The Conundrum of Two Fellows in The Same Ship: A Comparative Legal Analysis of The Duplicity of Damages in South Africa

Bronwyn Le-Ann Batchelor | ORCID: 0000-0001-7300-131X
BComm (Law) LLB LLM, Head of Faculty, Law Department, Independent Institute of Education, Johannesburg, South Africa
Corresponding Author
bbatchelor@iie.ac.za

Shelton Tapiwa Mota Makore | ORCID: 0000-0002-4515-8122
LLB LLM LLD, Senior Law Lecturer, Department of Mercantile Law, Faculty of Law, University of the Free State, Bloemfontein, Free State Province, South Africa
motamakorest@ufs.ac.za

Abstract

South African law recognizes the common law right of the plaintiff to institute a claim for damages arising from loss caused by the delictual conduct of the defendant. In addition to the claim for common law damages for pain and suffering, insult, shock, past and future medical expenses, and loss of enjoyment of the amenities of life, depending on the nature of the delict, the plaintiff also has the right to claim constitutional damages for the infringement of constitutional rights. On that score, the South African Constitution, 1996 empowers the courts to ‘grant appropriate relief’ and to make ‘just and equitable’ orders in the context of common law and constitutional damages. This has resulted in the duplicity of damages in our law without clear guidance on how these two delictual “fellows” should interact in practical scenarios. Further, the courts have dragged their feet when it comes to the application of constitutional damages largely due to their orthodox approach which militates against the development of constitutional damages in South Africa. This article proposes avenues which enable the courts to take a coordinated approach in the application of these two remedies. It argues that in determining quantum for damages, the court should take a functional and pragmatic approach which is based on the ethos of fairness and equity over and above common law tenets.
Keywords

delictual damages – constitutional damages – duplicity of damages

1 Introduction

The inception of the South African democratic order, which began in 1990, marked the beginning of the process of dismantling an undemocratic apartheid system characterized by negation of fundamental rights and inaugurating a new constitutional order premised on democratic tenets, observance of human rights and respect for the rule of law.¹ This constitutional revolution places an obligation on the State to fulfill its constitutional ‘vowels’ by inter alia, desisting from unjustifiable infringement of people’s fundamental rights.² Nonetheless, the recent and apparent failures of the South African State to discharge its constitutional obligations, which often has fatal consequences, has resulted in the increase of litigants claiming ‘constitutional damages’.³ Whilst a general claim for damage is not novel in our law, since the dawn of the constitutional dispensation, South African courts have been invited to decide on the bourgeoning cases where constitutional damages are considered as viable alternative for vindicating constitutional rights in circumstances where the State through its agencies and proxies has egregiously violated the people’s constitutional rights.⁴

The ever increasing number of litigants claiming constitutional damages in South Africa is being driven by the new constitutional culture which requires the courts to take a transformative constitutional approach when resolving legal disputes.⁵ This means South African courts are grappling with the need to ensure that the application of delictual damages, either by constitutional prism or the common law lens, strikes a balance between remedying constitutional infringements and putting into account South African public policy

---

considerations. In other words, it is pertinent to ensure that the granting of appropriate relief which amounts to a ‘just and equitable’ order in delictual damages in our law should not result in the courts overstepping their power, but rather that the courts fulfill their constitutional duties. Whilst a cautionary approach in applying damages should be taken by the court, this should not amount to a judicial declaration of State immunity which does not form part of a constitutional State. The implication is that legitimate judicial restraint ought not to be confused with the courts abdication of its constitutional mandate of holding the State accountable or with the judicial activism which often leads to a juristocratic state.

It can be strongly argued that the validity of all law, State action, court decisions and the conduct of natural and juristic persons is tested against the Constitution and Bill of Rights in particular, considering that any limitation of a fundamental right must be in accordance with the general limitation clause. The entrenchment of fundamental rights in the Bill of Rights enhances their protection and raises them to a higher status. In exercising this value judgment (determining whether law is valid as tested against the Bill of Rights), the general principles which have already been crystallized in the common law regarding the reasonableness or boni mores criterion for delictual wrongfulness may serve as prima facie indication of the reasonableness of the limitation in terms of the Bill of Rights.

This article analyses the problem of duplicity of damages in a constitutional state with regard to monetary damages as a remedy for a constitutional breach. The first part looks at how the courts have dealt with the inundation of claims relating to the breach of constitutional rights since the introduction of the South African Constitution of 1996 together with the further changes

---

that this Constitution has wrought on the common law. In the second part, the conundrum that this article endeavours to explore is not just whether, but rather how delictual remedies can be sufficiently expanded upon and revolutionised in order to vindicate a constitutional right. It argues that the quest to deal with the duplicity of constitutional and delictual damages in South Africa requires that courts take a precautionary approach which ensures that an award for punitive constitutional damages is not made to a claimant who is already fully compensated for any loss or damage under the common law. The final part proposes that for the common law remedies to be applicable in terms of constitutional infringements, a relaxed approach to the fulfillment of the requirements of a constitutional infringement is required. It argues that the courts should diligently search for the purpose and substance of the remedy as opposed to the procedural correctness.

2 Problematising the Duplicity of Delictual Damages

The primary objective of this article remains to propose some form of legal settlement on the desirability, and practical application of the common law and constitutional damages. More important, the article acknowledges that the lack of a proper approach to the problem of duplicity of damages in our law has resulted in a patched approach to the acceptance of constitutional damages as an indispensable part of the South African constitutional remedies. This problem has been exacerbated by the lack of judicial guidance on the appropriate method of assessment and criteria for granting constitutional damages against state-driven infringement of the people's constitutional

18 Guarav Mukherjee and Juha Tuovinen (n 7) 386.
rights. Although many cases relating to duplicity of damages have been adjudicated so far, with the court preferring to grant constitutional damages, there is still a loophole on when such damages are appropriate, and the determination of relief. Therefore, this article delineates appropriate circumstances where the award of constitutional damages may be deemed prudent. Utilising the legal comparative lenses of Botswana, Namibia and Sweden, the article identifies scenarios where either the common law or constitutional damages are appropriate to the exclusion of the other.

