The potential of structural interdicts to constitute effective relief in socio-economic rights cases

Philip Swanepoel

Thesis presented in fulfilment of the requirements for the degree of Masters of Law in the Faculty of Law at Stellenbosch University

Supervisors:

Doctor Shanelle van der Berg

Professor Sandra Liebenberg

December 2017

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Summary

The realisation of socio-economic rights for the poorest and most vulnerable members of society is of critical importance if South Africa's project of transformative constitutionalism is to succeed. It is thus important that courts grant effective relief in cases where socio-economic rights have been found to be violated. This thesis sets out to determine whether the structural interdict in South African constitutional law can constitute such effective relief for socio-economic rights violations.

This thesis firstly aims to determine what the judicially recognised concept of effective relief entails. This is done by developing an evaluative framework that should be used to both design and evaluate remedies granted in cases where human rights have been violated. This evaluative framework consists of certain remedial norms, drawn from Susan Sturm's scholarship, to which public law remedies should adhere and also of more concrete factors that should be considered by courts during the remedial design phase. The remedial norms include participation, respect for the separation of powers doctrine, impartiality, reasoned decision making and remediation. The factors which should be considered include the nature of the right and nature of the violation, diverse interests, reason for the violation, practicability concerns, and the deterrent effect of the remedy.

The second part of this thesis aims to determine if structural interdicts can constitute effective relief. This thesis argues that structural interdicts can constitute such relief, and that it holds specific potential to remedy *systemic* violations. However, structural interdicts will only constitute effective relief if diverse stakeholders participate in the remedial design phase and if the court sufficiently retains supervisory jurisdiction over the case.

This thesis lastly proposes a participatory structural interdict model for socio-economic rights violations. This model is specifically designed to adhere to the remedial norms for public law remedies and to mitigate against concerns relating to the separation of powers doctrine, democratic legitimacy of the judiciary and institutional capacity of the courts – concerns traditionally associated with socio-economic rights adjudication.

Opsomming

Die verwesenliking van sosio-ekonomiese regte vir die armste en mees weerlose lede van ons samelewing is van kardinale belang vir die sukses van Suid-Afrika se transformatiewe grondwetlikheidsprojek. Dit is dus belangrik dat howe effektiewe regshulp verleen in gevalle waar menseregte geskend word. Hierdie tesis poog om vas te stel of die strukturele interdik as remedie in die Suid-Afrikaanse konstitusionele reg as effektiewe regshulp vir die skending van sosio-ekonomiese regte beskou kan word.

Hierdie tesis sal eerstens vasstel wat met die geregtelik erkende konsep van effektiewe regshulp bedoel word. Dit sal gedoen word deur die ontwikkeling van ’n evalueringsraamwerk wat gebruik moet word om beide remedies te ontwerp en te evalueer in gevalle waar menseregte geskend is. Hierdie raamwerk bestaan uit sekere remediërende norme waaraan publiekregtelike remedies moet voldoen, soos geïdentifiseer in Susan Sturm se uitsonderlike akademiese bydrae, sowel as meer konkrete faktore wat oorweeg moet word tydens die remediërende ontwerpsfase. Die norme sluit in deelname, respek vir die skeiding van magte leerstuk, onpartydigheid, beredeneerde besluitneming en remediëring. Die faktore wat oorweeg moet word sluit in die aard van die betrokke reg en die aard van die skending, uiteenlopende belange, die rede vir die skending, praktiese bekommernisse, en die voorkomende effek van die regshulp.

Die tweede gedeelte van hierdie tesis poog om vas te stel of die strukturele interdik as effektiewe regshulp geag kan word. Hierdie tesis argumenteer dat dit wel as sodanig geag kan word, en dat hierdie remedie veral potensiaal inhou om *sistemiese* regskendings te remediëer. Die strukturele interdik sal egter net as ‘n effektiewe regshulp geag kan word indien uiteenlopende belanghebbendes tydens die remediërende ontwerpsfase deelgeneem het en indien die hof toesighoudende jurisdiksie oor die saak behou het.

Hierdie tesis stel laastens ‘n deelnemende strukturele interdik model voor wat verleen kan word in sake waar sosio-ekonomiese regte geskend is. Hierdie model is spesifiek ontwerp om te voldoen aan die remediërende norme vir publiekregtelike remedies en ook om die bekommernisse wat tradisioneel geassosieer word met die beregting van sosio-ekonomiese regte te versag. Hierdie bekommernisse sluit in die

skeiding van magte leerstuk, die demokratiese legitimiteit van die regsbank, en die institusionele vermoëns van die howe.

Acknowledgements

I must first and foremost thank my supervisors, Doctor Shanelle van der Berg and Professor Sandra Liebenberg, for affording me the opportunity to have done this LLM. They have both inspired me to always produce work of a high standard and to pursue a meaningful career in law.

I would like to acknowledge the support I have received from Stellenbosch University's Law Faculty. The most significant support from the faculty was in the form of a Dean's Bursary which enabled me to successfully complete this study.

I would also like to acknowledge the support and collegiality from my colleagues in the *Socio-Economic Rights and Administrative Justice Research Project* for their support. Special thanks to Michelle du Toit for reading earlier drafts of this thesis and providing me with valuable feedback and to Gerda Adams for constantly motivating me to work hard.

I would lastly like to express my gratitude to my friends and family for their patience and support. In particular to my mother, Lizna Swanepoel, who has sacrificed more than most parents in order to give me an advantage in life and also to Maé du Toit for all of her love, support and patience. Special thanks also to my siblings who have all in their own way contributed to the success of this thesis and to Eddy Hanekom and Liam Moses who have been great friends and colleagues throughout the writing of this thesis.

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Chapter 1: Introduction

1 1 Introduction to research problem

1 1 1 Transformative constitutionalism

This thesis aims to investigate the question as to whether the structural interdict remedy can be designed so as to constitute effective relief in cases where the socio-economic rights enshrined in the Constitution of the Republic of South Africa, 1996 ("Constitution") have been violated.[1] In order to understand the need for effective relief in socio-economic rights cases, the transformative potential of socio-economic rights should be viewed against the backdrop of South Africa's project of transformative constitutionalism.

Klare describes the concept of transformative constitutionalism as "[a] long-term project of constitutional enactment, interpretation and enforcement committed to… transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction".[2] Liebenberg explains with reference to transformative constitutionalism that the Constitution is both forward-looking and backward-looking. It is backward-looking because of its aim to address the wrongs and injustices of the past.[3] The forward-looking aspect of our Constitution is encapsulated in its Preamble where it is stated that the Constitution aims to establish a society "based on democratic values, social justice and fundamental human rights". Pieterse elaborates on this understanding of transformative constitutionalism by arguing that the value of substantive equality underlies the transformative project of our Constitution.[4] He further argues that a society based on substantive equality cannot be achieved while the majority of South Africans are denied basic socio-

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[1] Socio-economic rights contained in the Constitution includes the right to adequate housing (s26) and the right to adequate health care, food, water and social security (s27). See chapter three part 3 2 1 where the nature of socio-economic rights is discussed.

[2] K Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146 150.

[3] S Liebenberg *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 25.

[4] M Pieterse "What Do We Mean When We Talk About Transformative Constitutionalism?" (2005) 20 *SA Public Law* 155 156.

economic conditions.[5] It is thus clear that the realisation of socio-economic rights is vital for the Constitution's transformative project to succeed.[6]

1 1 2 Socio-economic conditions in South Africa

Many of the prevailing social and economic injustices in South Africa are a direct legacy of apartheid and colonial rule. Before the advent of democracy in 1994, the majority of South Africans were systemically excluded from participating in social and economic activities because of their race, and the consequences of this can still be seen today in the form of structural poverty and inequality.[7] A significant number of people are still living in inhumane conditions and severe poverty.[8] The constitutional vision of a democratic and equal South Africa has thus not yet been realised and is

[5] 160.

[6] 160. See also P Langa "Transformative Constitutionalism" (2006) 17 *Stell LR* 351 352 where the author similarly states that socio-economic rights are central to the transformative project.

[7] Systemic human rights violations which leads to structural poverty and inequality are defined as cases where a large number of people are affected by way of rights violations because of pervasive public policy failures by multiple governmental agencies and other institutional deficiencies. C Rodríguez-Garavito "Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America" (2010) 89 *Tex L Rev* 89 1669 1671. Evidence of structural inequality is the fact that a very small percentage (0,6%) of previously advantaged white people qualify as poor compared to the previously disadvantaged black people of whom 66,8% qualify as living under the upper-bound poverty line. Statistics South Africa *Poverty Trends in South Africa An Examination of Absolute Poverty between 2006 and 2011 Report No. 03-10-06* (2014) 27.

[8] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 191. More than half of the population is classified as poor and over 20% is classified as living in "extreme poverty". Statistics South Africa *Methodological Report on Rebasing of National Poverty Lines and Development of Pilot Provincial Poverty Lines Report No. 03-10-11* (2015) 13. This is also illustrated by the fact that many South African households are food insecure even though South Africa is classified as a food secure country. This is due to the gross inequality in South Africa where more than half of the country qualified as poor at the end of apartheid, despite the fact that South Africa ranked as a middle income country. S Altman, T G B Hart & P T Jacobs "Household Food Security Status in South Africa" (2009) 48 *Agrekon* 345 345.

hampered by the on-going failure to fulfil various socio-economic rights.[9] It can accordingly be argued that the inclusion of justiciable socio-economic rights in the Constitution has not yet reached its full transformative potential since socio-economic rights related to housing, education, social security and health care have not yet been realised for the majority of South Africa's population.

1 1 2 1 Housing

Spatial and other injustices, which are a legacy of apartheid, are still prevalent in modern South African society,[10] despite the Constitution's transformative ideals. The enormous housing shortage currently faced by government can be directly attributed to apartheid-era housing policies, in terms of which millions of people were forcibly removed from their homes and moved to informal settlements.[11] Today, those who were forcibly removed often still live in deplorable circumstances and have no title security to the land they live on. The many evictions that still take place under the new democratic government is evidence of the lack of title security and continuing effects of historical land dispossession.[12]

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[9] See *Daniels v Scribante* 2017 ZACC 13 (CC) para 22 where Madlanga J states that South Africa's racially discriminatory past is not yet history for many South Africans, since the brutal consequences of apartheid and colonialism are still present.

[10] The Group Areas Act 41 of 1950 was introduced by the National Party after an election victory. The aim of this Act was to make residential separation compulsory. The effects of such legislation can still be seen today in South Africa where white farmers continue to own the majority of the 67% agricultural land. C Walker & A Dubb "The Distribution of Land in South Africa: An Overview" (2016) *Institute for Poverty, Land and Agrarian Studies* <http://www.plaas.org.za/sites/default/files/publications-pdf/No1%20Fact%20check%20web.pdf> (accessed 15-06-2016). See *Daniels v Scribante* 2017 ZACC 13 (CC) para 14 where Madlanga J states that "[d]ispossession of land was central to colonialism and apartheid" and M Strauss *A Right to the City for South Africa's Urban Poor* LLD dissertation, Stellenbosch University (2017) 34-53 where the author discusses land dispossession of black South Africans under colonial and apartheid rule.

[11] Z Skweyiya "Towards a Solution to the Land Question in Post-Apartheid South Africa: Problems and Models" (1989) 21 *Colum Hum Rts L Rev* 211 212. See also *Residents of Joe Slovo Community v Thubelisha Homes* 2010 3 SA 454 (CC) para 191 where Ngcobo J recognises apartheid as the cause of the housing shortage in South Africa.

[12] *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) is an example of one such case. The Court described the eviction in this case as "reminiscent of

1 1 2 2 Education

Everyone has a right to education as guaranteed in section 29 of the Constitution. This right is of paramount importance given its instrumental value in "freeing and unlocking the potential of each person" in South Africa.[13] Education should not be viewed as a stand-alone right, but rather as a right which holds the potential, if realised, to help individuals who are socially and economically marginalised to create dignified lives for themselves.[14] There is still a great disparity between the quality of education received by white students (who mostly attend former model C schools)[15] compared to black students (who often attend no-fee schools in rural areas with very limited resources).[16] The Constitutional Court has stated in this regard that the "lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners" in South Africa.[17] Spaull echoes the Constitutional Court in this regard, stating that many of the schools that were dysfunctional under the apartheid government, remain so to this day.[18] It is clear that unequal resource distribution,

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apartheid-style evictions" since most of the occupiers' possessions were destroyed during the eviction process (which took place a day earlier than scheduled) and they were subsequently left to fend for themselves in the cold Cape winter (para 10). See also *Hadibeng Local Municipality v Unlawful Occupiers of Portions 33 And 37 of the Farm 448 Bokfontein* (27481/15) 2015 ZAGPPHC 367 and *Khauhelo v Mosupa* (A252/2014) 2015 ZAFSHC 69.

[13] *Section 27 v Minister of Education* 2012 3 All SA 579 (GNP) para 3.

[14] Para 4.

[15] Former model C schools are schools which were previously reserved for white pupils only under the apartheid government. The segregated education system of the apartheid regime was introduced by the Bantu Education Act 47 of 1953. These former "white" schools typically still benefit from better facilities, human and financial resources.

[16] S van der Berg "Apartheid's Enduring Legacy" (2007) 16 *J Afr Econ* 849 851.

[17] *Governing Body of the Juma Musjid Primary School v Essay NO* 2011 8 BCLR 761 (CC) para 42. See also *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) para 2 where the Constitutional Court described this "continuing deep inequality" as "a painful legacy of our apartheid history".

[18] N Spaull "Poverty and Privilege: Primary School Inequality in South Africa" (01-07-2012) *Stellenbosch Economic Working Papers: 13/12* <*www.ekon.sun.ac.za/wpapers/2012/wp132012/wp-13-2012.pdf*> (accessed 14-04-2016) 3. In *Minister of Basic Education v Basic Education for All* (20793/2014) 2015 ZASCA 198 para 3 the Court stated per Navsa JA that the issue of providing textbooks to students is one which

which took place on a structural scale during apartheid, has not yet been rectified.[19] Former "white only" schools are still better resourced than former black schools and can thus provide a better educational experience to its learners.[20] Yamauchi further suggests that the geographical positioning of schools is a factor that should be considered when evaluating inequality in education. Previously white schools, which are well resourced, are mostly situated in rich urban areas. These schools are therefore not accessible to the majority of poor black South Africans.[21] The spatial injustices of the past thus also affect other socio-economic issues, such as education. Moreover, the no-fee schools attended by mostly poor black students are more vulnerable to be adversely affected by recalcitrant or incompetent educational departments, thereby leading to further inequalities.[22]

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almost exclusively affects black children in rural communities and thus not white students who mostly attend former model C schools.

[19] F Veriava & F Coomans "The Right to Education" in D Brand & C Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 57 61.

[20] See N Ally & D McLaren "Education Funding Formula Needs to be Fixed" (29-07-2016) *Groundup* <http://www.groundup.org.za/article/education-funding-formula-needs-be-fixed/> (accessed 13-06-2017) where the authors state that the equitable share formula according to which national government allocates money to the different provinces for education does not take into account the fact that some schools were historically underfunded. The effect is thus that the historically unequal resource distribution is perpetuated.

[21] F Yamauchi "School Quality, Clustering and Government Subsidy in Post-Apartheid South Africa" (2011) 30 *Econ Edu Rev* 146 146. See also *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng* (CCT 209/15) 2016 ZACC 14 paras 38–39 where the Court considered the argument espoused by the *amici curiae.* The latter argued that the default feeder zones of schools, based on their geographical positioning, led to unfair discrimination. The Court stated that this argument held "traction" (para 39).

[22] See chapter four part 4 3 2 1 where *Section 27 v Minister of Education* 2013 2 BCLR 237 (GNP) is discussed. The severe incompetence of both the Limpopo Department of Education and the National Department of Basic Education led to the systemic violation of a right to a basic education of thousands of learners who did not receive textbooks timeously.

1 1 2 3 Social security

Another socio-economic right which is often systemically violated in South Africa is the right to social assistance.[23] Social assistance can be defined as "needs-based assistance financed from public funds" for the poorest and most vulnerable members of our society.[24] The realisation of this right is extremely important due to the high rate of poverty and inequality in South Africa. There are, however, many reported cases of government recalcitrance in respect of grant payment and administration, especially in the Eastern Cape Province.[25]

1 1 2 4 Health care

There is a great disparity between the quality of health care received by poor people when compared to the middle and upper income class. This is because those who can afford medical aid are able to access private institutions, which possess ample resources.[26] The first socio-economic rights case to reach the Constitutional Court was *Soobramoney v Minister of Health*.[27] This case serves as a stark reminder of the consequences of unequal health care. The Court found that the KwaZulu-Natal Health

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[23] S27(1)(c) of the Constitution states that "everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance."

[24] I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 592.

[25] The Court stated in *Kate v MEC for the Department of Welfare* 2005 1 All SA 745 (SE) para 5 per Froneman J that "there has been a persistent and huge problem with the administration of social grants" in the Eastern Cape Province. See also chapter four part 4 3 3 2 for a discussion of *Black Sash Trust v Minister of Social Development* 2017 ZACC 8 (CC) in which the recalcitrant attitude of the Minister of Social Development and the South African Social Security Agency almost led to the breakdown of the social grants payment system in South Africa.

[26] There are 83 medical schemes in the private medical sector which serves only 16,2% of the South African population, thereby demonstrating that very few people have access to the quality of care offered by the private sector. This disparity in the health care services received by the poor and the wealthy, respectively, is also visible when one considers the fact that the wealthiest 20% of the country enjoys 36% of the total health benefits compared to the poorest 20% who receive 12,5% of the total health benefits. Department of Health *White Paper on National Health Insurance No. 1230* (2015) 28.

[27] 1998 1 SA 765 (CC).

Department was unable to provide the applicant with ongoing dialysis treatment due to severe resource constraints. Notably, the Court stated that "the hard and unpalatable fact is that if the appellant were a wealthy man he would be able to procure such treatment from private sources; he is not and has to look to the State to provide him with the treatment".[28] It is thus clear that there are great inequalities, largely caused by unequal resource distribution, between the quality of health care services received by patients who are treated at public health care centres when compared to the quality of care offered by the private health care sector.[29]

1 1 3 The need for effective relief

Human rights litigation can meaningfully contribute to the alleviation of the socio-economic inequalities highlighted above – and thus the transformative vision of the Constitution – if courts grant relief that is effective where it is found that a socio-economic right has been infringed.[30] South African courts have a constitutional obligation to grant relief that is "appropriate",[31] "just", and "equitable".[32] The judiciary has further recognised that appropriate, just and equitable relief must constitute "effective relief" for the infringement of the rights set out in the South African Bill of Rights.[33] However, it is unclear when a remedy will constitute effective relief since South African courts have not yet provided an explicit definition or set of criteria for this judicial requirement, and academic literature on this topic is likewise inconclusive.

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[28] Para 31.

[29] *Law Society of South Africa v Minister of Transport* 2011 1 SA 400 (CC) para 95.

[30] It is important to note that courts are merely one of many stakeholders in what must be a concerted effort to combat poverty and inequality in South Africa. See S Budlender, G Marcus & N Ferreira *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons* (2014) 95-107 where the authors discuss different strategies involving diverse stakeholders that must be employed in combination with human rights litigation in order to effect positive social change.

[31] S38 of the Constitution.

[32] S172(1)(b) of the Constitution.

[33] See chapter two part 2 2 2 where the Constitutional Court's interpretation of "appropriate", "just" and "equitable" relief as "effective" relief is discussed.

1 1 4 The structural interdict remedy

The structural interdict as constitutional remedy in diverse jurisdictions has attracted widespread attention from academic commentators.[34] On the one hand, this remedy holds enormous potential to vindicate claimants' rights effectively in cases of socio-economic rights violations, in that this remedy has the ability to facilitate structural changes.[35] On the other hand, it has the perceived potential to encroach upon the separation of powers doctrine by blurring the lines between judicial, executive, administrative and legislative functions while over-burdening the courts with supervisory functions.[36] The nature of this remedy, the challenges presented by its utilisation and its potential efficacy to remediate socio-economic rights violations in South Africa thus fall to be further scrutinised.

1 2 Research aims and hypotheses

This study aims to address two overarching research questions. The first question relates to precisely what the notion of effective relief entails. The second question asks how the structural interdict can be best designed and applied in socio-economic rights cases whilst remaining sensitive to concerns relating to the separation of powers doctrine, the democratic legitimacy of courts and the institutional capacity of the judiciary. This study has five research aims aimed at answering the above-mentioned research questions.

The first research aim is to determine what constitutes "effective relief" for human rights violations in general by analysing relevant jurisprudence and literature. The corresponding hypothesis posits that in addition to vindicating the infringed right, relief

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[34] M Ebadolahi "Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa" (2008) 83 *NYU L Rev* 1565 1590.

[35] W Trengrove "Judicial Remedies for Violations of Socio-Economic Rights" (1999) 4 *ESR Review* 8 9.

[36] Two other concerns which arise when courts grant structural interdict remedies in socio-economic rights cases are the democratic legitimacy of the courts and institutional capacity of the judiciary. See chapter five part 5 2 where these concerns are discussed.

will be effective if it is deemed as legitimate by those affected by it and those responsible for the implementation thereof.

The second research aim of this study is to determine how the notion of effective relief will operate in the specific context of socio-economic rights. These rights are often perceived as different and peculiar in relation to civil and political rights. It thus falls to be investigated whether this is indeed the case, and whether or not this affects the requirements for effective relief. The hypothesis from which this enquiry proceeds is that non-compliance with positive rights obligations will often be systemic in nature. It is furthermore hypothesised that these systemic violations will be particularly difficult to remedy in the specific context of socio-economic rights since the mechanisms needed to give effect to positive socio-economic rights obligations are, unlike positive obligations flowing from civil and political rights, historically underfunded and neglected.

This study will thirdly aim to establish under what circumstances the granting of structural interdicts will constitute appropriate and effective relief where a socio-economic right has been infringed. The analysis in this section will be guided by the hypothesis that structural interdicts are especially suited to remedy cases where socio-economic rights have been systemically violated and that the reason for non-compliance with constitutional obligations will be one of the factors which will indicate the appropriateness of the remedy.

This study will lastly aim to determine how structural interdicts can be best designed and applied by South African courts so as to constitute appropriate and effective relief for socio-economic rights violations. The hypothesis underlying this discussion is that courts need to firstly incorporate a substantial participatory element into the remedy in order to mitigate the concerns which arise when structural interdicts are granted in socio-economic rights cases.[37] Courts must secondly maintain a significant role in this participatory remedial process in order to ensure the efficacy of the remedial outcome.

[37] These concerns relate to the separation of powers doctrine, the democratic legitimacy of the judiciary, and the institutional capacity of courts. See chapter five part 5 2 for a discussion of these concerns.

1 3 Methodology

This study will make use of both primary and secondary sources. South African jurisprudence as a primary source will firstly be analysed and evaluated in order to establish the need for and contours of effective and appropriate relief. The second aim of this analysis will be to determine in what kinds of cases the courts are willing to grant the structural interdict as remedy. The selection of appropriate cases is inevitable, and those cases that are systemic in nature,[38] and involved a direct impact on a large number of people, will be focused on. Illustrative jurisprudence on socio-economic rights in which structural interdicts have been granted will be analysed and evaluated. However, this study will not only consider cases in which structural interdicts were granted, but also certain other cases dealing with socio-economic rights violations in which structural interdicts were not granted.[39] A comparison of these cases will help identify concerns relating to the structural interdict as well as circumstances which warrant the granting of the structural interdict. Many of the remedial developments relating to structural interdicts in South African constitutional law have taken place at the High Court level. This study will thus not only focus on judgments of the Supreme Court of Appeal and the Constitutional Court, but also judgments of the High Courts.

Secondary sources such as academic commentary will also be used in this study. Secondary sources will assist with the analyses of primary sources and will contribute to the research aims relating to the concerns raised in respect of this remedy. Secondary sources will also aid the formulation of proposals pertaining to the design of structural interdicts. None of these secondary sources provides an up-to-date account of the use of structural interdict remedies in socio-economic rights jurisprudence. This study will thus aim to offer an updated account of the use of structural interdict remedies by South African courts in socio-economic rights disputes. It will further investigate the potential of participatory structural interdicts to alleviate some of the concerns ordinarily associated with the granting of this type of remedy.

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[38] See chapter two part 2 3 2 1 2 (b) where systemic rights violations are discussed.

[39] Such cases include the Constitutional Court judgments in *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) and *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC).

This study will also make use of some foreign sources as structural interdict type remedies are controversial in many other jurisdictions.[40] Most foreign sources used in this study will consist of academic commentary which will help analyse and understand the South African position with regard to the structural interdict as constitutional remedy. Certain foreign sources will also be crucial in making recommendations with regard to the design of structural interdicts.[41]

1 4 Outline of chapters

1 4 1 Chapter 2: Appropriate and effective relief for human rights violations

This chapter will analyse the broad remedial powers of South African courts as provided for in the Constitution. It will further consider the judicial interpretation of these remedial provisions as requiring "effective relief", and attempt to determine when a remedy will qualify as effective relief with reference to jurisprudence and academic literature. This discussion will consider whether effective relief must be perfect in the sense that it fully vindicates the infringed right, or whether it can be less than perfect while still constituting effective relief.

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[40] S39(1)(b) and (c) of the Constitution state that "[w]hen interpreting the Bill of Rights, a court, tribunal or forum, must consider international law; and may consider foreign law." O'Regan J stated in *K v Minister of Safety and Security* 2005 6 SA 419 (CC) para 35 that a "[c]onsideration of the responses of other legal systems may enlighten us in analysing our own law, and assist us in developing it further". See the well-known American case of *Brown v Board of Education* 349 US 294 (1955) in which the first structural interdict type remedy was granted. See also chapter five part 5 4 4 3 2 where this case is relied upon to make recommendations with regard to the design of structural interdict remedies.

[41] This study relies heavily on the seminal scholarship of Sturm, in which the author develops a normative framework for public law remedies. Sturm's work is crucial in considering all of the research aims of this study since she addresses the need for effective relief and the nature of structural remedies in the public law context, while simultaneously making recommendations as to how public law remedies should be designed in order to be effective. See S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355.

This chapter will thereafter consider the overarching remedial norms for public law remedies, as identified by Sturm, which should be observed throughout the remedial process for the resultant remedy to be legitimate and effective.[42]

The last part of the chapter will analyse case law and academic literature in order to determine what factors should be considered by a court when choosing a remedy in order to ensure that the remedy will be appropriate and effective.[43] These factors will be analysed in the context of human rights violations in general, whereas the focus of chapter three turns to socio-economic rights cases, in particular.

1 4 2 Chapter 3: Effective relief for socio-economic rights violations

This chapter will consider the judicially recognised requirement for effective relief within the specific context of socio-economic rights violations. The nature of socio-economic rights and the nature of the infringements of these rights will firstly be considered in order to determine what relief will be most effective. It will be argued that violations arising from non-compliance with positive obligations flowing from socio-economic rights will often be systemic in nature due to historical and political choices and concomitant resource allocation.[44] The focus of the study will thus shift to the specific context of systemic socio-economic rights violations.

This chapter will secondly consider various types of constitutional remedies in order to determine whether remedies besides the structural interdict can be effective in systemic socio-economic rights cases. The remedies considered include declaratory orders, prohibitory and mandatory interdicts, constitutional damages, reading in and contempt of court proceedings.

1 4 3 Chapter 4: The structural interdict

Having analysed various types of constitutional remedies for socio-economic rights violations in chapter three, chapter four proceeds to consider the structural interdict in

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[42] See chapter two part 2 3 1 for a discussion of these norms. See also S P Sturm “A Normative Theory of Public Law Remedies” (1990) 79 *Geo LJ* 1355 1410.

[43] See chapter two part 2 3 2.

[44] See chapter three part 3 2 2.

particular. This chapter will discuss the potential of the structural interdict to constitute effective and appropriate relief in cases dealing with systemic socio-economic rights violations. It will commence by briefly considering the remedial powers of South African courts to grant structural interdicts specifically, and will then continue to discuss the nature and main characteristics of the structural interdict.

This chapter aims to identify the circumstances under which the granting of a structural interdict will constitute effective and appropriate relief. This chapter will critically analyse and evaluate cases which are the most illustrative of the different circumstances under which structural interdicts have been granted, with reference to Sturm's overarching norms for public law remedies and the factors that should be considered by courts when choosing a remedy, as identified in chapter two. The aim of these evaluations is to determine whether structural interdicts as granted by South African courts are effective in cases where socio-economic rights have been violated and if not, what the shortcomings of the remedy may be.

1 4 4 Chapter 5: Designing structural interdict remedies to provide effective relief in socio-economic rights cases

This chapter will make proposals regarding the design of structural interdicts. The discussion will commence with the identification and analysis of the concerns relating to the adjudication of socio-economic rights, which is perceived as being exacerbated when these rights are enforced by way of a structural interdict remedy. These concerns relate to the separation of powers doctrine, the democratic legitimacy of the courts, and the institutional capacity of the judiciary.[45] This discussion will be followed by a brief analysis and evaluation of the existing structural interdict models as identified by Sturm.[46]

The second part of this chapter aims to propose a participatory structural interdict model in which the court plays a central role.[47] The meaningful engagement jurisprudence of the Constitutional Court will be considered as a participatory model,

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[45] See chapter five part 5 2 for an analysis of these concerns.

[46] See chapter five part 5 3 for this analysis and evaluation. See also S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1365.

[47] See chapter five part 5 4 4 in this regard.

and this will be supplemented with Sturm's deliberative model in order to propose a structural interdict model which adheres to the overarching norms for public law remedies. This discussion will conclude with several proposals for how courts can effectively retain supervisory jurisdiction over cases. These proposals will aim to shed light on how the practical concern regarding the insufficient resources at the disposal of apex courts can be alleviated.

This chapter will thus propose ways of designing the structural interdict in a manner that renders it "effective" in the sense of constituting a viable mechanism for redressing relevant socio-economic rights violations. Simultaneously, this remedy must be designed so as to remain responsive to the separation of powers doctrine, and to concerns regarding the democratic legitimacy and the institutional capacity of the judiciary to grant this type of remedy.

1 4 5 Chapter 6: Conclusion

Chapter six concludes the study by setting out its main findings and recommendations, and by summarising the answers to the overarching research questions which this study aimed to address.

Chapter 2: Appropriate and effective relief for human rights violations

2 1 Introduction

This chapter will commence by considering the meaning of "effective relief" as a legal concept in South African constitutional law. The origins of this concept will be explored, and relevant constitutional provisions will be considered in order to establish what remedial powers South African courts possess. Thereafter, the content of the concept of effective relief will be explored in greater depth. This will be done by considering the overarching remedial norms which must be observed by courts when designing remedies in human rights cases. This discussion will be followed by the identification and analysis of more concrete factors which must be taken into account during the remedial phase of constitutional adjudication. It is important to note that effective relief as used in this study refers to the judicially recognised requirement for remedies in cases dealing with human rights violations, and not to empirical data pointing to efficacy or otherwise of judicial remedies. This chapter will thus aim to establish when a remedy will satisfy the judicial requirement for effective relief.

2 2 Effective relief

This section will firstly consider the constitutional provisions dealing with the remedial powers of the courts and the judicial interpretation of these provisions as requiring effective relief. Case law and academic literature will thereafter be analysed in order to confirm whether courts have the constitutional responsibility and power to grant *effective* relief. This section will conclude with a discussion of the different conceptualisations of the concept of effective relief in the South African context.

2 2 1 Constitutional provisions

The South African judiciary enjoys a wide discretion when issuing remedies for rights violations.[1] The Constitution of the Republic of South Africa, 1996

[1] S Liebenberg *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 380.

("Constitution") requires that courts declare any unconstitutional law or conduct invalid.[2] However, the only further constitutional requirement when exercising this discretion is that any ensuing order must be just, equitable and appropriate.[3]

The first relevant constitutional provision in respect of issuing relief is that regulating standing, enshrined in section 38 of the Constitution. According to section 38, any person with standing "has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights". Section 172 of the Constitution is equally important in the remedial context since it sets out the obligations and powers of courts when deciding constitutional matters.[4] Significantly, section 172(1)(b) of the Constitution emphasises the broad remedial discretion afforded to courts in that it states that a court "may make any order that is just and equitable" when deciding on a constitutional matter.

These two remedial provisions should be read together as complementary or mutually supporting provisions. The Constitutional Court has stated in this regard that section 38 should be interpreted in the light of section 172(1)(b).[5] "Appropriate relief" in terms of section 38 must thus also be relief that is "just and equitable" in accordance with section 172(1)(b). The Court has explained this by stating that "appropriate relief" must be relief that is "fair and just in the circumstances of the particular case".[6]

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[2] S172(1)(a) of the Constitution states that courts "*must* declare that any law or conduct that is inconsistent with the Constitution is invalid" (emphasis added).

[3] S38 read with s172(1)(b) of the Constitution. See also W Trengove "Judicial Remedies for Violations of Socio-Economic Rights" (1999) 4 *ESR Review* 8.

[4] Section 172: "Powers of courts in constitutional matters

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

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

(b) May make any order that is just and equitable, including-

(i) An order limiting the retrospective effect of the declaration of invalidity; and

(ii) And order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[5] *Hoffmann v South African Airways* 2001 1 SA 1 (CC) para 42.

[6] Para 42. See *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) in which the Court stated (para 101) that it would grant "appropriate relief" in terms of s38 and that this may include any order that is "just and equitable" in terms of s172(1)(b). In discussing the relationship between these two remedial provisions, the Court stated (para 38) that s38 of the

2 2 2 Appropriate, just and equitable relief as effective relief

This section will explore the interpretation of "appropriate, just and equitable relief" in the Constitutional Court's jurisprudence dealing with violations of the rights enshrined in the Bill of Rights, and will further attempt to show how the Court conceptualises the concept of "effective relief".

In *Fose v Minister of Safety and Security* ("*Fose*"), the Constitutional Court grappled with the issue of what would constitute appropriate, just and equitable relief for the violation of the plaintiff's right to human dignity, freedom and security of his person, privacy and his rights relating to lawful arrest and detention.[7] In issuing a remedy, the Court held that "an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying the rights entrenched in the Constitution cannot properly be upheld or enhanced".[8] Thus, in order to constitute appropriate and effective relief, relief must give effect to the values of human dignity, equality, freedom, accountability, openness, responsiveness and supremacy of the Constitution and the rule of law.[9] The Court held that such an interpretation is especially important within the South African context, given its nascent Constitution which seeks to redress an unjust past characterised by gross human rights violations.[10] The Court stated that courts must, when exercising their remedial discretion in choosing an appropriate remedy, aim to "strike effectively at [the constitutional infringement's] source".[11] The Court further stated that appropriate relief will be relief that is "specially fitted or suitable" to the circumstances.[12] According to the Court, the appropriateness and efficacy of a remedy in the context of rights violations will be measured, firstly, by the extent to which it vindicates the infringed

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Constitution is "mirrored" in s172, indicating that there is indeed a close relationship between these two remedial provisions.

[7] 1997 3 SA 786 (CC) para 12.

[8] Para 69. This case was adjudicated in terms of the Constitution of the Republic of South Africa Act 200 of 1993, which contained a comparable *locus standi* provision in s7(4)(a). This interpretation of appropriate relief has been confirmed in *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) para 106 which was decided under the final Constitution.

[9] S1 of the Constitution.

[10] *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 69.

[11] Para 96.

[12] Para 97.

right[13] and, secondly, by the extent to which it deters future violations of rights contained in the Bill of Rights.[14]

It is clear from the above discussion that courts do indeed have a duty to grant effective relief. This constitutional mandate further enables courts to grant a particular remedy even if that specific remedy was not asked for by the applicants or if it differs from the remedy that was originally asked for.[15]

2 2 3 Determining what will constitute effective relief

One can distil from case law and academic literature that there are two main conceptualisations of what will constitute effective relief in cases where constitutional rights have been violated.[16] These two approaches can be explained with reference to Gerwitz's theories for choosing remedies, namely the rights maximising approach and the interests balancing approach.[17]

The rights maximising approach requires the court to grant a perfect remedy which will fully vindicate the infringed right. The victim of the violation must, according to this approach, be put in the position he or she would have been in but for the violation.[18] A less than perfect remedy will only be acceptable under this approach if there are unavoidable limits which will have a direct, negative impact on the remedy's ability to

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[13] See part 2 2 3 below where it is argued that the full vindication of an infringed right will not always be possible. See also chapter four part 4 3 3 2 1 for an analysis of *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 4 SA 179 (CC) which is a good example of where the relief granted by the Court did not fully vindicate the infringed right to just administrative action (s33 of the Constitution) since diverse interests had to be accommodated.

[14] *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 97.

[15] *President of the Republic of South Africa v Modderklip* 2005 5 SA 3 (CC) para 54.

[16] See C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 138 where the author acknowledges the different conceptualisations. He states that "appropriate, just and equitable" relief can either be defined as relief which fully vindicates the infringed right or it can be defined as relief that takes into account all of the different interests implicated in the case.

[17] P Gerwitz "Remedies and Resistance" (1983) 92 *Yale LJ* 585 591.

[18] M Bishop "Remedies" in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 6 2014) 9-29. Bishop describes this approach to choosing a remedy as "entirely victim-focused".

vindicate the infringed right. Unavoidable limits can include multiple remedial goals, conflicting rights and implementation concerns.[19] This approach is congruent with Bishop's definition of effective relief. He defines effective relief as relief that will close the gap between the reality (in which the right has been violated) and the constitutional ideal (where rights are respected and protected).[20]

The other approach is known as the interest balancing approach.[21] This approach requires a balancing process between vindicating the infringed right, on the one hand, and the societal costs implicated by the remedy, on the other.[22] The interest of the victim in having his or her rights vindicated is thus but one of the factors that should be considered when designing a remedy. Gerwitz states:

> "However strong remedial effectiveness [in the sense of vindicating the infringed right] is as a value, it is not society's only value. Where effective remedies conflict with interests that were not considered at the rights stage - interests that are not relevant to the question of whether a right has been violated - those interests press to be considered at the remedy stage and, on occasion, to override the value of remedying violations of the right."[23]

Other societal interests that should be balanced against the victim's interest include factors like the separation of powers doctrine and the monetary impact on the public purse of enforcing the remedy.[24] A less than perfect remedy can thus be granted if it can be justified by way of the balancing process.[25] This approach is wholly congruent

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[19] P Gerwitz "Remedies and Resistance" (1983) 92 *Yale LJ* 585 593–598. See also M Bishop "Remedies" in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 6 2014) 9-67.

[20] Bishop explains this by stating that there must be "no gap between right and remedy". M Bishop "Remedies" in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 6 2014) 9-67. This understanding of what "effective relief" entails is congruent with *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 19 in which the Court stated that appropriate relief must protect and enforce the Constitution.

[21] P Gerwitz "Remedies and Resistance" (1983) 92 *Yale LJ* 585 591.

[22] 592. These costs include all interests in the remedy other than that of the victim.

[23] 604.

[24] See part 2 3 2 2 below in this chapter where the balancing of diverse interests during the remedial enquiry is discussed.

[25] P Gerwitz "Remedies and Resistance" (1983) 92 *Yale LJ* 585 591. See *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC) which serves as an example of where an "imperfect" remedy for the violation of a constitutional right still amounted to effective relief in terms of the

with Sturm's conceptualisation of effective relief, in that an imperfect remedy can constitute appropriate and effective relief as long as there is adherence to the legitimacy norms of public remedial decision-making.[26]

The latter approach to choosing a remedy is furthermore congruent with the complementary and mutually dependent relationship, as noted above, between sections 38 and 172(1)(b) of the Constitution. It is also congruent with the Constitutional Court's jurisprudence. The Court has stated in this regard that diverse interests should be considered when determining what the most effective relief in a specific case will be and that the corrective principle aimed at vindicating the infringed right will sometimes have to yield to other interests.[27] This might result in a less than perfect remedy.

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interest balancing approach. *In casu*, the Court found that the common-law definition of marriage and the Marriage Act 25 of 1961 were unconstitutional to the extent that same-sex couples were prevented from celebrating their unions legally. The Court suspended its order to allow the legislature to enact legislation which would rectify the constitutional infringement. This led to the Civil Union Act 17 of 2006, in terms of which same-sex partners can form a union. The Court decided against a perfect remedy such as reading in (which would have enabled the victims to immediately form same sex unions in terms of the same legislation as heterosexual couples), since interests pertaining to the separation of powers doctrine and society's recognition of the same sex unions had to be balanced against the interests of the victims. See also *Gory v Kolver NO* 2007 3 BCLR 249 (CC) for another example of where an imperfect remedy was granted as the most effective relief in the circumstances. This case concerned the constitutionality of s1(1) of the Intestate Succession Act 81 of 1987 which conferred certain benefits only to heterosexual spouses and not also to same-sex life partners. The Court granted a remedy in the form of a declaration of invalidity to rectify the discrimination, but with limited retrospective effect, which made the remedy imperfect. The Court justified this, stating that the interests of the victims had to be balanced against the "potentially disruptive effects of an order of retrospective invalidity" (para 42).

[26] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1411. See part 2 3 1 below in this chapter for a discussion of the different norms for public law remedies as identified by Sturm. These norms are participation, respect for the separation of powers doctrine, impartiality, reasoned decision making and remediation

[27] See also *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 1 SA 604 (CC) para 56 where the Court stated:

> "The interests of those most closely associated with the benefits of that contract must be given due weight. Here it will be the imperative interests of grant beneficiaries and particularly child grant recipients in an uninterrupted grant system that will play a major role. The rights or expectations of an unsuccessful bidder [who was the victim in this case] will have to be assessed in that context."

2 2 4 Conclusion

Courts have wide remedial powers to grant effective relief in cases where constitutional rights have been violated. It is clear that the Constitution envisages a wide, interest balancing approach to remedying rights violations according to which both perfect and imperfect remedies can constitute effective relief. It is thus not possible, or even desirable, to formulate one single, all-encompassing definition for effective relief since different cases will implicate different interests which would have to be considered and balanced against each other. The next section of this chapter will instead aim to formulate an evaluative framework which can be used to both design and evaluate remedies in order to ensure that it constitutes effective relief.

2 3 Evaluative framework for remedies in human rights cases

One can conclude from the foregoing discussions that what will constitute effective relief will depend on the circumstances of the specific case.[28] The evaluative framework proposed by this study consists of different remedial norms to which remedies should adhere and factors that should be considered when determining what the most effective relief will be in any case where human rights have been violated.

2 3 1 Overarching norms that should be observed at the remedial stage of adjudication

Sturm acknowledges that the traditional adversary model of litigation is not appropriate for designing remedies that aim to bring about institutional or structural reform in the public law sphere. She suggests that it is the systemic and on-going nature of many public law rights violations which makes traditional remedial approaches inappropriate and ineffective.[29] She further argues that the liability stage of adjudication provides little guidance as to how these remedies can be appropriately designed, since the design of these remedies should be based on norms such as efficacy and practicability, which are not relevant to the liability stage.[30] According to

[28] *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 19.
[29] See part 2 3 2 1 2 (b) below for a discussion of systemic rights violations.
[30] S P Sturm “A Normative Theory of Public Law Remedies” (1990) 79 *Geo LJ* 1355 1364.

