

# The feasibility of the victims of corruption's claim for constitutional damages against corrupt public officials in South Africa

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## SUMMARY

South Africa, just like other countries, is grappling with corruption in the private and public sectors. For this reason, the state has adopted various measures aimed at fighting this scourge. Part of the measures adopted, in this regard, are the legal measures. This article argues that, in addition to the legal measures in place, there is a feasibility for victims of corruption to pursue a claim for constitutional damages arising from corruption by public officials. This contention is based on the fact that constitutional damages is an appropriate remedy for corruption cases involving public officials.

## 1 Introduction

Corruption, whether by public or private individuals, knows no boundaries. For this reason, the term "corruption" is well known throughout the world.<sup>1</sup> This is evident from the reaction of the international community and different countries to corruption.<sup>2</sup> South Africa's reaction to this scourge emanates from the negative impact that corruption has on political, economic and social life. The following Judge Baqwa's remarks in *Sammy Aron Mofomme v S* are instructive:

"... our society stands at a precipice where corruption seems to have penetrated every nook and cranny of society to a point where every aspect be it political, economic, social or constitutional is so eroded, so threatened as to bring down the whole edifice."<sup>3</sup>

In addition to regulating this area of life, South Africa also established State Institutions such as the Special Investigating Unit, Human Rights Commission, and Public Protector, among others, which are partly

1 *Ortiz-Ospina and Roser Corruption* 2016 <https://ourworldindata.org/corruption> (accessed 2018-05-10).

2 Some of the Treaties are: United Nations Convention Against Corruption, adopted on 31 October 2003, entered into force on 14 December 2005; the African Union Convention on Preventing and Combating Corruption adopted 1 July 2003, entered into force on 01 August 2006. SADC Protocol against Corruption Adopted 14 August 2001, entered into force on 6 August 2003.

3 (A812/2016) [2017] ZAGPPHC 719; 2018 (1) SACR 213 (GP) (9 November 2017) para 21.

tasked to deal with corruption. The existence of these measures, essentially, is indicative that corruption is not condoned.<sup>4</sup> This is evident from the fact that neither state institutions nor corrupt public officials are exempted from the wrath of the law. The court captured this assertion in the case of *Mohamed v President of RSA* as follows:

“The Department of Justice represents the State and its employees represent the department ... South Africa is a young democracy still finding its way to full compliance with the values and ideals enshrined in the Constitution. It is therefore important that the State lead by example.”<sup>5</sup>

In light of the various legal consequences of corruption by public officials in South Africa,<sup>6</sup> this article seeks to pursue the feasibility of victims' claim for constitutional damages arising from corruption by public officials in South Africa. This article draws inspiration from the United Nations Convention Against Corruption<sup>7</sup> and the Criminal Procedure Act (CPA)<sup>8</sup> which affirm the payment of compensation for corruption.<sup>9</sup> The first part of this article analyses the extent of corruption by public officials and the legal consequences of corruption. The second part explores constitutional damages as an appropriate relief in South Africa. The third and the last part then sets out the legal basis for the feasibility of the victims of corruption's claim for constitutional damages as an appropriate relief for corruption by public officials. This article, in essence, argues that in addition to the legal measures in place, the victims of corruption are legally entitled to pursue a claim for constitutional damages arising from corruption by public officials.

## 2 The extent of corruption by public officials and its legal consequences

Corruption by public officials, just like corruption by private sector actors, poses a serious challenge for the government, the courts, and the people of South Africa. This scourge has been overwhelming South Africa as far back as when it became a democratic country. For instance, it was

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4 De Vos *On Nelson Mandela: Compassion and corruption: choosing the difficult path* Transition No. 116 (2014) 49, emphasis added <https://constitutionallyspeaking.co.za/wp-content/uploads/2015/12/Compassion-and-Corruption.pdf> (accessed 2018-05-22).

5 2001 (3) SA 893 CC para 68; *Sammy Aron Mofomme v S* *supra*, para 23.

