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Forcing the Court's Remedial Hand: Non-Compliance as a Catalyst for Remedial Innovation

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ABSTRACT: This article juxtaposes the pioneering remedies granted by the Constitutional Court in its trilogy of *Black Sash* judgments with similar innovations forged by our lower courts in the cases of *Madzodzo*, *Linkside* and *Mwelase*. By juxtaposing these cases in this way, their shared remedial predicament is foregrounded: litigation progresses in multiple stages as the court is confronted by the government's continuing failure to comply with its positive constitutional duties, with remedial escalation culminating in a resort to novel mechanisms that seek to compel compliance. In seeking to capture this dynamic in which persistent non-compliance serves as a catalyst for remedial innovation, the article explores two lines of remedial development. First, it considers the emerging use of court-appointed agents to enhance the court's supervisory jurisdiction, comparing the appointment of the Auditor-General and Panel of Experts in *Black Sash I* with the independent auditor in *Madzodzo*, the claims administrator in *Linkside* and the special master in *Mwelase*. Second, the resort to a personal costs order against the Minister in *Black Sash III* is evaluated as a strategy to 'pierce the political veil'; and is compared to the attachment of state assets in *Linkside*. This analysis yields significant insights for our remedial jurisprudence. The front-line remedial experimentation in lower court litigation contextualises the innovations that filter up to the Constitutional Court, thus providing a richer understanding of the cross-fertilisation in remedial development between the different tiers of court. The two lines of remedial development also underscore the range and complexity of reasons for government non-compliance. Judicial responses to persistent non-compliance should not be confined to the individual mental states of public officials, but also target the systemic functioning of institutions that chronically fail to fulfil their constitutional obligations.

KEYWORDS: remedies, supervisory jurisdiction, special master, personal costs, attachment of assets

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I INTRODUCTION

For any remedies enthusiast, the series of *Black Sash* judgments handed down by the Constitutional Court during 2017 and 2018 makes for binge-worthy reading.[1] In this sequel to the *AllPay* series,[2] the Court dealt with the remedial repercussions of an organ of state's non-compliance with the terms of its order in *AllPay Remedy*. *Black Sash I* delivered a stinging judicial rebuke of the South African Social Security Agency's (SASSA) failure to comply with its undertaking to the Court that it would be able to pay social grants from 1 April 2017. The Court expressed its frustration at being forced to escalate remedial measures in order to avert the 'national crisis' caused by SASSA's non-compliance.[3] Forging ahead along the pioneering pathway of the *AllPay Remedy* judgment,[4] the *Black Sash* trilogy broke new ground in our remedial jurisprudence through its innovative response to persistent non-compliance. In *Black Sash I*, the Court reinforced its supervisory jurisdiction with the appointment of the Auditor-General and a Panel of Experts to evaluate compliance with its order and file regular reports with the Court. In *Black Sash II*, the Court appointed a referee to make factual findings as to whether the Minister of Social Development had acted in bad faith when withholding a full disclosure of her conduct to the Court. This culminated in a personal costs order being issued against the Minister in *Black Sash III*.

This article offers an enriched account of these innovative remedies by juxtaposing an analysis of the *Black Sash* trilogy with similar developments in our lower courts. I focus on two particular lines of remedial development, reflecting the two major innovations featured in the *Black Sash* trilogy. First, I consider the emerging use of court-appointed agents to ameliorate supervisory jurisdiction, comparing the appointment of the Auditor-General and Panel of Experts in *Black Sash I* with the independent auditor in *Madzodzo*,[5] the claims administrator in *Linkside*[6] and the

[1] *Black Sash Trust v Minister of Social Development & Others* [2017] ZACC 8, 2017 (3) SA 335 (CC)('*Black Sash I*'); *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening)* [2017] ZACC 20, (2017) 9 BCLR 1089 (CC)('*Black Sash II*'); *Black Sash Trust (Freedom Under Law Intervening) v Minister of Social Development & Others* [2018] ZACC 36 (CC)('*Black Sash III*'). I refer collectively to these decisions as '*Black Sash*'.

[2] The Constitutional Court handed down three judgments on this matter prior to *Black Sash I*: *AllPay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer, South African Social Security Agency & Others* [2013] ZACC 42, 2014 (1) SA 604 (CC)('*AllPay Merits*'); *AllPay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer, South African Social Security Agency & Others (No 2)* [2014] ZACC 12, 2014 (4) SA 179 (CC)('*AllPay Remedy*'); *AllPay Consolidated Investment Holdings (Pty) Ltd & Others v Chief Executive Officer, South African Social Security Agency & Others* [2015] ZACC 7, 2015 (6) BCLR 653 (CC)('*AllPay III*').

[3] *Black Sash I* (note 1 above) at para 51.

[4] On the pioneering contribution of *AllPay Remedy*, see M Finn '*AllPay Remedy*: Dissecting the Constitutional Court's Approach to Organs of State' (2016) 6 *Constitutional Court Review* 258; M du Plessis & A Coutsoudis 'Considering Corruption through the *AllPay* Lens: On the Limits of Judicial Review, Strengthening Accountability, and the Long Arm of the Law' (2016) 133 *South African Law Journal* 755.

[5] *Madzodzo & Others v Minister of Basic Education & Others* [2014] ZAECMHC 5, 2014 (3) SA 441 (ECM) ('*Madzodzo*').

[6] *Linkside & Others v Minister for Basic Education & Others* [2015] ZAECGHC 36('*Linkside*').

special master in *Mwelase*.[7] Second, the personal costs order in *Black Sash III* is evaluated as a strategy to 'pierce the political veil'[8] and compared to the attachment of state assets in *Linkside*.

Although this turn to the lower courts is somewhat counter-intuitive for a journal focused on our apex court, drawing connections between these remedial developments foregrounds the cross-fertilisation between the different tiers of courts. Successful remedial experimentation in our lower courts can filter up to the Constitutional Court, while remedial precedents set by the Constitutional Court can be taken up by our lower courts. Tracing the roots of remedial innovation leads to a deeper understanding of these developments and fosters critical debate about the future direction of our remedial jurisprudence.

The cases covered in my analysis concern different constitutional rights – the right to social security[9] in *Black Sash*, the right to basic education[10] in *Madzodzo* and *Linkside*, and the right to security of land tenure[11] in *Mwelase* – but they share a common remedial predicament. In each case, the litigation progressed in multiple stages as the court was confronted by the government's continuing failure to comply with its positive constitutional duties. This prompted remedial escalation as structural orders became increasingly detailed and prescriptive through each stage of the litigation, culminating in a resort to novel remedial mechanisms in an effort to compel compliance. By juxtaposing accounts of the serialised litigation in *Black Sash*, *Madzodzo*, *Linkside* and *Mwelase*, the article captures this dynamic in which persistent non-compliance served as a catalyst for remedial innovation.

The argument proceeds as follows. Part II sets out the problem that my analysis addresses, namely a remedial predicament of persistent non-compliance. I contextualise *Black Sash* within the spate of recent Constitutional Court cases concerned with accountability for government compliance with constitutional obligations, and accordingly identify a need for greater judicial creativity in the exercise of constitutional remedial power. The heart of the article then considers two recent lines of remedial development: part III identifies the emerging use of court-appointed agents as an amelioration of supervisory jurisdiction, and part IV evaluates personal costs and the attachment of assets as strategies for 'piercing the political veil'. I close in part V by briefly drawing out the implications of this account for our remedial jurisprudence.

II THE REMEDIAL PREDICAMENT OF PERSISTENT NON-COMPLIANCE

Black Sash and the other main cases covered in this article – *Madzodzo*, *Linkside* and *Mwelase* – all see the court confronted with persistent non-compliance in an extended remedial process that requires the government to implement systemic relief. The cases engage different

[7] *Mwelase & Others v Director-General for the Department of Rural Development and Land Reform & Others* [2016] ZALCC 23, 2017 (4) SA 422 (LCC)('*Mwelase LCC*'); *Director-General for the Department of Rural Development and Land Reform & Another v Mwelase & Others; Mwelase & Others v Director-General for the Department of Rural Development and Land Reform & Another* [2018] ZASCA 105, 2019 (2) SA 81 (SCA)('*Mwelase SCA*'). At the time of writing, the appeal against the decision of the Supreme Court of Appeal was set down by the Constitutional Court for hearing on 23 May 2019.

[8] I adopt this metaphor of 'piercing the political veil' from S Woolman 'A Politics of Accountability: How South Africa's Judicial Recognition of the Binding Legal Effect of the Public Protector's Recommendations Had a Catalysing Effect That Brought Down a President' (2018) 8 *Constitutional Court Review* 155, 185 fn 120. See further discussion at part II below.

[9] Section 27(1)(c) of the Constitution of the Republic of South Africa, 1996 ('Constitution').

[10] Constitution s 29(1)(a).

[11] Constitution s 25(6).

constitutional rights – social security, basic education and security of land tenure – but they all concern failures by the government to fulfil those rights as required by the Constitution. The breaches have systemic impact on the rights of particularly vulnerable and disadvantaged groups: the fifteen million people reliant on social assistance;[12] the thousands of children without desks or chairs[13] or even teachers[14] at some of the worst-off schools in the Eastern Cape; and the ten thousand labour tenants who do not enjoy secure rights over land that they and their forebears have farmed for generations.[15] Where the government is required to take positive action to implement structural reform, non-compliance not only undermines the integrity of court orders and erodes respect for the rule of law, but also poses a systemic threat to rights. As non-compliance persists in these cases, court orders become increasingly detailed and prescriptive through each stage of the litigation, culminating in a resort to innovative remedial mechanisms to ensure accountability for full compliance. In short, non-compliance serves as a catalyst for remedial innovation.

Although this remedial predicament is perhaps more familiar to our lower courts than our apex court, accountability for compliance has emerged as a strong theme in recent Constitutional Court decisions.[16] In the last few years, non-compliance with court orders has strained institutional comity in the context of corruption and abuse of state power,[17] institutional dysfunction[18] and disregard for the rule of law.[19] Reflecting on two such cases, *SABC v DA*[20] and *EFF I*,[21] Stu Woolman argues that our apex courts have 'become increasingly frustrated by the failure of the coordinate branches of government or organs of state to abide by even the most *de minimus* understanding of the rule of law'.[22] He identifies a similar sentiment underlying the personal costs order against Minister Dlamini in *Black Sash I*:

[12] *AllPay Merits* (note 2 above) at para 1.

[13] This was the subject of litigation in *Madzodzo* (note 5 above). See *Ready to Learn? A Legal Resource for Realising the Right to Education* (Legal Resources Centre 2013)('*Ready to Learn*') 51.

[14] This was the subject of litigation in *Linkside* (note 6 above). See *Ready to Learn* (note 13 above) at 65–66.

[15] The number of outstanding claims is recorded as being 10 914 in *Mwelase LCC. Mwelase LCC* (note 7 above) at para 9.

[16] Woolman (note 8 above).

[17] The Pandora's box of accountability cases triggered by the Public Protector's 'Secure in Comfort' report on impropriety in security measures installed at former President Jacob Zuma's private Nkandla residence encompass the following matters: *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* [2016] ZACC 11, 2016 (3) SA 580 (CC)('*EFF I*'); *United Democratic Movement v Speaker of the National Assembly* [2017] ZACC 21, 2017 (5) SA 300 (CC); *Economic Freedom Fighters, United Democratic Movement, Congress of the People & Democratic Alliance v Speaker of the National Assembly & President Jacob Zuma (Corruption Watch as Amicus Curiae)* [2017] ZACC 47, 2018 (2) SA 571 (CC)('*EFF II*'). See also *South African Broadcasting Corporation v Democratic Alliance* [2015] ZASCA 156, 2016 (2) SA 522 (SCA) ('*SABC v DA*').

[18] *Black Sash* (note 1 above) is the obvious case in point. See also *Pheko & Others v Ekurhuleni Metropolitan Municipality (No 2)* [2015] ZACC 10, 2015 (5) SA 600 (CC)('*Pheko II*').

[19] Ignoring a High Court order for the arrest of visiting Sudanese President Omar Hassan al-Bashir is the most striking recent example of the government's disregard for the rule of law: *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* [2016] ZASCA 17, 2016 (3) SA 317 (SCA); *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development & Others* [2015] ZAGPPHC 402, 2015 (5) SA 1 (GP). South Africa's notification to withdraw from the International Criminal Court halted the appeal to the Constitutional Court in the Al-Bashir case.

[20] *SABC v DA* (note 17 above).

[21] *EFF I* (note 17 above).

[22] Woolman (note 8 above) at 175–176.

