



EFFECTIVE REMEDIES IN SOCIO-ECONOMIC RIGHTS LITIGATION

Compiled by Mila Harding

This report is based on a workshop on Effective Remedies in Socio-economic Rights Litigation held on 5 December 2023 at Cliffe Dekker Hofmeyr Inc's offices in Johannesburg, South Africa. The workshop was a collaboration between SECTION27, Cliffe Dekker Hofmeyr and Sandra Liebenberg, H.F. Oppenheimer Chair in Human Rights Law in the Faculty of Law, University of Stellenbosch.

LIST OF ACRONYMS

Abbreviation	Meaning
AG	Attorney General
CC	Constitutional Court of South Africa
CCC	Colombian Constitutional Court
CDH	Cliffe Dekker Hofmeyr Inc
CPS	Cash Paymaster Services
DJP	Deputy Judge President
EE	Equal Education
EELC	Equal Education Law Centre
IDP	Internally displaced persons
LRC	Legal Resources Centre
SAHRC	South African Human Rights Commission
SASSA	South African Social Security Agency
SCA	Supreme Court of Appeal South Africa
SERI	Socio-economic Rights Institute

CASE TABLE

Abbreviation	Case name
<i>Abbott v Burke</i>	<i>Abbott v Burke</i> 100 N.J. 269, 495 A.2d 376, 26 Ed. Law Rep. 670 (1985)
<i>Amasango</i>	<i>The School Governing Body of the Grahamstown Amasango Career School v MEC for Education, Eastern Cape</i> Case no. 3838/2009 (11 March 2010)
<i>BEFA</i>	<i>Minister of Basic Education v Basic Education for All</i> 2016 (4) SA 63 (SCA)
<i>Blue Moonlight</i>	<i>City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd</i> 2012 (2) SA 104 (CC)
<i>Canada (AG) v Ward</i>	<i>Canada (Attorney General) v Ward</i> , [1993] 2 S.C.R. 689
<i>Dladla</i>	<i>Dladla v City of Johannesburg</i> 2018 (2) SA 327 (CC)
<i>Equal Education</i>	<i>Equal Education v Minister of Basic Education</i> 2019 (1) SA 421 (ECB)
<i>Fose</i>	<i>Fose v Minister of Safety and Security</i> 1997 (3) SA 786 (CC)
<i>Grootboom</i>	<i>Government of the Republic of South Africa v Grootboom</i> 2001 (1) SA 46 (CC)
<i>Grootboom (High Court judgment)</i>	<i>Grootboom v Oostenberg Municipality</i> (6826/99) [1999] ZAWCHC 1 (17 December 1999).
IDP case	Judgment T-025/2004
<i>Komape</i>	<i>Komape v Minister of Basic Education</i> [2018] ZALMPPHC 18 (LP)
<i>Linkside</i>	<i>Linkside v Minister of Basic Education</i> (3844/2013) [2015] ZAECHC 36 (26 January 2015)
<i>Madzodzo</i>	<i>Madzodzo v Minister of Basic Education</i> 2014 (3) SA 441 (ECM)
<i>Mazibuko</i>	<i>Mazibuko v City of Johannesburg</i> 2010 (4) SA 1 (CC)
<i>Metrarail</i>	<i>Rail Commuters Action Group v Transnet Ltd t/a Metrorail</i> 2005 (2) SA 359 (CC)
<i>Migrant Health Case</i>	<i>Section 27 v MEC For Health: Gauteng</i> Case No 19304 22 Court Order Default Judgment 14 April 2023.
<i>Mwelase</i>	<i>Mwelase v Director-General for the Department of Rural Development and Land Reform</i> 2019 (6) SA 597 (CC)
<i>Olivia Road</i>	<i>Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg</i> 2008 (3) SA 208 (CC)

Abbreviation	Case name
<i>Prison system cases</i>	Judgment T-153/1998 and Judgment T-388/2013
<i>Rycloff</i>	<i>Rycloff Beleggings (Pty) Ltd v Bonkolo</i> (2019/18156) [2022] ZAGPJHC 796 (4 October 2022)
<i>Scholar transport case (Eastern Cape)</i>	<i>Tripartite Steering Committee v Minister of Basic Education</i> 2015 (5) SA 107 (ECG)
<i>Scholar transport case (KwaZulu-Natal)</i>	<i>Equal Education v Minister of Basic Education and Others KwaZulu-Natal High Court, Pietermaritzburg</i> Case No 3662/17P
<i>Sechaba Protection Services</i>	<i>Sechaba Protection Services CC (Pty) Ltd v Passenger Rail Agency of SA Ltd</i> [2023] ZAWCHC 280
<i>Social grant cases</i>	<i>Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency</i> 2014 (4) SA 179 (CC); <i>Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency</i> 2014 (1) SA 604 (CC); <i>Black Sash Trust v Minister of Social Development</i> 2017 (3) SA 335 (CC), <i>Black Sash Trust v Minister of Social Development (CCT48/17)</i> [2018] ZACC 36
<i>Social Justice Coalition</i>	<i>Social Justice Coalition v Minister of Police</i> 2022 (10) BCLR 1267 (CC).
<i>Thubakgale</i>	<i>Thubakgale v Ekurhuleni Metropolitan Municipality</i> 2022 (8) BCLR 985 (CC)
<i>UDM v Eskom</i>	<i>United Democratic Movement v Eskom Holdings SOC Ltd</i> [2023] ZAGPPHC 280; 005779/2023 (5 May 2023)

INTRODUCTION

By Faranaaz Veriava, Jacquie Cassette
and Sasha Stevenson

In many socio-economic rights cases, public interest organisations and affected persons struggle to compel the government to comply with the court orders made against them. There are several reasons for this, but it is often because the court orders the government to perform tasks that require the government to change systems, organisational cultures and individual attitudes. These are not easily addressed by a single court order, and usually court supervision is required to ensure orders are implemented.

Court supervision is often entirely reliant on civil society's resources and capacity to monitor the progress that the government makes. This has been a common issue for litigation concerning socio-economic rights. If one asks for systems to change and for the state to report on it, one is going to have to check that it is happening on the ground. However, relying to this extent on civil society to conduct long-term monitoring in such cases creates further issues in terms of sustainability and feasibility, considering the scale of the task and the time and resources required. Because of this, and because of government's increasing failure to comply with court orders addressing systemic issues, there is a need for remedies that would both lighten the monitoring burden of public interest organisations and increase the capacity of the courts to supervise structural orders.

The idea for this workshop arose in 2022. The *Thubakgale* judgment,¹ which had disturbed us on both a human and a jurisprudential level, had just been handed down. The case cast doubt on the ability of public interest organisations to claim constitutional damages for socio-economic rights violations. SECTION27 was also in the midst of another round of monitoring compliance with



the structural order in the *Komape* case,² which required the development and implementation of a plan to get rid of unsafe pit latrines in Limpopo schools. To execute the monitoring task, SECTION27 had to analyse vast numbers of spreadsheets, often supplied in formats that were difficult to navigate. The task also required calling and visiting hundreds of schools across the province; and on one occasion, returning to court because of the unconstitutionality of the plans to eradicate pit toilets. The monitoring thus required a great deal of resources and capacity, which may not always be available. However, because of this case, over a thousand schools in Limpopo no longer need to rely on unsafe pit latrines.

SECTION27 was also busy monitoring progress in the *Migrant Health Case*,³ in which SECTION27 and Cliffe Dekker Hofmeyr Inc (CDH) worked together as attorneys of record. The purpose of the case was to ensure that all pregnant and lactating women, as well as children under six, could access free healthcare services at public health facilities, regardless of their citizenship or documentation status. The matter was overseen by DJP Sutherland of the Gauteng High Court.

At first, Judge Sutherland required an affidavit from the state attorney and from the Head of the Gauteng Department of Health explaining why they had failed to respond to this litigation. He included a threat of referral to the Legal Practice Council for the state attorney. Later, Judge Sutherland ordered the government to place posters at public health facilities informing staff and patients that public health providers were not allowed to charge a fee to any indigent pregnant or lactating woman, or child under six. The government was ordered to report to court at every step of implementation, which resulted in four reports. He also ordered the government to return to court on the date implementation was meant to have been completed.

¹ *Thubakgale v Ekurhuleni Metropolitan Municipality* 2022 (8) BCLR 985 (CC).

² *Komape v Minister of Basic Education* [2018] ZALMPPHC 18 (LP) ('Komape').

³ *Section 27 v MEC For Health Gauteng* Case No 19304 22 Court Order Default Judgment 14 April 2023 ('Migrant Health Case').

The tight judicial oversight paired with our verification of the reports (SECTION27 went to hospitals to check if the posters were up) achieved meaningful results regarding access to healthcare for pregnant women and children. This outcome was the result of the courts and the litigators actively working together. Unfortunately, in December 2023 Judge Sutherland announced a moratorium on case management because of an unreasonable caseload, which was overburdening the few judges available in Gauteng. Therefore, the incredible structural order paired with innovative case management by Judge Sutherland will not be available to litigants for the foreseeable future.

As is often the case, lack of resources – or perhaps misuse of resources, in some respects – hindered the system’s ability to do justice. However, the point is that there are ways to craft remedies that meet the needs of the litigants and litigators, and even some that do not wholly rely on the litigators’ capacity to meticulously monitor and verify the government’s progress. This workshop aimed to explore what options exist to make this possible.

The main question concerned how to make remedies more effective for the vindication of socio-economic rights, and what the upshots and limitations of each of the various approaches has been. Those who attended the workshop were academics, researchers, attorneys and advocates, as well as judges. Many of the participants were from public interest organisations that focus on furthering different socio-economic rights in the Constitution, including the rights to healthcare, basic education, housing, and social security. We also sought to bring in the perspective of academics and jurists from Colombia, which has a rich socio-economic rights jurisprudence in which the Colombian Constitutional Court established a support structure to assist it with monitoring structural remedies.

The participants discussed many potential remedies that may be effective in bringing about tangible gains for persons whose socio-economic rights are being violated, as well as changing systems to prevent similar rights violations in future. These included declarators, constitutional damages, supervisory orders, and the imposition of court-appointed agents to assist with some of the monitoring burden. Such agents have included the Auditor General (AG), panels of experts, independent auditors, and

a special master. Additionally, the participants discussed the potential of establishing in the South African judiciary something like the support structure established for monitoring supervisory orders in Colombia. The participants also spoke extensively on the need to democratise public interest litigation, and to recognise the limits of the judiciary as a vehicle for attempting to vindicate socio-economic rights. Advocacy, engagement with government officials, and submissions to parliament on legislation concerning socio-economic rights must continue and be strengthened.

The workshop was timely, if not overdue. Without the vindication of socio-economic rights, and effective judicial remedies to facilitate this, our Constitution may become a sad and soiled promise. Our hope is that readers of this report are inspired to consider further the many methods that have been used to realise socio-economic rights in South Africa, and conduct the research that is still necessary to advance this.

The workshop was divided into three parts.

- **Part one** concerned the perspective of civil society attempting to ensure the realisation of socio-economic rights in South Africa.
- **Part two** focused on how to design remedies to address the causes behind a socio-economic right being violated in an individual case, from both a South African and a Colombian perspective.
- **Part three** brought in the perspectives of members of the judiciary in South Africa and Colombia on granting remedies for the vindication of socio-economic rights.

