

Structural Interdicts for Environmental Rights Violations? South African Human Rights Commission v Msunduzi Local Municipality (8407/2020P) [2021] ZAKZPHC 35 (17 June 2021)



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Abstract

The environmental right, as provided in section 24 of the *Constitution of the Republic of South Africa, 1996* (Constitution), read with section 7(2), places a positive duty upon all three government spheres to realise this right. This duty thus also befalls every municipality in the country. From time to time this right is adjudicated in the context of municipal governance. This note is premised on the judgment handed down in the case *South African Human Rights Commission v Msunduzi Local Municipality (8407/2020P) [2021] ZAKZPHC 35 (17 June 2021)*. In this case the court found the Msunduzi Local Municipality to have breached section 24 of the Constitution and related legislative provisions. In addition to the declaratory order granted against the Msunduzi Local Municipality, the court further ordered a structural interdict as a way to enforce compliance on the part of the Municipality. Against this backdrop this note examines the use of a structural interdict as a remedy to achieve judicial enforcement when municipalities breach constitutional and statutory environmental law. The meaning and relevance of the structural interdict in relation to local government are discussed with reference to the South African judiciary's historical application of structural relief in some of the most prominent socio-economic rights cases.

Keywords

Environmental rights; local government; municipality; structural interdict; supervisory order.

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1 Introduction

Section 24 of the *Constitution of the Republic of South Africa, 1996* (Constitution) recognises the right to the environment in order to ensure the health and well-being of the present and future generations.¹ Fundamentally, the right to the environment seeks to extend this benefit to all South Africans, not just a few.² Although converting this vision of the benefit of the right to a healthy environment into reality has become more challenging, it is as vital to ensure the realisation of this right as that of any other right entrenched in the Bill of Rights.³ The inclusion of environmental rights in the South African Constitution signifies the need to protect the environment. The environment (which is understood to include surroundings made up of human beings, land, water and the atmosphere) significantly impacts on human livelihoods and development.⁴ Section 24 of the Constitution, in conjunction with section 7(2), imposes a positive duty on the state to respect, protect and fulfil the environmental right contained in the Bill of Rights.⁵ These provisions necessitate positive action from the state to ensure an environment that does not pose harm to health and, thereby, people's well-being. The realisation of environmental rights for vulnerable members of society is important for the success of South Africa's vision of transformative constitutionalism.⁶ There is an interconnectedness between environmental rights, social justice and transformative constitutionalism, which emphasises the need for proactive measures to protect the most vulnerable members of society in order to establish a sustainable future. The courts play a crucial role in this context by granting effective relief in cases where environmental rights are violated.⁷ In this

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¹ Section 24 of the *Constitution of the Republic of South Africa, 1996* (the Constitution).

² SAHRC 2004 <https://www.sahrc.org.za/home/21/files/Economic%20and%20Social%20Rights%20Reports.pdf> xxi.

³ SAHRC 2004 <https://www.sahrc.org.za/home/21/files/Economic%20and%20Social%20Rights%20Reports.pdf> xxi.

⁴ Section 1 of the *National Environmental Management Act 107 of 1998* (NEMA); also see Du Plessis and Nel "An Introduction" 12.

⁵ Section 24 read with s 7(2) of the Constitution.

⁶ *Pheko v Ekurhuleni Metropolitan Municipality* (No 3) (CCT19/11) [2016] ZACC 20 (26 July 2016) (*Pheko* case) para 1.

⁷ *Pheko* case para 1.

regard the courts ensure that municipalities perform their environmental duties through the remedies or orders they make, such as interdicts.⁸

The author's aim is not to rehearse the details found in case law and literature, such as the content available in Du Plessis A (ed) *Environmental Law and Local Government in South Africa* 2nd ed (Juta Cape Town 2021). Instead, the intention is to establish a theoretical basis for this note. Against this background this note aims to determine whether the structural interdict can constitute an appropriate and effective relief for municipal violations of environmental rights. The structure of this paper is as follows: the first section analyses the legal framework for the municipal environmental mandate. An overview of the meaning and a discussion of the relevance of a "structural interdict" are given in the second section. The third section provides a brief background of the *South African Human Rights Commission v Msunduzi Local Municipality (Msunduzi)* case.⁹ An analysis of prominent cases where a structural interdict formed part of the order is provided in the fourth section, and finally a discussion and concluding remarks are provided.

2 The legal framework for the municipal environmental mandate

The hierarchy for South African environmental legislation flows down from the Constitution, which, apart from the section 24 environmental right also contains several other rights with direct or incidental bearing on the environment.¹⁰ Accordingly, the Constitution establishes the overarching legal framework for environmental matters in South Africa. The *National Environmental Management Act* 107 of 1998 (NEMA), gives effect to the environmental right in pursuit of the positive obligation placed on the state, or to some extent even on individuals.¹¹ The adoption of NEMA as a primary environmental legal framework resulted in the promulgation of a range of other specific environmental management acts (SEMAs), which focus on specific environmental media or sectors, for example, water, waste, biodiversity or air quality.¹² These environmental sector acts are interpreted and applied in the context of NEMA and, more specifically, the environmental management principles outlined in section 2 of NEMA.