> Holding individual ministers accountable – piercing 'the political veil' – reflects remarkable institutional confidence and indicates that the Court has grown weary of the contempt that government officials have shown for the law and their constitutional obligations. For the Court, these actions go to the very heart of the legal system's legitimacy.[23]

Confronted by intransigent non-compliance and a lack of accountability in political institutions, the Court has shown a greater readiness to grant intrusive remedies when it perceives the rule of law and the integrity of court orders to be at risk.[24] In both *Black Sash I* and *Mhlope*,[25] for example, the Court described the need for 'extraordinary' and 'exceptional' remedies to avoid a 'constitutional crisis'.[26]

While non-compliance has by no means ever been a rarity,[27] the current trend stands in stark contrast to the good track record of compliance that had informed the Court's (misplaced) optimism in *Treatment Action Campaign* that the 'government has always respected and executed the orders of this Court. There is no reason to believe that it will not do so in the present case.'[28] The Court has often referred to its 'broad remedial discretion'[29] to provide just and equitable relief, but its early reluctance to issue supervisory orders unless there were strong reasons to suspect non-compliance meant the breadth of these powers remained unexplored.[30] Even when the Court began to rely on supervisory orders more frequently, they did not meet the kind of persistent and intransigent non-compliance that caused the remedial predicament in *Black Sash*.[31]

Drawing on the principles laid down in *Treatment Action Campaign*, Roach and Budlender have developed a three-level model of remedies to serve as a guide for justifying remedial

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[23] Ibid at 185, fn 120.

[24] The strain on institutional comity caused by non-compliance demonstrates Michael Bishop's prescient insight that, '[u]nlike the more structural elements of the separation of powers, this respect can be lost and earned. If the executive continuously fails to comply with court orders, the Court will feel more comfortable issuing detailed interdicts or supervisory orders'. See M Bishop 'Remedies' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Ed, 2006) Chapter 9 at 75.

[25] *Electoral Commission v Mhlope & Others* [2016] ZACC 15, 2016 (5) SA 1 (CC)('*Mhlope*').

[26] The intervention in *Black Sash I* is described by the Court as 'a remedy that must be used with caution and only in exceptional circumstances' (*Black Sash I* (note 1 above) at para 51), while Mogoeng CJ similarly characterised *Mhlope* as 'an exceptional case that cries out for an exceptional solution or remedy to avoid a constitutional crisis' (*Mhlope* (note 25 above) at para 137).

[27] *Nyathi v MEC for the Department of Health, Gauteng & Another* [2008] ZACC 8, 2008 (5) SA 94 (CC) ('*Nyathi*') at para 124 (Nkabinde J, dissenting, lamented the 'endemic non-compliance with court orders by state officials'). For an early example of Froneman J dealing with non-compliance in the context of social grants, see *Kate v MEC for the Department of Welfare, Eastern Cape* [2004] ZAECHC 25, 2005 (1) SA 141 (SE).

[28] *Minister of Health & Others v Treatment Action Campaign & Others (No 2)* [2002] ZACC 15, 2002 (5) SA 721 (CC)('*Treatment Action Campaign*') at para 129. For an empirical analysis of non-compliance in the early jurisprudence of the Constitutional Court, see D Hausman 'When and Why the South African Government Disobeys Constitutional Court Orders' (2012) 48 *Stanford Journal of International Law* 437–455.

[29] *Janse van Rensburg NO & Another v The Minister of Trade and Industry NO & Another* [2000] ZACC 18, 2001 (1) SA 29 (CC) at para 28. See also *Fose v Minister of Safety and Security* [1997] ZACC 6, 1997 (3) SA 786 (CC) ('*Fose*').

[30] With respect to the Court's preference for a declaratory order over a supervisory order, see *Rail Commuters Action Group & Others v Transnet t/a Metrorail & Others* [2004] ZACC 20, 2005 (2) SA 359 (CC).

[31] *August & Another v Electoral Commission & Others* [1999] ZACC 3, 1999 (3) SA 1 (CC); *Sibiya & Others v Director of Public Prosecutions: Johannesburg High Court & Others* [2005] ZACC 6, 2005 (5) SA 315 (CC); *Nyathi* (note 27 above). See also Bishop (note 24 above) at 189.

escalation.[32] Their model charts the three reasons they identify as commonly underlying a government's non-compliance with constitutional standards: inattentiveness, incompetence and intransigence.[33] While their fundamental insight that each species of governmental failure calls for a different responsive technique is sound, the recent trend of non-compliance highlighted by this article suggests that their typology may need to be refined. Instead of framing non-compliance in psychological terms – inattentiveness, incompetence and intransigence – the cases featured in this article expose the institutional dynamic that often underlies non-compliance with constitutional obligations. In these cases, the retention of supervisory jurisdiction and the reliance on court-appointed agents are best understood as remedial mechanisms aimed at addressing institutional dysfunction and political blockages that threaten rights at a systemic level, rather than punitive measures targeting the recalcitrance of individual public officials.

This approach recognises that non-compliance with remedial orders does not only strain institutional comity but also undermines the normative commitment embodied by the right at stake, harming both successful claimants and similarly situated rights-holders. Remedies 'concretise' rights in the sense that they require courts to respond to social context in a way that gives practical and tangible effect to rights.[34] It is in their crafting of remedies that courts most closely engage with the contextual realities of the state's failure to fulfil its constitutional obligations, including the institutional problems that may underlie such a failure and jeopardise future compliance efforts. Furthermore, on a practical and immediate level, non-compliance severely depreciates the 'cash value' of a right for successful claimants, for whom the practical value of a right amounts to remedial relief that has tangible effect.[35] Non-compliance therefore not only undermines the authority of court orders and the rule of law, but also harms the interests of rights-holders.[36]

Section 172 of the Constitution empowers courts deciding constitutional matters to 'make any order that is just and equitable'.[37] Courts are therefore equipped with broad and discretionary remedial power to craft remedies that enhance accountability for compliance with constitutional obligations.[38] Exercising this broad remedial power, courts need to look beyond the traditional remedial repertoire to find creative ways of overcoming the remedial challenges that threaten compliance with court orders.[39] This imperative is captured by the oft-repeated call for remedial innovation issued by the Court in *Fose* to '"forge new tools" and shape innovative remedies' to ensure rights are vindicated.[40]

[32] K Roach & G Budlender 'Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just and Equitable?' (2005) 122 *South African Law Journal* 325.

[33] Ibid.

[34] Sandra Liebenberg has highlighted the importance of 'responsive remedies' that are attentive to contextual realities and promote transformative responses to socio-economic violations: S Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010).

[35] D Levinson 'Rights Essentialism and Remedial Equilibration' (1999) 99 *Columbia Law Review* 857, 874.

[36] *Pheko II* (note 18 above) at para 27.

[37] Constitution s 172(1)(b).

[38] Bishop (note 24 above); K Hofmeyr, 'A Central-Case Analysis of Constitutional Remedial Power' (2008) 125 *South African Law Journal* 521.

[39] Bishop (note 24 above) at 77; K Roach, 'The Challenges of Crafting Remedies for Violations of Socio-Economic Rights' in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (2009) at 58.

[40] *Fose* (note 29 above) at para 69.

The wave of recent cases exposing a lack of accountability for government compliance with constitutional obligations has prompted the Court to shift gear in its exercise of constitutional remedial power.[41] The Court has emphasised its strong constitutional mandate to enforce rights and the expansive framing of its constitutional remedial powers in discharging this mandate. In *Mhlope*, Mogoeng CJ elaborated on the nature of constitutional remedial power as follows in his judgment for the majority:

> Section 172(1)(b) clothes our courts with remedial powers so extensive that they ought to be able to craft an appropriate or just remedy even for exceptional, complex or apparently irresoluble situations. [...] If justice and equity would best be served or advanced by [a particular] remedy, then it ought to prevail as a constitutionally sanctioned order contemplated in section 172(1)(b).[42]

Madlanga J's separate judgment in *Mhlope* similarly registers this recent emphasis on the expansiveness of the Court's remedial powers, warning that courts should not self-censor their exercise of these powers:

> The outer limits of a remedy are bounded only by considerations of justice and equity. That indeed is very wide. It may come in different shapes and forms dictated by the many and varied manifestations in respect of which the remedy may be called for. The odd instance may require a singularly creative remedy. In that case, the court should be wary not to self-censor. Instead, it should do justice and afford an equitable remedy to those before it as it is empowered to do.[43]

These dicta signal the Court's willingness to draw on its broad remedial powers to find creative ways of providing just and equitable relief. Moreover, given the recent line of cases in which the Court has 'grown weary'[44] and 'become increasingly frustrated'[45] by government non-compliance and disregard for the rule of law, it is likely the Court will more readily resort to innovative remedies that promote greater accountability for compliance with court orders in the future. Parts III and IV of this article identify two lines of remedial development which have emerged from litigation in our lower courts, and which may increasingly find favour with the Constitutional Court as they did in *Black Sash*.

III AMELIORATING SUPERVISORY JURISDICTION: COURT-APPOINTED AGENTS

The first line of remedial development covered in this article concerns the emerging use of court-appointed agents as an extension or enhancement of a court's supervisory jurisdiction. The retention of supervisory jurisdiction is now a well-established remedial mechanism used by our courts to supervise the implementation of a court order and thus ensure compliance with constitutional obligations.[46] *Black Sash*, *Madzodzo*, *Linkside* and *Mwelase* exemplify the type of case which typically calls for supervisory jurisdiction, namely a breach of the state's positive constitutional duties which requires the implementation of systemic relief. The forward-looking nature of positive duties poses a challenge to securing compliance because the implementation

[41] For an analysis of the Court's recent use of structural interdicts, see S Viljoen & S Makama 'Structural Relief – A Context-Sensitive Approach' (2018) 34 *South African Journal on Human Rights* 209.

[42] *Mhlope* (note 25 above) at para 132.

[43] Ibid at para 83.

[44] Woolman (note 8 above) at 185, fn 120.

[45] Ibid at 175.

[46] *Pheko & Others v Ekurhuleni Metropolitan Municipality and Others (No 3)* [2016] ZACC 20, 2016 (10) BCLR 1308 (CC)('*Pheko III*') at para 1. See, generally, Bishop (note 24 above) at 196; Liebenberg (note 34 above); Viljoen & Makama (note 41 above); Roach & Budlender (note 32 above).

of systemic relief is subject to a range of temporal, contextual and institutional contingencies. Most obviously, compliance is contingent on positive steps being taken by those responsible for implementing systemic relief. This paradigmatically takes the form of a remedial plan to be implemented in stages rather than any once-off intervention. While conceptually distinct, a court's task of crafting a remedy and its task of ensuring its enforcement are closely connected in such cases – there is a continuity between the remedy and its enforcement which may require sustained judicial involvement throughout an extended remedial process.

The retention of supervisory jurisdiction enables the parties to return to court without instituting fresh litigation in the event of non-compliance. This procedural function also has the '"important symbolic effect" [of] interject[ing] a continued judicial presence in the affairs of the defendant that detracts from the defendant's sense of institutional autonomy'.[47] This background presence is the foundation of the court's accountability-reinforcing role.[48] However, supervisory jurisdiction also enables the court to engage in a more active oversight role during implementation to fulfil three important remedial functions. First, implementation may entail the prolonged and resource-intensive administration of systemic relief, such as the processing of large numbers of individual claims in a class action. Second, implementation needs to be subject to monitoring so that progress can be assessed and the remedial plan adjusted if need be. Third, reporting requirements can enhance transparency and accountability where there is a need for robust supervision over deadlines for implementing systemic relief.

Where these challenges of administration, monitoring and reporting strain the resources, capacity or competence of the court, comparative law demonstrates how the court may choose to rely on the parties, court-appointed agents or even civil society to assist with these supervisory functions. Public law litigation[49] in the United States has led the way in the use of court-appointed agents to administer and supervise the implementation of systemic relief.[50] Courts have drawn on a diversity of specialist functions in the form of special masters, monitors, mediators, administrators and receivers.[51] Perhaps the most radical shift away from a court-centred approach to supervising the implementation of systemic relief is seen in India. The ongoing public interest litigation on the right to food is a noteworthy example of a truly collaborative approach to the implementation of systemic relief. Beginning with the landmark interlocutory decision of *People's Union for Civil Liberties v Union of India*,[52] the Supreme Court's active and sustained involvement in the implementation of its orders has been 'both a response to and a catalyst for a well-organized, grass-roots activist campaign

[47] R Buckholz, D Cooper, A Gettner & J Guggenheimer 'Special Project: The Remedial Process in Institutional Reform Litigation' (1978) 90 *Columbia Law Review* 784, 817.

[48] C Sabel & W Simon 'Destabilization Rights: How Public Law Litigation Succeeds' (2004) 117 *Harvard Law Review* 1015, 1090.

[49] 'Public law litigation' is a term often used interchangeably with structural or institutional reform litigation in the United States. It refers to a class of litigation involving public institutions and policies, typically in settings such as school desegregation, prison conditions and housing discrimination. On the definition, see further S Sturm 'A Normative Theory of Public Law Remedies' (1991) 79 *Georgetown Law Journal* 1355, 1357. On the rise of public law litigation in the United States, see the seminal texts of A Chayes 'The Role of the Judge in Public Law Litigation' (1975) 89 *Harvard Law Review* 1281; O Fiss 'Foreword: The Forms of Justice' (1979) *Harvard Law Review* 1; L Fuller 'The Forms and Limits of Adjudication' (1979) 92 *Harvard Law Review* 353.

[50] For an excellent overview of the use of court-appointed agents in the United States, see Buckholz, Cooper, Gettner & Guggenheimer (note 47 above).

[51] Ibid at 824–837.