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OPENING ADDRESS – Former Justice of the Constitutional Court Johan Froneman



Froneman served as a Constitutional Court Justice from 2009 to 2020. He is currently an Extraordinary Professor at the University of the Free State.

Introduction

Based on his experience at the Constitutional Court (CC), particularly in the cases of *Mwelase*,⁴ and the social grants cases,⁵ Froneman commented on topics including structural orders, court-appointed agents, an institutionalised monitoring mechanism within the judiciary, and constitutional damages. However, before this he set out the necessary context for his address.

Context of judicial remedies in socio-economic rights cases

After centuries of oppression, colonialism and apartheid, South Africans of all races established a constitutional democracy. The Constitution of the Republic of South Africa 1996 is based on the values of human dignity, equality and freedom. It protects the rights of those living in the country from unjust intrusion by the state or private parties. It acknowledges our past injustices and makes provisions to address inequality, including in terms of socio-economic rights.

The democratically elected government was bound to give effect to the Constitution. The judiciary was given the power of judicial review, to ensure human rights were not infringed. The Constitution also made provision for necessary institutions such as the South African Human Rights Commission (SAHRC) and the AG.

We assumed that the government would realise the Constitution. If it failed, we thought the courts would remedy this. Instead, many South Africans still live in systemic deprivation, preventing them from enjoying their rights. Froneman referenced Liebenberg regarding the cause of this, which is a 'complex mix of factors that includes inappropriate political influence over public sector appointments, corruption and patronage networks, capacity and skills deficits, maladministration and resource constraints', the cumulation of which are called 'structural governance dysfunctions'.⁶



Froneman stated that comparing what we believed South Africa would become to its dysfunctional reality can help us identify what aspects of our society do not function, and how to remedy them. This may result in us focusing on trying to influence legislation, policy, and budgets. Many have argued that socio-economic rights issues cannot be addressed without

⁴ *Mwelase v Director-General for the Department of Rural Development and Land Reform* 2019 (6) SA 597 (CC) ('Mwelase').

Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency 2014 (4) SA 179 (CC);

⁵ *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (1) SA 604 (CC); *Black Sash Trust v Minister of Social Development* 2017 (3) SA 335 (CC); *Black Sash Trust v Minister of Social Development* (CCT48/17) [2018] ZACC 36 ('social grants cases').

⁶ Sandra Liebenberg, 'The Art of the (Im)Possible? Justice Froneman's Contribution to Designing Remedies for Structural Human Rights Violations' (2022) 12 Const Ct Rev 137 139.

considering economic policy. Organisations should also remember to look at obstacles caused by the private sector in their interventions.

Mwelase v Director-General for the Department of Rural Development and Land Reform

Froneman used the Mwelase case as his starting point in discussing remedies for socio-economic rights violations. The majority judgment in the case was penned by Cameron J. The case concerned the confirmation of an order in which a special master was appointed to assist the Department of Rural Development and Land Reform with processing over 10 000 labour tenants' applications. The special master would have greater powers than any court-appointed agent before it – in addition to oversight, which is the usual function given to court-appointed agents, it would have land drawing and budget projection powers. The CC found this was justified because of the '...sustained large-scale systemic dysfunctionality and obduracy [...] evidenced [in Mwelase].'⁷

The appointment of the special master was to address the political blockages that were plaguing the Department of Rural Development and Land Reform. In this regard, Cameron J stated that the courts and the government should be seen as part of a shared enterprise to fulfil the Constitution's promises. This may not be without tensions, but the tension may also be productive. This is true if we view the separation of powers doctrine as establishing '...a relationship of mutual accountability, responsiveness and openness between the three branches.'⁸

According to Froneman, in this case and others, it was the government's failures that required the courts to 'explore the limits of separation of powers jurisprudence'.⁹ Where rights have been severely violated, the courts have few options but to grant effective remedies. This was true in both Mwelase and the social grants cases.

⁷ Mwelase [39].

⁸ Mwelase [47].

⁹ Mwelase [48].

The social grants cases

In the social grants cases, penned by Froneman J, the CC had declared that a contract between the South African Social Security Agency (SASSA) and Cash Paymaster Services (CPS) for the management of the payment of grants was constitutionally invalid, and ordered the government to run a new tender process. Additionally, even though CPS was a private entity, the CC stated that it had constitutional duties when exercising public functions (managing the right to social security), which would persist until the completion of a new tender process. The invalidity of the contract would thus not take effect while the government ran the tender process.



SASSA then promised the CC that government itself would manage the payment of social grants. However, it was later revealed that SASSA was aware that this was not possible within the relevant timeframes. Neither SASSA nor the Minister of Social Development informed the CC. Immediately before the invalidity of the contract would take effect, it came to light that SASSA planned to enter into another contract with CPS without a competitive tender process. Black Sash then brought an application to contest this, and were joined by several other organisations.

Froneman stated that SASSA's plan was a flagrant breach of the CC's previous order, and

this required accountability. The CC extended the original – invalid – contract with CPS for another year, disallowing the negotiation of a new contract. The Minister and SASSA were ordered to file detailed reports on how they would ensure grant payments. The CC established an independent, high-level specialist panel consisting of the AG, independent lawyers and experts to report on the payment of grants and the steps taken by SASSA to either take over the payment of grants or run a competitive tender process.

Finally, the CC ordered the Minister to explain why she should not personally pay for the costs of the application; there had been a severe breach of the rule of law, and a potential imminent breach of millions of people’s right to social security. Later, the CC made a personal costs order against the Minister. It also referred her to the Director of Public Prosecutions for possible perjury charges, which transpired and of which she was later found guilty.

From Froneman’s perspective, this was a case calling out for effective relief, and the CC was unable to trust the government to fulfil its obligations. However, the CC had no predetermined ideas of what an effective remedy would be in this case. This made the submissions of Black Sash, Freedom Under Law and the amici (Corruption Watch and the Post Office) in the case crucial. Other challenges remained: the CC lacked both resources and facilities to monitor its orders. Froneman doubts that this has changed.

CONCLUDING REMARKS

1 First, while the courts are obliged to give effective remedies, applicants must ensure that the relief requested is clear. Judges are not necessarily experts on these matters, and so must be provided with the necessary research to assist them in crafting effective remedies.

2 Second, when seeking a supervisory order, litigants must ensure it is designed to include the participation of all of the affected persons and relevant government institutions. Additionally, while some judges perform well in managing structural orders, most do not have the capacity. Litigants must thus do the hard work, and the structural order itself should provide for monitoring mechanisms that in the end require only court approval.

3 Third, on the creation of a judicial monitoring mechanism: Froneman would support this, but is sceptical regarding its implementation in the current circumstances. For now, public interest organisations should focus on creating incremental precedents that may one day assist the Department of Justice to create such an institution. It would also be valuable to engage directly with the Minister of Justice.

4 Fourth, on constitutional damages, Froneman stated that he is unaware of any firm precedent excluding them in socio-economic rights cases. If a compelling case is brought, he believes that it is possible that this would create authority that such damages will be awarded in appropriate cases. Finally, on punitive cost orders, he stated that they are important as a last resort, and the forgotten crime of perjury must be remembered more often.

PART

1

THE VIEW FROM CIVIL
SOCIETY ON ENFORCING
SOCIO-ECONOMIC RIGHTS
REMEDIES IN SOUTH AFRICA

This panel was facilitated by Dr Faranaaz Veriava.

CHALLENGES AND ACCOMPLISHMENTS IN LITIGATING FOR THE RIGHT TO BASIC EDUCATION – CAMERON MCCONNACHIE



Cameron McConnachie is an attorney, and is the co-lead of the education programme at the Legal Resources Centre (LRC).

Introduction

In McConnachie's experience with socio-economic rights litigation in the Eastern Cape, he has found that it takes many years and several court orders to compel the state to make progress. *Madzodzo*,¹⁰ which required the state to provide schools with 600 000 pieces of furniture, took five court trips over six years. The *Linkside* class action and its predecessors (*'Linkside'*),¹¹ which aimed to fill 7 000 teacher posts and reimburse schools for having paid their salaries, required six court trips over four years. The *Amasango* matter,¹² in which the state was ordered to build an adequate school for learners with special educational needs, has taken more than 12 years and four court trips, yet construction only began in 2023. The scholar transport cases have taken eight years; and despite a few hundred more learners having benefited, over 100 000 learners still require transport.¹³ Many remedies were granted in these cases, and McConnachie believes that there was no 'silver bullet' for improving compliance.

McConnachie gave a non-exhaustive list of reasons as to why these types of cases take so long and require various orders.

Multiple orders over multiple years

First, many of the orders are consent orders, in which the state hurriedly agrees to execute tasks that it lacks the capacity to perform. Noncompliance is immediate, and real engagement only happens later, if ever.

Second, the orders are expensive. When *Madzodzo* and *Linkside* were handed down in 2014, they collectively required nearly half of the province's entire infrastructure budget. *Blue Moonlight* precludes the state from defending their failures to budget in line with their constitutional obligations by citing resource constraints.¹⁴ However, the money required may not be immediately available, and it can take



¹⁰ *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM) ('*Madzodzo*').

¹¹ *Linkside v Minister of Basic Education* (3844/2013) [2015] ZAECGHC 36 (26 January 2015).

¹² *The School Governing Body of the Grahamstown Amasango Career School v MEC for Education, Eastern Cape* Case no. 3838/2009 (11 March 2010) ('*Amasango*').

¹³ *Tripartite Steering Committee v Minister of Basic Education* 2015 (5) SA 107 (ECG) ('*Scholar transport case (Eastern Cape)*').

¹⁴ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) [74] ('*Blue Moonlight*').

years to budget for an item. Compliance with an order may require redirecting funds from other essential items, thus creating new cases.

Third, applicants and their lawyers often do not understand how the bureaucracy functions. Understanding this is vital for designing effective remedies. The lack of understanding of the system in the scholar transport litigation may have contributed to the lack of widespread progress.

Fourth, state officials are often under-capacitated, sometimes beholden to unions, or inexperienced. A culture of service may not be present. This has been evident in many cases where orders have had little effect without changes in organisational culture.

Fifth, preparing for court and obtaining court dates takes time. The legal system can be used as a delay mechanism when the state is intransigent.

Sixth, after the initial orders, one needs more time to collect evidence of non-compliance to justify stronger remedies that can catalyse action.

Seventh, there are often unexpected challenges. Tender disputes or personnel changes in official positions can add years to matters. Changes on the applicant's side can also result in delays. Additionally, laws or regulations may be introduced that change the playing field; or a pandemic may occur, as it did in 2020.

Achievements

Despite these challenges, McConnachie stated that there have been achievements in the development of effective remedies, with meaningful results. Hundreds of mud schools have been replaced with safe structures. Thousands of classrooms have been built to reduce overcrowding. Over a thousand pit toilets at Limpopo schools have been eradicated. Millions of textbooks have been delivered on time. Hundreds of thousands of learners no longer need to sit on floors. Thousands of undocumented learners can access schooling.

