad.[57]

[52] As currently constructed, section 13(7)(c) similarly grants members of the police the same wide-ranging powers that this Court was concerned with in *Gaertner* and contains no safeguards as to the place, time, and scope of the warrantless searches. The facts in this matter are illustrative of the wanton and complete disregard of the privacy of individuals that the section permits. It was specifically due to the lack of safeguards that the officials did indeed behave in a despicable manner – the searches occurred without any warning, for hours at a time, and the applicants returned to rooms that were rummaged through and in disarray. Section 13(1) and (3) of the SAPS Act is cold comfort for victims of searches under section 13(7)(c). This wide discretion supports

[54] *Gaertner v Minister of Finance* [2013] ZACC 38; 2014 (1) SA 442 (CC); 2014 (1) BCLR 38 (CC) at para 47.

[55] 91 of 1964.

[56] *Gaertner* above n 54 at para 40.

[57] Id at para 66.

the position that the limitation occasioned by section 13(7)(c) is overbroad in light of section 14 of the Constitution.[58]

[53] In *Magajane*, in the context of warrantless regulatory inspections, this Court held that where legislation authorises warrantless inspections, provision must be made for a constitutionally adequate substitute to limit the discretion of inspectors.[59] There, this Court noted that the greater the discretion afforded to those conducting the warrantless searches, the greater the privacy intrusion.[60] This is even more apt when warrantless searches are not regulated and target private homes. It is not sufficient, as the respondents argue, that the members of the police are required in terms of sections 13(1) and 13(3) of the SAPS Act, to conduct their duties in accordance with the Constitution. It is not adequate for legislation to provide that discretionary powers that may be exercised in a manner that could limit rights should be read in the light of the constitutional obligations placed on those officials to respect the Constitution. In addition to this, guidance must be provided in the legislation to limit how that discretion must be exercised.[61]

[54] This Court in *Van der Merwe*,[62] considered whether search and seizure warrants were valid notwithstanding their failure to mention the specific offences to which the search related and held:

> "Warrants issued in terms of section 21 of the Criminal Procedure Act are important weapons designed to help the police to carry out efficiently their constitutional mandate of, amongst others, preventing, combating and investigating crime. In the course of

[58] In *Mistry* above n 15 at para 30, this Court noted that the breadth of a provision is an important determinant of the extent of the limitation.

[59] *Magajane* above n 15 at para 77.

[60] Id at paras 71 and 94.

[61] *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) (*Dawood*) at para 52.

[62] *Minister of Safety and Security v Van der Merwe* [2011] ZACC 19; 2011 (5) SA 61 (CC); 2011 (9) BCLR 961 (CC) (*Van der Merwe*).

> employing this tool, they inevitably interfere with the equally important constitutional rights of individuals who are targeted by these warrants.
>
> Safeguards are therefore necessary to ameliorate the effect of this interference. This they do by limiting the extent to which rights are impaired. That limitation may in turn be achieved by specifying a procedure for the issuing of warrants and by reducing the potential for abuse in their execution. Safeguards also ensure that the power to issue and execute warrants is exercised within the confines of the authorising legislation and the Constitution."[63]

[55] Further, in terms of section 13(7)(c), members of the police are not required to have a reasonable suspicion that each house, person, vehicle or any receptacle or object of whatever nature they search is related to a particular, narrowly specified type of offence or threat, and could thus search anything or anyone in the area. A warrantless search is permitted even in situations where the threat to public order or safety is not urgent or pressing, and where obtaining a warrant would not defeat the purpose of the search.

[56] In *Kunjana*, this Court had to determine whether section 11(1)(a) and (g) of the Drugs and Drugs Trafficking Act,[64] which granted members of the police the power to conduct a warrantless search in any premises, if there were reasonable grounds to suspect an offence under that Act, was constitutional. This Court held that "the existence of safeguards to regulate the way in which state officials may enter the private domains of ordinary citizens is one of the features that distinguishes a constitutional democracy from a police state".[65] It further held that a fundamental problem with the impugned provision in that matter was that it allowed members of the police to escape

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[63] Id at para 35-6. In *Kunjana* above n 14 at para 23, this Court said that it is—

> "desirable that the statutory provision authorising a warrantless search procedure be crafted so as to limit the possibility of a greater limitation of the right to privacy than is necessitated by the circumstances, which the warrant requirement would otherwise do".

[64] 140 of 1992.

[65] *Kunjana* above n 14 at para 18.

the rigours of obtaining a warrant even "where urgent action is not required".[66] Section 13(7)(c) has the same fundamental shortcomings. The lack of safeguards has resulted in warrantless searches in these regularly cordoned-off areas being the rule instead of the exception.[67]

[57] This Court has on several occasions emphasised the importance of warrants in balancing privacy with the public interest. This is because warrants guarantee "that the state must be able, prior to an intrusion, to justify and support intrusions upon individuals' privacy under oath before a judicial officer".[68] Further, a warrant is a "mechanism employed to balance an individual's right to privacy with the public interest in compliance with and enforcement of regulatory provisions" and "governs the time, place and scope of the search". These guidelines soften the intrusion on the right to privacy; guide the conduct of the inspection and inform the official of the legality and limits of the search.[69] In *Gaertner*, this Court held that legislation authorising warrantless searches must make provision for "a constitutionally adequate substitute to ensure certainty in the conduct of the inspections and limit the discretion of the inspectors".[70] The Court said:

> "The legislation must sufficiently inform the property owner that searches of the property will be undertaken periodically and for a specific regulatory purpose. The discretion of the inspectors should be limited as to time, place and scope. To my mind, the legislation must also provide for a manner of conducting searches that accords with common decency and is not more intrusive than is necessary."[71]

When considering that section 13(7)(c) neither provides for urgency when authorising such searches nor does it provide guidelines for the manner in which these searches

[66] Id at para 25.

[67] Id at para 27.

[68] Id.

[69] Id.

[70] *Gaertner* above n 54 at para 71.

[71] Id at para 72.

must be conducted or require that a reasonable suspicion of criminality must exist before the search, it is evidently overbroad.

The relation between the limitation and its purpose

[58] A rational connection must exist between the purpose of the law and the limitation imposed by it.[72] Here, I accept that the limitation (limiting the right to privacy through warrantless search and seizures in a cordoned-off area) is rationally connected to the purpose (restoring public order and ensuring the safety of the persons in that cordoned-off area).

Less restrictive means

[59] There are less restrictive means available to members of the police to fulfil the objects of section 205(3) of the Constitution and the purpose set out in section 13(7) of the SAPS Act. If the need arises for a search to be conducted to restore public order and safety in a cordoned-off area, the provisions of sections 21 and 22 of the Criminal Procedure Act can be utilised. Thus, where members of the police need to conduct searches they may do so by way of obtaining a search warrant[73] or requesting

[72] *Magajane* above n 15 at para 72 and *Gaertner* above n 54 at para 67.

[73] This will be in terms of section 21 which reads as follows—

> "(1) Subject to the provisions of sections 22, 24 and 25, an article referred to in section 20 shall be seized only by virtue of a search warrant issued—
>
> (a) by a magistrate or justice, if it appears to such magistrate or justice from information on oath that there are *reasonable grounds for believing that any such article is in the possession or under the control of or upon any person or upon or at any premises within his area of jurisdiction*; or
>
> (b) by a judge or judicial officer presiding at criminal proceedings, if it appears to such judge or judicial officer that any such article in the possession or under the control of any person or upon or at any premises is required in evidence at such proceedings.
>
> (2) A search warrant issued under subsection (1) shall require a police official to seize the article in question and shall to that end authorise such police official to search any person identified in the warrant, or to enter and search any premises identified in the warrant and to search any person found on or at such premises.
>
> (3) (a) A search warrant *shall be executed by day, unless the person issuing the warrant in writing authorises the execution thereof by night*.

the consent[74] of the person to be searched. They of course may conduct warrantless searches in that area if they have a reasonable belief that the delay in obtaining a warrant would eviscerate the object of the search or such warrant would, if sought, have been granted.

[60] After balancing the above factors, it follows that the portion of section 13(7)(c) permitting warrantless searches without any appropriate safeguards is inconsistent with section 14 of the Constitution and therefore invalid. The unconstitutional part of section 13(7)(c) must be severed.

Constitutionality of paragraphs (a) and (b) of section 13(7)

[61] Section 13(7)(a) gives the Commissioner the power to provide written authorisation to cordon off an area where it is reasonable in the circumstances to restore public order or safety. Section 13(7)(b) specifies what must be included in the written authorisation. Neither of these two paragraphs limits or infringes any constitutional rights. While it is arguable that the nature of the powers contained in the two paragraphs is to cater for the power in section 13(7)(c),[75] it is important to emphasise this Court's

(b) A search warrant may be issued on any day and shall be of force until it is executed or is cancelled by the person who issued it or, if such person is not available, by a person with like authority.

(4) A police official executing a warrant under this section or section 25 shall, after such execution, upon demand of any person whose rights in respect of any search or article seized under the warrant have been affected, hand to him a copy of the warrant." (Emphasis added.)

[74] This is provided for in section 22 which reads as follows—

"A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20—

(a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or

(b) if he on reasonable grounds believes

(i) that a search warrant will be issued to him under paragraph (a) of section 21(1) if he applies for such warrant; and

(ii) that the delay in obtaining such warrant would defeat the object of the search."

[75] This is because section 13(7)(c) is exercised "after receipt of the written authorisation referred to in paragraph (a)". This indicates to me that properly constructed the sub-sections of section 13(7) must read together.

finding in *Cool Ideas*[76] where it held that "all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to *preserve their constitutional validity*".[77] When considering the constitutionality of legislation, this Court in *Hyundai* implores us to, where reasonably possible and without unduly straining the language of a statute, prefer an interpretation that falls within the constitutional bounds over an interpretation that does not.[78]

[62] The basis on which the applicants challenge the constitutionality of paragraphs (a) and (b) of section 13(7) is limited. First, it is not that the paragraphs limit the right to privacy or any right in the Bill of Rights. Second, it is only that these paragraphs serve to provide a framework that makes it possible for the warrantless searches under paragraph (c) to be conducted. Third, if paragraph (c) is unconstitutional – which it is – paragraphs (a) and (b) are left inchoate and serve no purpose other than to facilitate possible nefarious use like a show of force and intimidation. Fourth, for these reasons, paragraphs (a) and (b) must suffer the same fate as paragraph (c).

[63] I disagree. It is not the whole of section 13(7)(c) that is unconstitutional. What is unconstitutional is only that portion of the section that permits warrantless searches without appropriate safeguards. What the applicants miss is that it is not obligatory for there to be searches when a member of the police – acting in terms of section 13(7)(c) – gives effect to a section 13(7)(a) authorisation. What is being authorised is the restoration of public order or the ensuring of the safety of the public. Quite conceivably and depending on the circumstances, that can be done without any searches, warrantless or otherwise. In terms of section 13(7)(c), the impugned searches *may* be conducted only "where it is reasonably necessary in order to achieve the object specified in the

[76] *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) (*Cool Ideas*).

[77] Id at para 28(c).

[78] *Hyundai* above n 41 at para 23.

written authorisation". On its own, this is indication enough that searches are not obligatory.

[64] All this puts paid to the idea that – without the impugned portion of section 13(7)(c) – paragraphs (a) and (b) of section 13(7) are inchoate and must, of necessity, fall with the impugned portion of section 13(7)(c). And in giving effect to the section 13(7)(a) authorisation, nothing stands in the way of undertaking *lawful* search and seizure operations to restore public order and safety where reasonably necessary in the circumstances. For example, those operations may be undertaken in terms of sections 21 and 22 of the Criminal Procedure Act. This construction does not distort the language of the text or give rise to constitutional invalidity and therefore it must be preferred.[79]

[65] I have read the judgment of my sister Victor AJ (third judgment) whose conclusion is that paragraphs (a) and (b) are also unconstitutional. She reasons that because paragraphs (a), (b) and (c) are interlinked, a finding that section 13(7)(c) is unconstitutional "must of necessity" trigger the same finding in respect of the other paragraphs.[80] The third judgment then conducts a limitations analysis on section 13(7) in its entirety. It accepts, however – as it must – that it is *only* paragraph (c) that infringes the right to privacy.[81] It then concludes that section 13(7) in its entirety is unconstitutional as it does not specify the time searches may occur and members of the police may search anything where reasonably necessary.[82] These, of course, are problems that arise from section 13(7)(c) specifically. It is because of these problems, which I have discussed at length above, that I have declared a portion of the paragraph unconstitutional.

[79] *National Coalition* above n 52 at para 23.

[80] Third judgment at [178].

[81] Id at [196].

[82] Id at [198]-[199].

[66] Members of the police cannot search any premises or persons in terms of sections 13(7)(a) or (b). Further, following the severance of the warrantless search provisions in paragraph (c), the written authorisations in sections 13(7)(a) and (b) cannot result in unlawful searches in the cordoned-off area.

[67] Does the fact that the terms "ensure the safety of the public" and "restore public order" are not defined in the SAPS Act render paragraphs (a) and (b) unconstitutional? The third judgment is of the view these terms, as used in paragraph (a), are overboard and can be invoked arbitrarily where a "very general concern of crime and disorder can be made out".[83] The third judgment argues that because the terms are undefined "even if paragraph (c) were excised from the Act, the jurisdictional requirements to invoke the cordoning off power would be too low".[84]

[68] There are three difficulties I have with this analysis. First, the third judgment does not indicate what right in the Bill of Rights is limited by the cordoning-off power alone following the excision of the unconstitutional parts of section 13(7)(c).[85] It is, therefore, unclear how the unconstitutionality of paragraphs (a) and (b) of section 13(7) would arise without the limitation of a right. Indeed, even the applicants contended themselves with reliance only on the perceived inchoate nature of paragraphs (a) and (b) of section 13(7) without alleging that these paragraphs – in and of themselves – limit the privacy right or any other right in the Bill of Rights. Second, section 13(7)(a), as discussed, has an internal limitation – the cordoning-off power can only be exercised if it is "*reasonably necessary*" to restore public order and safety. In addition to this, the section 13(7)(a) power to cordon-off an area is administrative action – and is subject to the stringent requirements of PAJA. Therefore, it must be exercised, amongst other things, rationally, reasonably,[86] not for an ulterior purpose and in good faith. It,

[83] Id at [210].

[84] Id at [211].

[85] Cordoning-off is merely the act of blocking an area to prevent persons from entering an area.

[86] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 45, this Court has held that factors relevant to determining whether a

therefore, cannot be exercised arbitrarily or "used to discriminatory ends" *without consequence* as the third judgment suggests. If it is, the written authorisation can be taken on review, as was successfully done in this case. The concerns explicated in the third judgment, that the power is "unfettered" due to the undefined terms, are therefore unsustainable.