Sturm, a normative theory for public law remedies, in particular, is thus merited. Although the theory that Sturm goes on to espouse is firmly rooted in the context of large-scale, institutional and structural violations of public law rights, certain elements are equally applicable in the context of constitutional rights infringements that may not be structural in nature. For example, Sturm addresses certain norms that should be observed during both the liability determination and remedial stages of adjudication for the judicial process to be regarded as legitimate. These norms will be manifested differently depending on whether a traditional adversary process is followed for isolated violations, or innovative procedures are developed for remedial decision-making in cases of systemic violations of rights.[31] These norms should be present for the resultant remedy to be appropriate and effective.[32] These norms are participation, impartiality, respect for the separation of powers doctrine, reasoned decision making and remediation.[33]

2 3 1 1 Participation

Sturm states that parties who are affected by or responsible for the implementation of a remedy should be granted a "meaningful opportunity to participate" in the design of the remedy.[34] The model used to facilitate participation amongst different stakeholders will depend on the type of case that is before the court. Structural cases will require large-scale participation which would include diverse stakeholders who might not be parties before the court[35] whereas non-structural cases will mostly only

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[31] For a discussion of systemic socio-economic rights violations, see chapter three part 3 2 2 2.

[32] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1410. Sturm argues that adherence to the norms as discussed in this section will result in a remedy that is legitimate, and that this in turn makes the remedy more effective. She explains this by stating that the "court's capacity to bring about compliance with [violated] substantive norms" is increased when its orders are perceived as being legitimate (1403).

[33] 1390.

[34] 1410. See also S Liebenberg "Remedial Principles and Meaningful Engagement in Education Rights Disputes" (2016) 19 *Potchefstroom Electronic Law Journal* 1 6.

[35] See chapter five part 5 4 1 where the advantages of participation during the remedial stage of adjudication are discussed.

require the participation of the parties before the court as is required by the *audi alteram partem* principle.[36]

Participation within the remedial context has two main purposes. Firstly, it protects and enhances the dignity of parties who are affected by the remedy since they will be able to participate in the remedial decision.[37] Sturm explains that participation contributes to the "perceived fairness" of the remedial process.[38] Secondly, Sturm argues that the participation of different parties in the remedial decision-making process will contribute to effective compliance with the remedy. There are also a range of other benefits to the participation norm. Participation can, according to the author, further help to define the group of people who will be involved in the implementation of the remedy.[39] Participation will also serve an educational purpose since parties will be made aware of any potential difficulties that might arise during the implementation of the remedy as well as possible solutions to these difficulties.[40]

The participation by parties must, however, occur in such a way as to mitigate the effects of the possible unequal bargaining power of the different parties.[41] Sturm notes in this regard:

> "The plaintiffs frequently are poor, politically powerless, and unorganized, and thus may be less able to influence the remedial decision. Yet, the values served by participation at the remedial stage depend on some direct involvement by those who must live with the results.

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[36] See L M du Plessis "Just Legal Institutions in an Optimally Just South Africa under the 1996 Constitution" (1998) 9 *Stell LR* 239 241 where the author discusses how the *audi alteram partem* principle is present in the Bill of Rights.

[37] See also *Doctors for Life International v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC) para 15 where the Court stated that participatory democracy is significant for individuals who are poor and marginalised.

[38] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1392.

[39] 1393.

[40] 1394. See chapter five part 5 4 3 below for a discussion on the meaningful engagement jurisprudence of the Constitutional Court.

[41] This concern is exacerbated in cases dealing with socio-economic rights since the applicants in these cases "are usually poor and politically and socially weak". W Trengove "Judicial Remedies for Violations of Socio-Economic Rights" (1999) 1 *ESR Review* 8 9. See chapter five part 5 4 4 2 for a discussion of the significant role of the court in mitigating unequal bargaining concerns during remedial engagement processes.

> An important criteria of remedial participation, therefore, is the capacity of a particular form of remedial practice to control for unequal power, resources and sophistication."[42]

Diverse participation during the remedial stage is furthermore congruent with the notion of transformative constitutionalism.[43] The Constitutional Court stated in *Doctors for Life International v Speaker of the National Assembly*, referring to participation in the legislative process, that our constitutional order "envisages an active, participatory democracy".[44] The Court further stated that participation by interested parties will contribute to the "deliberative character" of the Constitution and directly contribute to the transformation of South African society.[45]

2 3 1 2 Respect for the separation of powers doctrine

Sturm states that the public law remedial process must "respect the integrity of… governmental institutions".[46] She states that critics perceive the role of the courts in cases dealing with the violation of public law rights as exceeding "the boundaries of judicial authority".[47] This, she argues, can have a negative effect on the legitimacy of the remedial process and thus in turn affect the efficacy of the remedy. Courts must thus be conscious of this concern when designing a remedy in cases dealing with rights violations. Effective participation processes can, however, potentially help to democratise the remedial stage of adjudication and thus be a mitigating factor against separation of powers-based concerns.[48]

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[42] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1396.
[43] K Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146 150. See also chapter one part 1 1 1 above.
[44] 2006 12 BCLR 1399 (CC) para 235.
[45] Para 235.
[46] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1410.
[47] 1403.
[48] See chapter five part 5 4 1 where participation as a crucial element of the remedial design stage is discussed as a mitigating factor against democratic concerns relating to socio-economic rights adjudication and structural interdicts.

2 3 1 3 Impartiality

Sturm argues that an effective remedy must be the result of an impartial and objective decision-making process.[49] Judges must be careful not to let their own politics influence their remedial decisions. A biased judge might choose a remedy which unfairly favours one of the parties.[50] Such a remedy would be inappropriate and could thus not be regarded as effective relief.

Sturm notes that the participation norm can be a perceived threat to the impartiality norm since parties can possibly unduly influence the judge. However, she does not view this as an insurmountable obstacle to impartiality. Instead, the author argues that challenging and developing our ideas about the role of remedies in the public law context will enable us to assign remedial responsibility in new and innovative ways.[51] This will make it possible to maintain both participation and impartiality as norms in the remedial decision-making process.[52]

2 3 1 4 Reasoned decision making

Sturm argues that an appropriate and effective remedy should be based on reasoned decision making.[53] This requires a court to give reasons for why a specific remedy was chosen as the most appropriate and effective relief in the circumstances. This reasoning must be based on "reliable factual foundations" and "identified, persuasive norms".[54] The court would thus have to consider all the possible factors that could render a remedy less than perfect. This principle will also help ensure that the court remains impartial, as it would have to provide reasons for its decisions.[55]

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[49] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1410.
[50] 1398.
[51] This is congruent with *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 69 where the Constitutional Court stated that courts must "shape innovative remedies" if this is needed to grant effective relief.
[52] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1399.
[53] 1410.
[54] 1411.
[55] 1411.

Liebenberg similarly states that the notion of substantive reasoning is equally important during the liability and the remedial stages of adjudication.[56] She argues that such reasoning will require an explanation of the link between the violated right and the chosen remedy. Such reasoning should further explain why the particular remedy was deemed to be more appropriate than other available constitutional remedies.[57]

Moreover, the norm of reasoned decision making is congruent with a "culture of justification" as advocated by Mureinik.[58] He defines this as "a culture in which every exercise of power is expected to be justified".[59] He argues that judicial decisions taken with regard to rights violations must be justified with reference to the rights themselves.[60] Langa similarly argues, with reference to Mureinik, that the Constitution requires that any decision must be based on substantive reasoning.[61] He further states that transformative constitutionalism requires that judicial decisions must be justified "by reference to ideas and values".[62] Sturm's espousal of reasoned decision making as a norm that must be observed throughout the remedial process is thus wholly congruent with South Africa's project of transformative constitutionalism.[63]

2 3 1 5 Remediation

Another important norm for remedial processes dealing with the violation of public law rights is that of remediation.[64] Sturm states that the remedial process will only be legitimate if it "is reasonably calculated to produce compliance with [the] basic constitutional principles" which had been violated.[65] However, Sturm acknowledges that certain norms such as remediation will not always be completely satisfied since

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[56] S Liebenberg "Remedial Principles and Meaningful Engagement in Education Rights Disputes" (2016) 19 *Potchefstroom Electronic Law Journal* 1 7.

[57] 7.

[58] E Mureinik "A Bridge to Where - Introducing the Interim Bill of Rights" (1994) 10 *SAJHR* 31.

[59] 32.

[60] 33.

[61] P Langa "Transformative Constitutionalism" (2006) 17 *Stell LR* 351 353.

[62] 353.

[63] See chapter one part 1 1 1 for a discussion of transformative constitutionalism.

[64] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1411.

[65] 1399.

the "demands and constraints of the particular remedial problem" that needs to be solved will require these norms to be balanced against each other.[66]

2 3 2 Factors to consider when designing effective remedies

The crafting of a remedy which is "appropriate, just and equitable" while simultaneously constituting effective relief requires the consideration of a wide range of factors. Gerwitz describes constitutional law as a mediating process between the ideal and what would be effective in practice.[67] This section will consider the relevant factors which should be considered by courts when dealing with this mediating process in order to determine what the most effective relief will be in a specific case.

These factors are: the nature of the right and the nature of the violation; balancing of diverse interests; the reason for the rights violation; the practicability of the remedy and, lastly, the deterrent effect of the remedy. These factors must be explicitly considered by courts when dealing with rights violations in order to meet Sturm's requirement for reasoned decision making while simultaneously adhering to the tenets of a culture of justification under a transformative Constitution.

2 3 2 1 The nature of the infringed right and the nature of the violation

The Constitutional Court has stated that there are two main factors that should be considered as a point of departure during the remedial phase in order to design a remedy which is suitable and aimed at rectifying the source of the infringement. A court must firstly consider the nature of the right and the obligations accompanying it, which will in turn enable it to secondly consider the nature of the violation.[68]

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[66] 1411. See chapter four part 4 3 3 2 1 where *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 4 SA 179 (CC) is analysed, and in which case the remediation norm was not completely satisfied.

[67] P Gerwitz "Remedies and Resistance" (1983) 92 *Yale LJ* 585 587.

[68] *Hoffmann v South African Airways* 2001 1 SA 1 (CC) para 45. The Court reiterated this in the later judgment of *Minster of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) para 106.

2 3 2 1 1 Nature of the right

(a) Underlying constitutional values

Courts should consider the underlying constitutional values which are threatened in a specific case where constitutionally protected rights are infringed upon. Considering the specific context of the case will aid the court in identifying the relevant values and this will in turn help the court to identify and understand the nature of the violated right.

With regard to the context of the case, the Court stated in *Fose* that South Africa has a long history characterised by grave human rights abuses.[69] The Court thus placed this case, which was heard only three years after the advent of democracy, within a context where the injustices of the past were not yet resolved and where a constitutional culture was not yet firmly established. It is this context which led the Court to state that a constitutional remedy must aim to promote values such as freedom, equality and respect for human rights - values which are fundamental to establishing and maintaining a constitutional democracy.[70] Remedies must thus not merely vindicate the infringed right, but must be tailored in such a way that will ensure that the underlying constitutional values are promoted.[71]

Mohamed v President of the Republic of South Africa is another example of where the Court considered relevant underlying constitutional values in designing an appropriate and effective remedy.[72] This case came before the Constitutional Court after the applicant was arrested by the South African authorities and subsequently extradited to New York to stand trial where a guilty conviction was punishable by

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[69] *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 69.

[70] Para 17. See also s1(a) of the Constitution which states that South Africa is founded on values such as "[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms." These values should always be promoted during the remedial phase of human rights adjudication in order to maintain South Africa's constitutional democracy. See *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC) para 135 where the Constitutional Court stated that an effective remedy must be designed in a way that will best promote constitutional values.

[71] *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 69.

[72] 2001 3 SA 893 (CC).

death.[73] The applicant alleged that, in addition to certain statutory provisions, his rights relating to life, dignity and freedom and security of the person were violated.[74]

The State argued that it would not be appropriate for the Court to grant any declaratory or mandatory order with regard to the interrogation and extradition of the applicant since that would violate the separation of powers doctrine and be futile since the applicant had been "irreversibly surrendered" to the United States.[75] However, the Court rejected these arguments by, *inter alia*, stating that the underlying constitutional values in this case necessitated the granting of a remedy.[76] The values implicated by the rights violation in this case were the supremacy of the Constitution and the rule of law.[77] The Court further stated, in deciding whether a remedy must be granted, that all organs of State must adhere to the Constitution and the Bill of Rights contained therein and that the Court thus had a duty to grant appropriate relief in this case.[78]

The Court further referred to the context of the case as a factor which necessitated the Court to grant a remedy. The Court stated in this regard that "South Africa is a young democracy still finding its way to full compliance with the values and ideals enshrined in the Constitution".[79] This context, similarly to the context described in *Fose* above, forced the Court to declare the State's conduct, which was inconsistent with the Constitution, invalid, even though it stood to have little or no practical effect for the victim of the rights violation. The Court stated that the State is responsible for creating a culture where the Constitution and its values are respected and complied with.[80]

Context is thus crucial in any given case in order to determine which underlying constitutional values are implicated by a particular rights-infringement. The identification of relevant values will, in turn, help a court to understand the nature of the right in order to tailor appropriate and effective relief.

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[73] Para 2.

[74] The relevant constitutional provisions are ss10, 11 and 12 respectively.

[75] *Mohamed v President of the Republic of South Africa* 2001 3 SA 893 (CC) para 70.

[76] Para 72.

[77] Para 72.

[78] Para 72.

[79] Para 69.

[80] Para 69.

(b) Urgency with which underlying interests should be protected

The nature of the right and the interests that underlie it might further determine the urgency with which its violation should be remedied. *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offender*s ("*NICRO*") serves as an example of where the Court took the urgency with which the underlying interests had to protected, into account.[81] This case concerned the right to vote as enshrined in section 19(3) of the Constitution, which was threatened by the Electoral Laws Amendment Act 34 of 2003 ("Amendment Act"). This Act effectively prevented convicted and imprisoned criminals from participating in elections.[82]

The underlying interest in this case was that which the prisoners had in exercising their right to vote in the impending election. This interest was of an exceptionally urgent nature, since the Amendment Act was promulgated just four months before the next elections were to be held. The applicants' right to vote would thus have been irreversibly violated if the impugned legislation was not declared unconstitutional with consequential relief granted in order to enable the prisoners to vote.[83] The Court justified the consequential relief granted in this case by stating that the notion of effective relief requires that the rights violation must be rectified and that the urgent nature of the interests in this case required this to be accomplished quickly and without delay.[84] The Court accordingly granted a report-back-to-court order declaring the relevant legislative provisions unconstitutional.[85] Qualifying prisoners had to be registered on the voters' role according to the mandatory interdict component of the remedy.[86] It is important to note that the Court emphasised the fact that the urgency

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[81] 2005 3 SA 280 (CC).

[82] Ss8(2)(f), 24B(1) and 24B(2) of the Electoral Act 73 of 1998 as introduced by the Amendment Act limited the right to vote of prisoners who were "serving a sentence of imprisonment without the option of a fine".

[83] See *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offender*s 2005 3 SA 280 (CC) para 1 where Chaskalson CJ describes this case as an urgent matter since it concerns the right to vote and was heard on the "eve of the elections".

[84] Para 79.

[85] See chapter five part 5 3 1 where this model of the structural interdict is discussed.

[86] *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offender*s 2005 3 SA 280 (CC) para 80.

in this case was not due to the conduct of the applicants.[87] Chaskalson CJ stated that the applicants acted as swiftly as possible and that they were thus entitled to effective relief,[88] thus suggesting that the urgency of underlying interests will be a less weighty consideration in cases where the urgency was self-created.[89]

2 3 2 1 2 Nature of the violation

Sturm argues that cases dealing with structural rights violations which take place in "complex organizational settings" will require a different remedial approach as opposed to cases which are not of a systemic nature.[90] Bishop similarly argues that the court would have to consider whether the violation is "isolated or systemic; complete or ongoing; serious or trivial; individual or widespread".[91] The remedy granted by a court in any case dealing with the violation of a constitutional right would have to be able to deal with the nature of the infringement in order to effectively rectify the infringement.[92]

(a) Isolated violations

Rights violations can be isolated or discrete in cases where there is no "systemic wrong" which led to the infringement, but rather where the violation was caused by the conduct of an identifiable individual or individuals.[93] An isolated or discrete violation can further be defined as a once-off violation which affects only an individual or a "small identifiable group of individuals".[94]

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[87] Para 79.
[88] Para 79.
[89] See para 5 where the Court discusses the directions of the Chief Justice which stated that "[t]he delay in this matter is due to the delay on the part of the respondents".
[90] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1357.
[91] M Bishop "Remedies" in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 6 2014) 9-34.
[92] See chapter three part 3 2 2 below for a more in-depth discussion of the nature of socio-economic rights violations.
[93] M Bishop "Remedies" in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 6 2014) 9-10.
[94] 1.

One case in which an isolated violation occurred is that of *NM v Smith*.[95] This case concerned the alleged violation of the applicants' right to privacy after their names and positive HIV status' were published in a politician's biography.[96] The Court stated that this case had to be adjudicated in terms of the law of delict.[97] However, it was established that this case did in fact raise constitutional issues "since it involve[d] a nuanced and sensitive approach to balancing… freedom of expression" against the "privacy and dignity of the applicants".[98] The Court found that there was a violation of the applicants' right to privacy.[99] The Court further found that their dignity and psychological integrity were also violated.[100] These violations were isolated or discrete since the affected individuals were an easily identifiable group consisting of three women. The individuals who were liable for the violation were also an easily identifiable group which further points to the isolated nature of the violation. Damages coupled with a mandatory order requiring the removal of the applicants' names from all of the unsold books were sufficient to remedy the violation in this case since there were no structural issues at play.[101]

Isolated violations are relatively easy to remedy, as seen from this case, and usually require remedies that are more simple in nature than those required to constitute effective relief for systemic violations.

(b) Systemic violations

Mbazira defines systemic rights violations as violations "that establish themselves and endure in a sustained manner as part of an institution's behaviour".[102] These types of violations cannot be attributed to the fault of any one specific person, because of

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[95] 2007 7 BCLR 751 (CC). See *NM v Smith* 2005 3 All SA 457 (W) for the High Court judgment in which the application for damages against the first two respondents was dismissed with costs.

[96] *NM v Smith* 2007 7 BCLR 751 (CC) para 1.

[97] Para 27.

[98] Para 31.

[99] Para 47.

[100] Para 54.

[101] Para 90.

[102] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 110.

the simple fact that no single identifiable person's actions led to the infringement.[103] The infringement is rather a result of firmly established institutional practices which are difficult to change and are created over long periods of time. The rights violation is thus a mere symptom of a bigger, structural problem that needs to be addressed in a systemic manner in order to effect institutional reform which would effectively ensure that the institution (or potentially multiple institutions) do not continue to violate human rights.[104]

Rail Commuter Action Group v Transnet Ltd t/a Metrorail is a case in which the infringement was systemic in nature.[105] This case concerned the safety of train commuters who were at risk because of violent attacks which took place on trains in the Western Cape. This case was not about a single isolated incident which was the result of one specific official's conduct, but rather "a result of systemic deficiencies in the security apparatus on all trains", which made certain remedies such as damages inappropriate and ineffective.[106] The High Court instead granted a structural interdict to ensure that the necessary steps were taken to ensure the safety of train commuters. If, hypothetically, this case concerned a violent attack on a passenger because a security official did not guard a train carriage as he or she was instructed to do, then it would have been an isolated rights infringement. Constitutional damages could then have constituted an appropriate and effective remedy.[107]

The case was eventually heard by the Constitutional Court after also being before the Supreme Court of Appeal.[108] The Constitutional Court agreed that there was in fact a systemic safety risk on trains, citing the history of deteriorating safety services available on trains since 1994. However, the Court replaced the structural interdict remedy granted by the High Court with a simple declaratory order in terms of section

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[103] 110.

[104] 111.

[105] 2003 3 BCLR 288 (C).

[106] M Bishop "Remedies" in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 6 2014) 9-35.

[107] 35.

[108] The Supreme Court of Appeal upheld the appeal brought by the respondents in *Transnet Ltd t/a Metrorail v Rail Commuters Action Group* 2003 4 All SA 228 (SCA) para 35, holding that the applicants were justified in their concern regarding the safety of train passengers, but that they had not made a proper case before the court.

38 of the Constitution. The declaratory order was deemed as appropriate and effective relief since Metrorail and the Commuter Corporation "denied, in error, that they bore obligations to protect the security of rail commuters".[109] The respondents were thus merely inattentive in this case and therefor a stronger, more managerial remedy would not have been appropriate.[110]

In *Sonke Gender Justice v Government of the Republic of South Africa*, a malfunctioning system also led to the systemic violation of numerous rights.[111] This case concerned the inhumane living conditions which were plaguing the Pollsmoor Remand Detention Facility ("RDF") in Cape Town. The conditions had been described as "appalling" by Justice Edward Cameron of the Constitutional Court in 2015.[112] After Justice Cameron's inspection and subsequent recommendations, the Public Services Commission similarly described the conditions in 2016 as "alarming and not fit for human habitation".[113] Sonke Gender Justice applied to the Cape Town High Court for an order declaring that the State was in breach of its constitutional and statutory obligations and an order in the form of a structural interdict directing the State to rectify the rights infringements that had been taking place on a structural level.[114] The Court granted a remedy in the form of a strong structural interdict requiring immediate action by the respondents, with stringent reporting back requirements.[115]

The Court first alluded to the systemic nature of the violations when it stated that the "notoriously overcrowded and inhumane conditions that prevailed in… correctional facilities" were an issue inherited by the new democratic government in 1994.[116] The

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[109] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 2 SA 359 (CC) para 109.

[110] See part 2 3 2 3 in this chapter where different reasons for government non-compliance are discussed and how the reason for non-compliance should be a factor considered by courts during the remedial stage of adjudication. Note that strong or managerial remedies in the context of this study refers to remedies that are perceived as intrusive since they contain detailed instructions which can be accompanied by judicial oversight mechanisms.

[111] WCD 23-02-2017 case no 34087/15.

[112] Para 2. Justice Cameron visited the Pollsmoor RDF in terms of s99(1) of the Correctional Services Act 111 of 1998 which states that "[a] judge of the Constitutional Court, Supreme Court of Appeal or High Court… may visit a prison at any time."

[113] *Sonke Gender Justice v Government of the Republic of South Africa* WCD 23-02-2017 case no 34087/15 para 2.

[114] Paras 150–151.

[115] Para 160.

[116] Para 1.

Court cited “inadequate infrastructure” and “over-crowding” as the key problems.[117] The Court discussed evidence which indicated that overcrowding in the RDF was a systemic issue since it persisted, and in fact worsened, over an extended period of time.[118]

The Court continued to discuss the violations relating to health care,[119] lack of exercise,[120] nutrition,[121] and horrendous sanitation facilities.[122] The respondents claimed that insufficient capacity was one of the major contributors to their inability to comply with their statutory and constitutional obligations.[123] They further claimed that overcrowding in the RDF was a symptom of an ineffective justice system.[124] These issues were not caused by any one or group of identifiable individuals, but rather by various people and departments over an extended period of time. The resultant violations were thus systemic in nature.[125]

The above case discussions indicate the complexity of systemic violations. These violations do not have one single cause and this makes remedying these violations extremely difficult since an effective remedy would have to be capable of addressing multiple issues.

2 3 2 2 Balancing diverse interests

Sturm argues that a balancing of diverse interests is of utmost importance when choosing an effective remedy for constitutional rights infringements, especially if these infringements are structural in nature. She explains this by stating that the greatest challenge in respect of designing a remedy for public law violations is the acceptance

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[117] Para 22.

[118] Paras 27–33. The RDF was 186% occupied in 1995, 236% in 2003, 246% in 2005, 255% in 2011 and 249% in 2014.

[119] Para 84.

[120] Para 81.

[121] Para 83.

[122] Para 80.

[123] Para 110. Capacity problems included staff shortages and poor infrastructure (para 119).

[124] See paras 119–128.

[125] See para 139 where the Court discusses the respondents’ contentions that the issues are a result of a malfunctioning justice system and that several different departments and institutions share responsibility for the infringements.

and understanding of the remedy "by those who must live with it".[126] She therefore argues that participation by a diverse group of stakeholders is essential when designing an effective remedy.[127] Mbazira similarly argues that an "appropriate, just and equitable" remedy could be a remedy that balances "all interests implicated by the case" against the individual interests of the victim.[128] The Constitutional Court has likewise interpreted the phrase "just and equitable" as requiring a balancing of the interests of all parties who might be affected by the remedy.[129]

2 3 2 2 1 Interests of the parties before the court

Parties before the court will often have competing interests. It is the duty of the court to balance these interests against each other in order to grant a remedy which will be appropriate and effective in the circumstances.

Hoffmann v South African Airways serves as a good example of where the Constitutional Court had to consider diverse interests in designing an effective remedy.[130] *In casu*, the applicant alleged that the respondent airline had unfairly discriminated against him by refusing him employment based on his HIV status. The Court found that Hoffmann had in fact been unfairly discriminated against.[131] The Court paid special attention to the interests of the parties before the court during the remedial enquiry, stating that "the interests of the prospective employee" as well as "the interests of the employer" had to be considered.[132] The Court continued to consider the different interests when evaluating the appropriateness of instatement as remedy. It stated in this regard that instatement is "the fullest redress obtainable" and will thus fully respond to the interest of the prospective employee in having his right

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[126] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1365.
[127] 1410.
[128] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 138.
[129] See *Zondi v MEC for Traditional and Local Government Affairs* 2005 3 SA 589 (CC) para 130 where the Court said that the interest of both the stockowners and the landowners had to be taken into account. See also *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 94.
[130] 2001 1 SA 1 (CC).
[131] Para 40.
[132] Para 43.

vindicated.[133] The Court furthermore stated that instatement as remedy could be denied if it is unfair or unjust in the circumstances, indicating that the interests of the employer also need to be considered during the remedial enquiry.[134] It concluded that instatement as remedy would not be impractical and that there were no valid medical reasons against it, thus indicating that this remedy would be fair and appropriate.[135] The Court also considered the interests of the employer with regard to the effective date of the order.[136] It concluded in this regard that an order backdating the date of instatement to the date of the High Court order would be unfair to the employer who was not given a fair opportunity to prepare for opposing such a claim.[137] A balancing of interests during the remedial enquiry thus resulted in instatement from the date of the Constitutional Court's order as the most appropriate and effective relief in the circumstances.[138]

2 3 2 2 2 Interests of stakeholders not before court

Stakeholders who are not before the court can include the wider society, those responsible for implementing the remedy, those who are in a position to hinder the effective implementation of the remedy and those who are affected by the remedy.[139] The Constitutional Court has stated in this regard that "the interests of both the complainant and society as a whole ought, as far as possible, to be served", thus indicating that a diverse set of interests should be considered and balanced if relief granted by the Court is to constitute appropriate and effective relief.[140]

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[133] Para 52.
[134] Para 53.
[135] Para 54.
[136] Paras 58-61.
[137] Para 59. See *Hoffmann v South African Airways* 2000 2 SA 628 (W) for the High Court order.
[138] *Hoffmann v South African Airways* 2001 1 SA 1 (CC) para 64.
[139] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1410.
[140] *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 38. See also chapter four part 4 3 3 2 1 where *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 4 SA 179 (CC) is analysed, in which case the *amicus curiae* brought the unrepresented grant beneficiaries' interests squarely before the court.

Mbazira similarly argues that diverse interests, including that of parties who are not before the court, should be considered for the resultant remedy to be effective. He argues in this regard that litigation brought against the State arising from human rights violations will almost always affect stakeholders who are not parties to the specific case. He states that a remedy granted in such cases will necessarily be less effective if the court neglects to consider all of the different interests since polycentric consequences might ensue.[141]

2 3 2 2 3 Interests of those similarly situated

Another set of interests that should be considered when designing an effective remedy is the interests of other persons similarly situated to the victim of the rights infringement.[142] The Constitutional Court has stated in numerous judgments that a remedy only qualifies as effective and appropriate if it provides relief to all similarly situated people.[143] A remedy which provides relief solely to the litigant cannot be regarded as being appropriate and effective.[144] This interest has mostly been considered in cases where the constitutionality of legislation has been contested.[145]

A relevant case in this regard is *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs*.[146] This case concerned the constitutionality of section 25(5) of the Aliens Control Act 96 of 1991 which facilitated the immigration of spouses of permanent South African residents. This Act did not confer the same benefits upon homosexual people who were in a permanent relationship with a permanent South

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[141] See chapter five part 5 2 3 for a discussion of polycentricity.

[142] M Bishop "Remedies" in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 6 2014) 9-35.

[143] *S v Bhulwana*; *S v Gwadiso* 1996 1 SA 388 (CC) para 32. See also *Van der Merwe v Road Accident Fund (The Women's Legal Centre Trust as amicus curiae)* 2006 4 SA 230 (CC) para 71 and *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offender*s 2005 3 SA 280 (CC) para 74.

[144] M Bishop "Remedies" in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 6 2014) 9-35.

[145] See *Da Silva v Road Accident Fund* (1349/2008) 2013 ZAFSHC 188 and *Ramuhovhi v President of the Republic of South Africa* (412/2015) 2016 ZALMPTHC 18.

[146] 2000 2 SA 1 (CC).

African resident.[147] The Court confirmed the unconstitutionality of this provision and considered diverse interests in designing an effective remedy.[148] Importantly, the Court stated that an effective remedy in this case would "also [have to] be seen to be effective" to the applicants and to "people similarly placed within the context of" the impugned provision.[149] The Court furthermore stated that effective relief must give effect to a "wider public dimension" and that "[t]he bell tolls for everyone", thus emphasising the need for relief to extend to all similarly situated people.[150] The Court concluded that reading in was the most effective remedy in the circumstances since this would grant immediate relief to both the applicants and other people in permanent same sex relationships.[151] The Court accordingly ordered the words "or partner, in a permanent same-sex life partnership" to be included after "spouse" in section 25(5) of the Act.[152]

It is thus crucial for a court to consider a wide range of both represented and unrepresented interests when designing effective remedies. Where structural violations are at issue, relief should be tailored so as to ensure that structural benefits ensue not only for those before the court, but to all those similarly placed.

2 3 2 3 The reason for the rights violation

Different remedies will constitute effective relief depending on the reason for non-compliance with the constitutional standard.[153] According to Roach and Budlender, there are three main reasons for government's non-compliance with its constitutional obligations, namely: government inattentiveness, government incompetence or lack of capacity and, lastly, government intransigence.[154]

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[147] Para 1.
[148] Para 87.
[149] Para 81.
[150] Para 82.
[151] Para 86.
[152] Para 86.
[153] M Bishop "Remedies" in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 6 2014) 9-35.
[154] K Roach & G Budlender "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable" (2005) 122 *SALJ* 325 345.

Roach and Budlender have devised a pyramid of escalating remedies with regard to human rights violations.[155] According to this pyramid, weak remedies such as a declaration of rights might constitute effective relief in cases where a violation is caused because of the mere inattentiveness of the government towards its constitutional obligations. Government can thus be made aware of its obligations and proceed to fulfil them.[156] However, violations of human rights which occur in cases where the government does not have the political will to fulfil its constitutional obligations or where it does not have the necessary capacity to fulfil its obligations might require stronger, more managerial type remedies to effectively rectify the situation.[157] Courts will thus have to closely scrutinise the evidence presented by government in order to determine the reason for the rights violation.

2 3 2 4 Practicability of the remedy

Constitutional remedies will only constitute appropriate and effective relief if there is a reasonable prospect that they will be successfully implemented.[158] The Constitutional Court has thus recognised that courts must grant orders that can be successfully complied with.[159]

Remedies which are too vague or which require compliance within an unreasonable timeframe will not be appropriate and effective. *Modderklip Boerdery (Edms) Bpk v President van die RSA* illustrates this point.[160] This case dealt with a difficult situation where a previous eviction order required substantial resources in order to be complied

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[155] 345.

[156] 346.

[157] 349–350.

[158] I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 183. Swart suggests that the implementation of a remedy should be considered when evaluating the efficacy of the remedy. See M Swart "Left Out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor" (2005) 21 *SAJHR* 215 217. See also S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1382 where the author argues that there are "critical issues of implementation that arise in the public remedial context" in support of the development of a distinct normative theory for the remediation of public law violations.

[159] *Hoffmann v South African Airways* 2001 1 SA 1 (CC) para 45.

[160] 2003 6 BCLR 638 (T).

with.[161] The High Court as court of first instance had granted a structural interdict ordering the State to give effect to Modderklip's constitutional right to property by enforcing the eviction order. The High Court's order further instructed the government to make housing provisions for those who stood to be evicted in order to protect their section 26 housing rights. However, the Supreme Court of Appeal criticised the structural interdict for being too vague and stated that an order that merely requires the State to comply with its constitutional obligations will not be appropriate.[162] More specific steps and guidance from the courts were thus needed. The Supreme Court of Appeal further criticised the structural interdict for imposing "unrealistic" time limits with which the State could not be expected to comply.[163]

Currie and De Waal state that another concern when granting a remedy is the "ability and capacity" of the remedial target.[164] Relief granted by a court will not constitute appropriate and effective relief if the person or institution who is supposed to comply with it does not have the necessary resources or skills to do so.[165]

2 3 2 5 The deterrent effect of a remedy

Constitutional remedies must have a deterrent effect in order to discourage future violations if the remedy is to constitute appropriate and effective relief.[166] Most academic literature on deterrence as an aim for constitutional remedies focuses

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[161] The original eviction order was granted in *Modderklip Boerdery (Pty) Ltd v Modder East Squatters* 2001 4 SA 385 (W).

[162] *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 6 SA 40 (SCA) para 38.

[163] Para 38.

[164] I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 183.

[165] See *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 BCLR 150 (CC) para 69 where the Court stated that it would be inappropriate for a court to order "an organ of state to do something that is impossible, the more so in a young constitutional democracy".

[166] *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 17. See also S Liebenberg *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 380.

specifically on damages as remedy.[167] An award of damages is often seen as a deterring remedy since a violator will resist from infringing on another's right in future since he or she will associate the unlawful action with economic harm. Damages will, however, only have a deterrent effect if it is directed against an identifiable individual or group of individuals. It will not have such an effect if it is directed against a whole government department in cases of systemic violations since the employees might see it as a necessary operational cost.[168]

Other stronger remedies such as a structural interdict directing a government department to report back to the court might have more of a deterrent effect in cases concerning structural violations, since recalcitrant officials can be called back to court to explain their non-compliance.

2 3 3 Correlation between public law norms and factors which should be considered

There is a clear correlation between the norms for public law remedies as identified by Sturm and the factors that should be considered during the remedial phase as espoused above. For example, a remedy will adhere to the norm of reasoned decision making if the court explicitly considered all of the factors identified above during the remedial phase. There is also a clear correlation between the norms of participation and respect for the separation of powers doctrine and the balancing of diverse interests factor. This balancing process will have to include the consideration of the interests of the other branches of government, thus allowing the remedy to adhere to

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[167] See I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 182 and M E Gilles "In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies" (2000) 35 *Ga L Rev* 845.

[168] *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 103. The Court stated that the people who commit the violations will not be personally liable which will lessen the deterrent effect of damages. See also *Vumazonke v MEC for Social Development and Welfare for Eastern Cape Province* (ECJ 050/2004) 2004 ZAECHC 40 para 5 where the Court noted that the respondents in this case were more willing to pay legal costs than to try and solve the systemic issues at hand. This issue is also addressed in C Plasket "Protecting the Public Purse: Appropriate Relief and Cost Orders against Officials" (2000) 117 *SALJ* 151 where the author proposes punitive cost orders against individual government officials as appropriate relief in human rights cases since it will serve a deterrent function.

the separation of powers norm. When conducting the balancing process, the court might further have to rely on representations by all relevant parties, which will mean that the remedy will also adhere to the participation norm.[169] There is also a clear correlation between the norm of remediation and the practicability factor, since a remedy will not vindicate the infringed right if it cannot be successfully implemented.

2 4 Conclusion

Courts have a duty to grant relief that is appropriate and effective in cases where a constitutional right has been infringed.[170] What relief will constitute appropriate and effective relief is, however, not as simple as just vindicating the infringed right and realising the substantive norm underlying a judicial determination of liability.[171] Section 38 read together with section 172(1)(b) of the Constitution require judges to take multiple interests into consideration when designing a remedy that will constitute appropriate and effective relief. It is clear from the above discussions and the relevant constitutional provisions that our Constitution envisions an approach to remedial decision making that is congruent with Gerwitz's interest balancing approach. It was further argued that a remedy does not have to be perfect in order for it to qualify as effective relief.

The question thus arose as to what will constitute an effective remedy in cases dealing with human rights violations. This chapter did not propose a single definition for effective relief, but rather established that there are certain overarching norms that must be complied with during the remedial enquiry in order for the resultant remedy to be legitimate and thus effective. It was further established that there are certain factors that should be considered by courts during the remedial phase of adjudication. The first factor that should be considered is the nature of the right and the nature of the violation. Courts should secondly consider diverse interests when designing a remedy. The third factor that must be considered is the reason for the rights violation. The fourth

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[169] See chapter five part 5 4 1 where it is argued that adherence to the participation norm will contribute to the alleviation of concerns relating to the separation of powers doctrine.

[170] *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 3 All SA 169 (SCA) para 42.

[171] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1393.

factor that the court should consider is the practicability of the remedy. Furthermore, appropriate and effective relief must also act as a deterrent for future infringements of the same nature.

This chapter explored the concept of effective relief within the broad context of human rights cases. The following chapter will investigate the contours of effective relief in the specific context of socio-economic rights cases.

Chapter 3: Effective relief for socio-economic rights violations

3 1 Introduction

The previous chapter investigated the concept of effective relief within the context of human rights violations in general. This chapter will focus on effective relief within the specific context of socio-economic rights violations.

This chapter consists of two main parts. The first part will consider the factors which need to be considered when designing an effective remedy as identified in chapter two within the specific context of socio-economic rights. Special attention will be paid to the nature of socio-economic rights and the nature of socio-economic rights violations, since these two considerations should be the starting point of the remedial enquiry.

The second part of this chapter will briefly consider various constitutional remedies available to South African courts. The aim is to determine whether or not these remedies have the potential to effectively remedy socio-economic rights violations. The remedies which will be considered include declaratory orders; interdicts; constitutional damages; reading in; and, lastly, contempt of court proceedings.

3 2 Effective relief for socio-economic rights violations

This section will analyse the factors that should be considered by courts during the remedial design phase in socio-economic rights adjudication. The aim is thus to determine how these factors should guide the remedial enquiry where courts have found socio-economic rights to have been violated. This section will furthermore indicate that the norms of participation, respect for the separation of powers doctrine, impartiality, reasoned decision making and remediation will remain the same regardless of the nature of the right at issue.[1]

[1] See chapter two part 2 3 1 for a discussion of the overarching norms for public law remedies. See also S P Sturm “A Normative Theory of Public Law Remedies” (1990) 79 *Geo LJ* 1355 1390.

3 2 1 The nature of the socio-economic right

When designing an effective remedy for the violation of a socio-economic right, a court's point of departure will be to consider the nature of the socio-economic right at issue and the nature of the obligations flowing from the right.[2] Liebenberg divides the socio-economic rights contained in the Constitution of the Republic of South Africa, 1996 ("Constitution") into three categories. First, qualified socio-economic rights are enshrined in sections 26 and 27 of the Constitution.[3] These rights include the right to health care, adequate housing, sufficient food, water and social security,[4] and are qualified in that the State has a duty to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights".[5] The second category consists of unqualified socio-economic rights.[6] These include children's socio-economic rights,[7] the right to a basic education,[8] and the socio-economic rights of detained persons.[9] The third category of socio-economic rights are negative in nature in that the State and other actors are prohibited from interfering with existing access to socio-economic rights.[10]

This section will firstly consider the values and urgency underlying socio-economic rights since courts must take this into account when designing effective relief. The section will thereafter consider the different obligations imposed by socio-economic rights since this will have a direct influence on the remedial design phase.

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[2] *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) para 106.

[3] S Liebenberg "The Interpretation of Socio-Economic Rights" in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 2003) 13–2.

[4] Ss26(1) and 27(1) of the Constitution.

[5] Ss26(2) and 27(2) of the Constitution.

[6] S Liebenberg "The Interpretation of Socio-Economic Rights" in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 2003) 13–2.

[7] S28(1)(c) of the Constitution.

[8] S29(1)(a) of the Constitution.

[9] S35(2)(e) of the Constitution.

[10] See part 3 2 1 3 1 in this chapter where the negative obligations relating to socio-economic rights are discussed.

3 2 1 1 Values underlying socio-economic rights

The underlying constitutional values in cases dealing with the violation of socio-economic rights must be considered when designing effective relief.[11] Chaskalson P stated in the first socio-economic rights case to have come before the Constitutional Court that:

> "We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring."[12]

The close relationship referred to in the above statement between socio-economic rights and the values of human dignity, equality and freedom have been confirmed in many subsequent cases.[13] These values are always implicated in cases where socio-economic rights have been violated and courts should thus aim to promote them during the remedial design phase.[14]

There are also other foundational constitutional values which are implicated in socio-economic rights cases. The Constitutional Court stated in *Mazibuko v City of Johannesburg* that the constitutional values of transparency, responsiveness and accountability are also typically present in socio-economic rights cases.[15] These values underlie socio-economic rights cases in that the State must explain and justify

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[11] See chapter two part 2 3 2 1 1 (a) for a discussion of the underlying values as remedial consideration within the context of general human rights violations.

[12] *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC) para 8.

[13] See *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) para 40 and *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 23.

[14] See *Jaftha v Schoeman, Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 21 where the Constitutional Court stated that these values are always implicated in socio-economic rights cases.

[15] 2010 3 BCLR 239 (CC) para 161.

its policies relating to socio-economic rights whenever its policy decisions are challenged in court.[16]

3 2 1 2 Urgency underlying interests in socio-economic rights cases

An analysis of the nature of the right will furthermore point to the urgency with which the underlying interests must be vindicated.[17] The underlying interests in socio-economic rights cases will often be urgent in nature since these rights provide for the most basic necessities needed to live a dignified life and people affected by the violation of these rights are often amongst the most vulnerable members of society. *Minister of Health v Treatment Action Campaign* ("*TAC*") constitutes a prime example of where the interest underlying a socio-economic right rendered the case urgent.[18] This case concerned government policy which restricted the provision of Nevirapine, an HIV anti-retroviral drug, to limited test sites. This limitation on the availability of the drug meant that pregnant women outside of the test sites could not guard their unborn babies against HIV infection and potential death, thus rendering the need for effective relief exceptionally urgent.[19]. The Court stated:

> "We do not underestimate the nature and extent of the problem facing government in its fight to combat HIV/AIDS and, in particular, to reduce the transmission of HIV from mother to child. We also understand the need to exercise caution when dealing with a potent and a relatively unknown drug. But the nature of the problem is such that it demands *urgent* attention."[20]

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[16] Para 161.