And millions of school meals were distributed during the COVID-19 lockdowns.

Many of these successes resulted from courts and litigators crafting effective remedies. First, even simple declaratory orders have sometimes had a positive impact. For example, the order in the BEFA case confirming that the right to basic education includes textbook provisioning greatly improved such provisioning.¹⁵

Second, orders requiring the state or independent entities to conduct audits have generated crucial data, which can itself be a significant aim or result of litigation. Such data assists the applicants, government and activists to measure progress and monitor implementation. The audits on furniture and pit toilets in schools resulted in better engagement with the state, and probably increased compliance.



Third, structural interdicts granting the state more administrative resources can improve compliance. The claims administrator in *Linkside* effectively managed the payment of the money owed to schools. In *Madzodzo*, the court-ordered task team resulted in the applicants identifying specific issues that needed to be addressed. McConnachie has also been informed that the special master in *Mwelase* is finally making some progress on developing a plan to help with processing the applications of over 10 000 labour tenants.

Fourth, specificity can help. In *Madzodzo* and round three of *Amasango*, the court ordered the

¹⁵ *Minister of Basic Education v Basic Education for All* 2016 (4) SA 63 (SCA) ('BEFA').

¹⁶ Ann Skelton, 'Strategic Litigation Impacts: Equal Access to Quality Education' (Open Society Foundations 2017), <www.justiceinitiative.org/publications/strategic-litigation-impacts-equal-access-quality-education> accessed 4 April 2024.

development of plans that needed to address specific challenges in detail. The court being very specific has improved implementation in some cases, for example naming which officials are responsible for what, and specifying that circulars on the order be distributed or that posters be displayed to alert officials and the public of court orders.

Fifth, fostering long-term, positive relationships with sympathetic, capable government officials has been extremely valuable. One of the officials in *Madzodzo* made all the difference in ensuring the orders were implemented. That relationship has endured, and still provides the LRC with valuable insight into the system.

Sixth, in cases of chronic noncompliance, punitive orders such as contempt of court can be effective. In complex cases it can be easy for officials to defend themselves against such an order; however, the threat of having to explain oneself in court against such an order can be as effective.

Seventh, innovative orders linked to the specific case can enhance compliance. In *Linkside*, when the Department failed to pay teachers' salaries, the court ordered that this constituted a judgment debt, which allowed the issuing of a writ for the attachment of an official's car. This brought swift compliance.

WAY FORWARD

After listing the above successes, McConnachie presented six points to consider in future:

1 Cases that attempt to address systemic issues will not end quickly. Therefore, before litigation starts, organisations must develop a long-term plan, with necessary contingency plans, to ensure there are dedicated applicants and attorneys as well as sufficient funding. Involving other organisations may help.

2 Organisations must be proactive in creating positive relationships with sympathetic state officials before, during and after litigation. This can limit the need for litigation, help frame relief, and help with ensuring orders are implemented. Orders that establish joint task teams or require meaningful engagement may help.

3 Organisations should have some understanding of the tasks and costs necessary to implement an order. This should inform their strategies, the remedies sought, and the timing of cases.

4 Once obtained, court orders should be widely disseminated. One could attempt to obtain an order for the state itself to communicate the orders to the public. Additionally, orders requiring the state to hold public hearings on their progress could enhance transparency and accountability.¹⁷

5 Organisations must ensure they have built and are maintaining relationships with the people they serve over the course of the litigation. Regular engagements should be planned and budgeted for.

6 We should consider developing a practitioner's handbook on remedies for socio-economic rights violations. This may help expedite matters or catalyse more meaningful, innovative remedies.

¹⁴ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) [74] ('Blue Moonlight').

THUBAKGALE V EKURHULENI METROPOLITAN MUNICIPALITY AND HOW JUDICIAL REMEDIES DO NOT ALWAYS WORK FOR THE POOR – KHUSELWA DYANTYI

Introduction

Dyantyi described the challenges she has faced trying to bring about state compliance with court orders, with a particular focus on the case of *Thubakgale*. She described *Thubakgale* as a case in which SERI had done everything they could to fight for the rights of their clients; yet the fulfilment of their rights remains illusory.

Facts of *Thubakgale v Ekurhuleni Metropolitan Municipality*

The case concerned Mr Thubakgale and 132 other applicants living in extreme poverty, who were promised and allocated housing by the government over 20 years ago. This means that at that point, their right to adequate housing had been realised. However, the housing they were allocated never materialised for them. This was because the Municipality had unlawfully allocated the houses to other people. In the meantime, the applicants were suffering, out in the cold, without an inch of dignity. The conditions the applicants were forced to live in, despite having been allocated already built houses, necessitated a remedy for the state to provide them with housing. However, after three court orders spanning six years, this has not materialised.



At the time of the workshop, Khuselwa Dyantyi was an activist and attorney at the Socioeconomic Rights Institute of South Africa (SERI). She is now an attorney at SECTION27.

Choosing judicial remedies for socio-economic rights violations

Dyantyi noted that in constitutional matters, one must try to predict which remedies would properly vindicate the relevant constitutional rights. The duty of legal practitioners is to understand clients' challenges and obtain tangible relief. However, public interest lawyers must also understand that the remedy sought should benefit not their clients, but also all those in a similar position.

Socio-economic rights cases are often complex, involving questions of the separation of powers and affecting state budgets. This makes the stakes extremely high. Legal practitioners must try to develop ideas for remedies that would allow the court to make orders that can provide true redress, both to their clients and to others who face the same hardships. It is thus crucial that individual clients are made aware that the process will be slow and not straightforward. Obtaining tangible relief may take years, if it ever happens at all.

Remedies in *Thubakgale*

In *Thubakgale*, eviction of the current residents of the applicants' houses was not a just option.

The current residents were in a similar position as the applicants in terms of poverty and marginalisation. Instead, the applicants obtained a structural interdict, which required participation from all the parties, and a supervisory order. Such orders require the state to plan and do certain things within certain timeframes, and require parties to return to court and report on progress. While in some cases this type of order can be successful, in *Thubakgale* it was not. The Municipality went to the Supreme Court of Appeal (SCA) for an order to extend the timeframes, which was granted. Much later, a day before the timeframes in the SCA order were to expire, the Municipality – having failed to make progress – reapproached the court to extend the deadline without consequence.

At that point, the applicants had many remedies on paper – a declaratory order, a mandatory interdict, a supervisory order, as well as an order for the Municipality to establish a steering committee for monitoring. However, the applicants still had no housing; and there had been a total lack of progress towards providing it. The applicants opposed the Municipality's attempt, and requested constitutional damages. This was not because the applicants wanted constitutional damages – they wanted the housing that was due to them. But constitutional damages had the potential in this case to compel compliance and temporarily alleviate their living conditions. The High Court and SCA denied the applicants this remedy, and the case was taken to the CC.

The CC broadly agreed that the rights of the applicants had been violated, but did not grant them constitutional damages. The result of the judgment is that such damages could possibly be granted in socio-economic rights cases, but they can only be granted as a last resort, where no other remedies are available.

Dyantyi argued that the position of the CC was untenable. This was a case in which the applicants were not required to wait for the state to progressively realise their rights using available resources. The Municipality had already

done that by building and allocating the housing. The applicants did not receive their housing, solely because the Municipality wrongfully allocated the applicants' houses to other people, very probably due to corruption.

Applicants should not be forced to try every other remedy before they obtain one that vindicates their rights. At times it is both acceptable and necessary to choose the quickest vehicle for this. The CC also did not appreciate the potential deterrent effect that constitutional damages could have against other such severe rights violations.



State non-compliance with remedies

Dyantyi noted that sometimes remedies and laws are good on paper, but simply do not work for the poor in cases where the state is recalcitrant. *Thubakgale* is a perfect example of this. The result is that poor and marginalised socio-economic rights holders are the ones who suffer. Several remedies have been granted by the CC for the realisation of socio-economic rights, including declarators and supervisory orders.

Declaratory orders clarifying the obligations attached to the right to adequate housing were used in *Grootboom*,¹⁸ *Dladla*,¹⁹ and *Olivia Road*.²⁰ While declarators are victories, they often do not expedite the state's compliance with its

¹⁸ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

¹⁹ *Dladla v City of Johannesburg* 2018 (2) SA 327 (CC).

²⁰ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC).

obligations, resulting in the need to return to court. Poor applicants do not have the resources or time to litigate endlessly against the state for the vindication of their rights.

If the state is unresponsive, supervisory orders can be undesirable. In the end, what matters is that the consequences of the remedy sought must be felt by the applicants and those in similar circumstances. It is difficult to find a judge willing to monitor structural orders until the matter is over. Without a responsive and cooperative state, even finding a willing judge can be of little use. In a case Dyantyi worked on – *Rycloff Beleggings (Pty) Ltd v Bonkolo*²¹ – the appointed judge was active in monitoring the order. However, because of a lack of cooperation on the part of the government, the judge needed to issue multiple directives to induce compliance. Even then, the government failed to comply with the order, and instead appealed to the SCA.

CONCLUDING REMARKS

While resources and policies often exist for the realisation of socio-economic rights, the state may lack the political will to realise these rights. Remedies that are appropriate to the specific circumstances of a case must be utilised or creatively forged to ensure socio-economic rights are more than paper promises. For example, personal costs orders may send a message to an unresponsive, uncooperative state that socio-economic rights were made justiciable for a reason – they are at the cornerstone of the Constitution. Additionally, because there are also constraints on civil society, meaningful engagement is an avenue we must try before going to court.

The many landmark cases on socio-economic rights, while good on paper,

have not always been effective in ensuring the enjoyment of such rights. For example, after the Grootboom case, Mrs Grootboom eventually died without a house. And there is a strong risk that six years after initially approaching the court, Mr Thubakgale might also die before receiving his house.

THE ISSUES WITH USING JUDICIAL REMEDIES TO ADDRESS STATE INCAPACITY AND DYSFUNCTION – NURINA ALLY



Ally is a senior lecturer in the Department of Public Law and the director of the Centre for Law and Society at the University of Cape Town. Prior to this, Ally served as the executive director of the Equal Education Law Centre (EELC).

²¹ (2019/18156) [2022] ZAGPJHC 796 (4 October 2022) (*'Rycloff'*).

Introduction

According to Ally, the foremost challenge faced by organisations and activists is dealing with state incapacity – an inability to plan, budget and coordinate effectively to provide basic services. She has focused on navigating some of the complexities of the courts adopting a greater managerial stance in its dealings with the state. In this regard, her instinct regarding public interest litigation leans towards remedial de-escalation rather than escalation. Having set out this context, Ally highlighted several challenges that she encountered at the EELC.

Challenges in localised interventions

In one's choice of intervention, there are tensions or trade-offs between targeting large structural issues and conducting more localised interventions (for example, representing just a few schools in a matter). Localised interventions and remedies can be very effective, and have tangible impact; although the EELC frequently struggled with state compliance even in such cases.

Ally stated that even if tangible benefits materialise for our clients in localised interventions, this does not address the root causes of the issues. It also risks the accusation that we may be contributing to governance dysfunctions by disrupting existing priorities, budgets and plans. The validity of that accusation may depend on the case; however, it is true that if our focus is on targeting isolated issues, we will not contribute to resolving the problems at the root of governance dysfunction.