[69] The last issue is one of separation of powers. To require the Legislature to precisely define the ambit of these terms would be an undue restriction. The term "maintain public order" and its variations are also used in the Constitution and in the Criminal Procedure Act several times without definition.[87] Presumably, the Legislature did not want to unduly constrain or overly circumscribe terms such as "public order" and "public safety", as these concepts are broad and there are innumerable types of mischief that could be addressed under their ambit. Absent a finding of unconstitutionality, I see no basis in terms of which this Court can sever them from section 13(7)(a) simply because they are not precisely defined beyond their ordinary grammatical meaning.[88]

[70] The applicants also asserted that other sections in the SAPS Act could serve the same purpose as the impugned section. I have considered these sections, that is, section 13(6), 13(8) and 13(11)(a). The paragraphs do make provision for cordoning-off areas but not for the specific purposes of maintaining public order and the restoration of public safety. Instead, these paragraphs deal with (a) border

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decision was reasonable include "the nature of the competing interests involved and *the impact of the decision on the lives and well-being of those affected*".

[87] See for example sections 60, 125 and 252A of the Criminal Procedure Act.

[88] *Cool Ideas* above n 76 at para 28 tells us that a "fundamental tenet of statutory interpretation is that the words in a statute must be given their *ordinary grammatical meaning*, unless to do so would result in an absurdity". Furthermore, as a general principle, the law does not concern itself with trivialities, this would exclude some acts from reasonably falling within the scope of what could be considered a substantial danger to public order and safety. In addition, a strict definition for certain terms within the criminal law framework is often impractical as the gravity of some crimes is self-evident and courts are often able, on a case-by-case basis, to determine this. Thus, the terms cannot be said to be overbroad for mere lack of a definition. See *Economic Freedom Fighters v Minister of Justice and Correctional Services* [2020] ZACC 25; 2021 (2) SA 1 (CC); 2021 (2) BCLR 118 (CC) (*EFF*) at paras 53, 69, 70 and 142.

security;[89] (b) potential fugitive pursuits[90] or proactive crime-stopping operations on roads; and lastly (c) cordoning-off for investigative purposes.[91] It may be argued that these all fit into the broader purpose of public order and public safety. However, narrowly construed in the context of the ordinary citizenry in crime-ridden areas, these may be of little to no effect for those ends.

[71] Therefore, paragraphs (a) and (b) of section 13(7) pass constitutional muster and serve as mechanisms that are meant to enable the police service to fulfil its

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[89] Section 13(6) of the SAPS Act provides:

> "Any member may, where it is reasonably necessary for the purposes of control over the illegal movement of people or goods across the borders of the Republic, without warrant search any person, premises, other place, vehicle, vessel or aircraft, or any receptacle of whatever nature, at any place in the Republic within 10 kilometres or any reasonable distance from any border between the Republic and any foreign state, or in the territorial waters of the Republic, or inside the Republic within 10 kilometres or any reasonable distance from such territorial waters, or at any airport as defined in section 1 of the Aviation Act, 1962 (Act 74 of 1962), or within any reasonable distance from such airport and seize anything found in the possession of such person or upon or at or in such premises, other place, vehicle, vessel, aircraft or receptacle and which may lawfully be seized."

[90] Section 13(8) provides in relevant part:

> "(g) Any member may, *without warrant*—
>
> (i) in the event of a roadblock or checkpoint that is set up in accordance with paragraph (c), search any person or vehicle stopped at such roadblock or checkpoint and any receptacle or object of whatever nature in the possession of such person or in, on or attached to such vehicle and seize any article referred to in section 20 of the Criminal Procedure Act, 1977, found by him or her in the possession of such person or in, on or attached to such receptacle or vehicle: Provided that a member executing a search under this subparagraph shall, upon demand of any person whose rights are or have been affected by the search or seizure, exhibit to him or her a copy of the written authorisation by the Commissioner concerned; and
>
> (ii) in the event of a roadblock that is set up in accordance with paragraph (d), search any person or vehicle stopped at such roadblock and any receptacle or object of whatever nature in, on or attached to such vehicle and seize any article referred to in section 20 of the Criminal Procedure Act, 1977, found by him or her in, on or attached to such receptacle or vehicle: Provided that a member executing a search under this subparagraph shall, upon demand of any person whose rights are or have been affected by the search or seizure, inform him or her of the reason for the setting up of the roadblock." (Emphasis added.)

[91] Section 13(11)(a) provides:

> "(a) A member may, for the purposes of investigating any offence or alleged offence, cordon off the scene of such offence or alleged offence and any adjacent area which is reasonable in the circumstances to cordon off in order to conduct an effective investigation at the scene of the offence or alleged offence.
>
> (b) A member may, where it is reasonable in the circumstances in order to conduct such investigation, prevent any person from entering or leaving an area so cordoned off."

constitutional obligations. Further, the paragraphs have internal safeguards. In terms of paragraph (a), before a written authorisation can be granted, it must be reasonable to do so and the purpose must be to restore public order and safety in a particular area. Paragraph (b) requires the authorisation to specify the period for the cordoning off, and that period must not exceed 24 hours. It also requires one to specify the object for the proposed action and the area that is going to be cordoned off.

[72] The preamble of the SAPS Act provides that it was enacted to provide for the establishment, powers and functions of the South African Police Service. It also provides that the police service is meant to "ensure the safety and security of all persons and property in the national territory; and uphold and safeguard the fundamental rights of every person as guaranteed by Chapter 3 of the [Interim] Constitution". This must also be considered in light of section 205(3) of the Constitution which provides that "the objects of the police service are to prevent, combat and investigate crime, to *maintain public order*, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law".[92] Paragraphs (a) and (b) of section 13(7) serve that legitimate government purpose.

Remedy

[73] I have concluded that paragraphs (a) and (b) of section 13(7) are constitutionally compliant, but that a portion of section 13(7)(c) does not pass constitutional muster. The constitutionally repugnant part of section 13(7)(c), the one that permits warrantless searches without appropriate safeguards, must be severed. This includes not just the warrantless search of a person's home, as found by the High Court, but of their vehicle or person, or any receptacle or object of whatever nature. The order of invalidity of the High Court will have to be varied to reflect this. To cure the unconstitutionality of section 13(7)(c), it is also necessary to read-in, on an interim basis, the following at the end of the severed portion of section 13(7)(c): "and within the cordoned-off area, search any person, premises or vehicle, or any receptacle or object of whatever nature in terms

[92] Section 205(3) of the Constitution.

of sections 21 and 22 of the Criminal Procedure Act 51 of 1977". I say it is necessary because to remove the unconstitutional portion of section 13(7)(c) without replacing it with lawful search and seizure provisions would divest the police of the power to conduct searches and seizures even where these may be necessary.

[74] It is trite that the remedy of reading-in must be used sparingly so as not to encroach on the terrain of the Legislature. Here, the proposed interim reading-in is not to amend the legislation, a power vested in Parliament, but rather to provide necessary guidance to protect the fundamental rights of privacy and dignity. Sections 21 and 22 of the Criminal Procedure Act prescribe articles that can be lawfully seized under a search warrant and circumstances in which articles may be seized without a search warrant. Therefore, what remains of section 13(7)(c) read with sections 21 and 22 of the Criminal Procedure Act provides clear guidance on the full spectrum of activities that can be lawfully undertaken in the cordoned-off area. As discussed above, the search provisions in the Criminal Procedure Act are less restrictive means and are therefore appropriate to read-in into section 13(7)(c) as they simply replace the portion that authorises warrantless searches that has been severed.

[75] To this end, once the constitutionally repugnant part of the section is severed and the necessary interim reading-in is added, section 13(7)(c) shall read as follows:

> "Upon receipt of the written authorisation referred to in paragraph (a), any member may cordon off the area concerned or part thereof, and may, where it is reasonably necessary in order to achieve the object specified in the written authorisation, conduct a search in the cordoned off area in terms of sections 21 and 22 of the Criminal Procedure Act 51 of 1977 and seize any article referred to in section 20 of the Criminal Procedure Act, found by him or her in the possession of such person or in that area or part thereof: Provided that a member executing a search under this paragraph shall, upon demand of any person whose rights are or have been affected by the search or seizure, exhibit to him or her a copy of the written authorisation."

[76] The severance and reading-in will be with immediate effect. In the circumstances of this case, I see no reason for this Court to suspend the declaration of invalidity as members of the police will still be entitled to search the premises in a cordoned-off area in accordance with the provisions of sections 21 and 22 of the Criminal Procedure Act, which provide the requisite safeguards, and balance the right to privacy of citizens against the public interest sought to be addressed by section 13(7).

Retrospectivity

[77] A confirmation of constitutional invalidity will have retrospective effect unless the court making the declaration, orders otherwise for reasons pertaining to justice and equity.[93] Here, the order must be prospective "to avoid the dislocation and inconvenience of undoing transactions, decisions or actions taken under [the invalidated] statute".[94]

[78] How does the prospective order affect the applicants' other claims? In *Mistry*, this Court applied its order prospectively and refused to cause the order to apply to the applicant in that matter. It did so because it recognised that the interests of justice in an individual case might not always coincide with the interests of good government for the country as a whole.[95] This Court in *Kunjana* held that it is generally not appropriate to single out a specific party and not give other litigants who were in the same position in the past the same benefit.[96]

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[93] Section 172(1) of the Constitution provides:

> "When deciding a constitutional matter within its power, a court—
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> (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."

[94] *S v Zuma* above n 37 at para 43.

[95] *Mistry* above n 15 at para 41.

[96] *Kunjana* above n 14 at paras 34-5.

[79] However, as I see it, the prospective nature of the order will not affect the availability of potential additional relief sought by the applicants in this case. This is so because the unlawfulness of the warrantless searches emanates from the fact that the written authorisations themselves were non-compliant with section 13(7) even before the declaration of constitutional invalidity. The High Court found amongst others, that it had been shown that the written authorisations in terms of which the searches were conducted were irrational in that the decision-makers failed to apply their minds to the material before them before issuing the written authorisations, or undertake an independent evaluation of the contents of the applications.[97] It held that "by failing to state the true objective of the proposed cordoning operation in the written authorisations they issued, the decision-makers did not comply with a mandatory and material procedure or condition prescribed by section 13(7) of the SAPS Act".[98]

[80] The consequent warrantless searches were, *before* the declaration of invalidity of section 13(7)(c), not only unlawful but, because they exceeded the parameters of the empowering legislation, breached the rights to privacy and dignity of the applicants. At the time, had the authorisations been lawful and compliant with section 13(7), it could not be said that they undermined the applicants' constitutional rights because the section had not yet been declared constitutionally invalid.

Final interdict

[81] In *Masstores,*[99] this Court reiterated the test for a final interdict as set out in *Setlogelo,*[100] and held that "[t]he requirements for a final interdict are usually stated as (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the lack of an adequate alternative remedy".[101]

[97] High Court judgment above n 2 at para 97.

[98] Id at para 78.

[99] *Masstores (Pty) Ltd v Pick n Pay Retailers (Pty) Ltd* [2016] ZACC 42; 2017 (1) SA 613 (CC); 2017 (2) BCLR 152 (CC) (*Masstores*).

[100] *Setlogelo v Setlogelo* 1914 AD 221 and *Pilane v Pilane* [2013] ZACC 3; 2013 JDR 0295 (CC); 2013 (4) BCLR 431 (CC) at para 39.

[101] *Masstores* above n 99 at para 8.

[82] The applicants submit that the High Court erred in its understanding of the scope of its discretion to refuse interdictory relief once the requirements had been met. Further, they submit that in refusing interdictory relief, the High Court overlooked the raids of the seventh and eleventh applicants which were not authorised by section 13(7) and that no protection is provided for these residents.

[83] The respondents support the decision of the High Court and submit that the interdict would have had the effect of handicapping members of the police from executing their constitutional mandate. Furthermore, the final interdict would not be appropriate in the circumstances as there is no reasonable apprehension of harm.[102] They argue that the matter is now moot as the interim relief by the High Court pending confirmation is in force.

[84] With regard to the interdict, the acts of the officials of the Department of Home Affairs and officers of the Johannesburg Metropolitan Police Department, and acts of members of the police must be distinguished. The conduct of Lieutenant-General De Lange and Major General Nkuna in issuing the authorisations for an improper and ulterior motive was certainly reprehensible and inexcusable, and such conduct must be deprecated in the strongest possible terms. But what distinguishes searches issued under the SAPS Act is that – as a matter of law – the searches follow without safeguards. That much is fully explained above. It is so that some of the authorisations were purportedly issued in terms of the SAPS Act so as to justify the searches. But the difference now is that even if there were to be an authorisation, searches are subject to safeguards as the constitutionally repugnant part of section 13(7)(c) is declared unconstitutional. This makes it difficult, for the purposes of an interdict against the SAPS, to make the leap that there may continue to be improper authorisations in future, but that there will also be searches that will disregard the safeguards that will now be in place. Furthermore, with the impugned part of section 13(7)(c) now declared unconstitutional, any person

[102] *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* [2008] ZASCA 78; 2008 (5) SA 339 (SCA) at para 20.

subject to an unlawful search in the future can approach a court on an urgent basis for an interdict.

[85] Therefore, the interim remedy relied upon by the High Court when it refused to grant a final interdict was adequate relief for those applicants whose homes were raided by the members of the police. This is because the interim remedy required that all searches of private homes authorised by section 13(7) must comply with the provisions of the Criminal Procedure Act. Furthermore, since it was the impugned section that made it possible for the applicants to be subjected to this egregious unconstitutional maltreatment, it follows that the declaration of invalidity of that section will change the conduct of members of the police. They will have to comply with the provisions of the "new" section and sections 21 and 22 of the Criminal Procedure Act. At this stage, there is no evidence that there will be raids and searches in contravention of the new legal dispensation. Therefore, I am not satisfied that there is enough to justify the grant of a final interdict against the police. In respect of this issue, the appeal falls to be dismissed.

[86] That is not the case with regard to the officials of the Department of Home Affairs and officers of the Johannesburg Metropolitan Police Department. They conducted the raids and searched the homes of the seventh and eleventh applicants at Wemmer Shelter and 1 Delvers Street without the involvement of members of the police and without any authorisation to do so under the SAPS Act. It seems therefore that whatever law might have been in place, constitutional or otherwise – these actors would probably have acted in exactly the same manner. Added to this, the applicants aver that a threat was made that more searches were to be conducted in future. So there is no reason to believe that a change in the law is likely to influence the conduct of these actors. An order invalidating a portion of section 13(7)(c) would do nothing to change the conditions that prompted the officers of the Johannesburg Metropolitan Police Department and the Department of Home Affairs to conduct the unlawful raids.