[17] See chapter four part 4 3 3 where urgency is discussed as a factor justifying the incorporation of detailed and immediate relief into structural interdict remedies in systemic socio-economic rights cases.

[18] 2002 5 SA 721 (CC). *Section 27 v Minister of Education* 2012 3 All SA 579 (GNP) serves as another good example of where the underlying interests had to be urgently vindicated. See chapter four part 4 3 2 1 1 for a critical analysis of this case.

[19] *Minster of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) para 19. See further paras 130–131 where the Court stated that there is an urgent need for Nevirapine to be distributed widely, citing the deadly nature of HIV and also para 9 where the Court described this case as important and urgent.

[20] Para 131 (emphasis added).

3 2 1 3 Different obligations imposed by socio-economic rights

The specific obligations accompanying a socio-economic right that has allegedly been violated are not only relevant when determining liability,[21] but also when designing effective relief.[22] Mbazira states in this regard that courts must distinguish between positive and negative obligations during the remedial phase of adjudication since different obligations require different remedies to be effectively enforced.[23] This section will thus consider the nature of both positive and negative socio-economic rights obligations and the effect these will have on the remedial design phase.

3 2 1 3 1 Negative obligations

Socio-economic rights, as noted above, impose negative obligations that must be adhered to by both the State and private parties.[24] Section 7(2) of the Constitution is relevant in this regard since it requires the State to, *inter alia*, "respect" the rights

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[21] South African courts use different models of review for different types of obligations during the liability stage of socio-economic rights adjudication. The Constitutional Court has developed the reasonableness review model to test State policy in respect of qualified socio-economic rights in order to determine whether or not the State is fulfilling its positive obligations to progressively realise these rights within its available resources. See *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) paras 39–44 where the Court discusses the criteria for the reasonableness review test. See also *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) paras 34–38 and B Ray *Engaging with Social Rights: Procedure, Participation, and Democracy in South Africa's Second Wave* (2016) 54. Compliance with the negative obligations imposed by socio-economic rights is subject to a stricter standard of review since non-compliance must be justifiable in terms of the general limitations clause contained in s36 of the Constitution. *Jaftha v Schoeman, Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 34. See also L Chenwi "Socio-Economic Gains and Losses: The South African Constitutional Court and Social Change" (2011) 41 *Social Change* 427 439 and S Liebenberg *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 57.

[22] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 18.

[23] 18. See also S Liebenberg *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 76.

[24] S Liebenberg "The Interpretation of Socio-Economic Rights" in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 2003) 33–58.

contained in the Bill of Rights. This means that the State must "refrain from law or conduct that directly or indirectly interferes with people's enjoyment" of the rights as contained in the Constitution.[25] Violations occurring due to non-compliance with these obligations can be remedied with negative remedies such as prohibitory interdicts.[26]

(a) Normative content of negative obligations imposed by socio-economic rights

The normative content of negative obligations imposed by socio-economic rights is clear since it merely requires parties to refrain from interfering with another's existing enjoyment of their socio-economic rights.[27] Liebenberg states that the "universal application" of negative obligations to both the State and private parties contributes to the easy enforcement of these obligations.[28]

(b) Negative obligations imposed by socio-economic rights ordinarily not resource intensive

The State would ordinarily not require significant resources to fulfil its negative constitutional obligations, since the party who is allegedly violating the right must merely refrain from doing something in order to end the violation.[29] The Constitutional Court has stated with regard to the negative obligations related to socio-economic

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[25] 6.

[26] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 18. Bishop defines negative remedies as remedies "that tell people not to do something". M Bishop "Remedies" in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 6 2014) 9–1.

[27] S Liebenberg "*Grootboom* and the Seduction of the Negative/ Positive Duties Dichotomy" (2011) 26 *SAPL* 37 38.

[28] 38.

[29] The conclusion that negative obligations are not resource-intensive to fulfil is congruent with the Constitutional Court's judgment in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) para 78 where it accepted that socio-economic rights are justiciable since the negative obligations arising from these rights can, at the very least, be enforced. The fact that the Court was more willing to accept the negative obligations as legitimate and enforceable indicates that these obligations are easier and less resource-intensive to fulfil.

rights that "[t]he availability of state resources [is] not an issue".[30] Liebenberg agrees with the Court when she argues that the negative obligations arising from socio-economic rights usually do not require significant resources or positive conduct by the State in order to be complied with.[31]

However, it is important to note that remedying negative violations do sometimes require the State to comply with far-reaching positive obligations.[32] This can be explained with reference to eviction cases. The Constitutional Court has stated in this regard that an eviction can only take place if the State provides alternative accommodation.[33] This requirement places a positive duty on the State which will necessarily require substantial resources. This means that remedying the non-compliance with the negative obligation to not deprive someone of their existing access to housing contained in section 26(1) of the Constitution[34] – even where a lawful eviction order is obtained in terms of section 26(3) – could be resource intensive.

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[30] *Jaftha v Schoeman, Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 31.

[31] S Liebenberg "The Interpretation of Socio-Economic Rights" in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (OS 2003) 33–18. See also C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 230 where the author states that budgetary consequences relating to the enforcement of negative obligations will be "more occasional" than when positive obligations are enforced. This argument should be distinguished from the argument made that socio-economic rights are more resource-intensive than civil and political rights, as these differences in resource allocation relate to historical political choices and investment in infrastructure. See S Liebenberg "*Grootboom* and the Seduction of the Negative/ Positive Duties Dichotomy" (2011) 26 *SAPL* 37 48-52 where the author argues this by referring to *S v Jaipal* 2005 4 SA 581 (CC) which illustrates how civil and political rights are also resource intensive.

[32] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 229.

[33] See *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 BCLR 150 (CC) para 96 and *Pheko v Ekurhuleni Metropolitan Municipality* 2012 4 BCLR 388 (CC) para 49.

[34] Both ss26(1) and 27(1) contains a negative obligation, see *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) para 88 and *Minster of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) para 46 in this regard.

(c) Impact on remedial design

The clear normative content of negative obligations imposed by socio-economic rights and limited resource implications mean that concerns relating to the separation of powers doctrine and polycentricity will be less pressing where these obligations are enforced by courts. These obligations can thus easily be enforced "through clear and immediate judicial remedies".[35]

However, those cases where positive obligations must be complied with in order to remedy the violation occurring because of non-compliance with a negative obligation, will have a bigger impact on the remedial design stage. Compliance with the positive obligations triggered in these cases will give rise to concerns relating to polycentricity and the separation of powers doctrine because of the positive conduct and resources needed.[36] These concerns will have to be considered by the court in order for the resultant remedy to be effective.

3 2 1 3 2 Positive obligations

It is primarily – but not exclusively – the State that is bound by the positive duties imposed by socio-economic rights.[37] These obligations can be defined as obligations requiring the person or entity who bears the duty to act positively in order to comply therewith. Mbazira accordingly argues that a court must grant a positive remedy in a case where the violation was caused by non-compliance with a positive obligation.[38] Positive remedies include mandatory interdicts and structural interdicts.

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[35] S Liebenberg "*Grootboom* and the Seduction of the Negative/ Positive Duties Dichotomy" (2011) 26 *SAPL* 37 38.

[36] See *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 BCLR 150 (CC) paras 68-75 where the Constitutional Court considered the resource implications of the positive duty to provide alternative temporary accommodation in eviction cases. See also part 3 2 1 3 2 directly below where positive obligations flowing from socio-economic rights and the impact these have on the remedial design stage are discussed.

[37] See *Daniels v Scribante* 2017 ZACC 13 (CC) para 39 where the Constitutional Court stated that positive obligations can also in appropriate circumstances be imposed on private parties.

[38] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 18. A positive remedy can be defined as a remedy which

(a) Normative content of positive obligations imposed by socio-economic rights

An important aspect of positive obligations imposed by socio-economic rights, which must be considered by courts when designing effective relief, is the undefined nature of these obligations. Liebenberg states in this regard that the "normative content of the duties that [positive socio-economic rights] impose are unclear".[39] She elaborates that it is unclear as to who is bound by positive obligations and what will constitute adequate fulfilment of these obligations.[40] The undefined aspects of these obligations will to some extent be clarified during the liability stage of adjudication, but will still bear an impact on the remedial stage. This is due to the fact that mechanisms must be designed during the remedial stage which are aimed at giving effect to the rights as interpreted in the liability stage. This is an important consideration for a court when designing relief in a case where there is non-compliance with a positive socio-economic rights obligation, since relief that goes beyond the judicial boundaries will be perceived as illegitimate and might consequently not be effective.[41]

(b) Resource intensive nature of positive obligations imposed by socio-economic rights

Another key difference between positive obligations *vis-à-vis* negative obligations imposed by socio-economic rights that is relevant for the remedial design stage of adjudication is the enforcement costs involved. In explaining the resource intensive nature of socio-economic rights, Liebenberg acknowledges that the "realisation of socio-economic rights in many liberal, market based democracies requires far greater

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instructs a person to do something. M Bishop "Remedies" in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 6 2014) 9–1.

[39] S Liebenberg "*Grootboom* and the Seduction of the Negative/ Positive Duties Dichotomy" (2011) 26 *SAPL* 37 39. See also C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 230 and A Neier "Social and Economic Rights: A Critique" (2006) 13 *Human Rights Brief* 1 3.

[40] S Liebenberg "*Grootboom* and the Seduction of the Negative/ Positive Duties Dichotomy" (2011) 26 *SAPL* 37 39.

[41] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1403.

resources and positive measures than civil and political rights".[42] This is true in the South African context, not because these rights are inherently different in nature, but because of our history. The State has historically invested a vast amount of resources in the "institutional infrastructure and mechanisms" necessary for the realisation and maintenance of civil and political rights.[43] However, the same is not true for socio-economic rights, as one of the results of the apartheid regime was the systemic deprivation of the socio-economic rights for the majority of the population, based on race. Underdeveloped institutional mechanisms that are supposed to enforce and protect people's socio-economic rights in post-apartheid South Africa are thus a result of historical underfunding at a structural level.[44] The result of this is that, today, compliance with positive obligations imposed by socio-economic rights will require substantial resources.

(c) Impact on remedial design

The resource intensive nature of the positive obligations imposed by socio-economic rights, coupled with the uncertain normative content of these obligations, raise concerns relating to the separation of powers doctrine and polycentricity. This explains the deferent approach of South African courts in adjudicating these rights.[45]

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[42] She makes this statement in arguing that the dichotomy between positive and negative obligations is untenable. S Liebenberg "*Grootboom* and the Seduction of the Negative/ Positive Duties Dichotomy" (2011) 26 *SAPL* 37 51. See also C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 228 and part 3 2 1 3 1 (b) above.

[43] S Liebenberg "*Grootboom* and the Seduction of the Negative/ Positive Duties Dichotomy" (2011) 26 *SAPL* 37 51.

[44] 51.

[45] Davis argues that South African courts have adopted a deferent approach to adjudicating socio-economic rights cases where positive obligations have not been complied with, referring to the relatively weak reasonableness review model used to establish liability and the weak remedies granted by courts in these cases. D M Davis "Adjudicating the Socio-Economic Rights in the South African Constitution: Towards 'Deference Lite'?" (2006) 22 *SAJHR* 301 312. See also B Ray "*Occupiers of 51 Olivia Road v City of Johannesburg*: Enforcing the Right to Adequate Housing Through 'Engagement'" (2008) 8 *Human Rights Law Review* 703 707; D Brand "Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa" (2011) 22 *Stell LR* 614 615; S Liebenberg "Judicially Enforceable Socio-Economic Rights in

However, an overly deferent approach to remedial design will not amount to effective relief and will not lead to the realisation of the transformative potential of socio-economic rights.[46] Courts should thus carefully design remedies that are capable of securing compliance with positive obligations while also mitigating democratic and related concerns.[47]

3 2 2 The nature of socio-economic rights violations

3 2 2 1 Isolated violations of socio-economic rights

Isolated violations of socio-economic rights will mostly occur in cases where private parties or the State breach the negative obligations arising from socio-economic rights. *Jaftha v Schoeman, Van Rooyen v Stoltz* ("*Jaftha*") is illustrative of an isolated violation of a socio-economic right.[48] This case concerned the constitutionality of sections 66(1)(a) and 67 of the Magistrates' Courts Act 32 of 1944 ("the Act"). These provisions made provision for immoveable property to be sold in a sale in execution in order to satisfy a debt.[49] The applicants argued that the impugned provisions infringed on their section 26(1) right of access to housing since this right places a negative obligation on both the State and private parties to not hinder their existing access to housing.[50] The Court found that section 66(1)(a) of the Act was "overbroad" and that it violated section 26(1) of the Constitution "to the extent that it allow[ed] execution against the homes of

South Africa: Between Light and Shadow" (2014) 37 *Dublin U LJ* 137 167 and S van der Berg "The Need for a Capabilities-Based Standard of Review for the Adjudication of State Resource Allocation Decisions" (2015) 31 *SAJHR* 330 345.

[46] See S Liebenberg "*Grootboom* and the Seduction of the Negative/ Positive Duties Dichotomy" (2011) 26 *SAPL* 37 38. See also chapter one part 1 1 1 where transformative constitutionalism is discussed.

[47] See chapter five part 5 4 1 where it is argued that the inclusion of a participatory element into strong remedies such as structural interdicts can effectively mitigate concerns relating to separation of powers and polycentricity.

[48] 2005 2 SA 140 (CC). This case was first brought before the High Court in *Jaftha v Schoeman*; *Van Rooyen v Stoltz* 2003 10 BCLR 1149 (C).

[49] *Jaftha v Schoeman, Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 2.

[50] Para 17.

indigent debtors, where they lose their security of tenure".[51] The Court stated that judicial oversight was necessary in the execution process in order to ensure that all relevant considerations are taken into account.[52] The Court made use of the reading in remedy in order to rectify the limited unconstitutionality of the impugned provision.[53]

The isolated nature of the infringement in this case meant that it was relatively easy to remedy due to several reasons.[54] First, there was a very limited number of people whom were affected and the victims were furthermore easy to identify.[55] Second, the origin of the violation points to the isolated nature of the violation. This potential infringement on the victims' existing access to housing was caused by a deficient legislative provision as opposed to a deficiency in a large government institution. This legislative deficiency was easily remedied by employing the reading in remedy. Third, relatively few resources were needed to remedy the violation.[56]

Another case which is illustrative of an isolated violation of a socio-economic right is *Bondev Midrand (Pty) Ltd v Madzhie*.[57] This case concerned the purchasing of an open residential stand in a security estate. The purchase contract contained a clause which stated that the property had to be transferred back to the developer if the purchaser had not built her or his home within 18 months of the purchase date.[58] The Court found that this clause should not be enforced since it violated the negative

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[51] Para 44. See paras 50-51 where the Court discusses the constitutionality of s67 of the Act. The Court found that s67 is constitutional.

[52] Para 62.

[53] Para 64. See part 3 3 4 of this chapter where the reading in remedy is discussed.

[54] See S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1378 where the author states in the context of isolated rights violations that "[i]n some situations the remedy is clear". One can thus infer from this statement that Sturm believes that isolated violations are simpler to remedy than systemic violations, in which case she argues for more complex, structural remedies (1379).

[55] *Jaftha v Schoeman, Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 2.

[56] The Court stated that "[t]he availability of state resources [was] not an issue" since this case concerned the protection of existing access and not the lack of access (para 31). However, one could argue that more resources will be needed since the oversight role of the judiciary was expanded by this case. See S Liebenberg "*Grootboom* and the Seduction of the Negative/ Positive Duties Dichotomy" (2011) 26 *SAPL* 37 50 where the author argues that the reading in remedy requiring judicial oversight does in fact involve substantial resources.

[57] (63297/15) ZAGPPHC 1097 (19 December 2016).

[58] Para 4.

obligation imposed by section 26(1) of the Constitution.[59] The Court further stated that developers also have a positive obligation in terms of section 26(1) because of the context in which they operate and that the clause additionally violated this obligation.[60]

The violation caused by the impugned contractual clause in this case was isolated in nature. The victim was an easily identifiable individual who had entered into a contract with the developer. Furthermore, the violation was not caused by multiple parties or institutional deficiencies, but by an unconstitutional contractual term. The violation was also easily remedied in this case. The Court simply dismissed the application, which was brought by the developer in an attempt to enforce the contract.[61] There were furthermore no resource implications in this case, which again points to the isolated nature of the infringement.

3 2 2 2 Systemic violations of socio-economic rights

Sturm, similarly to Mbazira,[62] defines systemic public law violations as "ongoing constitutional and statutory violations" involving "complex institutions".[63] She further states that "targets of remedial activity [in cases of systemic violations] tend to be organizations and systems involving participants with differing perspectives on, and interests in, the remedy".[64] She thus argues that many systemic rights violations, or ongoing violations, are not a consequence of individual actions, but rather of institutional deficiencies. Rodríguez-Garavito similarly defines systemic violations of socio-economic rights as cases which "implicate multiple government agencies found to be responsible for pervasive public policy failures that contribute to such rights violations".[65] A remedy aimed at rectifying a systemic socio-economic rights violation

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[59] Para 37. See also para 28 where the Court stated that "persons must desist from preventing or impairing a person's attempts to gain access to adequate housing."

[60] Para 37.

[61] Para 54.

[62] See chapter two part 2 3 2 1 2 (b) where systemic rights violations in general are discussed with reference to Mbazira. See also C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 110.

[63] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1377.

[64] 1377.

[65] C Rodríguez-Garavito "Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America" (2010) 89 *Tex L Rev* 1669 1671. See also G

must thus be able to address and consider the interests of multiple actors, both private and public in nature, who might have contributed to the violation.[66]

Systemic socio-economic rights violations are mostly due to non-compliance with the positive obligations imposed upon the State to realise these rights.[67] The fulfilment of positive obligations presupposes State departments that are effective and functional. Infringements of "positive" rights will thus occur when and where there "is a breakdown or malfunctioning of the system".[68] Effective and appropriate relief in the context of socio-economic rights adjudication would thus have to allow for a systemic approach to ending the rights violation in cases where there is non-compliance with positive obligations.[69] Such a systemic approach will often involve "a series of steps

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Budlender "The Role of the Courts in Achieving the Transformative Potential of Socio-Economic Rights" (2007) 8 *ESR Review* 9 10 where the author states that systemic violations occur because of ineffective or broken systems.

[66] The remedial norms of diverse participation and respect for the separation of powers doctrine are relevant here. A court observing these norms in a systemic case will be in a good position to address the interests of the multiple complex institutions which are responsible for the violation and this will result in a more effective remedy. See chapter two part 2 3 1 where these norms are discussed.

[67] See for example *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC), *Minster of Health v Treatment Action Campaign* 2002 5 SA 721 (CC), *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC), *Residents of Joe Slovo Community v Thubelisha Homes* 2010 3 SA 454 (CC), *Section 27 v Minister of Education* 2013 2 BCLR 237 (GNP) and *Basic Education for All v Minister of Basic Education* 2014 9 BCLR 1039 (GP). See also S Liebenberg "*Grootboom* and the Seduction of the Negative/ Positive Duties Dichotomy" (2011) 26 *SAPL* 37 39 and G Budlender "The Role of the Courts in Achieving the Transformative Potential of Socio-Economic Rights" (2007) 8 *ESR Review* 9 10 where the authors respectively link systemic violations to the non-compliance with positive obligations and C Rodríguez-Garavito "Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America" (2010) 89 *Tex L Rev* 1669 1684 where the author ascribes certain systemic socio-economic rights violations to the "inaction of relevant institutions" and "the lack of coordination among them".

[68] G Budlender "The Role of the Courts in Achieving the Transformative Potential of Socio-Economic Rights" (2007) 8 *ESR Review* 9 10. It is important to note that mere non-compliance with a positive obligation will not automatically amount to a systemic violation. The other elements of this type of violation as identified here must also be present.

[69] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 111.There is thus a clear correlation between the nature of the right as factor to be considered and the nature of the violation since the nature of the violated right can be indicative of the nature of the violation.

or measures… over a period of time"[70] and "once off" remedies will thus not be appropriate and effective.[71]

Rodríguez-Garavito further states that the systemic violation of a socio-economic right will affect large groups of people, referring to the millions of people who were adversely affected in Columbian socio-economic rights cases dealing with severe overcrowding in prisons and the failing health care system.[72] This is also true in the South African context, where severe poverty and subpar socio-economic conditions are the reality of the majority of the population.[73] Non-compliance with positive obligations imposed by socio-economic rights due to institutional deficiencies will thus always affect large groups of people. A remedy granted in a systemic socio-economic rights case will accordingly have to be able to effect structural changes aimed at improving the lives of groups of people, as opposed to individuals, in order to constitute effective relief. A remedy that neglects to provide relief to everyone affected cannot be regarded as effective.[74]

It is clear from the many different aspects of systemic socio-economic rights violations that such violations will require complex remedies which incorporate the interests of many different stakeholders. The need to adhere to remedial norms such as participation and respect for the separation of powers doctrine is thus intensified in systemic socio-economic rights cases.[75] Designing effective relief for systemic socio-economic rights violations is furthermore more difficult when compared to designing effective relief for isolated violations, as discussed above, which can be remedied by

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[70] S Liebenberg "*Grootboom* and the Seduction of the Negative/ Positive Duties Dichotomy" (2011) 26 *SAPL* 37 39.

[71] W Trengove "Judicial Remedies for Violations of Socio-Economic Rights" (1999) 1 *ESR Review* 8 10.

[72] C Rodríguez-Garavito "Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America" (2010) 89 *Tex L Rev* 1669 1671. See also S Liebenberg "*Grootboom* and the Seduction of the Negative/ Positive Duties Dichotomy" (2011) 26 *SAPL* 37 52.

[73] See chapter one part 1 1 2 where the structural poverty and socio-economic deprivation in South Africa are discussed.

[74] This element of systemic socio-economic rights violations highlights the need for courts to consider the interest of people similarly situated to the victims in also receiving relief. See part 3 2 3 below in this chapter where this factor is discussed.

[75] See chapter two part 2 3 1 where these norms are discussed.

simple, once-off remedies. The remainder of this study will thus focus on effective relief within the context of systemic socio-economic rights violations.[76]

3 2 3 Balancing diverse interests

Socio-economic rights are aimed at enhancing the dignity, freedom and substantive equality of those who are poor, marginalised and vulnerable.[77] The realisation of these rights are therefore essential to the transformative project of our Constitution, and sufficient weight must thus be given to the interests of the applicants who bring these cases to court.[78]

Other pressing concerns in socio-economic rights cases are the interest in maintaining the separation of powers doctrine and the interests of the institution that is responsible for rectifying the violations.[79] These interests should not be neglected since the cooperation of the institutions whose non-compliance with positive obligations led to the systemic violation will be needed for the remedial plan to be effectively implemented.[80] Institutions that feel that their interests were not considered and adequately accommodated might adopt a recalcitrant attitude that will negatively impact upon the effective implementation of the remedy.[81]

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[76] See chapter four where the potential of the structural interdict to constitute effective relief for systemic socio-economic rights is explored.

[77] See *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC) para 9 where the Court states that the socio-economic rights provisions are specifically aimed at rectifying the injustices of the past.

[78] See chapter one part 1 1 1 for a discussion of transformative constitutionalism.

[79] M Bishop “Remedies” in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 6 2014) 9-29. The Court refers in *Hoffman v South African Airways* 2000 11 BCLR 1211 (CC) para 45 to this process of taking into account the victim’s interest and the wider societal interests as “a balancing process”.

[80] See chapter two part 2 3 1 1 where it is stated that parties who are responsible for the implementation of a remedy should be allowed to participate in the remedial phase of adjudication in order for the relief to be effective.

[81] See chapter two part 2 3 1 5 where the norm of remediation as identified by Sturm is discussed. See also S P Sturm “A Normative Theory of Public Law Remedies” (1990) 79 *Geo LJ* 1355 1411.

The need to consider the interests of those similarly situated to the victims of the right infringement becomes magnified in systemic socio-economic rights cases.[82] The Court stated in *Fose* that South Africa is a country where "few have the means to enforce their rights through the courts".[83] Remedies granted in those cases where victims do gain access to courts should thus as far as possible also provide relief to other similarly situated people if the transformative ideals of the Bill of Rights, and specifically the socio-economic rights contained therein, are to be fulfilled.[84]

It is important to note the large-scale, structural poverty which persists in our society means that in order to extend relief to those who are similarly placed, additional resources will be needed by government, thus again raising separation of powers-based concerns.[85]

3 2 4 The reason for the infringement

Discrete socio-economic rights violations occurring because of non-compliance with negative obligations can be due to different reasons. Mere inattentiveness by the violator will often be the reason for non-compliance in cases where unconstitutional legislative provisions result in negative constitutional obligations not being complied with.[86] However, non-compliance with negative obligations can also occur due to deliberate actions. For example, a discrete violation of section 26(3) of the Constitution will occur if a group of occupiers are evicted from buildings without a court order in order to fulfil a political mandate.[87] Simple remedies such as reading in, prohibitory

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[82] I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 182. Gutto supports this by arguing that the justiciability of socio-economic rights should not only lead to "goods and services" for the parties to the litigation, but that it should also have a broader impact on the "development of transformative normative ideas, values and institutional arrangements" which will benefit many people who are not parties to the litigation. S B O Gutto "Beyond Justiciability: Challenges of Implementing/Enforcing Socio-Economic Rights in South Africa" (1998) 4 *Buff Hum Rts L Rev* 79 99.

[83] *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 69.

[84] See chapter one part 1 1 1 for a discussion of transformative constitutionalism.

[85] See chapter five part 5 2 where these concerns are discussed.

[86] See *Jaftha v Schoeman, Van Rooyen v Stoltz* 2005 2 SA 140 (CC).

[87] Johannesburg Mayor Herman Mashaba has recently expressed worrying sentiments with regard to the inner city housing crises, stating that he will use "shock and awe" tactics in order

interdicts or damages (where a private party is the infringing party) will likely be effective in most isolated cases.

Systemic socio-economic rights violations occurring because of non-compliance with positive obligations imposed on the State can likewise be due to various reasons. These types of violations can usually be ascribed to either incompetence (lack of capacity) or recalcitrance on the part of the State as bearer of positive duties.[88] These violations might require stronger, more managerial remedies in order to be effectively remedied.

3 2 5 The practicability of the envisaged remedy

Practicability concerns are exacerbated in cases where socio-economic rights have been systemically violated since such remedies would necessarily have to be implemented on a large scale and strike at the institutional shortcomings that led to the infringement. Courts might be tempted to grant far-reaching, detailed structural remedies aimed at rectifying institutional deficiencies, but they must be cautious against granting a remedy which the respondents cannot reasonably be expected to comply with.[89]

However, the court must not only consider the ability of the respondent to comply with the order, but also its own ability to effectively supervise complicated and detailed

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to reclaim the so-called "highjacked" buildings. This rhetoric used by Mashaba is concerning since it suggests that whole scale evictions might take place without court orders or the provision of alternative housing, which will amount to a violation of s26(3) of the Constitution. See S Mkokeli "Herman Mashaba is Pressing On with 'shock and awe' Plan for Inner City, Despite Cries of Xenophobia" (15-08-2017) *Business Day* <https://www.businesslive.co.za/bd/national/2017-08-15-herman-mashaba-is-pressing-on-with-shock-and-awe-plan-for-inner-city-despite-cries-of-xenophobia/> (accessed 15-08-2017).

[88] See *Centre for Child Law v MEC for Education, Gauteng* 2008 1 SA 223 (T) in which incompetence led to a systemic violation and *MEC for the Department of Welfare v Kate* 2006 2 All SA 455 (SCA) in which government recalcitrance was a major contributor to the systemic rights violations in respect of social assistance grants.

[89] Froneman J stated in *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 2 SA 609 (E) 663A that "[i]t seems futile to make an order which the respondents might have difficulty in complying" with.

structural interdicts.[90] Remedies aimed at systemic socio-economic rights violations must thus be practical and realistically designed in order to effect positive change.[91] The Constitutional Court has stated before that the "effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced".[92] A perfect remedy that cannot be complied with will not be regarded as an effective remedy.

3 2 6 Deterrent effect of the envisaged remedy

The need for deterrence in cases dealing with socio-economic rights are crucial since the victims of these violations are often amongst the poorest and most vulnerable members of our society.[93] They may not have the capacity to bring further litigation if the violations reoccur. The need for deterrent remedies is especially important in cases where socio-economic rights have been systemically violated since a failure to effectively remedy the institutional shortcomings will naturally result in a continuing violation at a structural level. Relief in such cases would thus have to address the systemic issues in order to effectively deter and prevent future violations of the right in question.

The relief would have to target the root of the systemic issue to achieve this and not merely deal with the symptoms.[94] Cases dealing with systemic socio-economic rights violations are more complex to remedy. This is why Sturm argues, as noted in the previous chapter, that the traditional binary, adversarial litigation process is not appropriate in such cases. She argues that non-adversarial and participatory mechanisms are more appropriate for remedying systemic violations as these hold

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[90] See chapter five part 5 2 3 where this concern is discussed in more depth.

[91] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 BCLR 150 (CC) para 69.

[92] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 1. See chapter four part 4 3 1 2 for a critical analysis of this case.

[93] See chapter two part 2 3 2 5 where deterrence is discussed as a factor that must be considered when designing effective relief in the context of general human rights violations.

[94] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 177.

greater potential to rectify the root problems and thus deter similar infringements in future.[95]

3 3 Constitutional remedies in the context of socio-economic rights

Having proposed what effective relief entails where constitutional rights in general, and socio-economic rights in particular, are infringed, this part of the chapter will briefly evaluate some constitutional law remedies granted by the Constitutional Court in past socio-economic rights cases. This study will, as noted above, focus on effective relief for the *systemic* violation of socio-economic rights since these violations occur often in the context of socio-economic rights, are complex, and cannot easily be addressed within the structures of our traditional, binary mode of adjudication. The following chapters will deal solely with the structural interdict because of its ostensible potential to constitute appropriate and effective relief in cases of systemic socio-economic rights violations.[96] The remedies that will be briefly considered here are declaratory orders, prohibitory and mandatory interdicts, constitutional damages, reading in and contempt of court proceedings.[97]

3 3 1 Declaratory orders

3 3 1 1 A description

Section 38 of the Constitution explicitly makes provision for the granting of a declaration of rights by a court where it is alleged that a right has been infringed.[98]

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[95] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1377.

[96] 1379. The author justifies the use of structural interdict remedies for systemic public law violations with reference to the court's "remedial duty".

[97] Pieterse states that a wide variety of remedial orders could possibly constitute appropriate and effective relief in cases dealing with socio-economic rights infringements. M Pieterse "Coming to Terms with Judicial Enforcement of Socio-Economic Rights" (2004) 20 *SAJHR* 383 413.

[98] Mbazira defines this type of remedy as "a legal statement of the legal relationship between the parties". C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 156.

This flexible and discretionary remedy allows a court to declare what obligations are imposed by a right whilst leaving the decision as to how best to fulfil the obligations to the other branches of the State.[99]

3 3 1 2 Declaratory orders as appropriate and effective relief

Declaratory orders hold the greatest potential to constitute effective relief in cases dealing with systemic socio-economic rights violations where such violations are caused by the government's mere inattentiveness to its constitutional obligations.[100] In such cases, courts can use declaratory orders to provide guidance to government as to how a particular constitutional violation can be rectified. The Court stated in *TAC* that "[e]ven simple declaratory orders against government or organs of state can affect their policy" and that "Government is constitutionally bound to give effect to such orders".[101]

Liebenberg argues that pure declaratory orders are appropriate as relief in cases dealing with systemic socio-economic rights violations in one of two circumstances. Purely declaratory orders are firstly appropriate in cases where it is expected that the government or relevant State agency will both understand their constitutional obligations and comply therewith in accordance with the declaratory order.[102] The Court stated in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* that interdictory relief, as opposed to declaratory relief, would not be appropriate in the circumstances of the case as there was "nothing to suggest on the papers that Metrorail and the Commuter Corporation will not take steps to comply" with the declaratory relief granted by the Court.[103]

The second circumstance in which a declaratory order might be regarded as being appropriate and effective relief is in cases where the matter before the court has

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[99] I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 196.

[100] See part 3 2 4 above for a discussion of the different reasons for socio-economic rights violations.

[101] *Minster of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) para 99.

[102] Liebenberg *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 408.

[103] 2005 2 SA 359 (CC) para 109. See also *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) para 129 where the Court followed a similar line of reasoning.

become moot.[104] Currie and De Waal define a case which is moot as a case which can no longer affect the interest of the parties before the court or a case where there is no longer an existing controversy present.[105] A declaratory order in a moot case might still be appropriate relief for two reasons. Firstly, it can serve as a confirmation that the applicant's constitutional right has been infringed and by doing so it vindicates the right.[106] Secondly, it can deter future infringements of socio-economic rights by government by declaring what its constitutional duties are in a particular case.

Declaratory orders also have certain shortcomings that should be taken into account by courts when designing effective relief for systemic socio-economic rights violations. Declaratory orders often "suffer from vagueness, [have] insufficient remedial specificity, an inability to monitor compliance, and [could lead to] an ensuing need for subsequent litigation to ensure compliance".[107] Bishop argues that these deficiencies mean that declaratory orders are often too weak as a form of remedy in cases of systemic rights violations.[108] He continues by stating that the South African government is inefficient and will possibly not be able to comply with broad declarations in the context of socio-economic rights. He further argues that litigants in South Africa are often poor and marginalised groups who might not have the necessary financial resources to bring subsequent litigation which might be needed to ensure compliance. This renders declaratory orders less appropriate in cases where on-going institutional reform is required because of systemic violations.[109]

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[104] S Liebenberg *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 398.

[105] I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 87.

[106] S Liebenberg *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 399.

[107] *Little Sisters Book and Art Emporium v Canada (Minister of Justic*e) 2000 2 SCR 1120 para 258.

[108] M Bishop "Remedies" in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 6 2014) 9–141.

[109] 141. The author refers to *Treatment Action Campaign v MEC for Health, Mpumalanga and Minister of Health* TPD case no 35272/02 in which contempt of court proceedings had to be launched to ensure complete compliance with the Court's order as granted in *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC). See also *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 69 where the Court stated that many poor and marginalised people do not possess the necessary means to access courts in order to protect their constitutional rights.

Establishing whether or not declaratory orders are effective in systemic socio-economic rights cases is often difficult. For example, in the landmark case of *Government of the Republic of South Africa v Grootboom* ("*Grootboom*")[110] the Court issued a declaratory order that the State was "to devise and implement within its available resources a comprehensive and co-ordinated programme progressively to realise the right of access to adequate housing" as required by section 26 of the Constitution.[111] The case concerned a group of people who illegally occupied a piece of privately owned land.[112] A previous court order ordered that the occupiers must be evicted from the privately-owned land.[113] The group of occupiers accordingly moved to a nearby sports field after being evicted and brought an urgent application to the High Court since the conditions became intolerable.[114] The declaratory order followed a settlement of the dispute between the parties.[115] Pillay notes that two years after the judgment was delivered, the circumstances and the absence of a "reasonable" housing policy, which the Constitutional Court declared to be unconstitutional, subsisted.[116] According to the author, this delay was arguably a result of the nature of the relief granted by the Court which did not provide for implementation timeframes or judicial supervision over the implementation process.[117]

On the other hand, *Grootboom* led to significant positive housing policy developments and outcomes which helped to address the systemic housing issue in

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[110] 2000 11 BCLR 1169 (CC).

[111] Para 99.

[112] Para 3.

[113] Para 9.

[114] Para 11. See *Grootboom v Oostenberg Municipality* 2000 3 BCLR 277 (C) for the High Court judgment.

[115] C Mbazira *Strategies for Effective Implementation of Court Orders in South Africa*: *You are the "weakest link" in Realising Socio-economic Rights: Goodbye* (2008) 15.

[116] K Pillay "Implementation of *Grootboom*: Implications for the Enforcement of Socio-Economic Rights" (2002) 6 *Law, Democracy & Dev* 255 270.

[117] K Pillay "Implementing *Grootboom*: Supervision Needed" (2002) 3 *ESR Review* 13 14. See T Roux "Legitimating Transformation: Political Resource Allocation in the South African Constitutional Court" (2003) 10 *Democratization* 92 97 where the author likewise criticises this judgment on the grounds that the Court neglected to prioritise the needs of the poor by not granting them immediate relief.

South Africa.[118] It is important to distinguish between the settlement agreement which was made an order of the Court and the declaratory orders which were made with regard to the constitutionality of the State's housing programme in the Cape Town area in terms of section 26 of the Constitution.[119] The settlement order dealt with the question of immediate relief for the applicants, in terms of which the respondents were required to provide certain basic services to the affected community.[120] The main criticism against this settlement order is that it was only focused on a short term solution for the occupants, and not for other persons similarly situated.[121] The declaratory order did prompt government compliance, even though this compliance was delayed. A new plan entitled "Housing Assistance in Emergency Housing Situations" was approved in August 2003 and later incorporated into the National Housing Code.[122] Liebenberg argues that the Court's confidence that the State would comply with the orders made in *Grootboom* was justified given that this was the first significant case to come before the Court in terms of section 26 of the Constitution.[123]

Divergent academic opinions regarding the efficacy of the *Grootboom* order thus illustrate the complexity involved in designing effective remedies in systemic socio-economic rights cases. The declaratory orders made by the Constitutional Court

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[118] Budlender, Marcus and Ferreira note that the judgment in *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) led to broad positive outcomes related to improved national housing policy and the development of South African law on housing and evictions. S Budlender, G Marcus & N Ferreira *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics and Lessons* (2014) 45–46.

[119] S Liebenberg *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 401. Roach and Budlender contend that because of the nature of the right and breach in question, considering whether or not a mandatory and supervisory order would be appropriate was no longer necessary, K Roach & G Budlender "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable" (2005) 122 *SALJ* 325 329.

[120] *Grootboom v Government of the Republic of South Africa* 2000 11 BCLR 1169 (CC) para 5.

[121] S Liebenberg *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 401.

[122] 401. The National Housing Code was published in terms of section 4 of the Housing Act 107 of 1997.

[123] S Liebenberg *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 409.

therefore cannot simply be assumed to have been ineffective or inappropriate given the structural housing problems at issue.

3 3 2 Interdicts

3 3 2 1 A description

An interdict does not merely declare what the legal position is, but also orders a party to either do something (mandatory interdict) or to not do something (prohibitory interdict).[124] These remedies are thus essentially future orientated as they aim to regulate future conduct.[125] Courts can grant either a permanent interdict or an interim interdict.[126]

3 3 2 2 Interdicts as appropriate and effective relief

Liebenberg notes that prohibitory interdicts can be appropriate in the context of socio-economic rights cases where there is a "threatened interference" with a person's existing access to socio-economic rights.[127] In other words, prohibitory interdicts can be most effective in cases where a violation occurred because of non-compliance with a negative obligation arising from a socio-economic right.[128] Prohibitory interdicts can also be granted to deter future socio-economic rights violations if there is a threat of

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[124] M Bishop "Remedies" in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 6 2014) 9–130.

[125] S Liebenberg *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 409.

[126] The requirements for the granting of permanent and interim interdicts differ. See *Setlogelo v Setlogelo* 1914 AD 221 para 227 where the requirements for the granting of permanent interdicts are discussed and *Janse van Rensburg NO v Minister of Trade and Industry NNO* 2001 1 SA 29 (CC) para 32 where the requirements for interim interdicts are discussed.

[127] S Liebenberg *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 410.

[128] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 170.

such a violation.[129] These interdicts can thus potentially be effective in cases of discrete socio-economic rights violations, but will not be effective in cases dealing with systemic socio-economic rights violations.[130] Liebenberg further states that mandatory interdicts may constitute effective relief in cases where socio-economic rights are infringed because of a failure to give effect to a positive obligation by the government or organ of State.[131] It is this ability of mandatory interdicts to enforce positive obligations that renders these types of remedies particularly effective in cases dealing with systemic socio-economic rights violations.[132]

Mbazira argues that mandatory interdicts will be inappropriate as a remedy in cases where there is reason to believe that the government or organ of State will be *bona fide* in obeying the court's order.[133] One could thus argue that a mandatory interdict as remedy will be appropriate and effective in cases where non-compliance is reasonably expected.[134] Mbazira further supports this argument by stating that the distinction between declaratory orders and interdicts is most prevalent in cases where government disregards its constitutional obligations because of the different ways in which these remedies can be enforced. An interdict can be followed by contempt of court proceedings whereas declaratory orders cannot.[135] The consequences for

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[129] Mbazira refers to prohibitory interdicts aimed at deterring future infringements as "preventative interdicts" (170).

[130] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1378.

[131] S Liebenberg *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 410.

[132] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 170.

[133] 171.

[134] 171. See *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) in which the Court granted a mandatory interdict despite stating that government compliance was expected (para 129). This matter needed to be urgently remedied because of the potential infection of thousands of infants with HIV. It is thus this urgency of the underlying interests that justified the mandatory interdict component of the relief. See chapter four part 4 3 3 where it is argued that detailed and immediate relief is needed in cases where irreparable harm might ensue.

[135] *Fakie NO v CCII Systems (Pty) Ltd* 2006 4 SA 326 (SCA) para 38. See also *MEC for the Department of Welfare v Kate* 2006 4 SA 478 (SCA) para 31 where the Supreme Court of Appeal stated that interdictory remedies have "the capacity to be effective where there is a breach or a threatened breach by a public official of a duty that is imposed upon him or her by a statute or by the Constitution". See also M Bishop "Remedies" in S Woolman, T Roux & M

disobeying an interdict are thus potentially more severe, which may have a deterrent effect.[136] This type of remedy is thus potentially more effective in cases of possible government recalcitrance.[137]

3 3 3 Constitutional damages

3 3 3 1 A description

Constitutional damages can be defined as "a sum of money paid to a person to compensate him or her for harm that was caused" due to a violation of her or his constitutionally protected rights.[138] Currie and De Waal state that there is nothing in the Constitution that prevents the courts from awarding damages in cases where constitutionally protected rights have been infringed upon.[139] This position has been confirmed in the *Fose*-case where the Court stated that "there is no reason in principle why 'appropriate relief' should not include an award of damages, where such an award is necessary to protect and enforce" the rights contained in the Bill of Rights.[140]

3 3 3 2 Constitutional damages as appropriate and effective relief

Mbazira argues that non-pecuniary damages hold the most potential in terms of damages as a remedy to constitute appropriate and effective relief in systemic socio-economic rights cases.[141] Non-pecuniary damages do not only vindicate the victim's

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Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 6 2014) 9-130 where the author discusses how contempt of court proceedings can contribute to the effectiveness of mandatory orders.

[136] See part 3 2 6 above where the deterrent effect of a remedy is discussed as an important consideration during the remedial enquiry.

[137] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 172.

[138] P de Vos & W Freedman *South African Constitutional Law in Context* (2014) 409.

[139] I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 200.

[140] *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 60.