Combining litigation and advocacy

An alternative approach has been to use both litigation and broader advocacy to combat systemic failures. This entails attempting to stimulate government to adopt plans and policies, coordinate and budget effectively, and collect

accurate data on an issue. Equal Education (EE), which consists of secondary school students from across the country, adopted a model to address issues through establishing flagship campaigns and using advocacy and litigation to advance those campaigns. Two of EE's campaigns were for scholar transport and for norms and standards for school infrastructure. These were aimed at securing better governance, systems and administration, as opposed to garnering immediate results. This strategy has been painfully slow, and requires significant determination to maintain.

Progress on the ground

However, even when litigation that targets broad systemic improvements does result in incremental progress (e.g. the development of plans or data collection processes), this does not always translate into improved realisation of socio-economic rights. Follow-up litigation becomes necessary for full implementation.

The Norms and Standards Campaign did eventually secure regulations for basic norms and standards for school infrastructure, which were at first so poorly drafted that they had to be challenged in court.²² The High Court ordered that the regulations be redone so that clear obligations and timelines were set out. However, with several of the timelines having elapsed, many learners must still go to schools that are essentially death traps.

Now the Department of Basic Education has indicated that there may be new regulations that backtrack on the commitments made in the current regulations. Concurrently, government has slashed funding allocated to basic education, making the incremental progress we saw with the Norms and Standards Campaign at risk of being undermined. Many have argued that the best litigation for socio-economic rights occurs when accompanied by strong social movements. This was the case with the Norms and Standards Campaign, but the desired level of progress has not occurred.

²² *Equal Education v Minister of Basic Education* 2019 (1) SA 421 (ECB) (*'Equal Education'*).

Capacity in civil society and the courts

Civil society needs to be capacitated to engage in the long-term advocacy, litigation and oversight work that is necessary to address these challenges. The courts must also be capacitated for this kind of work. For example, the scholar transport campaign ran over seven years, and litigation took over four years.²³ A structural interdict was obtained which required continuous engagement between EE and the state, data verification, and constant monitoring. SECTION27 was involved as an amicus focusing on learners with disabilities. They, EE and the EELC invested significant time and resources in monitoring the order. According to Ally, there were some positive results – a provincial policy was put in place, actual data collection occurred, and a mechanism for intergovernmental cooperation was set up. However, the sustainability of this is questionable.

Ally stated that the investment of time and resources was draining, even for a relatively well-funded organisation. Organisations face numerous demands, and must respond to the changing priorities of their members. Maintaining interest in a long-term campaign can be difficult, with no quick, tangible benefits. The question arises as to whether or how the courts can sustain monitoring and oversight in the absence of a capacitated civil society.

On occasion, the courts have been willing to adopt creative, managerial interventions such as appointing agents to monitor compliance with their orders. This can sometimes be a positive development. However, Ally stated, the sustainability of this is also uncertain. South Africa faces widespread governance failures across the board. It is unlikely that the courts would be able to intervene in a systemic manner in all governance failures. There are also concerns regarding the separation of powers, and that the courts do not have the capacity to conduct many interventions of this kind. Therefore, the

monitoring role of the courts is limited; in addition to thinking about how courts can become bolder in their orders, we must also think about how to bolster civil society.

Questions regarding our reliance on litigation

Finally, Ally stated, public interest organisations (and broader civil society) must consider whether we place too much reliance on litigation. Despite litigation's shortcomings, it is now increasingly becoming the only way to get the state to respond to issues. Historically, EE has relied on a variety of methods, including shaming government, protesting and raising public awareness, and these methods have had significant impact. Sometimes the state becomes very active when it is threatened with public shame; however, Ally believes the state has become increasingly immune to shame. Calling government out for its failures gets lost in the noise generated by corruption and local government failures. This phenomenon has become so severe that many members of the public seem to be unable to respond to all of it.

CONCLUSION

Ally posited that if we accept that civil society and the courts can do a lot, but cannot do everything, then we must begin to consider how to get the broader public – beyond our silos and organisations – engaged and active in trying to remedy the challenges we face. This is a challenge for us to consider; do we sufficiently consider the state of engagement with the broader public on the issues we care so deeply about?

²³ *Equal Education v Minister of Basic Education* KwaZulu-Natal High Court, Pietermaritzburg Case No 3662/17P ('Scholar transport case (KwaZulu-Natal)').

PANEL ONE DISCUSSION



PUBLIC PARTICIPATION THROUGH THE COURT

- The participants noted that courts can promote public participation through orders requiring such, which may enhance accountability and put pressure on the government to comply with orders.
- Court-appointed agents can also transform into more permanent forums facilitating meaningful engagement with government. Hooda Abrahams-Fayke from the Black Sash described how the high-level expert panel established by the CC in the social grants cases led to the establishment of a recourse forum, which is a key platform to address issues concerning social grant payments.



LOCAL GOVERNMENT

- Additionally, local governments – which deliver most services on the ground – were mentioned; in that they have the structures for public participation, but these are either not working or not being adequately utilised.
- Understanding and attempting to meaningfully engage with local governments could be an important alternative to litigation.
- Ultimately, democracy must be made to work, and section 195 of the Constitution must be engaged more often. Participants suggested engaging with organisations such as the Public Service Accountability Monitor, which engages in this work and is having encouraging impact.



ENGAGING WITH NATIONAL AND PROVINCIAL PARLIAMENT

- Engaging with national and provincial parliament was also recognised as an important route that public interest law organisations do sometimes pursue, but should do so more often.
- This does not need to be to the exclusion of litigation.
- Public interest organisations must evaluate the gains they have made through parliamentary engagement, and potentially enhance collaboration between organisations that have expertise in doing this with those who do not.



ISSUES ENCOUNTERED WITH MEANINGFUL ENGAGEMENT

- Participants also described their struggles with meaningful engagement – that it takes time, and is often ineffective when government is unresponsive.
- The participants also acknowledged that there is a need to ensure that actual members of the public participate in the meaningful engagement, as opposed to only the public interest law organisations representing them. Litigants should ensure that remedies are democratised.



CHAPTER 9 INSTITUTIONS

- The participants recognised that Chapter 9 institutions have distinct advantages that may be of great help in monitoring supervisory orders, and even in resolving disputes before litigation begins. For example, government is very responsive to the Auditor General, the orders of the Public Protector are binding, and the Human Rights Commission has subpoena powers.
- Public interest organisations should definitely engage Chapter 9 institutions more often.

PART

2

TAILORING REMEDIES TO
THE CAUSE OF GOVERNANCE
DYSFUNCTION IN SOCIO-
ECONOMIC RIGHTS CASES IN
SOUTH AFRICA AND COLOMBIA

This panel was facilitated by Dr Sanya Samtani. Dr Samtani is a legal academic and currently a senior researcher at the Mandela Institute at the University of the Witwatersrand.

BENEFITS AND ISSUES WITH LONG-RUNNING CASES AND SPECIAL MASTERS – GEOFF BUDLENDER



Budlender is a senior counsel practising in Cape Town. He co-founded the Legal Resources Centre in 1979, served as its National Director from 1994 to 1996 and led its Constitutional Litigation Unit from 2000 to 2004. From 1996 to 2000, he was Director General of the Department of Land Affairs. He has also served as an acting judge on the High Court.

Introduction

Around two decades ago, when Budlender finished working in the Department of Land Affairs and was rejoining the LRC, he attended a meeting between several lawyers and activists in New Jersey, US, in which he stated that he was interested in structural remedies, but that South African public interest lawyers obviously did not want to replicate the slow pace of the New Jersey school litigation (*Abbott v Burke*).²⁴ This case concerned the right to education in the New Jersey State Constitution, and at the time had been running for about 20 years.

A lawyer later informed Budlender that he was representing the plaintiffs in the case, and that he believed it would not be a bad thing if the case went on for decades longer. The ongoing nature of the litigation created accountability to the poor people of New Jersey on the part of state government. The plaintiffs had got their 'hooks into the system', and the lawyer stated he was in no hurry to release them. By 2015 the case had significantly transformed parts of New Jersey's education system, and it continued to be taken further.

From this, Budlender learnt that structural issues may require lawyers to go against their instincts, which is usually to try to win a case and move on. Structural cases require long-term thinking, and

for lawyers to consider not only their individual clients, but also the greater cause. They should be in a hurry to obtain solutions, but not be in a hurry to close the case file. Donors should also be made aware of this.

Supervisory orders in South Africa

Judges are also not familiar with long-term litigation requiring several orders for a single case, which is what usually happens when supervisory orders are granted. Judges usually hand down an order and then close the file. Most often, this is not what is required in cases addressing structural issues. Usually a declaration of rights is handed down, followed by a declaration of a breach of rights, an order to remedy the breach, and a supervisory order. Government is ordered to develop a plan, which it then negotiates with the litigants. After this, implementation is meant to occur. This takes time, and many rounds of litigation.

In this regard, Budlender stated that one should take note of the recent judgment by Judge Michael Bishop in *Sechaba Protection Services v PRASA* ('*Sechaba Protection Services*'),²⁵ originating from the original *Metrorail* case.²⁶ Bishop J clarified that the aim of judicial supervision is pragmatic, not punitive. It is an

²⁴ 100 N.J. 269, 495 A.2d 376, 26 Ed. Law Rep. 670 (1985).

²⁵ *Sechaba Protection Services CC (Pty) Ltd v Passenger Rail Agency of SA Ltd* [2023] ZAWCHC 280.

²⁶ *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC).

acknowledgment that one order cannot properly resolve a dispute or protect the public interest. Supervisory orders also recognise the need to be able to adapt to changing conditions.



Using supervisory orders to address government incapacity or incompetence

Government incapacity or incompetence is one issue that cannot be solved through a single order. For example, Budlender is involved in a case in which some rural villages in the Eastern Cape have not had a water supply for years. The case was allocated to the Deputy Judge President (DJP), who took it seriously and quickly handed down an interim relief order. This directed the government to have meetings with the applicants and report back regularly to the court on the situation. The applicants hired an independent expert to make a report on what was required to occur for water to be supplied. The DJP later adopted this report, making it part of their ruling. This meant the government had to explain what they were doing to comply with the expert report – a crucial moment in the case.

Progress started to be made that was inconceivable at the start of the case. However, this ended when the DJP was given an acting appointment at the Supreme Court of Appeal. The DJP allocated the case to two other judges to take over. Unfortunately, the applicants were unable to garner any response from them, and have now decided to seek permanent relief; the result of which remains unknown.

This experience taught Budlender several lessons. First, public interest litigation, unfortunately, is heavily dependent on the specific judge allocated to a case. Second, it is important for the original judge allocated the case to remain on the case until it is concluded. Third, courts adopting the applicant's expert reports as their own can be hugely effective. This also highlights the importance of entities such as independent panels, which can become agents of change or accountability for the court. Fourth, when lawyers on both sides cooperate on a case, progress can be made regarding even the most complicated issues. In this case, the state's lawyers recognised that the water situation was urgent, and agreed to work with the applicants to try to fix it.