[87] In this regard, I agree with the applicants that the High Court overlooked the plight of the seventh and eleventh applicants. Its refusal to grant the interdict against the Johannesburg Metropolitan Police Department and the Department of Home Affairs was based on an incorrect premise. These respondents – who were present at all the searches – did not even attempt to comply with the legal provisions for search and seizures as prescribed in the Immigration Act.

[88] Therefore, I am satisfied that the seventh and eleventh applicants have made out a case for a final interdict restraining the officials of the Department of Home Affairs and officers of the Johannesburg Metropolitan Police Department from unlawfully interfering with them and their homes, except on the authority of an order of court, or a warrant granted in terms of any applicable law or in terms of section 22 of the Criminal Procedure Act. They are entitled to the relief sought, and the appeal on behalf of these applicants must be upheld.

Constitutional damages

[89] The applicants submit that each of them is entitled to a token amount of R1 000 for every unlawful raid suffered, and the consequent breach of their rights to privacy and dignity. They argue that in cases such as this, the award of constitutional damages is an appropriate surrogate for non-pecuniary loss caused by the negation of constitutional values embodied in a breach of rights.

[90] A court may award damages for a violation of rights in the Bill of Rights. This remedy flows directly from section 38 of the Constitution. This section is broad and provides:

> "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 interest of, a group or class of persons;

(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members." (Emphasis added.)

[91] In *Fose*, this Court held:

> "[T]here 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 rights in the Bill of Rights] . . . . When it would be appropriate to do so, and what the measure of damages should be will depend on the circumstances of each case and the particular right which has been infringed."[103]

[92] The concept of "appropriate relief" as a remedy for a direct infringement of a right in the Bill of Rights, therefore, includes an award of constitutional damages. However, the notion of "appropriateness", when considering relief for the breach of rights, can be somewhat elusive. In *Fose*, this Court equated appropriateness with effectiveness, and said the following:

> "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, if needs be, to achieve this goal."[104] (Emphasis added.)

[93] In that matter, constitutional damages were claimed against the Minister of Safety and Security for damages arising from an alleged series of assaults by members of the police during the course and scope of their employment, which infringed on the applicant's constitutional rights to human dignity, freedom and safety

[103] *Fose* above n 32 at para 60.

[104] Id at 69.

and security, and privacy. These damages were claimed in addition to damages for pain and suffering and future medical expenses.[105] The applicant argued that these additional damages would vindicate the constitutional rights that had been violated, deter future conduct of a similar nature, and punish the state for such an egregious infringement of fundamental rights.

[94] This Court held that constitutional damages did not constitute appropriate relief. This was so because: first, the applicant would be awarded substantial delictual damages and that, in itself, was a powerful vindication of the constitutional rights in question.[106] Second, there was no evidence to prove that constitutional damages in that matter would serve as a significant deterrent against an individual or systemic repetition of the infringement in question. In addition, this Court noted that the scarce resources in a country such as South Africa would render it inappropriate, on those facts, to use such resources to pay punitive constitutional damages to plaintiffs who have already been compensated.[107]

[95] Importantly, the Court insightfully noted that—

> "The South African common law of delict is flexible and under section 35(3) of the interim Constitution should be developed by the courts with 'due regard to the spirit, purport and objects' of [the Bill of Rights]. *In many cases the common law will be broad enough to provide all the relief that would be 'appropriate' for a breach of constitutional rights. That will of course depend on the circumstances of each particular case*."[108] (Emphasis added.)

[96] In the same vein, a few years later in *Dikoko*,[109] in considering the delict of defamation and its impact on the section 10 right to dignity and section 16 right to

[105] Id at para 13.

[106] Id at para 67.

[107] Id at para 72.

[108] Id at para 58(b).

[109] *Dikoko v Mokhatla* [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC).

freedom of expression, this Court held that although the remedy of sentimental damages is located within the common law of delict, it is nonetheless "appropriate relief" within the meaning of section 38. It held:

> "There appears to be *no sound reason why common law remedies, which vindicate constitutionally entrenched rights, should not pass for appropriate relief within the reach of section 38.* If anything, the Constitution is explicit that, subject to its supremacy, it does not deny the existence of any other rights that are recognised and conferred by the common law."[110] (Emphasis added).

[97] The above statements from this Court suggest that where the violation of constitutional rights involves the commission of a delict, an award of constitutional damages, in addition to those available under the common law, will seldom be available.[111] This is because the delictual remedy will most likely be the most appropriate remedy in those circumstances. It will therefore be unnecessary to "forge a new tool" – to use the language in *Fose* – since one already exists under the circumstances. The implication here is that where a common law remedy exists, an applicant must first have recourse to such remedy. More on this later.

[98] In *Modderklip (CC)*, this Court awarded constitutional damages to a farmer, for the state's failure to remove the many unlawful occupiers on his land (as required by a court order). The Court held that this failure to remove the occupiers amounted to a failure by the state to take reasonable steps to ensure that Modderklip was, in the final analysis, provided with effective relief.[112] This Court awarded constitutional damages to vindicate the farmer's constitutional rights, and to ensure that the occupiers were not evicted until alternative accommodation had been found.[113] In that matter, this Court

[110] Id at para 91.

[111] Currie and De Waal above n 41 at 202.

[112] *Modderklip (CC)* above n 33 at paras 50-1.

[113] This Court went on to consider whether the award of damages took into account the following factors: the occupiers had formed themselves into a settled community and built homes for themselves; the occupiers had no other option but to remain on Modderklip's property; their investment into their own community on Modderklip's farm should be weighed against the financial waste that their eviction would represent; the cost of avoiding such

considered other remedies available to the applicant, including a declarator, or granting an order that the state should expropriate Modderklip's property instead of granting constitutional damages. However, this Court concluded that, in the circumstances, constitutional damages were the most appropriate relief and held:

> "It is true that a declaratory order would go some way towards assisting Modderklip by way of clarifying its rights. It could even be open to Modderklip to bring a separate delictual action against the State. What Modderklip required at that stage, however, having regard to the long history of its efforts to relieve its property from unlawful occupation, was something more *effective* than the suggested clarification of its rights."[114] (Emphasis added.)

[99] This Court, therefore, once again emphasised that appropriateness should be understood to denote *effectiveness*. In that case, this Court opted for what was the more effective remedy in the circumstances. This Court seemed to accept that sometimes there may be alternative remedies available to a claimant that may assist her, but these remedies may not be as effective as constitutional damages in the circumstances, and in such instances, it would be open to the Court to award constitutional damages to vindicate that particular breach of rights.

[100] Where there are many possible remedies, a remedy that constitutes appropriate relief will ultimately be determined by the circumstances of that case. This determination entails a judgment call by the court in the exercise of its discretion. It is not inconceivable that in a given case appropriate relief may not necessarily be the more or most effective of two or more options. The operative word in section 38 of the Constitution is "appropriate". And that does not necessarily connote more or most effective. Of course, as was the case in *Modderklip (CC)*, the more (or even most)

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waste would be minimal; the state is and has always been involved in matters concerning the unlawful occupation of Modderklip's farm; the state gave notice to Modderklip in terms of section 6(4) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, to institute eviction proceedings and Modderklip made various requests for assistance from various organs of State; and the responses of the state were consistently negative and unhelpful.

[114] *Modderklip (CC)* above n 33 at para 60.

effective remedy may be the appropriate relief in a given case.[115] I deal more fully with the contours of "appropriate" below.

[101] Claims for constitutional damages for pure economic loss have had less success. In *Olitzki*,[116] for example, the Supreme Court of Appeal had to determine whether the breach of a provision regarding procurement administration in the interim Constitution gave rise to a delictual claim for loss of profits. The applicant was unsuccessful in its application for a government tender. The applicant argued that the tender board had been improperly influenced by the provincial government and that it should have won the tender. It argued that the board had breached its responsibilities under the procurement provision of the interim Constitution and therefore was liable for the loss of profits that it had suffered as a result of not receiving the tender.

[102] Importantly for our purposes, one of the issues the Supreme Court of Appeal had to determine was whether, in the circumstances, constitutional damages for loss of profits were an appropriate remedy for the infringement of a fundamental constitutional right.[117] The Supreme Court of Appeal held that it was not necessary to decide whether a loss of profits can never be claimed as constitutional damages but held that the applicant was not entitled to constitutional damages.[118] It said so primarily because the applicant in that matter could have obtained an interdict, and an "interdict would not only have anticipated the later dispute; it would have eliminated the source of loss the applicant invokes."[119] In addition, the Supreme Court of Appeal held that the applicant had failed to apply for a revocation of the tender award. Finally, it considered the financial impact of such an award on the state and concluded that the applicant was not

[115] Id at para 65.

[116] *Olitzki Property Holdings v State Tender Board* [2001] ZASCA 51; 2001 (3) SA 1247 (SCA) (*Olitzki*).

[117] Id at para 1.

[118] Id at para 42.

[119] Id at para 38.

entitled to constitutional damages.[120] The existence of alternative remedies was thus significant to the decision not to award constitutional damages.

[103] When considering whether, on the facts of a particular case, constitutional damages are appropriate relief, several pertinent factors for consideration have emerged from the jurisprudence of this Court and the Supreme Court of Appeal. There are two overarching considerations; the first is the existence of an alternative remedy that would vindicate the infringement of the rights alleged by the claimant and the second is, whether that alternative remedy is effective or appropriate in the circumstances. Ancillary factors include whether the infringement of the constitutional rights was systemic, repetitive and particularly egregious; whether the award will significantly deter the type of constitutional abuses alleged; the effect of the award on state resources; and the need to avoid opening the floodgates in respect of similar matters. These considerations are discussed below.

Alternative remedies

[104] The first factor is whether the applicant has an alternative remedy – either found in common law or statutory provisions – available to her. The availability of alternative remedies is not an absolute bar to the granting of constitutional damages but a weighty consideration against the award of such damages. In general, if the applicant can pursue a delictual claim to vindicate her constitutional rights, she must do so and prove all the elements of the delict before being compensated. However, in some rare instances, where an existing delictual remedy available to the applicant is not *effective* because the harm-causing conduct is inherently a barrier to a delictual remedy, or such remedy would be ineffective in light of the circumstances, a court may consider awarding constitutional damages despite the existence of an alternative remedy. This is precisely what this Court did in *Modderklip (CC)*.[121]

[120] Id at para 41.

[121] In *Modderklip (CC)* above n 33, this Court, at para 59, said that—

[105] A delictual remedy will not be effective if the nature of the unlawful conduct itself creates a complete barrier to proving one of the elements of the delict. However, litigants cannot avoid claiming alternative relief through trial proceedings and proving the stringent requirements of delictual liability simply because they wish to, or it would be less difficult for them to do so. They can only do so if, in the circumstances, and on the facts of a matter, they can show a court that delictual damages are not *effective*. Again, "effectiveness" can be elusory. When determining effectiveness one must have regard to whether expecting the claimant to pursue an alternative remedy (if there is one) would be *manifestly unjust or unreasonable* in the circumstances. This is determined with reference to the nature and extent of the violation, the position of claimants, and the impact of the violation on the requirements for obtaining alternative relief.

[106] Counsel for the respondents submits that the applicants have two alternative remedies available to them and therefore they are not entitled to constitutional damages. First, they contend that section 28 of the Criminal Procedure Act provides adequate redress, including an award for compensation, and, secondly, they submit that the applicants have the right to bring a delictual claim and prove their entitlement to compensation. Is this so? Section 28 of the Criminal Procedure Act provides:

> "(1) A police official—
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> (a) who acts contrary to the authority of a search warrant issued under section 21 or a warrant issued under section 25(1); or
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> (b) who, without being authorised thereto under this Chapter—
>
> (i) searches any person or container or premises or seizes or detains any article; or
>
> (ii) performs any act contemplated in subparagraph (i), (ii) or (iii) of section 25(1),

"*[i]t could even be open to Modderklip to bring a separate delictual action against the state*. What Modderklip required at that stage, however, having regard to the long history of its efforts to relieve its property from unlawful occupation, *was something more effective*. . .". (Emphasis added.)

> shall be guilty of an offence and liable on conviction to a fine not exceeding R600 or to imprisonment for a period not exceeding six months, and shall in addition be subject to an award under subsection (2)."

[107] This section is not applicable because it regulates warrants issued in terms of the Criminal Procedure Act. Before the present constitutional challenge, warrantless searches in terms of section 13(7) of the SAPS Act were in no way regulated by the warrant provisions in section 21 of the Criminal Procedure Act. The applicants in this matter could therefore not rely on this section to hold the members of the police liable. It follows that section 28 is not an alternative remedy available to the applicants.

[108] In respect of the possibility of a claim for delictual damages, I agree that the applicants do have a claim under the *actio iniuriarum* and accordingly have an alternative common law remedy available to them. Actionable harm for the *actio iniuriarum* requires that there be a wrongful and intentional infringement of one's personality rights.[122] The requirements for liability to arise under the *action iniuriarum* are harm or loss – it must be shown that there was a violation of a personality right, either of bodily integrity, dignity (which includes infringing one's privacy), or reputation; conduct, causation, wrongfulness, and fault, in the form of intention.[123]

[109] The applicants submit that they are not well placed to adduce the primary evidence required against the Minister of Police to sustain a delictual claim vindicating their personality rights. The reason therefor is the removal of the applicants from their homes and the confusion occasioned by the number of officials present – on account of the ulterior motive of the searches, members of the police were not only accompanied by the Johannesburg Metropolitan Police Department officers but also by immigration officials from the Department of Home Affairs and in some instances officials from the City's "forensic unit". The authorisations under which the first, second and third respondents acted were, of course, issued by the South African Police Service.

[122] Van der Walt and Midgely *Principles of Delict* 3 ed (LexisNexis Butterworths, Durban 2005) at 10.

[123] Neethling and Potgieter *Law of Delict* 7 ed (LexisNexis, Durban 2015) at 4 and 12.

Although they were acting in concert with other state bodies, the South African Police Service can be said to have been the primary actor.

[110] The delictual claim did not cease to be an alternative remedy simply because it may be onerous to prove it. The principle is not that the alternative remedy must be easy and convenient for the claimant to pursue it. Nevertheless, this difficulty in proving the delictual claim can be overcome by not only seeking damages from the first respondent, but seeking a claim for damages against the first to third respondents jointly and severally. Due to the entwined role that the South African Police Service, the Johannesburg Metropolitan Police Department and the Department of Home Affairs played in the wrongful conduct a claim for damages against all three respondents, jointly and severally, would have dissolved the difficulty in pinpointing the exact respondent who infringed on their privacy and dignity rights due to the chaotic nature of the searches. In this instance, the applicants elected to seek a claim for damages against the first respondent only. It is unclear why they chose to do so as joint wrongdoers are undoubtedly jointly and severally liable at common law and can be sued in the same action.[124] It would not be manifestly unjust or unreasonable to expect the applicants to have pursued their delictual claim against the first to third respondents jointly.