[141] Pecuniary damages refer to what the "plaintiff has suffered directly in monetary terms" because of the rights violation. Non-pecuniary damages refer to the compensation for pain and suffering of a victim. This is often very difficult to reduce to a monetary value as it might

violated right, but also serve as a deterrent which might help to end the systemic violation, since the respondent and other institutions who might engage in similar unlawful conduct are made aware that such conduct will result in a loss for them in the form of payable damages.[142]

However, Sturm differs from Mbazira in this respect since she argues that damages will be ineffective in cases where public law rights have been systemically violated for two reasons. First, damages in systemic cases are difficult to quantify and there is a tendency to undervalue the harm caused by these violations. This results in the payment of damages being "viewed as considerably cheaper than efforts to achieve compliance with legal norms".[143] Second, officials responsible for the violations are normally not personally liable for the payment of the damages, which has a negative impact on the deterrent effect of the remedy.[144]

A further argument against the award of damages in systemic socio-economic rights cases centres on the financial impact it might have on the public purse. South Africa is a resource scarce country and awarding damages to a litigant might have a negative effect on the State's ability to fulfil its positive obligations in respect of myriad policies aimed at the realisation of diverse constitutional rights.[145]

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include compensation for things such as anxiety, depression and humiliation. C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 143. Trengove suggests that "reparations in kind" might be a more appropriate and effective form of relief. He states that the purpose is exactly the same as an award for conventional damages, but that it "is tailored to suit the nature of the violation". This remedy will be awarded in the form of "appropriate remedial services" aimed at vindicating the infringed right. W Trengove "Judicial Remedies for Violations of Socio-Economic Rights" (1999) 1 *ESR Review* 8 10.

[142] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 144. See W Trengove "Judicial Remedies for Violations of Socio-Economic Rights" (1999) 1 *ESR Review* 8 9 for a discussion of preventative damages. He states that concerns relating to punitive damages can be mitigated if one rather awards preventative damages against the State and in favour of a non-governmental organisation which has the ability to prevent similar rights violations.

[143] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1379.

[144] 1379.

[145] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 154.

Despite the above mentioned concerns, the courts have recognised direct constitutional damages as appropriate in certain cases dealing with socio-economic rights violations.[146] The Court awarded direct constitutional damages for the first time in *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* after the State failed to give effect to two previous court orders.[147] The Court held that constitutional damages constituted an appropriate remedy as this allowed the residents of Gabon (the unlawful occupiers) to stay in their homes while simultaneously vindicating Modderklip's right to private property.[148] It was deemed fair for the State to pay the damages as it had not fulfilled its obligation to provide alternative land to the occupiers and had failed to meet its obligation to help Modderklip execute the eviction order.[149] The Constitutional Court essentially upheld the order of the Supreme Court of Appeal. The Court rejected the State's argument that an order declaring the rights of the parties would be sufficient, holding that "something more effective than the suggested clarification of its rights" was needed to rectify this systemic issue which was caused in large part by the government's failure to both protect Modderklip's property rights and also to progressively realise the occupiers' housing rights.[150]

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[146] Liebenberg identifies two such areas. The first area deals with the reconciliation between property rights and housing rights. The second area is where direct constitutional damages are awarded as compensation for the maladministration of social grants. S Liebenberg *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 438.

[147] 2004 6 SA 40 (SCA). See chapter two part 2 3 2 4 for a brief discussion of the previous court orders in this case.

[148] *President of the Republic of South Africa v Modderklip Boerdery (Pty)* 2004 6 SA 40 (SCA) para 43.

[149] M Bishop "Remedies" in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 6 2014) 9-134. The Court justified damages as the only appropriate remedy by stating that "Modderklip will not receive more than what it has lost, the State has already received value for what it has to pay and the immediate social problem is solved". *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 6 SA 40 (SCA) para 43.

[150] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 60. See also *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 69 where the Court stated that the granting of constitutional damages is supported by the judicially recognised need for effective relief.

The Supreme Court of Appeal again granted constitutional damages in *MEC for the Department of Welfare v Kate* ("*Kate*").[151] This case arose from a 40-month delay by the Department of Social Welfare in deciding whether or not Kate should receive a disability grant. The Court awarded the damages based on the fact that the delay infringed Kate's right to social security as contained in section 27(1)(c) of the Constitution. The Court regarded the violation as systemic in nature.[152] Constitutional damages were the only appropriate and effective remedy in the circumstances of the case.[153] In reaching this conclusion, the Court considered other constitutional remedies such as a declaration of rights and an interdict. Declaratory relief would have been ineffective and thus inappropriate in this case, as there was reason to believe that the government would not act *bona fide* and promptly.[154] The Court further considered the appropriateness of an interdict as relief in this case.[155] The Court stated that such a remedy would be ineffective, because the "rights that [were]… in issue are directed towards the very poorest in our society, who have little or nothing to sustain them".[156] The Court further stated in this regard that grant beneficiaries might very well not understand their rights, and even if they did, might not have the necessary resources to protect and enforce their rights.[157] An interdict which might need further litigation to be enforced because of the recalcitrant nature of the Department would thus not be effective.[158]

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[151] 2006 4 SA 478 (SCA).

[152] The Court emphasised the systemic nature of the violation by stating that "there seems to be no end in sight" with regard to the maladministration of social grants in the Eastern Cape (para 5). The Court further stated (para 31) that the violation of the right to social security in the Eastern Cape was "endemic".

[153] Para 22. See also para 25 where the Court considered factors such as the nature of the right, the availability of other remedies, and the "consequences of the breach for the claimant concerned" in deciding whether or not damages would be appropriate and effective.

[154] The Court based this conclusion in para 29 on the fact that the High Court had already made such orders with regard to social grants and that the Department of Welfare had still not ended the "impasse".

[155] Para 31.

[156] Para 31.

[157] Para 31.

[158] Remedies should be practically implementable and enforceable as per part 3 2 5 above in order to constitute effective relief for systemic socio-economic rights violations.

It is clear from the above discussion and case analyses that constitutional damages can constitute appropriate and effective relief in cases dealing with systemic socio-economic rights infringements. However, this will depend on the facts of each case since constitutional damages will almost always have a negative impact on the public purse.

3 3 4 Reading in

3 3 4 1 A description

Reading in is a remedy used by courts to remedy a statute that has been found to be constitutionally invalid. This remedy can help rectify a statute that is inconsistent with the Constitution if such an inconsistency is caused by an omission of certain words.[159] Courts must ensure that the constitutional inconsistency is cured, but they must do this with the minimal required intrusion.[160]

3 3 4 2 Reading in as appropriate and effective relief

Reading in as constitutional remedy has been granted by South African courts in cases dealing with isolated non-compliance with the negative obligations imposed by socio-economic rights.[161] This section will consider whether this remedy has the ability to constitute appropriate and effective relief in cases dealing with the systemic violation of socio-economic rights.

An important case in this context is *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* ("*Khosa*").[162] This case concerned the confirmation of an order of invalidity of certain provisions in the Social Assistance Act 59 of 1992 which excluded permanent residents who did not have citizenship from receiving certain welfare grants. The Court held that this exclusion amounted to unfair

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[159] I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 187.

[160] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 24. See also para 75 where the Court formulated additional requirements that should be adhered to when employing the reading in remedy.

[161] See for example *Jafta v Schoeman; Van Rooyen v Stolz* 2005 2 SA 140 (CC).

[162] 2004 6 SA 505 (CC).

discrimination in terms of section 9(3) of the Constitution and that it violated the right of access to social assistance as provided for in section 27(1)(c) of the Constitution.

In considering what remedy to grant, the Court stated that "[r]eading in the words 'or permanent resident' after 'South African citizen'" in the challenged provisions would be the most appropriate remedy in this case.[163] Chenwi notes that this "intrusive" remedy vindicated the victims' rights since permanent residents gained access to the same social welfare benefits as enjoyed by South African residents.[164] However, vindication of the infringed right is not the only requirement for an appropriate and effective remedy.[165] Reading in as a constitutional remedy essentially means that courts become embroiled in the work of the legislative authority by altering legislation. This concern was exacerbated in *Khosa* where the remedy had financial implications because of the wider group of people who now qualified for social assistance from the State. Mokgoro J held in the majority judgment that while this was a concern, the overall budgetary impact would be too small to justify not widening the pool of beneficiaries.[166]

However, in his minority judgment, Ngcobo J arrived at a different conclusion. He stated that it is the work of policymakers to determine what the financial impact on government will be if access to social welfare were to be expanded.[167] He further stated that courts "should be slow to reject reasonable estimates made by policymakers" as this was not the Court's area of expertise. It is clear that Ngcobo J placed more emphasis on the separation of powers-doctrine when compared to the majority judgment in this case.

Liebenberg argues that the appropriateness of the reading in remedy must be determined by conducting a balancing exercise.[168] Courts must consider whether the

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[163] Para 89.

[164] L Chenwi "Socio-Economic Gains and Losses: The South African Constitutional Court and Social Change" (2011) 3 *Social Change* 427 437.

[165] See chapter two part 2 2 3 where it is argued that an interest balancing approach must be followed when determining what the most effective relief would be.

[166] *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) para 62.

[167] Para 128.

[168] S Liebenberg *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 388.

relief provided by the re-drafting of the legislative provision justifies the granting of such an intrusive remedy. She further notes that this type of remedy will generally not be appropriate in cases where the rights infringement can be remedied by a range of different policy options.[169] She argues that this is the case since the drafting of policy normally involves broad public participation which ultimately contributes to the efficacy of said policy. Lastly, she notes that reading in as remedy will be inappropriate in cases where the violation can only be rectified "through organs of state undertaking a series of positive steps and structural reforms over a period of time", thus indicating that this remedy will only be effective in rare systemic cases where violations are caused by non-compliance with a negative constitutional obligation.[170]

3 3 5 Contempt of court proceedings

3 3 5 1 A description

Contempt of court proceedings can be launched by a party who seeks to enforce a mandatory order which has not been complied with. Such proceedings normally follow the issuing of a *rule nisi* in order to give the party who has allegedly not complied with the mandatory order an opportunity to show why he or she should not be held in contempt of court.[171] In order to be successful in contempt of court proceedings, an applicant would have to show that there was indeed non-compliance and that the non-compliance was wilful and *mala fide*.[172]

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[169] 388.

[170] 388.

[171] I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 205.

[172] 205. See also *Fakie NO v CCII Systems (Pty) Ltd* 2006 4 SA 326 (SCA) para 42 for an elaboration on these requirements and *Eisenberg de Saude v Director-General of the Department of Home Affairs* (14705/15) ZAWCHC (15 September 2015) para 51 where a distinction is drawn between contempt of court proceedings directed at committal and those directed at other relief such as a declaration of contempt or monetary fines.

3 3 5 2 Contempt of court proceedings as appropriate and effective relief

Court orders must be implementable and enforceable in order to qualify as appropriate and effective relief. Contempt of court proceedings are one way of making orders against the State more effective, because one can approach a court for an order stating that the other party is in contempt of court due to non-compliance.[173] The Court stated in *Victoria Park Ratepayers Association v Greyvenouw CC* that the court's ability to declare a recalcitrant party to be in contempt of court "has at its heart the very effectiveness and legitimacy of the judicial system".[174] Contempt of court proceedings can thus contribute to the efficacy of certain remedies as it enhances the enforceability of such remedies.

Contempt of court proceedings have been particularly needed in cases where the State had been ordered to pay a sum of money in the context of socio-economic rights cases as these orders seem to be problematic in terms of compliance.[175] A judgment debtor may not, according to the common law, be held in contempt of court for failing to comply with an order to pay a sum of money.[176] This aspect of the common law has since been developed to allow such orders against the State because an effective mechanism was needed to force the government to comply with money orders in cases dealing with the infringement of the right to social assistance.[177] This development was again possibly overturned in *Jayiya v MEC for Welfare, Eastern Cape* ("*Jayiya*") which led to an uncertain legal position.[178] Froneman J, however,

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[173] S Liebenberg *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 451.

[174] 2004 3 ALL SA 623 (SE) para 5. Nkabinde J defines contempt of court in *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 ZACC 10 (CC) para 28 as "the commission of any act or statement that displays disrespect for the authority of the court or its officers acting in an official capacity". See chapter four part 4 3 1 2 where this case is discussed.

[175] The Court stated in *Kate v MEC for the Department of Welfare* 2005 1 All SA 745 (SE) para 5 per Froneman J that "there has been a persistent and huge problem with the administration of social grants" in the Eastern Cape Province. See also *MEC for the Department of Welfare v Kate* 2006 2 All SA 455 (SCA) para 4.

[176] I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 205.

[177] See *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 4 SA 446 (Tk) and *East London LTC v MEC for Health, Eastern Cape* 2001 3 SA 1133 (Ck).

[178] 2004 2 SA 611 (SCA).

construed the *Jayiya*-judgment narrowly in *Kate v MEC for the Department of Welfare, Eastern Cape* and courts can as a result still make a declaratory order stating that a State functionary is in contempt of court when not complying with a money order.[179]

This discussion will not be complete without brief reference to *Minister for Justice and Constitutional Development v Nyathi*.[180] Enforcement of money orders against the State has been a major issue faced by successful litigants, as discussed above.[181] Courts were forced to develop the common law in respect of contempt of court proceedings because section 3 of the State Liability Act 20 of 1957 precluded execution against State assets. However, the Constitutional Court declared this section to be unconstitutional as there were no other effective ways for litigants to enforce judgment debts.[182] Attachment of State assets is now regulated by section 3 of the State Liability Amendment Act 14 of 2011 and this will make contempt of court proceedings much more effective in cases dealing with money orders against the State.[183]

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[179] 2005 1 All SA 745 (SE). Froneman J was critical of the Supreme Court of Appeal's judgment in *Jayiya v MEC for Welfare, Eastern Cape* 2004 2 SA 611 (SCA), stating that this judgment creates the impression that the State is above the law as there is no way to ensure compliance with a money order against the State. See also the important judgment of *City of Johannesburg Metropolitan Municipality v Hlophe* 2015 2 All SA 251 (SCA) in which the Supreme Court of Appeal had to consider whether an order obliging the State functionaries to ensure compliance by the City with a court order was justified. The Court concluded that it was appropriate, referring to the statutory and constitutional obligations imposed on the functionaries to ensure that court orders are complied with (paras 15-26). It is important to note that an order of contempt of court against a State functionary would not be appropriate if the functionary in question have been nominated or deployed for that purpose by the relevant organ of State and if she or he were not "responsible for the wilful default in complying with a court order that lies at the heart of contempt proceedings." See *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality* 2015 2 SA 413 (SCA) para 20 in this regard.

[180] 2010 4 SA 567 (CC).

[181] See also S Liebenberg *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 450.

[182] *Nyathi v Member of the Executive Council for the Department of Health Gauteng* 2008 5 SA 94 (CC) para 58. See S Liebenberg *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 453 for an in-depth discussion of the *Nyathi*-judgment and subsequent developments.

[183] See *Nyathi v Member of the Executive Council for the Department of Health Gauteng* 2008 5 SA 94 (CC) para 75 where Madala J criticises contempt of court proceedings and specifically

3 4 Conclusion

The first part of this chapter considered the judicially recognised requirement for effective relief in respect of public law remedies within the specific context of socio-economic rights violations. It was established that discrete violations will mostly occur where either the State or private parties breach their negative duties relating to socio-economic rights. Socio-economic rights violations arising in instances where the State did not fulfil its positive obligations will often be systemic in nature and these violations are difficult to remedy. It was further established that the reason for the violation might also be an indication as to the nature of the violation and that considerations relating to the practicability of the remedy and the deterrent effect of the remedy are crucial in cases where socio-economic rights have been systemically violated.

The second part of this chapter considered different constitutional remedies in order to establish whether or not they have the potential to deal effectively with systemic socio-economic rights violations. It was concluded that all of these could potentially constitute appropriate and effective relief in such cases, but that it would depend on the circumstances of each case.

Declaratory orders have the potential to be effective, but this potential is limited by their weak nature. Compliance with these remedies cannot be guaranteed since there is no real and direct recourse for parties in cases where these remedies are disregarded, other than to bring subsequent litigation. Mandatory interdicts seem to have more potential to constitute effective relief in cases of systemic socio-economic rights infringements because of the threat of contempt of court proceedings. However, both these remedies will require further litigation which makes it inaccessible for poor and marginalised people.

This chapter also considered constitutional damages and reading in as remedies. Both these remedies do have the potential to constitute appropriate and effective relief, but should only be granted in limited circumstances. Constitutional damages will almost always have a negative impact on the public purse and broader societal interests thus fall to be considered before an order for damages is made. Reading in

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the heavy burden this form of relief places on successful litigants, especially where these litigants are poor and marginalised people, ultimately making this remedy less effective.

is also available in limited circumstances since it can only be granted to rectify unconstitutional texts, and does not promote broad participation.

The limitations of the "traditional" constitutional remedies as discussed above confirms Sturm's argument relating to the unsuitability of the traditional binary adversarial model of adjudication for public law violations.[184] The next chapter will thus focus solely on the structural interdict remedy, which is a more recent and experimental remedy in South African constitutional law, in order to establish whether this remedy can constitute appropriate and effective relief in cases of systemic socio-economic rights violations.

[184] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1377.

Chapter 4: The structural interdict

4 1 Introduction

The previous chapter explored effective relief as a judicially recognised requirement for remedies in the specific context of socio-economic rights violations. It is clear from the earlier chapters of this study that isolated violations are relatively easy to remedy. However, systemic violations are difficult to remedy since it often involves the cooperation of various government departments and other actors.

The aim of this chapter is to explore the apparent potential of the structural interdict remedy to constitute appropriate and effective relief in cases where socio-economic rights have been systemically violated. The first part of this chapter will discuss the nature and main characteristics of the structural interdict. The second part of this chapter will then analyse and evaluate case law dealing with systemic socio-economic rights violations in which structural interdict type remedies have been granted. The analysis and evaluation will be conducted with reference to the overarching norms for public law remedial processes as identified by Sturm and the factors which need to be considered during the remedial phase as discussed in chapter two.[1]

4 2 Nature of the structural interdict

4 2 1 Remedial powers of courts to grant structural interdicts

The structural interdict as remedy in South African constitutional law was first foreshadowed in *Fose v Minister of Safety and Security* when the Court recognised that courts may have to design new remedies if there is no existing remedy which will adequately protect and vindicate the constitutionally entrenched rights.[2] This led to the Court confirming its powers to grant such a remedy in *Pretoria City Council v Walker*, in which case the respondent refused to pay the City Council for rendered services,

[1] See chapter two part 2 3 where the evaluative framework for remedies in human rights cases is discussed.

[2] 1997 3 SA 786 (CC) para 19.

because they were allegedly unfairly discriminating against him.[3] The respondent based these allegations on the fact that residents of "old Pretoria" (the former white areas) were levied higher rates for water and electricity than residents living in Mamelodi and Atteridgeville (former black areas).[4] The Court found that there was indeed unfair discrimination.[5] However, the Court stated that the respondent should not have taken the law into his own hands in an attempt to remedy the discrimination by not paying his municipal fees. Instead, he should have approached a court for an appropriate remedy. The Court envisioned that this appropriate remedy could potentially have taken the form of a mandamus compelling the City Council to eliminate the rights infringement and "to report back to the court" so as to inform the court of the steps taken and progress made in remedying the situation.[6] The Court further stated that "further ancillary orders or directions" could be given if such a remedy is granted in order to ensure satisfactory compliance, thus indicating that courts have the remedial power to retain judicial supervision after a remedy has been granted.[7]

The remedial powers of the courts to grant structural interdicts have been confirmed in various subsequent cases,[8] most notably in the landmark case of *Minister of Health v Treatment Action Campaign*.[9] The government argued in this case that the only appropriate remedy which the Court could grant was a declaratory order, stating that the separation of powers doctrine prevented the Court from making orders that would intrude on government's policy terrain.[10] The Court rejected this argument, stating:

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[3] 1998 2 SA 363 (CC) para 1.

[4] Para 6. The residents of "old Pretoria" were charged metered rates which were higher than the flat rates which residents in Mamelodi and Atteridgeville had to pay.

[5] Para 82.

[6] Para 96.

[7] Para 96.

[8] See for example *August v Electoral Commission* 1999 3 SA 1 (CC) para 42, *Grootboom v Oostenberg Municipality* 2000 3 BCLR 277 (C) para 23 and *Sibiya v The Director of Public Prosecutions, Johannesburg* 2005 5 SA 315 (CC) para 61.

[9] 2002 5 SA 721 (CC). See chapter three part 3 2 1 2 where this case is discussed in order to illustrate the urgent nature of the underlying interests in socio-economic rights cases.

[10] *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) para 97.

> "South African courts have a wide range of powers at their disposal to ensure that the Constitution is upheld. These include mandatory and structural interdicts. How they should exercise those powers depends on the circumstances of each particular case. Here due regard must be paid to the roles of the legislature and the executive in a democracy. What must be made clear, however, is that when it is appropriate to do so, courts may – and if need be must – use their wide powers to make orders that affect policy as well as legislation."[11]

The Court further stated in this regard that its "primary duty… is to the Constitution and to the law" and that it must declare unconstitutional and subsequently remedy any State policy which is not congruent with the Constitution of the Republic of South Africa, 1996 ("Constitution").[12] The Court thus confirmed its wide remedial powers to grant effective relief.[13] The Court closed its remedial discussion by explicitly confirming that its wide remedial powers set out above includes the power to grant a structural interdict, stating that it must grant such a remedy if necessary to "secure compliance" with its order.[14] The Court concluded that this was not such a case, since compliance on the part of government was expected.[15]

4 2 2 Defining structural interdicts

A structural interdict type remedy consists, in part, of interdictory relief.[16] The relevant party will thus be instructed by the court to either carry out a positive act or refrain from doing something in order to end the violation as established in the liability stage of adjudication. Such an order will often contain timeframes within which certain steps must be taken.[17] However, this interdictory relief must be complied with under

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[11] Para 113.
[12] Para 99.
[13] Para 101.
[14] Para 129.
[15] Para 129.
[16] See chapter three part 3 3 2 for a discussion of the different types of interdicts in South African law and their potential to constitute effective relief in cases dealing with systemic socio-economic rights infringements.
[17] N Swanepoel "Die Aanwending van die Gestruktureerde Interdik in die Suid-Afrikaanse Konstitusionele Regsbedeling: 'n Eiesoortige Beregtingsproses" (2015) 12 *LitNet Akademies* 374 378.

court supervision in order for the remedy to amount to a structural interdict.[18] In other words, compliance with the remedy will be subject to judicial review if the remedy is granted in the form of a structural interdict. Courts can also issue "periodic directions" as the case will remain under court supervision.[19] The court will continue to approve interim steps and issue directions, as necessary, until the constitutional infringement is effectively remedied.[20] This remedy thus "provides for an ongoing regime of performance" which means that the court will stay involved in the case until it is satisfied that the constitutional infringement has been rectified.[21] The aim of the structural interdict is thus not solely deterrence, as is the case with most other constitutional remedies, but rather to remedy structural violations by focusing on changes that need to be effected in institutional or organisational design and functioning.[22] The structural interdict therefore "seeks to adjust future behaviour and is deliberately fashioned rather than logically deduced from the nature of the legal harm suffered".[23]

It is important to differentiate between a "reporting order" and a "structural interdict" as the two are not identical, even though these terms are often used interchangeably in academic literature. A "reporting order" is an order coupled with some form of other relief granted by a court which requires the respondent to report back to the court and all other parties to the litigation on the progress of the implementation of the relief. A structural interdict will normally contain a reporting back element, but the court will also supervise the implementation of the remedy and give further directions if necessary to ensure the effective vindication of the constitutional right.[24] Judicial approval of the

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[18] I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 199.

[19] S Liebenberg *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 424.

[20] 424.

[21] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 176.

[22] 176. This is not to say that deterrence is not one of the purposes of this remedy, but it is certainly not the primary purpose. See I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 181 for an in-depth discussion of the purpose of constitutional remedies.

[23] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive justice* (2009) 176.

[24] S Liebenberg *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 424.

remedy and implementation thereof is thus a key difference between a reporting order and a structural interdict. The court is thus a participant in the structural interdict type remedy and not merely an observer.

4 2 3 Unique features of the structural interdict

The first feature that makes the structural interdict type remedy unique is its flexibility.[25] Systemic socio-economic rights cases are often complex and polycentric in nature.[26] It is not always possible to predict all possible consequences and factors that might arise but which were not considered or even present when the remedy was initially designed.[27] The form of this remedy allows for judicial adaption to accommodate changed circumstances.[28]

Mbazira argues that the initial structural interdict in a case is often vague as to how the rights infringement must be rectified.[29] This allows the court to give the executive or legislative branch of government an opportunity to decide how best to remedy the systemic rights infringement in the first instance.[30] The court can then alter the structural interdict at a later stage if compliance with the initial design is not satisfactory and it is thus quite possible for the initial design and the final design of the remedy to

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[25] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009) 180.

[26] See chapter five part 5 2 3 for a discussion on polycentricity.

[27] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009) 180. These changing factors can include the inadequacy of the respondents' plans to remedy the systemic rights infringement, increasing recalcitrance on the respondents' part, or urgency caused by the threat of irreparable harm.

[28] See chapter five part 5 3 for a discussion of the different models of structural interdict type remedies.

[29] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009) 180. See also K Roach & G Budlender "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable" (2005) 122 *SALJ* 325 334.

[30] This approach helps to alleviate separation of powers, democratic legitimacy and institutional capacity concerns. See chapter five part 5 2 for a discussion of these concerns. This gradual approach to remedying a violation, which is possible due to the flexibility of the structural interdict, might not be appropriate in cases where the underlying interests of the right are very urgent. Such urgent cases might warrant immediate relief. See part 4 3 3 below where this is discussed in more detail.

differ significantly.[31] The flexibility of the structural interdict thus makes it possible for a court to revise its remedy. Michelman explains this revisability within the context of democratic experimentalism:

> "As the discursive benchmarking moves along and the emerging answers gain public recognition and authorization, the court might turn up the heat on deployment of its powers of review. At a relatively early stage, what the court presumes to dictate will be agendas of questions to be addressed and answered by one or another stakeholder group or class. At later stages, the court starts calling for substantive compliance with the emergent best-practice standards, in the name of the constitutional right (say) to access to healthcare services. The screws tighten on what can count as cogent or 'reasonable.' The court serves as arbiter but it never has or claims a door-closing last word."[32]

The second feature that sets the structural interdict apart from other constitutional remedies is the retention of supervision by the court.[33] This feature means that the structural interdict can potentially be effective in ensuring compliance in cases of systemic rights infringements as the applicants can approach the court without instituting new proceedings if they believe that the initial order is not being complied with.[34] However, supervisory jurisdiction could also be beneficial to the respondents as they can without difficulty approach the court on the same papers if they seek clarity on what the initial order entails.[35]

These two features, namely flexibility and retention of supervision, are dependent on each other. The flexibility of structural interdicts allows courts to gradually change its remedy to accommodate changing circumstances. Supervisory jurisdiction, on the other hand, allows the court to make sure that there is satisfactory compliance with

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[31] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009) 180.

[32] F I Michelman "Constitutionally Binding Social and Economic Rights as a Compelling Idea: Reciprocating Perturbations in Liberal and Democratic Constitutional Visions" in H A García, K Klare & L A Williams (eds) *Social and Economic Rights in Theory and Practice* (2015) 277 288-289. See also O Fiss *The Civil Rights Injunction* (1978) 36 and S van der Berg *A Capabilities Approach to the Judicial Review of Resource Allocation Decisions Impacting on Socio-Economic Rights* LLD dissertation, Stellenbosch University (2015) 320-321.

[33] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009) 181.

[34] 181.

[35] 181.

this remedy, and to amend its directions as circumstances change. These two features give courts the capacity to respond to polycentric, unforeseen consequences as they arise, thus contributing to the efficacy of structural interdicts in cases dealing with systemic socio-economic rights violations.[36]

4 3 Structural interdicts as appropriate and effective relief for systemic socio-economic rights violations

Budlender argues that systemic rights violations cannot be effectively remedied overnight.[37] There is no quick and simple solution to these issues. He suggests that systemic rights violations should be addressed in a systemic manner that allows for "proper interaction between the government, civil society and the courts".[38] The structural interdict has the potential to meet these criteria as suggested by Budlender because of its peculiar nature and features.[39]

Roach and Budlender identify three different circumstances under which structural interdicts will constitute appropriate and effective relief for systemic violations. These circumstances will often overlap with each other since systemic violations are complex and often not the result of one single identifiable cause. The three main circumstances

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[36] S van der Berg *A Capabilities Approach to the Judicial Review of Resource Allocation Decisions Impacting on Socio-Economic Rights* LLD dissertation, Stellenbosch University (2015) 303-304. See also C F Sabel & W H Simon "Destabilization Rights: How Public Law Litigation Succeeds" (2004) 117 *Harv LR* 1016 1080 where the authors state:

> "Just as the court's liability determination destabilizes relations and practices within the defendant institution, so does it ramify to other institutions and practices. These ramifications, and their monitored feedback on the institutions in the case, are the web effect. The web effect makes it possible to address sequentially - in a sequence determined in the course of problem-solving itself - reforms too complex to be addressed whole. This effect is polycentricity viewed as an aid, not an obstacle, to problem solving."

[37] G Budlender "The Role of the Courts in Achieving the Transformative Potential of Socio-Economic Rights" (2007) 8 *ESR Review* 9 11.

[38] 11. See chapter three part 3 2 2 2 for a discussion of systemic socio-economic rights violations.

[39] Swanepoel argues that structural interdict remedies are especially effective in cases where rights have been systemically violated. N Swanepoel "Die Aanwending van die Gestruktureerde Interdik in die Suid-Afrikaanse Konstitusionele Regsbedeling: 'n Eiesoortige Beregtingsproses" (2015) 12 *LitNet Akademies* 374 387. See also M du Plessis, G Penfold & J Brickhill *Constitutional Litigation* (2013) 124.

under which structural interdicts will constitute appropriate and effective relief in cases dealing with the systemic violation of socio-economic rights are cases of government intransigence, government incompetence, and lastly cases with possible grave consequences.[40] This section will analyse and evaluate jurisprudence that has been identified to best illustrate these different circumstances. Much development with regard to structural interdicts has taken place at the High Court level and this section will thus make use of the best illustrative examples from both the High Court and the Constitutional Court. This analysis will be done according to the factors which must be considered by courts when determining what the most effective relief will be in the circumstances, as developed in chapter two, and with reference to Sturm's overarching norms for public law remedies.[41]

4 3 1 Government intransigence

The first scenario in which a structural interdict will constitute appropriate and effective relief is when the constitutional violation occurred because of an intransigent government.[42] Roach and Budlender argue that the most prominent challenge for the implementation of court orders in cases dealing with systemic violations is government officials who are purposefully not complying with their constitutional obligations and who are thus unlikely to comply with a court order directing them to do so.[43] Courts

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[40] This is not a closed list. See K Roach & G Budlender "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable" (2005) 122 *SALJ* 325 345 where the authors state that they identify only "*some* [of the] guidelines and principles" for determining when structural interdicts will be appropriate (emphasis added).

[41] The factors for choosing effective relief as developed in chapter two are: the nature of the right and the nature of the violation; balancing of diverse interest; the reason for the infringement; practicability of the remedy and the deterrent effect of the remedy. See chapter two part 2 3 1 above for a discussion on the overarching norms for public law remedies as identified by Sturm.

[42] K Roach & G Budlender "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable" (2005) 122 *SALJ* 325 350.

[43] 350. See *Black Sash Trust v Minister of Social Development* 2017 ZACC 8 (CC) para 58 where the Court criticises the conduct of the Minister of Social Development, stating that her conduct contributed to the "continued recalcitrance" in the SASSA saga. The SASSA saga refers to the crisis in South Africa's social security administration which arose after a contract for the administration of social grants were awarded to Allpay based on a constitutionally

will, on the other hand, generally not consider structural interdicts as appropriate if there is reason to believe that government will in fact comply with the court order.[44]

4 3 1 1 Rudolph

4 3 1 1 1 Analysis

City of Cape Town v Neville Rudolph ("*Rudolph*")[45] serves as an illustration of where government intransigence led to the systemic violation of the right to housing. This case concerned the eviction of a group of illegal occupiers who were in desperate need. The group started occupying a public park in the Valhalla Park area in 2001. The occupiers found themselves in horrendous living conditions where they were living in overcrowded houses, backyards, car wrecks and even schools.[46]

The High Court in the *Rudolph* case ultimately granted a structural interdict in the form of a report-back-to-court model, ordering the City to comply with its constitutional obligations as declared in the order and to report back to the Court on the progress made in this regard.[47] Final judgment was given after the City submitted a total of four reports. The Court stated that there was still no satisfactory compliance by the City with its constitutional obligations.[48] However, the Court went further, stating that it was

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invalid tender process. Non-compliance with the relief granted in *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 4 SA 179 (CC) led to further litigation which were aimed at preventing the crises from fully unfolding. See part 4 3 3 2 below where this crisis is critically analysed.

[44] See the Constitutional Court's judgments in both *Minster of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) and *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 2 SA 359 (CC) where the Court refused to grant structural interdict remedies since there was no reason to believe that the government would not comply with its duties in the respective cases. See also part 4 3 3 below in this chapter for a discussion of one of the exceptions to this rule.

[45] 2003 11 BCLR 1236 (C).

[46] Para 13.

[47] Para 218. The Court declared that the City's housing policy was unconstitutional as it did not make provision for people who "are in a crisis or in a desperate situation" and that the housing allocation process did not take the relevant factors into consideration. See chapter five part 5 3 1 where the report-back-to-court model of the structural interdict is discussed.

[48] *City of Cape Town v Rudolph* WC 01-12-2005 case no 8970/01 para 35.

satisfied that the City now understood and acknowledged its obligations and that a further structural interdict would thus not be appropriate. There was evidence that the City had made progress in providing help to people in desperate circumstances.[49] The Court granted a declaratory order declaring that the City had not complied with its constitutional obligations as set out in the initial order.[50] This order was deemed appropriate by the Court since the City no longer sought an eviction order and the immediate crisis situation was thus circumvented.[51] In crafting its initial order, the Court considered several factors in deciding which remedy would be most appropriate and effective in the circumstances:

(a) Nature of the right and nature of the infringement

The Court considered the nature of the infringed right since a remedy "must be chosen for its ability to protect the constitutional right".[52] The Court went on to say that this remedy must also be designed to "meet the nature of the infringement".[53] The Court stated in this regard that a mere declaratory order would not be effective, referring to the Constitutional Court's remedy in *Government of the Republic of South Africa v Grootboom* ("*Grootboom*").[54] *Grootboom* dealt with similar housing issues in the Western Cape and the government was ordered to develop a progressive housing plan which would include people living in crisis situations.[55] *Rudolph* is a result of the failure by government to develop such a plan timeously.[56] The Court stated that one must consider the factual context of a case when deciding what the most effective

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[49] Para 41.
[50] Para 42.
[51] Para 40.
[52] *City of Cape Town v Neville Rudolph* 2003 11 BCLR 1236 (C) para 202. This is congruent with the factors considered by the Constitutional Court in *Minster of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) para 106.
[53] *City of Cape Town v Neville Rudolph* 2003 11 BCLR 1236 (C) para 202.
[54] 2000 11 BCLR 1169 (CC).
[55] Para 99.
[56] See *City of Cape Town v Neville Rudolph* 2003 11 BCLR 1236 (C) para 151 where the Court stated that the issue in this case was whether the government "has complied with its constitutional duties as declared by the Constitutional Court" in *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC).

remedy would be. The factual context in *Rudolph* suggested that the right to housing had been systematically violated in the Cape Town metropole. The Court referred in this regard to the continuous infringement of the right to housing and the substantial back log faced by the Department in terms of providing houses. The Court drew this conclusion after considering the nature of the right of access to adequate housing enshrined in section 26 of the Constitution and the positive obligations relating to it.[57] The Court also referred to the applicable standard of review and stated that the Constitutional Court had already found the State's policy with regard to emergency housing to be unreasonable. The Court further noted that it was clear that not much had been done to implement the Constitutional Court's remedy and that the State was thus still not complying with its positive obligations, despite being aware of what these entailed.[58] The Court held that a stronger and more managerial remedy was needed to remedy this systemic problem and thus opted for the structural interdict.[59]

(b) Balancing diverse interests

The Court balanced a diverse set of interests in the judgment.[60] The Court considered the interests of the victims with reference to the purpose of The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE"). The Court stated in this regard that "PIE mandates the courts to ensure that justice and equity prevail" and that there is a constitutional mandate to protect occupiers.[61] Great emphasis was placed on the interest of the marginalised and vulnerable occupiers in not being left homeless.[62] However, the Court also considered the interests of

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[57] *City of Cape Town v Neville Rudolph* 2003 11 BCLR 1236 (C) para 145–150.

[58] Para 176.

[59] Para 206.

[60] See chapter two part 2 3 2 2 above for a discussion on the balancing of diverse interests as a factor which needs to be considered when designing effective relief and chapter three part 3 2 3 where this is discussed within the specific context of socio-economic rights violations.

[61] *City of Cape Town v Neville Rudolph* 2003 11 BCLR 1236 (C) paras 98–102.

[62] The Court, in considering the interest of the victims, discussed the circumstances of the victims and how they were living in intolerable conditions. These terrible conditions exacerbated the need for their rights to be vindicated. See paras 153–170 in this regard. It is important to note that the balancing process was conducted by the Court during the liability stage of adjudication. However, the balancing enquiry exerted significant influence on the

government. The Court stated that a lack of funds had an inhibitory effect on the ability of the government to provide housing. In balancing this interest against the interest of the victims, the Court concluded that the lack of funds and consequential housing shortage made the need for "emergency provisions" much greater.[63]

(c) Reason for the rights violation

The Court also considered the reason for the rights violations in deciding on the structural interdict as the most appropriate and effective relief in this specific case.[64] The Court observed that the State in this case was denying its responsibility towards people who found themselves in a desperate situation due to having nowhere to live, despite the Constitutional Court's judgment in *Grootboom*.[65] The Court concluded that the State had disregarded its constitutional obligations.[66] This was thus not a case of mere inattentiveness, since the applicant had already been made aware of its obligations. Such continued non-compliance with constitutional obligations point

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remedial enquiry, as is evident from the Court's statement that "the factual context of the case", which was discussed at length during the liability stage, would determine what the most effective relief would be (para 202). This is congruent with Sturm's argument that "the liability norm… bears profoundly on the scope of the remedial enterprise". S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1365. See also C F Sabel & W H Simon "Destabilization Rights: How Public Law Litigation Succeeds" (2004) 117 *Harv LR* 1015 1054 where the authors discuss the relationship between the liability phase and the remedial phase. They contend that the liability stage indicates only what the "broadest goals" of the remedy must be, but that it does have "implications for the specific forms" of the relief.

[63] *City of Cape Town v Neville Rudolph* 2003 11 BCLR 1236 (C) para 180.

[64] See chapter two part 2 3 2 3 above for a discussion on why rights are violated and how this is an important factor to consider when designing a remedy.

[65] *City of Cape Town v Neville Rudolph* 2003 11 BCLR 1236 (C) para 172. This observation was based on a statement by the applicant's Head of Housing which stated that none of the respondents were "persons in crises". The Court further stated (para 189) that the State did not only acknowledge the fact that it did not fulfil its constitutional obligations with regard to people in desperate situations, but that it also "does not intend to do so."

[66] Para 206.

toward a recalcitrant attitude.[67] Government intransigence was thus an overriding factor in the Court's decision to grant a reporting-back structural interdict.

(d) Practicability of the remedy

The Court further considered the practicability of the remedy during the design phase.[68] The Court decided to grant the government four months to comply with the order (which included the filing of a report). The Court also decided that the government would need a month to reply to the respondents' comments on the report, stating that the "[a]pplicant is a very large institution with many departments" which would have to have an input in order to remedy the violation effectively.[69] The Court was thus cautious of providing government with unrealistic timeframes as this might have rendered the remedy ineffective.[70]

4 3 1 1 2 Evaluation

(a) Consideration of factors in designing effective relief

The remedy granted in *Rudolph* can largely be regarded as an effective remedy. The Court considered many of the factors outlined in chapter two in determining which remedy would be most appropriate. The Court considered both the nature of the right and the nature of the infringement. The consideration of this factor led to the Court deciding that a strong form of remedy like the structural interdict was needed to provide

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[67] The Court condemned the government's attitude, stating (para 180) that it "has displayed and continues to display, an unacceptable disregard for the order of the Constitutional Court – and therefore for the Constitution itself."

[68] The Western Cape High Court also considered the remedial practicability in the earlier judgment of *Grootboom v Oostenberg Municipality* 2000 3 BCLR 277 (C) para 58. The Court stated in this regard that the remedy should not be too vague as the respondents will then not know what is expected of them in order to rectify the violated right.

[69] *City of Cape Town v Neville Rudolph* 2003 11 BCLR 1236 (C) paras 208–209.

[70] See chapter two part 2 3 2 4 above for a discussion of practicability as a factor that should be considered when choosing and designing a remedy.

effective relief to the litigants.[71] The Court also paid attention to the practical concerns which contributed to the remedy's efficacy.

It is clear that the Court allowed diverse interests to enter the enquiry since it considered the interests of both the applicants and the respondents. However, the Court neglected to consider the interest of other parties who might have been in a position to impede the implementation of the remedy, such as other levels of government and residents of the Valhalla Park suburb who were not parties before the Court.[72] The Court should thus have allowed for more participation during the remedial phase of adjudication.

(b) Norms for public law remedies

The consideration of multiple factors by the Court suggests that Sturm's requirement for reasoned decision making was indeed met in this case.[73] Furthermore, the Court explicitly justified why a structural interdict was more appropriate than other available constitutional remedies.[74] The norm of respect for the separation of powers doctrine was also observed in the judgment. The Court, although granting a strong remedy, merely set the normative parameters of the remedy. It held that the State

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[71] The recalcitrant attitude of the government in this case was also a contributing factor which led to the strong managerial remedy to be granted. See *City of Cape Town v Neville Rudolph* 2003 11 BCLR 1236 (C) para 207.

[72] Sturm argues that the interests of all parties who can affect the implementation of the remedy should be considered. S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1365, see chapter two part 2 3 2 2 where this is discussed as a factor in human rights cases and chapter three part 3 2 3 where balancing of diverse interests is discussed in the specific context of socio-economic rights cases. Not allowing sufficiently diverse interests to enter the remedial enquiry is one of the weaknesses of the report-back-to-court model, see chapter five part 5 3 1.

[73] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1410. See also chapter two part 2 3 1 4.

[74] *City of Cape Town v Neville Rudolph* 2003 11 BCLR 1236 (C) para 206. See also S Liebenberg "Remedial Principles and Meaningful Engagement in Education Rights Disputes" (2016) 19 *Potchefstroom Electronic Law Journal* 1 7 where the author explains what reasoned decision making entails.

must comply with its constitutional obligations as set out in the judgment, but did not instruct the State on how this should be done.[75]

The norm of remediation was not satisfactorily met in this case.[76] The fact that the Court ultimately granted an order declaring that the State had still not complied with its constitutional obligations indicates that the rights violation was not sufficiently remedied. However, the structural interdict was successful in eliminating the reason for the rights violation, since the Court stated that the continued lack of compliance by the City could not be ascribed to "incompetence, inattentiveness or intransigence" anymore.[77] The Court could potentially have incorporated a bigger participatory component into the remedial phase of the adjudication aimed at addressing the broader issue of systemic housing shortages with an interim order aimed at addressing the narrow emergency housing issue. The Court could then have joined other stakeholders to the litigation such as provincial and national government departments which would have ensured that the participation was diverse.[78] Such an approach

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[75] *City of Cape Town v Neville Rudolph* 2003 11 BCLR 1236 (C) para 218. The Court stated that the State must report to the Court on "what steps it has taken to comply with its constitutional and statutory obligations".