⁸ *Pheko* case para 1.

⁹ *South African Human Rights Commission v Msunduzi Local Municipality* (8407/2020P) [2021] ZAKZPHC 35 (17 June 2021) (*Msunduzi* case).

¹⁰ Nel and Alberts "Environmental Management and Environmental Law" 38. One of the rights which has an indirect environmental bearing is the right to administrative justice.

¹¹ Section 24(b) of the Constitution.

¹² Section 1 of NEMA; Nel and Alberts "Environmental Management and Environmental Law" 38.

Together with the Constitution, NEMA and the environmental sector acts, serve as an environmental legal framework, outlining the basic principles that, among other things, underpin the relationship among the people, the environment, and the government.¹³ South Africa's government is divided into three spheres: the national, provincial and local.¹⁴ It is established that these "spheres are distinctive, interdependent and interrelated".¹⁵ The Constitution allocates and assigns functions, duties and powers to each sphere.¹⁶ It is stated that all spheres of government and all organs of state must "cooperate, consult and support one another on matters involving and affecting the environment".¹⁷ In this system of government, municipalities possess the authority to govern on their own initiative without interference from other spheres of government.¹⁸

Although the "environment" is listed as a concurrent function of national and provincial competence in terms of schedule 4A,¹⁹ local government, functioning as an autonomous entity, is not exempted from upholding the provisions of section 24 of the Constitution.²⁰ Du Plessis also observes that "local government is co-responsible, together with the national and provincial government, for the realisation of section 24 of the Constitution".²¹ As a result, local government has to conform to the fundamental obligations of section 7(2) of the Constitution, which is to "respect, protect, promote and fulfil" the rights contained in the Bill of Rights.²² This section emphasises the responsibility entrusted to local government in fulfilling the provisions of section 24 of the Constitution. Section 152(1)(d) of the Constitution further places local government under an obligation to promote a safe and healthy environment.²³ In addition, the *Local Government: Municipal Systems Act* 32 of 2000 also contains provisions that mandate local government to contribute towards realising the constitutional environmental right.²⁴

According to section 156(1) of the Constitution, a municipality is granted executive authority over local government matters listed in relevant schedules of the Constitution, along with any responsibilities assigned to it

¹³ Section 2 of NEMA.

¹⁴ Section 40(1) of the Constitution.

¹⁵ Section 40(1) of the Constitution.

¹⁶ For instance, see s 156(1)(a) of the Constitution.

¹⁷ Section 41(1)(h) of the Constitution.

¹⁸ Section 152(1)(b) read with s 156(1)(a) of the Constitution.

¹⁹ Schedule 4A of the Constitution.

²⁰ Fuo "Environmental Rights Protected in the Constitution" 4.

²¹ Du Plessis 2015 *PELJ* 1856.

²² Section 7(2) of the Constitution; this section, in conjunction with s 24, establishes municipalities as co-responsible, along with the other two spheres of government and all other organs of state, for safeguarding, realising, and promoting an environment that does not pose a risk to health and thereby, people's well-being.

²³ Section 152(1)(d) of the Constitution.

²⁴ Section 11(3)(l) of the *Local Government: Municipal Systems Act* 32 of 2000.

by the national and provincial government.²⁵ Municipalities have the right to perform all functions as provided for in schedules 4B and 5B of the Constitution, subject to national and provincial legislation.²⁶ Moreover, the courts have provided clarification on their interpretation of the interplay between section 24 and the authority of local government, particularly regarding the role of municipalities in realising the environmental right. For example, in *Le Sueur v eThekweni Municipality*²⁷ the High Court adjudicated whether the Municipality had the authority in terms of the Constitution or any other law of general application to legislate on environmental issues.²⁸ The court turned to the South African framework of environmental law and other sources of environmental law in deciding this matter.²⁹ The judge who presided over this matter reiterated that the principles of NEMA apply to all organs of the state, including every municipality.³⁰ The court finally ruled that municipalities are authorised to regulate environmental matters from the micro level for the protection of the environment and that the eThekweni Municipality's use of its spatial planning instruments did not transgress the constitutional or other environmental powers of the national and provincial authorities.³¹

The precedent set in the *Le Sueur* case is essential in confirming that municipalities have the authority to legislate on environmental matters.³² As mentioned above, NEMA outlines the principles supporting the notion that municipalities have an environmental mandate.³³ For example, NEMA provides for the duty of care and the remediation of environmental damage.³⁴ The section 28 duty of care has been interpreted to mean that "every person has the legal obligation or responsibility to avoid acts or omissions likely to cause harm to the environment".³⁵ The duty of care in section 28 of NEMA is one way in which the environmental rights in section 24 of the Constitution and section 2(4)(p)³⁶ of NEMA are made concrete. The duty of care is imposed on every person who causes, has caused or

²⁵ Section 156(1) of the Constitution.

²⁶ Section 156(1) read with schedules 4B and 5B of the Constitution.

²⁷ *Le Sueur v eThekweni Municipality* (9714/11) [2013] ZAKZPHC 6 (30 January 2013) (*Le Sueur* case).