[111] Another alternative compensatory remedy available to the applicants can be found in legislation. The High Court held that the written authorisations issued by the first respondent constituted unlawful administrative action. The respondents do not challenge the finding that the written authorisations themselves were unlawful.[125]

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[124] *Nedcor Bank Ltd t/a Nedbank v Lloyd-Gray Lithographers (Pty) Ltd* [2000] ZASCA 166; 2000 (4) SA 915 (SCA) at para 11. Joint wrongdoers are persons who, acting in concert or in furtherance of a common design, jointly commit a delict. They are jointly and severally liable. In addition, section 2 of the Apportionment of Damages Act 34 of 1956 reads as follows:

> "Where it is alleged that two or more persons are jointly or severally liable in delict to a third person (hereinafter referred to as the plaintiff) for the same damage, such persons (hereinafter referred to as joint wrongdoers) may be sued in the same action."

[125] High Court judgment above n 2 at para 96, where the Court found that the Commissioner failed to take into account relevant considerations before issuing the authorisations for repeat raids, and that the raids were conducted for an ulterior motive other than that set out in section 13(7), this ulterior motive was to enable the Department of Home Affairs to arrest those suspected of being "illegal immigrants" without a warrant.

Section 8(1)(c)(ii)(bb) of PAJA[126] provides for a court to direct an administrator or any other party in the litigation to pay compensation in judicial review proceedings in exceptional circumstances. In the High Court, the applicants sought compensation of R1 000 for each applicant for every unlawful search under section 8(1)(c)(ii)(bb) of PAJA or, in the *alternative,* constitutional damages for their breach of rights to privacy and dignity. During oral argument in the High Court, the applicants only pursued constitutional damages and the PAJA claim was abandoned. Compensation under section 8(1)(c)(ii)(bb) of PAJA was also not pursued in this Court. It is unclear why this claim was abandoned by the applicants.

[112] In *Steenkamp*,[127] Sachs J held in his concurring judgment in this Court that "[j]ust compensation today can be achieved where necessary by means of PAJA". He was

[126] Section 8(1) of PAJA states:

> "8 Remedies in proceedings for judicial review
>
> (1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders—
>
> (a) directing the administrator—
>
> (i) to give reasons; or
>
> (ii) to act in the manner the court or tribunal requires;
>
> (b) prohibiting the administrator from acting in a particular manner;
>
> (c) setting aside the administrative action and—
>
> (i) remitting the matter for reconsideration by the administrator, with or without directions; or
>
> (ii) in exceptional cases—
>
> (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
>
> (bb) directing the administrator or any other party to the proceedings to pay compensation;
>
> d) declaring the rights of the parties in respect of any matter to which the administrative action relates;
>
> (e) granting a temporary interdict or other temporary relief; or
>
> (f) as to costs."

[127] *Steenkamp N.O. v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC).

referring specifically to section 8(1)(c)(ii)(bb).[128] In *Darson*,[129] the High Court held that section 8(1)(c)(ii)(bb) "empowers the court to grant 'constitutional damages' by way of compensation when there has been a breach of administrative justice rights".[130] Section 8(1)(c)(ii)(bb) is accordingly available to vindicate an infringement of the right to administrative action that is not lawful, reasonable and procedurally fair. Reliance on this compensation route, found in legislation enacted to give effect to a constitutional right, is aligned with the principle of subsidiarity.[131] The applicants, therefore, had two clear alternative routes to obtain compensatory relief for the breach of their rights to privacy and dignity and their administrative justice rights – under the common law and legislation respectively.

Appropriate relief

[113] The second overarching consideration is whether the alternative remedies are appropriate in the circumstances. If they are, constitutional damages need not be resorted to. When it comes to the issue of a remedy for a breach of the rights in the Bill of Rights, section 38 confers a flexible power on courts to determine what is appropriate relief in a specific case. Appropriate relief in that context means any relief that is justified by the facts of the case and all other legal considerations. In other words, it is relief suitable to specific facts and exigencies of a particular case. In a case where there are many appropriate remedies, the court enjoys a discretion to choose the one that is *most* appropriate to the case at hand. It may not grant all of them where one is adequate. This means that if an award of constitutional damages is one of the appropriate remedies, the court may still choose a different remedy as an appropriate relief envisaged in section 38. The fact that constitutional damages are potentially one

[128] Id at para 101.

[129] *Darson Construction (Pty) Ltd v City of Cape Town* (2007) 1 SA 488 (C) (*Darson*).

[130] Id at 502D.

[131] In *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31; 2016 (1) SA 132 (CC); 2015 (12) BCLR 1407 (CC) at para 46 this Court held:

> "Subsidiarity denotes a hierarchical ordering of institutions, of norms, of principles, or of remedies, and signifies that the central institution, or higher norm, should be invoked only where the more local institution, or concrete norm, or detailed principle or remedy, does not avail."

of them does not mean that the court suddenly loses its discretion and becomes obliged to grant those damages.

[114] The discretion which a court enjoys on relief under section 38 is subject to the command of section 172(1) of the Constitution. Since both of these provisions address the issue of remedy, they must be read together. Where, as here, a court declares invalid legislation that is inconsistent with the Constitution, the latter provision mandates such court to make an order that is just and equitable. Justice and equity are the guidelines for the exercise of the discretion to choose an appropriate remedy. This gives appropriate relief contemplated in section 38 a different colour. The determination of what is appropriate is not seen from the claimant's perspective only. Justice and equity require consideration of all relevant factors, including the interests of the state and the general public.[132] This exercise sometimes entails the balancing of the conflicting and competing interests. A court is required to balance the interests of the claimant against those of the respondent and, where applicable, the public interest as well.[133]

[115] It is only after considering all those interests and properly balancing them that a court will be in a position to determine which remedy will be just and equitable in all the circumstances of a particular case. During this exercise, a court should not overemphasise some interests while underemphasising others. Appropriate weight should be attached to all relevant interests. Therefore, the term "appropriate relief" envisaged in section 38 must be read as relief that is effective in protecting the claimant's interests as well as the interests of good governance.

[116] This process of assessing the appropriate remedy in a given case was described by this Court in *Mvumvu* as follows:

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[132] *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) at para 96.

[133] *Millennium Waste Management (Pty) Ltd v Chairperson Tender Board, Limpopo Province* [2007] ZASCA 165; 2008 (2) SA 481 (SCA) at paras 22–9.

> "In determining a suitable remedy, the courts are obliged to take into account not only the interests of parties whose rights are violated, but also the interests of good government. These competing interests need to be carefully weighed."[134]

[117] In *Mvumvu*, the Court was dealing with the right to equality and the competing interests there were affording the applicants full protection of their violated right to equality by allowing a retrospective operation of the declaration of invalidity and thereby increasing the Road Accident Fund's liabilities by R3 billion. Having balanced these interests, this Court concluded that the declaration of invalidity should not have a retrospective effect. The same approach to balancing interests is called for when a court is asked to allow constitutional damages.

[118] To hold that constitutional damages are available in any matter if they meet the mere threshold of appropriate relief would create considerable uncertainty in our law and inequality in the sense that claimants who seek to vindicate the same right would be treated differently. This would generate uncertainty on when constitutional damages may be allowed. The uncertainty and unpredictability would be at variance with the rule of law, a linchpin of the Constitution. Therefore, constitutional damages must be the *most appropriate remedy* available to vindicate constitutional rights with due weight attached to other alternative remedies available in the common law and statutes.

[119] Furthermore, as in *Fose*, there is no evidence before this Court that constitutional damages will serve as a significant deterrent against an individual or systemic repetition of the infringements in question. In this matter, the appropriate deterrent remedies are the delictual claims – to prevent further individual infringements of the applicants' rights – and the declaration of constitutional invalidity of section 13(7)(c) of the SAPS Act to deter systemic violations.

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[134] *Mvumvu v Minister for Transport* [2011] ZACC 1; 2011 (2) SA 473 (CC); 2011 (5) BCLR 488 (CC) at para 49. See also *Minister of Police v Mboweni* [2014] ZASCA 107; 2014 (6) SA 256 (SCA) at para 25.

[120] Once the appropriate relief is established, it becomes unnecessary to award constitutional damages as an additional remedy where the object of the damages is not to compensate the claimants for the loss they have suffered, but to uphold the Constitution. In this matter, that compensation ought to have been claimed under the common law or in terms of PAJA as discussed above. It is not fair to burden the public purse with financial liability where there are alternative remedies that can sufficiently achieve that purpose. To do otherwise would effectively amount to punishing the taxpayers for conduct for which they bear no responsibility.

[121] Therefore, the granting of constitutional damages would not be just and equitable in this matter because the applicants had alternative remedies available to them, which are effective and more appropriate. If the applicants' claim were to succeed the Minister would be required to pay an amount of R7 193 000 to them. Given the many pressing demands on the fiscus, it is not appropriate to use scarce resources to pay damages to individuals for purposes of enforcing rights conferred on the general public, where there are other effective methods for upholding the Constitution. These resources would be better spent on addressing the structural and systemic deprivation and deplorable conditions under which the majority of people continue to live 27 years into the democratic order. In these circumstances, it would not be just and equitable to grant constitutional damages in addition to other forms of relief granted.

[122] No doubt the conduct of the respondents was egregious – the applicants, who are poor and vulnerable people, were subjected to demeaning and intrusive raids with no consideration for their rights to privacy and dignity. The dismissal of the claim for constitutional damages does not condone the appalling and systemic rights violations by the respondents. It merely holds that more appropriate alternative remedies are available to the applicants.

Conclusion

[123] The applicants collectively experienced more than 15 targeted raids over a period of almost one year, one after the other, each one infringing their rights to privacy and

dignity. Further, and of particular concern, was the finding by the High Court that the written authorisations were unlawful administrative action. The respondents do not challenge the finding that the written authorisations themselves were unlawful.[135] One of the bases for finding that these written authorisations were unlawful was that they were conducted for the ulterior purpose of enabling the Department of Home Affairs to arrest those suspected of being "illegal immigrants". This abuse of power indicates wanton and calculated disregard of the law by the respondents and a predacious, mechanical scheme to terrorise and arrest non-citizens and forcibly evict suspected unlawful occupiers, under the guise of restoring public order.

[124] The rights to privacy and dignity in the Constitution attach to "everyone" and not just citizens.[136] Human dignity has no nationality.[137] It appears to me that the respondents were under the impression that because the applicants were largely suspected to be non-citizens or undocumented, they could repeatedly over many months, at any hour of the day or night, violate their rights without consequence.[138] This cannot be so.

Costs

[125] The applicants have been successful, therefore, they are entitled to their costs, which include the costs of two counsel. Only the Minister of Police opposed this

[135] High Court judgment above n 2 at para 96 found that the Commissioner failed to take into account relevant considerations before issuing the authorisations for repeat raids, and that the raids were conducted for an ulterior motive to that set out in section 13(7), this ulterior motive was to enable the Department of Home Affairs to arrest those suspected of being "illegal immigrants" without a warrant.

[136] See in contrast to these rights the section 19 political rights, and the section 22 right to freedom of trade, occupation and profession for example, which attach only to citizens of the Republic.

[137] *Minister of Home Affairs v Watchenuka* [2003] ZASCA; 2004 (4) SA 326 (SCA); 2004 (2) BCLR 120 (SCA) at para 25.

[138] This Constitutional Court in *Lawyers for Human Rights v the Minister of Home Affairs* [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) at paras 21-2, noted that non-citizens have a very limited understanding of the South African legal system as well as the constitutional rights to which they are entitled. This Court further noted that they generally have a very remote chance of challenging a violation of their rights, mostly because they do not have the "resources, knowledge, power or will to institute appropriate proceedings." Although in that case the Court was dealing with non-citizens who had only just recently arrived in the country, this phenomenon is pervasive even in the case of those who have been resident in the country for longer periods.

application and the impugned Act is administered by him. Accordingly, the Minister of Police must pay the costs in this Court.

Order

[126] In the result, the following order is made:

1. The declaration of invalidity issued by the High Court in respect of section 13(7)(c) of the South African Police Service Act 68 of 1995 (SAPS Act) is confirmed but its order is varied in the terms set out in paragraph 2.
2. The portion of section 13(7)(c) that authorises warrantless searches is severed and the section is now deemed to read as follows, with the underlining denoting an insertion: "Upon receipt of the written authorisation referred to in paragraph (a), any member may cordon off the area concerned or part thereof, and may, where it is reasonably necessary in order to achieve the object specified in the written authorisation <u>and within the cordoned-off area, search any person, premises or vehicle, or any receptacle or object of whatever nature in terms of sections 21 and 22 of the Criminal Procedure Act 51 of 1977</u> and seize any article referred to in section 20 of the Criminal Procedure Act 51 of 1977, found by him or her in the possession of such person or in that area or part thereof: Provided that a member executing a search under this paragraph shall, upon demand of any person whose rights are or have been affected by the search or seizure, exhibit to him or her a copy of the written authorisation."
3. Leave to appeal directly against the orders of the High Court is granted.
4. The appeal against the order of the High Court dismissing a constitutional challenge against paragraphs (a) and (b) of section 13(7) of the SAPS Act is dismissed.
5. The appeal in respect of the claim for constitutional damages is dismissed.
6. The appeal in respect of the claim for a final interdict is upheld only in respect of the seventh and eleventh applicants.

7. The order of the High Court dismissing the claim for a final interdict in respect of the seventh and eleventh applicants is set aside.
8. The City of Johannesburg, the Minister of Home Affairs and the Director-General of the Department of Home Affairs (second, third and fourth respondents) are interdicted and restrained from raiding, searching, inspecting, seizing any person or item, or otherwise interfering with the seventh and eleventh applicants' peaceful and undisturbed possession of their homes, except on the authority of an order of court, a warrant granted by a Magistrate or Judge in terms of any applicable law, or in terms of section 22 of the Criminal Procedure Act.
9. The Minister of Police must pay the applicants' costs, including the costs of two counsel.

JAFTA J (Mogoeng CJ, Madlanga J, Mathopo AJ, Mhlantla J and Tshiqi J concurring):

[127] I have had the benefit of reading the judgments by my colleagues Mhlantla J (first judgment) and Victor AJ (third judgment). I agree with the first judgment on all issues. I write separately to underscore the point that a claim for constitutional damages is not justified in this matter, for reasons set out below.