6 The legal consequences of the law on corruption will be discussed shortly.

7 United Nations Convention Against Corruption *supra*.

8 Criminal Procedure Act 51 of 1977.

9 The details of these instruments will be discussed shortly.

revealed in 1996 that the Department of Social Services lost about R1,5 billion a year as a result of corruption in the delivery of social grants.<sup>10</sup> Few years later, corruption began to involve members of the public who were paying for extra services and the delivery of social grants. After all, around 2003 and 2004, between 15% and 30% of public officials were reported to have received payment for extra services regarded as a “back-door” solutions to the clients’ problems.<sup>11</sup>

A decade later, the levels of corruption in the public sector had reached alarming levels, to the extent that the courts described corruption as so “endemic that all right-thinking members of society must be sick and tired of it”.<sup>12</sup> However, despite the courts’ stance on corruption, it persisted to be rife in South Africa that by the year 2018, it had manifested itself in all the Provinces.<sup>13</sup> Government Institutions such as Schools, Municipalities, South African Police Services (SAPS), Licensing Centres, State Owned Entities (SOE’s), and the Health Sector were the hardest hit by this scourge.<sup>14</sup> For instance, about 35.5% of corruption cases concerned the mismanagement of school funds by school officials in order to create favourable conditions for friends and relatives who sought procurement deals and employment opportunities.<sup>15</sup> Further, 7.9% and 3.1% of cases had to do with theft of school resources and sextortion at schools, respectively.<sup>16</sup> The SAPS, Health Sector, and the SOE’s are no different. About 28.9% of Police Officers are reportedly accepting bribes from suspects in return for their dockets to be destroyed and their crimes ignored.<sup>17</sup> The bribery and irregularities in the Health Sector and the SOE’s are associated with procurement and employment.<sup>18</sup> About 44% of procurements in the SOE’s are irregular and 20.3% of cases involves bribery which includes sending officials on expensive holidays and catering for their lavish lifestyles.<sup>19</sup>

10 Council for the Advancement of South African Constitution, “The Impact of Corruption on Governance and Socio-economic Rights” 2011 7 <http://www.casac.org.za/wp-content/uploads/2011/09/IMPACT-OF-CORRUPTION.pdf>, (accessed 2020-02-05), citing Andile Sokomani and Trusha Reddy, Corruption and Social Grants in South Africa 2008 1 <http://www.iss.co.za/uploads/MONO154FULL.PDF1> (accessed 2019-10-04).

11 United Nation Office on Drugs and Crime and Department of Public Service and Administration sacorruptionassessment report 2003 3 <https://www.westerncape.gov.za/text/2004/4/sacorruptionassessmentreport2003.pdf> (accessed 2019-05-10).

12 *S v Boshoff* (CA &R 390/12) [2013] ZAECHGHC 102; 2014 (1) SACR 422 (ECG) (27 September 2013) para 39.

13 Corruption Watch *Analysis of Corruption Trends Report* (2018) <https://www.corruptionwatch.org.za/cws-2018-analysis-corruption-trends-report-now-available/> (accessed 2019-10-04).

14 Corruption Watch *supra*.

15 Corruption Watch *supra*.

16 Corruption Watch *supra*.

17 Corruption Watch *supra*.

18 Corruption Watch *supra*.

19 Corruption Watch *supra*.

The foregoing statistics around corruption could, therefore, be interpreted to mean not only that corruption by public officials is rampant in South Africa but also that it has a negative impact on the lives of millions of people of South Africa who are dependent on the State for their survival.

It is worth, however, to note that there are some legal consequences of corruption by public officials. The criminal law consequences of corruption by public officials could be deduced from the Prevention and Combating of Corrupt Activities Act (PCCAA).<sup>20</sup> The PCCAA deems a public official who engages in the following broad acts of corruption directly or indirectly as committing a punishable offence:

- a accepts or agrees or offers to accept any gratification from any other person whether for the benefit of himself or herself or for the benefit of another person or
- b gives or agrees or offers to give to any other person any gratification for the benefit of that other person or for the benefit of another person in order to act personally or by influencing another person so to act in a manner
  - i that amounts to
    - aa) illegal, dishonest, unauthorised, incomplete, or biased; or
    - bb) misuse or selling of information or material acquired in the course exercise, carrying out or performance of any powers, duties or function arising out of a constitutional, statutory, contractual or any other legal obligation;
    - ii that amounts to –
      - (aa) the abuse of a position of authority;
      - (bb) a breach of trust; or
      - (cc) the violation of a legal duty or a set of rules;
    - iii designed to achieve an unjustified result; or
    - iv that amounts to any other unauthorised or improper inducement to do or not to do anything.”<sup>21</sup>