²⁸ *Le Sueur* case para 3; Humby 2014 *PELJ* 1661.

²⁹ Du Plessis 2015 *PELJ* 1859.

³⁰ *Le Sueur* case para 34.

³¹ *Le Sueur* case para 40; Du Plessis 2015 *PELJ* 1860.

³² Humby 2014 *PELJ* 1685.

³³ Section 2(1) of NEMA.

³⁴ Section 28 of NEMA.

³⁵ Chauke *Critical Analysis of the Law on Duty of Care to the Environment* 20.

³⁶ Section 2(4)(p) of NEMA stipulates that the expenses associated with addressing pollution, environmental degradation, resultant adverse health effects, and the efforts to prevent, control, or minimise further pollution, environmental damage, or adverse health effects must be borne by those responsible for causing harm to the environment.

may cause significant environmental pollution or degradation.³⁷ It has been established that this duty involves taking "reasonable measures to prevent pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment".³⁸ The general duty of care under NEMA may frequently be construed in conjunction with the particular obligation of the SEMAs to increase and enhance its scope and impact and to combat severe environmental pollution and degradation.³⁹

The literature reveals that the measures listed in section 28(3) of NEMA⁴⁰ can be regarded as the minimum legal standard for the duty of environmental care. This effectively imposes a legal obligation on affected or relevant parties to actively monitor and identify the significance of environmental pollution or degradation.⁴¹ It also requires affected or relevant parties to take reasonable measures to effectively address such significant environmental impacts.⁴² In the event that a responsible party does not comply with this duty, the relevant official may issue a directive that the responsible party take certain measures.⁴³ NEMA introduces remedies which allow any interested person to apply to the court for an order that directs the relevant official to take steps specified in section 28(4) of NEMA to ensure that the responsible party addresses significant pollution

³⁷ Section 28(1) of NEMA.

³⁸ Section 28(1) of NEMA; Erasmus 2011 https://static.pmg.org.za/docs/120828analysis_0.pdf 3.

³⁹ Oosthuizen *et al* "National Environmental Management Act 107 of 1998" 177.

⁴⁰ Section 28(3) of NEMA states that the reasonable measures to be taken by any person responsible for, or potentially causing, significant pollution or degradation of the environment may encompass actions such as: (a) investigating, assessing, and evaluating the environmental impact; (b) informing and educating employees about the environmental risks associated with their work and the proper procedures to prevent significant pollution or degradation; (c) discontinuing, altering, or controlling any act, activity, or process causing the pollution or degradation; (d) containing or preventing the movement of pollutants or the factors causing degradation; (e) eliminating any source of pollution or degradation; or (f) addressing and rectifying the effects of the pollution or degradation.

⁴¹ Oosthuizen *et al* "National Environmental Management Act 107 of 1998" 179.

⁴² Oosthuizen *et al* "National Environmental Management Act 107 of 1998" 179.

⁴³ Section 28(4) of NEMA; the section stipulates that the Director-General, the Director-General of the department responsible for mineral resources, or a provincial head of the department, may, following adequate opportunity for affected parties to disclose their relevant interests, instruct any person causing, having caused, or likely to cause significant pollution or degradation of the environment to: (a) halt any activity, operation, or undertaking; (b) investigate, evaluate, and assess the impact of specific activities and submit a report; (c) initiate specific measures by a designated date; (d) diligently pursue and maintain those measures; and (e) conclude those measures by a specified reasonable date. It is important to note that if urgent action is imperative for environmental protection, the Director-General or a provincial head of the department may issue such a directive, subsequently consulting and providing an opportunity to inform as soon as reasonably possible.

or environmental degradation.⁴⁴ Furthermore, sustainable development is a prominent theme and goal of NEMA, and it creates a framework in which court orders such as structural interdicts could fit in cases where the environmental duty of care has been compromised. The repeated mention of sustainability throughout NEMA and the definition of sustainable development in section 1 of NEMA clearly indicate the need for the protection and realisation of a healthy environment.

3 Structural interdict: an overview

In South Africa, Chapter 8 of the Constitution governs the judiciary. Section 165 of the Constitution rests the judicial authority of the Republic upon the courts, emphasising their independence, which is subject only to the Constitution and the law.⁴⁵ This section explicitly prohibits any interference with the functioning of the court by any organ of state or any individual.⁴⁶ Moreover, every court order binds all persons and organs of state to which it applies.⁴⁷ This provision emphasises the autonomy of the courts, upholds the principle of the separation of powers, affirms the supremacy of the Constitution, and underscores the obligation of both the state and its citizens to respect and comply with the judgments made by the courts.⁴⁸

Section 172(1)(b) of the Constitution allows courts to issue "any order that is just and equitable" in constitutional matters. This section empowers courts to make orders such as structural interdicts to ensure compliance. It has been established that "a structural interdict consists in part of an interdictory relief".⁴⁹ In that light, a structural interdict can be defined as an order under which the court controls compliance with its orders.⁵⁰ This definition entails that the court retains the supervisory jurisdiction and participates in the implementation of its orders by requiring the relevant party to report to it on the measures the party has taken to carry out the court's orders.⁵¹ Accordingly, the court will direct the relevant party to perform a specific action or abstain from certain conduct to remedy the established violation determined during the liability stage of adjudication.⁵² Typically such an order will include specified timeframes within which particular actions must

⁴⁴ Section 28(12) of NEMA.