[128] Decisions of our courts are not coherent on the question when an award of constitutional damages should be approved by a court. On the one hand there are decisions which hold that constitutional damages must be allowed where this remedy is the only appropriate remedy.[139] In *Modderklip (SCA)* the Supreme Court of Appeal stated:

[139] *Olitzki* above n 116 at para 42 and *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd* [2004] ZASCA 47; 2004 (6) SA 40 (SCA) (*Modderklip (SCA)*).

> "What 'effective relief' entails will obviously differ from case to case. Where a trespasser invades an owner-occupied household, more immediate intervention will be required from the State than in the case of unoccupied or unutilised land. This is not to deny the fact of the breach of rights in the latter case. It is merely to assert that constitutional remedies will differ by circumstance. The only appropriate relief that, in the particular circumstances of the case, would appear to be justified is that of 'constitutional' damages, ie, damages due to the breach of a constitutionally entrenched right. No other remedy is apparent. Return of the land is not feasible. There is, in any event, no indication that the land, which was being used for cultivating hay, was otherwise occupied by the lessees or inhabited by anyone else. Ordering the State to pay damages to Modderklip has the advantage that the Gabon occupiers can remain where they are while Modderklip will be recompensed for that which it has lost and the State has gained by not having to provide alternative land. The State may, obviously, expropriate the land, in which event Modderklip will no longer suffer any loss and compensation will not be payable (except for the past use of the land). A declaratory order to this effect ought to do justice to the case. Modderklip will not receive more than what it has lost, the State has already received value for what it has to pay and the immediate social problem is solved while the medium and long term problems can be solved as and when the State can afford it."[140]

[129] This reasoning was in line with the position that was taken earlier by the same Court in *Olitzki*. There the Supreme Court of Appeal emphasised the availability of alternative remedies in an inquiry to determine whether constitutional damages should be allowed.[141] This was particularly so in a case where the objective was not to compensate the claimant for the loss he or she has suffered but the purpose was to vindicate the Constitution. Remedies that serve the purpose of enforcing the Constitution, by design, transcend the interests of litigants in a particular case. They should be equally available to all persons similarly situated.

[130] On the other hand, in *Kate*[142] the Supreme Court of Appeal adopted a position at variance with its earlier decisions in *Olitzki* and *Modderklip (SCA)*. Without

[140] *Modderklip (SCA)* id at para 43.

[141] *Olitzki* above n 116 at para 38.

[142] *MEC, Department of Welfare, Eastern Cape v Kate* [2006] ZASCA 49; 2006 (4) SA 478 (SCA) (*Kate*).

overturning *Olitzki* and *Modderklip (SCA)*, in *Kate* the Court reasoned that constitutional damages are 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".[143] This conclusion was grounded in two reasons. The first was that a direct breach of a constitutional right should be vindicated directly. And the second was that the endemic breach of rights justified and called out for the clear assertion of their independent existence.[144] In their contention that constitutional damages should be awarded here, the applicants relied heavily on *Kate*. Consequently, it is necessary to determine whether that decision entitles them to the damages claimed.

[131] The Supreme Court of Appeal incorrectly concluded that the constitutional damages compensated Ms Kate for her loss. This was in error because she was awarded back pay and interest that covered the entire period of the delay in processing her social assistance. She was put in the position she could have been in if the social assistance was paid to her timeously. Therefore, the constitutional damages that were awarded in addition to her full compensation were punitive for the breach of a right guaranteed by section 27 of the Constitution. The Court accepted that Ms Kate suffered no financial loss. Instead, the Court held that the denial of social assistance when it should have been given to her caused her "the physical discomfort of deprivation" which reduced her dignity.[145]

[132] Having identified the nature of the loss she had suffered, the Court proceeded to consider the quantum of damages she was entitled to. It accepted that payment of those damages would come from the public purse and not from the official responsible for the delay in processing Ms Kate's application for social assistance. The Court lamented the fact that there was no empirical monetary standard against which to measure the loss sustained by her. And as a result the Court settled for an amount equivalent to the interest payable in law where a litigant has unlawfully withheld payment of money.

[143] Id at para 27.

[144] Id.

[145] Id at para 33.

This meant that Ms Kate was paid double interest because the Department was ordered to pay interest on the amount she was entitled to. The entire process illustrates that the Court approached what was a breach of the Constitution through the lens of the common law.

[133] Before addressing the reasons in *Kate* in greater detail, I wish to point out that the Supreme Court of Appeal in that matter was not entitled to depart from its decisions in *Olitzki* and *Modderklip (SCA)* unless it was convinced that those decisions were clearly wrong.[146] In our law judicial precedent requires that a court should follow, not only decisions of the upper courts, but also its own decisions. What frees a court from this obligation is an opinion by it to the effect that its own decision was clearly wrong.

[134] But *Kate* failed to follow not only the decisions of the Supreme Court of Appeal but also some of this Court's. In *Fose*[147] this Court made it plain that punitive constitutional damages are not appropriate where a claimant has been fully compensated for the loss suffered. Both the majority and minority in that matter agreed on this point. They agreed that where punitive damages are awarded against the government, it is the general public which bears liability. Writing for the majority, Ackermann J stated:

> "I agree with the criticisms of punitive constitutional damages referred to in para [65] above. Nothing has been produced or referred to which leads me to conclude that the idea that punitive damages against the government will serve as a significant deterrent against individual or systemic repetition of the infringement in question is anything but an illusion. Nothing in our own recent history, where substantial awards for death and brutality in detention were awarded or agreed to, suggests that this had any preventative effect. To make nominal punitive awards will, if anything, trivialise the right involved.
>
> For awards to have any conceivable deterrent effect against the government they will have to be very substantial and, the more substantial they are the greater the anomaly

[146] *Ruta v Minister of Home Affairs* [2018] ZACC 52; 2019 (2) SA 329 (CC); 2019 (3) BCLR 383 (CC) at para 21; *Camps Bay Ratepayers' and Residents Association v Harrison* [2010] ZACC 19; 2011 (4) SA 42 (CC); 2011 (2) BCLR 121 (CC) at paras 28-30; *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) at paras 58-62; and *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 24; 1997 (2) SA (CC) ; 1997 (1) BCLR 1 (CC) at para 8.

[147] *Fose* above n 32.

that a single plaintiff receives a windfall of such magnitude. And if more than one person has been assaulted in a particular police station, or if there has been a pattern of assaults, it is difficult to see on what principle, which did not offend against equality, any similarly placed victim could be denied comparable punitive damages. This would be the case even if, at the time the award is made, the individuals responsible for the assaults had been dismissed from the police force or other effective remedial steps taken.

In a country where there is a great demand generally on scarce resources, where the government has various constitutionally prescribed commitments which have substantial economic implications and where there are 'multifarious demands on the public purse and the machinery of government that flow from the urgent need for economic and social reform', it seems to me to be inappropriate to use these scarce resources to pay punitive constitutional damages to plaintiffs who are already fully compensated for the injuries done to them, with no real assurance that such payment will have any deterrent or preventative effect. It would seem that funds of this nature could be better employed in structural and systemic ways to eliminate or substantially reduce the causes of infringement."[148]

[135] The minority said:

"I am not able to accept, however, that punitive damages are any better for this purpose. The problem here is a profound and a disturbing one. According to paragraph 16 torture is a widespread and persistent phenomenon at South African police stations. I cannot see that this form of harm is adequately repaired by the award of punitive damages to the appellant. The relief in this case would come from the public coffers and be directed towards the appellant. The policemen implicated in the appellant's claim could not possibly be deterred by a payment of damages bearing no relation to their own finances. Nor do we vindicate the Constitution by enriching a particular claimant at the cost of the taxpayer – particularly when the problem is far larger than the claimant concerned. In other words, we do not adequately defend the Constitution by merely granting punitive damages in this case, or even in several cases. In this conclusion I am in agreement with some of the criticisms of punitive damages set out

[148] Id at paras 71-2.

> by Ackermann J in paragraph [65] of his judgment, in particular the objections in sub-paragraphs *(d), (f), (g) and (l)*."[149]

[136] Both judgments emphasised the fact that where the violation of guaranteed rights is pervasive and systematic, punitive damages are inappropriate for the purpose of vindicating the Constitution and deterring its further violation.[150] The underlying reason for this is that a breach of a constitutional right, unlike common law rights which are individualistic in nature, does not affect the claimant only but the entire public. It is in the interests of the general public that the Constitution be upheld but it plainly cannot be in the interests of the same public to bear liability for upholding the Constitution. An award to pay damages against the state imposes liability upon the public to pay those damages. In *Fose* it was stated:

> "I would add that the harm caused by violating the Constitution is a harm to the society as a whole, even where the direct implications of the violation are highly parochial. The rights violator not only harms a particular person, but impedes the fuller realisation of our constitutional promise."[151]

[137] Seen in this context, it is difficult to appreciate how awarding constitutional damages for a violation of a right that does not cause particular damage to a claimant, may vindicate that right. In other words, if the violation of a right affects the general public and not specific members, it is difficult to see how an award of constitutional damages would be appropriate relief. I share the scepticism expressed by Ackermann J in *Fose*:

> "I have considerable doubts whether, even in the case of the infringement of a right which does not cause damage to the plaintiff, an award of constitutional damages in order to vindicate the right would be appropriate for purposes of section 7(4). The sub-section provides that a declaration of rights is included in the concept of appropriate relief and the Court may well conclude that a declaratory order combined

[149] Id at para 103.

[150] Id at para 104.

[151] Id at para 95.

> with a suitable order as to costs would be a sufficiently appropriate remedy to vindicate a plaintiff's right even in the absence of an award of damages."[152]

[138] Without any meaningful motivation in *Kate*, the Supreme Court of Appeal held that constitutional damages were appropriate over and above the full compensation plus interest that was awarded to Ms Kate. It will be remembered that in that case the compensation served the purpose of vindicating her right. The object of the additional constitutional damages was to uphold the Constitution. That upholding of the Constitution was motivated by the endemic delays in processing applications for social assistance in the Eastern Cape. It was therefore a breach that affected the public at large. But the irony was that constitutional damages were awarded to an individual litigant who had already been fully compensated for the violation of her right. As observed in *Fose*, the anomaly is that only one person benefitted from a violation that affected the whole public. And since the award amounted to a small sum, it could not have had a deterrent effect.[153]

[139] All this illustrates is that *Kate* is not useful guidance in the inquiry at hand. In that matter the Court also failed to consider whether constitutional damages may be awarded for the breach of rights for which no damages have been awarded in the past. For example, administrative justice rights and fair trial rights on their own do not give rise to a claim for damages. There are many such rights in the Bill of Rights.[154] Happily, here we are concerned with rights to privacy and dignity which are ordinarily vindicated in delict by means of damages. Therefore, we need not concern ourselves with the question whether constitutional damages may be awarded for a breach of rights which do not usually attract damages.

[140] What the Supreme Court of Appeal in *Kate* overlooked was that it was dealing with a socio-economic right to appropriate social assistance which is guaranteed by

[152] Id at para 68.

[153] Id at para 71.

[154] Some of these rights are found in sections 15-21 and 26-35 of the Constitution.

section 27(1) of the Bill of Rights. And that section, as this Court held in *Treatment Action Campaign (No 2),* does not give rise to a self-standing right enforceable with no regard to section 27(2).[155] This Court has emphatically rejected an interpretation of section 27 which suggests that the section entitles individuals to approach a court and claim social assistance immediately or access to water or healthcare.[156]

[141] In *Mazibuko* this Court held that it was inappropriate for any court to determine what a socio-economic right entailed and order the state to deliver it. The Court reasoned:

> "[O]rdinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter in the first place for the legislature and the executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so, for it is their programmes and promises that are subject to democratic popular choice."[157]

[142] On the authority of this Court in *Grootboom,*[158] *Treatment Action Campaign (No2)* and *Mazibuko*, the content of the rights conferred by section 26(1) read with 26(2) as well as section 27(1) read with 27(2) is the entitlement to demand that the state takes reasonable measures within available resources at any given time, to make those rights progressively realisable. On this interpretation of the socio-economic rights, the state's failure to provide an individual

[155] *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (*Treatment Action Campaign (No 2)*) at para 39.

[156] *Mazibuko v City of Johannesburg* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC) at para 49.

[157] Id at para 61.

[158] *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) (*Grootboom*).

with a house or social assistance on demand cannot give rise to damages. This is because that right is not breached by that failure alone. For there to be a breach, the combined requirements of subsections (1) and (2) of each section must have been violated. For example, if a house is not provided to an individual because there are no resources available to the state at the relevant time, there would be no breach of the right giving rise to damages.

[143] At best for the claimants, a breach would occur if the housing policy adopted does not cater for a certain group of individuals who are also in need of housing. Even so, the affected group will not be entitled to damages. Instead, they would be entitled to an order declaring the housing policy to be invalid and directing the state to cure the defect in the policy, as was done in *Grootboom* and approved in *Mazibuko*. Consequently, the Supreme Court of Appeal erred in *Kate* when it awarded damages for a failure to process an application for social assistance timeously. Such failure could not and did not give rise to harm to anybody.

[144] With regard to dignity and privacy, the common law has always protected these personality rights through an award of damages. In *Khumalo*, the delictual claims to protect privacy and dignity were described in these terms:

> "In the context of the *actio injuriarum*, our common law has separated the causes of action for claims for injuries to reputation (*fama*) and *dignita*s. *Dignitas* concerns the individual's own sense of self-worth, but included in the concept are a variety of personal rights including, for example, privacy. In our new constitutional order, no sharp line can be drawn between these injuries to personality rights. The value of human dignity in our Constitution is not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the worth of human beings in our society. It includes the intrinsic worth of human beings shared by all people as well as the individual reputation of each person built upon his or her own individual achievements. The value of human dignity in our Constitution therefore values both the personal sense of self-worth as well as the public's estimation of the worth or value of an individual. It should also be noted that there is a close link between human dignity and privacy in our constitutional order. The right to privacy, entrenched in s 14 of the Constitution,

> recognises that human beings have a right to a sphere of intimacy and autonomy that should be protected from invasion. This right serves to foster human dignity."[159]

[145] In a similar vein, this Court defined these claims in *Dey:*

> "In short, if a reasonable observer would agree with Dr Dey that he had been humiliated, infringement of dignity has been established. But by the same token Dr Dey would have been humiliated in the eyes of a reasonable observer to whom the statement had been communicated, which means that defamation had been established as well. If, on the other hand, the reasonable observer did not find the picture humiliating of Dr Dey, defamation would not have been established, but neither would infringement of dignity. And so I believe that we land ourselves in the same never ending circle of logic."[160]

[146] These claims have been considered by this Court to constitute appropriate and effective relief for vindicating personality rights of privacy and dignity.[161] But the question we are confronted with here is not whether the applicants could have made these claims but whether they should have been granted constitutional damages, in addition to other remedies to which they were entitled. The determination of this question requires us to trace our steps back to the Constitution. Section 38 of the Constitution addresses enforcement of the rights in the Bill of Rights.[162] First and

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[159] *Khumalo* above n 42 at para 27.