Structural interdicts and supervisory orders are labour-intensive for judges, and many of them are already under severe strain. Judges might close cases even when there is no genuine compliance. In other instances, judges may pass the case on to other judges in each round of the litigation. This is what happened in *Sechaba Protection Services*. A judge had issued a judgement and then sent the file to the registry, telling the parties that they could reactivate the case by returning to court. On each occasion this occurred, the case was allocated to a different judge. Eventually the case had gone through seven judges, each of whom had issued appropriate orders, but then sent the case back to await reactivation. Even though there was a public interest element to the case, the litigants were acting in their own interests. The case was thus not being re-activated until something happened.



Judge Bishop stated that judges must appreciate that a supervisory order is a commitment by the judiciary to work together with the government until an issue is resolved. Judge Bishop laid down a new, general rule of practice in the Western Cape High Court that when a judge hands down a supervisory order, if possible that specific judge should retain the case until its end. This is what the Constitutional Court (CC) committed to in the social grants cases. The CC understood that because it had heard the case, it had a greater responsibility to see that the issues before it were fixed. This is what it means for a court to take their responsibility seriously – to see the problem as more than just the personal problem of the litigants.

The duty of public interest lawyers is to try to understand the particularity of a case, and what specific causes are behind government maladministration. Litigants have the responsibility to mould the shape a case takes; and when cases involve independent panels or other entities, litigants must assist them.

Special masters

Regarding special masters, Budlender is not hugely hopeful of their potential. From his experience in the civil service, when things are not functioning in a department, it is usually due to inadequate resources, inadequate staff, or a belief that the specific task is unnecessary. A special master, who has limited powers, cannot do anything to resolve issues of this kind. These issues were all present in Mwelase, and the special master in the case is very experienced, extremely intelligent, and passionate about land reform. However, he still struggled to make significant headway. Therefore, though the special master should not be seen as a 'silver bullet' to fix our problems, the position should not be discounted entirely. It would be useful to speak to someone from that world to find out what their experience was. In future, this may assist us with fashioning a judicial monitoring mechanism.

Democratisation of litigation

On the democratisation of litigation, Budlender is an unapologetic advocate for public interest litigation, particularly for people who are

marginalised and do not have access to other forms of power. However, lawyers have not done well in terms of democratising litigation. In Budlender's experience, lawyers tend to portray the litigation as their own, and have been bad at making it part of what is happening on the ground. The reason we have not done this is because it takes time and know-how, which lawyers often do not have. However, democratising this litigation is crucial, because it is about the democratic process. It is part of the Constitution's democratic structure, and we must ensure that democracy exists outside of theory.

An additional issue, which Budlender did not have the answers for, is the tendency to litigate for persons or communities on one issue and then move on, hoping someone else will address the other issues. Budlender stated that we need to recognise that this is not good enough, and cannot continue.

CONCLUSION

Budlender acknowledged that working on the ground is difficult, and that moments of victory are few and far between. However, when one steps back and looks at many of the cases and what has resulted from them that would not otherwise have happened, its effect is extraordinary. It is a vindication of the decision to include socio-economic rights in the Constitution. The type of work done by public interest organisations is what makes the Constitution real, and strengthens the prospects of its survival. They must not sell themselves short or turn away from this work.

REMEDIES IN COLOMBIA'S SOCIO- ECONOMIC RIGHTS CASES – PROFESSOR RODRIGO UPRIMNY

Introduction

Professor Uprimny spoke about the Colombian experience of the judicial protection of socio-economic rights. First, he gave a broad overview of the Colombian Constitutional Court's (CCC) socio-economic rights jurisprudence. Second, he discussed the different types of remedies developed by the CCC and other courts. In this he briefly reflected on their impact, noting that evaluating the impact of a judicial decision is notoriously controversial in sociological terms. Finally, he gave some suggestions about how to tailor and adjust remedies to make them as effective as possible.

Colombian Constitutional Court's socio-economic rights jurisprudence

Since 1991, when Colombia enshrined socio-economic rights in its Constitution, Colombia has developed a rich jurisprudence on the protection of socio-economic rights. It is impossible to summarise all of this in one presentation. Therefore, Professor Uprimny proposed constructing a typology of the cases by looking at the remedies ordered, using four categories. First, there are individual routinary cases, which occur when a person or group makes a petition to the CCC, which is called a tutela action, asserting



Professor Uprimny is a lawyer and Professor Emeritus at the National University of Colombia. He was an assistant magistrate and temporary replacement at the Colombian Constitutional Court and is co-judge of that Court and of the Council of State. He was a member of the International Court of Justice and the UN Committee on Economic, Social and Cultural Rights (2015-2022).

that a socio-economic right has been violated. For example, a person who is unable to access a certain medication can file a tutela action for the court to order that this medication must be provided. These cases are routine.

Second, there is the abstract judicial review of legislation by the CCC. Colombia allows any person to request a review of legislation, even if that person has no direct interest in the case. The CCC has the power to declare the legislation unconstitutional and invalid.

Third, there are structural global cases. These concern important issues taken up directly by the CCC because of many individual tutelas having been filed on the same issue. The court may state that the issue amounts to an unconstitutional state of affairs, with the rights violations being structural in nature, and can then hand down structural injunctions to authorities and retain supervisory jurisdiction. The most important case in this regard is the internally displaced persons (IDP) judgment,²⁷ which addressed the living conditions of about seven million IDPs. There have also been cases relating to prison overcrowding, and a case relating to the general health system.

Fourth, there are collective cases. These are cases in which courts make local or regional structural orders, as opposed to being at national

²⁷ Judgment T-025/2004.

level. For example, when there is an issue regarding the supply of water, the courts will order municipalities to provide a water supply.

Different types of remedies

The type of remedy granted depends on the case. Professor Uprimny stated that both routine and abstract review cases require relatively simple remedies, and are efficient. In routine cases, the remedy will generally be a simple top-down order for the government or a private entity to do something. These orders are generally fulfilled. However, there has been controversy regarding the broader consequences of these cases. First, for most people there is the problem of access to justice. Second, mass individual solutions do not solve systemic dysfunction, and can make issues more complicated. Abstract review of legislation also generally requires simple remedies. If the court finds the law is unconstitutional, the court may adjust the law, which usually takes effect immediately.

According to Professor Uprimny, what has been more complex are the remedies ordered in structural global cases and collective cases. A recent PhD dissertation created a typology in which these kinds of orders are classified into five types. The first one is strict, top-down orders, in which the court tells the government exactly what to do in a specific timeframe. While this is a more classic remedy, it is less common in these kinds of cases. The second one is more open pragmatic orders, in which the court does not tell the government exactly what to do. Rather, the court will state that the rights of certain persons must be met, and that the government must provide the court with a plan on how this will be ensured.

The third type of order is a deliberative order, in which the court creates a mechanism through which a dialogue can occur between the court, the government, the persons affected and scholars. In the IDP case, one of the most important orders was the creation of a Commission, which consisted of IDPs and civil society, to ensure the implementation of the judgment. Professor Uprimny is part of the Commission, which goes to all the hearings concerning the case.

The fourth kind of order is an accountability order. This is where the court orders the government to return to court within a certain period and show the results of the policy they were ordered to create. In the IDP judgment the government was given six months to create a policy and then return to the court to elaborate on the budget and steps for its implementation. Finally, the fifth kind of order is a follow-up order, in which the court either orders a government institution to monitor the case, or states that it will revisit the case within a certain period to monitor progress.

This is not the only kind of classification. For example, in an article written by Professor Uprimny and another scholar 15 or 20 years ago, the authors distinguished between ideological or normative remedies (in which the court only affirms a right) and remedial remedies. Where the right is clearly established, the focus is on how to guarantee that right in the real world. As an example, in the prison system cases,²⁸ for instance, there was consensus that prisoners have the right to health. The issue was which practical remedies could provide that.



Implementation and impact

According to Professor Uprimny, implementation and impact are more controversial issues. While routine cases result in good implementation, it is not clear that there is any broader positive impact. Legislative review has clear normative impacts, but this is a Colombian phenomenon – not many systems allow just any person to bring a case of legislative review, especially when that person's rights are not affected.

²⁷ Judgment T-025/2004.

Structural global cases and collective cases require more nuanced evaluation. The IDP cases have been evaluated positively, as they have instigated more coherent policies that have led to an improvement in the dire circumstances of IDPs. For example, in terms of access to healthcare, the level of access for IDPs is similar to that of the general population. However, displacement continues, and the circumstances continue to be dire. Therefore, the evaluation is mixed. Some have argued that this is not because the judicial intervention has not worked but rather because the situation is so complex, given that millions of persons are displaced and the armed conflict continues.

On the other hand, the prison system cases have garnered more criticism in terms of their impact on the system. The court has stated that there is an unconstitutional state of affairs regarding overcrowding, but has not been able to develop remedies that have improved the situation. Finally, regarding collective cases, the cases concerning the provision of water have been effective in some local municipalities, but the impact has varied between municipalities.



CONCLUSION

Some scholars have postulated that the kind of remedy chosen will have an impact. For example, Diana Rodriguez and Cesar Rodriguez have argued that a more efficient way to deal with complex structural situations, such as that of IDPs, is for the court to combine a strong affirmation of rights with an open or weak order regarding how to fulfil those rights, and a strong supervisory order.²⁹ This recognises that the courts do not necessarily have the competence or legitimacy to design programmes to fix structural issues – that is the duty of the relevant authorities. Only ordering one facet of each of these remedies would not go far enough, but combining them can deliver better results.

However, studies have indicated that there is a limit to these orders because of factors beyond the control of the courts – for example, the policy choices of elected officials. If the court must hand down an order that is inconsistent with these policy choices, then that must be done. However, if possible, it is more effective to make orders that are in line with existing programmes. Additionally, the support of external audiences or social organisations makes court orders much easier to implement. These audiences and organisations can push for implementation and monitor progress. Courts cannot control these factors, but they can consider them when tailoring remedies to a particular case. This could perhaps improve the implementation and impact of orders.

²⁹ A reminder of the well-known book by Mark Tushnet, *Weak courts, strong rights. Judicial review and social welfare rights in comparative constitutional law* (2008, Princeton University Press).

PANEL TWO DISCUSSION



STATE INCAPACITY

- The participants noted the need to expand on the meaning of 'state incapacity' as a category, because there are different types of state incapacity, which have different causes.
- The category at present is too broad, and we need to analyse the actual causes of dysfunction on a case-by-case basis.
- This requires more research and analysis, but will help us tailor better, more effective remedies.



SEPARATION OF POWERS

- The speakers broadly agreed that while this question may always arise, there can be no real issue of separation of powers where a state has failed to comply with the law and the court points this out and states what compliance would look like in the ordinary sense.
- Judges must not act like kings; but when they do, most often it appears to be due to misunderstanding what courts should or can do effectively.
- The worst thing a judge can do is make an order with which it is impossible to comply. In a complex case, a strong declaration of rights combined with an open programmatic order and an accountability order can allow courts to understand the hurdles government is facing over time, and potentially make stricter orders in future.



LEGITIMACY

- According to the speakers, in terms of legitimacy, the problem with strict, inflexible orders is not necessarily legitimacy but rather effectiveness.
- Often, no one doubts that the state has the obligation to fix the problem; the question is what remedy will be effective in pushing the state to do so.
- However, legitimacy may come into play when courts affirm new rights that are not plainly set out in constitutions, or where they unilaterally interfere with public policy.