⁴⁵ Section 165(2) of the Constitution.

⁴⁶ Section 165(2) of the Constitution.

⁴⁷ Section 165(5) of the Constitution.

⁴⁸ Kotze and Du Plessis 2010 *Journal of Court Innovation* 160.

⁴⁹ An interdict is a form of order that declares what the legal position is, but it can also tell a party to do something (a mandatory interdict) or not to do something (a prohibitory interdict).

⁵⁰ Thakur 2018 <https://hsf.org.za/publications/hsf-briefs/structural-interdicts-an-effective-means-of-ensuring-political-accountability>.

⁵¹ Swanepoel *Potential of Structural Interdicts* 84.

⁵² Swanepoel *Potential of Structural Interdicts* 85.

be undertaken.⁵³ Under supervision, compliance with this interdictory relief is essential for the remedy to qualify as a structural interdict.⁵⁴ It would be an appropriate proposition to suggest that structural interdicts could be most suitable for remedying violations of constitutional environmental rights. They have the capacity to address systemic violations effectively.⁵⁵ However, their appropriateness hinges on the active involvement of various stakeholders during the remedial design phase.⁵⁶ Additionally, the court must retain adequate supervisory jurisdiction over the case for such relief to be considered appropriate.⁵⁷

A structural interdict is made up of five elements.⁵⁸ Firstly, the court issues a declaration specifying how a municipality violated an individual's or a group's constitutional rights or failed to fulfil its constitutional obligations.⁵⁹ Secondly, the court instructs the relevant sphere of government to comply with its constitutional obligations.⁶⁰ Thirdly, the relevant sphere of government is required to prepare and submit a comprehensive report to the court on a specified date, typically under oath.⁶¹ The report should outline a detailed action plan for addressing the identified violations, granting the responsible state agency the flexibility to choose its approach to comply with the constitutional rights at issue rather than the court dictating a specific solution.⁶² Fourthly, upon receiving the report the court evaluates whether the proposed plan adequately rectifies the constitutional infringement and whether it brings the sphere of government into compliance with its constitutional obligation.⁶³ In the fifth and final step the court issues a final order that integrates the approved plan and any court-ordered amendments.⁶⁴ Any failure by the sphere of government to adhere to the

⁵³ Swanepoel *Potential of Structural Interdicts* 85.

⁵⁴ Swanepoel *Potential of Structural Interdicts* 85.

⁵⁵ Swanepoel *Potential of Structural Interdicts* 85.

⁵⁶ Swanepoel *Potential of Structural Interdicts* 85.

⁵⁷ Swanepoel *Potential of Structural Interdicts* 85.

⁵⁸ Currie and De Waal *Bill of Rights Handbook* 199; Woolman *et al* 2018 <https://constitutionallawofsouthafrica.co.za/wp-content/uploads/2018/10/Chap09.pdf>.

⁵⁹ Currie and De Waal *Bill of Rights Handbook* 199; Woolman *et al* 2018 <https://constitutionallawofsouthafrica.co.za/wp-content/uploads/2018/10/Chap09.pdf>.

⁶⁰ Currie and De Waal *Bill of Rights Handbook* 199; Woolman *et al* 2018 <https://constitutionallawofsouthafrica.co.za/wp-content/uploads/2018/10/Chap09.pdf>.

⁶¹ Currie and De Waal *Bill of Rights Handbook* 199; Woolman *et al* 2018 <https://constitutionallawofsouthafrica.co.za/wp-content/uploads/2018/10/Chap09.pdf>.

⁶² Swanepoel *Potential of Structural Interdicts* 85.

⁶³ Currie and De Waal *Bill of Rights Handbook* 199.

⁶⁴ Currie and De Waal *Bill of Rights Handbook* 199.

plan or associated requirements following this step is considered contempt of court.⁶⁵

The structural interdict is a valuable tool to combat potential non-compliance.⁶⁶ This remedy allows the court to monitor the implementation of the court's order, for example by requiring the relevant party (the respondent/defendant) to report to the court on actions taken to enforce that order.⁶⁷ This implies that the court will put in place interim steps and issue directives until such time that it is satisfied that the constitutional infringement has been remedied. This remedy, therefore, provides a continuous performance regime in that the court will continue to get involved in litigation until it is satisfied that the violation has been rectified.⁶⁸

Accordingly the aim of a structural interdict is not simply to "deter, as is the case with most other constitutional remedies, but rather to remedy the structural violation by focusing on changes that need to be effected in institutional or organisational design and functioning".⁶⁹ The structural interdict, therefore, seeks to adjust future behaviour and is deliberately fashioned rather than logically deduced from the nature of the legal harm suffered.⁷⁰ With the above said, one could argue that the benefit of a structural interdict is that the court remains in charge, which could be beneficial to the extent that the order will be realised. One advantage of using a structural interdict in the *Msunduzi* case is that through the flexible and pragmatic exercise of supervisory jurisdiction, the High Court created a dynamic dialogue between the judiciary and the local government in remedying the violation of the constitutional environmental right by the local government.⁷¹ Therefore, the characteristics of structural interdict mirror a major part of the remedy imposed by the High Court in the *Msunduzi* case.