[52] Writ Petition (Civil) 196 of 2001.

of fact-finding, compliance monitoring, and strategic litigation'.[53] While so-called 'umbrella orders' set out the lines of accountability for the implementation of its interim orders, the Supreme Court relies heavily on non-judicial mechanisms for promoting accountability for compliance. Court-appointed commissioners are assisted by a network of state-level advisors to monitor progress with the implementation of systemic relief and resolve disagreements with the government through deliberation.[54]

The analysis below captures the nascent use of court-appointed agents in South African courts. In each case, the court-appointed agent fulfilled a specialised function that was tailored to the unique remedial challenges that emerged as the serialised litigation unfolded, but these functions share a common purpose in ameliorating the court's supervisory jurisdiction. Where the court's supervisory capacity was too limited to provide the necessary degree of oversight or expertise, the court-appointed agents served as independent monitors, auditors or administrators to ensure the implementation of systemic relief. I begin with an analysis of *Black Sash I*, before tracing its remedial roots to three cases brought by the Legal Resources Centre (LRC) in our lower courts: the use of an independent auditor in *Madzodzo* (cited as authority for the appointment of the Panel of Experts in *Black Sash I*), the claims administrator appointed in the *Linkside* class action, and the special master appointed by the Land Claims Court in *Mwelase*.

A A panel of experts: *Black Sash*

1 *The remedial compromise in* AllPay

The *Black Sash* trilogy takes place against the backdrop of the *AllPay* decisions, which concerned an unlawful contract concluded between SASSA and Cash Paymaster Services (Pty) Ltd (Cash Paymaster) to provide services for the payment of social grants for a period of five years. In *AllPay Merits*,[55] the Constitutional Court found that the award of this tender to Cash Paymaster was constitutionally invalid, but grappled with the remedial consequences of this finding in a separate judgment, *AllPay Remedy*,[56] after a further hearing on the question of remedy. The Court had to decide whether the unlawful tender should be set aside or whether 'just and equitable relief' called for a deviation from the 'default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented'.[57] In determining whether to depart from this default 'corrective principle',[58] the Court had to navigate a tension posed by competing remedial imperatives: on the one hand, the need to ensure the rights of grant beneficiaries are protected through timely and uninterrupted payment of their social grants and, on the other hand, the need to provide administrative justice and uphold the rule of law in public procurement.[59] In *AllPay Remedy*, the Court struck a compromise between these competing remedial imperatives, with Froneman J observing that

[53] S Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (2008) at 131.

[54] Ibid at 131–132. See also L Birchfield & J Corsi 'Between Starvation and Globalization: Realizing the Right to Food in India' (2010) 31 *Michigan Journal of International Law* 691.

[55] *AllPay Merits* (note 2 above).

[56] *AllPay Remedy* (note 2 above).

[57] Ibid at para 30.

[58] Ibid at para 32.

[59] Finn (note 4 above) at 261.

'a just and equitable remedy will not always lie in a simple choice between ordering correction and maintaining the existing position. It may lie somewhere in between'.[60]

First, the Court sought to ensure the timely and uninterrupted payment of social grants by suspending its declaration of invalidity in respect of the contract concluded between SASSA and Cash Paymaster. It held that this exercise of discretionary remedial power falls squarely within the Court's authority under s 172(1) of the Constitution, with its explicit textual support for 'an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'[61] In this case, the suspension served to protect the rights of grant beneficiaries rather than its usual function of preserving comity as a dialogic device that shows deference towards the other branches of government.[62] By suspending the declaration of invalidity, the Court exercised its discretionary remedial power to ensure the continued operation of Cash Paymaster's contractual operations and thus also the uninterrupted payment of social grants.[63] Moreover, the Court held that Cash Paymaster assumed constitutional obligations when it entered into the social grants contract with SASSA, acquiring public power for the performance of a public function.[64] This means that Cash Paymaster, functioning as an organ of state, 'cannot simply walk away: it has the constitutional obligation to ensure that a workable payment system remains in place until a new one is operational'.[65] Cash Paymaster's continuing obligation to provide services for the payment of social grants therefore arose from both constitutional and contractual sources, with the latter being sustained through the Court's exercise of remedial power in terms of s 172(1)(b)(ii) of the Constitution.

Second, the Court sought to vindicate the public interest and uphold the rule of law by ordering that the tender process be re-run. This order reflected the Court's insistence that there be accountability and transparency in public procurement but did 'not attempt to impose a final solution on SASSA'.[66] Instead, recognising that SASSA was better placed to assess the impact of a new tender award on the range of interests implicated, the Court left it with the choice of either awarding a new five-year tender or taking over payment of social

[60] *AllPay Remedy* (note 2 above) at para 39.

[61] Constitution s 172(1)(b)(ii).

[62] *Minister of Home Affairs v Fourie* [2005] ZACC 19, 2006 (1) SA 524 (CC)('*Fourie*'). The Court was split as to whether the declaration of invalidity should take immediate effect or be suspended pending legislative reform to regulate same-sex unions. Robert Leckey has recently challenged the prevailing view of suspended declarations of invalidity as a restrained and deferential exercise of remedial discretion by identifying their potential to harm rights-holders and undermine the rule of law. See R Leckey, 'The Harms of Remedial Discretion' (2016) 14 *International Journal of Constitutional Law* 584, 597. Of particular interest in the context of *AllPay Remedy* is his argument that suspended declarations of invalidity require us to rethink our understanding of constitutional supremacy: 'It becomes untenable to claim that the invalidity of legislation flows directly from the "operation" of the Constitution's supremacy clause, rather than from an exercise of judicial discretion' (Ibid at 603). *AllPay Remedy* foregrounds the role of remedial discretion in disrupting the link between constitutional supremacy and a theory of nullity. However, Froneman J's framing of the corrective principle as the 'default position' arguably obscures the fact that the consequences of a constitutional inconsistency are *always* contingent on the exercise of discretionary remedial power. (*AllPay Remedy* (note 2 above) at para 30). See also Hofmeyr (note 38 above) at 523. At the very least, Leckey's insight supports Meghan Finn's call for a more principled approach in justifying departures from Froneman J's corrective principle (Finn (note 4 above) at 261–262).

[63] *AllPay Remedy* (note 2 above) at para 63.

[64] Ibid at para 59. For an excellent analysis of this grounding of Cash Paymaster's continuing constitutional obligations in its status as an organ of state, see Finn (note 4 above).

[65] *AllPay Remedy* (note 2 above) at para 66.

[66] Ibid at para 40.

grants itself.[67] Given the importance of the right to social security and the large number of beneficiaries affected by the public procurement of a social grant service provider, the Court maintained that the need for 'disciplined accountability' justified the imposition of a 'structural interdict requiring SASSA to report back to the Court at each of the crucial stages of the new tender process'.[68] The retention of supervisory jurisdiction to monitor SASSA's progress was a forward-looking accountability mechanism aimed at securing prospective compliance once the suspension of the declaration of invalidity lapsed. In the brief judgment of *AllPay III*, the Court clarified that it maintained supervisory jurisdiction to the exclusion of other courts until completion of the new tender process.[69]

There can be no doubt that the *AllPay* decisions represent a pioneering contribution to our jurisprudence. As du Plessis and Coutsoudis observe, *AllPay* was the first occasion on which the Constitutional Court directly considered a review of a tender, setting out the appropriate review standard and emphasising the instrumental as well as intrinsic value of procedural fairness for guarding against corruption.[70] Their praise rightly goes beyond the finding in *AllPay Merits*, however. The bifurcated procedure in which remedial questions received independent and equal attention to the merits is welcomed as an 'innovative' and 'refreshing' approach worthy of replication in future cases.[71] While remedy is too often consigned to a couple of sentences or paragraphs at the end of a judgment, frequently reading like a postscript or afterthought, *AllPay* dedicates an entire judgment to remedial decision-making. The reasoning in *AllPay Remedy* has been hailed as 'laudable',[72] with its remedial compromise navigating 'an inspired route via media between Scylla and Charybdis'[73] that demonstrates 'judicial creativity ... on full display'.[74]

However, *AllPay* comes with a sting in the tail. In November 2015, SASSA reported to the Court that it would not award a new tender but rather take over the payment of social grants itself from 1 April 2017. On the basis of this undertaking and the progress report filed in support of SASSA's assurance that it would meet the 1 April 2017 deadline, the Court discharged its supervisory jurisdiction over the matter. On the eve of this deadline, however, it emerged that this assurance had not only been 'without foundation' but that the responsible functionaries of SASSA had in fact been aware for a year that it would not be able to comply with its undertaking to the Court.[75]

2 *Justifying an escalated remedial response*

SASSA's non-compliance brought the country to the brink of a systemic breach of the social assistance rights of millions of people.[76] In *Black Sash I*, the Court was tasked with achieving 'the practical avoidance of that potential catastrophe' through the exercise of its discretionary remedial

[67] Ibid at paras 40–46.
[68] Ibid at para 71.
[69] *AllPay III* (note 2 above) at para 16.
[70] Du Plessis & Coutsoudis (note 4 above) at 764–765.
[71] Ibid at 765–768.
[72] Finn (note 4 above) at 258.
[73] Du Plessis & Coutsoudis (note 4 above) at 768.
[74] Ibid at 767.
[75] *Black Sash I* (note 1 above) at paras 5–6.
[76] Ibid at para 43.

powers.[77] Given *AllPay Remedy* had sought to avoid continued reliance on the unlawful contract beyond the period of suspension, Froneman J expressed the Court's frustration with SASSA's intention to enter into a contract with Cash Paymaster without a competitive tender process:

> This Court and the country as a whole are now confronted with a situation where the executive arm of government admits that it is not able to fulfil its constitutional and statutory obligations to provide for the social assistance of its people. And, in the deepest and most shaming of ironies, it now seeks to rely on a private corporate entity, with no discernible commitment to transformative empowerment in its own management structures, to get it out of this predicament.[78]

Resigned to the inevitability of further tolerating an unconstitutional state of affairs, the question to be answered by the Court in *Black Sash I* was *how* the Court could enforce the performance of SASSA and Cash Paymaster's self-acknowledged continuing constitutional obligations.[79] As Froneman J observed, it was 'for the Court in the exercise of crafting a just and equitable remedy to spell out the content of those obligations'.[80]

Before delving into this remedial decision-making, however, the judgment began with a reflection on the nature and significance of the government's non-compliance as the direct cause of the remedial predicament confronting the Court.[81] SASSA and the Minister's forced reply to the Chief Justice's directions painted a picture of institutional dysfunction, with a diffusion of responsibility and shifting of blame among absent and transient incumbents of the office of CEO of SASSA.[82] However, Froneman J's analysis of the evidence goes beyond identifying the 'demonstrated inability of SASSA to get its own affairs in order' as the underlying reason for non-compliance.[83] His characterisation uses language that suggests this incompetence was in fact coupled with intransigence. SASSA is said to have 'walked away from the two fundamental pillars of this Court's remedial order' and 'broken the promise in its assurance to the Court ... which formed the basis of the withdrawal of the supervisory order'.[84] SASSA and the Minister of Social Development showed 'no reciprocal comity'[85] towards the judicial branch and did not even 'deign to inform the Court' of its inability to meet the April 2017 deadline.[86] The judgment of *Black Sash I* is described as the 'judicial part of that [public] accounting'[87] in calling on government to explain its 'conduct [that] puts grant recipients at grave risk and appears to disregard court orders'.[88]

This searing indictment of SASSA's conduct provides an important framing for the Court's justification of its escalated remedial response. Most obviously, exposing SASSA's intransigence allowed the Court to defend its order in *AllPay Remedy* and subsequent discharge of supervisory jurisdiction. Froneman J declared in absolute terms that the 'conduct of the Minister and SASSA had created a situation that no one could have contemplated: the very negation of the

[77] Ibid at para 15.
[78] Ibid at para 8.
[79] Ibid at para 41.
[80] Ibid at para 48.
[81] Ibid at para 9.
[82] Ibid at para 19. See especially the answers in response to the Chief Justice's first direction which attempts to clarify the person responsible on behalf of SASSA for ensuring compliance with *AllPay Remedy*.
[83] Ibid at para 57.
[84] Ibid at para 11.
[85] Ibid at para 13.
[86] Ibid at para 12.
[87] Ibid at para 15.
[88] Ibid at para 58.

purpose of this Court's earlier remedial and supervisory order'.[89] His insistence that the Court had no reason to suspect non-compliance with *AllPay Remedy* was emphatic:

> [T]here was *no constitutional tension* about social grants in November 2015. There was *no legitimate reason* for the Court not to accept the assurance of an organ of state, SASSA, under the guidance of the responsible Minister, that it would be able to fulfil an executive and administrative function allotted to it in terms of the Constitution and applicable legislation. There was *no threatened infringement* to people's social assistance rights and *no suggestion* that the foundation of the Court's remedial order would be disregarded. Now there is.[90]

While it was arguably appropriate for the Court to defer to SASSA in the first instance, this characterisation is overstated as the government's conduct in *AllPay Remedy* did in fact give some cause for concern about compliance. The Court had chastised SASSA in *AllPay Remedy* for having 'adopted an unhelpful and even obstructionist stance'[91] and, citing this bad character reference, remarked in *Black Sash I* that, '[r]egrettably, not much has changed, except that this time around the Minister may have contributed to the continued recalcitrance'.[92]

However, the insistence that non-compliance was not foreseeable added rhetorical force to the Court's defence of the order crafted in *AllPay Remedy* and, more importantly, provided a basis for an escalated remedial response in *Black Sash I*. By foregrounding SASSA's intransigence, the Court is able to cast its remedial intervention as one of reluctance and last resort:

> It is necessary to be frank about this exercise of our just and equitable remedial power. That power is not limitless and the order we make today pushes at its limits. It is a remedy that must be used with caution and only in exceptional circumstances. But these are exceptional circumstances. Everyone stressed that what has happened has precipitated a national crisis.[93]

Great care was therefore taken to frame the Court's innovative remedial order as the necessary response to exceptional circumstances. The government's intransigent non-compliance forced the Court's remedial hand.