[160] *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* [2011] ZACC 4; 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC) (*Dey*) at para 149.

[161] *The Citizen 1978 (Pty) Ltd v McBride (Johnstone and Others, Amici Curiae)* [2011] ZACC 11; 2011 (4) SA 191 (CC); 2011 (8) BCLR 816 (CC) at para 136(2)(b) and *NM v Smith (Freedom of Expression Institute as Amicus Curiae)* [2007] ZACC 6; 2007 (5) SA 250 (CC); 2007 (7) BCLR 751 (CC) at para 81.

[162] Section 38 provides:

> "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 interest of, a group or class of persons;
>
> (d) anyone acting in the public interest; and
>
> (e) an association acting in the interest of its members."

foremost, this provision deals with the issue of legal standing in proceedings which are launched in order to enforce rights in the Bill of Rights. Under it, standing is more expanded to allow many litigants to institute proceedings. But the provision is not restricted to the issue of standing. It also addresses possible remedies that may be granted by a court in those proceedings. The section explicitly states that the court may grant appropriate relief, including a declaration of rights.

[147] Having reviewed foreign jurisdictions, in *Fose*, this Court cautioned against adopting constitutional damages recognised in other jurisdictions on the basis that they differ from our own system, where some of the rights in the Bill of Rights are governed by private law and where many of those rights are adequately protected by the common law.[163] Building on the reasoning in *Fose*, this Court held in *Dikoko* that where an award of damages is necessary to enforce rights in the Bill of Rights, it constitutes appropriate relief. It stated:

> "[I]t seems to me that the same considerations apply to the 'appropriate relief' envisaged in s 38 of the Constitution when an award of damages is necessary to vindicate, that is to protect and enforce, rights which aside their common-law pedigree are also enshrined in the Bill of Rights. There appears to be no sound reason why common law remedies, which vindicate constitutionally entrenched rights, should not pass for appropriate relief within the reach of s 38."[164]

[148] What emerges from the reasoning of this Court in both *Fose* and *Dikoko* is that an award of damages may not be made purely because it is asked for. The award must be necessary for purposes of enforcing the Bill of Rights. This draws a distinction between damages awarded for compensating the claimant for the loss he or she has suffered and damages awarded for enforcing the Constitution.

[163] *Fose* above n 32 at para 58.

[164] *Dikoko* above n 109 at para 91.

[149] In *Fose*, the minority advocated for constitutional damages not as a form of compensation but as a means to enforce the Bill of Rights. While acknowledging the discretion to choose between appropriate forms of relief, it called for a careful analysis of the matter.[165] However, because in that case a delictual claim would sufficiently compensate the plaintiff for his loss, this Court declined to recognise a claim for constitutional damages that was going to be additional to the delictual claim. The minority stated:

> "I have argued that 'appropriate relief' vindicates the Constitution and deters further violations of it. I see no reason in principle why common-law and statutory remedies can never be suitable for this purpose. The appellant has not persuaded me to the contrary. Of course, there will be instances where these remedies are ill-suited. For example, a common-law remedy is unlikely to address a diffuse and systematic pattern of rights violations. Nevertheless, common-law remedies – particularly delictual remedies – have been designed to protect personality interests such as dignity which are central to chap 3. In cases where the harm arising from a rights violation is highly localised, a common-law remedy may well be appropriate, that is, it may effectively vindicate the Constitution and deter further violations of it. This is not to speak of the wide range of common-law administrative remedies which are readily harnessed to our constitutional needs."[166]

[150] What emerges from a careful reading of this statement and the majority judgment is that if the common law or statutory law provides adequate and effective protection of rights in the Bill of Rights, there is no need for allowing constitutional damages over and above those protections. The claimant must make use of those remedies. It is not permissible for him or her to eschew the remedies in question and prefer to ask for constitutional damages because they can conveniently be established. In order to discourage this, the Supreme Court of Appeal in *Modderklip (SCA)* and *Olitzki* held that constitutional damages ought to be permitted where there is no other appropriate remedy.

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[165] *Fose* above n 32 at paras 96-7.

[166] Id at para 98.

[151] However, in *Modderklip (CC)* this Court did not base the award of constitutional damages on the ground that such damages were the only effective remedy. The Court held that by its failure to enforce an eviction court order, the state had breached the landowner's right to an effective relief entrenched in section 34 of the Constitution. The Court held that in the special circumstances of that case, constitutional damages were the most appropriate remedy that took account of the constitutional rights of the landowner and the right of unlawful occupiers to adequate housing. Langa ACJ said:

> "In deciding that the type of compensation awarded to Modderklip was the most appropriate remedy in the circumstances, the Supreme Court of Appeal referred to a number of advantages which other forms of relief did not have. It compensates Modderklip for the unlawful occupation of its property in violation of its rights; it ensures the unlawful occupiers will continue to have accommodation until suitable alternatives are found and it relieves the State of the urgent task of having to find such alternatives. The difficulty of quantifying the compensation is met by resorting to the mechanism provided in s 12 of the Expropriation Act, thus obviating the need for Modderklip to institute new proceedings".[167]

[152] A careful reading of the various decisions reveals that our courts do not grant constitutional damages in every case where there has been a violation of the rights in the Bill of Rights. In some cases, those damages were awarded where they were the only effective relief. In others they were granted on the basis that there were special circumstances which rendered such damages the most appropriate relief. And in respect of each instance, the computation of those damages was based on a clear and objective formula.

[153] These requirements serve the purpose of establishing certainty in relation to circumstances under which constitutional damages may be claimed. However, this applies to claims for the violation of rights which are also enforceable under the

[167] *Modderklip (CC)* above n 33 at para 59.

common law. The requirements do not apply to a breach of socio-economic rights as these require a different approach to enforce.

[154] While the present matter involves constitutional rights of the common law pedigree, it does not meet any of the requirements for awarding constitutional damages. It follows that this claim must fail.

[155] But even if we were not to follow the principle that constitutional damages should be allowed where there are no alternative effective remedies, we would still not grant such damages for a number of reasons. For a claim of that nature to succeed, it is not enough for the claimants to show that there was a breach of a guaranteed right. In addition to this, they should establish the nature of the harm or loss suffered and the causal link between the loss and the wrongful conduct that resulted in a breach. Here, we are told that the applicants cannot provide such proof owing to the manner the unlawful searches were conducted. That does not relieve the applicants from the burden to prove their claims. They ought to know the nature and effect of the loss they have suffered. The fact that they were outside when the searches were conducted and that they did not know the identity of those who searched is not fatal to their case. Instead, what presents a difficulty in their case is the lack of knowledge on which homes were searched by members of the Johannesburg Metropolitan Police Department and which ones were searched by officials of the Department of Home Affairs. This is so because the Minister of Police cannot in law be held liable for wrongful acts by persons who are not employees in his department. But this does not mean that liability of a defendant in cases of this nature can never arise without the employment relationship.

[156] Moreover, there were a number of alternative remedies available to the applicants against members of the South African Police Service. The first judgment accepts that the presence of alternative remedies is a weighty consideration in determining whether to award constitutional damages.[168] As was observed in *Fose*,

[168] First judgment at [103].

those remedies may be in the form of common law or statutory remedies.[169] The common law and statutory remedies may constitute "appropriate relief" envisaged in section 38 of the Constitution. Here, in conducting these unlawful searches, the police claimed to have acted in terms of the SAPS Act and the applicants were aware of this hence they challenged the validity of some of its provisions. This Act provides for accountability measures to be taken against members who breach the Constitution during the performance of their duties.

[157] The other alternative remedy that was available to the applicants was a delictual claim. The delictual claim did not cease to be an alternative remedy only because it may be onerous to prove it. The principle is not that the alternative remedy must be easy to prove. Nor should it be convenient for the claimant to pursue it. It will be recalled that in *Fose* and *Dikoko*, this Court stressed the fact that constitutional damages may be allowed where it is necessary. It cannot be necessary to award them where there is an adequate alternative remedy that is not easy to prove.

[158] Another alternative remedy that was available to them and which they have asked for is the interdict. In *Fose*, this Court affirmed that an interdict is one of remedies which constitutes appropriate relief as envisaged in section 38:

> "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 have to fashion new remedies to secure the protection and enforcement of these all important rights."[170]

[169] *Fose* above n 32 at para 98.

[170] Id at para 19.

[159] It is apparent from this statement that any form of relief may be appropriate relief envisaged in section 38 of the Constitution. Depending on the exigencies of a particular case, an interdict alone may constitute appropriate relief.

[160] The fact that, in respect of some buildings, the raids were repetitive does not make constitutional damages appropriate. In this regard, the Court stated in *Fose*:

> "Nothing has been produced or referred to which leads me to conclude that the idea that punitive damages against the government will serve as a significant deterrent against individual or systemic repetition of the infringement in question is anything but an illusion. Nothing in our own recent history, where substantial awards for death and brutality in detention were awarded or agreed to, suggests that this had any preventative effect."[171]

[161] It is for all these reasons and those articulated in the first judgment that I do not support the granting of constitutional damages in this matter.

VICTOR AJ

> "Ideas that poor black people represent a threat to the urban order persist in the current state's treatment of certain populations."[172]

Introduction

[162] This matter is a stark reminder that, even after celebrating more than 27 years of our democracy, the constitutional promise of dignity and equality remains unfulfilled for some of the most indigent members of the South African society. It is incumbent

[171] Id at para 71.

[172] De Vos and Webster "No Place for the Poor: The Governance of Removal in *Zulu* and *SAITF*" (2015) 7 *Constitutional Court Review* 321 at 328. The authors also warn, at 335, that "[i]f these currents persist, the South African urban crisis is unlikely to reach any democratic conclusion, and urban governance will become increasingly exclusionary, authoritarian and repressive".

on courts, in matters such as this one, to vindicate the principle of transformative equality which sits at the heart of the transition from the *rule by law* to the *rule of law*.[173] It is unfortunate that, for some segments of our society, the kind of indiscretions notoriously committed by the police during the apartheid era, characterised by the lack of regard for one's humanity, remain a contemporary reality.

[163] I have had the benefit of reading the judgments of my colleagues Mhlantla J (the first judgment) and Jafta J (the second judgment). I agree that the appeal must be upheld but, unlike the first and second judgments, I am of the view that all three paragraphs of section 13(7) – that is paragraphs (a), (b), and (c) – of the SAPS Act are constitutionally problematic.

Background facts

[164] The facts in this matter illustrate the enormous transgressions on the lives of the poor, such as the applicants, and are a stain on our foundational constitutional values, including human dignity, equality and freedom. Our constitutional democracy demands that officials must be held accountable. The preamble of the SAPS Act directs members of the South African Police Service to *uphold and safeguard* the fundamental rights of every person as guaranteed in the Bill of Rights.[174] Similarly, under international law, General Recommendation XIII issued by the Committee on the Elimination of Racial Discrimination (CERD Committee) recognises that the obligation to protect human rights "very much depends upon national law enforcement officials who exercise police powers, especially the powers of detention or arrest".[175]

[173] Krüger "The South African Constitutional Court and the Rule of Law: The *Masethla* Judgment, a Cause for Concern?" (2010) 13 *Potchefstroom Electronic Law Journal* 468 at 479.

[174] The Preamble to the SAPS Act provides:

> "[T]here is a need to provide a police service throughout the national territory to—
>
> (a) ensure the safety and security of all persons and property in the national territory;
>
> (b) uphold and safeguard the fundamental rights of every person as guaranteed by [Chapter 2] of the Constitution."

[175] General Recommendation XIII on the Training of Law Enforcement, UN Doc A/48/18 (1993) at para 2.

[165] The applicants complain of the repetitive raids by the police accompanied by other officials. In this case, much fanfare was made by the former mayor of the city of Johannesburg (City) in the media that the purpose of the raids was to bring back the rule of law and "criminals must know that they might run but there is no place for them to hide".[176] The High Court found that, save for a handful of undocumented immigrants, there was no evidence of illegalities at the applicants' homes.

[166] The applicants point out that the raids were an occasion for state-sanctioned racism and xenophobia and the repeated humiliation of the poorest and most vulnerable members of our society. The High Court also found that members of the police and Johannesburg Metropolitan Police Department officers arbitrarily detained those applicants "who looked too dark".[177] The last raid took place in the early hours of the morning and at that raid, women and children were made to stand on the street. An elderly woman was made to undress from her night clothes in front of a Johannesburg Metropolitan Police Department officer and a community leader was frogmarched out of the building in his underwear. All this misconduct by the police and others in the employ of the respondents is egregious and harks back to our pre-democratic days.

[167] These raids took place over a 10-month period with some homes raided five times. These raids were part of some 39 other raids in central Johannesburg. The applicants ask this Court to recognise the scale and depth of these violations and to declare section 13(7) constitutionally invalid in its entirety so as to ensure that they do not happen again.[178]

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[176] Anderson "City of Joburg arrests 272 undocumented immigrants during property raid" *The South African* (3 May 2018), available at https://www.thesouthafrican.com/news/city-of-joburg-arrests-272-undocumented-immigrants/.

[177] High Court judgment above n 2 at para 100.

[178] Notably, former Deputy Chief Justice Moseneke, writing extra-curially, once remarked that:

> "Ours is a 'never and never again' Constitution. At its inception, it had several purposes, but two were foremost. The one objective was to shut the door firmly on what Mr Mandela called the 'oppression of one by another'. The Constitution has and continues to afford us the opportunity to turn our backs firmly on a dim and painful past. The other prime objective is aspirational, and therefore transformative. Its hope is that there will be 'justice, peace, work,

[168] These violations illustrate the humiliation and disregard of persons who live in poor socio-economic circumstances. None of these violations were carried out on residents who live in more affluent parts of the Johannesburg Metropolitan area and who seem to have been protected from these human rights violations. The authorities' selection of which building to cordon off leads to the conclusion that this choice was informed by racial profiling. The CERD Committee defines racial profiling in General Recommendation No 36 in the following terms:

> "Racial profiling is: (a) committed by law enforcement authorities; (b) is not motivated by objective criteria or reasonable justification; (c) is based on grounds of race, colour, descent, national or ethnic origin or their intersection with other relevant grounds, such as religion, sex or gender, sexual orientation and gender identity, disability and age, migration status, or work or other status; (d) is used in specific contexts, such as controlling immigration and combatting criminal activity, terrorism or other activities that allegedly violate or may result in the violation of the law."[179]

[169] The Inter-American Commission on Human Rights has noted that racial profiling is often used as a tactic under the guise of public safety and protection while, in reality, it is motivated by racial and other stereotypes rather than objective suspicions.[180] The CERD Committee has cautioned that racial profiling can result in, among other things, the "over criminalisation of certain categories of persons", the "reinforcement of misleading stereotypical associations", disproportionate imprisonment and increased vulnerability of certain categories of persons to abuse by law enforcement officials.[181] The CERD Committee specifically requires states to

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> bread, water and salt for all [and that for each] the body, the mind and the soul [will be] freed to fulfil themselves'."