3 Analysing the Intersection Between Constitutional and the Common Law Related Damages

From the perspective of South African law, the question of either basing a claim on the common law or constitutional damages arises from the existence of a delict which is an actionable wrong satisfying five requirements, namely: (a) there must be commission or omission of an act (actus reus), (b) which is unlawful or wrongful, (c) committed negligently or with a particular intent (culpa or fault) (d) which results in or causes the harm and (e) the suffering of injury, loss or damage. The requirements are separate and distinct components of the same actionable wrong with each requirement having its conceptual determinants and test. When reference is made to legally recognised and protected rights one is, in the context of this article, referred to the Constitution and the fact that the South African Constitution enshrines and codifies the rights, which are legally recognised and ought to be protected.
by the State.\textsuperscript{25} Notably, all five requirements of a delict\textsuperscript{26} must of necessity be present before the conduct complained of may be classified as a delict.\textsuperscript{27} It is noteworthy that in South Africa, the determination of delictual liability is mainly governed by the ‘generalised approach’, which allows the conceptualisation of a delict in a manner which is adaptive to changing socio-economic, legal and political environment. Accordingly, the common law remedy should be viewed as dynamic, responsive and applied in a manner which furthers the values of the Constitution, which is the \textit{lex fundamentalis}.\textsuperscript{28}

In determining the existence of a delictual action, damage is a necessity. Conceptually, damage (\textit{damnum}) is said to be the detrimental impact upon any patrimonial or personality interest deemed worthy of protection by the law.\textsuperscript{29} A deduction can therefore be drawn that ‘law’ encompasses the many sources of law that South Africa has developed over the years including the common law, customary law and the Constitution.\textsuperscript{30} The awarding of damages for patrimonial loss, in the form of interest, is achieved through the \textit{actio legis Aquiliae}.\textsuperscript{31} It should be noted that within the definition of a delict reference is made to the infringement of a legally recognised right.\textsuperscript{32} Therefore, it is conceivable that any right protected under the Constitution which is infringed is equally protected and compensated by the common law remedy, that is, the \textit{actio legis Aquiliae} provided that the elements of delict are proven.\textsuperscript{33} In terms of the generalised approach to delictual claims, the requirements of the delictual remedy must be met for the remedy to be awarded. This is possible because the generalised approach to delictual claims allows the adaptation and growth of the common law remedies to provide for changing circumstances.\textsuperscript{34} Without the possibility of this reformation, one would have to envisage a total overhaul

\begin{itemize}
\item[\textsuperscript{25}] Iain Currie and Johan De Waal (n 2).
\item[\textsuperscript{26}] Which refers to the act or omission, wrongfulness, fault, harm and causation.
\item[\textsuperscript{27}] J Neethling, JM Potgieter and JP Visser (n 11).
\item[\textsuperscript{28}] Constitution of the Republic of South Africa, 1996 (n 10).
\item[\textsuperscript{30}] L Meintjes van der Walt and others, \textit{Introduction to South African law: fresh perspectives} (2nd edn, Heinemann/Pearson Education South Africa 2011) 5.
\item[\textsuperscript{31}] A Mukheibir and G Michel, ‘The Price of Sadness: Comparison between the Netherlands and South Africa’ (2019) 22 \textit{PER / PELJ} 3.
\item[\textsuperscript{32}] J Neethling, JM Potgieter and JP Visser (n 11).
\item[\textsuperscript{33}] ibid para 2.
\item[\textsuperscript{34}] ibid para 2.
\end{itemize}
of our legal system to accommodate the changes that South Africa has experienced in the past years.\textsuperscript{35}

Notwithstanding the above, an example of an overlap of conduct which constitutes both a delict and an infringement of a constitutional right is an intentional violation of the right to privacy.\textsuperscript{36} In \textit{Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies intervening)},\textsuperscript{37} the Constitutional Court stated that the net of delictual liability should be cast wider by emphasising its objective and by defining it more widely in order to provide enhanced protection to, \textit{inter alia}, recognised fundamental rights.\textsuperscript{38} The court was also of the opinion that fault and legal causation should fulfill a more important role in limiting liabilities.\textsuperscript{39} A proper application and casting of the delictual elements should dispel the fear of opening the floodgates of liability without limits.\textsuperscript{40}

In the case of an infringement of or a threat to a fundamental right, a prejudiced person is entitled to approach a competent court for ‘appropriate relief’. The court is empowered to grant ‘appropriate relief’ which includes a declaration of a person’s rights in circumstances where the rights enshrined in the Bill of Rights have been infringed. In this respect, there is the possibility of developing a ‘constitutional delict’, in other words, that the infringement of a fundamental right \textit{per se} constitutes a delict and would entitle the injured person to an appropriate delictual remedy. This may result in the overlapping of the remedy for a common law delict and infringement of a constitutional right.\textsuperscript{41} The requirements for a common law-based delict and those of a constitutional wrong differ materially; as a result, not every delict is necessarily also a constitutional wrong entitling the injured person to a constitutional remedy, and vice versa. Besides, unlike the common law delictual remedy, which is aimed at compensation, a constitutional remedy, even in the form of damages, is directed at affirming, enforcing, protecting, and vindicating fundamental rights and preventing or deterring future violations of constitutional rights.\textsuperscript{42}

\begin{thebibliography}{10}
\bibitem{35} J Neethling, JM Potgieter and JP Visser (n 11).
\bibitem{36} ibid para 3.
\bibitem{37} 2001 (4) SA 938 (CC) 962.
\bibitem{38} ibid para 1.
\bibitem{39} ibid para 1.
\bibitem{40} J Neethling, JM Potgieter and JP Visser (n 11).
\bibitem{41} ibid para 3.
\end{thebibliography}
It seems to still be true that there is a lack of extension of the common law remedy in the case of pure economic loss. It is evident that damages, normally in the form of interest as demonstrated by *Kate v Member of Executive Council of the Department of Welfare*, are a just and equitable remedy for the breach of a social assistance right. The pure economic loss of an individual due to the lack of attainment of an economic benefit at the time when the economic benefit should be considered. In terms of damages, interest on the amount which should have been granted at the appropriate time would be awarded in order to compensate the individual for the delay in providing the economic benefit. It is clear that the gradual expansion of the Aquilian action in South African law has not quite reached the desired end. As mentioned above, our law is amenable to change and reform, and therefore such desired end may be reached in due course. Our courts tend to adopt a conservative approach to the expansion of the Aquilian action and will only allow such an extension if it is justified by policy considerations which favour such extension. The forthcoming discussion will determine policy considerations which justify the extension of the Aquilian action to provide a remedy in the cases of pure economic loss. It is common logic that a proposition should never be made without due regard to the consequent social implications. Social assistance in South Africa is financed out of State revenues, mostly through the budget of the national government. The question which the courts confront when there is a breach of the social assistance right in terms of section 27 of