Over and above these foregoing punishable acts, the PCCAA criminalises an act where a public official holds a private interest in a contract, agreement or investment which is connected with the state institution for which he/she is an employee.<sup>22</sup> These punishable acts of corruption by the PCCAA not only seek to prevent corruption but also align South Africa with the international community in the fight against this scourge. For instance, as it is the case in South Africa, the United Nation deems as illegal or as corruption “any act or omission in the performance of or in connection with one's duties, in response to gifts, promises or incentives demanded or accepted, or the wrongful receipt of these”.<sup>23</sup> Further, the World Bank and Transparency International deem as illegal or as corruption the use of public resources for personal gain and deem bribery as the “offering, promising, giving, accepting or soliciting of an

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20 Prevention and Combating of Corrupt Activities Act (PCCAA) 12 of 2004.

21 S 4(1); S 7(1); S 8(1) and S 9(1) of the PCCAA.

22 S 17(1) of the PCCAA.

advantage as an inducement for an action which is illegal or a breach of trust", respectively.<sup>24</sup>

Apart from the PCCAA, the Public Finance Management Act;<sup>25</sup> the Local Government: Municipal Finance Management Act;<sup>26</sup> and the Prevention of Organised Crime Act<sup>27</sup> directly or indirectly attach some form of criminal sanctions against corrupt public officials. For instance, in prohibiting irregular, fruitless and wasteful losses resulting from a criminal conduct, both the Public Finance Management Act and the Local Government: Municipal Finance Management Act recommend either a fine or imprisonment for an irregular, fruitless and wasteful expenditure. The Prevention of Organised Crime Act, on the other hand, allows courts to impose a fine not exceeding R100 000 000 or imprisonment for a period up to imprisonment for life to any person who receives or retains any property that has been obtained directly or indirectly from racketeering activity.<sup>28</sup>

The civil law legal consequences of corruption by public officials, on the other hand, could be gleaned from the United Nations Convention Against Corruption<sup>29</sup> and the CPA.<sup>30</sup> The United Nations Convention Against Corruption partly obliges state parties to ensure that people who have suffered damage as a result of corruption get compensated.<sup>31</sup> This Convention is given effect to by section 300(i) of the CPA which provides that:

"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

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- 23 Article 7 of the Code of Conduct for Law Enforcement Officials adopted by Resolution 36/169 of the 17th of December 1979 <https://www.ohchr.org/en/professionalinterest/pages/lawenforcementofficials.aspx> (accessed on 2021-03-10). The United Nations Convention against Corruption *supra* describes corruption, as Danilet argue in a book entitled, *Corruption and Anti-corruption in the Justice System* 2009 6, as any act of bribery, influence peddling, abuse of functions, illicit enrichment, laundering of proceeds of crime, concealment, obstruction of justice.
- 24 Combat *Helping Countries Combat Corruption: The Role of the World Bank* (1997) 8 <http://www1.worldbank.org/publicsector/anticorrupt/corruptn/corruptn.pdf> (accessed 2021-03-10). Transparency International *Business Principles for Countering Bribery* (2013) [http://www.transparency.org/global\\_priorities/private\\_sector/business\\_principles](http://www.transparency.org/global_priorities/private_sector/business_principles) (accessed 2021-03-10).
- 25 Public Finance Management Act 1 of 1999.
- 26 Local Government: Municipal Finance Management Act 56 of 2003.
- 27 Prevention of Organised Crime Act 121 of 1998.
- 28 S 3 of the Prevention of Organised Crime Act 121 of 1998.
- 29 The United Nations Convention Against Corruption *supra*.
- 30 Criminal Procedure Act *supra*.
- 31 Article 35 of the United Nation Convention Against Corruption *supra*. South Africa signed this Convention on 09/12/2003 and ratified it on 22/11/ 2004.

acting on the instructions of the injured person, forthwith award the injured person compensation for such damage or loss ...”<sup>32</sup>

This section, essentially, empowers the victims of corruption to institute legal proceedings for compensation emanating from corruption by public officials. However, for the purposes of section 300(i) of the CPA,<sup>33</sup> courts can only issue an award for compensation against a corrupt public official if he or she is in a financial position to pay it.<sup>34</sup> However, the foregoing legal consequences of corruption do not make any specific mention of a claim for constitutional damages emanating from corruption by a public official. It is on this basis that the next paragraphs focus on constitutional damages as an appropriate relief and the feasibility of the victims of corruption to claim constitutional damages against a corrupt public official.