SECTION 100 ADMINISTRATORS

- The participants mentioned that administrators appointed in terms of section 100 of the Constitution should also be researched regarding what has or has not worked for them and the difficulties they have faced.
- Like special masters, these administrators are thrust into systems that work in a certain way and are resistant to change. However, a larger number of administrators have been placed in this position compared to special masters.
- The administrators are not given the resources necessary for their duties, and actors in national government do not necessarily know how to run provinces effectively.
- Research on them, and perhaps the enactment of legislation to govern the process, is as necessary as the research that should be conducted on court-appointed agents.

PART

3

**THE PERSPECTIVE OF THE
JUDICIARY IN DESIGNING AND
ENFORCING SUPERVISORY ORDERS
IN SOUTH AFRICA AND COLOMBIA**

THE LIMITATIONS OF THE COURTS AND THE ROLE OF LITIGANTS IN CRAFTING EFFECTIVE REMEDIES – JUDGE DENNIS DAVIS



Judge Davis was a judge of the Western Cape High Court (1998–2020) and Judge President of the Competition Appeal Court (1999–2020). He is an honorary professor at the University of Cape Town and the University of the Western Cape. He is host of Judge for Yourself on ENCA.

Introduction

Judge Davis's starting point on remedies is that courts should not be the focal point in terms of the realisation of socio-economic rights. Socio-economic rights should be central to the process of constructing and implementing social and economic policies. At the end of the day, the courts cannot provide much more than palliative care. However, Judge Davis did discuss how to best formulate remedies that could act as more than palliative care, the importance of choosing the right case and providing the courts with all necessary research, and the CC's disappointing jurisprudence.

The role of courts

Judge Davis stated that one must consider what we mean when we speak about 'the role of the Constitution' when it is of the transformative economic and social kind that we have, and how its promises should be vindicated. In this regard, Judge Davis referenced the book *The Anti-oligarchy Constitution*, by Fishkin and Forbath.³⁰ While the book is set in the American context, it argues forcefully that courts play a smaller role in attempting to develop an anti-oligarchic constitutional enterprise. In the South African context, this book may provide some insight into developing the economic foundations necessary for the democratic model in the Constitution.

The book suggests that when deciding whether to uphold statutes or regulations against constitutional challenges in court, the courts should consider the constitutional character of legislation that aims to shape our political economy, and build and preserve democracy of opportunity. The tradition of the anti-oligarchic democracy of opportunity acts more as a shield than a sword – aiming not to strike down legislation, but to show why it is constitutionally essential to uphold many of them. However, there is a danger, on the one hand, of 'rights fundamentalism'; and on the other, the belief that the courts have no role to play at all.

Government of the Republic of South Africa v Grootboom

Judge Davis stated that his views are influenced by having been the first judge in South Africa to give a supervisory interdict in *Grootboom* (High Court judgment),³¹ which he sees as having been a failure in multiple respects. In this regard, the remarks of Froneman in his opening address to the Workshop resonated with him – that the Constitution contains all these rights, and few people expected that there would need to be a fight to vindicate them. In *Grootboom* (High Court judgment), at the Western Cape High Court, Judge Davis was approached by a group of poor homeless people requesting the provision of

³⁰ Joseph Fishkin and William E Forbath, *The Anti-Oligarchy Constitution Reconstructing the Economic Foundations of American Democracy* (2022 Harvard University Press).

³¹ *Grootboom v Oostenberg Municipality* (6826/99) [1999] ZAWCHC 1 (17 December 1999).

adequate shelter. He was being asked to address the issues that he and many others fought against during apartheid, and were sure would never happen again.

While the CC overturned the supervisory order, the case did develop some form of socio-economic rights jurisprudence, which if not for *Mazibuko*³² may have been developed further than it is today. One of the reasons Judge Davis thinks NGOs and academic articles are so important is that he had no idea what a supervisory interdict was before he adjudicated on *Grootboom*. He was inspired to give a supervisory interdict due to an article by Trengrove SC.³³ In this context, Judge Davis commented on the crafting and ordering of appropriate remedies, in particular supervisory orders and constitutional damages.

Crafting and handing down appropriate remedies

Supervisory orders depend on whether you can have a viable socio-economic rights jurisprudence, which acts as more than palliative care, when the government is incapable of delivering and when available resources are drained because of high levels of corruption. Supervisory jurisdiction therefore has limited scope. One must choose one's case carefully for a supervisory order to deliver results.

Where a supervisory order fails, the court must search for other remedies such as constitutional damages. Judge Davis stated that he could not think of a more appropriate case for such damages than *Thubakgale*, and yet the CC denied them. He stated that it was the CC's most anti-poor judgment perhaps since its introduction, but certainly over the last few years. It was insulting to poor people that the CC required the appellants to return to the High Court to request a contempt of court order. It degraded the Constitution's legitimacy. Judge Davis despairs for the development of the jurisprudence if this is the approach adopted by the courts. He also finds it frustrating when the courts state that they are waiting for the appropriate case, because it often seems that the appropriate case is the one

currently before them. The courts seem to be rationalising their judicial myopia.

Therefore, Judge Davis believes, there are cases for which constitutional damages are appropriate, and others where supervisory orders may be more appropriate. However, in giving orders, there is always the possibility of judicial overreach. The recent judgment against Eskom is an example of this.³⁴ The court ordered the Minister to provide uninterrupted electricity to various entities. While the motive was commendable, it was not clear whether what was ordered in the Eskom case was possible, and the order could also have wider, reverberating effects. One would need significant evidence to guide one's judgment in order to make such a dramatic order.

CONCLUDING REMARKS AND RECOMMENDATIONS

One of the great difficulties judges face is the correlation between the increasing incompetence and corruption of the government, and the greater pressure placed on the courts to do the duties of the legislature and executive. Once that pressure sets in, it is difficult to turn people away; and in fact, the courts should try very hard not to, and to give relief. However, the relief must consider at least three components.

1. If the relief is supervisory, does it provide sufficient guidelines to facilitate a meaningful dialogical exchange when the judge must rehear the matter?
2. The importance of the separation of powers. One must ensure that the remedy crafted is broadly within the courts' competence. This can

³² *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC)

³³ Wim Trengrove 'Judicial Remedies for Violations of Socio-Economic Rights' (1999) 1 ESR *Review* 8-11.

³⁴ *United Democratic Movement v Eskom Holdings SOC Ltd* [2023] ZAGPPHC 280; 005779/2023 (5 May 2023) ('UDM v Eskom').

be a difficult balancing act because, in Judge Davis's opinion, *Mazibuko* went too far in its deference, which has damaged the potential of jurisprudential development since.

3. We should not rely on the judiciary in our fight for the vindication of socio-economic rights to such an extent that we let parliament off the hook.

Courts must calibrate their orders carefully, because there are considerations regarding the separation of powers and the limits of judicial competence. However, once granted, courts should guard their orders jealously. In practice, litigants must be cognisant that the number of difficulties faced by High Court judges is immense. They are totally reliant on their own intellectual resources and the ability of counsel to guide their judgments. It is extremely important for counsel and attorneys to point judges in the right direction, refer to the correct authorities, and thus help judges be imaginative in their crafting of orders. That is the best way to get the orders one wants. Otherwise, it is often beyond the sheer capacity of a High Court judge to do so.

DIFFICULTIES FACING JUDGES AND THE NEED TO PUSH BOUNDARIES WHEN CHOOSING REMEDIES – JUDGE KATE SAVAGE



Judge Savage serves at the Western Cape High Court.

Introduction

Judge Savage stated that she agreed with Judge Davis when he stated that the realisation of rights cannot be left solely to judges, who lack both resources and capacity. The role of the courts is part of a greater constitutional enterprise in which we are all involved. She spoke about the potential of pre-trial procedures and choosing remedies. In this regard, she stated that when considering appropriate relief in public interest cases, we must consider relief that acts as a deterrent or is preventative.

Court delays and resolving disputes early on

Judge Savage stated that she cannot overemphasise how overrun the courts are. In Gauteng, trial dates for cases against the state are being set nearly three years after the matter is brought to court, which severely impacts access to justice and the realisation of rights. This means that when one looks at how to design relief and the types of remedies available, one must bear in mind that relief could be handed down only years later.

One of the issues discussed during the Workshop was better and more effective case management. In addition to this, Judge Savage stated that we need more reliance on alternative dispute resolution. Not all cases need to be precedent-setting, when communities may be able to obtain justice through shorter and more curtailed proceedings with orders taken by agreement. In this regard, we are not using Rule 37, the new Rule 41A of the Uniform Rules of Court, and the mediation clause in section 7 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 as we should. We must get judges and parties to commit to trying to use these processes earlier, particularly in disputes

where an earlier positive outcome may result from alternative dispute resolution.

Regarding case management, it is a huge commitment for a judge to commit to this, especially since there are so many other things for which a judge is responsible. However, Judge Savage stated that a judge may be prepared to do this where it is appropriate, and where the litigant has specifically requested it. There is certainly a need for more judges to keep cases they have been allocated. We also need litigants to know when to approach a judge president to request that their case should be allocated to another judge who is invested in the case, or with whom a Rule 41A pre-trial process may be embarked on. These earlier processes should be used as effectively as possible, and must be developed more than they are currently.

Supervisory orders

Once remedies have been imposed, Judge Savage stated she usually has no issue with judicial supervision to the extent that it is seen as collaboration between the different spheres of government. Arguments against this based on the separation of powers doctrine are not terribly compelling at this point in the process. However, what judges often face is state attorneys and government officials who fail to act in relation to the order, and that is where issues regarding the separation of powers arise. This becomes troubling for courts, who do not wish to micromanage parties who can be recalcitrant and often do not do what they are required to do.

Generally, Judge Savage stated, those engaging in public interest litigation with a wide impact should not sit back and wait for court dates or accept inadequate judicial supervision. They should take the available opportunities to request files to be moved or to obtain preferential court dates. It is very common for private parties to approach a judge president to obtain preferential hearing dates. Those engaging in public interest litigation should work on exploring, developing and pressing for consequences both prior to and after orders are made, to ensure the effective relief they are seeking.

Choosing remedies

When one chooses causes of action and remedial options, Judge Savage stated one must appreciate how much reliance the judiciary has on this. It seems to her that Komape was a bifurcated case. On the one hand, the plaintiffs desired relief to vindicate their rights; and on the other, they desired structural relief. The structural relief is still ongoing, and has been mostly successful, despite challenges. The individual relief needed to be unpacked further, however, in terms of the request for constitutional damages, as well as other potential remedies such as an apology – no one from government had properly proffered an apology to the Komape family, which they had requested.

Public interest litigation should also still push the boundaries of the rules of delict. We should not simply be bound by the rules and limitations of the common law, which in any event is supposed to develop in line with the Constitution.