3 *Resorting to a panel of experts*

The first part of the remedial order in *Black Sash I* resembled the order in *AllPay Remedy* enforcing the reciprocal constitutional obligations between SASSA and Cash Paymaster for the payment of social grants. Drawing on its remedial powers under s 172(1)(b)(ii) of the Constitution, the Court declared that SASSA and Cash Paymaster are both under continuing constitutional obligations to fulfil the right to social assistance.[94] They were accordingly mandated to ensure the payment of social grants under the same terms and conditions of the previous contract, subject to further safeguards for protecting the personal data of grant beneficiaries and auditing Cash Paymaster's finances.[95] The Court recognised, however, that just and equitable relief required more than simply identifying and circumscribing reciprocal obligations between SASSA and Cash Paymaster.

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[89] Ibid at para 36.
[90] Ibid at para 10 (my emphasis).
[91] *AllPay Remedy* (note 2 above) at para 75, quoted in *Black Sash I* (note 1 above) at para 56.
[92] *Black Sash I* (note 1 above) at para 57.
[93] Ibid at para 51.
[94] Ibid order 4 at para 76.
[95] Ibid orders 6 and 10 at para 76.

The second half of the remedial order in *Black Sash I* therefore features a range of remedial mechanisms to enhance accountability for SASSA's compliance with its constitutional obligations. First, the Court held that SASSA's failure to inform the Court that it would not be in a position to assume the payment of social grants from 1 April 2017 meant that the retention of supervisory jurisdiction alone 'has been proved not to be enough to coax SASSA into doing what it was constituted to do. More is required.'[96] Court supervision was therefore complemented by extensive reporting requirements, with both the Minister and SASSA being mandated to file regular progress reports with the Court detailing compliance with a timetable for deliverables.[97]

Secondly, the Court introduced a bold remedial innovation to facilitate independent monitoring of SASSA's compliance. Not content to rely solely on SASSA's own evaluation of its progress, the Court accepted the argument put forward by the Black Sash Trust about the importance of independent court-appointed monitors.[98] With none of the parties objecting to this proposal,[99] the remedial order made provision for the appointment of the Auditor-General and suitably qualified independent legal practitioners and technical experts to jointly evaluate and report to the Court on SASSA's compliance.[100] This innovative remedy demonstrates institutional responsiveness to the reasons underlying SASSA's non-compliance: the independence of the panel of experts offers much-needed accountability in light of SASSA's intransigence, while their technical and legal expertise compensates for the institutional incapacity which has so far prevented SASSA from assuming payment of social grants itself.

While the Court spent considerable time in *Black Sash I* justifying the need for more intensive oversight over SASSA, surprisingly little was said about the theoretical basis for appointing a Panel of Experts or the significance of this innovation for our remedial jurisprudence. Three cases were cited as authority for this remedial intervention, although these references were consigned to a footnote without further explanation:[101] *Grootboom*,[102] *South African Human Rights Commission*,[103] and *Madzodzo*. While all three cases affirm the importance of reporting and monitoring for ensuring compliance with structural relief, the appointment of an independent auditor in *Madzodzo* is different to the reliance on the South African Human Rights Commission (SAHRC) in the other two cases. In *Madzodo*, as set out below, the independent auditor was a court-appointed agent charged with specific tasks as part of the court's supervisory order. In the other two cases, by contrast, the SAHRC was already involved in the litigation in its capacity as an independent Chapter 9 institution, with the court in each instance simply recognising its constitutional duties and powers to monitor the observance of human rights in the country.[104] In *Grootboom*, the Court simply observed that the SAHRC, as amicus, 'will monitor and, if necessary, report in terms of these powers on the efforts made by the state to comply with its section 26 obligations in accordance with

[96] Ibid at para 62.
[97] Ibid orders 7–9 at para 76.
[98] Ibid at para 71.
[99] Ibid.
[100] Ibid orders 11–12 at para 76.
[101] Ibid at para 71, fn 37.
[102] *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19, 2001 (1) SA 46 (CC)('*Grootboom*').
[103] *South African Human Rights Commission v Minister of Home Affairs: Naledi Pandor* [2014] ZAGPJHC 198('*South African Human Rights Commission*').
[104] Constitution ss 184(1) and (2).

this judgment'.[105] The Court issued a declaratory order rather than a structural interdict, with no mention of the SAHRC's reporting role since it was not part of a court-supervised remedial process.[106] In *South African Human Rights Commission*, the SAHRC was an applicant seeking (and being granted) an order requiring the respondents to provide them with regular reports setting out, among other things, the steps taken to comply with the court order on an ongoing basis.[107] The SAHRC in these cases was therefore not acting as a court-appointed agent as much as simply fulfilling its independent role as a Chapter 9 institution. The remedial roots of *Black Sash I* are therefore more properly found in *Madzodzo*. The next section recovers these roots by drawing out the resonances of *Madzodzo* with the remedial predicament faced in *Black Sash I*.

B An independent auditor: *Madzodzo*

1 *Resorting to an independent auditor*

Madzodzo concerns litigation brought by the LRC against the Department of Education to address the severe furniture shortages in public schools across the Eastern Cape.[108] It began in 2012 with a settlement approved by Griffiths J that was structured to address both the urgent furniture needs of the three individual applicant schools and the systemic shortage of furniture in schools across the province.

Besides requiring the Department to provide adequate desks and chairs to the three applicant schools, the court-approved settlement also set out a detailed plan for providing systemic relief.[109] First, the Department was directed to complete a comprehensive audit to record the furniture shortages of all schools in the Eastern Cape.[110] Second, the court order noted that the Department would 'endeavour to ensure' that the furniture needs established through the audit would be delivered to schools throughout the province by the end of June 2013.[111] This structured relief – involving an auditing stage and a delivery stage – recognised that the Department's progress in implementing systemic relief cannot be monitored unless the scale of the problem is first ascertained. The remedial plan was fortified with extensive reporting requirements involving both the LRC[112] and the affected schools,[113] so that the Department's progress with its audit and actual delivery of furniture could be tracked. Deadlines were attached to these reporting requirements.

In spite of the Department's agreement with this plan for systemic relief, compliance was partial and begrudging. Although the individualised relief was implemented by duly delivering desks and chairs to the three applicant schools,[114] little had been done by the Department to implement the structural relief. Moreover, much of what had been done in this regard was

[105] *Grootboom* (note 102 above) at para 97.

[106] Ibid at para 99.

[107] *South African Human Rights Commission* (note 103 above) at paras 42 and 52.

[108] Having undertaken extensive site visits over a period of several years, the LRC realised the enormity of the problem, noting that 'thousands of children still sit on the ground because their classrooms have no, or an insufficient number of, desks and chairs. They hunch over workbooks and crane their necks to see the blackboard. They often get sick from sitting for hours on cold, dirty floors.' *Ready to Learn* (note 13 above) at 51.

[109] *Madzodzo* Court Order (Griffiths J, 29 November 2012).

[110] Ibid at para 3.

[111] Ibid at para 5.

[112] Ibid at para 3.1 and para 7.

[113] Ibid at para 4.

[114] *Madzodzo* Supplementary Founding Affidavit at para 11.

either ineffectual or inadequate. The LRC was able to establish the extent of non-compliance when the Department submitted an incomplete and inaccurate audit of the province's furniture needs.[115] The Department had not made its task any easier by failing to issue a circular to inform schools of the audit and invite them to submit their furniture needs, as required by the court order.[116] It was therefore unsurprising that many schools had been excluded from the audit and that the furniture needs recorded for those schools that were included in the audit had not been verified.[117] Confidence in the accuracy of the audit was further undermined by glaring data irregularities, with similarities across school districts raising strong suspicions of data falsification.[118]

The Department had failed to comply with the court order in other key respects too. It failed to present the LRC with a comprehensive plan setting out when it would deliver the furniture recorded in the (inaccurate and incomplete) audit,[119] and had also failed to inform those schools due to receive furniture what they would receive and when it would be delivered.[120] Another obstacle to implementation was the inadequacy of the furniture budget, with less than ten per cent of the required R360 million having been allocated to addressing the furniture shortage in 2013/2014.[121] Having failed at this first stage of the plan for implementing structural relief, it was unlikely that the delivery phase of the plan would have been complied with, and indeed, by August 2013 no furniture had been delivered to schools using the R30 million budget that was in place.[122] In short, it was clear that the Department had no reliable mechanism to ascertain or fund the actual furniture needs of schools in the province. Although the reporting requirements did not prevent non-compliance, they nevertheless functioned as a valuable diagnostic tool for detecting the extent and reasons for such non-compliance. By exposing these problems through regular reporting deadlines, the LRC was able to pick up on non-compliance relatively quickly and had clear grounds for returning to court.

The LRC filed an urgent application in August 2013 with the bold request that the Department be directed to appoint and pay an independent auditor.[123] This remedial strategy was not newly envisaged by the LRC, as it had sought the appointment of an independent auditor during the early negotiations leading up to the initial settlement.[124] The Department had strongly resisted this move at the time, however, claiming that an independent auditor was unnecessarily intrusive as it had already undertaken an audit which simply needed updating.[125] Relying on this expression of political will by the government, the LRC conceded that an independent auditor need not be appointed. The inaccurate and incomplete audit subsequently presented by the Department led the LRC to regret this concession, as noted in the Supplementary Founding Affidavit during the second round of litigation in *Madzodzo*:

[115] Ibid at para 24.
[116] Ibid at para 23.
[117] Ibid at paras 31–32.
[118] Ibid at para 33.
[119] Ibid at para 25.
[120] Ibid at para 46.
[121] Ibid at para 12.1.
[122] Ibid at para 12.2.
[123] *Ready to Learn* (note 13 above) at 52.
[124] *Madzodzo* Supplementary Founding Affidavit at para 54.
[125] Ibid at para 55.

'We negotiated in good faith with the respondents and granted their request to leave the audit process in their hands. This has proven a grave error.'[126]

In returning to court, the LRC therefore sought to tailor structural relief more effectively to both underlying reasons for non-compliance, namely the Department's lack of capacity and its increasingly apparent lack of political will. In approving the terms of the second settlement, the High Court effectively agreed with the LRC's argument that:

> [T]he granting of a structured order and the appointment of an independent auditor is within the South African court's power in this matter. Moreover, it is believed that such an order is warranted and necessary in light of the [Department]'s repeated violations of the immediately realisable, constitutional right to a basic education.[127]

The order subsequently granted by Makaula J in September 2013 identified the specific tasks that the independent auditor would have to undertake in order to remedy the Department's failed audit. This involved receiving reports from schools that had been left out of the audit and visiting the schools to verify their furniture needs.[128] The Department was directed to file the revised audit at court and present a comprehensive plan for procuring and delivering the furniture as recorded by the independent auditor to all schools in the province.[129]

2 *Robust supervisory jurisdiction over deadlines*

Following the appointment of an independent auditor to ascertain and verify the furniture needs of schools across the Eastern Cape, the LRC continued to monitor the implementation of systemic relief in *Madzodzo* closely. In spite of the appointment of the independent auditor, the institutional inertia in the Department continued to impede any meaningful progress from being made in meeting the furniture needs ascertained through the audit. By February 2014, children were still sharing desks and sitting on makeshift chairs such as beer crates, empty paint cans and sacks.[130] A third round of litigation therefore ensued and the intransigence displayed by the Department received a sharp judicial rebuke. The judgment of the High Court in *Madzodzo* represents an important milestone in the LRC's furniture litigation as it constituted explicit judicial recognition, in contrast to the implicit recognition of a court-approved settlement, that inappropriate or insufficient school furniture constituted a breach of the state's positive duties in relation to the immediately realisable right to education.[131]

The argument put forward by the Department in defence of their non-compliance with the second settlement was two-fold, and resembled the justifications frequently offered in relation to the failure to fulfil socio-economic rights: firstly, that budgetary constraints and the availability of resources had constrained their ability to satisfy the basic requirements of the right to education immediately and, secondly, that is was unreasonable to impose a fixed deadline for when the furniture needs of all public schools had to be met.[132] In rejecting the first argument, Goosen J relied on the Constitutional Court's holding in *Blue Moonlight*:

[126] Ibid.
[127] *Ready to Learn* (note 13 above) at 52.
[128] *Madzodzo* Court Order (Makaula J, 26 September 2013) at para 4.1.
[129] Ibid at paras 5 and 9.
[130] *Fighting to Learn: A Legal Resource for Realising the Right to Education* (2015) ('*Fighting to Learn*') at 37.
[131] *Madzodzo* (note 5 above) at para 20.
[132] Ibid at para 22.