### 3 Constitutional damages as an appropriate relief

The claim for constitutional damages emanates from the Constitutional Court’s interpretation of section 7(4) of the Interim Constitution (1993) which later became section 38 of the Final Constitution (1996) in the case of *Fose v Minister of Safety and Security*.<sup>35</sup> Section 38 of the Final Constitution provides that:

“Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights ...”

In interpreting this section, the Constitutional Court categorically stated that constitutional damages would qualify as an appropriate relief for the violation of a constitutional right. The Constitutional Court argued this as follows:

“... it seems to me that there is no reason in principle why “appropriate relief” should not include an award of damages, where such an award is necessary to protect and enforce Chapter 3 rights ...”<sup>36</sup>

It is on this basis that Shaun argues that “[t]he starting point for a claim for constitutional damages in South Africa is section 38 of the Constitution.”<sup>37</sup>

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32 The incorporation of United Nation Convention Against Corruption into the Criminal Procedure Act renders it enforceable in South African courts.

33 Criminal Procedure Act *supra*.

34 *S v Huhu* (96/2012) [2013] ZAFSHC 74 (16 May 2013) para 4, citing the case of *S v Khoza* 2011 (1) SACR 482 (GSJ) 8.

35 *Fose v Minister of Safety and Security* (CCT14/96) [1997] ZACC 6; 1997 (7) BCLR 851; 1997 (3) SA 786 (5 June 1997).

36 *Fose v Minister of Safety and Security supra*, para 60.

37 Barns “Constitutional damages: A call for the development of a framework in South Africa” 2013 *Journals* 9 <https://www.journals.ac.za/index.php/responsa/article/view/3790> (accessed on 2021-03-10).

This remedy, unlike other constitutional reliefs, seeks to compensate a person who has suffered loss because of a breach of a constitutional right.<sup>38</sup> According to Currie and De Waal, there are two reasons that justify an award of constitutional damages:

“First, there are situations where a declaration of invalidity or an interdict makes little sense and an award for damages is then the only form of relief that will vindicate the fundamental rights and deter future infringements.

Secondly, the possibility of substantial award of damages may encourage victims to come forward and litigate, which may in itself serve to vindicate the Constitution and to deter further infringements.”<sup>39</sup>

The general principles regulating constitutional damages, as developed by the courts over the years, are as follows: This remedy is to be awarded only if it is appropriate considering the circumstances of each case and the particular right which has been infringed.<sup>40</sup> The appropriateness of this remedy lies in its effectiveness and vindication of a constitutional right and in its upholding the values underlying the Constitution.<sup>41</sup> Barns, citing the case of *Fose v Minister of Safety and Security*, sums up these principles as effectiveness, suitability and a just relief.<sup>42</sup> The effectiveness of this remedy focuses on its ability to vindicate the Bill of Rights and deters future violations.<sup>43</sup> This partly includes taking into account the poor status of the victims of corruption.<sup>44</sup> Suitability of this remedy, on the other hand, considers whether this remedy fit the nature of the infringement and its impact.<sup>45</sup> Just relief requires that the interest of those affected by the remedy are accounted for.<sup>46</sup> It is worth noting that vindication of a constitutional right goes beyond the person who suffered harm to society as a whole because the infringements of a citizen's rights “impair public confidence and diminish public faith in the efficacy of the protection”.<sup>47</sup>

38 Barns 9.

39 Currie and De Waal *The Bill of Rights Handbook* (2013) 200.

40 *Fose v Minister of Safety and Security supra*, para 60.

41 *Fose v Minister of Safety and Security supra*, para 69. *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency (No 2)* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) (*Allpay II*) para 42. *Mvumvu v Minister for Transport* [2011] ZACC 1; 2011 (2) SA 473 (CC); 2011 (5) BCLR 488 (CC) paras 46 and 48. *Department of Transport and Others v Tasima (Pty) Limited* [2016] ZACC 39 para 203. *MEC for the Department of Welfare v Kate (580/04)* [2006] ZASCA 49; 2006 (4) SA 478 (SCA); [2006] 2 All SA 455 (SCA) (30 March 2006) para 27.