Constitutional damages

Regarding Thubakgale, Judge Savage stated that she agreed with Judge Davis's analysis that he could not think of a more appropriate case for such damages. Thubakgale was the kind of case in which the numerous decisions coming out of the CC just become unhelpful, and create a level of chaos on where the law stands. This makes the jobs of those trying to litigate public interest matters significantly more difficult. One needs to unpack, first, what the Constitutional Court actually stated, and second, how one can push the court to develop the law further. Judge Savage stated that more work could be done on the possibility of constitutional damages, and the concept should not be set aside.



CONCLUDING REMARKS

At the outset, we must think carefully about the relief sought, and take a principled position regarding what we are attempting to achieve. We must also think about creative ways of dealing with underlying disputes, and what course of action we need to take in each individual case. In this regard, Judge Savage stated that she strongly agreed that bringing in the Auditor General in local and provincial government matters seems to be more effective than threats of judicial consequence.



THE INTERNALLY DISPLACED PERSONS JUDGMENT IN COLOMBIA FROM THE PERSPECTIVE OF A JUSTICE OF THE COLOMBIAN CONSTITUTIONAL COURT — JUSTICE NATALIA ÁNGEL CABO



Justice Cabo currently serves on the Colombian Constitutional Court (CCC) and is Professor of Law at the Universidad de los Andes. Prior to this, she was Deputy Justice at the CCC and directed the Support Office for its Special Follow-up Plenary on Judgment T-025/04.

Introduction

Justice Cabo's speech specifically focused on one of the CCC's most ambitious judgments – the internally displaced persons (IDP) case (Judgment T-025/2004). The monitoring and follow-up procedure established in the IDP case has been ongoing for the past 20 years. This length of time has raised many questions on the choice of remedies and their impact.

Facts of the IDP case and findings of the CCC

The case concerned the situation of IDPs due to armed conflict in Colombia. In 2004 there were millions of IDPs in Colombia, and the number has only increased since. The case came before the CCC in the form of tutela actions. Any person in Colombia can lodge a tutela action alleging that a fundamental right has been violated. The IDPs' tutela actions captured the CCC's attention. At the time, Colombia had one of the biggest populations of IDPs in the world; but for most Colombians, the issue was invisible.

The CCC accumulated several of the tutelas and declared that there was a 'unconstitutional state of affairs'. An unconstitutional state of affairs is a declaration that there is a humanitarian crisis, and massive human rights violations are occurring, which are associated with systemic failures.

The CCC found that despite the scale of the crisis, there was no serious, coordinated state policy for helping IDPs, or even reliable information

on IDP numbers. The existing policy was not allocated sufficient budget, and did not address the responsibilities of different actors. The CCC also considered public international law in the reasoning for its decision – asserting that there must be progressive implementation of socio-economic rights, and that a minimum core must be guaranteed.

Remedies

Having found that there was an unconstitutional state of affairs, which was a declaration of strong rights on the part of IDPs, the CCC handed down several remedies. The CCC ordered that a rational public policy with funding must be developed, and that it needed to address what would be done both immediately and over the medium and long term. The CCC allowed the government to design its own policy, but gave it a clear road map on how to do so. The CCC also asserted that there must be coherence between what the government was claiming publicly and its real-life actions. Additionally, the different branches and levels of government needed to collaborate. The CCC also ordered that a minimum core of rights must be ensured, and that immediate assistance must be provided.

Justice Cabo described the judgment as dialogical. In the past, the CCC had declared an unconstitutional state of affairs but had used strong remedies.³⁵ The CCC had this experience in mind when designing remedies in the IDP case. At the time, there was much discussion on the concept of dialogical judgments,³⁶ and

deliberative democracy in Latin America, both of which influenced the CCC. The CCC thus decided to combine what Justice Cabo called ‘moderate remedies’ (in that the remedy allowed the state to design its own policy response) with a clear road map on what needed to be done, which was to address the minimum core of the rights, ensure progressive realisation, and address what was to be done in the short, medium and long term.

The CCC also assumed a strong monitoring role. This was novel at the time for the CCC, but had happened before at the level of trial judges.

Monitoring the IDP case

The monitoring began from the beginning; but in 2009, the CCC set up a special monitoring chamber to follow up on the case permanently. Justice Cabo is currently the President of that chamber, and has seven employees working permanently on the matter. The tools used for monitoring are periodic reports, regular public hearings and technical hearings. Infrequently, the CCC also uses contempt or non-compliance orders against government. Part of the monitoring phase is about understanding the institutional blockages and difficulties government faces in addressing the rights of IDPs, and the court has dedicated a lot of time and resources to this.

The measure for progress used by the CCC is called ‘the effective enjoyment of rights indicators’. What is measured is not per se what the government has done, but whether the population has effective enjoyment of the relevant rights. The threshold for the effective enjoyment of rights is not unreachable, but is nevertheless ambitious. Importantly, the threshold is not for forced internal displacement to be ended or reduced; forced displacement depends on the armed conflict, which is beyond the court’s control.

Instead, the threshold is whether IDPs are enjoying rights at the same level as the general population. IDPs have extremely low levels of the enjoyment of rights. They live in extreme poverty, and there are more barriers to them accessing basic goods and services than for the general



³⁵ In these cases, the CCC ordered the government to simply construct more prisons, which did not result in many prisons being built.

³⁶ The Court had looked at *Grootboom*.

population. When the government can prove that IDPs are enjoying a right at the same level as the general population, then the government has overcome that aspect of the unconstitutional state of affairs. The government has achieved this in terms of IDPs' access to health and education, for example. It is necessary to keep in mind that the general population's level of enjoyment of rights is itself not high – Colombia is a poor country with difficulties regarding the realisation of socio-economic rights.

Impact of the IDP case

There are few studies dealing with the effects of the CCC's intervention. One important study was undertaken by Rodríguez-Garavito in 2011, though Justice Cabo does have some reservations about it. However, what Rodríguez-Garavito found was that at least at the beginning, the CCC's intervention had 'unblocking effects' that shook up the bureaucracy and improved coordination between different public agencies in charge of designing, financing and implementing the policy. The case also had a positive effect in terms of long-term national policy concerning IDPs, and resulted in a law called the 'Victims Law', which addresses the issues of IDPs and includes reparations.

The participatory effects of the case were also significant, because of the public hearings. However, the participation of IDPs themselves has been reduced over the years. The reason for this is that in every round the monitoring metrics become more complicated, and the ability of IDPs to intervene was reduced.

Additionally, Justice Cabo stated, there was an important symbolic effect of the case, often wrongly dismissed as unimportant. The case made the existence and situation of IDPs visible, and changed the way forced displacement was seen.

The hardest impact to measure is the structural effects of the case on IDPs and whether their enjoyment of rights has improved, which is what the CCC wanted most. What has been found is that while there has been improvement in access to education and health, there are still many challenges in other areas, such as housing and labour. Because of the continuation of the armed

conflict, the CCC and government continue to face these challenges, which appear to be never-ending.

Challenges faced by the CCC

The CCC also faces difficulties in terms of the long-term nature of the monitoring. When Justice Cabo took over the chamber, the pressing questions were when the monitoring would end, and whether it was time for the chamber to step down.

In response to this, the chamber performed surveys and qualitative research. It conducted almost 50 interviews with IDPs, government and civil society. The interviewees stated unanimously that the monitoring should continue. The main reason given for this was that it kept the conversation going – despite not delivering the same results as a decade ago, and in some ways becoming routine. The results thus also showed that the procedures needed to be changed slightly.

CONCLUSION

Justice Cabo believes that while the monitoring chamber takes a lot of work, it acts as a kind of mediator between government, civil society and IDPs. She still believes, therefore, that there are benefits to the CCC continuing its monitoring. Currently the chamber is trying to improve their procedures, so that the process does not become a routine with little result. They are also thinking about how to reinvigorate the conversation about IDPs. However, Justice Cabo also stated that the CCC must remain modest regarding what courts can do, and the extent of the results they can deliver.

PANEL THREE DISCUSSION



COMMONALITIES BETWEEN JURISDICTIONS

- Participants commented on the common use of language between the South African and Colombian members of the judiciaries in thinking about how to design remedies.
- The participants also commented on the similarity of the issues faced by their courts, particularly regarding when to end a case.



MINIMUM CORE

- According to the speakers, bringing back the minimum core in South Africa would take a brave counsel and a compelling set of facts.
- However, it would not be impossible per se to convince the CC that it has been wrong in the past. Therefore, this is not a point that the participants should abandon, particularly considering the further development of international human rights law.



CONSTITUTIONAL DAMAGES

- Constitutional damages in South Africa should also not be abandoned; but one would need to examine the composition of the CC to see if they would be feasible.
- Majiedt J's minority judgment in *Thubakgale* made powerful points; and because the court was so tightly split, these same points may convince future Constitutional Court Justices.
- The factors set out in the case of *Canada (AG) v Ward*,³⁸ may be useful in the future development of a framework for constitutional damages.
- However, at present, attempting to use the statutory route for constitutional damages may be more fruitful.



APOLOGIES

- Participants reiterated that apologies as a remedy in South Africa must be explored.
- There could be a reparative and corrective element to this remedy, as well as an element of accountability.
- The remedy need not be handed down in isolation but could be part of an order's basket of remedies.



FREEDOM OF THE COLOMBIAN CONSTITUTIONAL COURT (CCC)

- The participants heard about how the CCC has a lot of freedom to try to stimulate public interest in long-running cases.
- In 2024, it will gather the experiences of internally displaced persons across the country on how and whether the judgment has been disseminated.
- An interesting example of the dissemination of the judgment was that women in one area had written songs about it – translating it into their own language and method of learning.
- Additionally, the CCC is commissioning artists to develop art about the judgment, to raise awareness not only of the judgment but also of the problem of internal displacement.



JUDICIAL TRAINING

- According to the speakers, judicial training in South Africa is highly inadequate. Very short training sessions are scheduled for huge areas of law.
- In both Colombia and South Africa there is also the issue that judges think of themselves as untrainable, or not in need of training.
- Training desperately needs to be improved, and more workshops like this one would be useful to update judges on cases and to have a dialogue with them on the merits of these cases, even if lower court judges are bound by precedent.

³⁸ *Canada (Attorney General) v Ward*, [1993] 2 S.C.R. 689.

CLOSING – PROFESSOR SANDRA LIEBENBERG



Professor Sandra Liebenberg is a distinguished professor, and the HF Oppenheimer Chair in human rights law, at the University of Stellenbosch. She was a member of the UN Committee on Economic, Social and Cultural Rights from 2017 to 2020, and served as its vice chair from 2019 to 2020. She is currently serving as a chair of the Maastricht IV Drafting Committee to Prepare Principles and Guidelines on the Human Rights of Future Generations.

Introduction

Relevant organs of state have the primary responsibility to ensure that rights, including socio-economic rights, are respected, protected, promoted and fulfilled. However, when human rights are violated, the courts have a constitutional mandate to ensure effective remedies. Effective remedies are those that repair the harm to the victims (as far as possible), but that also prevent future violations of the human rights of others similarly situated.

As Froneman stated in his opening address, we live in a country with deep levels of poverty and inequality, and multifaceted structural barriers to human rights enjoyment, including state dysfunction in several sectors and spheres of government. Considering how best to remedy state dysfunction requires a novel approach by civil society organisations and public interest organisations, including gaining deeper insight into the underlying causes and drivers of state dysfunction.