> The court's determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. In other words, it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations.[133]

The government's failure to ensure that an adequate budget was made available for providing desks and chairs to all schoolchildren in the province was rejected as a defence for not giving immediate effect to the right to education. In respect of the Department's second argument, Goosen J was scathing of the government's resistance to a fixed deadline for furniture delivery because 'the effect of the open-ended approach' that they propose 'offers little or no prospect that the furniture crisis will be addressed in the foreseeable future.'[134] The judgment strongly holds that the immediately realisable nature of the right to education requires a clear timetable for the provision of relief.

Although the Department relied on these defences of budgetary constraints and impossibly short deadlines to claim that their non-compliance was not wilful,[135] Goosen J maintained that these excuses 'must be viewed against the backdrop of what has transpired since this application was first brought by the applicants in October 2012.'[136] Contextualising the ostensible reasons for non-compliance within this longer perspective, he described their reliance on the unreasonableness of the deadlines in the settlement as 'extraordinary in light of the fact that the terms of the order made by Griffiths J were negotiated between the parties and were accepted by the department's officials as reasonable at the time that Griffiths J granted the order'.[137] Goosen J therefore implied that the Department's *post hoc* excuses exposed their lack of any genuine intention to comply with the terms of the settlement. He argued in light of the Department's non-compliance that 'this court is called upon to exercise its supervisory jurisdiction to ensure that the executive authorities charged with responsibility for ensuring the right of access to basic education act reasonably to fulfil their constitutional obligations'.[138]

The remedial order granted by Goosen J accordingly carved out a robust supervisory role for the court over clear deadlines for the implementation of systemic relief. The Department was directed to submit a revised independent audit to the court and the LRC, and to subsequently deliver all the furniture to schools in the province as recorded in the audit within 90 days.[139] By setting this deadline, Goosen J refused to allow the Department's preference for an open-ended approach to undermine the need for a clear timeline for the provision of systemic relief. At the same time, however, Goosen J fine-tuned the remedial order by softening the effect of the 90-day deadline for furniture delivery by allowing for the Department to apply for an extension of time:

> To the extent however, that the exigencies of executing so significant a project may give rise to legitimate delays and therefore a legitimate inability to meet that projected time period, it will be appropriate to order that the time period may be extended at the instance of the respondents,

[133] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another* [2011] ZACC 33, 2012 (2) SA 104 (CC)('*Blue Moonlight*') at para 74.
[134] *Madzodzo* (note 5 above) at para 33.
[135] Ibid at para 31.
[136] Ibid at para 23.
[137] Ibid at para 27.
[138] Ibid at para 36.
[139] Ibid orders 3 and 4 at para 41.

> subject to full disclosure as to the steps already taken to meet the deadline and the projected time period within which the needs will indeed be met.[140]

The resulting order strikes a fine compromise between the insistence on a clear timeline for the provision of systemic relief and the value of flexibility to recalibrate the remedial order in response to unforeseen but legitimate implementation difficulties. This opening for the Department to apply for an extension of the deadline for furniture delivery should not be seen as a weakness in Goosen J's remedy. Rather, recognising the likelihood that compliance would be patchy irrespective of any deadline, it sought to ameliorate the court's supervisory jurisdiction over the deadline by requiring the Department to present a progress report and disclose the reasons for its non-compliance when it applied to the court for an extension. This prerequisite of a full disclosure was aimed at identifying the political blockages that were thwarting compliance.

The value of this approach for increasing transparency and accountability was demonstrated when, unsurprisingly, the Department requested an extension in May 2014.[141] While predictably relying on their staple excuse of budgetary constraints, the Department's justification for an extension also highlighted other key reasons for their partial compliance.[142] Firstly, they had faced a number of legal challenges to their procurement processes, including litigation by the LRC on behalf of the Centre for Child Law concerning unlawful tender processes which resulted in delays in furniture delivery and a considerable waste of money.[143] A second, but related, reason for the delays in furniture delivery was that the repeated irregular procurement processes resulted in the National Treasury assuming control of procurement, leaving the provincial Department in the position of being unable to purchase furniture.[144] By requiring full disclosure before granting an extension, the court was able to exercise its supervisory jurisdiction in response to these obstacles to compliance.

With these institutional problems identified, a remedial plan could be developed to overcome them. In January 2016, the High Court ordered by consent that the Department appoint a school furniture 'task team' to prepare a consolidated list of the province's furniture needs, which would then be verified and subsequently reconciled against deliveries to schools.[145] Through the patient, robust and responsive exercise of supervisory jurisdiction, enhanced by the appointment of an independent auditor and, subsequently, a furniture task team, the systemic furniture needs of public schools across the Eastern Cape have been met.

C A claims administrator: *Linkside*

The use of a court-appointed agent in *Madzodzo* met the need for an independent audit of the province's school furniture shortages. Ascertaining the scale of the systemic problem was an essential first step in the remedial plan over which the court exercised robust supervisory jurisdiction. The *Linkside* class action featured an equally ground-breaking use of a court-appointed agent, but this time the particular function served was administering the large number of individualised claims involved in implementing systemic relief. The two cases

[140] Ibid at para 40.
[141] *Fighting to Learn* (note 130 above) at 37–38.
[142] Ibid at 38.
[143] Ibid.
[144] Ibid.
[145] *Madzodzo* Court Order (Brooks AJ, 26 January 2016).

therefore demonstrate different functions that a court-appointed agent might be required to fulfil in ameliorating the court's supervisory jurisdiction.

The *Linkside* class action was the culmination of another stream of education litigation run by the LRC. This education litigation concerned the allocation and payment of teachers in public schools across the Eastern Cape. The LRC records that, at the time of first launching litigation on this issue in 2012, there were over 4 000 vacant teaching posts but also over 7 000 excess teachers in the Eastern Cape.[146] This simultaneous shortage and surplus of teachers in the province revealed that the Department had significant difficulty complying with the national teacher post-provisioning norms that determine how many teachers should be employed and where they should be placed. The excess number of teachers holding posts at certain schools had the obvious consequence that the Department was overspending on teacher salaries. At the same time, however, schools with severe teacher shortages resorted to appointing temporary teachers at their own expense or through emergency donations from parents.[147]

Over the course of protracted litigation that began with the case of *Centre for Child Law*[148] and culminated in the class action of *Linkside*, the LRC sought to secure relief for schools whose teachers had not been formally appointed by the Department and therefore had not been paid. My discussion here is confined to the *Linkside* class action as it refined and extended the earlier remedial experimentation in *Centre for Child Law*.

The *Linkside* case itself unfolded in two phases. The first phase brought individual relief to particular schools and teachers listed as beneficiaries of the relief granted by the court. The novel aspect of this individualised relief was the use of so-called 'deeming' provisions, whereby a teacher who had been duly identified by the relevant School Governing Body to fill a vacant post and had been performing the functions of that post, would be *deemed* to be appointed. The use of 'deeming' provisions is discussed more fully in part IV below, as it facilitated the subsequent attachment of the Minister's assets when the Department failed to pay those teachers who were deemed to be appointed. For the moment, it suffices to point out that the 'deeming' provisions were effective in providing relief for those individual teachers who were known to the LRC and could thus be identified and listed as beneficiaries of the relief approved by the High Court in the first phase of *Linkside*.

The scope of this relief was too narrow, however, as many teachers at similarly situated public schools did not benefit from the remedy. The first phase of the *Linkside* litigation therefore also launched an opt-in class action as a way of scaling up relief to all affected public schools in the province.[149] In arguing for the certification of a class action, the LRC clearly articulated the rationale for the class action as being to secure systemic relief for the state's failure to appoint and pay teachers:

> It is submitted that, in the absence of a class action mechanism, the claims of schools other than the applicants are unlikely to be enforced. Individual schools are unlikely to secure legal representation to bring their own claims for appointment and payment of educators. Each individual's claim is

[146] *Ready to Learn* (note 13 above) at 65.

[147] Ibid.

[148] *Centre for Child Law & Others v Minister of Basic Education & Others* [2012] ZAECGHC 60, 2013 (3) SA 183 (ECG)('*Centre for Child Law*').

[149] *Fighting to Learn* (note 130 above) at 54. The LRC intervened in its own name as an *amicus curiae* in *Mukkadam v Pioneer (Pty) Ltd and Others* in order to advocate for opt-in class actions, doing so with their litigation strategy in *Linkside* in mind. [2013] ZACC 23, 2013 (5) SA 89 (CC).

> too small to justify litigation to enforce it. A class action is not only the most appropriate means to determine the claims, it is the only way to do so.[150]

The *Linkside* opt-in class action was certified in March 2014, becoming the first class action of its kind in South Africa.[151] It offered an opening for all public schools in the Eastern Cape affected by the government's failure to appoint and pay teachers to join the proceedings and thereby receive relief. While 32 schools had initially approached the High Court requesting vacant permanent posts to be filled and a reimbursement of the R25 million they had paid in teacher salaries, this number rose to an additional 90 schools once the opt-in class action was certified and advertised.[152]

The second phase of *Linkside* concerned relief for all those schools and teachers who had opted into the class action. An important part of the remedial order granted by Roberson J concerned the payment and administration of outstanding teacher salaries. It declared that each of the specific amounts paid by the class member schools to teachers occupying vacant posts constituted a debt against the state.[153] Roberson J recognised that this declaration alone was unlikely to provide effective relief, however, given the government's poor track record in following through with these reimbursements.[154] As covered in part IV below, the Department failed to reimburse schools for the outstanding salaries owed to those individual teachers identified in the first phase, with the result that state assets were attached to satisfy these debts. To avoid resorting to this radical intervention in the second phase of *Linkside*, the LRC requested the appointment of a claims administrator to process the large number of claims by schools that had opted-in to the class action. Roberson J granted this request and appointed a claims administrator to oversee implementation of the court order.[155] The Department was accordingly directed to appoint a firm of registered chartered accountants 'to distribute the amounts payable to individual schools as members of the class and advise the court of their identity'.[156] The Department was required to pay R81 million to the claims administrators so that they could verify each class member's claim and disburse payments according to their respective entitlements.[157]

Roberson J justified the appointment of a claims administrator on the basis of the Supreme Court of Appeal's reference to court-appointed supervisors in *Meadow Glen* as a remedial innovation that courts should consider in future.[158] She pointed to the government's poor track record of compliance in this matter and the added complexity of the class action as evidence for the 'strong likelihood that administrative problems will be encountered in the implementation of payment by the Department'.[159] She therefore held that 'an efficient and independently accountable method of payment is essential' to providing just and equitable

[150] *Linkside* Founding Affidavit at para 149.

[151] See further J Rooney 'Class Actions and Public Interest Standing in South Africa: Practical and Participatory Perspectives' (2017) 33 *South African Journal on Human Rights* 406.

[152] *Fighting to Learn* (note 130 above) at 54.

[153] *Linkside* (note 6 above) order 1.1 at para 1.

[154] Ibid at para 20.

[155] Ibid.

[156] Ibid order 1.3.1 at para 1.

[157] Ibid orders 1.3.2 and 1.3.3 at para 1.

[158] *Meadow Glen Home Owners Association & Others v City of Tshwane Metropolitan Municipality & Another* [2014] ZASCA 209, 2015 (2) SA 413 (SCA)('*Meadow Glen*') at para 35.

[159] *Linkside* (note 6 above) at para 20.

relief.[160] In prioritising the effective administration of payments, Roberson J dismissed the government's objection about the cost implications of appointing a firm of chartered accountants, recognising that 'their charges will not be insubstantial but it is unlikely they will make a significant inroad into the budget of the Department in its overall extent'.[161]

The scale and complexity of relief in the *Linkside* class action meant that the High Court lacked the capacity and expertise to administer the processing of claims. The appointment of a claims administrator therefore ameliorated the court's supervisory jurisdiction by providing the independent, expert and hands-on oversight that was required for the processing of mass claims against the Department. This role assigned to the claims administrator in *Linkside* class action was the first of its kind in our jurisprudence, but the important case of *Mwelase* represents a valuable opportunity for this innovation to be affirmed by our apex court as a tool for ameliorating supervisory jurisdiction where systemic relief entails the processing of mass claims.