---

43 2005 1 SA 141 SECLD.
44 Noting that interest is merely an example of one of the forms of constitutional damages to be explored and not the only form of constitutional damages provided by South Africa’s judiciary.
46 PJ Visser and JM Potgieter, *Law of Damages* (Juta 1993); *Kate v Member of the Executive Council of the Department of Welfare* 2005 1 SA 141 SECLD; *Member of the Executive Council of the Department of Welfare v Kate* 2006 SCA 46 (RSA).
47 ibid para 1.
48 Such loss which could be occasioned by the infringement of a constitutional right, specifically those enshrined in the 1996 Constitution with relation to socio-economic rights and the social security benefits at section 27 of the 1996 Constitution. Another example is the infringement of the right to dignity which causes pure economic loss by the loss of a contract or tender.
49 It is important to emphasise that South African Social Security law makes a distinction between two major strands of social security: social assistance and social insurance. Social assistance is mainly governed by the Social Security Act 13 of 2004 and financed by the State through taxation whereas social insurance is mainly financed through private insurance schemes, among others.
the Constitution is simply whether there are available State resources which can be used for compensating the victim without foregoing and compromising other important and competing service delivery objectives.

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

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

55 François du Bois (n 52).
for the new era of the movement towards a relaxed approach should provide an effective remedy which is relevant for the infringed person’s needs and simultaneously satisfies the requirements of the common law or the constitutional law respectively.\footnote{JA Robinson and R Prinsloo (n 14).} Bearing in mind the above three criteria for the new era of the movement towards a relaxed approach to remedies, it is important to consider some relevant case law.\footnote{ibid para 1.}

There are several cases that have examined some of the issues discussed above. One of the significant cases is \textit{Member of the Executive Council of the Department of Welfare v Kate},\footnote{2006 SCA 46 (RSA).} which revolves around whether it is permissible to grant constitutional damages to a disabled person who had been deprived of her right to a disability grant. The appellant claimed that during the period in dispute interest did not accrue to Kate on ordinary principles.\footnote{ibid 2 para 1.} In essence, this was a reference to the common law definition of interest and damages, thus linking the idea that for a remedy to be granted it must meet the requirements necessitated by the purpose of the remedy.\footnote{ibid 14 para 2.} It was further noted by the appellant’s counsel that Kate had delictual remedies that were sufficiently restorative of any loss that was caused to her due to the failure of the administration to perform its constitutional duties and that, in those circumstances, the remedy of constitutional damages was not required.\footnote{ibid 14 para 2.} This submission failed and interest as claimed was awarded as a measure of damages for the unreasonable delay that Kate had endured. This case demonstrates that constitutional remedies, specifically in the form of new constitutional damages, are not a remedy of last resort.\footnote{Constitution of the Republic of South Africa, 1996, s 38.} It is suggested that the remedy of constitutional damages is similarly associated with the new, expanded version of the Aquilian action. Pausing here we may ask the question: ‘is the granting of constitutional damages a revolutionised form of the Aquilian action?’

It was recognised in \textit{Fose v Minister of Safety and Security}\footnote{1997 (3) SA 786 (CC).} that, in principle, monetary damages are capable of being awarded for a constitutional breach. In other words, delictual principles are capable of being extended to encompass State liability for the breach of constitutional obligations, but the relief that is permitted by section 38 of the Constitution is not a remedy of last resort, to be looked to only when there is no alternative, indirect means of asserting

\begin{itemize}
\item \footnote{JA Robinson and R Prinsloo (n 14).}
\item \footnote{ibid para 1.}
\item \footnote{2006 SCA 46 (RSA).}
\item \footnote{ibid 2 para 1.}
\item \footnote{ibid 14 para 2.}
\item \footnote{ibid 14 para 2.}
\item \footnote{Constitution of the Republic of South Africa, 1996, s 38.}
\item \footnote{1997 (3) SA 786 (CC).}
\end{itemize}
and vindicating constitutional rights. Judges now have the option of utilising the common law remedy of the Aquilian action or the remedies encompassed in section 38 of the Constitution for the vindication of a breach of a constitutional right. The remedy provided must be appropriate and equitable in the circumstances to provide an effective and efficient remedy. It is pointless to provide a remedy that is merely a façade, which does not in substance provide that relief which the infringed person requires to restore himself or herself to the position in which he or she would have been in had the damage-causing event not occurred.65

The court, in Minister of Health and Others v Treatment Action Campaign and Others (No 2),66 refused to acknowledge that the granting of a monetary order, as opposed to a mere declaratory order, would amount to an unwarranted infringement of the separation of powers. In fact, the court enunciated that it retained the power to exercise some form of supervisory jurisdiction to ensure that its orders are implemented.67 In one case the court awarded punitive interest against State respondents because of the unacceptable way the respondents dealt with the applicant’s application for a social grant.68

It is submitted that the remedy that was granted in Mahambehlala v Minister of the Executive Council of Welfare, Eastern Cape69 was constitutional damages in terms of punitive interest whereas the common law remedy of an Aquilian action has moved away from its punitive nature towards a purely compensatory nature.70 The preceding case revolved around whether an award of damages is an appropriate remedy for the infringement of the constitutional right to social security.71 There is a possible contradiction if one is to utilise the common law Aquilian action to provide punitive interest due to an individual whose constitutional right has been infringed.72 In such a case a constitutional remedy would be more appropriate as it would comply with the requirements of a constitutional remedy whereas the requirements of a common law remedy are in contradiction to what is being provided.