4 SAHRC v Msunduzi case: background and decision

The case of *South African Human Rights Commission v Msunduzi Local Municipality* had to do with the New England Road Landfill Site in Pietermaritzburg (the landfill site) and the purported failure of the Msunduzi Municipality (the Municipality) to fulfil its constitutional duty in managing and maintaining the landfill site in a way that did not negatively impact on the health and well-being of the residents of Pietermaritzburg and the

⁶⁵ Currie and De Waal *Bill of Rights Handbook* 199.

⁶⁶ Mbazira *Socio-Economic Rights Project* 17.

⁶⁷ Mbazira *Socio-Economic Rights Project* 17.

⁶⁸ Swanepoel *Potential of Structural Interdicts* 85.

⁶⁹ Swanepoel *Potential of Structural Interdicts* 85.

⁷⁰ Swanepoel *Potential of Structural Interdicts* 85; Thakur 2018 <https://hsf.org.za/publications/hsf-briefs/structural-interdicts-an-effective-means-of-ensuring-political-accountability>.

⁷¹ *Msunduzi* case.

neighbouring areas.⁷² The applicant in this matter was the South African Human Rights Commission (the Commission).⁷³ The Commission's involvement arose due to its constitutional duty of promoting and protecting human rights.⁷⁴ The Commission's powers to act are further fortified by the provision of section 38 of the Constitution⁷⁵ and section 32 of NEMA.⁷⁶ The first respondent is the Msunduzi Municipality. The second respondent is the Head of the Department of Economic Development, Tourism and Environmental Affairs, Province of KwaZulu-Nata, while the third respondent is the Member of the Executive Council (MEC) for Economic Development, Tourism and Environmental Affairs, Province of KwaZulu-Natal.⁷⁷ The respondents are responsible for waste management in the province in terms of the *National Environmental Management Act: Waste Act* 59 of 2008 (*Waste Act*).

The brief facts of the case are that the Msunduzi Local Municipality had a long history of non-compliance with its duties under NEMA, the *National Water Act*,⁷⁸ the *Waste Act* and its Waste Management Licence (WML).⁷⁹ The applicant applied to the court for a declaratory order and structural interdict in order to bring the Municipality into compliance with its constitutional duties in terms of section 24 of the Constitution.⁸⁰ The Commission commenced with an investigation of the Municipality's operation of the landfill site and its failure to comply with its constitutional obligations in terms of section 24 of the Constitution and other various provisions of NEMA, the *Waste Act* and the *National Water Act*.⁸¹ The residents of Pietermaritzburg made what can only be regarded as a desperate plea for assistance, asking the Commission to intervene to hold the Municipality accountable for its ongoing failure to maintain the dump site

⁷² *Msunduzi case* para 1.

⁷³ The South African Human Rights Commission is a national institution established in terms of Chapter 9 of the Constitution. The constitutional role of the Commission is to protect and promote the fundamental human rights enshrined in Chapter 2 of the Constitution as well as *inter alia* to take steps to secure appropriate redress where human rights have been violated.

⁷⁴ Chapter 9 of the Constitution.

⁷⁵ Section 38 of the Constitution; a person seeking remedy has the option to act in his or her own interest, on behalf of a group or class of people whose interests are impacted, or in the broader public interest.

⁷⁶ Section 32 of NEMA stipulates that any person or group of persons has the right to seek suitable remedies concerning any actual or imminent violation of any provision within this Act or SEMA.

⁷⁷ *Msunduzi case* paras 4 and 5.

⁷⁸ *National Water Act* 36 of 1998 (the *National Water Act*).

⁷⁹ *Msunduzi case* para 32.

⁸⁰ *Msunduzi case* para 101.

⁸¹ These provisions included s 20(b) of the *National Environmental Management: Waste Act* 59 of 2005 (the *Waste Act*), ss 31L(4), 28(1) and (3) of NEMA and s 19(1) of the *National Water Act* and its obligation in terms of international law.

in a way that would not endanger their health and welfare.⁸² Numerous newspaper articles, media stories and petitions from ordinary citizens and civil society organisations echoed this need for assistance.⁸³ The Commission's founding affidavit outlined a lengthy history of the Municipality's non-compliance with the WML and its statutory obligations.⁸⁴

Following the investigation by the Commission, the then National Department of Environmental Affairs conducted audits on the site, together with the MEC, engaging with the Municipality to improve its management and operation of the landfill site.⁸⁵ Consequent to these audits the Department issued a compliance notice in terms of section 31L of the NEMA in 2019.⁸⁶ The purpose of the compliance notice was to bring to the attention of the Municipality some of the areas identified in the investigation report and to require the Municipality to take action to remedy those identified areas.⁸⁷ With no significant corrective action taken by the Municipality, the situation worsened further with many uncontrolled fires on the landfill site, some of which resulted in the surrounding air quality being affected to the point that schools and highways in close proximity to the site had to close.⁸⁸ The Department laid criminal charges against the Municipality following its failure to comply with its environmental duties, which were set out in the compliance notice on the site.⁸⁹ The matter is still pending.⁹⁰ However, the Department issued more compliance notices which the Municipality ignored or to which instead it failed to respond appropriately.⁹¹

The Commission approached the court, seeking an interdict that would bring the Municipality into compliance with its constitutional obligation relating to managing and operating the landfill site. The relief sought by the

⁸² *Msunduzi* case para 14.