D A special master: *Mwelase*

1 *The need for a special master*

Mwelase concerns the ongoing failure by the Department of Rural Development and Land Reform to process claims submitted by labour tenants seeking to obtain ownership of land they have worked on for generations but over which they were prevented from enjoying security of tenure as a result of past racially discriminatory laws and practices. Parliament enacted the Land Reform (Labour Tenants) Act 3 of 1996 (LTA) to enable labour tenants to gain security of tenure as promised in s 25(6) of the Constitution, but the Department has failed to comply with its constitutional imperative to process LTA applications. On its own admission, the Department seriously neglected applications between 2006 and 2015, even to the extent that it ceased processing claims altogether. This failure has perpetuated the tenuous position of over ten thousand labour tenants who have waited in vain to claim the entitlement s 25(6) promises them. Indeed, some of these claimants died before their claims were even gazetted. The litigation in *Mwelase* has itself been protracted, poignantly illustrated by the death of the first applicant, Bhekindlela Mwelase, on 7 November 2018.[162]

The case began in July 2013, when the LRC launched litigation on behalf of the applicants in the Land Claims Court challenging the Department's enduring and systemic failure to process LTA applications. Besides seeking individual relief for the first to fourth applicants, the LRC sought a structural interdict directing the Department to provide statistics detailing the status of all labour tenant claims and report regularly on its progress to the Land Claims Court until all outstanding claims had been settled or referred to the court for resolution. The Department repeatedly failed to provide the relevant statistics, in spite of having agreed to an order that it would collate and present the statistics to the court by March 2015. In April 2015, the Department estimated it would need a further two years merely to capture the basic details of the thousands of outstanding applications. Even before the Constitutional Court in 2019,

[160] Ibid.

[161] Ibid at para 21.

[162] The deceased applicants are represented in the Constitutional Court by their heirs, but their tenuous position is aggravated by the argument put forward by the third respondent (the Hiltonian Society) in the Land Claims Court that their land tenure claims are not transmissible. I refer throughout this analysis to the applicants before the Land Claims Court and Constitutional Court as 'the applicants' even though they were of course the respondents before the Supreme Court of Appeal.

the applicants noted that this collation process still appears not to have been finalised. Similar to the challenge in *Madzodzo*, then, the Department was not able to ascertain the nature and scale of the problem, thus precluding progress from being made in addressing it.

Yet, as in *Madzodzo*, the reporting requirements served an important function in diagnosing non-compliance and prompting the Department to acknowledge its constitutional obligations to implement the LTA. With the poor state of the Department's records exposed, the prospect of compliance was bleak in spite of the Department's renewed commitment to processing applications. The applicants therefore considered the appointment of a special master to be the most effective form of supervision over a problem of this nature and scale. In June 2015, however, the parties were able to reach agreement on a detailed plan of court supervision that would enable the Land Claims Court to monitor the Department's compliance. On the basis of regular reports, the court would be in a position to evaluate the targets set by the Department, assess its progress in reaching them, and recalibrate the implementation plan in the light of unexpected challenges that may arise during the remedial process.

However, this plan for court supervision failed on several fronts. The Department was unable to meet the deadlines set for filing its progress reports, it failed to comply with the implementation plan agreed to, and never responded to the concerns raised by the applicants in relation to the reports. The applicants returned to court with a renewed request for the appointment of a special master but, once again, a settlement was reached in an attempt to forge a mutually acceptable plan for implementation. This settlement agreement, approved by the Land Claims Court in May 2016, sought to foster good faith negotiation between the parties with a view to concluding a Memorandum of Understanding. As an alternative to a special master, the parties would establish a National Forum of NGOs to work together with the Department to implement the LTA. Instead of promoting co-ordination and co-operation between the parties, however, this negotiation agreement led to a breakdown in relations. The applicants claimed that the Minister of Rural Development and Land Reform had refused to negotiate in good faith, wilfully misconstruing the negotiation agreement by unilaterally establishing a National Forum in spite of vigorous objection by the applicants.[163]

After two years of failed court supervision and multiple settlement agreements that met with non-compliance, the applicants returned to the Land Claims Court to push ahead with their request for the appointment of a special master. Although this move was a last resort after persistent non-compliance, the rationale for a special master put forward by the applicants remained unchanged: it offered the most effective means of supervision to co-ordinate the efforts of all parties in achieving the common goal of implementing the LTA. The appointment of a special master was therefore not a punitive measure but rather a mechanism directed at securing effective relief for the applicants.

In a comprehensive and carefully reasoned judgment handed down by Ncube AJ in December 2016, the Land Claims Court held that it was not only desirable but also urgent to enlist the aid of a 'Special Master of Labour Tenants'.[164] In reaching this conclusion, Ncube AJ found that ordinary court supervision had been undermined by the Department's failure to

[163] The Land Claims Court found that the Minister was not in contempt of the negotiation agreement. This finding was upheld by the Supreme Court of Appeal and is also the subject of the appeal pending before the Constitutional Court.

[164] *Mwelase LCC* (note 7 above) at paras 33 and 36.

accurately set implementation targets or provide proper plans for reaching those targets.[165] In setting out four key functions of the special master, the court was clear in characterising the role as being an agent of the court.[166] First, the special master is an independent person who is appointed by, and reports to, the court. Second, his or her duty is to assist the court according to the mandate set by the court. Third, the special master's decision-making powers are limited and always subject to court oversight. Finally, the special master enhances the court's supervisory jurisdiction by bringing additional resources and specialised skills to bear on the case, engaging more comprehensively and informally with the parties than a judge is able to.

Based on this general characterisation of the nature of role of the special master, Ncube AJ identified the specific benefits to be gained from a court-appointed agent in *Mwelase*. On the one hand, the institutional dysfunction which had confounded the Department's progress was said to 'cry out for the intervention of a dedicated and competent person such as a Special Master'.[167] The special master could aid the Department in developing a comprehensive strategy for the efficient processing of claims to ensure that the Director-General plays a proactive role in managing the referral process so that claims are adjudicated expeditiously.[168] On the other hand, Ncube AJ held that a special master would significantly ameliorate the disadvantages that result from the capacity constraints suffered by the Land Claims Court.[169] With only one permanent judge and a few acting judges each term, the Land Claims Court is ill-equipped to provide intensive, sustained court supervision over the implementation of systemic relief. In *Mwelase*, the eight different court appearances before the Land Claims Court had involved six different judges. Acutely aware of the court's capacity constraints and the protracted litigation history in this case, Ncube AJ held that the appointment of a special master would be to the benefit of all concerned.[170]

2 *Misguided objections to a special master*

On appeal, the Supreme Court of Appeal set aside the appointment of a special master. Writing for the majority, Schippers JA (Leach, Seriti and Willis JJA concurring) held that although it was 'unassailable'[171] that the Department had breached its obligations in terms of ss 10, 25(6), 33, 195 and 237 of the Constitution, the appointment of a special master was 'a textbook case of judicial overreach'.[172] The majority's objections to a special master extended beyond its necessity on the particular facts of *Mwelase* to embrace a principled stance against such an appointment ever being an appropriate exercise of remedial power.

In dealing with these objections, I argue that both the case-specific and principled reasons against the appointment of a special master are misguided. My critique is three-pronged, arguing that the majority judgment (1) failed to fully appreciate the remedial predicament faced by the Land Claims Court; (2) misconceived the function envisaged for the special master, prompting misplaced concerns about the separation of powers; and (3) ignored the

[165] Ibid at para 17.
[166] Ibid at para 19.
[167] Ibid at para 29.
[168] Ibid at para 27.
[169] Ibid at para 28.
[170] Ibid.
[171] *Mwelase SCA* (note 7 above) at para 33.
[172] *Mwelase SCA* (note 7 above) at para 51, quoting Mogoeng CJ's separate minority judgment in *EFF II* (note 17 above) at para 223.

clear constitutional authority and precedential basis for the Land Claims Court's true remedial discretion to appoint a special master. This critique is enriched by the compelling reasoning offered by Mocumie JA in her dissent.

The first cause for criticism of the majority judgment lies in its failure to fully appreciate the dynamic of protracted litigation and persistent non-compliance that culminated in the appointment of a special master. Schippers JA pointed to the earlier amenability of the parties to appointing a senior manager within the Department as evidence that a special master was unnecessary;[173] he criticised the Land Claims Court for not launching an inquiry into non-compliance or asserting a more proactive oversight role;[174] and he dismissed the Land Claims Court's capacity constraints as providing justification for reliance on a special master.[175] This characterisation of the litigation history implies that the special master offered a convenient outsourcing of the Land Claims Court's supervisory function, rather than being the last resort after multiple alternatives had met with non-compliance. While the appointment of a special master had been raised by the applicants at the outset of litigation, they only pushed ahead with this request after both ordinary court supervision and negotiation had failed. The majority's dismissal of the Land Claims Court's own articulation of its limited capacity to engage in the kind of active oversight required in this case overlooks the protracted litigation history in this case – eight court appearances before six different judges over the course of several years. The serialised structure of the litigation in *Mwelase* resonates strongly with the tortuous trajectory of litigation in *Black Sash*, *Madzodzo* and *Linkside*, where in each case the court recognised the need for an independent court-appointed agent.

In contrast to the majority, Mocumie JA's dissent is responsive to the broader context in which the litigation in *Mwelase* unfolded. She assessed the appropriateness of the special master in relation to the scale and urgency of what the majority conceded to be 'unassailable' constitutional violations.[176] In short, the remedy was evaluated in light of the nature of the established breach. The Department's track record of non-compliance extended beyond the confines of this litigation, as the claimants had been waiting 22 years for their applications to be processed.[177] Mocumie JA was therefore careful to situate this 'explicit and continued violation of constitutional obligations'[178] against the backdrop of our long and painful history of land dispossession and its perpetuation through the slow pace of land reform that our courts have lamented on numerous occasions.[179]

Second, the majority misconceived the role that a special master would fulfil, giving rise to misplaced concerns about its implications for the separation of powers. Schippers JA described the appointment as 'direct[ing] a complete outsider – the special master – effectively to take

[173] Ibid at para 43.
[174] Ibid at para 45.
[175] Ibid at para 46.
[176] Ibid at para 33 (majority) and para 71 (dissent).
[177] Ibid at para 87.
[178] Ibid at para 74.
[179] Ibid at para 75. See further *In re Amaqamu Community Claim (Land Access Movement South Africa and Others as Amicus Curiae)* 2017 (3) SA 409 (LCC); *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* [2016] ZACC 22, 2016 (5) SA 635 (CC)('*LAMOSA I*'); *Speaker of the National Assembly and Another v Land Access Movement of South Africa and Others* [2019] ZACC 10('*LAMOSA II*'). The pain – shame – of our colonial and apartheid history of land dispossession is most eloquently placed in constitutional context in *Daniels v Scribante and Another* [2017] ZACC 13, 2017 (4) SA 341 (CC).

over the functions and responsibilities of the DG and officials of the Department in relation to labour tenant claims'.[180] In short, he understood the special master to be usurping executive power, fulfilling a function that 'cuts directly across the powers of the DG'.[181] The majority feared that this role would embroil both the special master and the Land Claims Court in the budgetary and operational allocations of the Department.[182] This concern was the subject of Willis JA's concurring judgment, which equated the appointment of a special master with the court 'do[ing] battle with a potentially hugely expensive sword rather than a shield'.[183] His reliance on this metaphor is telling, as it belies a bias towards shielding or protecting rights by enforcing the state's negative duties of restraint, rather than boldly discharging the court's constitutional mandate to provide effective relief where the state has breached its positive duties to fulfil rights.

The majority's concerns about budgetary and operational allocations were largely speculative, based on a misconception of the functions the special master would fulfil. Its characterisation ignores the Land Claims Court's careful delineation of the role of the special master in exercising limited powers according to the mandate set by the court and subject to judicial oversight.[184] Indeed, reliance on a special master should not amount to judicial abdication. And, properly understood, this is not what the Land Claims Court ordered. On the contrary, Ncube AJ was alive to the potential friction that a special master could cause between the judiciary and the executive, and therefore applied his mind in amending the comprehensive draft order provided by applicants to ensure there would be no such intrusion in the functional domain of the executive.[185] While the cost of a special master would likely not be trivial, it offers a more efficient form of judicial oversight in this case than ordinary court supervision, which is also a drain on judicial resources even if these costs are largely hidden. Given the capacity constraints of the Land Claims Court and the history of failed court supervision, the appointment of a special master would enhance the court's supervisory jurisdiction. While cost may influence an assessment of what constitutes just and equitable relief in a particular case, such cost implications should be evaluated in light of what is required for the state to fulfil its constitutional obligations. As Mocumie JA recognised, 'the doctrine of separation of powers is an important one in our democracy, but it cannot be used to avoid the obligation of a court to provide appropriate relief that is just and equitable.'[186] The promise of s 25(6) of the Constitution cannot be realised cost-free, and the fact that the state has so far neglected or mistaken its obligations in this regard is no excuse.[187] By indulging these excuses, the majority allows the state to have its cake and eat it, without paying.

The majority's misconception of the special master's role as being actual implementation, rather than oversight over implementation,[188] was aggravated by a failure to distinguish the

[180] *Mwelase SCA* (note 7 above) at para 48.
[181] Ibid.
[182] Ibid at para 50.
[183] Ibid at para 98.
[184] Ibid at para 19.
[185] Ibid at para 37.
[186] Ibid at para 89, relying on *Fourie* (note 62 above).
[187] *Blue Moonlight* (note 133 above) at para 74.
[188] Schippers JA relied on this distinction in finding that the applicants' reliance on *Fose* (note 29 above) and *Meadow Glen* (note 158 above) was misplaced. See *Mwelase SCA* (note 7 above) at para 47.

diverse forms that this 'foreign institution' takes in the United States.[189] While the functional role of a special master is primarily to assist the court in formulating rather than implementing the remedy,[190] the majority's characterisation is more akin to the intrusive roles performed by an administrator or a receiver, whose respective tasks are to supplement and replace the management of the relevant government institution.[191] Moreover, as Mocumie JA recognised in her dissent, embracing the benefits of a special master does not require the wholesale adoption of a foreign institution but rather the careful adaptation of its core purpose to our unique jurisdictional setting and constitutional context:

> [T]he social circumstances, historical reality of labour tenants, scope of powers of the LCC, specificity of our judicial methods to interpret transforming legislation and our courts' ever available oversight powers would shape the institution of a special master in a way that makes it compatible, specific and appropriate in this context.[192]

While foreign institutions should not be uncritically transplanted into South African law, a receptiveness to alternative approaches can spark creative solutions to shared challenges.