42 Barns 9 citing *Fose v Minister of Safety and Security supra*, 826.

43 Barns 9.

44 This was one of the factors that the court took into account when awarding constitutional damages as appropriate remedy in the case of *MEC for the Department of Welfare v Kate supra*, para 31. This factor is also reiterated by De Vos in his article entitled, “Glenister: a monumental judgment in defence of the poor” 2011 <https://constitutionallyspeaking.co.za/glenister-a-monumental-judgment-in-defence-of-the-poor> (accessed 2018-05-22), emphasis added.

45 Barns 9 citing *Fose v Minister of Safety and Security supra*, 826.

46 Barns 2013 9, citing *Fose v Minister of Safety and Security supra*, 836.

The appropriateness of constitutional damages also lies in the advantage it has over other reliefs in a particular case. For instance, in awarding constitutional damages in the case of *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd*, the court stressed the importance of considering the advantage that this remedy has over other constitutional reliefs.<sup>48</sup> In summing up these principles, the Supreme Court of Appeal (SCA) listed the following factors, among others, that play a role in determining whether the constitutional damage is appropriate in the case of *MEC for the Department of Welfare v Kate*:

“... the nature and relative importance of the rights that are in issue, the alternative remedies that might be available to assert and vindicate them, and the consequences of the breach for the claimant concerned.”<sup>49</sup>

The case of *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency*, however, also stressed that appropriate relief is the one that serves the interests of the society. The court argued this as follows:

“In crafting an appropriate remedy, even where a range of court orders have been violated, the interests of the public must remain paramount.”<sup>50</sup>

Thus, the court will award constitutional damages as an appropriate relief if it has the effect of serving the interest of the society in a particular case. It also seems that our courts seem to favour an award for constitutional damages as an appropriate relief for cases involving pecuniary loss as opposed to non-pecuniary loss.<sup>51</sup> However, it is worth noting that constitutional damages are not appropriate in a case where the court has already awarded common law damages. The reason being common law

47 Barns 10.

48 *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) paras 31-33.

49 *MEC for the Department of Welfare v Kate supra*, para 25.

50 *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency supra*, para 32. *Department of Transport and Others v Tasima (Pty) Limited supra*, para 205.

51 This contention stems from the case of *Fose v Minister of Safety and Security supra*, para 74 in which the court avoided dealing with a claim that does not sound in money and indicated that jurisprudence pertaining to claims not sounding in money would be gradually developed. In rejecting the constitutional damage claim for partly being a non-pecuniary loss, the SCA in the case of *R K and Others v Minister of Basic Education and Others* (754/2018 and 1051/2018) [2019] ZASCA 192 (18 December 2019) para 58, partly referred to some of the following cases where the courts awarded constitutional damages for pecuniary loss: *MEC for the Department of Welfare v Kate supra*, in which the court granted constitutional damages equivalent to the interest which would have been payable on the money which had been unlawfully withheld; *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd supra*, where the court ordered the State to pay damages equivalent to the value of land that had been lost due to a squatter invasion that occurred after the State failed to provide land for occupation by the residents of an informal settlement. Thus, the courts are yet to award a constitutional damage for a non-pecuniary loss.

damage could also serve as an appropriate relief that protects or vindicates a constitutional right. The following paragraph in the case of *Fose v Minister of Safety and Security* is instructive:

“[O]ur common law of delict is flexible and will in many cases be broad enough to provide all the relief that would be appropriate for a breach of the constitutional right, depending of course on the circumstances of each particular case.”<sup>52</sup>

#### **4 The feasibility of the victims of corruption's claim for constitutional damages against corrupt public officials**

Having analysed the extent and legal consequences of corruption as well as constitutional damages as an appropriate relief, this part of this article outlines the feasibility of the victims of corruption's claim for constitutional damages arising from corruption by public officials in South Africa. In other words, the following paragraphs are indicative of an appropriateness of the constitutional damages for corruption by public officials in South Africa. The appropriateness of constitutional damages in this regard emanates from the following hypothetical example:

The Department of Human Settlement issues a R500 000 000 tender to Mr X in terms of which Mr X is to erect 200 houses for the community of Seshego over a period of five years. However, on the expiry of the period of five years, it turns out that Mr X has erected 100 houses instead of 200. Mr X's version is that his failure to build the other 100 houses is that he transferred R250 000 000 of the R500 000 000 as a gratification to the public officials of the Department of Human Settlement who had pulled the strings in ensuring that he was awarded the tender.