[76] One of the weaknesses of the report-back-to-court model for structural interdicts is that the remediation norm is often not satisfied. See chapter five part 5 3 1 in this regard.

[77] *City of Cape Town v Rudolph* WC 01-12-2005 case no 8970/01 para 40.

[78] Sturm argues that courts must identify stakeholders whose assistance is needed for the formulation of an effective remedy and invite them to "join in the formulation of the remedy." S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1429. Joinder of parties under South African law is regulated in terms of the Uniform Rules of the High Court GN R315 in *GG 19834* of 12-03-1999 as amended by GN R678 in *GG 40045* of 3-06-2016 and the Constitutional Court Rules GN R1675 in *GG 25726* of 31-10-2003. The Relevant rules are rule 10 and rule 5, respectively. It is important to note that these rules do not specifically provide for the joinder of parties to the remedial phase of adjudication. However, the remedial powers of courts in cases where constitutionally entrenched rights have been violated in terms of ss38 and 172(1)(b) are wide enough to allow for this if the participation of these parties are needed for an effective remedy to be designed. See *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) in which parties were joined in order to secure effective implementation of a previous order and part 4 3 1 2 below where this case is discussed. See also the in-depth discussion of joinder in G Muller *The Impact of Section 26 of the Constitution on the Eviction of Squatters in South African Law* LLD dissertation, Stellenbosch University (2011) 231 and G Muller & S Liebenberg "Developing the Law of Joinder in the Context of Evictions of People from their Homes" (2013) 29 *SAJHR* 554.

could potentially have led to better adherence to the remediation norm as well as the alleviation of concerns traditionally associated with structural interdicts.[79]

4 3 1 2 Pheko

4 3 1 2 1 Analysis

Pheko v Ekurhuleni Metropolitan Municipality ("*Pheko 1*") is another good example of where recalcitrance led to a socio-economic rights violation.[80] This case concerned the lawfulness of the forcible removal of residents of the Bapsfontein Informal Settlement and the subsequent demolition of their homes.[81] This followed after Bapsfontein was declared a disaster area in terms of section 55(1) of the Disaster Management Act 57 of 2002 ("DMA"). This declaration was based on the dolomite instability in the area which led to the formation of various sporadic sinkholes, depressions and cracks. The municipality issued a directive in terms of the DMA instructing the residents to move to temporary shelters and warning them that they would be relocated in terms of the DMA if they resisted.[82] The municipality argued that they could evacuate the residents without a court order. The residents believed that this would amount to an eviction and subsequently applied to the High Court for an urgent interdict against the municipality. The High Court dismissed their application. The residents accordingly sought leave to appeal directly to the Constitutional Court.[83]

The Constitutional Court found that the forced "evacuation" of the Bapsfontein residents amounted to an eviction since it was not authorised by the DMA.[84] The Court furthermore found that the residents' right not to be evicted or have their homes demolished as contained in section 26(3) of the Constitution was violated.[85] The Court

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[79] See chapter five part 5 4 1 where participation during the remedial phase of adjudication is discussed as a mitigating factor.

[80] 2012 4 BCLR 388 (CC).

[81] Para 3.

[82] Para 11.

[83] See *Pheko v Ekurhuleni Metropolitan Municipality* (5394/11) ZAGPPHC 130 (11 March 2011) for the High Court judgment.

[84] *Pheko v Ekurhuleni Metropolitan Municipality* 2012 4 BCLR 388 (CC) para 45

[85] Para 45.

decided that the most appropriate and effective relief in the circumstances would be a structural interdict to ensure compliance with the positive obligations relating to the provision of alternative accommodation imposed by the order.[86]

However, non-compliance led to contempt of court proceedings in *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* ("*Pheko 2*").[87] Neither the municipality nor its lawyer was found to be in contempt since the crucial elements of wilfulness and *mala fides* were not present. The Court, despite this finding, stated that the municipality's explanation for not complying with its obligations flowing from the structural relief granted in *Pheko 1* was inadequate and that it was still in breach of its constitutional obligations.[88] The Court furthermore ordered the Municipality's Mayor, Manager, Head of Department for Human Settlements as well as the Member of the Executive Council for the Gauteng Department for Human Settlements ("MEC") to be joined to the case in order to ensure that the structural interdict as granted in *Pheko 1* was complied with.[89]

The third judgment, *Pheko v Ekurhuleni Metropolitan Municipality (No 3)* ("*Pheko 3*"),[90] followed after numerous reports were filed by both the applicants and the respondents which gave rise to factual disputes. The Court decided to discharge its supervisory jurisdiction and to refer the matter back to the High Court, which was deemed better placed than the Constitutional Court to supervise the relocation process.[91]

These three judgments must be viewed as one concerted effort by the Court to bring relief to the former residents of Bapsfontein and will thus be analysed simultaneously. The Court considered various factors over the course of these three judgments in designing the most effective relief in the circumstances.

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[86] Para 53.
[87] 2015 ZACC 10 (CC).
[88] Para 43.
[89] Para 68.
[90] 2016 10 BCLR 1308 (CC).
[91] Para 36.

(a) Nature of the right and nature of the infringement

The Court stated in *Pheko 1* that two rights were implicated in this case. First, the Court stated that any case involving alleged arbitrary evictions will necessarily implicate the section 26 right to have access to adequate housing.[92] Secondly, the Court stated that the applicants' right to have their dignity respected and protected as contained in section 10 of the Constitution was also implicated in this case.[93]

The municipality argued that section 26(3) consists of two distinguished parts and that evictions authorised by legislation can take place without a court order as long as it is not arbitrary.[94] The Court found that this is not the case and stated that section 26(3) must be read as a whole and thus concluded that no legislation may allow for an eviction to take place without a court order.[95] The Court continued, stating that section 55(2)(d) of the DMA which provides for the "evacuation to temporary shelters" of people in a disaster area, must be interpreted narrowly since a wide construction could potentially lead to the violation of the rights contained in section 26 of the Constitution.[96]

The Court also considered the positive obligation implicated in this case which requires the State to provide suitable temporary accommodation to the applicants which are in the immediate vicinity of Bapsfontein and with no less amenities than what was initially provided.[97] The Court went further, stating that the positive obligation includes the obligation to "identify and designate land for housing development for the applicants".[98] The consideration of these positive obligations contributed to the appropriateness of the structural interdict since this remedy aims to prevent non-compliance with positive obligations imposed by a court order.[99]

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[92] *Pheko v Ekurhuleni Metropolitan Municipality* 2012 4 BCLR 388 (CC) para 28.
[93] Para 28.
[94] Para 21.
[95] Para 35.
[96] Para 37.
[97] Para 49.
[98] Para 50. The Court referred in this regard to s9(1) of the Housing Act 107 of 1997 which was promulgated to give effect to s26 of the Constitution.
[99] *Pheko v Ekurhuleni Metropolitan Municipality (No 3)* 2016 10 BCLR 1308 (CC) para 1.

(b) Balancing diverse interests

The Court considered interests of both the applicants and the respondent in this case. It is clear from the Court's reasoning in *Pheko 1* that it did implicitly consider the interests of the municipality in designing the structural interdict. This is firstly evident from the fact that the Court did not, as part of the remedy, order the municipality to restore the occupiers' homes in the Bapsfontein Informal Settlement, thus giving effect to the municipality's interest in ensuring the health and safety of its residents.[100] The Court thus accepted the fact that the area was too dangerous for mass housing and instead ordered the municipality to relocate the community to alternative land.[101]

The Court furthermore implicitly gave effect to the municipality's interest to organise its own affairs by not ordering it to move the applicants to the specific land which had been identified in the consulting geologists' report as suitable for housing.[102] This is implicit form the order which states that the municipality must meaningfully engage with the applicants with regard to the identification of suitable land.[103]

The Court also considered the applicants' interest in receiving relief that is effective.[104] This is firstly evident from the fact that the Court ordered the applicants to be provided with the same standard of amenities as what they were originally provided with.[105] This is furthermore evident from the strong remedy granted by the Court which required the municipality to report back to the Court on the progress made in relocating the applicants. This judicial oversight contributed to the remedy's efficacy since the Court was in a position to counter any recalcitrance and unnecessary delays by the municipality. This interest was again considered in *Pheko 2* when the Court stated that compliance with court orders are in the interest of successful litigants and the broader

[100] *Pheko v Ekurhuleni Metropolitan Municipality* 2012 4 BCLR 388 (CC) para 1.
[101] Para 6
[102] Para 7.
[103] Para 53.
[104] See para 50 where the Court stated that "[t]he applicants are entitled to effective relief."
[105] Para 49.

public.[106] The Court accordingly, of its own accord, instituted contempt of court proceedings after there was non-compliance with its order in *Pheko 1*.[107]

The Court furthermore considered the interests of the whole community to have governmental officials who "act diligently and expeditiously".[108] This consideration, together with the interest of the applicants to have their rights vindicated, formed part of the Court's reasoning to join certain State functionaries to the proceedings in *Pheko 2*. It stated in this regard that these functionaries are there to serve the interests of the community.[109]

(c) Reason for the rights violation

The judgment in *Pheko 1* and the subsequent strong remedy suggests that the Court regarded the municipality as recalcitrant. Section 55(2)(d) of the DMA authorises "the evacuation to temporary shelters" of people in disaster areas if it "is necessary for the preservation of life". The Court held that the municipality went significantly beyond what the DMA envisions an evacuation to be since it demolished the residents' homes and indefinitely relocated them to a faraway area.[110] The Court also noted the lack of urgency in this case which furthermore indicates that this was not an emergency evacuation as envisioned by the DMA. The Court referred in this regard to the history of Bapsfontein and the fact that it has been identified as a dangerous area as early as the 1980's. It stated that "the facts do not suggest that there was any need for urgent

[106] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 2. See also para 27 where the Court stated that non-compliance with court orders by State parties negatively impacts the interests of the people they are supposed to serve and para 53 where the Court acknowledges the harm caused to the applicants due to the delay by the municipality to comply with the order granted in *Pheko v Ekurhuleni Metropolitan Municipality* 2012 4 BCLR 388 (CC).

[107] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) paras 2.

[108] Para 64.

[109] Para 63.

[110] Para 40.

evacuation at all" and that the action taken by the municipality in this case was completely unwarranted and unlawful.[111]

One can conclude from the disconnect between the municipality's actions and what is authorised by the DMA that the municipality attempted to circumvent its obligations which would arise in normal eviction proceedings by relying on the DMA.[112] Such a circumvention of constitutional obligations would amount to recalcitrance.

The recalcitrant attitude of the municipality is further evident from the fact that the applicants informed the municipality prior to the forced removal that its "evacuation" plans would amount to an unlawful eviction.[113] Concluding that the municipality was recalcitrant is thus fair, since it had been informed of its obligations.

(d) Practicability of the remedy

The Court did, albeit not explicitly, consider the practicability of the remedy in *Pheko 1*. The Court took note of the fact that identifying land which is suitable for mass housing within the immediate vicinity of Bapsfontein could be a lengthy and contested process.[114] It is exactly circumstances like this where the practical nature of the structural interdict becomes apparent. Structural interdicts are, as discussed above, flexible in nature.[115] This allowed the Court to exercise its supervisory jurisdiction in an attempt to ensure that the relocation process was dealt with expeditiously and effectively and to give further directions if needed.

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[111] Para 41. See also para 42 where the Court states that the municipality's powers in terms of the DMA may only be used "to the extent that it is strictly necessary" and not for "purposes other than evacuation."

[112] S26(3) of the Constitution states that evictions can only take place if there is a court order to that effect which has been granted after consideration of all relevant circumstances. See S Viljoen "The Systemic Violation of Section 26(1): An Appeal for Structural Relief by the Judiciary" (2015) 30 *SAPL* 42 52 where the author argues that the State attempted to circumvent s26(3) of the Constitution and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 by relying on the DMA, thus indicating that the State was recalcitrant in complying with its obligations. See also G Muller "Evicting Unlawful Occupiers for Health and Safety Reasons in Post-Apartheid South Africa" (2015) 132 *SALJ* 616 638 where the author makes a similar point.

[113] *Pheko v Ekurhuleni Metropolitan Municipality* 2012 4 BCLR 388 (CC) para 9.

[114] Para 50.

[115] See part 4 2 above where the nature of the structural interdict remedy is discussed.

The Court again took practicability concerns into account in *Pheko 2* when it considered whether certain State functionaries should be joined to the proceedings. It stated in this regard that the Mayor and Municipal Manager should be joined since they already had "[c]onstitutional and statutory obligations in relation to the supervisory orders of *Pheko 1*".[116] The Court similarly argued that the MEC should be joined since he has a statutory obligation to assist the municipality with the provision of adequate housing.[117] Joining these parties to the proceedings was a practical way of making the structural interdict as granted in *Pheko 1* more effective since the State functionaries responsible for overseeing the implementation thereof were now directly involved and accountable to the Court.

Practical considerations also played a significant role in *Pheko 3*. The Court took practicability considerations into account in both deciding whether referral is appropriate and in deciding on the terms of the referral. The applicants approached the Court for an order referring the matter back to the High Court because of the "factual and technical disputes which have arisen" over the course of the case.[118] The Court stated in this regard that issues raised by the various expert reports "are incapable of being resolved" by the Constitutional Court.[119] The Court concluded that the High Court was better placed to deal with these disputes.

The municipality suggested, with regard to the terms of referral, that the Court should order that all affidavits regarding the factual disputes be filed in the High Court, but that it retains jurisdiction over the case. The Constitutional Court stated that such a bifurcated supervisory order would not be practical since the Court would run the risk of getting "enmeshed in disputes... that are best suited to be determined by the High Court".[120] Practical considerations thus contributed to the Court discharging its supervisory jurisdiction completely and referring the matter back to the High Court.[121]

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[116] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 59.

[117] Para 60. The Court referred in this regard to s7 of the Housing Act 107 of 1997.

[118] *Pheko v Ekurhuleni Metropolitan Municipality (No 3)* 2016 10 BCLR 1308 (CC) para 16.

[119] Para 36.

[120] Para 29.

[121] The Court did not, however, discharge the declaratory component of the order (para 26). See part 4 3 1 2 1 (e) below where this is discussed.

(e) Deterrent effect of the remedy

The Court stated in *Pheko 2* that the negligent conduct of the attorney relating to him not informing the Court or the municipality of his change of address led to the "extensive delay [which] has already caused [harm] to the applicants".[122] The Court ordered him to pay costs *de bonis propriis*.[123] This penalty against the lawyer will deter other officers of the court from acting negligently or unreasonably, especially if the conduct can negatively impact on the rights of others.[124]

The cost orders awarded against the municipality in *Pheko 2* and *Pheko 3* also served a deterrent effect since it might deter municipalities from unlawfully evicting people in terms of health and safety legislation in future.[125] It can furthermore encourage municipalities to comply with positive obligations imposed on them by structural court orders timeously since failure to do so can lead to massive cost orders in later judgments.

The refusal of the Court in *Pheko 3* to discharge the declaratory component of its order as granted in *Pheko 1* also served a deterrent effect.[126] The declaratory order makes it clear that the permanent removal of residents from their homes according to health and safety legislation will amount to an unlawful eviction. Municipalities are thus now aware that a court order is needed for such "evacuations".

4 3 1 2 2 Evaluation

(a) Consideration of factors in designing effective relief

The relief as granted in this series of judgments can be regarded as having been effective. The Court considered, albeit not explicitly, all of the factors that are relevant

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[122] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 53.
[123] Para 68.
[124] Para 51.
[125] The municipality and its lawyer were ordered to each pay 50% of the applicants' costs in *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC). The cost order awarded against the municipality in *Pheko v Ekurhuleni Metropolitan Municipality (No 3)* 2016 10 BCLR 1308 (CC) para 42 was more adverse since the municipality had to pay the applicants' costs, including the costs of two counsel and the expert fees.
[126] Para 26.

to the remedial enquiry over the course of the three judgments. The revisability allowed for by structural interdicts allowed the Court to consider different factors over the course of the litigation and to amend its order accordingly. This is evident from the ultimate discharge by the Court of its structural interdict order after it concluded, based on the consideration of relevant factors, that it was not the most effective relief under the circumstances anymore.

(b) Norms for public law remedies

The relief granted in this case can furthermore be regarded as effective since all of the norms for public law remedies were adhered to. The norm of participation was met in this case since the Court allowed the Socio-Economic Rights Institute of South Africa to be admitted as an *amicus curiae* and stated that their submissions had been "most helpful".[127] The Court furthermore ordered the parties to meaningfully engage with each other with regard to the identification of land for the alternative accommodation.[128] However, more diverse participation during the remedial design phase could potentially have resulted in more expeditious compliance with the positive obligations imposed by the order. This could have been achieved if the court invited all potential stakeholders such as the relevant provincial and national government departments to also participate in the design phase. Such course of action could also potentially have avoided the need for *Pheko 2* in which multiple stakeholders were joined to the proceedings in an attempt to secure compliance.[129]

The Court also adhered to the norms of respect for the separation of powers doctrine and judicial impartiality. This is evident from the remedy which only gave the broad requirements for the alternative accommodation, thus not encroaching on the municipality's terrain.[130] The Court again adhered to the separation of powers doctrine in *Pheko 2* when it considered whether certain State functionaries should be joined to the proceedings. The Court carefully considered the role of each functionary and their

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[127] *Pheko v Ekurhuleni Metropolitan Municipality* 2012 4 BCLR 388 (CC) para 4.

[128] Para 53.

[129] See part 4 3 1 1 2 (b) above in which the joinder of stakeholders to the remedial phase of adjudication is discussed in the context of *City of Cape Town v Neville Rudolph* 2003 11 BCLR 1236 (C).

[130] *Pheko v Ekurhuleni Metropolitan Municipality* 2012 4 BCLR 388 (CC) para 50.

statutory and constitutional obligations.[131] The Court did this in order to not unduly impose obligations on these parties, thus adhering to the separation of powers doctrine. The Court also adhered to this norm in *Pheko 3* when it considered its and the High Court's own roles within the separation of powers doctrine. The Court concluded in this regard that there are certain functions which can be more appropriately dealt with by the High Court than the Constitutional Court.[132] The Court's impartiality is evident from the fact that the Court called for submissions from both the applicants and the respondent in *Pheko 2* in order to ensure that it considered all possible arguments.[133]

The Court only partially adhered to the reasoned decision making norm. The consideration and incorporation of the factors as discussed above are evidence of the Court's adherence to this norm. However, the Court did not explicitly explain why the structural interdict as remedy was more appropriate than other constitutional remedies, as is required by this norm.[134]

The norm of remediation was also only partially met in this case. It is important to note that the applicants organised themselves into two groups, namely the N12 community and the Mayfield community. The participatory structural interdict as granted in this case led to successful negotiations between the municipality and the N12 community with regard to alternative accommodation.[135] However, no agreement was reached between the municipality and the Mayfield community.[136] The remediation norm was further negatively impacted by the many factual disputes which led to *Pheko 3*. These disputes further hindered the relocation processes of both communities. The referral of this case to the High Court is thus aimed at addressing the remediation norm since it is regarded as the appropriate forum to deal with these

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[131] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) paras 56-60.

[132] *Pheko v Ekurhuleni Metropolitan Municipality (No 3)* 2016 10 BCLR 1308 (CC) paras 34-37.

[133] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 17.

[134] See chapter two part 2 3 1 4 where the norm of reasoned decision making and how this norm requires a court to consider why a specific remedy is more appropriate in the circumstances than other constitutional remedies, are discussed.

[135] *Pheko v Ekurhuleni Metropolitan Municipality (No 2)* 2015 6 BCLR 711 (CC) para 8.

[136] Para 8. See chapter five part 5 4 4 2 where fair and equal participatory processes are discussed.

factual disputes. The fact that the remediation norm was not completely satisfied in this case despite the consideration of all of the factors and adherence to all of the other remedial norms illustrates how difficult it is to effectively remedy systemic socio-economic rights violations.

4 3 2 Government incompetence

The second scenario in which a structural interdict will be an appropriate and effective remedy is when the systemic violation is a product of a severely incompetent government.[137] Roach and Budlender argue that the use of structural interdicts should not be confined to cases where the government is intransigent since it also holds enormous potential to remedy violations caused by incompetence.[138] The authors justify this by stating that governments in developing democracies such as South Africa often require expertise and guidance in terms of their constitutional obligations and that courts can provide this *via* a structural interdict.[139]

The granting of a structural interdict remedy in such cases should not be perceived to be a form of punishment, but rather as an invitation to the relevant government department to comply with its constitutional obligations under the guidance and supervision of the court.[140] Bishop explains this by stating that court supervision in such cases is justified since the relevant governmental department might not be able to fulfil its obligations even if it is *bona fide*.[141] The *Textbook* case saga in Limpopo will

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[137] K Roach & G Budlender "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable" (2005) 122 *SALJ* 325 349. The authors argue that the justification for a structural interdict remedy will increase the more incompetent or incapable government is to fulfil its human rights obligations.

[138] 349.

[139] 349. A lack of expertise (incompetence) can present a significant obstacle to compliance with court orders. Structural interdicts can help overcome this obstacle by directing different parties with the necessary expertise to work together in order to rectify the infringement. Courts can further direct independent monitors with the necessary technical expertise to supervise compliance, see *Black Sash Trust v Minister of Social Development* 2017 ZACC 8 (CC) para 76 for such an example and chapter five part 5 4 4 3 2.

[140] K Roach & G Budlender "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable" (2005) 122 *SALJ* 325 350.

[141] M Bishop "Remedies" in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 6 2014) 9-10.

be analysed and evaluated in this section since it illustrates severe government incompetence which led to the systemic breach of the right to a basic education of thousands of children.

The series of textbook cases followed after the not-for-profit organisation, Section 27, initiated legal action against the Limpopo Department of Education and the National Department of Basic Education because of a failure by these two government departments to fulfil their constitutional duties relating to the right to a basic education. Section 27 alleged that this was the case because of the non-delivery of textbooks to students across schools in the province.[142] The need for new textbooks in schools arose because the curriculum changed from the Revised National Curriculum Statement ("RNCS") which was implemented in 2002 to the new Curriculum and Assessment Policy Statement ("CAPS") in 2009.[143]

4 3 2 1 Analysis of the Textbook case saga

4 3 2 1 1 *Section 27*

The first judgment was handed down in *Section 27 v Minister of Education* ("*Section 27*").[144] Kollapen J found that the failure to provide learners with textbooks does indeed constitute a violation of the right to a basic education.[145] The judge stated that a remedy must be effective and meaningful in cases where rights are found to have been violated.[146] He went on to state that an order merely requiring the delivery of textbooks would not meet the requirements of being effective and meaningful as it would not fully vindicate the infringed right since the negative consequences of non-delivery would still persist and that something more innovative was thus needed to address these consequences.[147] The Court granted a structural interdict remedy coupled with an order declaring that the non-delivery of textbooks constituted a

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[142] F Veriava "The Limpopo Textbook Litigation: A Case Study into the Possibilities of a Transformative Constitutionalism" (2016) 32 *SAJHR* 1 7.

[143] 3.

[144] 2013 2 BCLR 237 (GNP).

[145] Para 32.

[146] Para 35.

[147] Para 36.

violation of the right to a basic education. The respondents had to develop a "catch-up/remedial plan" for all affected grade ten learners in the province.[148]

(a) Nature of the right and nature of the infringement

The Court considered the nature of the right in determining liability as well as what remedy would be most appropriate and effective in the circumstances. The Court stated in this regard that the right to a basic education is immediately realisable unlike some other socio-economic rights which must be progressively realised by the State.[149] The Court described the right to a basic education as a "central and interlocking right" since it enables individuals to enjoy and exercise their other constitutionally protected rights.[150] The Court further stated that it was an urgent matter as the academic year had already reached the halfway mark and that many learners still did not have access to textbooks.[151] The Court found that the respondents should have considered the adverse consequences which would be faced by students if textbooks were not delivered, again indicating that this was a matter that merited urgent attention and remediation.[152] It is thus urgency and the empowering nature of the right that partly justified a strong, managerial remedy like the structural interdict.[153]

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[148] Para 43.

[149] Para 21. See also *Governing Body of the Juma Musjid Primary School v Essay NO (Centre for Child Law as amici curiae)* 2011 8 BCLR 761 (CC) para 37 where the Constitutional Court distinguished between the right to a basic education and other socio-economic rights.

[150] *Section 27 v Minister of Education* 2013 2 BCLR 237 (GNP) para 2. The Court also stated that "[e]ducation is critical in both freeing and unlocking the potential of each person" (para 3).

[151] Para 20.

[152] Para 30.

[153] The Court stated that the respondents had so far acted in good faith, but that their actions were unreasonable because of the urgency of the matter (para 32). Urgency acted as a unifying factor between the liability stage and the remedial stage in this litigation since it contributed not only to the conduct being classified as unreasonable, but also to the justification of a strong remedy. See part 4 3 3 of this chapter where it is argued that structural interdicts are not only appropriate in cases of government recalcitrance or incompetence, but also where the violation should be urgently remedied because of a risk of adverse consequences. See also K Roach & G Budlender "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable" (2005) 122 *SALJ* 325 333 where the authors argue that structural interdicts will be appropriate in cases where even *bona fide* non-compliance will have serious consequences.

(b) Balancing diverse interests

Kollapen J also took cognisance of the fact that a structural interdict requiring the respondents to submit a plan should accommodate a diverse set of interests in order to be effective. The Court stated that the respondents were primarily responsible for formulating the plan and that the Court should not prescribe the exact contours of the plan.[154] However, the Court went further, stating that the formulation of the plan should be a "collaborative effort" and that schools, teachers, parents and learners should be consulted since they have a vested interest in the remedy.[155]

(c) Reason for the rights violation

It is important to note that the Limpopo Department of Education was placed under national administration in December 2012 in terms of section 100(1)(b) of the Constitution.[156] This provision makes it possible for the national executive to intervene "[w]hen a province cannot or does not fulfil an executive obligation".[157] This indicates that severe incompetence contributed to this systemic violation. The Court stated that the violation did not occur due to *mala fide* conduct by the Department.[158] It cited the Department's unreasonable conduct as the reason for the violation, stating that the Department could not meet its own targets and indicators.[159] This suggests that the infringement did not occur due to an inattentive or intransigent state, but rather because of severe incompetence.

4 3 2 1 2 *BEFA*

Compliance by the Department was unsatisfactory despite the strong managerial remedy granted in *Section 27*. The parties reached a settlement out of court which

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[154] *Section 27 v Minister of Education* 2013 2 BCLR 237 (GNP) para 40.
[155] Para 39.
[156] Para 11.
[157] S100(1)(b) of the Constitution.
[158] *Section 27 v Minister of Education* 2013 2 BCLR 237 (GNP) para 32.
[159] Para 32.

was endorsed by the Court and thus made an order.[160] The parties further agreed to appoint an independent party to verify the contents of the progress reports which the respondents had to submit as per the order in *Section 27*.[161]

The applicants returned to court in September 2012 because of non-compliance by the respondents, which led to the continued violation of the right to a basic education.[162] Kollapen J declared that the respondents had failed to comply with the two previous court orders, describing the situation created by this failure to comply as "distressing".[163]

In 2014, another urgent application was launched in *Basic Education for All v Minister of Basic Education* ("*BEFA*") after reports were received relating to textbook shortages in the Limpopo province.[164] The applicants firstly sought an order declaring that the late delivery of textbooks constituted a violation of the basic right to education. Secondly, the applicants sought an agreement with regard to the delivery date of textbooks as reached between them and the Department to be made an order of court, and they lastly sought a structural interdict remedy.

(a) Nature of the right and nature of the infringement

The Court firstly considered the nature of the right. The Court found that the positive obligations flowing from section 29(1)(a) did require the provision of textbooks to students.[165] The Court further confirmed the empowering nature of this right and thus the urgency with which it had to be remedied.[166] The Court did not explicitly discuss the nature of the violation, but it did discuss the history of the *Textbook* case saga in

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[160] F Veriava "The Limpopo Textbook Litigation: A Case Study into the Possibilities of a Transformative Constitutionalism" (2016) 32 *SAJHR* 1 7.

[161] 7. Professor Mary Metcalfe, the former MEC for Education in Gauteng, was appointed as the independent party.

[162] *Section 27 v Minister of Basic Education* (GNP) 23-12-2012 case no 24565/2012.

[163] Para 9.

[164] 2014 9 BCLR 1039 (GP). This application was brought by Basic Education for All with Section 27 acting as the attorneys in this case.

[165] Para 55.

[166] Para 54. See *Minister of Basic Education v Basic Education for All* 2016 1 All SA 369 (SCA) para 1 where the Supreme Court of Appeal, similarly to the previous judgments in this series, confirmed the centrality of the right to a basic education.

Limpopo.[167] The Court therefore acknowledged that the Department had continuously failed to meet its positive obligation to provide textbooks, thus making this violation systemic in nature.[168]

(b) Balancing diverse interests

The Court took different interests into account during the judgment. The Court took into consideration the financial interests of the State.[169] It stated in this regard that the right to a basic education is not subject to any limitations, but that the content of the right is subject to the availability of State resources.[170] It further considered the interest of separation of powers in this regard, stating that the authority to determine how State resources should be used "has been vested in the state and secondly that courts are not well equipped to make such determinations".[171] The Court elaborated on this, stating that the Constitution does empower courts to grant supervisory orders in cases where the State has disregarded its constitutional obligations.[172] However, the Court found that this was not such a case since the Department did attempt to get the necessary funding, but that the relevant fiscal authorities only granted it a lesser sum than what was requested.[173] The Court refused to consider whether Parliament failed to fulfil its constitutional obligations by not adequately budgeting for textbooks in Limpopo, citing the "policy laden" nature of this obligation and the fact that it was not an issue before the court.[174]

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[167] *Basic Education for All v Minister of Basic Education* 2014 9 BCLR 1039 (GP) paras 11–31.

[168] See chapter three part 3 2 2 2 where systemic socio-economic rights violations are discussed.

[169] See *Basic Education for All v Minister of Basic Education* 2014 9 BCLR 1039 (GP) para 72 where budgetary constraints are discussed.

[170] Para 67.

[171] Para 68.

[172] Para 69. The Court quoted para 183 of *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 4 SA 222 (CC) in this regard.

[173] *Basic Education for All v Minister of Basic Education* 2014 9 BCLR 1039 (GP) para 73.

[174] Para 74. However, the Court acknowledged that such a case, although difficult, could hypothetically be made.

(c) Reason for the rights violation

The Court further considered the reason for the violation. The Court stated in this regard that the Department had initially failed to fulfil its constitutional obligation because it had, in good faith, erred in thinking that the provision of textbooks did not form part of this responsibility.[175] The Court went on to consider why there was unsatisfactory compliance with the previous court orders. The Court accepted the respondents' contentions with regard to budgetary constraints, stating that the "non-compliance has been explained".[176] The Court concluded that there was no reason to believe that the respondents would not fulfil their constitutional obligations following the judgment and that a structural interdict would thus not be appropriate.[177]

(d) Practicability of the remedy

Practicability concerns increased in the *Textbook* case saga since the first judgment which led to the Court placing more emphasis on this consideration in *BEFA* than it had done in *Section 27*. The applicants had suggested in *BEFA* that the South African Human Rights Commission ("SAHRC") be instructed by the Court to supervise the

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[175] Para 75.

[176] Para 75. On appeal in *Minister of Basic Education v Basic Education for All* 2016 1 All SA 369 (SCA), the Supreme Court of Appeal was less satisfied with the explanation for non-compliance. The Court ascribed the systemic rights violation to the incompetence of the Department, stating that the violation clearly occurred because of incompetence and insufficient planning (para 43). The Court referred in this regard to the implementation of the new curriculum, stating that the Department "stumbled" in doing this. The Court, similarly to the previous judgments, found that the right to a basic education does include the right of every learner to be provided with the necessary textbooks. The Court held that the failure by government to provide the affected learners with textbooks did not only violate their right to a basic education, but also their rights to equality and dignity as contained in ss9 and 10 of the Constitution (para 53). The Court also found that there was non-compliance with the previous court orders (para 53).

[177] *Basic Education for All v Minister of Basic Education* 2014 9 BCLR 1039 (GP) para 75. See also *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 2 SA 359 (CC) para 109 where the Constitutional Court made a similar statement with regard to *bona fide* denial of constitutional obligations.

Department's compliance and progress.[178] The Court in *BEFA* rejected this on the basis that the SAHRC does not have the necessary capacity to fulfil this function.[179] Such an order would thus not be enforceable and could not be regarded as effective relief. The Court further stated that such an order would be inappropriate since there was no good reason for the Court to interfere with the responsibilities of the SAHRC.[180]

Another practical consideration which the Court took into account during the remedial phase in *BEFA* was that the record for this case was exceptionally voluminous. The Court concluded that a new record would be easier to deal with effectively if this case were to come before a new judge in the future.[181] The Court thus declined the request for a structural interdict.[182]

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[178] *Basic Education for All v Minister of Basic Education* 2014 9 BCLR 1039 (GP) para 78.

[179] Para 78.

[180] Para 78.

[181] Para 79.

[182] This case was taken on appeal to the Supreme Court of Appeal in *Minister of Basic Education v Basic Education for All* 2016 1 All SA 369 (SCA). The Department appealed Tuchten J's findings in *Basic Education for All v Minister of Basic Education* 2014 9 BCLR 1039 (GP) relating to textbooks and the right to a basic education, arguing that the right to a basic education did not require them to provide every learner in every school with a textbook. BEFA cross-appealed on grounds that Tuchten J erred in not finding that there had been non-compliance with the first two judgments and, secondly, against Tuchten J's refusal to grant a structural interdict remedy. However, BEFA abandoned their cross-appeal relating to the structural relief. See F Veriava "The Limpopo Textbook Litigation: A Case Study into the Possibilities of a Transformative Constitutionalism" (2016) 32 *SAJHR* 1 21 where the author explains this abandonment of the structural interdict prayer by stating that a structural interdict would have made it possible for the Department of Basic Education to go back to the Court in an "attempt to justify its reasons for continued non-delivery". This litigation strategy can be questioned since the South African Human Rights Commission reported that many schools in the Limpopo province has not received learning materials in the form of textbooks by the start of the 2017 academic year, thus indicating that BEFA's strategy to supervise implementation itself was ineffective. See G Smith "SAHRC Considering Legal Action on Non-delivery of Textbooks" (20-01-2017) *South African Human Rights Commission* <http://www.sahrc.org.za/index.php/sahrc-media/news-2/item/507-sahrc-considering-legal-action-on-non-delivery-of-textbooks> (accessed 20-01-2017).

4 3 2 2 Evaluation of the Textbook case saga

(a) Consideration of factors in designing effective relief

Section 27 is a significant judgment since it elaborated on the normative content of the right to a basic education, finding that this includes the provision of textbooks. However, the structural interdict as granted by Kollapen J can be criticised on the basis that the judge did not consider all of the necessary factors. The judge disregarded the respondents' argument that it was *bona fide* in not complying with its constitutional obligation, thus not thoroughly engaging with the reason for the rights violation.[183] However, the judge justified the strong managerial remedy, stating that the right should be urgently vindicated because a delay could have "adverse consequences" for the affected pupils.[184] The judge considered the nature of the right in concluding that it should be urgently vindicated.[185]

Tuchten J's judgment in *BEFA* is similarly subject to criticism. He decided that a structural interdict would not be an appropriate remedy in this case after considering the reason for the violation. In contrast to Kollapen J, he was of the view that the respondent's argument was *bona fide*, and that there was no reason to believe that the respondents would not comply with the order.[186] This belief that the government would comply was ultimately misplaced since the government had already failed to comply with several previous judgments and court orders. Objectively, it seems clear that government was aware of its obligation to provide textbooks to all learners in public schools prior to this series of litigation and should thus have planned accordingly.[187] Tuchten J should have emphasised the interests of the students in

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[183] *Section 27 v Minister of Education* 2013 2 BCLR 237 (GNP) para 27. This also negatively affected the norm of impartiality since the eventual remedy might be viewed as unfair.

[184] Para 30. See part 4 3 3 in this chapter where the possibility of adverse consequences is discussed as a scenario in which structural interdicts will be appropriate.

[185] *Section 27 v Minister of Education* 2013 2 BCLR 237 (GNP) para 21.

[186] *Basic Education for All v Minister of Basic Education* 2014 9 BCLR 1039 (GP) para 75.

[187] See *Section 27 v Minister of Education* 2013 2 BCLR 237 (GNP) para 23 where the judge quotes President Zuma as stating that every student should be provided with textbooks, as well as the Limpopo Education Department's Annual Performance Plan for 2011 to 2012 which also stated that every child should have textbooks.

receiving textbooks to a greater extent, given the importance and transformative potential of the right to a basic education.[188]

(b) Norms for public law remedies

The *Section 27* judgment did not explicitly order or make use of meaningful participation. However, the judge did envisage engagement as a useful tool to let a diverse set of interests enter the remedial enquiry.[189] He stated in this regard that the various relevant parties should participate in the formulation of the catch-up plan in order for the plan to be effective. However, this judgment can arguably be criticised for a lack of adequate reasoned decision making in that other available constitutional remedies were not considered.[190] However, the judge justified the strong remedy with reference to the importance and urgency underlying the right.

The judgment in *BEFA* can similarly be criticised for not fully adhering to Sturm's overarching norms for public law remedies. The Court placed a lot of emphasis on the separation of powers norm, but did this to the detriment of norms such as remediation. Tuchten J stated:

> "I do not think that this is a case where the Court should enter the terrain demarcated for the exercise of public power by another arm of government by directing the DBE to report to the Court on their progress with the deliveries which they have undertaken to make".[191]

The Court stated that a structural interdict would not be appropriate since BEFA could institute new proceedings in the case of non-compliance.[192] Evidently, the Court in *BEFA* adopted a deferential approach since it regarded the textbooks saga as a predominantly political issue, stating that "political issues require political solutions".[193]

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[188] See chapter one part 1 1 1 for a discussion of transformative constitutionalism.

[189] *Section 27 v Minister of Education* 2013 2 BCLR 237 (GNP) para 39.

[190] The lack of reasoned decision making also negatively affects the Court's adherence to the norm of impartiality and this can affect the perceived legitimacy of the remedy.

[191] *Basic Education for All v Minister of Basic Education* 2014 9 BCLR 1039 (GP) para 75.

[192] Para 75.

[193] Para 76.

4 3 3 Irremediable harm

The third set of circumstances in which a structural interdict will be appropriate and effective is in those cases where the consequences of even *bona fide* non-compliance will be so serious that a strong form of remedy is justified.[194] Roach and Budlender argue that the consequences of non-compliance in some cases could be so grave that further remedial action will not be adequate in vindicating the infringed right.[195] The revisability or gradual approach which structural interdicts allow for, as discussed above, will not by itself be effective in such urgent cases since this form of remedy can result in a lengthy process.[196] A court granting a structural interdict in systemic cases

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[194] K Roach & G Budlender "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable" (2005) 122 *SALJ* 325 333. See also N Swanepoel "Die Aanwending van die Gestruktureerde Interdik in die Suid-Afrikaanse Konstitusionele Regsbedeling: 'n Eiesoortige Beregtingsproses" (2015) 12 *LitNet Akademies* 374 388.

[195] K Roach & G Budlender "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable" (2005) 122 *SALJ* 325 333. The authors state that *Minster of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) is, with the benefit of hindsight, an example of such a case. See chapter three part 3 2 1 2 where this case is discussed in order to illustrate that the underlying interests in socio-economic rights will often be urgent in nature.

[196] *National Association of Welfare Organisations and Non-Governmental Organisations v MEC for Social Development* (1719/2010) [2010] ZAFSHC 73 (5 August 2010) illustrates the inability of structural interdicts to grant immediate relief to successful litigants. This case concerned the funding policy of the Free State Department of Social Development which regulated the grants awarded to non-profit organisations ("NPO's"). The Court found that the NPO's were fulfilling the constitutional and statutory obligations of the Department as contained in ss26, 27 and 28 of the Constitution, s4(2) of the Children's Act 38 of 2005 and s3(2) of the Older Persons Act 13 of 2006 (para 37). The Court furthermore found that the NPO's were chronically underfunded (paras 33-36) and that the arbitrary funding policy was unreasonable and thus unconstitutional. The Court accordingly granted a structural interdict directing the parties to redraft their funding policy (para 56). The Court found in the subsequent judgment of *National Association of Welfare Organisations and Non-Governmental Organisations v MEC for Social Development* (1719/2010) [2011] ZAFSHC 84 (9 June 2011) that the revised policy was still not reasonable and ordered the Department to meaningfully engage with the NPO's in order to formulate a reasonable policy. The Court found in *National Association of Welfare Organisations and Non-Governmental Organisations v MEC for Social Development, Free State* (1719/2010) [2013] ZAFSHC 49 (28 March 2013) para 14 that the revised funding policy was still deficient because of, *inter alia*, the failure by the Department to meaningfully engage with the NPO's. The third revised funding policy of the Department was finally upheld as compliant with the first three judgments and the Constitution in *National*

with urgent underlying interests[197] must also, as part of the structural interdict, grant detailed and immediate relief in order to prevent irremediable harm to the victims.[198] This section will analyse and evaluate three cases which would have resulted in grave consequences if compliance was not achieved, namely *EN v Government of the Republic of South Africa* ("*EN*"),[199] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* ("*Allpay 2*")[200] in which there was no compliance and *Black Sash Trust v Minister of Social Development* ("*Black Sash*")[201] which was aimed at preventing the constitutional crisis almost created by the government in *Allpay 2*.

Association of Welfare Organisations and Non-Governmental Organisations v Member of the Executive Council for Social Development, Free State (1719/2010) [2014] ZAFSHC 127 (28 August 2014). Whereas this chapter analyses case law where socio-economic rights were systemically violated, it is not clear that the *NAWONGO* saga involved a large-scale systemic issue, since an identifiably provincial government department was responsible for formulating a fair funding formula for an identifiable number of NPO's. Once a reasonable funding formula was devised, the funding shortfall and indirect violation of myriad socio-economic rights could be relatively simply rectified. It is nevertheless clear from this case, which consists of four judgments and spanned over a period of more than four years, that flexible structural interdicts alone cannot be regarded as a quick fix solution and that it will be inappropriate in urgent cases where there is a risk of adverse consequences. This inability of pure structural interdicts which is not accompanied by some form of immediate relief highlights the contradiction in academic literature which often advocates for structural interdicts as effective relief in cases with urgent underlying interests.

[197] It is important to note that the underlying interests in socio-economic rights cases will often be urgent as discussed in chapter three part 3 2 1 2. However, urgency as referred to here is qualified in that there must be a risk of irremediable harm.