This gestures towards the third shortcoming in the majority judgment, namely its disregard for the clear constitutional authority and precedential basis for the Land Claims Court's discretionary exercise of remedial power to appoint a special master. The majority held that the appointment of a special master could not be justified on the basis of either the Land Claims Court's authority to conduct informal or inquisitorial proceedings[193] or its power to appoint a referee.[194] Yet it failed to engage with the more obvious authority for the appointment of a special master to be found in the broad remedial powers granted to courts under s 172(1)(b) of the Constitution.[195] No attempt is made to explain why the appointment of a special master falls outside the expansive scope of constitutional remedial power as affirmed in recent Constitutional Court cases like *Mhlope*,[196] or to grapple with the implications of its decision for the prospect of securing effective relief for the applicants. While Schippers JA advanced a litany of objections to the appointment of a special master, only two paragraphs of his lengthy judgment are spent justifying the remedial order that replaces the Land Claims Court's order.[197]

Without the constitutional lens of s 172(1)(b), the majority's scrutiny of the Land Claims Court's remedial decision-making was out of focus. The correct perspective, as Mocumie JA set out in her dissent, is 'whether the appellants have made out a case that justifies interfering with the Land Claims Court's true discretion to grant appropriate remedies and to regulate its own process'.[198] Interfering with a specialist court's exercise of remedial discretion is only justified when there has been a 'demonstrable blunder' as a matter of legal principle rather than

[189] Buckholz, Cooper, Gettner & Guggenheimer (note 47 above) at 826–837.

[190] Ibid at 828.

[191] Ibid at 831–837.

[192] *Mwelase SCA* (note 7 above) at para 79.

[193] Section 32(3)(b) of the Restitution of Land Rights Act 22 of 1994. See *Mwelase SCA* (note 7 above) at para 44.

[194] Section 38 of the Superior Courts Act 10 of 2013 and s 28C of the Restitution of Land Rights Act 22 of 1994. See *Mwelase SCA* (note 7 above) at para 52.

[195] For a matter dominated by remedial questions, it is noteworthy that no reference to s 172 of the Constitution is to be found in the Supreme Court of Appeal's judgment.

[196] *Mhlope* (note 25 above) as discussed in part II of this article.

[197] Compare the objections to a special master in *Mwelase SCA* (note 7 above) at paras 38–54 with the justification of the order at paras 67–68.

[198] Ibid at para 80.

judicial preference.[199] The majority's criticism, while forceful, was not correctly framed as a justification for interfering in the Land Claims Court's exercise of true discretion to appoint a special master.

The final aspect of this third critique is borne out by this article's contribution to foregrounding the rich precedential basis for court-appointed agents like a special master. Schippers JA dismissed the case law authority relied on by the applicants for the appointment of a special master and distinguished the Panel of Experts in *Black Sash* as having been tasked with only the very limited role of evaluating SASSA's compliance. This functional distinction between the Panel of Experts in monitoring compliance and the special master in overseeing implementation is not misplaced, but misses the unifying purpose of both kinds of court-appointed agent in enhancing the supervisory jurisdiction of the court. By juxtaposing detailed accounts of *Black Sash*, *Madzodzo*, *Linkside* and *Mwelase*, this article has showcased the different functional roles that can be performed by a court-appointed agent – as monitor, auditor, administrator, special master – while simultaneously drawing out the shared remedial predicament that necessitated the resort to such remedial innovations. Instead of disregarding the lessons to be learnt from lower court litigation, it is hoped that the Constitutional Court's decision in *Mwelase* will demonstrate a deeper understanding of pioneering cases like *Madzodzo* and *Linkside* that have relied on court-appointed agents to perform very similar functions to the role of the special master envisaged by the Land Claims Court.

IV PIERCING THE POLITICAL VEIL: PERSONAL COSTS AND ATTACHMENT OF ASSETS

The second line of remedial development identified in this article concerns a response to non-compliance that involves 'piercing the political veil'. This metaphor seeks to capture the fact that public officials and government departments enjoy a measure of immunity as litigants before the court. When acting in their representative capacity, public officials are not usually affected *personally* by court orders against them. Instead, state resources and state assets are at stake. There are, of course, sound reasons for officials being spared exposure to personal liability for the performance of their representative functions, but there is a concomitant risk that this political veil may protect officials who are guilty of misconduct, gross negligence, incompetence or corruption from the court's remedial reach. Court orders may be rendered ineffective where this conduct is the reason for persistent non-compliance with constitutional obligations. In this part, I consider two different strategies for 'piercing the political veil': first, an order of personal costs against a public official (costs *de bonis propriis*), as used in *Black Sash* against the Minister of Social Development; and second, the mechanism used in *Linkside* to formulate relief as an ascertainable debt against the state that can be satisfied through the attachment of state assets that benefit public officials, such as motor vehicles. These strategies offer innovative alternatives where contempt of court may be too blunt a tool,[200] or may not be available because non-compliance concerns an order *ad pecuniam solvendam* (for the

[199] Ibid at paras 85 and 91. On the standard for interfering with an exercise of remedial discretion by a trial court, see *Florence v Government of the Republic of South Africa* [2014] ZACC 22, 2014 (6) SA 456 (CC) at paras 110–117; *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22, 2015 (5) SA 245 (CC) at paras 82–92; *Mphela & Others v Haakdoornbult Boerdery CC & Others* [2008] ZACC 5; 2008 (4) SA 488 (CC) at para 26.

[200] *Meadow Glen* (note 158 above) at para 35.

payment of a sum of money) or because no officials can be individually identified as having been specifically tasked with the responsibilities in question.[201]

A Personal costs: *Black Sash*

While the award of costs is subject to judicial discretion, it has long been regarded a general rule that public officials should not be held personally liable for costs where, though mistaken, they acted *bona fide* in litigation concerning the performance of their official duties.[202] Prior to *Black Sash*, the Constitutional Court recognised that a personal costs order against a public official was within its powers but was reluctant to do so in several cases where the issue arose.[203] *Black Sash* stands as both a pioneering and paradigmatic case of 'piercing the political veil' through a personal costs order against a top-ranking government official. Not only was it the first time the Constitutional Court has issued costs *de bonis propriis* against a cabinet minister, but it also exemplifies the kind of conduct that can justifiably elicit this 'mark of displeasure' from the Court.[204] Since the litigation history of *AllPay* and *Black Sash I* is covered in part III above, we need only set out here the course followed by the Court to establish whether the Minister of Social Development should be held personally liable for costs.

The issue of costs was left open in *Black Sash I* as the Court found that there were 'reasonable grounds for investigating whether this Court's remedial order was disregarded and, if so, whether this was done wilfully'.[205] As the office-holder bearing primary responsibility for SASSA's compliance with its constitutional obligations, the Minister was identified by the Court as the person who should be called upon to account for SASSA's breach of its undertaking to the Court.[206] The Minister was therefore mandated to file an affidavit with the Court explaining why she should not be joined in her personal capacity and why she should not be personally liable for the costs of the application.[207]

In her affidavit filed with the Court, Minister Dlamini argued against being joined to proceedings and bearing costs in her personal capacity. Her account instead laid the blame for the social grants crisis on officials from SASSA and the Department of Social Development, prompting two of these officials, the CEO of SASSA and the former Director-General of the Department, to enter the fray before the Court in *Black Sash II*.[208] Their accounts contended that Minister Dlamini established parallel decision-making structures and lines of communication that bypassed officials in both SASSA and the Department, in contravention

[201] A Ganesh 'Contempt and Execution in Vindicating the Right to Education' (2014) 29 *South African Public Law* 19, 28; A Klaasen 'The Duty of the State to Act Fairly in Litigation' (2017) 134 *South African Law Journal* 616, 627.

[202] *Coetzeestroom Estate & GM Co v Registrar of Deeds* 1902 TS 216 at 223. See also R Krüger 'The Buck Stops Here: The Eastern Cape High Court and Costs Orders in Litigation Against Organs of State' (2011) 1 *Speculum Juris* 72, 73–74.

[203] *Swartbooi v Brink* [2003] ZACC 25, 2006 (1) SA 203 (CC)('*Swartbooi*'); *Njongi v MEC, Department of Welfare, Eastern Cape* [2008] ZACC 4, 2008 (4) SA 237 (CC). See also *SA Liquor Traders Association v Chairperson, Gauteng Liquor Board* [2006] ZACC 7, 2009 (1) SA 565 (CC)('*SA Liquor Traders*'). The costs award against the MEC was on an attorney-and-client scale rather than *de bonis propriis*. The state attorney was mulcted with costs on both an attorney-and-client scale and *de bonis propriis*.

[204] *Black Sash III* (note 1 above) at paras 14 and 16.

[205] Ibid at para 72.

[206] Ibid at paras 73–74.

[207] Ibid order 13 at para 76.

[208] *Black Sash II* (note 1 above) at paras 1–2.

of government protocol.[209] Faced with this conflicting affidavit evidence in *Black Sash II*, the Court joined the Minister as a party to the proceedings in her personal capacity and set out to disentangle the facts in order to establish whether she should be liable for costs in her personal capacity.[210]

Froneman J once again delivered judgment on behalf of a unanimous Court in *Black Sash II*. First, he drew on a range of constitutional values and principles to breathe new life into the common law rules for granting personal costs against a public official acting in a representative capacity.[211] He identified accountable, responsive, transparent and effective government as the constitutional context within which to apply the test of bad faith and gross negligence to determine the Minister's personal liability for costs.[212]

Second, the Court proposed resolving the conflicting factual accounts through the referral process provided for in s 38 of the Superior Courts Act.[213] The parties subsequently agreed on a referee and the Court appointed the retired Ngoepe JP with a mandate to investigate the factual allegations at issue and report back to the Court with his findings.[214] Following a full investigation, including testimony by Minister Dlamini, Ngoepe JP duly delivered his Inquiry Report to the Court and the parties were invited to file submissions as to whether Minister Dlamini should be held personally liable for costs.[215] This reliance on a court-appointed referee not only assisted the Court in making factual determinations, but also revealed the potential for this referral process to enhance accountability through the public testimony and cross-examination of senior public officials like the Minister.

In *Black Sash III*, the Court characterised the Inquiry Report as 'diplomatic but nevertheless damning' and confirmed its essential factual finding that the Minister did not make a full disclosure to the Court for fear of being joined in her personal capacity and being mulcted personally in costs.[216] Finding the inference of bad faith 'irresistible' in view of these factual findings, Froneman J described the Minister's conduct as being at best 'reckless and grossly negligent'.[217] The Minister did not directly dispute the Inquiry Report but instead raised the belated objection that a personal costs order would offend the separation of powers.[218] This last-ditch attempt to evade responsibility was roundly rejected on the basis of *Black Sash II*, with Froneman J again pointing out that the Minister's culpable conduct was inimical to the Constitutional values she undertook to uphold as a member of the executive.[219] The Court's strong and unanimous stance against wilful non-compliance is clear from its insistence that 'consequences must follow' the Minister's conduct in order to prevent similar disregard for

[209] Ibid at paras 17–19.

[210] Ibid at paras 3–4.

[211] Ibid at paras 5–7.

[212] Ibid at paras 7–9.

[213] Act 10 of 2013. Ibid at para 23. This referral process in terms of s 38 of the Superior Courts Act is an example of a court-appointed agent as discussed in part III of this article, demonstrating yet another function that such an independent, court-appointed agent might perform to enhance the competence and capacity of the court in exercising its supervisory jurisdiction over a matter. See also *Pheko III* (note 46 above) at para 33, fn 33 and 34.

[214] *Black Sash III* (note 1 above) at paras 2–3.

[215] Ibid at para 4.

[216] Ibid at paras 6 and 12.

[217] Ibid at para 12.

[218] Ibid at para 10.

[219] Ibid at paras 10 and 14.

court orders in the future.[220] The Court therefore took the unprecedented step of holding the Minister personally responsible for 20 per cent of the costs of litigation, sending a clear message that her conduct is 'deserving of censure by th[e] Court as a mark of [its] displeasure'.[221] Rubbing salt in the wound, the Court directed the Inquiry Report to be forwarded to the Director of Public Prosecutions for consideration as to whether Minister Dlamini should be prosecuted for perjury in light of the strong suggestion that she lied under oath in affidavits filed with the Court and in oral testimony before the referee's inquiry.[222]

Black Sash bears out important principles underlying an order for costs *de bonis propriis*. First, the Court's description of a personal costs order as a 'mark of displeasure' is a feature it shares with other types of punitive cost orders. At the same time, however, personal costs are distinct from punitive cost orders made against officials in their representative capacity, as the former protects the public purse while the latter burden is ultimately borne by the taxpayer. The *Biowatch* principle[223] has gone a long way to counteract the inequality of arms in litigation involving the state, who as a public-subsidised litigant can afford to drag out litigation.[224] Yet where public officials are indifferent to adverse costs orders against them in their representative capacity – even on a punitive scale – more is required. The personal costs order against such a high-ranking executive official in *Black Sash* demonstrates the Court's willingness to pierce the political veil where other forms of punitive costs orders are inadequate.