⁸³ *Msunduzi* case para 14.

⁸⁴ *Msunduzi* case para 32.

⁸⁵ *Msunduzi* case para 33 read with para 36.

⁸⁶ Section 31L of NEMA empowers an environmental management officer to issue a compliance notice; s 31L(1) of NEMA provides that an environmental management inspector, within his or her mandate in terms of s 31D, may issue a compliance notice in the prescribed form and following a prescribed procedure if there are reasonable grounds for believing that a person has not complied— (a) with a provision of the law for which that inspector has been designated in terms of s 31D; or (b) with a term or condition of a permit, authorisation or other instrument issued in terms of such law.

⁸⁷ *Msunduzi* case para 42.

⁸⁸ *Msunduzi* case para 42.

⁸⁹ *Msunduzi* case para 46.

⁹⁰ *Msunduzi* case para 46; at the time of writing this note the criminal case was still pending.

⁹¹ *Msunduzi* case para 44; the Department eventually received the Municipality's response to one of the compliance notices of 26 July 2019, together with a draft action plan, but the action plan was never effectively implemented by the Municipality, which led to significant fires breaking out at the landfill site.

Commission was two-fold.⁹² In the first place it sought declaratory relief against the Municipality regarding the Municipality's violation of the terms of its WML, its failure to comply with compliance notices issued by the Department from time to time, its blatant failure to comply with section 24 of the Constitution, its fundamental breaches of various provisions of other relevant legislation such as the *Waste Act*, NEMA and the *National Water Act*, as well as its failure to fulfil its obligations in terms of international law.⁹³ In the second place, the Commission sought a structural interdict to allow the court to exercise some form of supervisory jurisdiction over the Municipality to ensure the implementation of the order.⁹⁴

Against the above background the issue before the court was whether the Municipality's violation of its WML, the compliance notices issued by the Department and the MEC, and the applicable legislation mentioned above constituted a violation of section 24 of the Constitution.⁹⁵ Secondly, whether the Municipality had discharged its duty of care as provided in the NEMA, the *Waste Act* and the *National Water Act* and its obligations in terms of international law.⁹⁶

The court held that it is evident that the operation and management of a landfill site is a highly regulated activity.⁹⁷ The legislative provisions provided under NEMA, the *Waste Act* and the *National Water Act* are obviously intended to stop such activity from harming the environment, thus ensuring that the health and welfare of ordinary citizens are not jeopardised.⁹⁸ The Municipality was obliged, throughout its operation of the landfill site, to comply with the provisions of the *Waste Act* and other legislative provisions.⁹⁹ Section 16 of the *Waste Act* imposes a duty on the Municipality regarding its waste management. It is required *inter alia* to ensure that waste is treated and disposed of in an environmentally safe manner.¹⁰⁰ It is

⁹² *Msunduzi* case para 10.

⁹³ *Msunduzi* case para 10.

⁹⁴ *Msunduzi* case para 10.

⁹⁵ *Msunduzi* case para 69.

⁹⁶ *Msunduzi* case para 69.

⁹⁷ *Msunduzi* case para 73.

⁹⁸ *Msunduzi* case para 85.

⁹⁹ *Msunduzi* case para 86.

¹⁰⁰ Section 16 of the *Waste Act* provides as follows; "(1) a holder of waste must, within the holder's power, take all reasonable measures to— (a) avoid the generation of waste and where such generation cannot be avoided, to minimise the toxicity and amounts of waste that are generated; (b) reduce, reuse, recycle and recover waste; (c) where waste must be disposed of, ensure that the waste is treated and disposed of in an environmentally sound manner; (d) manage the waste in such a manner that it does not endanger health or the environment or cause a nuisance through noise, odour or visual impacts; (e) prevent any employee or any person under his or her supervision from contravening this Act; and (f) prevent the waste from being used for an unauthorised purpose. (2) Any person who sells a product that may be used by the public and that is likely to result in the generation of hazardous waste must

also required to manage waste in such a manner that it does not endanger the health of the citizenry or the condition of the environment.¹⁰¹