The question remains as to whether a constitutional remedy should be granted at all.73 The infusion of constitutional values into delictual principles

65 This reference obviously points to a delictual claim within a constitutional framework.
66 2002 (5) SA 721 (CC).
67 ibid paras 25, 26–39, 68, 98–112.
68 Mahambehlala v MEC for Welfare, Eastern Cape, and another 2002 1 SA 342 (SE).
69 ibid.
70 ibid para 33.
71 ibid.
72 ibid.
73 Kate O’Regan (n 3).
itself plays a role in protecting constitutional rights, albeit indirectly.\textsuperscript{74} Delictual principles are capable of being extended to encompass State liability for the breach of a constitutional obligation, but the relief permitted by section 38 of the Constitution is not a remedy of last resort, as previously noted.\textsuperscript{75} There will be cases in which direct vindication of a constitutional right is appropriate, such as a direct section 38 remedy.\textsuperscript{76} Our Constitution clearly empowers courts to be the guardians of the Constitution and to ensure that the State respects, protects, and promotes the Bill of Rights.\textsuperscript{77}

In \textit{Mahambehlala},\textsuperscript{78} it was held that failure to consider the applicant’s application within the reasonable time of three months, and the consequent delay of five months, resulted in an unlawful and unreasonable infringement of the applicant’s fundamental right to just administrative action in terms of section 33(1) of the Constitution. As the common law remedies were not adequate to remedy the infringement of the applicant’s right, Elite J held that it was necessary to fashion an appropriate remedy and that his power to do so was to be found in section 38 of the Constitution. He held:\textsuperscript{79}

In the determination of appropriate relief, it is important to bear in mind that, although constitutional remedies will often be forward looking to ensure that the future exercise of public power is in accordance with the principle of legality ... they may also be backward looking. Moreover, in my respectful view, to vindicate the Constitution, one should have regard to the basic values and principles enshrined therein. In this regard section 195(1) of the Constitution is of importance. It provides that public administration should be governed by the democratic values and principles enshrined in the Constitution, including the maintenance of the high standard of professional ethics, the provision of services impartially, fairly, equitably and without bias, and the necessity to respond to the needs of the people. Bearing in mind the observation of Kriegler J in \textit{Fose’s} case ... that appropriate relief means that which is ‘specifically fitted or suitable’, it seems to me that it would be just and equitable for an aggrieved person in the position of the applicant to be placed in the same position which she would have been had her fundamental right to lawful and reasonable administrative action not been unreasonably delayed,

\begin{itemize}
  \item \textsuperscript{74} \textit{Mahambehlala} (n 68) para 44.
  \item \textsuperscript{75} GA Whittaker (n 20).
  \item \textsuperscript{76} \textit{Mahambehlala} (n 68) para 44.
  \item \textsuperscript{77} Constitution of the Republic of South Africa, 1996, s 7(2), 39(2).
  \item \textsuperscript{78} \textit{Mahambehlala} (n 68) para 44.
  \item \textsuperscript{79} Supra note 355 J–356 D.
\end{itemize}
and that relief placing her in such a position would be appropriate as envisaged by the Constitution.

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

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

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

---

80 Mahambehlala (n 68) paras 365C–365D.
81 Mahambehlala (n 68).
82 Mbanga v Member of Executive Council of Welfare Eastern Cape 2001 JDR 328.
83 ibid paras 368I–369B.
84 Carmichele (n 37).
86 ibid.
The warning in Bernstein and Others v Bester NO and Others\textsuperscript{87} is that the common law principles cannot, as a matter of course, be applied to the interpretation of fundamental rights and their limitation. In terms of section 38 of the Constitution, it appears that an award of constitutional damages will only be regarded as appropriate relief if no other effective compensatory remedy is available.\textsuperscript{88} If such a remedy is available, and here delictual remedies in particular can often play an important role, the remedy will be regarded as appropriate constitutional relief if it effectively vindicates the relevant fundamental right and deters future infringements thereof.\textsuperscript{89} The courts will not, mainly for reasons of public policy, readily order a compensatory remedy in circumstances where another effective remedy is available to the prejudiced person as appropriate relief.\textsuperscript{90} An effective remedy can include amending a statute, judicial review of an administrative decision, an appeal against an administrative decision, a declaratory order and an interdict (mandamus). It is apparent that many of the so-called ‘effective’ remedies may be of no practical use to an individual whose right has been infringed.\textsuperscript{91}

A further inconsistency between the granting of constitutional damages and damages in terms of the common law Aquilian action is that in terms of the common law to grant interest the amount must be a liquidated amount whereas in terms of the granting of constitutional damages the amount does not need to be liquidated. This variance was, however, eliminated when the legislature stepped in. Section 2A of the Prescribed Rate of Interest Act 55 of 1975 now provides for the granting of mora interest on an unliquidated debt which at common law was not possible until the debt had been liquidated by either agreement between the parties, by a court of law or an arbitrator.\textsuperscript{92}

\textsuperscript{87} 1996 (2) SA 751 (CC) para 790.
\textsuperscript{88} Dendy v University of Witswatersrand Johannesburg 2005 (5) SA 357 (W) para 369; 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 (Agri Sa and Legal Resources Centre, Amici Curiae) 2004 (6) SA 40 (SCA) para 62.
\textsuperscript{89} Fose (n 64).
\textsuperscript{90} ibid 75 para 63.
4 The Conundrum of Duplicity of Damages and the Restraint Imposed by the Doctrine of Separation of Powers

Having demonstrated the existing variance in the granting of common law and constitutional damages, the discussion now turns to the effect of the separation of powers in the context of duplicity of damages. The doctrine of *tria politica* requires the functions of the State to be generally classified as either legislative, executive or judicial, with each function performed by separate branches of government. The functions of making law, executing the law and resolving disputes through the application of law should be kept separate and, in principle, performed by different institutions. The main purpose of separating functions in this manner is to prevent the excessive concentration of power in a single person or body. In this regard, some judges of the Constitutional Court have recognised that a delicate balance must be developed between the need, on one hand, to control the State by separating powers and, on the other, to avoid defusing powers so completely that the State is unable to take timely measures in the public interest.