This hypothetical example, by far, depicts an act of corruption on the part of the public officials of the Department of Human Settlement. The public officials' acceptance of R250 000 000 amounts to corruption as described by the PCCA and international regulations. As already argued above, the PCCA and international regulations deem as punishable act a situation whereby public officials accept gratification from any person for their own benefit.<sup>53</sup> The reason being, such an act amounts to an unauthorised performance and has the effect of abusing position of authority; breaching trust; and violating legal duties. Danilet describes

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52 *Fose v Minister of Safety and Security supra*, para 58; *Komape and Others v Minister of Basic Education* (1416/2015) [2018] ZALMPPHC 18 (23 April 2018) para 67; *R K and Others v Minister of Basic Education and Others* (754/2018 and 1051/2018) [2019] ZASCA 192 (18 December 2019) para 58.

53 Ss 4(1); S 7(1); S 8(1) and S 9(1) of the PCCA *supra*; Article 7 of the Code of Conduct for Law Enforcement Officials *supra*; The UN Convention against Corruption *supra*; Combat *supra*; Transparency International *supra*.

this situation as an abuse of office for the purpose of satisfying personal interests.<sup>54</sup>

Having established that an acceptance of R250 000 000 by public officials would amount to corruption, it becomes crucial to set out the basis for an appropriateness of constitutional damages for the aforementioned hypothetical example. The appropriateness of this remedy for this hypothetical case is based on the application of the principles regulating the appropriateness of constitutional damages and which are: effectiveness, suitability and just relief<sup>55</sup> and which are summarised as "... the nature and relative importance of the rights that are in issue, the alternative remedies that might be available to assert and vindicate them, and the consequences of the breach for the claimant concerned".<sup>56</sup>

First and foremost, this remedy would be effective in that it would vindicate the most important constitutional rights of the Seshego community (victims of corruption)<sup>57</sup> such as the right to equality, right to development<sup>58</sup> and the right to have access to adequate housing.<sup>59</sup> These rights would be vindicated on the following grounds: Firstly, an act of corruption on the part of the public officials in this hypothetical example infringes them as it would have an effect of diverting funds that are intended for their development as some of the members of Seshego community would end up not receiving houses. Put differently, an act of corruption by public officials would reinforce the existing socio-economic inequality,<sup>60</sup> and abuses public trust in violation of some of the members of Seshego community's rights.<sup>61</sup> So, corruption by public officials would

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54 Danileț 10.

55 As summarised by Barns 9 citing *Fose v Minister of Safety and Security supra*, 826.

56 As summarised by the SCA in the case of *MEC for the Department of Welfare v Kate supra*, para 25.

57 This assertion is inspired by the PPCCAA *supra* which acknowledges that corruption and related corrupt activities undermine the constitutional rights. It also draws inspiration from the Constitutional Court case of *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (17 March 2011) para 177 in which the Constitutional Court argued "... It is incontestable that corruption undermines the rights in the Bill of Rights, and imperils democracy ..."

58 Moyo "An analysis of the impact of corruption on the realisation of the right to development" 2017 *South African Journal on Human Rights* Vol 33 No. 2 193-213, emphasis added.