[198] This detailed and immediate relief can potentially take the form of interim relief. This will be similar to cases where a court grants an order for interim relief when suspending a declaration of invalidity. The interim relief in such a case will be aimed at providing immediate relief to the victim of a rights violations in order to ensure that the victim does not suffer any further harm, whilst at the same time affording the government with sufficient "space and time to select the precise means by which to comply with the Constitution." K Roach & G Budlender "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable" (2005) 122 *SALJ* 325 340. See also S Liebenberg *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 391 in this regard.

[199] 2007 1 BCLR 84 (D).

[200] 2014 4 SA 179 (CC).

[201] 2017 ZACC 8 (CC).

4 3 3 1 EN

4 3 3 1 1 Analysis

EN concerned the right to health care of prisoners who were serving sentences at the Westville Correctional Centre. There were approximately twenty prisoners who were HIV positive but did not have access to antiretroviral treatments. The applicants approached the High Court, arguing that the prisoners have a right to health care and that they must accordingly be provided with the necessary medication.[202] The Court found that the government did not meet its constitutional obligations and that the medical care provided to the prisoners was not "reasonable" or "adequate".[203] The applicants sought a structural interdict, and the Court thus had to consider several factors in deciding whether such a remedy would be appropriate and effective in the circumstances.[204]

(a) Nature of the right and nature of the infringement

The Court considered the nature of the infringed right as well as the nature of the infringement. The Court referred in this regard to the positive obligations of the government imposed by section 35(2)(e) of the Constitution which are not subject to any qualifications,[205] stating that the State is "legally and constitutionally bound to provide adequate medical treatment to prisoners".[206] The Court noted in this regard that this was a matter of "life and death" since many of the applicants were very sick

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[202] The applicants based their arguments on ss27 and 35(2)(e) of the Constitution.

[203] *EN v Government of the Republic of South Africa* 2007 1 BCLR 84 (D) para 31.

[204] Para 4. The Court also confirmed the powers of the courts to grant structural interdicts in suitable cases to ensure compliance with a court order, referring to *City of Cape Town v Rudolph* 2004 5 SA 39 (C) and *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC).

[205] Section 35(2)(e): "Everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expenses, of adequate accommodation, nutrition, reading material and medical treatment".

[206] *EN v Government of the Republic of South Africa* 2007 1 BCLR 84 (D) para 8.

at the time that the judgment was given.[207] The Court accordingly emphasised the need for this rights violation to be urgently rectified.[208] The Court further considered the nature of the infringement, observing that "there has been and continues to be a violation of the applicants' constitutional rights" with regard to health care.[209] This statement indicates that this was not a once-off violation, but rather systemic and ongoing in nature.[210]

The Court furthermore considered the context of the case. The Court described prisoners as a particularly vulnerable group of persons in our country as they are incarcerated and thus left to the mercy of the State.[211] The Court further emphasised prisoners' vulnerability in stating that a prisoner's "prospects of emerging from prison alive is seriously compromised because of the HIV/AIDS pandemic".[212] It is this vulnerability that makes it important for courts to protect and enforce the rights of prisoners.

(b) Balancing diverse interests

The Court considered diverse interests in this case. This included the interests of parties (namely the respondents and broader public) other than the interests of the applicants to urgently access treatment. The Court did not have to consider the financial implication for the respondents as they did not raise a lack of resources as justification for non-compliance with their constitutional obligation.[213] The Court further considered the interest of people who were similarly situated in also receiving relief. The Court stated in this regard that it was contemplated by the applicants that a structural interdict remedy in a class action such as this case would also afford relief to other similarly situated prisoners.[214] The Court agreed that similarly situated people

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[207] Para 18.

[208] See paras 6, 18 and 32 where urgency as factor to consider is discussed.

[209] Para 32.

[210] See chapter three part 3 2 2 2 for a discussion of systemic socio-economic rights infringements.

[211] *EN v Government of the Republic of South Africa* 2007 1 BCLR 84 (D) para 18.

[212] Para 29.

[213] Para 25.

[214] Para 4. See also paras 17 and 25 with regard to the interests of similarly situated people.

should receive comparable relief, in displaying its dismay with the fact that the respondents had no plan with timeframes for the provision of antiretroviral medication to prisoners similarly situated to the applicants.[215] The Court accordingly included the words "other similarly situated prisoners" in its mandamus, ordering the respondents to remove any obstacles preventing prisoners from receiving treatment for HIV, thus rendering the relief more effective.[216]

(c) Reason for the rights violation

The Court raised concern over the apparent "dilatoriness and lack of commitment" of the respondents in dealing with this systemic issue.[217] The Court stated that the respondents argued that they were indeed meeting their constitutional obligations.[218] However, the Court found the State's policies aimed at meeting its obligations to be unreasonable.[219] The reasoning of the Court suggests that this was not a case where pure recalcitrance or incompetence led to the violations, but rather a case of inattentiveness coupled with a degree of recalcitrance.[220]

(d) Practicability of the remedy

Another factor considered by the Court was the practicability of the remedy. Remedies can be less effective if they are difficult to comply with.[221] The Court took this into consideration when it decided on the timeframe of the structural interdict. The Court described the suggested time limit of one week for submitting a report on how

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[215] Para 27.

[216] Para 35. See chapter two part 2 3 2 2 3 where it is discussed that an effective remedy must also provide relief to similarly situated people.

[217] *EN v Government of the Republic of South Africa* 2007 1 BCLR 84 (D) para 24.

[218] Para 25.

[219] Para 31.

[220] The Court reasoned that the respondents were somewhat recalcitrant in this case, stating that the respondents had not provided any "workable" solutions and that their attempt to adhere to their obligations had been "characterised by delays, obstacles and restrictions" (para 32).

[221] M Swart "Left Out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor" (2005) 21 *SAJHR* 215 217.

they intended to comply with the order as "optimistic and impractical" and decided instead to give the respondents a more realistic time limit of two weeks which, in turn, made the remedy more effective.[222]

4 3 3 1 2 Evaluation

(a) Consideration of factors in designing effective relief

The relief granted in this case can be considered to have been effective, but there are some shortcomings in the Court's judgment. The Court considered many of the factors for effective relief. The Court attached sufficient weight to the interests of the applicants in this urgent case as well as the urgent nature of the underlying interests of the right by granting a detailed and strongly managerial structural interdict.[223] The Court discussed the controversial nature of the structural interdict, but concluded that such a strong remedy was justified in the circumstances.[224]

The Court proceeded to grant a detailed and managerial structural interdict which was aimed at preventing any irremediable harm.[225] However, this urgency and threat of irremediable harm warranted an explicit consideration of the deterrent effect of the remedy, which the Court neglected to do. The need for an explicit consideration of the deterrent effect of the remedy was intensified in this case since there is a great need to deter future violations with such potentially grave consequences.

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[222] See *EN v Government of the Republic of South Africa* 2007 1 BCLR 84 (D) para 33 where the Court considered the practicability of the remedy in order to ensure that the relief is effective. The Court acknowledged that the formulation and implementation of a plan to provide prisoners with antiretroviral medication would require consultations between various parties including the State, hospitals and legal counsel and that one week would not be sufficient to allow for such a process.

[223] Paras 23–24.

[224] Para 32.

[225] The remedy granted by the Court ordered the respondents to immediately provide the prisoners with the necessary medical care (para 35), and did thus not give them much leeway since this could have led to irremediable harm.

(b) Norms for public law remedies

The Court did not facilitate participation by all the different parties during the remedial phase of adjudication as required by the theoretical paradigm espoused by Sturm.[226] Participation might have allowed more diverse interests to enter the remedial enquiry.[227] For example, the Court stated that the respondents' financial interests in the case were not a concern since it was not brought up during formal liability proceedings.[228] The Court thus made assumptions with regard to the diverse interests implicated in the matter. Direct and meaningful participation by government officials could possibly have placed the Court in a better position to grant an effective and impartial remedial judgment aimed at solving the systemic cause of the violation, while increasing the remedy's practicability and deterrent effect.

The Court did partially adhere to the norm of reasoned decision making in its remedial judgement. The Court justified the structural interdict as appropriate and effective relief, citing the facts and the circumstances of the case.[229] The Court did not, however, explicitly state why a structural interdict remedy was more appropriate and effective in this case when compared to other available constitutional remedies such as a mandatory interdict or declaratory order.[230]

The Court also only partially adhered to the norm of remediation. The Court granted a strong remedy in order to secure immediate compliance. However, the respondents were reluctant in implementing the remedy. This again supports the argument for

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[226] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1410. See also S Liebenberg "Remedial Principles and Meaningful Engagement in Education Rights Disputes" (2016) 19 *Potchefstroom Electronic Law Journal* 1 6.

[227] This case confirms Sturm's argument that structural interdicts granted in the form of a report-back-to-court model will often not comply with the participation norm for public law remedies. See chapter five part 5 3 1 where this is discussed.

[228] *EN v Government of the Republic of South Africa* 2007 1 BCLR 84 (D) para 25.

[229] Para 32. The judgment emphasised the urgency of the case since people were severely ill and the retention of jurisdiction thus made the remedy effective since the Court could easily have been approached again for ancillary relief in the case of non-compliance.

[230] See S Liebenberg "Remedial Principles and Meaningful Engagement in Education Rights Disputes" (2016) 19 *Potchefstroom Electronic Law Journal* 1 7 where the author states that this is a requirement of substantive reasoned decision making.

diverse participation, because respondents who participate in the design of a remedy are more likely to comply with it.[231]

4 3 3 2 SASSA saga

4 3 3 2 1 Analysis of *Allpay*

In *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency*,[232] the Constitutional Court found that the award of a tender by the South African Social Security Agency ("SASSA") to Cash Paymaster Services (Pty) Ltd ("CPS") was constitutionally invalid.[233] The tender in this case was for the administration of social grants on behalf of SASSA. Allpay instituted legal proceedings challenging the validity of the tender process after the tender was awarded to CPS. However, the Court did not immediately rule on an appropriate remedy, stating that the Court needed "further information".[234] The Court accordingly issued an order directing the parties to present further facts and arguments to the Court. In *Allpay 2*, which dealt with the remedy, the Court considered several factors in determining what the most effective relief would be.[235]

(a) Nature of the right and nature of the infringement

The Court aimed to ensure that the infringed right (the right to just administrative action) was vindicated.[236] This was done by declaring the tender award and

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[231] See chapter two part 2 3 1 1 where this is argued.

[232] 2014 1 SA 604 (CC). This case was brought before the Court on the basis of the right to just administrative action (s33 of the Constitution) and the tender was set aside for reasons relating to this. However, the Court recognised in para 4 that this case directly implicates the socio-economic right to social assistance (s27(1)(c) of the Constitution) and that the public thus had a major interest in this case.

[233] Para 93.

[234] Para 96.

[235] 2014 4 SA 179 (CC).

[236] Section 33: "Just administrative action

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

subsequent contract between CPS and SASSA constitutionally invalid in the merits judgment.[237] The Court further had to consider the nature of the right to social assistance as provided for in section 27(1)(c) read with subsection (2) of the Constitution. The Court stated that these provisions place a positive obligation on the State to provide social assistance to people who are unable to support themselves and that this must be realised progressively.[238] The Court went further, stating that this right has been realised through the Social Assistance Act 13 of 2004.[239]

(b) Balancing diverse interests

The main interest taken into account was that of social grant beneficiaries, especially children, to receive their grants in an uninterrupted manner.[240] This is a significant consideration since the beneficiaries were not parties before the court.[241] The Court also took the interests of SASSA and CPS into account.[242] Merely declaring the tender to be invalid and setting it aside would have created practical difficulties for these bodies in meeting their obligations, which could have resulted in the serious

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(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons."

[237] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 1 SA 604 (CC) para 98.

[238] Para 47.

[239] Para 47.

[240] Para 33. See also *Tripartite Steering Committee v Minister of Basic Education* 2015 3 All SA 718 (ECG) which was similarly decided on the basis of administrative law, but which also directly implicated a socio-economic right. This case concerned the right to a basic education because pupils did not have transport to schools. Plasket J granted a supervisory remedy requiring the government to report back to the court on the progress of adopting a new policy regulating scholar transport (para 67).

[241] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 1 SA 604 (CC) para 96. The interest of the unrepresented grant beneficiaries, specifically child beneficiaries, were brought into focus before the Court by the *amici curiae*. See chapter two part 2 3 2 2 2 where it is argued that the interests of stakeholders not before the court must be considered during the remedial enquiry.

[242] The Court stated that constitutional obligations can extend to non-State actors, such as CPS. *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 4 SA 179 (CC) para 52.

infringement of grant beneficiaries' right to social assistance.[243] The suspension of invalidity was aimed at safeguarding the above-mentioned interests – especially the interests of socio-economically vulnerable grant recipients – and thus rendering the relief more effective.

The Court also considered other diverse interests.[244] The Court took the interest of the public in having accountable and transparent government agencies into account. The Court stated in this regard that the "public interest in procurement" must be considered in the remedial phase.[245] Proper procurement processes that are constitutional ensure that citizens receive the most cost effective, quality service. The Court further recognised Allpay's interest in this case as "being co-extensive with the public interest".[246] The Court elaborated on this, stating that Allpay had an interest to compete in a fair and legal tender process.[247]

The Court also recognised another interest of Allpay in designing the remedy, namely Allpay's interest to compete for a profitable contract. The Court held in this regard that the duration of the new contract must also be for a period of at least five years since a shorter contract would not be profitable for a new company and would thus not constitute effective relief.[248] The Court accordingly ordered that the procurement process in this case for a five year contract had to be rerun in a constitutionally valid manner.[249] The choice of whether or not to award a new tender was left to SASSA. The declaration of invalidity was suspended pending SASSA's

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[243] Paras 36–41.

[244] The Court stated (para 33) that the Court must have a "broader range" as opposed to a "one dimensional" approach in the remedial stage, thus indicating that diverse interest must be considered.

[245] Para 33.

[246] Para 72.

[247] Para 72.

[248] Para 43. This is the case since a "long [contractual] period is essential to recoup the tenderer's huge initial outlay." A contract for a shorter period of time would thus effectively have meant that CPS would be the only bidder since it would not be a profitable contract for anyone else, thus maintaining the status quo.

[249] Para 71. It is clear that the Court also considered the interests of people who were not before the Court, thus making the remedy more effective.

decision and the Court ordered that the suspension will continue for the duration of the initial contract with CPS if no new tender was awarded.[250]

(c) Reason for the rights violation

The right to just administrative action seems to have been violated because of inattentiveness on SASSA's part. SASSA neglected to confirm the empowerment credentials of CPS.[251] The Court described this negligent conduct as "fatally defective".[252] The Court stated that "SASSA's irregular conduct has been the sole cause for the declaration of invalidity".[253] SASSA's unsatisfactory conduct and attitude escalated during the investigation prior to the litigation. The Court stated that SASSA failed to provide Allpay and Corruption Watch with information which was necessary for the investigation into the irregularities of the tender process.[254] The Court described SASSA's attitude as "unhelpful and almost obstructionist", thus indicating that SASSA adopted an intransigent attitude.[255]

4 3 3 2 2 Analysis of *Black Sash*

The Court discharged its supervisory jurisdiction over *Allpay 2* after SASSA filed a report in November 2015. This report stated that it would not award a new tender contract and further assured the Court that it would be able to take over the payment of grants in 2017.[256] The lack of supervision led to subsequent litigation in *Black Sash* after it became clear that SASSA still had made no provision for the payment of social grants for after 31 March 2017.

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[250] Para 78. SASSA was ordered to report back to the Court on various issues, including on when and how it will pay social grants itself after completion of the initial contract.

[251] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 1 SA 604 (CC) para 72.

[252] Para 72.

[253] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 4 SA 179 (CC) para 73.

[254] Para 75.

[255] Para 75.

[256] *Black Sash Trust v Minister of Social Development* 2017 ZACC 8 (CC) para 18.

An analysis of the *Black Sash* judgment is thus important as this will contribute to evaluating the efficacy of the relief granted in *Allpay 2*. The Court ordered a very strongly managerial remedy in the form of a structural interdict. The order declared that SASSA and CPS are under a constitutional obligation to ensure that social grants are paid after 31 March 2017. The declaration of invalidity as suspended in *Allpay 2* was again suspended for a period of twelve months. The Court retained supervisory jurisdiction over all aspects of the case.[257]

(a) Nature of the right and nature of the infringement

The Court stated in *Black Sash* that the circumstances and context of the case justified a strong and intrusive remedy.[258] The context which the Court considered during the remedial stage is different from the context which the Court considered during *Allpay 2*. This case was not about a "competitive and cost-effective procurement" process, but rather about the "very real threatened breach… to social assistance".[259] The Court emphasised the urgency of this matter by referring to the vast number of people who would be negatively affected if SASSA and CPS failed to meet their constitutional obligations relating to the payment of social grants.[260]

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[257] Para 76. The order requires the Minister and SASSA to report back to the Court every three months on the progress they have made to ensure that grants will be payed after 1 April 2018. The Court further ordered that a committee consisting of experts must, together with the Auditor-General, report back to the Court at least every three months on: the payment of grants for the twelve months following 1 April 2017; any bidding process by SASSA aimed at the appointment of a new contractor for the payment of social grants; and on any "steps envisaged or taken by SASSA aimed at SASSA itself administering and paying" social grants after the twelve month period. See chapter five part 5 4 4 3 2 where the appointment of experts to monitor the implementation of court orders is discussed with reference to this case.

[258] *Black Sash Trust v Minister of Social Development* 2017 ZACC 8 (CC) para 42.

[259] Paras 42–43.

[260] Para 43. The Court's reasoning justifying the strong and detailed mandatory component which was aimed at ensuring that there would be no interruption of the payment of social grants is similar to the reasoning in *EN v Government of the Republic of South Africa* 2007 1 BCLR 84 (D) as discussed above in part 4 3 3 1. Non-compliance in this case would have led to irremediable harm since millions of people would not have been able to afford the basic necessities needed to live a minimally dignified life.

(b) Balancing diverse interests

The Court took into account the interests of the different parties and stakeholders in this case. However, the Court justifiably attached overwhelming weight to the interests of the beneficiaries to receive their grants without interruption, since the Court stated that SASSA's conduct had put them "at grave risk".[261] The strongly managerial remedy granted in this case attests to the emphasis placed on the urgent interests of grant beneficiaries, and the grave consequences that would result if no grants were paid at the end of CPS' contractual term. The Court furthermore considered the interests of SASSA and CPS. The respondents argued that the continued relationship between SASSA and CPS must be based on a consensual contract. The Court considered this, but stated that this was a private law argument which was inappropriate when dealing with two institutions which are under a duty to meet the State's constitutional obligations in terms of section 27 of the Constitution.[262]

(c) Reason for the rights violation

The Court was scathing in its criticism of the Department's conduct. It stated that supervisory jurisdiction must be considered against the background of the failure of SASSA to "get its own affairs in order".[263] The Court stated that the recalcitrant nature of SASSA and the Department of Social Development had not yet changed and that this necessitated a strong remedy.[264] The respondents were deemed to have been recalcitrant on the basis that they ignored the material content of the order in *Allpay 2*.[265] The Court stated:

> "SASSA and the Minister have used the discharge by this Court of its supervisory jurisdiction as justification that there was no need for them to inform or approach the Court

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[261] *Black Sash Trust v Minister of Social Development* 2017 ZACC 8 (CC) para 58.

[262] Para 48.

[263] Para 57. The Court also described the conduct of the Minister and SASSA as "extraordinary" (para 1).

[264] Para 57. The Court stated that the only difference was that the Minister of Social Development had now also "contributed to the continued recalcitrance."

[265] Para 60.

when it became clear that SASSA would not be in a position to assume the duty to pay the grants itself. This is disingenuous and incorrect."[266]

The Court further stated that the failure of SASSA to approach the Court after realising that it could not comply with the *Allpay 2* order is a threat to the right to social assistance of our society's most poor and vulnerable people.[267] It is this conduct, or lack thereof, which "justifie[d] further Court supervision".[268]

(d) Practicability of the remedy

The Court took practical considerations into account with regard to the supervisory function of the structural interdict. The Court invited SASSA and the Minister of Social Development to make suggestions with regard to "practical measures" for monitoring compliance.[269] The final order made provision for the appointment of independent monitors to assist the Court with the practical implementation of the remedy.[270]

(e) Deterrent effect of the remedy

The Court did not explicitly consider the deterrent effect of the remedy, but it is clear from the judgment that the Court wanted to make sure that its order was to be complied with and that similar crises were avoided in future. The Court stated that the Minister is the "office-holder ultimately responsible for the crisis" and thus ordered her to furnish the Court with reasons explaining why she should not be held personally liable for the costs of the application.[271] The possibility for public servants of being held personally

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[266] Para 59.
[267] Para 62.
[268] Para 62.
[269] Para 19.
[270] Para 76. See chapter five part 5 4 4 3 2 where different possible ways for monitoring the implementation of a remedy are discussed.
[271] *Black Sash Trust v Minister of Social Development* 2017 ZACC 8 (CC) para 74. See the follow up order of *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)* 2017 ZACC 20 (CC) in which the Court ordered that the Minister be joined to the proceedings in her personal capacity (para 4). The Court further ordered an investigation to take place into the Minister's conduct in terms of s38 of the Superior Courts

liable for costs could possibly deter these individuals from causing rights infringements in future.

4 3 3 2 3 Evaluation of *Allpay*

(a) Consideration of factors in designing effective relief

The relief granted in the remedial judgment in the *Allpay*-case must be criticised for not having been effective. This criticism comes despite the fact that the Court did consider most of the factors for effective relief. However, the Court should have considered the deterrent effect of the remedy, since the main reason for the remedy being ineffective is that the Court prematurely discharged its supervisory jurisdiction over this case. Supervisory jurisdiction would have served as a deterrent against SASSA's unsatisfactory and unhelpful conduct.[272] The Court should thus have retained jurisdiction in expectance of non-compliance. The Court also laid emphasis on the poor and marginalised members of our society and their dependence on social grants.[273] This underscored the need for effective relief which ensured compliance, since non-compliance could potentially have led to a breakdown in the grants payment system. This would have had a devastating effect on the millions of people who rely on these grants in order to afford basic necessities.

However, the Court decided that the progress report filed by SASSA in terms of its order was sufficient and that it was no longer necessary to retain jurisdiction over the case.[274] Retention of jurisdiction in this case would not only have served as a deterrent, but would have allowed the Court to keep track of SASSA's progress in terms of setting

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Act 10 of 2013, stating (para 21) that it "cannot make an order adverse to the Minister on the basis of allegations that are untested and which she has not had an opportunity to challenge." The parties were ordered to engage with each other in order to agree on a process for the investigation in terms of the Act and to report back to the Court within 14 days. Failure to reach an agreement would result in the Court giving further directions determining the process to be followed (para 24).

[272] See *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 4 SA 179 (CC) paras 73–75 where the Court discusses the unsatisfactory conduct of SASSA.

[273] Para 33.

[274] *Black Sash Trust v Minister of Social Development* 2017 ZACC 8 (CC) para 18.

up their own grants payment system and earlier intervention by the Court would thus have been possible.

(b) Norms for public law remedies

The Court did adhere to some of the remedial norms in *Allpay 2*. It is obvious that the Court adhered to the separation of powers doctrine since the Court left the decision as to whether or not a new tender contract must be concluded to SASSA.[275] SASSA also had to formulate its own plan aimed at the payment of social grants post 31 March 2017. Furthermore, the discharge of the supervisory jurisdiction indicates that the Court respected SASSA's powers and functions and trusted it to fulfil these.

The Court also adhered to the reasoned decision making norm. The Court did not order just any remedy, but rather requested the presentation of more facts and arguments in order to grant the most appropriate relief available. The Court considered different potential remedies in *Allpay 2* and also justified the structural interdict by citing accountability concerns.[276]

The Court should have allowed for more participation during the remedial phase of adjudication. This could have been achieved by ordering the parties and other interested stakeholders to meaningfully engage with each other.[277] Such engagement could potentially have resulted in a more effective remedy since SASSA would have been exposed to more expertise which would have enabled it to successfully take over the payment of social grants. Such engagement would furthermore have contributed to more transparency which would have granted participating parties the opportunity

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[275] See *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 4 SA 179 (CC) paras 42-46 where the Court discusses separation of powers. This illustrates how the remediation norm and the corrective principle in this case had to yield to other pressing interests. This resulted in a remedy which was imperfect in nature since Allpay's right to just administrative action was not specifically vindicated. See chapter two part 2 2 3 where perfect and imperfect remedies are discussed within the context of effective relief.

[276] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 4 SA 179 (CC) para 71.

[277] See chapter five part 5 4 3 for a discussion of the meaningful engagement jurisprudence of the Constitutional Court.

to approach the Court for further directions once they have realised that SASSA would not be able to comply with the court order.

The Court did adhere to the norm of judicial impartiality in this case. The Court placed significant emphasis on the interests of grant beneficiaries, but nevertheless granted fair opportunities to the respondents to make arguments with regard to what the most appropriate remedy would be.[278]

4 3 3 2 4 Evaluation of *Black Sash*

(a) Consideration of factors in designing effective relief

The relief granted by the Court in *Black Sash* can be regarded as effective. The Court considered all five different factors for effective relief. This is not only evident from the Court's reasoning, but also from the remedy ultimately granted. The Court granted a managerially strong and detailed structural interdict with many built in safeguards aimed at securing compliance. The stringent reporting back requirements coupled with the independent monitors placed the Court in a good position to give further ancillary orders if circumstances change.

(b) Norms for public law remedies

The remedial phase in this litigation is congruent with Sturm's norms for public law remedies. The Court allowed participation by diverse stakeholders in order to help it with the remedial design. This is apparent from the admission of both Corruption Watch and the South African Post Bank as *amici curiae* in this case.[279] The Court also granted access to Freedom under Law to intervene in the application, thus allowing diverse interests to enter the enquiry.[280]

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[278] See *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 4 SA 179 (CC) paras 73-75 where it is clear that the Court wanted SASSA to participate in the remedial process.

[279] *Black Sash Trust v Minister of Social Development* 2017 ZACC 8 (CC) paras 38-39.

[280] Para 37.

The Court further adhered to the separation of powers doctrine. The remedy in this case is very intrusive, but the Court did give ample opportunity for the Minister and SASSA to present the Court with facts *via* the issued directives.[281] The Court thereafter exercised its remedial powers as set out in sections 38 and 172(1)(b) of the Constitution. The Court has previously stated that if it grants a remedy "that constitutes an intrusion into the domain of the executive [in order to protect a right], [then] that is an intrusion mandated by the Constitution itself".[282]

4 3 4 Conclusion

It is clear from the above case analysis that structural interdicts do have the potential to constitute effective relief in cases dealing with the systemic violation of socio-economic rights. All of the cases discussed above had some success in terms of remediation. However, subsequent litigation will often ensue in cases where the courts did not retain full supervisory jurisdiction, as was seen in *Allpay 2*.[283] This can render the remedy ineffective since parties who resort to socio-economic rights

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[281] This does not only indicate adherence to the separation of powers norm, but also promotes the judicial impartiality norm since the Court gave the respondents a fair chance to explain their side of the story.

[282] *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) para 99.

[283] *Madzodzo v Minister of Basic Education* 2014 3 SA 441 (ECM) is another good example of where non-compliance ensued after the Court neglected to retain supervisory jurisdiction over the case, despite articulating the need for such a remedy (para 36). This case concerned the serious school furniture shortage in the Eastern Cape. The Court found that this amounted to the systemic violation of the right to a basic education. However, the Court neglected to retain supervision, ordering the respondents to provide the necessary furniture and to only approach the court by way of application if it foresees its own inability to comply with the mandamus. Granting a proper structural interdict with retained jurisdiction could possibly have avoided the last consent order in 2016 and the systemic violation could have been rectified earlier. The latest consent order was the result of a combination of the respondent's application for an extension of the timeframe and a counter application by the Centre for Child Law asking for systemic relief. See *Centre for Child Law v Minister of Basic Education* (ECM) 14-01-2016 case no 2144/12 in which the order, in the form of a structural interdict, required the appointment of a task team by the Minister. This task team was tasked with preparing a consolidated list of the furniture needs of all public schools in the Eastern Cape (para 2). The Department was ordered to provide furniture accordingly and to report on the progress made (paras 8–9).

litigation are almost always poor and marginalised members of society who might not have the necessary resources or assistance from civil society organisations to bring subsequent litigation.

One can also conclude, based on the case discussions above, that broad participation is crucial in order to design a remedy that can effectively remedy a systemic socio-economic rights violation. *Black Sash* is the only judgment discussed here that sufficiently adhered to this remedial norm. The remedies granted in *EN*, *Allpay* and *Rudolph* fell short to the extent that diverse interests were not accommodated and were as a result less effective.

Lastly, it is also clear that the circumstances under which structural interdict remedies will be appropriate for systemic violations will often overlap. Both *Black Sash* and *EN* illustrate this point. The relevant government agencies in both cases were recalcitrant and non-compliance in both cases would have resulted in catastrophic consequences. Millions of people would not have been able to support themselves and their dependents if social grants were not paid and HIV positive prisoners could possibly have died if they did not receive the necessary medicine. These two cases further illustrate that detailed mandatory interdicts ordered as part of a larger structural interdict will be appropriate and justified in cases where violations must be urgently rectified in order to prevent grave consequences.

4 4 Conclusion

This chapter investigated the structural interdict remedy and its specific potential to constitute appropriate and effective relief in cases dealing with systemic socio-economic rights violations. The first part of this chapter discussed the nature of the structural interdict remedy. The remedial powers of courts to grant a structural interdict were firstly discussed, followed by a critical analysis of the different elements and features of a structural interdict.

The second part of this chapter critically analysed and evaluated case law in which structural interdicts were granted to remedy systemic socio-economic rights violations. The discussions were grouped under the three main scenarios in which these remedies will be appropriate in systemic cases, as identified by Roach and

Budlender.[284] It was concluded that the relief as granted in these cases was partially effective and did meet most of the legitimacy norms proposed by Sturm. However, it is clear from the case discussions that the failure to retain supervision and the absence of broad participation will render a remedy less effective and increase the likelihood for the need of subsequent litigation in order to remedy the systemic violation.

[284] K Roach & G Budlender "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable" (2005) 122 *SALJ* 325 350.

Chapter 5: Designing structural remedies to provide effective relief in socio-economic rights cases

5 1 Introduction

The previous chapter discussed the structural interdict as an appropriate and effective remedy in cases where socio-economic rights have been systemically violated. It was established that the structural interdict does have the potential to constitute effective relief. This remedy, although flexible, must include certain components in order to be effective.

This chapter consists of two main parts. The first part of this chapter will consider the traditional concerns which arise when structural interdicts are granted to enforce socio-economic rights. These concerns are related to the separation of powers doctrine, the democratic legitimacy of the courts and also the institutional capacity of the judiciary. This discussion will be followed by a brief analysis of the different structural interdict models as identified by Sturm in order to investigate the responsiveness of these models to the concerns and to evaluate them against the overarching norms for public law remedies.

The second part of this chapter will propose a participatory structural interdict model which seeks to address the concerns as identified in the first part of the chapter, but which will simultaneously constitute effective relief in cases involving the systemic violation of socio-economic rights. This discussion will consider participation as a key element of the structural interdict remedy and what role, if any, the court should play in a participatory process.

5 2 Concerns regarding the granting of structural interdicts in systemic socio-economic rights cases

There are a number of legitimate concerns which arise when socio-economic rights are enforced. These concerns are exacerbated in cases where the structural interdict remedy is used to enforce these rights as this remedy is perceived to be an intrusive and undemocratic remedy. These concerns question whether granting managerial remedies breach the separation of powers doctrine, as well as whether the judiciary

possesses the democratic legitimacy and institutional capacity to grant these remedies.

5 2 1 Separation of powers

The separation of powers doctrine is often raised as an argument against the granting of a structural interdict.[1] Sturm notes that both courts and critics are concerned that the courts' role in the public remedial process will breach the doctrine of separation of powers.[2] This doctrine is based on the principle that citizens must be protected from the abuse of State power and that the "division of centralised institutionalised power" is essential for this protection.[3] This doctrine consists of four principles. There must firstly be a formal distinction between the executive, legislative and judicial branches of government.[4] Secondly, each of these three branches must be staffed by different officials.[5] Thirdly, each branch is assigned its own focal role.[6] Lastly, each branch must have the necessary powers "to keep a check on the others so that an equilibrium in the separation and distribution of powers may be upheld".[7]

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[1] N Swanepoel "Die Aanwending van die Gestruktureerde Interdik in die Suid-Afrikaanse Konstitusionele Regsbedeling: 'n Eiesoortige Beregtingsproses" (2015) 12 *LitNet Akademies* 374 382. See also M Ebadolahi "Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa" (2008) 83 *NYU L Rev* 1565 1584 and S van der Berg *A Capabilities Approach to the Judicial Review of Resource Allocation Decisions Impacting on Socio-Economic Rights* LLD dissertation, Stellenbosch University (2015) 297.

[2] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1403.

[3] P Labuschagne "The Doctrine of Separation of Powers and its Application in South Africa" (2004) 23 *Politeia* 84 85. See also K O'Regan "Checks and Balances Reflections on the Development of the Doctrine of Separation of Powers under the South African Constitution" (2005) 8 *Potchefstroom Electronic Law Journal* 1.

[4] P Labuschagne "The Doctrine of Separation of Powers and its Application in South Africa" (2004) 23 *Politeia* 84 87.

[5] 87. This is, according to Sturm, the crux of the criticism against the public remedial process, since structural interdict opponents focus on "the proper division of responsibility among the judicial, legislative, and executive branches of government." S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1404.

[6] P Labuschagne "The Doctrine of Separation of Powers and its Application in South Africa" (2004) 23 *Politeia* 84 87.

[7] 87.

The Constitution of the Republic of South Africa, 1996 ("Constitution") does not make provision for the separation of powers doctrine explicitly,[8] but the Constitutional Court confirmed in *South African Association of Personal Injury Lawyers v Heath* that the Constitution does in fact provide for such a separation of powers amongst the judicial, legislative and executive branches of government.[9] The Constitutional Court has stated that "[c]ourts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government".[10] It is against this backdrop that the structural interdict is criticised for moving courts into the terrain of the other branches of government.[11]

Critics argue that courts become unduly involved in the functions of especially the executive branch of government when ordering managerial remedies like the structural interdict. The Supreme Court of Appeal has stated:

> "Structural interdicts… have a tendency to blur the distinction between the executive and the judiciary and impact on the separation of powers. They tend to deal with policy matters and not with the enforcement of particular rights."[12]

This impact on the separation of powers doctrine occurs since court orders in the form of structural interdicts aimed at rectifying systemic socio-economic rights

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[8] Constitutional Principle VI of Schedule 4 of the Constitution of the Republic of South Africa Act 200 of 1993 required the Final Constitution to make provision for the separation of powers doctrine and Constitutional Principle VII made provision for an impartial judiciary with the power to enforce and protect the Constitution.

[9] 2001 1 SA 883 (CC) paras 18-22.

[10] *Doctors for Life International v Speaker of the National Assembly* 2006 12 BCLR 1399 (CC) para 37. See also *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 66 and *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) para 98.

[11] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009) 192.

[12] *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 3 All SA 169 (SCA) para 39. See also *National Treasury v Opposition to Urban Tolling Alliance* 2012 6 SA 223 (CC) para 93 where Froneman J stated that policy decisions made by the executive must be contested in the political process and not in the courts.

infringements will often have an impact on budgetary and policy related questions.[13] These questions are considered to fall to the exclusive terrain of the legislative and executive branches of the government.[14]

However, the separation of powers doctrine must be understood in light of the Constitution. The doctrine, as stated above, assigns the function to adjudicate to the courts.[15] This includes the power to grant remedies that are effective, just and equitable.[16] The Constitutional Court has confirmed this, stating that the separation of powers doctrine does not only limit the courts' powers, but also invests it with the power to grant effective remedies in cases where the Constitution has been violated.[17] This is congruent with the checks and balances principle noted above. Sabel and Simon note in this regard that structural injunction type remedies can provide an "accountability-reinforcing" role for the courts which is in line with our traditional notions of checks and balances.[18]

Hirsch similarly argues that the structural interdict remedy can improve executive accountability, stating that this remedy "vindicates separation of powers concerns".[19]

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[13] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009) 192.

[14] 192.

[15] See *National Treasury v Opposition to Urban Tolling Alliance* 2012 6 SA 223 (CC) para 64 where the Court, in discussing the separation of powers doctrine in the context of interim interdicts, states that "[t]he exercise of all public power is subject to constitutional control."

[16] S van der Berg *A Capabilities Approach to the Judicial Review of Resource Allocation Decisions Impacting on Socio-Economic Rights* LLD dissertation, Stellenbosch University (2015) 297.

[17] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* 2014 4 SA 179 (CC) para 42.

[18] C F Sabel & W H Simon "Destabilization Rights: How Public Law Litigation Succeeds" (2004) 117 *Harv LR* 1015 1090.

[19] D E Hirsch "A Defense of Structural Injunctive Remedies in South African Law" (2007) 9 *Or Rev Int'l L* 1 62. Judicial review and enforcement of socio-economic rights can similarly promote legislative accountability. See R Dixon "Creating Dialogue about Socioeconomic Rights: Strong-form Versus Weak-form Judicial Review Revisited" (2007) 5 *International Journal of Constitutional Law* 391 394 where the author argues that courts are well placed to "counter failures of inclusiveness and responsiveness" by the legislature because the judicial process is "coercive" and participatory. She further states (406) that this role for the court is congruent with a dialogic understating of constitutionalism and that courts are obliged to pronounce socio-economic rights violations arising from legislative "blockages".

She argues that in the past, the High Court has issued structural interdicts while granting the executive a significant degree of discretion by merely requiring it to fulfil its constitutional obligations through the promulgation of reasonable policies which would address the socio-economic rights violations in the relevant cases.[20] Hirsch states that separation of powers-based concerns would have been more pressing if the High Court had instructed the executive on precisely how these policies should be drafted.[21] Davis agrees when he argues that the structural interdict is not supposed to replace the State administration with the judiciary – to the contrary, the remedy can be designed so as to afford sufficient leeway to the State to design the remedy without reducing the efficacy of the remedial process.[22]

5 2 2 Democratic legitimacy

The second concern that will be discussed is the democratic legitimacy of the courts.[23] The democratic legitimacy concern refers primarily to the legislative branch

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[20] Hirsch argues this with reference to *Grootboom v Oostenberg Municipality* 2000 3 BCLR 277 (C) and *Treatment Action Campaign v Minister of Health* 2002 4 BCLR 356 (T). See D E Hirsch “A Defense of Structural Injunctive Remedies in South African Law” (2007) 9 *Or Rev Int'l L* 1 62.

[21] 62.

[22] D Davis “Socio-Economic Rights in South Africa: The Record of the Constitutional Court after Ten Years” (2004) 5 *ESR Review* 3 6. See also E Ling "From Paper Promises to Real Remedies: The Need for the South African Constitutional Court to Adopt Structural Interdicts in Socioeconomic Rights Cases" (2015) 9 *H K J Legal Stud* 51 65 where the author argues that the non-specificity of the structural interdict remedy is aimed at granting government the discretion to decide how best to remedy a socio-economic rights violation in order to respect the separation of powers doctrine.

[23] Mbazira states that democratic legitimacy concerns with regard to socio-economic rights and structural interdicts have two dimensions. The first is the separation of powers concern as discussed above, and it is legal in nature. The second dimension is political in nature and is concerned with the democratic legitimacy of the courts. C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009) 233. Compare with M Ebadolahi “Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa” (2008) 83 *NYU L Rev* 1565 1579 where the author discusses democratic legitimacy and separation of powers as one broad concern.

of government.[24] Critics argue that unelected judges should not invalidate policies and decisions made by officials who are, unlike the judges, accountable to the public.[25] It can furthermore be argued that if courts lack the democratic legitimacy to invalidate government decisions and policies, they would similarly lack the democratic legitimacy to impose judicially crafted solutions upon these branches of government. Mbazira argues that this concern is most prominent at the remedial stage of socio-economic rights adjudication since the enforcement of these rights is often resource intensive.[26] Critics argue that policy and budgetary issues arising from socio-economic rights litigation should be addressed "by debate through the established democratic systems" and not through unelected judges.[27]

Courts granting structural interdicts with budgetary and policy implications are thus, according to this line of critique, acting in a counter majoritarian manner.[28] However, such criticism reveals a narrow understanding of democracy.[29] Democracy also includes the notions of the rule of law and constitutionalism.[30] These notions can act

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[24] See C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009) 93 where the author regards this concern as referring to both the legislative branch and the executive branch of government. See also R Dixon "Creating Dialogue about Socioeconomic Rights: Strong-form Versus Weak-form Judicial Review Revisited" (2007) 5 *International Journal of Constitutional Law* 391 406 where the author states that South African courts have a duty to rectify legislative failures.

[25] M Ebadolahi "Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa" (2008) 83 *NYU L Rev* 1565 1580. See also M Pieterse "Coming to Terms with Judicial Enforcement of Socio-Economic Rights" (2004) 20 *SAJHR* 383 390 where the author discusses the concern of unelected officials intruding on the domain of the democratically accountable branches of the government.

[26] 28. See chapter three part 3 2 1 3 2 (b) where the resource intensive nature of socio-economic rights enforcement is discussed.

[27] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009) 28.

[28] 28. Counter majoritarian conduct refers to the setting aside of democratically reached decisions by unelected and unaccountable judges.

[29] 32. See also S Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (2008) 105 where the author argues that democracy aims to "increase the scope for deliberation" and that courts are well suited to facilitate such deliberations.

[30] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009) 32. Constitutionalism and the rule of law are two separate but complementary notions. South African courts have applied these notions concurrently. See

as limitations on the will and conduct of the majority. This function of democracy is essential for the protection of minority and marginalised groups, since they do not necessarily have adequate political representation to ensure that their rights and interests are protected.[31] The protection of minority interests is guaranteed by the inclusion of justiciable rights in the Constitution,[32] in which it is further acknowledged that the Bill of Rights forms the cornerstone of the South African democracy.[33] The State's conduct must be congruent with these rights and courts are constitutionally mandated to protect the Constitution and to ensure that the legislative and executive branches of government exercise their powers in accordance with the constitutional limitations.[34] Courts have wide remedial powers to do this and the other branches of the State must obey these orders.[35]

The Constitutional Court stated in *Mazibuko v City of Johannesburg*[36] that litigation which concerns the positive socio-economic obligations of government is aimed at holding government accountable and this encourages participatory democracy.[37]

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for example *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 2 SA 374 (CC) and *Speaker of the National Assembly v De Lille* 1999 4 SA 863 (SCA).

[31] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009) 32. See *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1997 12 BCLR 1655 (CC) para 28 where the Constitutional Court confirmed that conduct or legislation representing the will of the majority must be pronounced as unconstitutional if it infringes on the rights of the minority in a constitutional democracy.

[32] I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 9.

[33] S7 of the Constitution. See also M Pieterse "What Do We Mean When We Talk About Transformative Constitutionalism?" (2005) 20 *SA Public Law* 155 161 where the author states that s7 of the Constitution has two main implications. It firstly conceptualises South African democracy as being based on the values of dignity, equality and freedom and it secondly establishes that the rights enshrined in the Constitution must be extended to all who live in South Africa.