The court indicated that the series of events presented before it by the Commission clearly demonstrated that there had been an abject failure on the part of the Municipality to comply with its WML and to fulfil its constitutional duties to the citizens of Pietermaritzburg and surrounding areas.¹⁰² The court further found that consistent violations by the Municipality of the legislative framework enacted to give effect to section 24 of the Constitution constituted a violation of section 24 of the Constitution.¹⁰³ Therefore, the court ruled that the Municipality had breached section 24 of the Constitution.¹⁰⁴ The court further ordered a structural interdict, under which the court gave directives with which the Municipality had to comply.¹⁰⁵ The court ordered that within a month of its order the Municipality must file an Action Plan with the court, which must substantially comply with the terms detailed in the court order.¹⁰⁶ One of the terms mentioned in the court order was that the Action Plan must explain the steps the Municipality would take to comply with the Revised Compliance Notice and the Variation Waste Management Licence, and must set measurable, periodic deadlines for progress.¹⁰⁷

Given that the Commission had established that the Municipality had violated section 24 of the Constitution and the reasonable measures contemplated in section 24, it could be held that the court was prompted to order the declaratory relief sought.¹⁰⁸ Section 172(1)(b) of the Constitution permits a court to make any order that is just and equitable. In relation to the *Msunduzi* case this section provided the court with wide discretion to provide the citizens of Pietermaritzburg with an effective relief that would

take reasonable steps to inform the public of the impact of that waste on health and the environment. (3) The measures contemplated in this section may include measures to— (a) investigate, assess and evaluate the impact of the waste in question on health or the environment; (b) cease, modify or control any act or process causing the pollution, environmental degradation or harm to health; (c) comply with any norm or standard or prescribed management practice; (d) eliminate any source of pollution or environmental degradation; and (e) remedy the effects of the pollution or environmental degradation. (4) The Minister or MEC may issue regulations to provide guidance on how to discharge this duty or identify specific requirements that must be given effect to, after following a consultative process in accordance with sections 72 and 73. (5) Subsection (4) need not be complied with if the regulation is amended in a non-substantive manner."

¹⁰¹ Section 16 of the *Waste Act*.

¹⁰² *Msunduzi* case para 88.

¹⁰³ *Msunduzi* case para 90.

¹⁰⁴ *Msunduzi* case para 109.

¹⁰⁵ *Msunduzi* case para 109.

¹⁰⁶ *Msunduzi* case para 4.

¹⁰⁷ *Msunduzi* case para 4.

¹⁰⁸ *Msunduzi* case para 102.

ensure compliance by the Municipality with its constitutional obligations.¹⁰⁹ Therefore, the structural interdict ordered by the court could be seen as an effort to bring the Municipality into compliance with its constitutional obligations.

5 Structural interdict: reflections on the case law

This part of the case note analyses some cases where the court had to order a structural interdict to enforce judicial compliance. Early in the development of our constitutional jurisprudence South African courts granted structural interdicts as a remedy for cases involving socio-economic rights and rights with similar forms of positive obligation on the state.¹¹⁰ The courts have resorted to the structural interdict because of its significance to both the applicants and the government.¹¹¹ The courts have also underlined the structural interdict as an appropriate response to systemic violations.¹¹² One court has observed that other remedies "such as the prohibitory interdict, *mandamus*, and awards of damages, are inappropriate to remedy systemic failures or the inadequate compliance with constitutional obligations, particularly when one is dealing with ... rights of a programmatic nature".¹¹³ One of the prominent cases includes the judgment handed down in the *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* (*Allpay case*).¹¹⁴ This case involved the South African Social Security Agency's (SASSA) and Cash Paymaster Services' (CPS) agreement to provide social benefits, which was declared unconstitutional by the Constitutional Court, but the pronouncement of invalidity was postponed while a just and equitable remedy was being found.¹¹⁵ The court subsequently commanded SASSA to conduct a new tender evaluation and make a decision about a new award.¹¹⁶

Additionally, it issued a structural order that called on SASSA to update the court at certain points during the new tendering process.¹¹⁷ In the end SASSA declared that it would begin making social payments on its own by 31 March 2017 and opted not to award a new tender.¹¹⁸ The court

¹⁰⁹ *Msunduzi case* para 103.

¹¹⁰ Currie and De Waal *Bill of Rights Handbook* 199.

¹¹¹ Mbazira 2008 SAJHR 9.

¹¹² Mbazira 2008 SAJHR 9.

¹¹³ *S v Zuba* 2004 4 BCLR 410 (E) para 36.

¹¹⁴ *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)* [2014] ZACC 12 (17 April 2014) (*Allpay case*).

¹¹⁵ *Allpay case* paras 1, 3 and 78.

¹¹⁶ *Allpay case* para 78.

¹¹⁷ *Allpay case* para 78.

¹¹⁸ *Black Sash Trust v Minister of Social Development* (CCT48/17) [2017] ZACC 8 (17 March 2017) (*Black Sash case*) para 3; CDH 2017

acknowledged this guarantee and revoked its supervisory order, thereby relinquishing control over the situation.¹¹⁹ Later it became clear that SASSA had not only been unable to assume responsibility for the payment of social grants by the deadline but also had neglected to notify the court of this, despite being fully aware of its problem beforehand.¹²⁰ Furthermore, SASSA's suggested course of action was to ask the court for permission to sign another contract with CPS without going through a tendering procedure.¹²¹