A court’s approach to the application, interpretation, and limitation of the Bill of Rights and particularly to remedies for the violation of the Bill of Rights may have serious implications for the doctrine of separation of powers. Since the courts make the final determination on the scope of their own powers, they have developed several mechanisms of self-restraint, which serve to prevent them from interfering with the functions of the other branches of government. For example, in *Soobramoney v Minister of Health, KwaZulu-Natal*, the Constitutional Court refused to order the State to provide treatment to keep a critically ill patient alive due to limited available resources. In the *Minister of Health and Others v Treatment Action Campaign and Others (No 2)*, on the other hand, the Constitutional Court demonstrated that it would not hesitate to order monetary relief which affects policy and has manifest cost

---


96 In re: Certification of the Constitution of the Republic of South Africa 1996 (10) BCLR 1253; *De Lange v Smuts NO and Others* 1998 (7) BCLR 779 para 60.

97 1998 (1) SA 765 (CC).

98 ibid para 52.

99 (n 66).
considerations when it reaches the conclusion that the State has not performed its constitutional obligations diligently and without delay. In respect of State actors, the Bill of Rights applies directly to: (a) the conduct of central, provincial and local government legislators as well as the non-legislative conduct of these legislators,\textsuperscript{100} (b) the administrative action which must, in addition, comply with the criteria listed in the just administrative action right in section 33 of the Constitution and in the Promotion of Administrative Justice Act,\textsuperscript{101} (c) conduct of the organs of State as defined in section 239 of the Constitution, (d) conduct of the executive (although deference will be shown to political decisions taken by the executives, particularly when exercising the constitutional executive and Head of State powers),\textsuperscript{102} and (e) non-lawmaking conduct of the judiciary (the conducting of trials, administrative action).\textsuperscript{103}

Under the Bill of Rights, the infringement of a fundamental right by an administrator's action would have to be authorised by legislation. If it were not, such an infringement would be invalid. Where the infringement of a fundamental right is authorised by legislation it would then pass constitutional scrutiny. Nevertheless, the administrator’s action could still be challenged\textsuperscript{104} on the basis that the infringement did not comply with the requirement of proportionality.\textsuperscript{105} Case law supports the contention that where it is alleged that an infringement of a fundamental right has taken place, the person affected has to prove the infringement of that fundamental right.\textsuperscript{106} The onus of proof will fall to the party attempting to uphold the validity of the administrative action to prove the facts and show absence of a ground of review.\textsuperscript{107}

Section 38 of the Constitution governs remedies in cases of direct application of the Bill of Rights.\textsuperscript{108} It does so in very general terms by simply providing that a court may grant appropriate relief for the violation or threat to fundamental rights.\textsuperscript{109} The source of constitutional remedies may be found in

\textsuperscript{100} Linda Muswaka (n 95).
\textsuperscript{101} Promotion of Administrative Justice Act 3 of 2000.
\textsuperscript{102} ibid s 1.
\textsuperscript{103} ibid.
\textsuperscript{105} Or that any of the grounds of review in Section 6 (2) of Promotion of Administrative Justice Act 3 of 2000 are present.
\textsuperscript{106} *Larbi-Odam and Others v Member of the Executive Council for Education and Another* 1996 (12) BCLR 1612 (B) 1620 (I). *Minister of Education v Harris* 2001 (11) BCLR 1157 (CC). *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC).
\textsuperscript{107} Jacques De Ville (n 104).
\textsuperscript{109} ibid.
legislation, the common law or the Constitution itself.\textsuperscript{110} As has been found, when the target of the remedy is private or State conduct, the source of the remedy will usually be found in the common law, whereas when the law itself is challenged, the remedy will be derived from the Constitution.\textsuperscript{111} Whereas the validity of conduct may be tested against the law including the Constitution, the validity of the law itself is only tested against the Constitution. Like their common law counterparts, constitutional rights and their remedies are complementary.\textsuperscript{112}

The nature of a constitutional remedy is determined by its objects.\textsuperscript{113} The harm caused by violating constitutional rights is not merely harm to an individual applicant, but to society as a whole since the violation impedes the realisation of the Constitution of creating a just and democratic society.\textsuperscript{114} The object of awarding a remedy should be, at least, to vindicate the Constitution and deter future infringements.\textsuperscript{115} The vindication is necessary because harm to constitutional rights, if not addressed, tends to diminish the public’s confidence in the Constitution.\textsuperscript{116} The judiciary bears the burden of vindicating rights by striking effectively at the source of the infringement. The object is to make reality more consistent with the Bill of Rights.\textsuperscript{117} In general, it can be emphasised that constitutional remedies are forward-looking, community orientated and structural rather than backward-looking, individualistic or retributive.\textsuperscript{118} As the Constitutional Court held in the Metro-rail case,\textsuperscript{119} private law damages claims are not always the most appropriate method of enforcing constitutional rights. Private law remedies tend to be retrospective in effect, seeking to remedy loss caused rather than preventing loss in the future. Moreover, the use of the common law remedies to claim damages to vindicate an individual may place heavy financial burdens on the State.\textsuperscript{120}

\begin{thebibliography}{120}
\bibitem{110} ibid.
\bibitem{111} This concept relates to the direct and indirect application of the Bill of Rights.
\bibitem{112} JA Robinson and R Prinsloo (n 14).
\bibitem{114} ibid 10 para 1.
\bibitem{115} ibid 10 para 1.
\bibitem{116} ibid 10 para 2.
\bibitem{117} ibid 11 para 1.
\bibitem{118} ibid 11 para 2.
\bibitem{119} Rail Commuters Action Group v Transnet Limited t/a Metrorail 2005 (2) SA 359 (CC); I Currie and J De Waal, supra note 95.
\bibitem{120} In re: National Education Policy Bill No 83 of 1995 1996 (3) SA 289 (CC) para 46; Dawood v Minister of Home Affairs 2000 (3) SA 936 (CC) paras 17, 59; Rail Commuters Action Group (n 119) para 106.
\end{thebibliography}
5 Duplicity of Damages and the Criteria for Determining the Application of Constitutional Damages

The above discussion has demonstrated that the Constitution places a duty on Courts to craft an order which provides effective legal relief to the persons affected by a constitutional breach in South Africa. The Constitution empowers Courts to make any order that is just and equitable. Without the Courts making an effective relief which is just and equitable, the constitutional rights which have been infringed cannot be vindicated. Over the years, the courts have formulated some guidelines for determining whether constitutional damages as opposed to common law damages will amount to a just and equitable order. This approach tries to provide some settlement to the dilemma of duplicity of damages. In *Fose v Minister of Safety and Security*, the court stated that the circumstances of each case are central in the determination of relief. The courts can only formulate fresh remedies to vindicate the constitutional rights which have been infringed where necessary. In many instances, the common law may be broad enough to encompass all the relief that will be ‘appropriate‘ to remedy the violation of constitutional rights. The ‘appropriate relief‘ may include an award for constitutional damages. The principle is that in situations where there is a paramount need for the State to deploy scarce State resources towards realising other constitutional obligations, courts must not award punitive constitutional damages to a claimant who is already fully compensated.