[34] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009) 35.

[35] S165(5) of the Constitution states that "[a]n order or decision issued by a court binds all persons to whom and organs of state to which it applies." See chapter two part 2 2 1 and *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) para 113 in relation to the remedial powers of South African courts.

[36] 2010 3 BCLR 239 (CC).

[37] Para 160.

Budlender goes further, arguing that structural interdict remedies granted in such systemic cases, where positive obligations have not been met, can "create spaces for a dialogue between the court, the government and civil society actors".[38] Structural interdicts thus have the potential to foster a participatory process which, if employed in systemic socio-economic rights cases, can moreover promote the constitutional values of accountability, responsiveness and openness.[39] Structural interdicts granted in appropriate socio-economic rights cases will thus not only be congruent with our constitutional democracy, but can in fact strengthen it.

5 2 3 Institutional capacity of courts

Another concern regarding the granting of structural interdicts is related to the perceived lack of institutional capacity of courts to grant strongly managerial remedies.[40] This concern is practical in nature since it is not concerned with "whether the courts should perform certain tasks, but whether they can perform those tasks competently".[41] This concern has two distinct dimensions.[42] The first dimension has to do with the court's capacity to make decisions dealing with social policy and public finance. Judges who are trained to apply legal principles are "ill-equipped to evaluate and adjudicate more complex questions of social policy"[43] and public finance and should therefore not be involved in such decisions. This concern is thus based on the

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[38] G Budlender "The Role of the Courts in Achieving the Transformative Potential of Socio-Economic Rights" (2007) 8 *ESR Review* 9 11.

[39] S1(d) of the Constitution. See also G Budlender "The Role of the Courts in Achieving the Transformative Potential of Socio-Economic Rights" (2007) 8 *ESR Review* 9 11 and part 5 4 4 below in this chapter where participatory structural interdicts are discussed.

[40] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1406.

[41] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009) 30.

[42] S Liebenberg *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 72.

[43] M Ebadolahi "Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa" (2008) 83 *NYU L Rev* 1565 1582.

perceived lack of expertise of judges, who are better equipped to deal with questions of law.[44] The Constitutional Court has stated:

> "Important though our review functions are, there are areas where institutional incapacity and appropriate constitutional modesty require us to be especially cautious."[45]

This concern also includes another aspect which is often neglected in academic literature, namely the technical and resource capacity of courts to practically implement supervisory orders.[46] The supervisory element of structural interdicts creates a unique challenge for courts that are mostly equipped to grant "once-off" remedies which do not require ongoing judicial supervision and involvement.[47] This concern is exacerbated where remedies are granted by the Supreme Court of Appeal and Constitutional Court, as these courts do not have different branches and are thus solely responsible for all cases to be heard by them. These courts can thus be easily over-burdened where a managerial role is assumed.[48]

The second dimension of the institutional capacity concern relates to the "many complex and unpredictable social and economic repercussions" which might arise

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[44] *Mazibuko v City of Johannesburg* 2010 3 BCLR 239 (CC) para 60. Hirsch similarly states that courts are experts at determining legal questions such as fact and causation. However, structural interdict remedies demand of courts to "discover and address the political, economic and social factors" that led to the systemic rights violation. D E Hirsch "A Defense of Structural Injunctive Remedies in South African Law" (2007) 9 *Or Rev Int'l L* 1 63.

[45] *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC) para 58.

[46] See part 5 4 4 3 2 in this chapter where suggestions are made as to how courts can retain supervisory jurisdiction without overburdening themselves.

[47] Bishop supports this position in stating that the granting of a structural interdict might place a court in a position where it does not have adequate resources to fulfil its obligations. M Bishop "Remedies" in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 6 2014) 9-36.

[48] Ebadolahi argues that the granting of structural interdicts may lead to prohibitive enforcement costs and resource diversion for courts and so the author suggests involving the South African Human Rights Commission to assist courts with their supervisory functions. M Ebadolahi "Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa" (2008) 83 *NYU L Rev* 1565 1597. See part 5 4 4 3 2 in this chapter where this suggestion is discussed.

when judges decide on disputes of a polycentric nature.[49] Polycentric disputes are disputes which will typically give rise to a diverse set of unforeseeable consequences.[50] A judicial decision on such a dispute might result in unforeseen consequences for rights and parties who are not before the court in a specific case, because the court suffers from an information deficit and will thus be unable to predict all possible outcomes. Fuller argues that problems like these can possibly be solved by parliamentary processes where all interested parties can come together to negotiate a solution to a problem.[51]

Sturm argues that this concern is overstated in the public law remedial context since proponents of this concern fail to take innovative developments in terms of the remedial process into account.[52] She refers in this regard to the participatory processes which have been developed and incorporated into the remedial process in the United States. The court's deficient knowledge and inability to foresee all the possible repercussions of its orders can to a large extent be solved by incorporating as many different interests and perspectives into the remedial design phase as possible. A court should thus allow all different parties who will be affected by its remedy to participate.[53] Another innovative remedial development which can help alleviate the institutional capacity concern is the retention of supervision by the court over the implementation of the remedy.[54] Van der Berg states that this development allows for revisable judgments in order to accommodate changed circumstances or

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[49] M Pieterse "Coming to Terms with Judicial Enforcement of Socio-Economic Rights" (2004) 20 *SAJHR* 383 392.

[50] 72. See also L Fuller "The Forms and Limits of Adjudication" (1978) 92 *Harv LR* 353 394.

[51] Fuller refers to this as a political contract. L Fuller "The Forms and Limits of Adjudication" (1978) 92 *Harv LR* 353 400. See C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009) 46 where the author argues that legislative processes might be inadequate to deal with polycentric issues since parties with an interest in policy formulation might be poor and politically unorganised and thus not adequately represented.

[52] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1408.

[53] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009) 235. See also S van der Berg *A Capabilities Approach to the Judicial Review of Resource Allocation Decisions Impacting on Socio-Economic Rights* LLD dissertation, Stellenbosch University (2015) 298.

[54] See chapter four part 4 2 3 where this is discussed as one of the peculiar features of the structural interdict remedy.

new information that might not have been available at the time when the remedy was initially granted.[55]

Sturm further rejects arguments against the courts' remedial role in public law cases based on capacity concerns by referring to the judiciary's "insolation from narrow political pressures", the ability to collect information through non-bureaucratic structures and the potential ability to facilitate diverse participation.[56] It is these qualities which lead to Mbazira arguing that a court's capacity to grant remedies in cases where socio-economic rights have been systemically violated should not only be assessed in terms of the court's institutional limitations, but also in terms of its advantages.[57]

Another argument against the court's incapacity to order structural interdicts in socio-economic rights cases is based on the fact that this role does not significantly differ from a court's usual obligations relating to complex matters. Hirsch states in this regard that "[r]emedial orders in institutional litigation are similar to, and no more complex than, the traditional duties of a judge".[58] For example, judges are often called upon to evaluate complex evidence in certain medical, financial, and criminal law cases without their competency being questioned.

5 2 4 Conclusion

It emerges from the above discussion that the concerns regarding the separation of powers doctrine and the democratic legitimacy are not insurmountable.[59] Critique

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[55] S van der Berg *A Capabilities Approach to the Judicial Review of Resource Allocation Decisions Impacting on Socio-Economic Rights* LLD dissertation, Stellenbosch University (2015) 303–304. See also C F Sabel & W H Simon "Destabilization Rights: How Public Law Litigation Succeeds" (2004) 117 *Harv LR* 1016 1080.

[56] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1407.

[57] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009) 193.

[58] D E Hirsch "A Defense of Structural Injunctive Remedies in South African Law" (2007) 9 *Or Rev Int'l L* 1 64.

[59] 32. See also M Ebadolahi "Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa" (2008) 83 *NYU L Rev* 1565 1580 where the author states that "the legitimacy objection has fallen out of favor".

relating to these perceived shortcomings of the judiciary is valid in many respects, yet does not fully account for the nature and peculiar features of the structural interdict. Structural interdict remedies should not be ordered in a way which would amount to "democracy by decree".[60] Judges should not formulate budgets or policies as part of a structural interdict, but should merely direct the State to fulfil its constitutional obligations under court supervision.[61]

Concerns relating to the institutional capacity of courts to grant structural interdicts in cases where socio-economic rights have been systemically violated are especially prominent. Ignoring these concerns will affect the efficacy of the remedy since courts self-admittedly do not always possess the necessary knowledge or skills to remedy these violations. It was argued that including diverse interests into the remedial enquiry, while granting sufficient leeway to the State to devise detailed remedial plans, will largely alleviate these concerns.[62] This study will further propose a participatory form of the structural interdict which mitigates both separation of powers- and competency-based concerns.[63]

5 3 Deficient models of the structural interdict

The flexibility inherent in structural interdicts has led to courts developing different forms or models of the structural interdict in order to provide effective and appropriate relief to litigants.[64] This part of the study will briefly consider the different models as identified by Sturm and identify both the strengths and weaknesses of each model in

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[60] D Davis "Socio-Economic Rights in South Africa: The Record of the Constitutional Court after Ten Years" (2004) 5 *ESR Review* 3 6. The concept "democracy by decree" comes from Sandler and Schoenbrod's famous work critiquing structural interdict remedies in the United States context. See R Sandler & D Schoenbrod *Democracy by Decree: What Happens when Courts run Government* (2003).

[61] See chapter four part 4 2 for a discussion of the nature of structural interdicts.

[62] See part 5 4 1 in this chapter where the advantages of participatory remedial models are discussed.

[63] See part 5 4 4 below in this chapter.

[64] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009) 180.

terms of the remedial norms for public law remedies as well as the ability of each model to address the concerns discussed above.[65]

5 3 1 Report-back-to-court model

Ling states that the "reporting-back model" is the most common model of the structural interdict used by South African courts.[66] This model will typically consist of five elements. Firstly, there must be government conduct that is inconsistent with the Constitution and the court must declare it as such.[67] Secondly, the court must order government to comply with its constitutional obligations.[68] Thirdly, government will be ordered to provide the court with a report. This report must be produced within a period of time specified by the court.[69] It can also be ordered that the report must, in addition to being given to the court, be provided to people who are not parties to the litigation.[70] Fourthly, the applicant should be granted an opportunity to comment on the report lodged by government.[71] The court can also issue further guidelines when the reports are submitted in order to regulate "further engagement between the parties" so as to

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[65] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1365. See also chapter two part 2 3 1 for a discussion of these norms.

[66] E Ling "From Paper Promises to Real Remedies: The Need for the South African Constitutional Court to Adopt Structural Interdicts in Socioeconomic Rights Cases" (2015) 9 *H K J Legal Stud* 51 62. It is important to distinguish between a reporting back order which is not a structural interdict as discussed in chapter four part 4 2 2 and the report-back-to-court model of the structural interdict as discussed here.

[67] I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 199.

[68] 199.

[69] 199. This period of time can be extended by the court if it is in the interest of justice to do so.

[70] S Liebenberg *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 424. See also M Ebadolahi "Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa" (2008) 83 *NYU L Rev* 1565 1590.

[71] Mbazira argues that the fact that the other parties can inspect the plan promotes the remediation norm, see C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009) 190.

ultimately ensure successful compliance with the court order.[72] Finally, the matter will be heard by the court and the report can then be made an order of court.[73]

Sturm states that this model is congruent with the overarching remedial norms of respect for the separation of powers doctrine and judicial impartiality, since the court does not impose a court-designed remedy on the parties.[74] However, this deferential approach to remedial design does compromise the legitimacy of the remedy.[75] This approach will limit the participation of diverse stakeholders in the remedial process and this will ultimately "bear on the development of an appropriate remedy".[76] She supports this argument by stating that remedies designed by way of the report-back-to-court model do not integrate diverse interests and will thus often not "redress the underlying legal violation".[77] This can lead to inadequate compliance with the norm of remediation.

The lack of *diverse* participation will inevitably have implications for the court's capacity to anticipate and possibly pre-empt polycentric consequences, since a lack of participation results in an information deficit for the adjudicating court. This model of the structural interdict will thus not be able to adequately address concerns relating to the court's institutional capacity. However, the deferential nature of this model will contribute to the alleviation of concerns relating to separation of powers and democratic legitimacy.

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[72] S Liebenberg *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 424.

[73] I Currie & J de Waal *The Bill of Rights Handbook* 6 ed (2013) 199.

[74] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1412. See also C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009) 184.

[75] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1412.

[76] 1412.

[77] 1412. Mbazira argues that the bargaining process will allow parties to consider information and other interests which were not before the court but that might still affect the successful implementation of the remedy, see C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009) 184.

5 3 2 The bargaining model

The bargaining model is aimed at overcoming some of the difficulties associated with the traditional, adversarial mode of adjudication when applied to cases dealing with systemic rights infringements. This model requires parties to find a remedial solution themselves.[78] The court will consider the remedial suggestion if the parties come to an agreement and this suggestion will then be made an order of court if appropriate.[79] The court can also follow a more indirect approach by ordering the parties to submit proposals as to how the infringement can be remedied. This will be enforced by penalising one or more parties with an unfavourable order if no agreement is reached.[80] In addition, the court can order that negotiations be mediated by a third party or that the parties should reach an agreement on how a specific remedy should be implemented.[81]

Sturm highlights certain deficiencies that are discernible from this model. She argues that the bargaining process will often take place at the expense of diverse participation since parties who are interested in achieving agreement will try to exclude those who might have conflicting interests.[82] This includes those who must ultimately live with the remedy, thus negatively affecting both the remediation norm and the participation norm since the consent remedy will not represent their interests.[83]

The bargaining model further does not make provision for any accountability mechanisms. Parties are mostly represented by lawyers and will thus often not be directly involved in the process. The interests of represented parties might thus be

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[78] S P Sturm “A Normative Theory of Public Law Remedies” (1990) 79 *Geo LJ* 1355 1368.

[79] This promotes the norm of remediation since the court will evaluate the proposed remedy before making it an order of court.

[80] M Bishop “Remedies” in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 6 2014) 9-3.

[81] Such an agreement must still be presented to the court so that it can be made a final order of the court if appropriate. N Swanepoel “Die Aanwending van die Gestruktureerde Interdik in die Suid-Afrikaanse Konstitusionele Regsbedeling: ’n Eiesoortige Beregtingsproses” (2015) 12 *LitNet Akademies* 374 380.

[82] S P Sturm “A Normative Theory of Public Law Remedies” (1990) 79 *Geo LJ* 1355 1415.

[83] 1416.

diminished in favour of reaching consensus.[84] This drive to reach consensus will also have a negative impact on the reasoned decision making norm since parties do not have to consider all possible remedial solutions when conducting negotiations.[85]

This model of the structural interdict is furthermore deficient because of its inability to adequately address the concerns as identified in the beginning of this chapter. Concerns relating to institutional capacity and polycentricity will be present when this model is employed by a court, since this model does not ensure that participation will be diverse. However, this model does adequately address the concerns relating to separation of powers and democratic legitimacy given that the ensuing remedy will not be court-imposed.

5 3 3 The legislative or administrative hearing model

The legislative or administrative hearing model of adjudication requires the court to conduct informal hearings where a wide range of parties can participate.[86] The purpose of these hearings is to allow a diverse set of interests to enter the enquiry as to what the most appropriate and effective remedy will be. The court will thus allow parties who were not before the court during the liability determination stage of adjudication to also participate in the informal hearings.[87] This model will be especially effective in dealing with polycentric issues as information will be before the court that

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[84] 1415. Sturm states that the representative lawyers will mostly "conform to the adversary model of representation" which will negatively affect the participation norm.

[85] 1416. See also C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009) 185 where the author discusses the bargaining model and its impact on the norm of reasoned decision making.

[86] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1370. The word "informal" is used to describe these hearings as courts often conduct these hearings with relaxed rules of evidence. M Bishop "Remedies" in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 6 2014) 9-3.

[87] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009) 187. Mbazira argues (188) that the informal nature of the hearings renders them more accessible to poor and vulnerable people than formal processes, thus promoting the participation norm.

would not have been presented in the liability stage, thereby ameliorating the information deficit that courts often face in cases of systemic rights violations.[88]

However, this model also suffers from some deficiencies. Sturm states that diverse participation is possible under this model, but that it comes at a cost. She argues that the norms of remediation and reasoned decision making are neglected since the focus is primarily on wide participation and not on the quality of the participation.[89] She further states that the participation under this model might result in a process of "airing differences" rather than "developing solutions".[90] This will force the court to eventually either impose a court ordered remedy or to coerce the parties into an agreement. Both these options will in turn negatively impact both the impartiality and separation of powers norms and will thus exacerbate concerns relating to the democratic legitimacy of the court.[91]

5 3 4 The expert remedial formulation model

The expert remedial formulation model of adjudication entails that a court will appoint an expert or panel of experts to help in the formulation of the remedy.[92] The court can alternatively also appoint a master who will then be responsible for coordinating the panel of experts and their operations.[93] Mbazira draws a distinction between experts appointed in cases dealing with systemic issues and those appointed in cases dealing with other types of issues.[94] He states that the role of experts in cases dealing with other issues will usually be limited to fact-finding exercises whereas experts in systemic cases will be tasked with formulating and proposing a remedy.[95]

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[88] 187.

[89] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1418. She states that it is unclear if participants will influence the eventual remedy.

[90] 1418.

[91] 1419.

[92] 1371. See also N Swanepoel "Die Aanwending van die Gestruktureerde Interdik in die Suid-Afrikaanse Konstitusionele Regsbedeling: 'n Eiesoortige Beregtingsproses" (2015) 12 *LitNet Akademies* 374 381.

[93] 381.

[94] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009) 188.

[95] 188.

This model is similar to the administrative hearing model in that it aims to deal effectively with matters of a polycentric nature and to ensure that parties who are not before the court will also accept the remedy.[96]

Sturm states that reasoned decision making is an "obvious strength" of the expert remedial formulation model.[97] She also states that the appointed expert or experts can easily consult affected stakeholders which means that diverse participation is possible.[98] However, she cautions that the form of participation under this model might not be meaningful since the expert decides who is and who is not allowed to participate. She further states that it is the expert who will use all the gathered evidence to design the remedy which contributes to the participation not being meaningful.[99] This model will furthermore satisfy the norm of judicial impartiality since the court can remain neutral during the remedial design phase.[100]

This model is only partially effective in alleviating the concerns related to the granting of structural interdicts in socio-economic rights cases. The polycentricity concern will only be alleviated if the expert(s) allows diverse parties to participate. Furthermore, concerns relating to the separation of powers doctrine and democratic legitimacy might persist since it is not the parties themselves who actually design the remedy. The remedy will thus still be court imposed.

5 3 5 Consensual remedial formulation model

The consensual remedial formulation model demands that the parties to a case are mutually responsible for further fact-finding and that they must subsequently mutually design an appropriate remedy.[101] The parties must be assisted by a third party during this process, and this model has thus been described by Swanepoel as akin to a

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[96] 188.

[97] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1419.

[98] 1419.

[99] Mbazira similarly argues that participation under the expert remedial formulation model will be diverse, but limited in nature. C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009) 188.

[100] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1419.

[101] 1374.

mediation process.[102] Sturm notes that "[c]ollaborative remedial processes need not follow judicial determinations of liability" since parties can initiate such a process of their own accord.[103]

The norm of respect for the separation of powers doctrine is sufficiently served by the consensual remedial formulation model since the relevant organs of state can participate in the formulation of the remedy.[104] Government is moreover more likely to effectively implement a remedy which is the result of a process in which it participated, meaning that the norm of remediation is also satisfied by this model.[105]

This model furthermore meets the norm of judicial impartiality since the judge is insulated from the negotiation process.[106] However, this insulation is also the model's greatest weakness. Sturm states:

> "The court's minimal role in evaluating the adequacy of the process and outcome of remedial development poses the risk that the remedy will be rubber stamped, even if it was reached unfairly or fails to effectuate the underlying norm".[107]

It is clear from the above discussion that the consensual remedial formulation model can be effective in alleviating the concerns related to structural interdict remedies in socio-economic rights cases. The fact that parties directly contribute to the formulation of the remedy mitigates the separation of powers and democratic legitimacy concerns. This collaborative effort by the parties in formulating the remedy will also contribute to the alleviation of the concerns relating to institutional capacity and polycentricity, since the parties most affected by the remedy and responsible for the implementation thereof will use their expert knowledge to formulate an appropriate remedy.

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[102] N Swanepoel "Die Aanwending van die Gestruktureerde Interdik in die Suid-Afrikaanse Konstitusionele Regsbedeling: 'n Eiesoortige Beregtingsproses" (2015) 12 *LitNet Akademies* 374 381.

[103] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1375. See part 5 4 4 1 2 below in this chapter where it is argued that negotiations should only commence after the judicial determination of liability in order for the remedial process to fully adhere to the remedial norms as discussed in chapter two.

[104] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1425.

[105] 1425.

[106] 1426.

[107] 1427.

5 3 6 Conclusion

It emerges from the above discussion that all of the structural interdict models as discussed above have both strengths and deficiencies. The models are deficient in the sense that they only partially adhere to the norms for public law remedies as identified by Sturm and they do not satisfactory address the legitimacy and competence related concerns. However, it is also clear from the above discussion that all of these models do have potential to constitute effective relief, especially those models that are designed to allow diverse parties to participate in the remedial stage. The next part of this chapter will discuss and propose a model of the structural interdict which contains elements of the models discussed above, but which is largely based on Sturm's deliberative model and the meaningful engagement model of the South African Constitutional Court.

5 4 Designing an effective structural interdict model

An effective structural interdict model in the context of this study must have two main goals. The first aim of the model is to provide effective relief to litigants and those similarly placed in systemic socio-economic rights cases by adhering to the norms for public law remedies[108] and the factors that should be considered during the design phase as espoused in chapter two of this study.[109] This model must thus allow for diverse participation by affected stakeholders and not unduly infringe on the terrain of the legislature or the executive branches of government. It must further ensure judicial impartiality and the subsequent remedy must be based on reasoned decision making. The model must also lastly adhere to the norm of remediation by ensuring that the violated right is adequately vindicated.

This model must secondly be structured in a manner that will alleviate the concerns relating to the separation of powers doctrine, democratic legitimacy of the courts, and

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[108] See chapter two part 2 3 1 for a discussion of the overarching norms for public law remedies as identified by Sturm. See also S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1410.

[109] See chapter two part 2 3 2 in this regard.

the institutional capacity of the judiciary. This can be accomplished by incorporating a participatory element into the structural interdict.

5 4 1 Participatory adjudication as mitigating factor

Liebenberg argues that the concerns regarding the court's institutional legitimacy and competence can to a large extent be alleviated through employing participatory models of adjudication.[110] Participation in the adjudication process can be enhanced in two different ways. It can firstly be enhanced by incorporating diverse interests into the adjudicatory process from the outset. Liebenberg suggests that this can be accomplished by broadening access to the courts, allowing *amici curiae* interventions, or joining stakeholders who are not parties to the case in the litigation.[111] Another strategy, which is relevant to this study, is to employ participatory remedies.[112]

There are three main advantages to employing participatory remedies in cases where socio-economic rights have been systemically violated. The first advantage is that it mitigates democratic legitimacy concerns by "decentring the judicial role" in the remedial design phase.[113] This will be the effect if the court orders the State to consult other stakeholders and to then formulate a plan stipulating how it is going to comply with its constitutional obligations. Rodríguez-Garavito states:

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[110] S Liebenberg "Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law" (2014) 32 *Nordic Journal of Human Rights* 312 317.

[111] 317. See also S van der Berg *A Capabilities Approach to the Judicial Review of Resource Allocation Decisions Impacting on Socio-Economic Rights* LLD dissertation, Stellenbosch University (2015) 298 and G Muller & S Liebenberg "Developing the Law of Joinder in the Context of Evictions of People from their Homes" (2013) 29 *SAJHR* 554.

[112] S Liebenberg "Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law" (2014) 32 *Nordic Journal of Human Rights* 312 318.

[113] 319. See B Ray *Engaging with Social Rights: Procedure, Participation and Democracy in South Africa's Second Wave* (2016) 278 where the author states that "a participatory remedial process like engagement" gives the court access to much more information which will help the court in choosing the most effective remedy.

> "[D]ialogic judgments tend to outline procedures and broad goals and, in line with the principle of separation of powers, place the burden on government agencies to design and implement policies."[114]

The second advantage of granting participatory remedies in socio-economic rights cases is that it will lessen institutional competence and polycentricity concerns.[115] Participatory remedies allow diverse interests to enter the remedial enquiry, thus broadening the information available to the court. Liebenberg suggests that information can be gathered "through the involvement of experts, human rights commissions/ombuds, and the convening of public hearings".[116]

Courts can further formulate the mandatory component of the structural interdict in general terms if it is unclear as to how the State should comply with its constitutional obligations due to a lack of information or polycentric consequences, thus avoiding institutional competency concerns.[117] The State will then have sufficient leeway to decide how best to comply with its obligations. The government can subsequently report back to the court and other stakeholders to present its plan for evaluation.[118] Roach and Budlender explain the benefits of this approach as follows:

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[114] C Rodríguez-Garavito "Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America" (2011) 89 *Texas L Rev* 1669 1691.

[115] S Liebenberg "Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law" (2014) 32 *Nordic Journal of Human Rights* 312 319. See also S van der Berg *A Capabilities Approach to the Judicial Review of Resource Allocation Decisions Impacting on Socio-Economic Rights* LLD dissertation, Stellenbosch University (2015) 300–304.

[116] S Liebenberg "Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law" (2014) 32 *Nordic Journal of Human Rights* 312 319.

[117] K Roach & G Budlender "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable" (2005) 122 *SALJ* 325 334. See also S van der Berg *A Capabilities Approach to the Judicial Review of Resource Allocation Decisions Impacting on Socio-Economic Rights* LLD dissertation, Stellenbosch University (2015) 300. See further chapter four part 4 2 3 where flexibility as a quality of structural interdicts is discussed. It is this flexibility which makes a gradual approach as discussed here possible. This approach alone will, however, not be effective in urgent cases where there is a threat of irremediable harm, see chapter four part 4 3 3 in this regard.

[118] K Roach & G Budlender "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable" (2005) 122 *SALJ* 325 334.

> "This approach to structural relief has some benefits to governments. It may provide governments with a timeline to follow. The approval of a plan by the court can allow the government to move forward with the implementation of its plan secure in the knowledge that implementation will constitute compliance with its obligations. The court can make an order which is as non-intrusive as possible on the choices which the elected government makes, because it can be secure in the knowledge that this will not be an invitation to non-compliance but rather an invitation to the government to formulate a plan in order to achieve compliance with the Constitution."[119]

The third advantage is that participatory remedies are deemed to be more legitimate than those emanating from "unilateral legislative, executive or judicial action".[120] This is significant since the perceived legitimacy of a remedy will influence the efficacy of the implementation of the remedy. Liebenberg explains this by stating that participatory remedies will firstly decrease the possibility of "direct conflict" between the courts and the other two branches of government because of the leeway granted to the State, and secondly increase the "popular legitimacy" of the judiciary.[121]

From the above discussion it thus appears that participatory adjudication models can contribute to alleviating the concerns traditionally associated with socio-economic rights adjudication. Furthermore, this chapter will investigate the meaningful engagement doctrine as developed by the Constitutional Court and consider how this can be incorporated into a structural interdict. Sturm's deliberative model will be used to supplement this in order to ensure that the participatory structural interdict does not only alleviate the concerns as discussed above, but that it also amounts to effective relief.

5 4 2 Contours of Sturm's deliberative model

Sturm's deliberative structural remedy has been designed to specifically adhere to the overarching norms for public law remedies and can be used as a "template for

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[119] 334.

[120] S Liebenberg "Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law" (2014) 32 *Nordic Journal of Human Rights* 312 319.

[121] 319.

structuring and evaluating the adequacy of the remedial process" in cases dealing with the violation of constitutional rights.[122] This model is based on collaborative decision-making and the aim is to include all parties with an interest in the case in the remedial stage of adjudication.[123] The aim of this model is to allow the participants to "develop a consensual remedial solution" themselves whilst still adhering to the norms of participation, respect for separation of powers, impartiality, reasoned decision making and remediation.[124] This model consists of three distinct stages, namely the pre-negotiation stage,[125] the negotiation stage[126] and the implementation stage.[127] Sturm states that the deliberative model is based on the consensual remedial formulation model in terms of the different stages of the remedial process and roles of the parties, but that a more significant role is envisioned for the court during all stages of the participatory process.[128] The more comprehensive role envisaged for the court aims to address the shortcomings of the consensual remedial formulation model in order to ensure that the relief is effective.[129] The structural interdict model proposed by this study incorporates this comprehensive judicial role and is thus largely based on Sturm's deliberative model. This proposed model is furthermore based on the meaningful engagement jurisprudence of the Constitutional Court because of the potential of this development in South African constitutional law to be incorporated into structural interdict remedies.

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[122] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1428.

[123] 1427.

[124] 1427.

[125] 1428. The participatory process is endorsed and set up during this stage of Sturm's model. This requires, among other things, the identification of all the role players and the establishment of the normative parameters of the remedy. See part 5 4 4 1 below where this is discussed in the context of the remedial model proposed by this study.

[126] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1422.

[127] 1428. The implementation process requires that the consensual remedial solution must be incorporated into formal governmental processes. Furthermore, this stage requires the establishment of monitoring mechanisms in order to ensure successful implementation of the remedial solution (1423). See part 5 4 4 3 2 where different monitoring mechanisms are discussed.

[128] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1427.

[129] 1428. See part 5 3 5 above in this chapter where the consensual remedial formulation model and its deficiencies are discussed.

5 4 3 Meaningful engagement

Liebenberg states that "there is much untapped potential in the structural interdict remedy to facilitate engagement" in order to remedy violations as determined during the liability stage of the adjudication.[130] This part will thus consider how participation can be incorporated into the structural interdict.

The Constitutional Court has developed a participatory adjudicatory model of meaningful engagement, originally situated within the context of evictions law.[131] This doctrine has been developed as both a requirement for reasonable State action and policy with regard to socio-economic rights as well as a remedial model. A significant case which led to the development of this doctrine is *Port Elizabeth Municipality v Various Occupiers*.[132] This case concerned an eviction application by the local municipality against unlawful occupiers of private land. The Court discussed the complexities inherent in eviction cases and how it is difficult to reconcile property rights with housing rights. In considering how these complexities can be overcome, the Court stated:

> "The managerial role of the courts may need to find expression in innovative ways. Thus one potentially dignified and effective mode of achieving sustainable reconciliations of the different interests involved is to encourage and require the parties to engage with each other in a pro-active and honest endeavour to find mutually acceptable solutions. Wherever possible, respectful face-to-face engagement or mediation through a third party should replace arms-length combat by intransigent opponents."[133]

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[130] S Liebenberg "Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of 'Meaningful Engagement'" (2012) 12 *AHRLJ* 1 27.

[131] The Constitutional Court has since also employed the meaningful engagement doctrine to remedy other rights violations. See *Head of Department, Department of Education, Free State Province v Welkom High School* 2014 2 SA 228 (CC) para 7 for an example of where this had been extended to education rights disputes. See also S Liebenberg "Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law" (2014) 32 *Nordic Journal of Human Rights* 312 313 and S Liebenberg "Remedial Principles and Meaningful Engagement in Education Rights Disputes" (2016) 19 *Potchefstroom Electronic Law Journal* 1 1.

[132] 2004 12 BCLR 1268 (CC).

[133] Paras 39–41. See also *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) para 87 where the Court, in describing how the unlawful occupation which

Meaningful engagement can be incorporated into the remedial process in one of two possible ways.[134] Meaningful engagement can firstly be employed as a mechanism to democratise the implementation of the remedy. The Court will in such an instance still design the remedy but will order the parties to engage with regard to the implementation of the court's remedy. Meaningful engagement as remedial mechanism can also be employed during the remedial design stage and thus contribute to the democratisation of the remedial enquiry process.[135]

5 4 3 1 Participation at the design stage

The Court utilised meaningful engagement as a remedy for the first time in *Occupiers of 51 Olivia Road v City of Johannesburg* ("*Olivia Road*").[136] This case came before the Constitutional Court by way of appeal against an eviction order granted by the Supreme Court of Appeal against 400 occupiers.[137] The eviction proceedings commenced after the City of Johannesburg issued notices that it would evict people from the so-called "bad buildings" in the inner city because of health and safety risks

led to this case started, expressed its disappointment in the lack of engagement that took place prior to the litigation. The Court stated that it "would have expected officials of the municipality responsible for housing to engage with" the occupiers in order to try and solve the problem before turning to the courts for an eviction order. The subsequent judgment of *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 3 SA 1151 (CC) which dealt with the government's plan to provide temporary housing to people who had been displaced by floods is also important in this context. The Court stated (para 111) that it would have been preferable and congruent with the "principles of good government" if the State first engaged with the concerned group of citizens before the commencement of the project. However, the Court found that the government's conduct in this specific case was reasonable despite the lack of engagement.

[134] See L Chenwi "Democratizing the Socio-Economic Rights-Enforcement Process" in G H Alviar, K Klare & L A Williams (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (2014) 178 184 where the author discusses meaningful engagement with reference to the different stages of rights-enforcement.

[135] 185.

[136] 2008 3 SA 208 (CC).

[137] The eviction order was granted in *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 6 SA 417 (SCA) after the City appealed an order by the High Court in *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 1 SA 78 (W) interdicting the eviction of the occupiers.

in terms of the National Building Regulations and Building Standards Act 103 of 1977. The evictions in this case were part of the Johannesburg Inner City Regeneration Strategy according to which 67 000 poor people stood to be evicted.[138] The applicants opposed the eviction on two main grounds. They firstly argued that the evictions as sought by the City would violate their right to housing as protected by section 26(3). Secondly, they argued that the City failed to progressively realise the right to housing as mandated by section 26(2) of the Constitution.[139]

The Court granted an interim order in the form of a structural interdict just two days after hearing oral argument. This interim order required the parties to "engage with each other meaningfully… in an effort to resolve the differences and difficulties aired in this application in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned".[140] The parties were ordered to "file affidavits… reporting on the results of the engagement".[141] The Court retained jurisdiction, stating that the affidavits would be taken into account in granting a final order. The Court concluded by stating that "further directions" could be issued by the Court if necessary.[142]

The Court justified the meaningful engagement order, stating that the City must have foreseen the possibility that their Inner City Regeneration Strategy would have led to people being left homeless. The Court further stated that the City should have engaged with the occupiers with regard to the probable evictions.[143] The Court supported this statement with reference to *Government of the Republic of South Africa v Grootboom* and *PE Municipality*, in which the Court had stated that occupiers should be engaged before an eviction application is made.[144] Meaningful engagement can

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[138] *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC) para 19.

[139] *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 1 SA 78 (W) paras 10–15.

[140] *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC) para 5.

[141] Para 5.

[142] Para 5.

[143] Para 13.

[144] See *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) para 87 and *Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC) para 39.

thus be seen as a factor that should be considered by a court in order to establish whether the government's conduct is reasonable before an eviction order is granted.[145]

An agreement was accordingly reached between the City and the occupiers, which was subsequently made an order of Court.[146] The agreement included interim measures to be taken by the City which were aimed at making the building safer and more habitable.[147] Agreement was also reached with regard to the City's eviction application. This agreement required the City to provide alternative temporary housing to the occupiers in buildings identified as per the agreement.[148] The agreement further specified how the rent for the temporary housing should be calculated, that permanent housing solutions were to be developed by the City, and that the occupiers should also be consulted in this regard.[149]

What makes this case particularly significant is that the Court elaborated on what meaningful engagement is and how it should take place.[150] The Court stated that it is a "two-way process" in which all parties should "act reasonably and in good faith" and that parties should thus resist from making "non-negotiable, unreasonable demands"

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[145] *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC) para 22. The Court stated that the lack of meaningful engagement before litigation should negatively affect the eviction application. See also K Mclean "Meaningful Engagement: One Step Forward or Two Back? Some Thoughts on Joe Slovo" (2010) 3 *Constitutional Court Review* 223 236 and G Muller "Conceptualising 'Meaningful Engagement' as a Deliberative Democratic Partnership" (2011) 22 *Stell LR* 742 743 in this regard.

[146] *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC) para 27.

[147] Para 25. These measures included "the installation of chemical toilets, the cleaning and sanitation of the buildings, the delivery of refuse bags, the closing of a certain lift shaft and the installation of fire extinguishers".

[148] Para 26.

[149] Para 26.

[150] These directives were given in the context of eviction cases, but could also where appropriate be applied in cases dealing with the violation of other socio-economic rights. See G Muller "Conceptualising 'Meaningful Engagement' as a Deliberative Democratic Partnership" (2011) 22 *Stell LR* 742 756 where the author states that meaningful engagement can be used to enforce socio-economic rights in general. See also B Ray "*Occupiers of 51 Olivia Road v City of Johannesburg*: Enforcing the Right to Adequate Housing Through 'Engagement'" (2008) 8 *HRLR* 703 712 where the author states that meaningful engagement as developed by the Constitutional Court can easily be extended to other contexts.

during the engagement process.[151] The Court further stated that the engagement process should be transparent and that a "complete and accurate account of the [engagement] process" should be provided.[152] Importantly, the Court also stated with regard to engagement in eviction cases that "[p]eople about to be evicted may be so vulnerable that they may not be able to understand the importance of engagement and may refuse to take part in the process. If this happens, a municipality cannot walk away without more".[153]

The Court furthermore commented on the crucial role that context will play in determining the contours of a meaningful engagement process in a given case:

> "[T]he larger the number of people potentially to be affected by eviction, the greater the need for structured, consistent and careful engagement. Ad hoc engagement may be appropriate in a small municipality where an eviction or two might occur each year, but is entirely inappropriate in the circumstances prevalent in the City."[154]

The form and structure of meaningful engagement will thus depend on the specific circumstances of the case and can be done on both an individual and collective level.[155] The Court further stated that people such as council workers should manage

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[151] *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC) paras 14-20. See also G Muller "Conceptualising 'Meaningful Engagement' as a Deliberative Democratic Partnership" (2011) 22 *Stell LR* 742 755-756 in this regard.

[152] *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC) para 21. This requirement is congruent with Sturm's reasoned decision making norm since a detailed account of the engagement process will help the court to establish whether the chosen remedy is based on "reliable factual foundations" and "identified, persuasive norms". S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1411.

[153] *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC) para 15.

[154] Para 19.

[155] L Chenwi "'Meaningful Engagement' in the Realisation of Socio-Economic Rights: The South African Experience" (2011) 26 *SAPL* 128 143. See also B Ray "*Occupiers of 51 Olivia Road v City of Johannesburg*: Enforcing the Right to Adequate Housing Through 'Engagement'" (2008) 8 *HRLR* 703 711 and G Muller "Conceptualising 'Meaningful Engagement' as a Deliberative Democratic Partnership" (2011) 22 *Stell LR* 742 744.

the engagement process since special skills are needed to facilitate engagement between a powerful city and people who are "poor, vulnerable or illiterate".[156]

The meaningful engagement remedy which resulted in a court approved remedy as granted in this case can be considered to have been largely successful. It led to the successful resolution of the conflict between the parties since it "forced the government to encompass opinions of those affected by the decisions".[157] Liebenberg notes in this regard that the engagement process led to "concrete benefits" for the poor and marginalised occupiers.[158]

5 4 3 2 Participation at the implementation stage

Residents of Joe Slovo Community, Western Cape v Thubelisha Homes ("*Joe Slove*") serves as an example of an instance where the parties were ordered to engage only after the remedy was designed by the court.[159] The Constitutional Court had to decide whether or not to grant leave to appeal against an eviction order granted by the Western Cape High Court.[160] A large community consisting of 20 000 people stood to be evicted from the Joe Slovo informal settlement and relocated fifteen kilometers away to Delft in order for the N2 Gateway Project development to commence.[161]

A string of broken promises by the State led to a breakdown of trust between the Joe Slovo community and the authorities. The residents thus resisted their eviction and relocation.[162] The authorities accordingly applied for an eviction order in terms of

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[156] *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC) para 19. See part 5 4 4 1 3 below where the role of the facilitator in participatory remedies is discussed and part 5 4 4 2 where deliberative inequalities are addressed.

[157] M Bishop "Remedies" in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 6 2014) 9-12.

[158] S Liebenberg *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 420.

[159] 2010 3 SA 454 (CC).

[160] *Thubelisha Homes v Various Occupants* WC 10-3-2008 case no 13189/07.

[161] This development formed part of a government programme which was aimed at replacing informal settlements with formal housing in terms of the Breaking New Ground Policy. See S Liebenberg *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 304.

[162] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) paras 30–34.

the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE"). O'Regan J stated that the Court must consider "whether the N2 Gateway Project is reasonable" in terms of section 26 of the Constitution and "whether the processes to implement the plan have been reasonable".[163]

With regard to the implementation, O'Regan J stated that the most important enquiry was whether or not the parties had meaningfully engaged with each other.[164] It was common cause that no adequate and meaningful engagement took place between the parties.[165] However, she concluded that the failure of the municipality to meaningfully engage with the residents did not render the implementation of the plan unreasonable. This conclusion was reached based on the fact that many residents had already co-operated with the municipality and were thus eagerly waiting for their houses to be built while staying in temporary housing.[166] The judge further cited reasons relating to the desperate need for better and formal housing solutions and the fact that some, albeit inadequate, engagement did take place.[167]

However, the Court did order the applicants and the respondents to meaningfully engage with each other with regard to how the eviction order should be implemented.[168] The Court further ordered that the results of the engagement process had to be placed before the Court and that it could subsequently be made an order of court if appropriate.[169] The parties were also instructed to engage with each other with regard to the allocation of permanent housing to those who had been moved to temporary housing and the processes necessary for the relocation.[170]

Liebenberg refers to this incorporation of meaningful engagement into the remedy as an attempt "to remedy some elements of the defects in the engagement process"

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[163] Para 294. See also para 353 where Sachs J discussed reasonableness.
[164] Para 297.
[165] Para 301.
[166] Para 303.
[167] Para 302.
[168] Para 7. The Court specified that the parties should engage about the date of the relocation, timetable of the relocation process, and any other matter to which the parties agree to engage on.
[169] Para 7.
[170] Para 7.

that had taken place prior to litigation.[171] The failure by the Court to find that the inadequate engagement process did not render the eviction and relocation of the residents unjust is regrettable since this indicates a departure from the normative principle that was established in *Olivia Road*.[172] It is also clear from the subsequent discharge of the remedy that the remedy as granted by the Court in this case was inappropriate and ineffective.[173] Both the Court and the State assumed in *Joe Slovo* that *in situ* upgrading was not possible. Engagement prior to the design stage would have allowed more diverse interests to enter the remedial enquiry and both the Court and the State would have been made aware of the fact that *in situ* upgrading was in fact possible. The Court would further also have been made aware of the financial implications of the temporary relocation units and the State's inability to comply with this part of the order.[174] The Court should thus have ordered the parties to engage with each other in order to resolve the issue. The Court could then have retained jurisdiction in order to ensure that the resultant agreement was appropriate in the circumstances.[175]

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[171] S Liebenberg *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 309.