See Moseneke "Separation of powers: Have the courts crossed the line?" *GroundUp* (24 July 2015), available at https://www.groundup.org.za/article/separation-powers-have-courts-crossed-line_3152/.

[179] General Recommendation No 36 on Preventing and Combating Racial Profiling by Law Enforcement Officials, UN Doc CERD/C/GC/36 (2020) (General Recommendation No 36) at para 13.

[180] Inter-American Commission on Human Rights, *The Situation of People of African Descent in the Americas* OEA/Ser.L/V/II, (2011) at para 143.

[181] General Recommendation No 36 above n 179 at para 30.

establish oversight measures in order to prevent and combat racial profiling by law enforcement officials.[182]

[170] The effect of the raids on women and children is manifest, having been put through these terrifying and repeated raids. Their rights to privacy and dignity have been fully referred to in the first judgment.

[171] The effect of intersectional discrimination in our constitutional jurisprudence has been recognised.[183] It means that there must be an acknowledgment that discrimination "may impact on an individual in a multiplicity of ways" because of their structural position in society.[184] The framework of intersectionality is relevant as these raids were directed as a "clean up" of areas consisting of poor and marginalised foreigners in South Africa.

[172] The intersectional impact on the lives of these applicants ought to be recognised. It is no coincidence that the applicants are Black and poor residents of an underprivileged neighbourhood in the City, whose race and social class make them vulnerable to this kind of ill-treatment. In addition, the power dynamic between them and the respondents compounds their vulnerability to discrimination and harassment. The applicants are people trying to eke out a living only to find themselves at the mercy of the police and other officials. All this illustrates an aggravation of the intersectional impact.

[173] Crenshaw's theory on intersectionality urges that consideration should be given to race, gender and class elements in every case.[185] The infringements in this case are blatant and an intersectional analysis illustrates the context of the unequal power

[182] Id at para 53.

[183] *Mahlangu v Minister of Labour* [2020] ZACC 24; 2021 (2) SA 54 (CC); 2021 (1) BCLR 1 (CC) at para 76.

[184] Id.

[185] Crenshaw "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) 1989 *University of Chicago Legal Forum* 139.

dynamic between the respondents and the applicants in light of the latter's socio-economic circumstances. Furthermore, the aggravated impact on the lives of the applicants viewed through the prism of an intersectional analysis illustrates that, in order to ensure systemic and structural change which empowers the poor and voiceless, this Court must declare the entire section 13(7) unconstitutional. In the absence of section 13(7) being declared invalid, there remains an opportunity for the wide-ranging powers to be abused. This is so because the Constitution endorses not only formal equality, but substantive remedial equality in which the full potential of each person can be realised irrespective of race, gender, social origin or other status.

[174] It is therefore important that this blot on our constitutional democracy should never happen again.

The legislative scheme of section 13(7) of the SAPS Act

[175] Section 13(7) has been quoted in full in the first judgment as well as the order. In short, the National or Provincial Commissioner may, where it is reasonable in the circumstances in order to *restore public order* or *to ensure the safety of the public* in a particular area, "in writing authorise that the particular area or any part thereof be cordoned off",[186] for a period not exceeding 24 hours.[187] Then, in accordance with the first judgment, in terms of section 13(7)(c) the police are then obliged to cordon off the area.

[176] The powers in section 13(7)(a) and (b) are vague yet far reaching in their implementation. The respondents' assertion that the wide powers under section 13(7) are justified on the basis of bomb threats or insurgent attacks overlooks the applicants' argument that the section plainly confers wide powers on the police in circumstances above and beyond such genuine public safety emergencies. The ease with which the applicants were exposed to repeated raids shows how easily the National or Provincial

[186] Section 13(7)(a) of the SAPS Act.

[187] Section 13(7)(b) of the SAPS Act.

Commissioners can simply form the opinion that if it is reasonable to restore public order, an area can be cordoned off. The publicity and fanfare which accompanied the raids made for sound bites and publicity for a civic office bearer, thus demonstrating how easily a National or Provincial Commissioner can be persuaded to deploy these powers for an ulterior motive or for political point-scoring.

[177] This Court in *Dawood* stated that "[i]t is an important principle of the rule of law that rules be stated in a clear and accessible manner".[188] Even if large-scale searches are to be carried out simultaneously, the provisions of the Criminal Procedure Act (CPA) will suffice. The police and other officials in this particular operation obviously had enough time to co-ordinate their efforts and to do so on repeated occasions, and this demonstrates that they had sufficient time and opportunity to obtain warrants for their searches. What occurred here is indicative of careless policing, characterised by short-cut methods intended to achieve a fear-inducing impact. This undermines the protection afforded by the Constitution.

Integrated jurisdictional requirements of section 13(7) of the SAPS Act

[178] There is a close relationship between all three paragraphs within section 13(7) of the SAPS Act. I consider that paragraphs (a), (b) and (c) are inter-linked and, as such, a finding of unconstitutionality in respect of one paragraph must, of necessity, trigger the same finding in respect of the other paragraphs. The applicants are correct when they assert that there are three sets of integrated jurisdictional requirements and each paragraph is dependent on the other two for its meaning and effect.

[179] Most importantly, the applicants argue that only severing paragraph (c) would leave an inchoate power that would be open to abuse. In my view, the applicants are correct in this regard. In addition, the respondents' submissions in response to these concerns provide cold comfort to genuine fears of police abuse and misconduct. For

[188] *Dawood* above n 61 at para 47.

example, the respondents argued that sections 13(1)[189] and 13(3)(a)[190] of the SAPS Act require members of the police to act with due regard to the affected persons' constitutional rights when exercising their powers. As stated above, this line of reasoning was rejected by this Court in *Dawood* when it stated:

> "There is, however, a difference between requiring a court or tribunal in exercising a discretion to interpret legislation in a manner that is consistent with the Constitution and conferring a broad discretion upon an official, who may be quite untrained in law and constitutional interpretation, and expecting that official, in the absence of direct guidance, to exercise the discretion in a manner consistent with the provisions of the Bill of Rights. Officials are often extremely busy and have to respond quickly and efficiently."[191]

[180] An immediate problem emerges when a policeman in the cordoned off area, acts with extensive powers and can, without a warrant, search any person, premises or vehicle, or any receptacle or object of whatever nature, in that area. It provides a lawful umbrella which unleashes unbridled power for an ordinary member of the police to act as he or she wishes. It follows therefore that if the power is vested in the Police Commissioner in paragraph (a) to authorise, in writing, an area to be cordoned off, which then results in the extensive powers in paragraph (c), then the source of that power is unbridled and should also be unconstitutional. Even the excision of paragraph (c) leaves undefined the nature of the police activity in the cordoned off area. I agree with the applicants when they submit that the *raison d'être* (reason for being) for paragraphs (a) and (b) of subsection (7) is paragraph (c).

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[189] Section 13(1) of the SAPS Act provides:

> "Subject to the Constitution and with due regard to the fundamental rights of every person, a member may exercise such powers and shall perform such duties and functions as are by law conferred on or assigned to a police official."

[190] Section 13(3)(a) of the SAPS Act provides:

> "A member who is obliged to perform an official duty, shall, with due regard to his or her powers, duties and functions, perform such duty in a manner that is reasonable in the circumstances."

[191] *Dawood* above n 61 at para 46.

[181] Notably, in *Dawood*, this Court also rejected the argument that because the state is obliged to respect, protect and fulfil the rights in the Bill of Rights, officials can be trusted to exercise their discretion in a way that protects constitutional rights, irrespective of how unfettered that discretion is in terms of the empowering provision.[192]

[182] In *Manamela*[193] and *EFF,*[194] this Court found that the onus is on the state to demonstrate that the limitation of rights is justified in terms of section 36. In my view, in this matter, the respondents have failed to discharge that onus. Notably, in *EFF* this Court said:

> "The limitation must *demonstrably be in the interests of the public* and *appropriately tailored* so as not to deny citizens their fundamental rights where this could have been avoided."[195]

[183] Whilst the objectives of the cordoning off, which are to restore public order or ensure the safety of the public, are self-evidently important objectives, this is not the end of the enquiry. The approach in *EFF* is quite similar to the issues raised in this matter. The following observation was made in *EEF* about engaging in a limitations analysis where the object of the statute is the preservation of public order and/or fighting crime:

> "[The impugned provision] is sought to be saved from invalidation merely because, like all other criminal legislation, *it serves the common or ordinary purpose of crime prevention*. What is, however required is that the purpose of criminal legislation, like the Riotous Assemblies Act, be much more than the ordinary need to protect society from potential "harm", to pass constitutional muster. *Additional to being legitimate,*

[192] Id at paras 46-7.

[193] *S v Manamela (Director-General of Justice Intervening)* [2000] ZACC 5; 2000 (3) SA 1 (CC); 2000 (5) BCLR 491 (CC) at para 49.

[194] *EFF* above n 88 at para 62.

[195] Id at para 50.

> *the purpose must still be specific, pressing and substantial* for that legislation to be regarded as reasonable and justifiable in its limitation of free expression."[196]

[184] The High Court referred to the frequency and regularity of the raids on the applicants' homes over the period of 30 June 2017 to 3 May 2018. The Court found that this "demonstrated a manifest propensity on the part of the police, the City and the Department of Home Affairs to engage in illegal raids" at will by using their unconstrained powers. Even where the aim of a statute is to strengthen crime prevention, it must still demonstrate that it is "appropriately tailored" to achieve that objective.[197]

[185] Whilst a reading of paragraphs (a) and (b) of section 13(7) may appear facially neutral, their application and implementation introduces vulnerabilities, and I agree with the applicants' contention that the impugned provisions are unconstitutional because of their effect and application. In the case of *Yick Wo*,[198] the Supreme Court of the United States held that a law which is neutral on its face could nevertheless fall foul of the equal protection clause based on the disproportionate and discriminatory administration of the law in question. The Court remarked:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."[199]

[186] It is not a coincidence, that *Yick Wo* also concerned a city administration bent on inflicting harm on a vulnerable group of residents (who incidentally were also foreign

[196] Id at para 49.

[197] Id at para 50.

[198] *Yick Wo v Hopkins* 118 US 356 (1886).

[199] Id at 373-4.

nationals) by using "public safety" as a smokescreen when its real motivation was racist and xenophobic in nature.

[187] Whilst no South African court has applied the principle in *Yick Wo* before, this principle is apt in light of the non-racist and egalitarian values of our Constitution. In my view, this principle applies perhaps with even more force in our constitutional context.

The interpretation of section 13(7) of the SAPS Act as a whole

[188] I cannot agree with the approach that paragraphs (a) and (b) of section 13(7) are not constitutionally problematic once the provision providing for warrantless searches in terms of paragraph (c) is excised from the SAPS Act. After the excision of paragraph (c), the first judgment is left with the directive that the police must then cordon off the area. This leaves paragraph (a) and (b) inchoate, meaning the powers are left in a state of partial completion. Once the Commissioner makes the decision that the area must be cordoned off for a period not exceeding 24 hours, the statute fails to define how the operation is to be carried out. In my view, this approach, which I describe as inchoate, leaves the far-reaching nature of the powers provided by paragraphs (a) and (b) wide and subject to abuse.

[189] Even the reduced ambit of paragraph (c) in the first judgment, which provides that the area be cordoned off, leaves the police with undefined and wide powers if paragraphs (a) and (b) are still present.

[190] The High Court proceeds from the premise that, because section 13(7) serves a legitimate governmental objective, this means its intrusion into constitutional rights is tolerable. This approach however contradicts what this Court recently said in *EFF*, where it warned:

> "An approach to the justification analysis that seems to move from the premise that a legitimate governmental objective for the limitation automatically renders the

> limitation reasonable and justifiable or somehow shifts the burden to citizens to explain what is wrong with the limitation or why their constitutional rights deserve protection, would be misplaced. *The purpose for the limitation, however legitimate and laudable, must still earn its juxtaposition to the right it inhibits*. *The burden to prove that it passes constitutional muster rests primarily on the State. And that is so because the obligation to give these rights the space to flourish rests on the same State that may limit them, in a constitutionally permissible manner*."[200]

[191] The first judgment and the High Court judgment, in accepting the constitutionality of paragraphs (a) and (b), conflate the question of the importance of the purpose of the limitation with the question of whether the limitation on rights is constitutionally justified.

[192] Furthermore, as this Court pointed out in *Manamela* and *EFF*, the onus is on the state to demonstrate that the limitation of rights is justified in terms of section 36.[201] In my view, in this matter, the respondents have failed to discharge that onus.

[193] In addition, when interpreting legislation, it is incumbent on courts to consider international law.[202] As demonstrated above, the jurisprudence of the CERD Committee leads to the conclusion that the impugned provision can be interpreted as a textbook example of racialised policing, which is contrary to the state's international obligations to ensure substantive racial equality in the criminal justice system.

[194] I will now proceed with a limitation analysis to demonstrate why I say so.

The nature of the right

[195] One must accept that there is a constitutional limit to the right to privacy, but that depends on whether the limitation is reasonable and justifiable under section 36.

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[200] *EFF* above n 88 at para 40.

[201] See *Manamela* above n 193 and *EFF* above n 88.

[202] Section 233 of the Constitution.

[196] It is accepted that paragraph (c) infringes the right to privacy. Paragraphs (a) and (b) are the safeguards in place to limit the infringement. They stipulate that warrantless searches under paragraph (c) can only occur where the National or Provincial Commissioner has given written authorisation to cordon off an area. They also stipulate that warrantless searches can only take place where it is reasonable to *restore public order* or *ensure the safety of the public* in that area; and only if the period (not exceeding 24 hours) is specified. Paragraph (c) then allows warrantless searches and seizures only "where it is reasonably necessary in order to achieve the object specified in the written authorisation".

[197] With these safeguards and the above jurisprudence in mind, are they sufficient to justify the limitation of the right to privacy? Although the limitation has an important purpose, the above jurisprudence assists us in showing that the nature and extent of the limitation is extreme, and that there are certainly less restrictive means available. As in *Gaertner* the powers in section 13(7) could "be exercised anywhere, at whatever time [within the 24-hour period] and in relation to whomsoever, with no need for the existence of a reasonable suspicion, irrespective of the type of search."[203]

[198] Firstly, the SAPS Act does not specify what types of premises may be searched. Any premises, person, vehicle or object may be searched. This includes a person's home (the inner sanctum of the right to privacy), their vehicles, and if they are not in their home but are walking in the cordoned off area, the search may also extend to their personal items (handbags etc.). These are certainly interferences by the state in one's "personal life",[204] even though they are outside of the home itself. Section 13(7) is thus extremely broad.