In *MEC for Department of Welfare v Kate*, the Supreme Court of Appeal laid down further guidelines for determining the appropriateness of constitutional damages. The Court maintained that the following factors, among others, should be considered, (a) the nature and relative importance of the rights that are in issue; (b) alternative remedies that may be available to assert

---

122 Geoffrey Allsop, ‘When should a court award compensation as a remedy for unlawful administrative action?’ (2021) 611 De Rebus 1–44.
123 ibid 2.
124 (n 64).
125 ibid para 38.
126 ibid para 58.
127 ibid.
128 ibid para 59.
129 [2006] 2 All SA 455 (SCA).
130 ibid para 25.
and vindicate the rights; and (c) the consequences of breaching these rights for the claimants.\textsuperscript{131} It is clear from the foregoing that while in some situations the common law damages is effective relief, it does not imply that constitutional damages may be depended on only as a remedy of last resort or as an indirect means of validating constitutional rights.\textsuperscript{132}

Further, the criteria for determining the applicability of constitutional damages were utilised in the recent Life Esidimeni arbitration.\textsuperscript{133} This matter relates to the decision taken by the Gauteng Health Department to terminate a contract with the Life Esidimeni Care Centre. Consequently, about 1400 people suffering from mental illness were transferred to non-governmental organisations who were not duly licensed or qualified to function as care givers to mental health patients.\textsuperscript{134} This unlawful transfer resulted in the death of about 144 mental health care patients because of improper treatment and trauma.\textsuperscript{135}

The arbitration award concluded that the State had infringed a number of constitutional rights.\textsuperscript{136} Considering the degree of suffering, emotional shock, trauma and inhumane treatment of the mental health care patients, the arbitrator concluded that the only viable way to vindicate their rights was awarding of constitutional damages in addition to the amount already awarded for emotional shock and trauma.\textsuperscript{137} The arbitration award observed that government officials had completely disregarded and neglected their constitutional duties by making a decision to terminate the Life Esidimeni contract without considering the possible consequences which ensued.\textsuperscript{138}

In \textit{Komape and Others v Minister of Basic Education},\textsuperscript{139} a case which involves the tragic death of a grade R pupil in Polokwane who drowned in a pit latrine,\textsuperscript{140} the pupil’s family sought relief in the Limpopo Division of the High Court in Polokwane. They based their claim on, \textit{inter alia}, constitutional damages.\textsuperscript{141} The family argued that the degree of the State’s violation of constitutional rights coupled with the clear failure to provide proper sanitation for rural schools makes an award for constitutional damages the most appropriate

\textsuperscript{131} ibid para 27.
\textsuperscript{132} ibid para 28.
\textsuperscript{133} Michelle Toxopeüs (n 21).
\textsuperscript{134} ibid para 2.
\textsuperscript{135} ibid para 3.
\textsuperscript{136} ibid para 4.
\textsuperscript{137} ibid.
\textsuperscript{138} ibid.
\textsuperscript{139} (1416/2015) [2018] ZALMPPHC 18.
\textsuperscript{140} ibid para 61.
\textsuperscript{141} ibid.
means by which to uphold constitutional rights. Constitutional damages were claimed separately from the common law damages for emotional shock and trauma. Although the Court found that various constitutional rights were infringed, it maintained that the constitutional damages amounted to punitive damages. The court was of the view that if granted this would result in the family being overcompensated without serving the interest of society. This is in spite of the fact that the claim for compensation based on emotional shock and trauma had been dismissed because the family could not prove that they had suffered a recognisable psychiatric injury. The Court held that a structural interdict to compel the State to provide proper sanitation facilities for rural schools was the only appropriate remedy to vindicate the Constitution.

The above discussion demonstrates that many litigants have come before the South African courts seeking the award of constitutional damages. In some instances the courts have obliged. However, it is still not clear as to when constitutional damages are appropriate, and how the relief should be couched. The cases touched on have made it apparent that the courts have struggled with the problem of acceptance, process and approach. These challenges are closely related to the question of the quantum of damages and quantification of such damages. South African courts have not sufficiently dealt with these questions. Indeed, the courts have just responded to the problem of duplicity of damages by taking a precautionary approach which is inadequate. This discussion below takes a comparative perspective to resolve the problem of duplicity of damages by seeking some criteria for determining the application of both constitutional and the common law damages in practical scenarios.

142 ibid para 67.
143 ibid.
144 ibid para 68.
145 ibid.
146 ibid para 70.
147 ibid.
148 GA Whittaker (n 20).
149 Kate O'Regan (n 3).
150 JA Robinson and R Prinsloo (n 14).
151 MEC for Department of Welfare (n 129).
152 ibid.
Comparative Lessons

6.1 From Canada and New Zealand’s Approach to the Problem of Duplicity of Damages

The problem of duplicity of damages is not unique to South Africa. Many common law jurisdictions have encountered this problem and made judicial pronouncements relating to the intersection between constitutional and common law damages.\(^\text{153}\) Although many common law and civil law traditions have dealt with these cases, this article only looks at the case studies of Canada, New Zealand, Botswana and Zimbabwe. These countries have awarded constitutional damages, despite the fact that they have applied the concept in different ways.\(^\text{154}\) These countries have been chosen as case studies as they have the same common law tradition as South Africa and have a great deal of jurisprudence on the protection of constitutional rights.\(^\text{155}\) This means these selected jurisdictions provide important insights, benchmarks and lessons for developing a more pronounced approach for dealing with duplicity of damages in South Africa.\(^\text{156}\)

Canadian courts have pronounced on the question of duplicity of damages in several cases.\(^\text{157}\) Many litigants in Canada base their claim for the award of constitutional damages on a plethora of constitutional rights enshrined in the Canadian Charter of Rights and Freedoms.\(^\text{158}\) Some of the earliest cases which dealt with duplicity of damages are Crossman v R,\(^\text{159}\) Collin v Lussier\(^\text{160}\) and the Lord v Allison (1986).\(^\text{161}\) In these cases, the Canadian courts awarded constitutional and common law damages as both punitive and compensatory damages.\(^\text{162}\) In Mackin v New Brunswick, Doucet-Boudreau v Nova Scotia,\(^\text{163}\) the Canadian Supreme Court endorsed the proposition that an action for public law damages is not a private law action in tort claim for which the State is vicariously liable but a distinct public law action directly against the State for


\(^{154}\) ibid 273 para 1.