[172] S Liebenberg "Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of 'Meaningful Engagement'" (2012) 12 *AHRLJ* 1 23. This approach by the Court in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) is often criticised by academics for diluting the normative principle of meaningful engagement as developed in *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC). See K Mclean "Meaningful Engagement: One Step Forward or Two Back? Some Thoughts on *Joe Slovo*" (2010) 3 *Constitutional Court Review* 223 and S Liebenberg *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 303–311.

[173] *Residents of Joe Slovo Community v Thubelisha Homes* 2011 7 BCLR 723 (CC) para 6. The Court stated that there were "second thoughts about whether the relocation order of this Court was appropriate and effective, and whether it could be complied with". See also K Mclean "Meaningful Engagement: One Step Forward or Two Back? Some Thoughts on *Joe Slovo*" (2010) 3 *Constitutional Court Review* 223 231 where the author discusses the impact of political events in the Western Cape which saw the African National Congress being unseated as ruling party in the province on the subsequent happenings of this case.

[174] *Residents of Joe Slovo Community v Thubelisha Homes* 2011 7 BCLR 723 (CC) para 6.

[175] It is important to note that the engagement component of the remedy in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) did have a positive impact. Liebenberg notes that meaningful engagement, although in a diluted form, still

5 4 4 Participatory structural interdicts

In order to effectively mitigate traditional concerns as discussed above, meaningful engagement should be incorporated into structural interdict remedies in order to contribute to the *design* of the remedy, and not merely to contribute to the *implementation* of the remedy.[176] During this process, the court should still play a significant role in order to ensure that the remedial design process and the subsequent remedy adhere to the norms for public law remedies.[177] This part of the chapter will propose a participatory structural interdict model which is based on a combination of the meaningful engagement doctrine and Sturm's deliberative model.

5 4 4 1 Pre-negotiation phase

The Court has several functions to fulfil during the pre-negotiation stage of remedial design which are crucial to the success of the participatory structural interdict. The court must firstly determine what would constitute the most effective relief in the specific circumstances of the case. The court must secondly determine the normative parameters of the remedial process in order to provide guidance to the participating parties. The third function of the court in this phase is to facilitate the identification of the different stakeholders and the independent third party facilitator.

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contributed to the "resolution of the dispute" between the parties in this case since it did eventually result in a just outcome which did not require the eviction and relocation of the residents. S Liebenberg "Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of 'Meaningful Engagement'" (2012) 12 *AHRLJ* 1 26. See *Residents of Joe Slovo Community v Thubelisha Homes* 2011 7 BCLR 723 (CC) para 11 where the Court discusses the agreement that had been reached between the Western Cape MEC for Human Settlements, the residents of the Joe Slovo community and the developer according to which *in situ* upgrading would take place and that all of the housing forming part of the new development would be allocated to Joe Slovo residents.

[176] See part 5 2 above in this chapter where the concerns are discussed. This submission is congruent with the consensual remedial formulation model as discussed in part 5 3 5 above.

[177] See chapter two part 2 3 1 for a discussion of the overarching norms for public law remedies.

5 4 4 1 1 Determination of remedial options

Sturm states that the court must firstly endorse the participatory model as the most effective model in the circumstances.[178] The court should do this with reference to the factors as identified in chapter two of this study. The court must thus firstly consider the nature of the right and the nature of the rights infringement.[179] The court must secondly balance all relevant interests against each other.[180] The court must thirdly consider the reason for the rights violation since this will also point towards the appropriateness of a structural interdict.[181] The last two factors to be considered by the court are the practicability of the remedy[182] and the deterrent effect of the remedy.[183]

Consideration of all of the above-mentioned factors will aid the court in deciding whether or not a participatory structural interdict will be the most appropriate and effective relief in the circumstances. Endorsement of the participatory structural interdict with reference to these factors will also contribute to the court's adherence to the norm of reasoned decision making which will further contribute to the legitimacy and effectiveness of the consequent remedy.[184]

It is important to note that a participatory structural interdict as proposed in this study will not be a "quick-fix" solution to systemic socio-economic rights violations.[185] This means that a pure participatory structural interdict might not always be the most effective remedy in systemic cases. For example, a court might conclude, after considering the above-mentioned factors, that the underlying interests in a case are urgent and that immediate relief is required in order to prevent irremediable harm from

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[178] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1429.

[179] See chapter two part 2 3 2 1 and chapter three parts 3 2 1 and 3 2 2.

[180] See chapter two part 2 3 2 2 and chapter three part 3 2 3.

[181] See chapter two part 2 3 2 3 and chapter three part 3 2 4.

[182] See chapter two part 2 3 2 4 and chapter three part 3 2 5.

[183] See chapter two part 2 3 2 5 and chapter three part 3 2 6.

[184] See chapter two part 2 3 1 4 for a discussion of the norm of reasoned decision making.

[185] See chapter four part 4 3 3 where it is argued that detailed interim relief as part of a structural interdict order are warranted in cases where immediate relief is necessary in order to prevent irremediable harm from ensuing.

ensuing.[186] The court can in such a case endorse a participatory structural interdict remedy coupled with a detailed interim interdict component. A detailed and managerial interim order as part of a participatory structural interdict will be justified in urgent cases since it will be aimed at preventing irremediable harm from occurring. A participatory process as proposed by this study can then still proceed in order to rectify the systemic issues which threaten the urgent interests.

5 4 4 1 2 Determination of normative parameters

Before granting a participatory remedy such as meaningful engagement, a court should secondly "articulate the normative parameters of the remedial enterprise".[187] Van der Berg notes that a mere participatory remedy will not constitute effective relief.[188] A participatory process will only be effective if the parties partaking in it are provided with normative guidelines since this will indicate to the State what its duties are and it will indicate to the victims what their entitlements are.[189] A court granting a participatory structural interdict must thus provide a normative interpretation of the infringed right.[190] A lack of normative guidance from the courts will result in the victims of systemic socio-economic rights violations not obtaining all the benefits which the constitutional right is meant to bestow on them.[191] The court does not only inform the parties of their obligations and entitlements when articulating the normative parameters of the remedy in a specific case, but it also lessens the concerns relating

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[186] See chapter three part 3 2 1 2 where urgency of underlying interests is discussed in the context of socio-economic rights violations.

[187] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1428.

[188] S van der Berg *A Capabilities Approach to the Judicial Review of Resource Allocation Decisions Impacting on Socio-Economic Rights* LLD dissertation, Stellenbosch University (2015) 320.

[189] 320.

[190] S Liebenberg "Remedial Principles and Meaningful Engagement in Education Rights Disputes" (2016) 19 *Potchefstroom Electronic Law Journal* 1 11.

[191] S van der Berg "Meaningful Engagement: Proceduralising Socio-Economic Rights Further or Infusing Administrative Law with Substance?" (2013) 29 *SAJHR* 376 386.

to deliberative inequalities between the parties.[192] This will also contribute to the overall efficacy of the remedy since the victims will be better positioned during the negotiations to vindicate their rights effectively, thus meeting Sturm's remediation norm.

The normative parameters are established with reference to the liability norms that have been violated.[193] Sturm states that the normative parameters are established by "defining the targets of the remedial process".[194] For example, if a court finds that prison conditions violate prisoners' socio-economic rights, then the court can specify aspects of the imprisonment that need to be remedied through engagement. Remedial targets in this example might include aspects such as nutrition, health care, sanitation and overcrowding.[195] The deliberations should thus be aimed at solving specifically these issues. Failure to do so might result in a less effective remedy.

Chenwi argues that remedies produced through engagement before a liability judgment is given by the court will result in the parties negotiating without any "normative parameters or knowledge of their legitimate entitlements".[196] Liebenberg agrees that the failure to establish normative parameters and remedial targets will render meaningful engagement less effective. She argues that this is the case since it will be difficult to assess the efficacy of the engagement process and the resultant

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[192] S Liebenberg "Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law" (2014) 32 *Nordic Journal of Human Rights* 312 329.

[193] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1428. It is important to note here that the deliberative process only begins after the court's finding of liability. This was not the case in *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC) since the Court granted the interim structural interdict compelling the parties to meaningfully engage before handing down any form of judgment.

[194] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1429.

[195] 1429.

[196] See L Chenwi "Democratizing the Socio-Economic Rights-Enforcement Process" in G H Alviar, K Klare & L A Williams (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (2014) 178 186. See also L Chenwi "A New Approach to Remedies in Socio-Economic Rights Adjudication: Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others" (2009) 2 *Constitutional Court Review* 371 384.

remedy if there is not an "evaluative framework" against which the engagement outcomes can be assessed.[197]

Mamba v Minister of Social Development ("*Mamba*") serves as an example of where a failure by the Court to articulate the remedial normative parameters led to an unsuccessful engagement order.[198] This case concerned the closure of camps which provided accommodation to refugees who were victims of xenophobic violence which erupted in South Africa in 2008. The Court ordered meaningful engagement, stating that the parties must "engage with each other meaningfully and with all other stakeholders as soon as it is possible… in order to resolve the differences" in this case.[199] The State refused to engage despite the order and went ahead with the closure. Liebenberg argues that it was the failure of the Court to provide guidance as to what the normative parameters of this case were which rendered this engagement order ineffective.[200] This failure by the Court resulted in the State not knowing what its obligations were and the applicants not knowing what they were entitled to.

It is clear from the above discussion that a failure by courts to determine the normative parameters prior to the engagement process will negatively impact the remediation norm as seen in *Mamba* where the victims of the rights violations did not receive any relief at all. Such a failure will also possibly negatively affect the norm of

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[197] S Liebenberg "Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of 'Meaningful Engagement'" (2012) 12 *AHRLJ* 1 23. See also D Brand *Courts, Socio-Economic Rights and Transformative Politics* LLD dissertation, Stellenbosch University (2009) 162–164 where the author similarly argues that engagement should only be ordered after the court has issued the normative parameters. See part 5 4 4 3 1 below in this chapter where the evaluative role of the court in participatory remedial processes is discussed.

[198] Case no CCT 65/08.

[199] Para 1.

[200] S Liebenberg *Socio-Economic Rights - Adjudication under a Transformative Constitution* (2010) 422. This is congruent with Sturm's position, as she argues that normative parameters and defined remedial targets as provided by the court are the "driving force" for the deliberation process. A lack thereof could thus potentially mean that no engagement will take place. S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1429. See also S van der Berg "Meaningful Engagement: Proceduralising Socio-Economic Rights Further or Infusing Administrative Law with Substance?" (2013) 29 *SAJHR* 376 384-385 where the author criticises the engagement order as granted in this case.

reasoned decision making since courts effectively fail to engage with the substantive issues at play.[201]

5 4 4 1 3 Identification of stakeholders and third party facilitator

The court must thirdly identify all the relevant stakeholders whose participation is needed in the engagement process in order to ensure that the norm of participation is adhered to.[202] Sturm states that participation should already start at this stage since the parties should be allowed to participate in the identification process.[203] With regard to who should all be allowed to participate, Sturm states:

> "Under the deliberative model, the net is cast broadly to include the range of individuals directly affected by, responsible for, or in a position to block implementation of a remedy."[204]

Sturm's deliberative model requires the involvement of an independent third party who will fulfil a facilitative role during the negotiations.[205] The court is responsible for supervising the process through which the participants appoint the facilitator.[206] The appointment of an independent facilitator will contribute to the overall efficacy of the remedial process due to several reasons. Firstly, the adversarial determination of liability is an inherently hostile exercise and this conflict between the parties might affect the negotiations negatively.[207] Secondly, the points of contention and parties involved in public interest litigation are often vast and the parties might need assistance with such a complex situation, especially since many participants will be

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[201] L Chenwi "Democratizing the Socio-Economic Rights-Enforcement Process" in G H Alviar, K Klare & L A Williams (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (2014) 178 188.

[202] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1429.

[203] 1429.

[204] 1429. This is congruent with the factor identified in chapter two which requires the entry of diverse interests in the remedial enquiry. See chapter two part 2 3 2 2.

[205] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1430.

[206] 1430. The involvement of a third party facilitator is congruent with the consensual remedial formulation model as discussed in part 5 3 5 above.

[207] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1430.

unfamiliar with deliberative processes aimed at problem solving.[208] Thirdly, a facilitator is needed in order to ensure that the deliberative process complies with the procedural requirements of the court.[209] Lastly, the independent facilitator can also help to ensure that the deliberative process is fair and equal.[210]

5 4 4 2 Negotiation phase: ensuring a fair and equal participatory process

Court supervision during the negotiation phase is necessary to ensure that the process is fair.[211] The principal threat to a fair participatory process and effective remedy is the unequal bargaining power which is an inherent feature of systemic socio-economic rights cases.[212] Applicants in cases where socio-economic rights have been systemically violated will often be poor and marginalised members of society. Negotiations between these applicants and a powerful State might thus not be fair, even if negotiations are in good faith and normative parameters have been set by the court prior to engagement.[213] A remedy which is the product of such an unequal deliberative process might not adhere to the remediation norm and will in such a case not constitute effective relief.

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[208] 1430.

[209] 1430.

[210] 1432. Sturm states that the facilitator must ensure that every participant gets an opportunity to make his or her case and that the negotiations are based on reasoned decision making. These functions of the third party facilitator will contribute to the elimination of unequal bargaining powers.

[211] 1433.

[212] See L Chenwi "A New Approach to Remedies in Socio-Economic Rights Adjudication: Occupiers of 51 Olivia Road and Others v City of Johannesburg and Others" (2009) 2 *Constitutional Court Review* 371 384 where the author discusses this concern in the specific context of meaningful engagement.

[213] See S Liebenberg & K Young "Adjudicating Social and Economic Rights: Can Democratic Experimentalism Help?" in G H Alviar, K Klare & L A Williams (eds) *Social and Economic Rights in Theory and Practice: Critical Inquiries* (2014) 237 251 where the authors discuss deliberative inequalities which arise when poor and marginalised people are parties to the negotiations. Their discussion is a response to the seminal scholarship of Dorf and Sabel, see M C Dorf & C F Sabel "A Constitution of Democratic Experimentalism" (1998) 98 *Colum L Rev* 267 in this regard.

In addressing the bargaining inequalities which accompany participatory remedies in systemic socio-economic rights cases, Liebenberg states:

> "One way of diminishing the impact of bargaining inequalities is for a court to set firm procedural and normative parameters within which engagement processes must occur in a particular case and to maintain on-going supervisory oversight of the engagement process."[214]

Judicial supervision thus places the court in a position to monitor the engagement process. Parties can approach the court whenever they believe that the negotiations are not taking place in good faith or if one of the parties decides to not engage at all.[215] The independent third party facilitator can also play a significant role in this regard since he or she will be involved in the engagement process and will thus be in a good position to identify *mala fide* negotiations or other deliberative inequalities.[216] The facilitator can, upon such identification, approach the court for further directions.[217]

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[214] S Liebenberg "Participatory Approaches to Socio-Economic Rights Adjudication: Tentative Lessons from South African Evictions Law" (2014) 32 *Nordic Journal of Human Rights* 312 329. This is congruent with Sturm who states that deliberative inequalities can be curtailed by situating informal deliberations within a formal framework where the decisions and negotiated conclusions must be based on reason. See S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1436. See also part 5 4 4 1 2 above in this chapter where the determination of normative parameters is discussed as one of the court's functions in a participatory adjudication process.

[215] *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC) para 15.

[216] An independent third party facilitator might have contributed to a more equal and fair negotiation process between the Mayfield community and the municipality who were ordered to meaningfully engage in *Pheko v Ekurhuleni Metropolitan Municipality* 2012 4 BCLR 388 (CC) para 53. See chapter four part 4 3 1 2 where this case is discussed.

[217] See S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1433 where the author states that the facilitator must report to the court.

5 4 4 3 Post-negotiation phase

5 4 4 3 1 Evaluation of proposed remedy

The Constitutional Court has stated that "[i]t will not always be appropriate for a court to approve all agreements entered into consequent upon engagement".[218] The mere fact that the remedy was designed through a participatory process will thus not be enough to ensure that it adheres to the norms and factors for effective relief.[219] The court must accordingly evaluate the appropriateness of the proposed remedy before making it an order of court.[220] The evaluation will require the court to determine whether or not the engagement process complied with the normative requirements as formulated before the participatory process commenced and whether or not the resultant remedy sufficiently addresses the violation in question.[221] This will ensure that the remediation norm is met. A detailed record or minutes should be kept of the engagement proceedings for the court to consult when evaluating the appropriateness of the proposed remedy.[222] The keeping of such a record as a basis for evaluation means that the norm of reasoned decision making is adhered to since participants and the court must base their decisions with regard to what the most appropriate remedy is, on merits and not mere preference.[223]

The remedy should not only be evaluated against the normative requirements as articulated by the court at the start of the process, but should also be evaluated against the factors for effective relief since there is a correlation between the norms and the

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[218] *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 3 SA 208 (CC) para 30.

[219] See chapter two part 2 3 1 for a discussion on the norms of participation, respect for separation of powers, impartiality, reasoned decision making and remediation and chapter two part 2 3 2 for a discussion on the factors that should be considered when designing an effective remedy.

[220] The evaluative function of the court under this model is congruent with the role of the court under the bargaining model as discussed in part 5 3 2 above.

[221] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1431.

[222] 1435. Sturm states (1433) that "[t]he minutes are not verbatim transcripts of the discussions" but must "reflect the interests, values, factual information, proposed solutions, and justifications for particular decisions".

[223] 1435.

factors.[224] The court must thus make sure that the remedy as designed by the parties is capable of addressing the underlying values and interests of the violated right and that it is sufficient to deal with the nature of and reason for the violation. The remedy must furthermore be capable of extending relief to similarly situated people and it must serve as a deterrent for future violations. Lastly, the court must be satisfied that the remedy is capable of being successfully implemented.

The court can refer the remedy back to the participants if there is a problem with either the remedy itself or the participatory process which resulted in the remedy.[225] The court can also impose a remedy on the parties if the participants are unable to design a remedy through engagement which adheres to the normative parameters as provided by the court.[226] The parties should then submit reports to the court indicating whether consensus had been reached with regard the some of the remedial targets. The court will then formulate a remedy aimed at achieving any remaining targets. This court imposed remedy will, however, be based on information gathered during the participatory process.[227] Such a remedy will thus still mitigate the institutional legitimacy and institutional capacity concerns since it is based on information gathered during a diverse participatory process.

5 4 4 3 2 Securing effective implementation of the approved remedy

Courts have to retain jurisdiction over a case to secure implementation of the remedy, even if the remedial plan was designed through a participatory process.[228] This is because systemic socio-economic rights violations are complex and difficult to remedy and even *bona fide* parties might be guilty of non-compliance. Retained jurisdiction will thus enable the court to supervise the process and intervene if

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[224] See chapter two part 2 3 3 where this correlation is discussed.

[225] S P Sturm “A Normative Theory of Public Law Remedies” (1990) 79 *Geo LJ* 1355 1431.

[226] 1431.

[227] 1431.

[228] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009) 178.

necessary, thus making the remedy more effective. This intervention will be done by issuing further directives aimed at rectifying the unsatisfactory implementation.[229]

One of the concerns relating to structural interdict remedies, as noted above in this chapter, is that courts lack the necessary technical and resource capacity to supervise the implementation of remedies.[230] However, a court does not necessarily have to perform the supervisory function itself.[231] There are several alternative possibilities that should be considered. Courts can potentially instruct the South African Human Rights Commission ("SAHRC") to assist with monitoring the implementation of a remedy.[232] Ebadolahi argues that the SAHRC has the necessary "institutional resources and expertise needed to aid courts in implementing structural interdicts".[233] She proposes that the SAHRC should take on a new role. This role will require the SAHRC to work together with State departments against which a structural interdict remedy has been granted. The Commission should be one of the participants involved in designing an appropriate and effective remedy.[234] The most important function under this new role would be for the Commission to monitor the implementation of the

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[229] S van der Berg *A Capabilities Approach to the Judicial Review of Resource Allocation Decisions Impacting on Socio-Economic Rights* LLD dissertation, Stellenbosch University (2015) 299.

[230] See part 5 2 3 above in this chapter where this concern is discussed.

[231] See D Brand *Courts, Socio-Economic Rights and Transformative Politics* LLD dissertation, Stellenbosch University (2009) 135 where the author states, with reference to *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC), that the Constitutional Court would have run the risk of "simply… becom[ing] bogged down in debilitating detail" if it chose to supervise the implementation of its remedy.

[232] M Ebadolahi "Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa" (2008) 83 *NYU L Rev* 1565 1568. See *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) para 97 where the Court discussed the SAHRC's agreement to monitor the implementation of the remedy.

[233] M Ebadolahi "Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa" (2008) 83 *NYU L Rev* 1565 1598. See J Klaaren "A Second Look at the South African Human Rights Commission, Access to Information, and the Promotion of Socioeconomic Rights" (2005) 27 *Human Rights Quarterly* 539 for a discussion of the role of the SAHRC.

[234] M Ebadolahi "Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa" (2008) 83 *NYU L Rev* 1565 1602.

approved remedy.[235] However, the feasibility of this proposal is questionable since the SAHRC would have to radically broaden its already wide mandate, alter its structures and processes, and additional funding would have to be sourced.[236]

The Court could also possibly appoint special masters to supervise the implementation of the structural interdict in cases where socio-economic rights have been systemically violated, as is done in the American context.[237] Erasmus and Hornigold state that these masters could supervise "the transformation of the public institution until such time as the non-compliance [with the constitutional obligation] has been appropriately resolved".[238] The authors argue that there is precedent in South Africa for the appointment of court officers whose role is similar to that of a special master. They refer in this regard to the role of the supervising attorney in an Anton Piller order,[239] the Family Advocate,[240] and the role of the business rescue

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[235] 1603.

[236] 1604. See also *Basic Education for All v Minister of Basic Education* 2014 9 BCLR 1039 (GP) para 78 where the Court rejected the applicant's proposal to order the SAHRC to monitor implementation due to the SAHRC's lack of capacity. See also S van der Berg *A Capabilities Approach to the Judicial Review of Resource Allocation Decisions Impacting on Socio-Economic Rights* LLD dissertation, Stellenbosch University (2015) 342 where the author states that a court ordering an institution such as the SAHRC to supervise the implementation of a remedy "must explicitly define [its] roles and functions" in order to prevent the ineffective monitoring that followed after the *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) judgment.

[237] It is argued in D Erasmus & A Hornigold "Court Supervised Institutional Transformation in South Africa" (2015) 18 *Potchefstroom Electronic Law Journal* 2457 that the American concept of a special master to monitor compliance can easily be introduced to public interest litigation in South Africa.

[238] 2460.

[239] 2478. An Anton Piller order is a "civil search, seizure and preservation of evidence procedure" which is carried out by the sheriff of the court in cases where there is a possibility that evidence might be destroyed. The role of the supervising attorney in such a procedure is to make sure that the order is properly executed and he or she must subsequently file a report with the court stating how the order was carried out and what evidence have been collected.

[240] D Erasmus & A Hornigold "Court Supervised Institutional Transformation in South Africa" (2015) 18 *Potchefstroom Electronic Law Journal* 2457 2478. The Family Advocate is empowered in terms of the Mediation in Certain Divorce Matters Act 24 of 1987 to conduct an investigation in any case involving a minor child and to subsequently furnish the court with a report stipulating what the best interest of the child is.

practitioner.[241] The authors acknowledge that there is no explicit provision for the appointment of a special master in South African law. However, they submit that the remedial powers of the courts in terms of sections 38 and 172(1)(b) are wide enough to grant courts the power to appoint such masters.[242]

Another closely related possibility is for the court to appoint an expert or committee of experts to supervise the implementation of the approved remedy.[243] Bhagwati, writing in the Indian context, states that Indian courts had to develop a methodology for the effective enforcement of orders in social justice cases.[244] This methodology entails the appointment of people such as judicial officers, members of the executive or independent third parties to supervise the implementation phase.[245] The Constitutional Court has recently set precedent within the South African context for this methodology in *Black Sash v Minister of Social Development*.[246] The Court ordered that "independent legal practitioners and technical experts" be appointed to

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[241] D Erasmus & A Hornigold "Court Supervised Institutional Transformation in South Africa" (2015) 18 *Potchefstroom Electronic Law Journal* 2457 2479. The Court can in terms of s128(1)(b)(i) of the Companies Act 71 of 2008 appoint a business rescue practitioner for the "temporary supervision of the company, and of the management of its affairs, business and property".

[242] D Erasmus & A Hornigold "Court Supervised Institutional Transformation in South Africa" (2015) 18 *Potchefstroom Electronic Law Journal* 2457 2482.

[243] See s19bis of the Supreme Court Act 59 of 1959 and the corresponding s38 of the Superior Courts Act 10 of 2013 which might provide a mechanism for courts to do this. These provisions state that courts can, with the permission of the parties, appoint special referees to conduct an enquiry and submit a report to the court. See also D Butterworth, J de Oliviera & C de Moor "Are South African Administrative Law Procedures Adequate for the Evaluation of Issues resting on Scientific Analyses?" (2012) 129 *SALJ* 461 476.

[244] P N Bhagwati "Judicial Activism and Public Interest Litigation" (1985) 23 *Colum J Transnat'l L* 561 577.

[245] 577. See also S van der Berg *A Capabilities Approach to the Judicial Review of Resource Allocation Decisions Impacting on Socio-Economic Rights* LLD dissertation, Stellenbosch University (2015) 140 and in general J Fowkes "How to Open the Doors of the Court - Lessons on Access to Justice from Indian PIL" (2011) 27 *SAJHR* 343.

[246] 2017 ZACC 8 (CC). See chapter four part 4 3 3 2 for an analysis and evaluation of this judgment.

supervise all aspects of the structural interdict and to report back to the Court on the implementation thereof.[247]

Another possible option is to simply refer the task of supervising the implementation of the remedy back to a lower court. The Constitutional Court did this in *Pheko v Ekurhuleni Metropolitan Municipality (No 3)*[248] after various reports were filed in terms of the structural interdict order granted in *Pheko v Ekurhuleni Metropolitan Municipality* ("*Pheko 1*").[249] These reports gave rise to factual disputes regarding the relocation of the communities and the Court held that the High Court was better placed to deal with this. The High Court thus had to supervise the relocation of the community to suitable land in line with the *Pheko 1* order.[250]

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[247] *Black Sash v Minister of Social Development* 2017 ZACC 8 (CC) para 76. Independent experts appointed in this case include high ranking individuals with expert knowledge such as Gill Marcus (former reserve Bank governor), Tim Masela (head of the National Payment System) and Mmamolatelo Mathekga (renowned information technology expert). See K Diseko "Uneasiness over SASSA Card Expiry as ConCourt Appoints Panel of Experts" (11-06-2017) *SASSA* <http://www.sassa.gov.za/index.php/newsroom/271-uneasiness-over-sassa-card-expiry-as-concourt-appoints-panel-of-experts> (accessed 13-06-2017).

[248] 2016 10 BCLR 1308 (CC). See chapter four part 4 3 1 2 where all of the judgments in this litigation series are discussed.

[249] 2012 4 BCLR 388 (CC).

[250] *Pheko v Ekurhuleni Metropolitan Municipality (No 3)* 2016 10 BCLR 1308 (CC) para 46. See also the American case of *Brown v Board of Education* 349 US 294 (1955) in which the United States Supreme Court ordered that American schools had to be desegregated (301). The Court further ordered that the cases be returned to the lower courts, which were better positioned to supervise the desegregation process. The order effectively required of the different school authorities to remedy the situation themselves. However, the Court ordered that the lower courts should "consider the adequacy of any plans the defendants may propose" in order to bring about transformation in the schooling system by desegregating it and that the lower courts would retain jurisdiction over these cases to ensure effective compliance (301). Mbazira states that many school authorities did not comply with court orders dealing with desegregation, but that the ongoing jurisdiction allowed courts to "intervene more intrusively" and to give further directions aimed at ensuring compliance. C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 180. See also F I Michelman "Constitutionally Binding Social and Economic Rights as a Compelling Idea: Reciprocating Perturbations in Liberal and Democratic Constitutional Visions" in H A García, K Klare & L A Williams (eds) *Social and Economic Rights in Theory and Practice* (2015) 277 288-289 where the author makes the same point.

It is clear that there are various options open to South African courts on how to supervise the implementation process of structural interdicts. These alternatives will not only reduce the concern relating to the court's capacity to supervise its own orders, but will also immensely contribute to the remedy being effective since the court can secure implementation of its orders, thus adhering to the norm of remediation and the deterrent factor.

5 5 Conclusion

This chapter investigated how a structural interdict can be best designed in order to constitute effective relief while remaining sensitive to separation of powers, institutional legitimacy and institutional capacity concerns in systemic socio-economic rights cases. The chapter commenced with a discussion of the traditional concerns which arise in socio-economic rights cases. These concerns are intensified where the positive obligations flowing from these rights are enforced through structural interdict remedies. However, it was argued that the separation of powers and democratic legitimacy concerns are, although valid, overstated since structural interdicts, if designed correctly, will contribute to the alleviation of these concerns in socio-economic rights cases. It was furthermore concluded that the concerns relating to institutional capacity are also valid and pressing and need to be taken into account during the remedial design process in order to ensure that the consequent remedy is effective. This was followed by a discussion and analysis of the existing structural interdict models which were all found to be deficient.

The second part of this chapter proposed a participatory model of the structural interdict which is designed to adhere the overarching norms for public law remedies as identified by Sturm. This model proposes that the parties should be ordered to meaningfully engage with each other and all other relevant stakeholders in order to design an effective remedy. The greatest advantage of the deliberative model *vis-à-vis* those models that are deficient in certain respects, is that it allows diverse stakeholders to meaningfully engage with each other within a formal structure. This formal structure is supported by the significant role that is envisioned for the court. The court is responsible for facilitating different aspects of the engagement process and will furthermore be responsible for supervising both the design stage and the implementation stage of the remedy. This active role for the court will ensure that the

remedy adheres to the norms of participation, separation of powers, impartiality, reasoned decision making and remediation. The court's active involvement will further ensure that the eventual remedy is based on a consideration of the relevant factors for effective relief. As a result, a participatory structural interdict combined with judicial supervision can constitute effective relief for the systemic violation of socio-economic rights.

Chapter 6: Conclusion

6 1 Introduction

This thesis has sought to emphasise the critical need for effective relief where socio-economic rights are violated in the context of a highly unequal society plagued by poverty. Litigation is one of the tools used by civil society to combat inequality in order to realise the transformative ethos of the Constitution of the Republic of South Africa, 1996 ("Constitution").[1] However, this litigation can only successfully contribute to the transformation of South African society if courts grant relief that is effective in cases dealing with human rights violations.

This study, focusing specifically on socio-economic rights because of their ostensible potential to transform our society into one based on substantive equality and human dignity,[2] endeavoured to establish the contours of the concept of effective relief and clarify in which circumstances the structural interdict remedy can constitute such relief. The primary contribution of this thesis was to propose how a structural interdict should be designed so as to ensure that it is as effective as possible in cases where socio-economic rights have been systemically violated.

6 2 Findings and recommendations

6 2 1 Defining effective relief for human rights violations in general

Chapter two sought to establish what the concept of "effective relief" entails. This enquiry commenced by investigating the remedial powers of South African courts in cases dealing with the violation of the rights enshrined in the Bill of Rights. As a point of departure, it was noted that the wide remedial powers of the courts, as provided for in sections 38 and 172(1)(b) of the Constitution, have been interpreted by the Constitutional Court as requiring "effective" relief.[3] The study thus proceeded by investigating the contours of this judicially recognised concept.

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[1] See chapter one part 1 1 1 for an explanation of transformative constitutionalism.

[2] S1(a) of the Constitution.

[3] *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 69.

At an overarching, normative level, reliance was placed on the normative theory for public law remedies espoused by Sturm in order to broadly define "effective" relief. It was recommended that in order to constitute effective and legitimate relief, the remedial process must conform to certain normative standards, as distilled from Sturm's theoretical approach. Accordingly, effective relief must allow for diverse participation by interested parties. Furthermore, an effective remedy must ensure that the separation of powers doctrine is respected and that judicial impartiality is maintained. Moreover, an effective remedy must be based on reasoned decision making and must, lastly, sufficiently vindicate the infringed right.

At a more practical level, it was recommended in chapter two that certain factors be considered by a court when designing a remedy in order to ensure that the consequent remedy constitutes effective relief.[4] It was found that the judicial consideration of these factors is essential if the remedy is to adhere to Sturm's norms and thereby constitute effective relief.[5] The first factor that should be considered is the nature of the violated right and the nature of the violation. Courts must secondly balance the diverse interests in a case against each other in order to ensure that the remedy is accepted by those who must live with it, implement it and who are in a position to compromise it. The court must thirdly also consider the reason for the rights violation since the remedy must be capable of addressing this in order to be effective. The last two factors that should be considered are the practicability and the deterrent effect of the remedy.

Chapter two thus concluded that relief will only be effective if it is regarded as legitimate by those affected thereby. However, effective relief encompasses more than acceptance by those impacted by it, and this study therefore did not propose a single definition of this complex concept. Instead, an evaluative framework consisting of Sturm's norms for public law remedies and the factors that should be considered during the remedial phase was elucidated and recommended for judicial use. It was thus ultimately concluded that a remedy will constitute effective relief where all of the enumerated factors are considered and the overarching norms are accordingly adhered to.

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[4] See chapter two part 2 3 2 for a discussion of these factors.

[5] See chapter two part 2 3 3 where the correlation between Sturm's norms and the factors that should be considered in designing just and equitable relief are discussed.

6 2 2 Effective relief for socio-economic rights violations

Chapter three of this study explored the contours of effective relief within the specific context of socio-economic rights violations. It was found that socio-economic rights have been historically neglected in terms of structural resource allocation. It was thereafter demonstrated that violations resulting from non-compliance with the positive obligations flowing from socio-economic rights will often be systemic in nature and difficult to remedy.[6] The study accordingly proceeded by focusing on systemic socio-economic rights violations.

Furthermore, the potential of various constitutional law remedies to constitute effective relief for systemic socio-economic rights was considered. It was shown that declaratory orders and interdicts can constitute effective relief for systemic socio-economic rights violations in certain circumstances. However, it was additionally found that the remedial potential of these remedies is limited to the extent that further litigation will be necessary in cases where there is not satisfactory compliance with court orders.[7] As a result, these remedies may be inappropriate in certain socio-economic rights cases where litigants are poor and marginalised and might thus not have the necessary resources to institute new judicial proceedings.[8] Other remedies considered were constitutional damages and reading in. It was concluded that the limitation of these remedies to constitute effective relief in systemic socio-economic rights cases lies in their narrow field of application.

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[6] See chapter three part 3 2 2 2 where this is argued.

[7] This study also considered the potential of contempt of court proceedings to aid in the alleviation of systemic socio-economic rights violations. It found that this procedure can contribute to the effectiveness of interdictory remedies. However, contempt of court proceedings also requires further litigation which limits its potential in socio-economic rights cases.

[8] W Trengove “Judicial Remedies for Violations of Socio-Economic Rights” (1999) 1 *ESR Review* 8 9.

6 2 3 Potential of the structural interdict to constitute effective relief

The structural interdict remedy has enormous potential to be effective in cases where rights have been systemically violated.[9] This study thus proceeded by determining in which circumstances in systemic cases it would be appropriate for a court to grant a structural interdict remedy. This enquiry proceeded by firstly investigating the nature of this unique remedy. The inherent flexibility of the structural interdict and the ability of a court to retain its jurisdiction when ordering this remedy are the most notable characteristics which make it possible for the structural interdict to effectively remedy systemic violations, which are often characterised by complex issues and polycentric consequences.[10] It was found that structural interdicts will be most appropriate in systemic socio-economic rights cases where the violation was a result of either government recalcitrance or severe government incompetence.[11]

However, it was found that the appropriateness of this remedy in systemic socio-economic rights cases will not only be determined by the reason for the violation, but also by the urgency with which the remedy must be complied with. Roach and Budlender convincingly argue in this regard that the structural interdict will also be appropriate in cases where non-compliance with a court order will lead to irreparable harm.[12] However, it must be noted that cases where the underlying interests are urgent justify strong and detailed structural interdicts in order to prevent irremediable harm.[13]

Case law illustrative of the above-mentioned circumstances under which structural interdicts might be appropriate, was critically analysed and evaluated. Three main conclusions were consequently drawn: First, the circumstances under which the granting of a structural interdict will be appropriate will often overlap. Second, the

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[9] N Swanepoel “Die Aanwending van die Gestruktureerde Interdik in die Suid-Afrikaanse Konstitusionele Regsbedeling: ’n Eiesoortige Beregtingsproses” (2015) 12 *LitNet Akademies* 374 378.

[10] C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice Between Corrective and Distributive Justice* (2009) 180–181.

[11] K Roach & G Budlender “Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable” (2005) 122 *SALJ* 325 349-350.

[12] 333. Urgent cases will require a strongly managerial and detailed structural interdict in order to prevent irremediable harm.

[13] See chapter four part 4 3 3 in this regard.

analysis confirmed that retained jurisdiction by the court is crucial to ensure effective implementation. The retention of supervision is not only required to enable the court to provide further directions if necessary, but the mere fact that the court is supervising the implementation of the remedy might deter government departments or officials who failed to fulfil their positive obligations from doing so again. Third, remedies granted in cases where the court facilitated participation by diverse parties were more effective since all stakeholders responsible for the implementation of the remedies were involved in the remedial process.

6 2 4 Designing an effective structural interdict for systemic socio-economic rights violations

The last aim of this study was to determine how structural interdicts can be best designed by South African courts in order to ensure that it constitutes effective relief. The structural interdict model as proposed by this study is based on two evaluative criteria: First, this model must be sensitive to the traditional concerns which arise when a structural interdict is granted in a case where socio-economic rights have been systemically violated. Second, the remedy must also be effective.

This study identified three main concerns traditionally raised in connection with the structural interdict remedy in socio-economic rights cases. The first two concerns are based on the separation of powers doctrine, and the perceived lack of democratic legitimacy of the judiciary. It was argued that these concerns are, although valid, somewhat overstated since critics of the structural interdict who rely on these concerns do not account for the peculiar nature of the structural interdict as well as the form of democracy which is envisioned by the Constitution.

The third main concern identified in this study relates to the institutional capacity of the judiciary. This concern is especially pressing since a failure to earnestly consider it may negatively affect a court's ability to grant effective relief.[14] In the context of socio-economic rights adjudication in general, proponents of the institutional capacity objection argue that courts are ill-suited to make decisions dealing with social policy and public finance because judges lack the necessary expertise to do so. Another

[14] See chapter five part 5 2 3 where this is argued with reference to *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC) para 58.

dimension of this concern relates to the polycentric nature of matters relating to systemic socio-economic rights violations.[15] This objection is therefore relevant for the remedial phase of adjudication. Judges suffer from an information deficit and can thus not foresee all possible consequences of their decisions. It was concluded that a model structural interdict remedy would thus have to be designed in a way which addresses this information deficit in order to ensure that the remedy is effective.

Chapter five of this study recommended a participatory structural interdict model based on the meaningful engagement doctrine as developed by the Constitutional Court[16] and the deliberative model as developed by Sturm.[17] The participatory model was specifically designed to meet the two evaluative criteria, namely effectiveness and sensitivity to the identified concerns. It was argued that the participatory component of this model can mitigate the identified concerns since parties will participate in every phase of the remedial process, especially during the negotiation phase where the design of the remedy is largely left to the parties. Diverse participation can help to address the concerns enumerated above while contributing to the consequent remedy's effectiveness since the information deficit of the court will be diminished.

The other remedial innovation which is incorporated into this model is the significant facilitative and supervisory role of the court. This study recommends that the court should facilitate the participatory process by fulfilling certain functions during the pre-negotiation phase. The most important function is to set the normative parameters of the remedy. This provides guidance to the parties by elucidating both their entitlements and responsibilities. Moreover, explicit guidance by the court can help counter deliberative inequalities which threaten the efficacy of the remedial process. It is important to note that a pure participatory structural interdict as recommended here will not constitute effective relief in cases where non-compliance can lead to irremediable harm. The court should in such cases couple the participatory structural interdict with a detailed mandatory order aimed at addressing the urgent interests in order for the remedy to adhere to the remediation norm.[18]

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[15] M Pieterse "Coming to Terms with Judicial Enforcement of Socio-Economic Rights" (2004) 20 *SAJHR* 383 392.

[16] See chapter five part 5 4 3 where the development of the meaningful engagement doctrine is briefly discussed.

[17] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1427.

[18] See chapter five part 5 4 4 1 1 where this is discussed.

Based on the conclusions drawn in chapter four, it was further recommended that the court assumes a strong supervisory role during the negotiation and post-negotiation phases. The purpose of this supervisory function during the negotiation phase is to further ensure the fairness of the participatory process. The supervisory role of the court during the post-negotiation phase has two distinct functions. The supervisory role during this phase firstly allows the court to evaluate the proposed remedy.[19] This can be accomplished by using the evaluative framework as developed in chapter two, which consists of the overarching norms for public law remedies as identified by Sturm as well as the more concrete factors which should be considered by a court when determining what the most appropriate relief will be where constitutional rights have been infringed. The court will approve the remedy if satisfied that it complies with the evaluative criteria.

The second function of the court's supervisory role during the post-negotiation phase is to secure the effective implementation of the approved remedy.[20] The supervisory role of the court during the implementation phase raises practical concerns related to the court's capacity to fulfil this role.[21] This study thus proposed a number of possible solutions to this problem. The recommendations made in this regard entail either the delegation of this function to other institutions, experts or committees who must report back to the court for further directions if appropriate, or the referral of the case to a lower court if the structural interdict is granted by one of the apex courts. It is important to note the recommendations made in this regard may require new judicial mechanisms, additional funding or even new legislation in order to be effectively implemented. However, these issues do not fall within the scope of the present study. They require further advanced research incorporating a comparative study of jurisdictions which make use of structural remedies.

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[19] S P Sturm "A Normative Theory of Public Law Remedies" (1990) 79 *Geo LJ* 1355 1431.

[20] See chapter five part 5 4 4 3 2.

[21] M Bishop "Remedies" in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 2 ed (RS 6 2014) 9-36.

6 3 Concluding reflections

Systemic socio-economic rights violations have a major impact on people who rely on the State for their basic socio-economic necessities. Those who are most dependent on reasonable State action are often poor and marginalised. In such cases, the need for effective relief is magnified since institutional deficiencies need to be rectified in order to deter future violations, confer systemic socio-economic benefits on all those who are similarly placed to the litigants, and thus contribute to the transformation of the unequal South African society.

This study has shown that the structural interdict does indeed hold enormous potential to effectively remedy systemic socio-economic rights violations. However, South African courts have thus far been cautious in granting this remedy since it is regarded as an intrusive remedy that should only be used as a "last resort".[22] The participatory structural interdict model developed in this study aims to allay these concerns, since it is specifically designed to promote a collaborative partnership between all branches of government and a wide range of other stakeholders. This remedy should thus be granted in cases where it is appropriate and not just as a last resort when other remedies have already proven to be ineffective. It is thus clear that the courts, the State and civil society must work together to effect the necessary structural reform which will lead to the realisation of socio-economic rights and thus contribute to the transformation of South African society.

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