59 Danileț 10.

60 Council for the Advancement of South African Constitution 3, emphasis added.

61 In establishing the link between the breach of public trust and the violation of human rights, the Constitutional Court, in the case of *K v Minister of Safety and Security* (CCT52/04) [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC); [2005] 8 BLLR 749 (CC) (13 June 2005) para 56 found that the actions of the policemen when raping the applicant not only amounted to an abuse of authority or breach of public trust but also infringed her rights to dignity and security of the person. While this case

undermine the rights of the very poor members of the Seshego community who have nothing to sustain them and have no knowledge of their rights and have no resources readily to secure them.<sup>62</sup> This factor, essentially, echoes the following former United Nations (UN) High Commissioner for Human Rights, Judge Navi Pillay's, remarks in favour of a human rights-based approach to anti-corruption:

A human rights-based approach to anti-corruption responds to the people's resounding call for a social, political and economic order that delivers on the promise of freedom from fear and freedom from want."<sup>63</sup>

Secondly, an act of corruption on the part of public officials violates the foregoing rights in a constitutionally unjustifiable manner. In other words, an act of corruption by public officials cannot be justified under section 36 of the Constitution or by the internal limitation clause in the community's right to adequate housing. This contention is based on the following factors: an act of corruption is a criminal act; an act of corruption does not constitute a law of general application;<sup>64</sup> and that corruption by public officials is contrary to constitutional values such as human dignity, the achievement of equality and the advancement of human rights and freedoms.<sup>65</sup> After all, corruption by public officials partly weakens accountability structures which are responsible for

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dealt with whether the Minister of Police was vicariously liable for the actions of the policemen, it serves as an authority for an argument that the corrupt act of the public official has the effect of violating the right to dignity. The Supreme Court of India from the case of *Common Cause A Regd. Society v Union Of India And Ors* on 4 November, 1996 <https://indiankanoon.org/doc/1155600/> (accessed 2020-06-05) made it clear that the Minister's betrayal of trust reposed in him had the effect of violating human rights.

62 As mentioned above, this was one the factors that the court took into account when awarding constitutional damages as appropriate remedy in the case of *MEC for the Department of Welfare v Kate supra*, para 31.

63 Former UN High Commissioner for Human Rights, Judge Navi Pillay, Corruption kills. Here's what we can do to address the rot, lecture delivered at the University of KwaZulu-Natal on 2018 <https://www.news24.com/citypress/voices/corruption-kills-heres-what-we-can-do-to-address-the-rot-20180316>, (accessed 2020-06-05).

64 The same argument was raised by the Constitutional Court in the case of *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd supra*, para 52 when it argued that section 36 of the Constitution (1996) was not applicable since no law of general application has been invoked in the limitation of Modderklip Boerdery's rights.

65 In *South African Association of Personal Injury Lawyers v Hendrik and others* (CCT27/00) [2000] ZACC 22; 2001 (1) SA 883; 2001 (1) BCLR 77 (28 November 2000) para 35, Chaskalson P argued that, "Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution ...". The importance of human dignity in the limitation of human rights was

protecting human rights.<sup>66</sup> The internal limitation clause in the community's right to adequate housing cannot also rescue an act of corruption by public officials. In other words, it is highly unlikely that corruption by public officials can be deemed to be reasonable for the purposes of the right to adequate housing.

The suitability of constitutional damages for the afore-mentioned hypothetical example would emanate from the following three factors: Firstly, other constitutional reliefs would not be appropriate for this hypothetical example. In other words, there would be no other alternative remedies that might be available to assert and vindicate the most important rights of the Seshego Community, mentioned above. The reason being, the declaration of rights would not assist the victims of corruption (Seshego Community) to recover the loss they would have suffered. Further, while a remedy of *mandamus* might be effective in cases where public officials have breached or threatened to breach a constitutional right,<sup>67</sup> it would not be suitable for this hypothetical example because the Seshego community would have already lost R250 000 000 as a result of corruption. Secondly, the Seshego community would have suffered a pecuniary loss (R250 000 000 which is the consequence of the breach of the rights of Seshego community) and which could be recovered only by a claim for constitutional damages.<sup>68</sup> Thirdly, constitutional damages for this hypothetical example would also be in line with the United Nations Convention Against Corruption to which South Africa is a party, and which partly obliges state parties to ensure that people who have suffered damage as a result of corruption get compensated.<sup>69</sup>

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stressed by the court in the case of *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 (7 June 2000) para 35.

66 Okpaluba "The Constitutional Principle of Accountability: A Study of Contemporary South African Case Law" 2018 *SA Public Law Journal* 1-39.

67 *MEC for the Department of Welfare v Kate supra*, para 31.