\(^{155}\) ibid.

\(^{156}\) ibid 273 para 2.


\(^{159}\) [1984] 1 F.C. 681.


\(^{161}\) 3 BCLR (2d) 300 (SC).

\(^{162}\) ibid para 22.

which the State is primarily liable.\textsuperscript{164} This means delictual actions against private individuals ought to be persuaded in accordance with the existing causes of action, that is, at common law and in statute, even though the underlying policy considerations engaged when awarding private law damages against State actors may be relevant when awarding public law damages directly against the State.\textsuperscript{165}

Canada and New Zealand have developed a four-pronged test for determining how constitutional damages should be adjudicated and awarded. \textit{Vancouver (City) v Ward}\textsuperscript{166} is a case which revolves around a wrongful arrest due to Mr Ward having the same vague facial and bodily features as a person who was suspected of having thrown a pie on the former Prime Minister of Canada.\textsuperscript{167} The Canadian Supreme Court relied on the approach used by New Zealand as enunciated in Doucet-Boudreau. According to this four-pronged test, the claimant must first establish that a Charter right has been violated. Second, the claimant must show why damages are an appropriate and just remedy to the extent that they serve a useful function or purpose, whether compensation, vindication of the right, deterrence, or a combination of any of these.\textsuperscript{168} The court found that pecuniary or physical loss is not a prerequisite.\textsuperscript{169} The third step involves a shift in onus, with the government rebutting the damages award by presenting countervailing factors that defeat the functionality of damages or renders them inappropriate or unjust. This includes the availability of other remedies that would adequately satisfy the need for compensation, vindication or deterrence.\textsuperscript{170} Charter damages will also be barred where a concurrent action in tort or private law would result in double recovery. Claimants need not show that they have exhausted all other recourses. Rather, it is for the State to show that other remedies, including private law remedies or another Charter remedy, are available in the particular case that will sufficiently address the Charter breach.\textsuperscript{171} The court however was clear that this must be distinguished from a case where the claimant does not have a concurrent tort action. The mere existence of a potential tort claim would not

\textsuperscript{164} ibid para 10.
\textsuperscript{165} ibid.
\textsuperscript{166} 2010 SCC 27.
\textsuperscript{167} ibid para 19.
\textsuperscript{168} ibid.
\textsuperscript{169} ibid.
\textsuperscript{170} ibid.
\textsuperscript{171} ibid.
preclude a claimant from claiming Charter damages because tort law and the Charter are distinct legal avenues.\textsuperscript{172}

It is clear from the Canadian jurisprudence that bad faith, abuse of power, or tortious conduct were not necessary requirements for constitutional damages to be awarded.\textsuperscript{173} Further, the Canadian Supreme Court has maintained that the amount awarded as constitutional damages should not only be fair to the claimant whose rights have been violated but also to the State which is required to pay compensation.\textsuperscript{174} The determination of whether the constitutional damages are fair to both parties, especially to the State, constitutes a countervailing consideration to ensure that the damages do not become an obstacle to effective governance by diverting public funds from communal government projects into private pockets.\textsuperscript{175} In summary, Canada has developed a well-defined approach which balances the rights of the claimant and the State public driven obligations in the determination of quantum – an approach that can be adopted by South Africa.\textsuperscript{176}

New Zealand is a leading light in the adjudication of constitutional damages often relied upon by other common law jurisdictions such as Canada and Australia.\textsuperscript{177} In \textit{Simpson v Attorney-General},\textsuperscript{178} the New Zealand Court developed the phrase ‘\textit{Baigent remedy’} to describe constitutional damages as public law compensation based on tort for a monetary award to vindicate the claimant’s constitutional right as enshrined in the New Zealand Bill of Rights Act (NZBOR\textit{A}) or deter future violations.\textsuperscript{179} The Court of Appeal rejected that the Crown had prosecutorial immunity in terms of section 6(5) of the Crown Proceedings Act of 1956 and the plaintiffs were only entitled to the remedy of a declaration of non-compliance.\textsuperscript{180} The Court emphasised that such a declaration would be toothless and only an award of \textit{Baigent remedy} would suffice.

\begin{enumerate}
\item \textsuperscript{172} ibid para 20.
\item \textsuperscript{173} ibid.
\item \textsuperscript{174} ibid.
\item \textsuperscript{175} ibid para 21.
\item \textsuperscript{176} For a further discussion on the Canadian approach to the award of constitutional damages see Chucks Okpaluba, ‘The development of Charter damages jurisprudence in Canada: guidelines from the Supreme Court’ (2012) 23(1) Stellenbosch L Rev 55.
\item \textsuperscript{177} It is noteworthy that even in the recent case of \textit{R K and Others v Minister of Basic Education and Others} (754/2018 and 1051/2018) [2019] ZASCA 192, the South African Supreme Court of Appeal in its decision relied heavily on lessons drawn from the New Zealand’s jurisprudence on constitutional damages.
\item \textsuperscript{178} [1994] 3 NZLR 667.
\item \textsuperscript{179} ibid para 22.
\item \textsuperscript{180} ibid.
\end{enumerate}
as a vindication for the rights which have been infringed. Further, *Taunoa v Attorney-General* is a case which involves state-driven violation of the prisoners’ rights in sections 9 and section 23(5) of the New Zealand Bill of Rights Act. In this case, the Supreme Court of New Zealand provided further clarity on the application of the *Baigent* remedy. The Supreme Court stated that the purpose of the award is not to punish the executive for the violations of constitutional rights, but rather to vindicate the constitutional rights with the objective to either redress the contravention or provide relief. The vindication of constitutional rights involves an assertion that the rights are valuable and that their enforcement must be prioritised to protect the complainant’s interests. To some extent, an award of constitutional damages is bound to act as a deterrent against further violations. From the foregoing, it can be deduced that New Zealand has adopted a liberal, rights-based approach to the problem of duplicity of damages with primary emphasis on awarding constitutional damages through the instrumentality of the *Baigent* remedy.