[203] *Gaertner* above n 54 at para 66.

[204] Id at para 47.

[199] Secondly, section 13(7) does not specify at what time searches may occur, except to say that the period must be specified and may not exceed 24 hours. This means that searches may occur unexpectedly and without a warrant in the middle of the night – an extremely intrusive measure. Ordinarily, a warrant would indicate to a person at what time and for how long the search of their premises may last – here, the search could last as long as 24 hours with people standing within or outside of the cordoned off area. It also does not preclude consecutive periods and repeated authorisations could thus be granted, permitting an endless number of intrusive searches.

[200] Thirdly, the police officer conducting the search and seizure may search anything where it is reasonably necessary to achieve the object in the written authorisation. However, the written authorisation is not required to specify the precise object of cordoning off the area – paragraph (a) merely permits cordoning off to restore public order or to ensure the safety of the public in the area. As a result, police officers are left with a wide discretion to decide what is reasonably necessary to achieve that object. They are not required to have a reasonable suspicion that each premise, person, vehicle or object they search is related to a particular, narrowly specified type of offence or threat, and could thus search anything at all in the area. A warrantless search is also permitted in situations where it is not urgent, and where obtaining a warrant wouldn't defeat the purpose of the search.

[201] Fourthly, the provision does not specify the manner in which the search must be conducted. As in *Gaertner*, the police officials could break into dwellings and break up floorboards.[205] The facts indicate that the respondents have similarly behaved in this manner, and worse. If searches occur without a warrant, which generally specifies the manner and limits of the search, the above jurisprudence indicates that the empowering legislation must instead provide clear limitations to prevent a greater intrusion than necessary.

[205] *Gaertner* above n 54.

[202] Finally, section 13(7) does not provide for "differentiation as to the nature of the search or the nature of the premises searched".[206] This has resulted in warrantless searches in these regularly cordoned off areas being the rule instead of the exception.[207] This is exacerbated by the fact that the bar for a Commissioner to authorise cordoning off an area is very low – with crime rates in South Africa being what they are, almost any area in South Africa could reasonably be cordoned off for crime detection and prevention (which would ensure the safety of the public in that area). This creates a loophole for unscrupulous persons to search anything without a warrant or a reasonable suspicion, and thus opens the process up to abuse.

[203] *Gaertner*, read with *Dawood*, tells us that it is not enough to simply accept that the police officers are generally required to act constitutionally, and that they may exercise their discretion in this regard.[208] In fact, legislation infringing the right to privacy is required to limit the officials' discretion as much as possible. The respondents' argument in this regard is thus misguided.

[204] It is trite that the rights to dignity and privacy are fundamental constitutional rights. Dignity, in particular, is not only a foundational value, but also a justiciable constitutional right.[209] In addition, there is a close relationship between the rights to dignity and privacy. When understanding the scope of the right to privacy, this Court has stressed our historical context and how we have recently transitioned from being a police state to a constitutional democracy.[210] The first judgment is correct that the High Court erred when it limited its considerations of privacy to the so-called inner sanctum and one's home in this regard. Rather, the right to privacy extends beyond such confines and concerns the entirety of one's personal life. Given the wide scope of the impugned law, it is clear that any person or object found within the cordoned off area may be

[206] *Estate Agency* above n 53 at para 40.

[207] *Kunjana* above n 14 at para 27.

[208] *Gaertner* above n 54 and *Dawood* above n 61.

[209] *Dawood* id at para 35.

[210] *Mistry* above n 15 para 25.

searched regardless of whether there is a reasonable suspicion that there is any relationship between the person or object and a threat to public safety or public order.

The importance of the purpose of the limitation

[205] The High Court was correct when it found that the impugned provision serves a legitimate governmental objective: namely, combatting crime and ensuring that the police fulfil their constitutional mandate to this end. This view is endorsed by the first and second judgments.

[206] In my view, the objectives of the cordoning off are to restore public order and to ensure the safety of the public. While these objectives are self-evidently important, this is not the end of the enquiry. This Court's approach in *EFF* is relevant to the issues raised by this matter. There, this Court stressed that it is not sufficient that the statute serve the common or ordinary purpose of crime prevention.[211] Rather, the Court held that over and above being aimed at crime prevention, the statute must serve a purpose which is also "specific, pressing and substantial".[212]

[207] In *EFF*, this Court stated further that, even where the aim of a statute is to strengthen crime prevention, it must still demonstrate that it is "appropriately tailored" to achieve that objective.[213] As such, it must interfere with fundamental rights no more than is necessary to achieve that objective. The mere fact that a statute strengthens crime prevention and assists the police in discharging its constitutional objectives is not sufficient to justify a limitation of rights; especially so egregious an infringement as we have seen in the present matter.

[211] *EFF* above n 88 at para 49.

[212] Id.

[213] Id at para 50.

The nature and extent of the limitation

[208] It cannot be gainsaid that the nature and extent of the limitation on the relevant rights is far-reaching. The High Court acknowledged as much, albeit in respect of paragraph (c), and observed the state's egregious conduct in this regard when it said:

> "[I]ndeed, the frequency and regularity of the raids on the applicants' homes, over the period 30 June 2017 to 3 May 2018, *demonstrate a manifest propensity on the part of the police, the City and the Department of Home Affairs to engage in illegal raids at will*. The applicants certainly have a clear right not to have their privacy, dignity and homes invaded by warrantless searches. As already established, a sizeable number of applicants have already suffered the harm of such an invasion multiple times. *Neither the City nor the other respondents have denied the threat to repeat the raids on the applicants' homes in the future. The applicants have a reasonable apprehension that the raids will be repeated in future and there is no other effective remedy opened to them.*"[214]

[209] The High Court also remarked that the extent of the limitation was "substantially disproportionate to its public purpose".[215]

[210] In my view, whilst these remarks were made in respect of only paragraph (c), the same can be said of the entire provision. It is notable that the terms "ensure the safety of the public" and "restore public order" are not defined in the SAPS Act. Furthermore, the respondents failed to proffer any precise definition of these concepts. It seems to me that these concepts (far-reaching as they are) can be invoked quite arbitrarily wherever a very general concern of crime and disorder can be made out. In light of the high crime rate in South Africa and the manner in which poor and vulnerable communities suffer disproportionately from violent and serious crimes, it stands to reason that such broad powers can be abused and used for discriminatory ends. The discriminatory ends to which the impugned provisions can and have been used undermine the constitutional guarantee of establishing a "non-racial" society. They

[214] High Court judgment above n 2 at para 106.

[215] Id at para 40.

further endorse intersectional forms of discrimination that are abhorrent to the constitutional mission to heal the injustices of the past and move beyond the indignities of apartheid-era policing. The impact on racial equality is also inconsistent with the state's obligations in terms of the International Convention on the Elimination of All Forms of Racial Discrimination.

[211] In my view, even if paragraph (c) were excised from the SAPS Act, the jurisdictional requirements to invoke the cordoning off power would be too low. Because the terms "public safety" and "public order" are not defined in the SAPS Act, the impugned provision confers wide and unbridled powers on the respondents. The facts of this matter illustrate the discriminatory ends to which such an unfettered power can be deployed. It is my view that such a power is plainly inconsistent with a society founded on the rule of law and respect for fundamental rights including dignity and equality.

The relation between the limitation and its purpose

[212] Besides general concerns about public disorder (which could apply to many parts of South Africa, mind you), the respondents have failed to articulate a specific purpose that the impugned law seeks to achieve and the relationship between this purpose and the limitation it imposes. In my view, based on this Court's reasoning in *EFF*, the relationship between the limitation and its purpose in this case is tenuous at best. The respondents have failed to establish a direct link between the arbitrariness that flows from the far-reaching power to cordon off areas, and harass members of the public at will, which inevitably entails a degree of arbitrariness, and the public safety achieved by the exercise of these wide powers.

Less restrictive means

[213] It has already been said that the impugned law is disproportionate to its purpose. It also fails to adhere to the standards for intrusion into privacy established by this Court. For example, in *Kunjana*, this Court found that laws which infringe the right to privacy

will be constitutionally problematic if they do not specify the time; place or manner of a search.[216] Applying the less restrictive means test, this Court also found the impugned law problematic because it enabled searches in all cases even where urgency had not been established and where there was no danger that the items would be lost or destroyed.[217]

[214] Similarly, in this matter, even if the first judgment severs paragraph (c) of section 13(7), the remainder of section 13(7) will still be problematic. Whilst it says the search may be for 24 hours, it suggests that a place can be cordoned off at any time – even in the early hours of the morning or the middle of the night. Furthermore, once the first judgment severs the warrantless search provisions, it will no longer be clear what powers the police have, when they cordon off an area. It therefore seems that it is entirely at their discretion what they may then do within the cordoned off area to preserve public order or safety. I agree with the applicants that severing paragraph (c) will leave behind an inchoate power that is equally ripe for abuse.

[215] In my view, the law is clearly disproportionate because the terms "public order" and "ensure the safety of the public" are given no definition. Furthermore, as pointed out above, the law can be invoked even where there is no genuine emergency such as a bomb threat, terrorist attack, insurrection, or other public emergency.

[216] The applicant is also correct that the police can still invoke Chapter 2 of the CPA, which defines the circumstances under which searches with or without warrants may take place. In these circumstances, the warrant must be justified and police officers must, on request, hand a copy of the warrant to the individual concerned. Even where there is no time to obtain a warrant, as set out in section 22 of the CPA, the police officer must believe that a warrant would have been issued in terms of section 21(1) of the CPA. This section requires that there must be reasonable grounds to obtain the search

[216] *Kunjana* above n 14 at paras 21-4.

[217] Id at paras 25-32.

warrant. The CPA goes on to provide protection to a citizen who has been wronged during or as a result of such search.

[217] In terms of section 28 of the CPA, where a police officer acts contrary to the warrant, he or she shall be guilty of an offence and liable to pay a fine not exceeding R600 or imprisonment for a period not exceeding six months.[218] Should a police officer be so convicted, there is also a remedy for the injured person in the form of compensation in terms of section 300 of the CPA.[219] Section 13(11) of the SAPS Act also provides for the cordoning off of an area which is adjacent to the scene where the offence or alleged offence took place for investigation purposes.[220] Thus, less restrictive means clearly exist, and more accountability is introduced when searches and cordoning off are carried out within the prescripts of the CPA.

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[218] Section 28 of the CPA provides:

> "(1) A police official—
>
> (a) who acts contrary to the authority of a search warrant issued under section 21 or a warrant issued under section 25(1); or
>
> (b) who, without being authorised thereto under this Chapter—
>
> (i) searches any person or container or premises or seizes or detains any article; or
>
> (ii) performs any act contemplated in subparagraph (i), (ii) or (iii) of section 25(1),
>
> shall be guilty of an offence and liable on conviction to a fine not exceeding R600 or to imprisonment for a period not exceeding six months, and shall in addition be subject to an award under subsection (2)."

[219] Section 300 of the CPA provides:

> "(1) Where a person is convicted by a superior court, a regional court or a magistrate's court of an offence which has caused damage to or loss of property (including money) belonging to some other person, the court in question may, upon the application of the injured person or of the prosecutor acting on the instructions of the injured person, forthwith award the injured person compensation for such damage or loss: Provided that—
>
> (a) a regional court or a magistrate's court shall not make any such award if the compensation applied for exceeds the amount determined by the Minister from time to time by notice in the Gazette in respect of the respective courts."

[220] Section 13(11) of the SAPS Act provides:

> "(a) A member may, for the purposes of investigating any offence or alleged offence, cordon off the scene of such offence or alleged offence and any adjacent area which is reasonable in the circumstances to cordon off in order to conduct an effective investigation at the scene of the offence or alleged offence.
>
> (b) A member may, where it is reasonable in the circumstances in order to conduct such investigation, prevent any person from entering or leaving an area so cordoned off."

[218] As such, based on this Court's recent approach to overbreadth in *EFF*, the impugned law would certainly be considered unconstitutional for overbreadth because it does not seek to achieve a *specific, pressing and substantial purpose*, which would justify the egregious violation of constitutional rights it enables. And to the extent that such a purpose has been identified, it is not appropriately tailored so as to minimise its effect on constitutional rights. The onus was on the police to justify the serious infringement of rights occasioned by the impugned law. In my view it failed to do so.

Conclusion

[219] Section 13(7) of the SAPS Act seeks to do no more than serve the purpose of crime prevention. There can be no doubt that in the context of South Africa's high crime rate this is an important and legitimate objective. However, for the reasons outlined above, the section is clearly disproportionate to its purpose and has been deployed for an ulterior purpose, namely, to systematically persecute the residents of a neighbourhood branded as "undesirable" by the respondents. That such a manifest violation of rights can take place in the new dispensation gives rise to concerns that the Constitution does not mean much for those who, due to their race, gender, class, or other status, may be brutalised by the police with no fear of consequences. It further gives rise to the concern of what the Bill of Rights means for people such as the applicants who are impoverished and who live in conditions of indignity.

[220] The intersectional nature of the harms suffered by the applicants calls for an intersectional remedy which will bring about transformative equality.[221] In my view severing section 13(7) in its entirety is the kind of remedy which will restore the dignity of the applicants and result in the kind of structural changes which will moderate the conduct of the police. The severance of the impugned provision will ensure that the

[221] The importance of crafting an intersectional remedy to respond to intersectional discrimination was recently underscored by this Court in *Mahlangu* above n 183 at para 128, where this Court said:

> "The fact that this case concerns intersectional discrimination is a relevant factor in determining whether a retrospective order should be granted. As discussed above, I am hopeful that the inclusion of domestic workers in the definition of 'employee' under COIDA will contribute towards the amelioration of systemic disadvantage suffered by these women and contribute to breaking the cycle of poverty they suffer."

unfettered powers resulting in discrimination and harassment are permanently excised from our statute books.

[221] For all these reasons, I would declare section 13(7) unconstitutional and invalid in its entirety.

[222] On the question of constitutional damages, I concur with the reasoning in both the first and second judgments. In particular, I agree with the emphasis in the second judgement that constitutional damages are not appropriate in this matter where other forms of relief can be granted.

For the Applicants:	S Wilson, I De Vos and O Motlhasedi instructed by SERI Law Clinic
For the First, Sixth, Seventh and Tenth Respondents:	M Mphaga SC and M Pompo instructed by the State Attorney, Johannesburg