Second, *Black Sash* affirms the constitutional basis for ordering costs *de bonis propriis*. In our constitutional context, improper conduct could be grounded in either the institutional competence which can be expected of public officials or in the constitutional obligations which bind such officials.[225] As Froneman J observed, there will be an overlap in most cases – where a personal costs order is justified on the basis of a public official's conduct during litigation which falls short of the expertise and dedication expected of them, it is likely that the Constitution will also be vindicated through such an order.[226] It is not entirely clear from the Court's reasoning in *Black Sash*, however, whether a public official's breach of constitutional duties which merely gives rise to litigation but is not sustained through the course of litigation can, without more, justify a personal costs order. The Minister's conduct before and during the litigation in *Black Sash* rendered such a distinction unnecessary for justifying the Court's personal costs order against her. For this reason, *Black Sash* should not be taken as authority for 'piercing the political veil' merely because a court finds a breach of constitutional duties to be serious.

Indeed, courts should be wary of wielding the threat of personal costs orders to goad public officials into better performance of their constitutional obligations in future. As the Constitutional Court held in *Swartbooi*, seeking to influence public officials in this way is an improper motive for ordering personal costs and trenches on the separation of powers.[227] Instead, personal costs orders are more properly a way to mark the court's displeasure with the

[220] Ibid at para 13.
[221] Ibid at para 14.
[222] Ibid at para 17.
[223] *Biowatch Trust v Registrar Genetic Resources & Others* [2009] ZACC 14, 2009 (6) SA 232 (CC)('*Biowatch*').
[224] Klaasen (note 201 above) at 618.
[225] *Black Sash II* (note 1 above) at para 8.
[226] Ibid at para 8.
[227] *Swartbooi* (note 203 above) at para 25. See also Krüger (note 202 above) at 84.

conduct of public officials *in connection with the litigation*.[228] The *primary* basis for ordering personal costs against a public official should therefore be understood as a breach of their constitutional duty to assist the court during litigation. Section 165(4) of the Constitution requires organs of state to assist and protect the independence, impartiality, dignity, accessibility and effectiveness of courts.[229] This includes placing all relevant and material evidence before the court when engaging in litigation.[230] As *Black Sash* demonstrates, a failure to disclosure such information to the court provides a basis for a personal costs order.

This conduct may involve serious and sustained breaches of constitutional obligations during the course of litigation, particularly where court orders are met with persistent non-compliance, but it is distinct from punitive costs for the breach which gave rise to the litigation in the first place.[231] This distinction is important because the punitive element of a personal costs order lies in it being a *post facto* response to conduct connected with the litigation, rather than a remedial measure aimed at curing the breach.[232] It may sometimes be effective in targeting a political blockage within a non-compliant government department that is caused by the intransigence of particular public officials,[233] but it is more often only a deterrent in the sense that it seeks to preserve the integrity of court orders and foster respect for the rule of law.[234]

B Attachment of assets: *Linkside*

Where the political veil is a barrier to securing compliance such that a punitive, *post facto* personal costs order is premature or inappropriate, more creative remedial mechanisms may be needed. *Linkside* demonstrates one such remedial possibility for piercing the political veil to coerce compliance, namely the attachment of state assets. Until recently, s 3 of the State Liability Act 20 of 1957 prohibited the execution or attachment of state assets in satisfaction of a judgment debt against the government. This was a relic of our pre-constitutional order of parliamentary sovereignty that protected state officials from being held accountable for their failure to comply with court orders.[235] In *Nyathi*, this form of state immunity was found to be unconstitutional and invalid. Section 2 of the State Liability Amendment Act 14 of 2011 now provides a mechanism for execution of state property.

[228] This position accords with Innes CJ's original formulation of the test as being whether the public official's 'conduct *in connection with the litigation* in question [was] *mala fide*, negligent or unreasonable': see *Vermaak's Executor v Vermaak's Heirs* 1909 TS 679, 691 (emphasis added). Froneman J echoes this reasoning in *Black Sash II. Black Sash II* (note 1 above) at para 9 ('[T]ests of bad faith and gross negligence *in connection with the litigation*, applied on a case by case basis, remain well founded' (emphasis added).)

[229] *Matatiele Municipality v President of the Republic of South Africa* [2006] ZACC 2, 2006 (5) SA 47 (CC) at para 107; *SA Liquor Traders* (note 203 above) at paras 48–49.

[230] M du Plessis, G Penfold & J Brickhill *Constitutional Litigation* (2013) at 4; *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* [2004] ZACC 11, 2004 (6) SA 505 (CC) at para 19; *Gory v Kolver* [2006] ZACC 20, 2007 (4) SA 97 (CC) at para 64.

[231] This distinction is pertinent for clarifying the basis of the High Court's personal costs order against the Public Protector in *Public Protector v South African Reserve Bank* [2018] ZAGPPHC 175. At the time of writing, judgment is reserved in this matter before the Constitutional Court.

[232] Klaasen (note 201 above) at 627.

[233] *MEC: Welfare (KZN) v Machi* [2006] ZASCA 78 at para 11.

[234] C Plasket 'Protecting the Public Purse: Appropriate Relief and Costs Orders Against Officials' (2000) 117 *South African Law Journal* 151, 158.

[235] *Nyathi* (note 27 above) at para 18.

Linkside is a leading example of how this mechanism can ensure compliance where a government department lacks the institutional capacity and political agency to take the positive action necessary for providing relief. As discussed in part III above, the second phase of the *Linkside* litigation provided systemic relief through an opt-in class action in which a claims administrator was appointed to process claims against the Department of Education. The focus here, however, is on the first phase of the litigation, which provided individualised relief for 32 applicant schools by attaching state assets in satisfaction of outstanding teacher salaries. In order to facilitate the attachment of state assets, however, the relief first had to be formulated as an ascertainable debt, which in turn required the relevant teachers to be duly appointed by the Department. The failure of the Department to appoint teachers was therefore the first obstacle to overcome, before the second obstacle of enforcing outstanding teacher salaries could be addressed through attachment.

Faced with the Department's persistent failure to appoint or pay teachers, the LRC premised its remedial strategy on a default of non-compliance. Instead of requiring positive action by the government to appoint and pay teachers, the relief requested anticipated non-compliance by being designed to ensure that a *failure* to act would trigger the same result. This was achieved through a so-called 'deeming provision', whereby a teacher who had been duly identified by the relevant School Governing Body to fill a vacant post, and had been performing the functions of that post, would be *deemed* to be appointed. This had the paradoxical (but effective) result that the Department's positive duties were enforced through inaction rather than positive action.

In March 2014, the Department agreed to the terms of settlement proposed by the LRC and the agreement was made an order of the court by Alkema J. The court-approved remedy ordered, firstly, that the 32 applicant schools be reimbursed for the money they had spent paying temporary teachers owing to the Department's failure to appoint or pay them. These debts were declared to be enforceable in terms of the State Liability Act, as amended after *Nyathi*. The order anticipated non-compliance by specifying that, should these reimbursements not be paid within 120 days after the applicant submitted the details of the temporary teachers, the applicant schools were authorised to enforce those debts through execution under s 3 of the State Liability Act.

Secondly, the court-approved remedy declared that the temporary teachers currently filling those positions were *deemed* to be appointed permanently, and the Department was required to provide them with letters of appointment and pay them accordingly. Any outstanding salaries owed to these teachers deemed permanently appointed would also constitute ascertainable debts subject to enforcement through attachment. While the subsequent opt-in class action scaled up relief to similarly situated schools, this first phase of *Linkside* confined relief to the lists of named teachers drawn up by the LRC in consultation with the 32 applicant schools. Only by individualising relief in this way could the outstanding teachers' salaries constitute an ascertainable debt enforceable through the attachment of state assets.

In September 2014, with the outstanding debts still not paid, the LRC issued the Department with a 14-day ultimatum after which time they would issue a writ to seize state assets to satisfy the R28 million debt owed to the 32 schools. Following through with this threat, the subsequent attachment of the movable assets of the Minister and top officials within the Education Department proved highly effective as the outstanding payments were made within days. Piercing the political veil in this way coerced compliance by targeting state assets that affected top public officials personally, such as the attachment of the Minister's motor

vehicle. Unlike contempt of court or personal costs orders, the attachment of state assets does not require proof of *mala fides* on the part of individual public officials. As Ganesh observes in this regard, the attraction of attachment is that it is 'relatively cold and clinical, and does not depend upon the composite mental state of the government department or its employees'.[236] Whether non-compliance stems from intransigence or incompetence, attachment offers speedy and effective relief for judgment debts against the state.[237]

V CONCLUSION

This article has showcased two lines of remedial development that are represented by the pioneering innovations in *Black Sash*: first, the nascent use of court-appointed agents to ameliorate supervisory jurisdiction and, second, the piercing of the political veil through personal costs orders against public officials and the attachment of state assets. In juxtaposing an account of *Black Sash* with similar remedial innovations featured in *Madzodzo*, *Linkside* and *Mwelase*, the article yields two particularly significant insights for the future of our remedial jurisprudence.

Firstly, the juxtaposition of *Black Sash* with lower court litigation foregrounds the cross-fertilisation in remedial development between different tiers of court. On the one hand, guidance for remedial innovation has filtered down from the Constitutional Court to our lower courts. The Court has issued clear authority for remedial development, identifying the 'particular responsibility' that obliges courts to '"forge new tools" and shape innovative remedies' where they are needed to provide effective relief.[238] For example, both the Constitutional Court and the Supreme Court of Appeal have suggested the potential benefit of court-appointed agents,[239] but much of the front-line experimentation in this regard is found in lower court litigation, as demonstrated by *Madzodzo*, *Linkside* and *Mwelase*. On the other hand, this remedial experimentation and innovation in our lower courts influences remedial development in the Constitutional Court. Some novel remedies get taken up by the Constitutional Court, often introduced by litigators or public interest organisations drawing on their experiences litigating in the lower courts. *Black Sash* and *Mwelase* offer leading examples of cases inspired by pioneering remedial experimentation in our lower courts. Much like comparative law analysis, an understanding of this cross-fertilisation can enrich our understanding of remedial developments and allow new ideas to take root.

Secondly, the juxtaposition of several streams of serialised litigation draws out their shared remedial predicament of persistent non-compliance which served as a catalyst for remedial innovation. These detailed accounts offer an insight into different manifestations of non-compliance in complex institutional settings of maladministration, dysfunction and even corruption. This suggests that the oft-cited typology of inattentiveness, incompetence and intransigence may need to be refined in order to fully capture the range and complexity of

[236] Ganesh (note 201 above) at 33.

[237] Ibid at 36.

[238] *Fose* (note 29 above) at para 69.

[239] In *Pheko III* (note 46 above) at para 33 footnotes 33 and 34, the Court pointed to the referral process provided for in the Superior Courts Act as a creative mechanism for enhancing supervisory jurisdiction, and alluded to the similarity between a referee and the American institution of a special master. Even more directly, the potential value of a special master was affirmed by the Constitutional Court in *Treatment Action Campaign* (note 28 above) at para 107 and by the Supreme Court of Appeal in *Meadow Glen* (note 158 above) at 35.

institutional reasons that might underlie non-compliance.[240] Inattentiveness, incompetence and intransigence characterise non-compliance in psychological terms that are most appropriately used in relation to individual states of mind or capacities. As this article demonstrates, however, non-compliance is more frequently the result of political blockages in public institutions that have chronically failed to meet their constitutional duties, with top officials often conceding as much.[241] A typology confined to inattentiveness, incompetence and intransigence can attribute responsibility to individual low-level officials based on discrete episodes of misconduct, but this often falls short of establishing systemic misconduct or the ultimate responsibility of senior public officials against whom relief is sought.[242] The remedial predicament identified in this article suggests that judicial responses to persistent non-compliance should primarily be targeted at the systemic functioning of institutions rather than the mental states of individual public officials.

The innovations featured in this article gesture towards the future direction of our remedial jurisprudence. They underscore the breadth of constitutional remedial power that can be drawn on when, having 'exhausted its lexicon of epithets'[243] in attempts to spur the government into action, the court's remedial hand is forced to forge novel mechanisms for compelling compliance. The value of remedial discretion is exemplified through such innovation, when courts do not resign themselves to the readily available repertoire of established remedies but rather imagine new possibilities for overcoming persistent non-compliance.

[240] See Roach & Budlender (note 32 above) at 345–351.
[241] Sabel & Simon (note 48 above) at 1062–1063.
[242] Ibid at 1095.
[243] *MEC for the Department of Welfare v Kate* [2006] ZASCA 49, 2006 (4) SA 478 (SCA) at para 29.