In *Fose*, Kriegler J stated that the role of constitutional remedies is to synchronise the ideal world of the Constitution with the real world of people.³⁹ This is what this Workshop sought to do, in light of the challenges of structural barriers to human rights enjoyment and state dysfunction. In this regard, participants explored the strengths and weaknesses of a range of different remedies.

The variety of remedies

a) Supervisory orders

Supervisory orders are one of the primary remedies for dealing with governance dysfunction, and a variety of models of supervisory orders were discussed. These included specific mandatory orders given to government officials, with the obligation to provide follow-up reports to the courts. There was also a rich discussion on deliberative supervisory orders, which I have termed 'participatory structural remedies'. This is where a court orders the government to devise a plan, but also requires participation and engagement between government officials, civil society and (potentially) Chapter 9 institutions.

Many of the speakers spoke on the advantages and disadvantages of the kind of support structures that could be built into the judiciary. This built on Helen Taylor's article concerning various task teams, audit committees and special masters.⁴⁰ The perspectives of both an academic and a CCC Justice on the IDP case allowed us to think comparatively about the successes and pitfalls of Colombia's experience with a monitoring chamber built into the judiciary.

While one cannot or should not necessarily transplant legal procedures from one jurisdiction to another, the Colombian experience certainly shows a judiciary willing to grapple with the question of effective relief, to experiment, and

³⁹ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) [94].

⁴⁰ Helen Taylor 'Forcing the court's remedial hand: non-compliance as a catalyst for remedial innovation' (2019) CCR 9(1).

to explore 'the art of the possible'. In the IDP case, the CCC made a combination of orders that included mandating specific measures to provide for the minimum basic needs of IDPs, and also more far-reaching measures aimed at the long-term re-integration and restoration of the rights of IDPs. The Court also established strong monitoring mechanisms, through regular public hearings, participatory monitoring and a monitoring chamber.⁴¹ These interventions were not all perfect, and issues persist. However, we can learn from the experimental mindset of Colombian judges.

In discussing the challenges of supervisory orders in the workshop, participants demonstrated a healthy dose of realism. Supervisory orders are not a silver bullet, and neither are constitutional damages and other remedies. Structural orders demand a lot of time, capacity and resources; not only from government, but also from courts, and from those organisations that keep the case going. The burden that supervisory orders can place on litigants, in cases where no real progress is being made to fulfil the orders, came to the fore in Dyantyi's presentation on *Thubakgale*, in which the applicants in the case were denied constitutional damages. However, the fact that supervisory orders do require time and energy is not an argument that they should not be granted in appropriate cases. An indication of appropriateness, for example, is when litigants and the organisations that support them have the capacity and commitment to be involved in monitoring and supporting the structural orders over the long run.

b) Constitutional damages

In *Thubakgale*, many years of advocacy (and later, litigation) had been pursued by an impoverished and marginalised community, in a case in which there was no question that their constitutional rights had been egregiously violated. After this long struggle the litigants had been through all potentially effective remedies without progress, and thus claimed constitutional damages.

Such damages may have provided them with a modicum of comfort, and may also have focused the mind of the municipality. However, a narrow majority in the Constitutional Court denied them constitutional damages and indicated that they should have brought a contempt of court application against the Ekurhuleni Municipality, which is not a remedy that would vindicate their right to adequate housing. Sometimes the only effective remedy in socio-economic rights cases is constitutional damages. There was criticism of the position adopted in the judgment of Jafta J in *Thubakgale* that constitutional damages were not a competent remedy in socio-economic rights cases. There was also debate on the interrelationship between delictual and constitutional damages remedies. Several participants also highlighted the need to develop a framework or set of criteria for when constitutional damages would constitute an appropriate remedy.

c) Additional points on remedies

The theme of access to justice and effective relief was prominent in the Workshop. Once a litigant has established a violation of rights, they should receive an effective remedy and be supported in obtaining it. Obtaining relief for human rights violations should be facilitated by the courts. In this regard, a case that was not explored in this Workshop, but that is important from the perspective of constitutional remedies and access to justice, is *Social Justice Coalition*.⁴² In this case, the CC refused the appeal of the Social Justice Coalition concerning the failure of the Equality Court to hold a hearing on what remedy would be granted after the Equality Court had found, in 2018, that the allocation of police resources in the Western Cape constituted unfair discrimination.⁴³ The Social Justice Coalition alleged that this failure was a constructive refusal of the Equality Court to grant a remedy, and that it violated the right of access to courts.⁴⁴ However, the majority of the CC argued that despite the unconscionable delay of the Equality Court in holding a hearing, the CC did not have

⁴¹ César Rodríguez-Garavito, 'Beyond the courtroom: the impact of judicial activism on socio-economic rights in Latin-America' (2011) vol 89 Texas Law Review 1669 – 1698.

⁴² *Social Justice Coalition v Minister of Police* 2022 (10) BCLR 1267 (CC).

⁴³ *Social Justice Coalition* [30].

⁴⁴ *Social Justice Coalition case* [42].

the power to grant a declaration that there was a constructive refusal by the Equality Court to grant relief.⁴⁵

On choosing remedies, the speakers and participants discussed less common remedies for socio-economic rights cases, including contempt orders, punitive costs orders, and apologies. Exploring these remedies prior to and during litigation is valuable, as in a case there may potentially be more effective remedies to pursue alongside or instead of supervisory orders or constitutional damages.

Many participants also emphasised that the public interest law community should remain attuned to the limits of litigation, and also be prepared to get involved in legal and institutional reforms (e.g. public administration reforms) that could help prevent the structural dysfunctions that result in human rights violations. In this regard, Judge Savage brought up that pre-litigation processes should be used more often. Additionally, one could experiment with more front-end remedies. Judge Davis mentioned an article by Trengrove SC in which the author suggested other potential remedies for socio-economic rights violations, such as preventative damages. The idea was when a human rights violation has occurred, the court could order the state to pay such damages to a public or private agency dedicated to ensuring that such abuses do not take place again in future.⁴⁶ These ideas were not fully developed, but should be in future work on the themes of the workshop.

A conservative legal culture and under-capacitated judiciary

Another underlying theme throughout the Workshop was that judicial culture in South Africa is still relatively conservative. The challenge that Karl Klare identified in 1998 – that we had a transformative constitution embedded in a legal culture anchored to a traditional Western liberal model – is still evident.⁴⁷ An example of this was Geoff Budlender's observation that some judges

see supervisory orders through, and others shut them down, which is partly because they feel uncomfortable with the lack of finality. We also saw in Judge Savage's presentation regarding the debate on constitutional damages that the development of the common law in line with the Constitution is not taking place as we would want. This should not be the case.

The Workshop highlighted how important case management by judges can be, especially in structural remedies. Geoff Budlender also spoke about the very important decision of Acting Judge Michael Bishop in the *Sechaba Protection Services* matter, who emphasised the importance of the judge who originally made the supervisory order retaining the file in the case until its orders have been effectively implemented. Active involvement by judges is crucial for the implementation of supervisory orders. However, we also know that the judiciary is under-capacitated and under-resourced. Many judges are thus unwilling to take on a supervisory order. There is an urgent need for more capacitation of the judiciary, particularly the High Court judges and even those in the Magistrates' Courts, which are at the coal face of monitoring orders.

Way forward

The Workshop made several broad, long-term suggestions, as well as suggestions that can and should be considered or taken up immediately.

1. We all agreed that there is a need to deepen the process of democratising remedies. This involves participation by the people on the ground, civil society, government, and Chapter 9 institutions. In that process, we must keep in mind the purpose of constitutional remedies, which is not for the court to run the government, but for the government to do what the Constitution requires of it.
2. Regarding the more specific suggestions, one was that there needs to be empirical research and analysis on the experience of some of the support structures that have resulted from structural orders. We need to understand the conditions under which these support

⁴⁵ *Social Justice Coalition case* [124].

⁴⁶ Wim Trengrove 'Judicial Remedies for Violations of Socio-Economic Rights' (1999) 1 *ESR Review* 8-11.

⁴⁷ Karl E Klare 'Legal Culture and Transformative Constitutionalism' (1998) *SAJHR* 14(1) 146.

structures were appointed, and whether and how they worked.⁴⁸

3. McConnachie suggested that a practitioner's handbook be developed on remedies in socio-economic rights cases, which would be valuable, and this suggestion should be taken forward. The research ideas mentioned above would be helpful in considering the establishment of a judicial follow-up mechanism in South Africa. More research and reflection must be done on this idea. The concern is always that these structures may become another layer of bureaucracy, taking over the process from the litigants and beneficiaries.
4. We must also remember the Chapter 9 institutions, which are resourced and have important constitutional mandates. A lot of work could be done to reinvigorate them and get them more actively involved in monitoring supervisory orders. The AG could potentially be brought into some of these discussions, as well as the SAHRC and the Public Protector.
5. Another suggestion is that outside of court we need to examine topics such as resources and the issue of rights-responsive budgeting. We need human rights principles to be up front in decision-making around resources. This would bring many of the participants out of their comfort zone, but is vital. There are also many initiatives we could connect to, such as the work done by the Public Service Accountability Monitor. Additionally, we should perhaps involve ourselves in the discussions regarding the reform flowing from the Zondo Commission report.
6. The important question of how much constitutional law training on socio-economic rights the public service and individual judges are receiving was brought up in the Workshop. This is something for us to think about, and perhaps we need to try to leverage some political accountability on this. Most importantly, we must broaden the conversation on remedies, and we need to engage with the Minister of Justice and more members of the judiciary. In future, we should also include in the conversation

representatives of the Chapter 9 institutions, broader civil society organisations, and other government officials. As Geoff Budlender stated, we can no longer sit back and lament that government is incompetent. We need to really understand what the political blockages are, and get some deeper insight into that.

These suggestions are being made in a space that is already experiencing huge resource and capacity constraints. However, we can make some incremental steps to reform the root causes that lead to outcomes where every single judicial remedy in the book has been tried but has failed.

CONCLUSION

What was made clear by the speakers and participants of the Workshop, particularly during informal discussions, is the importance of building a community among those working in the public interest sphere. That type of community has been lost over the years, as there have been fewer joint workshops sharing experiences in the human rights field, although some are still happening. Strengthening and building this community is important not only for sharing information on lessons learned, but also for providing us with mutual support and encouragement. It was undoubtedly meaningful to everyone when Geoff Budlender affirmed that our work is important, and that it must continue.

The key message is that this is the start of the conversation – the first initiative. More work needs to be done, and we hope to stimulate all public interest organisations to take the work forward and to continue attempting to bridge the gap between rights and remedies and the real lives of the people.

⁴⁸ These include the special master in *Mwelase*. There is also value in questioning the effectiveness of interventions made in terms of section 100 of the Constitution.



This report is based on a workshop on Effective Remedies in Socio-economic Rights Litigation held on 5 December 2023 at Cliffe Dekker Hofmeyr Inc's offices in Johannesburg, South Africa. The workshop was a collaboration between SECTION27, Cliffe Dekker Hofmeyr and Sandra Liebenberg, H.F. Oppenheimer Chair in Human Rights Law in the Faculty of Law, University of Stellenbosch.

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