### 6.2 From Botswana and Zimbabwe’s Approach to the Problem of Duplicity of Damages

Both jurisdictions, that is Zimbabwe and Botswana, are common law jurisdictions with the potential to offer significant insight to South Africa on how to resolve the problem of duplicity of damages. In *Oatile v Attorney General*, the Botswana Court of Appeal upheld the relief granted by the High Court whilst reducing the quantum. The case revolved around the plaintiff’s right to a fair trial within a reasonable time as provided under section 10(1) of the Constitution of Botswana. The Court of Appeal maintained that the constitution provided for the right to constitutional damages and that whenever the common law remedies are insufficient, the court should develop appropriate remedies. However, when the court finds the common law remedies to be sufficient, it should not fashion new remedies for the sake of judicial activism.

Zimbabwe adopted its new Constitution in 2013. The 2013 Zimbabwean constitution clearly provided for constitutional damages for the infringement
of constitutional rights. The 2013 Zimbabwean constitution contains an expansive bill of rights and places an obligation on the State to take corrective measures whenever there is a State induced negation of rights. Whilst the 2013 Zimbabwean Constitution provides for constitutional damages, there is no further guidance in the constitution, legislation or policy on when and how such damages are to be awarded. Currently, there has not been a case adjudicated by the Zimbabwean Constitutional Court that challenges the concept of constitutional damages. Perhaps the only challenges as time progresses would be on developing an appropriate framework relating to the interaction between the common law and constitutional damages.

Towards a New Complementary Approach to Address Duplicity of Damages in South Africa

South African courts should move towards a new complementary theorem in addressing the problem of duplicity of delictual damages in order to promote certainty, predictability, and an appropriate adjudicatory approach. South Africa should develop an approach which best suits its needs given that it is a constitutional democracy with an entrenched Bill of Rights. This approach should be predicated on the view that the common law and constitutional damages are applied to a particular set of facts without following a rigid or blind precedent. In other words, the award of constitutional damages should be needs-based. In some circumstances, constitutional damages should be awarded when the common law remedies are inadequate. In other instances, the presence of novel factors would require a much more compelling, vindictory relief – perhaps because of, inter alia, the mala fides, degree and frequency of constitutional rights violations. Another approach would be that courts should develop the concept of the common law damages so that it can be in sync with the norm, values and principles of the Constitution.

191 ibid.
192 ibid.
193 ibid.
194 JA Robinson and R. Prinsloo (n 14).
196 ibid para 1.
197 ibid para 3.
8 Conclusion

This article has demonstrated that South African courts have had an opportunity to pronounce on several cases relating to duplicity of the common law and constitutional damages. In some cases, the courts have awarded constitutional damages. Notwithstanding, there is still lack of certainty and predictability as to when either the common law or constitutional damages are appropriate. This problem is exacerbated by lack of acceptance of constitutional damages in South Africa. Perhaps this lack of acceptance emanates primarily from the inability of the court to shed light on the purpose of constitutional remedies and the difference between the common law and constitutional remedies. Courts have also been faced with the problem of quantifying constitutional damages. Therefore, the problem of duplicity of damages is apparent in our law.

The article has strongly argued that to address the problem of duplicity of damages in South Africa, a relaxed complementary approach to the fulfillment of the requirements of a constitutional infringement as well as a common law delict should be adopted. This requires that the purpose and substance of the remedy be sought as opposed to procedural correctness. There is, however, no need to prefer constitutional remedies above the common law remedies where the common law remedies do not contradict the Constitution. This argument reinforces the centrality of the common law alongside constitutional ethos, which not only guarantees its recognition but also its development within the context of the new constitutional dispensation. It is apt to

198 Emile Zitzke (n 42).
199 ibid 120.
200 ibid.
201 Kate O'Regan (n 3).
202 ibid para 1.
203 However, noting further that the constitutional remedies are not remedies of last resort. Constitution of the Republic of South Africa, 1996, s 38.
204 It is noteworthy that ’constitutional supremacy’ does not in any way call for the total discardment of the common law, except in instances where the common law is repugnant to the constitutional ethos and values. If there is no perceived conflict between the two, the principle of subsidiary requires that where it is possible to decide any case, civil or criminal without reaching a constitutional issue that is the course that should be followed. See Per Kentridge AJ in S v Mhlangu and Others 1995 (7) BCLR 793 (CC) para 55. Subsequently, this dictum was also followed in Motspe v Commissioner for Inland Revenue 1997 (6) BCLR 692 (CC) para 21; National Coalition for Gay and Lesbian v Minister of Home Affairs 2000 BCLR 39 (CC) para 21; Minister of Education v Harris 2008 (11) BCLR 1157 (CC) para 19.
conclude with a thought from Boberg that ‘the merit of a rule depends on its functional effect rather than the purity of its ancestry.’205

Biographical Notes

Ms Bronwyn Le-Ann Batchelor
Ms Batchelor holds a BCom (Law), LLB and LLM and is a Senior Fellow of the Advance HE UK Teaching Fellowship in terms of the UK Professional Standards Framework. She is currently awaiting the outcome of the examination of her LL.D. She is the Head of Faculty: Law at the Independent Institute of Education. Her research areas include Commercial Law, Family Law, Constitutional Law and Legal Education.

Dr Shelton Mota Makore
Dr Mota Makore is a Senior Law Lecturer at the University of the Free State in South Africa. He holds the degree of Bachelor of Laws (LLB), Master of Laws (LLM), Doctor of Laws Degree (LLD) and a Post-doctoral-Graduate Certificate in Higher Education and Certificate in Trial Advocacy by the South African Black Lawyers Association and Certificate from legal Education and Development (L.E.A.D).