68 As already mentioned, in rejecting the constitutional damage claim for partly being a non-pecuniary loss, the SCA in the case of *R K and Others v Minister of Basic Education and Others* (754/2018 and 1051/2018) [2019] ZASCA 192 (18 December 2019) para 58, partly referred to some of the following cases where the courts awarded constitutional damages for pecuniary loss: *MEC for the Department of Welfare v Kate supra*; *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd supra*.

69 Article 35 of the United Nation Convention Against Corruption *supra*.

The justness for constitutional damages for the foregoing hypothetical example would be based on three factors: Firstly, this remedy would serve the interests of the society<sup>70</sup> in that it would enable the Seshego community to recover (R250 000 000) which belongs to them and not the state. This contention draws inspiration from the following remarks of Chief Justice Mogoeng:

“... The powers and resources assigned to each of these arms do not belong to the public office-bearers who occupy positions of high authority therein. They are therefore not to be used for the advancement of personal or sectarian interests... They convey a very profound reality that State power, the land and its wealth all belong to “we the people”, united in our diversity. These servants are supposed to exercise the power and control these enormous resources at the beck and call of the people ...”<sup>71</sup>

Secondly, this remedy would seek to address or deal with corrupt or unfaithful public officials. As Currie and De Waal argue, compensation for an aggrieved party is necessary in cases where “the administrative decision is taken in bad faith or under corrupt circumstances or completely outside the legitimate scope of the empowering provision”.<sup>72</sup> Thirdly, this remedy would serve as a maintenance of public confidence and faith in the efficacy of this remedy.<sup>73</sup>

## 5 Conclusion

South Africa is battling corruption by public officials. However, South Africa needs to be commended for putting in place some measures that are aimed at dealing with corruption. However, the recent statistics on corruption paints a disheartening picture, especially the one involving public officials. It is on this basis that the author reveals another legal mechanism (a claim for constitutional damages against corrupt public officials) that can also be pursued in the fight against corruption by public officials. This assertion is based on two factors emanating from the hypothetical example, discussed above. The first one is that the public officials' acceptance of R250 000 000 would amount to corruption as described by the PCCA and international regulations. The second one is that constitutional damages would be an appropriate relief for the hypothetical case, discussed above, taking into account the principles regulating constitutional damages as an appropriate relief in South Africa. In other words, constitutional damages would be an effective,

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70 Serving the interests of the society is one of the critical factors considered when crafting an appropriate remedy in a particular case. *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency supra*, para 32; *Department of Transport and Others v Tasima (Pty) Limited supra*, para 205.

71 *United Democratic Movement v Speaker of the National Assembly and Others* (CCT89/17) [2017] ZACC 21; 2017 (8) BCLR 1061 (CC); 2017 (5) SA 300 (CC) (22 June 2017) para 7.

72 Currie and De Waal 200.

73 This is in line with Barns' article 10 which is based on the case of *Fose v Minister of Safety and Security supra*, 836, emphasis added.

suitable and a just relief considering the nature and relative importance of the rights that are in issue, the alternative remedies that might be available to assert and vindicate them, and the consequences of the breach for the claimant concerned and other relevant factors.

Constitutional damage would be effective in that it would vindicate the most important rights of the poor community of Seshego. It would be suitable since no other constitutional reliefs would be appropriate for the hypothetical example, discussed above. The suitability of this remedy would lie in the fact that the loss that the Seshego community (victims of corruption) would have suffered is a pecuniary loss (R250 000 000 which is the consequence of the breach of the rights of Seshego community) for which constitutional damages has already been awarded by the courts in South Africa. The justness of constitutional damages for the hypothetical example, discussed above, would emanates from its ability to serve the interests of the society and the maintenance of public confidence and faith in the efficacy of this remedy.

The foregoing application of the principles regulating the appropriateness of constitutional damages for the afore-mentioned hypothetical case serves as a justification for the feasibility of the victims of corruption's claim for constitutional damages for corruption by public officials in South Africa.<sup>74</sup> Therefore, a claim for constitutional damages emanating from corruption by public officials can be deemed as an additional legal measure aimed at combatting corruption.

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74 This is the case because the group of people are entitled to approach a competent court when their rights have been infringed as per the judgement of the case of *Ngxuza and others v Permanent Secretary, Department of Welfare, Eastern Cape, and others* 2001 (2) SA 609 (E).