The *Black Sash Trust v Minister of Social Development*¹²² emanated from the judgment in the *Allpay* case, wherein the Black Sash Trust filed an urgent application directly with the Constitutional Court asking for an injunction that, among other things, required SASSA to outline its plans for handling the payment of social funds.¹²³ In the *Black Sash* case the court considered whether it was competent to resume supervision in respect of SASSA's conduct since it had discharged its supervisory order, the continued performance of SASSA's and CPS' obligations in respect of the payment of social grants, and SASSA's responsibilities to either run another tender process or take over the payment of social grants itself.¹²⁴ The court held that "SASSA and the Minister have used the discharge by the Court of its supervisory jurisdiction as justification that there was no need for them to inform or approach the court when it became clear that SASSA would not be in a position to assume the duty to pay the grants itself".¹²⁵ The court further held that that conduct was disingenuous and incorrect.¹²⁶

It is arguable that litigants win cases against the government, but the government does little or nothing to produce the tangible benefits that these litigants were entitled to expect from their success.¹²⁷ This leads to courts ordering structural interdicts to enforce compliance. However, supervisory orders also come with disadvantages and difficulties. Most cases in which structural interdicts were ordered, some of which are discussed above, do not present a positive picture of structural interdicts as efficient judicial mechanisms. The success of a structural order ultimately depends on how

<https://www.cliffedekkerhofmeyr.com/news/publications/2017/dispute/dispute-resolution-alert-16-march-private-sector-beware-current-sassa-cps-saga-is-a-significant-case-study-for-public-private-partnerships.html>.

¹¹⁹ *Black Sash* case para 4.

¹²⁰ *Black Sash* case para 6; Thakur 2018 <https://hsf.org.za/publications/hsf-briefs/structural-interdicts-an-effective-means-of-ensuring-political-accountability>.

¹²¹ *Black Sash* case para 7.

¹²² *Black Sash* case.

¹²³ *Black Sash* case para 23.

¹²⁴ *Black Sash* case para 34; Thakur 2018 <https://hsf.org.za/publications/hsf-briefs/structural-interdicts-an-effective-means-of-ensuring-political-accountability>.

¹²⁵ *Black Sash* case para 59.

¹²⁶ *Black Sash* case para 59.

¹²⁷ Davis 2004 *ESR Review* 6.

willingly the executive obeys court directives. When the executive fails to comply there is a real risk that the judiciary's authority will be compromised, weakening the rule of law. As already indicated, supervisory interdicts can also create unnecessary complications regarding the principle of the separation of powers.¹²⁸ Since a structural interdict is a subjective form of relief, in that the terms of the order may differ from case to case, it should be used cautiously, as it may interfere with an institution's autonomy.¹²⁹

6 Discussion

The progressive next step after ordering structural interdicts in the case of breaches of socio-economic rights sees courts now resorting to ordering structural interdicts even in cases involving the breach of environmental rights.¹³⁰ A case in point is *Trustees for the Time Being of Groundwork Trust v The Minister of Environmental Affairs*¹³¹ (*DeadlyAir* case), where the court was confronted with determining whether high levels of pollution in a specific area constituted a breach of section 24(a) of the Constitution, which provides that "Everyone has the right to an environment that is not harmful to their health or well-being." This case sought to draw attention to the government's failure to formulate and implement its own plan to address the public health concern and the violation of the fundamental right to an environment that is not harmful to health and well-being. The court declared that the poor air quality in the High Priority Area was in breach of residents' constitutional right to an environment that is not harmful to their health and well-being.¹³² The court further ordered the Minister of Environmental Affairs to prepare, initiate and prescribe, within 12 months, regulations in terms of section 20 of the *National Environmental Management: Air Quality Act*¹³³ to implement and enforce the Highveld Plan.¹³⁴ The order also held the Minister responsible and thereby forced the Minister to discharge its environmental duties.¹³⁵ The *DeadlyAir* case and the *Msunduzi* case marked the moment when the judiciary had to clearly express its intentions to order structural interdicts as remedies to enforce organs of state to discharge their environmental duties. The judgments in both the *Msunduzi* case and the *DeadlyAir* case in themselves are crucial in advancing environmental rights and contributing to South Africa's jurisprudence on

¹²⁸ Qumbu 2021 *PELJ* 16.

¹²⁹ Qumbu 2021 *PELJ* 16.

¹³⁰ See for example, *Featherbrooke Homeowners Association NPC v City of Mogale Local Municipality* (High Court: Gauteng Local Division, Johannesburg) (unreported) case number 11292/2020 of 25 January 2021.

¹³¹ *Trustees for the Time Being of Groundwork Trust v Minister of Environmental Affairs* (39724/2019) [2022] ZAGPPHC 208 (18 March 2022) (*DeadlyAir* case).

¹³² *DeadlyAir* case para 241.

¹³³ *National Environmental Management: Air Quality Act* 39 of 2004.

¹³⁴ *DeadlyAir* case para 241.

¹³⁵ *DeadlyAir* case para 241.

environmental law.¹³⁶ Given the courts' finding that the constitutional right to a healthy environment had been breached, the terms of the structural interdict will hopefully impact positively on the manner of enforcement of the action plan.¹³⁷

However, the exercise of supervisory powers by the court can be seen as the court overlapping into exercising executive powers, which amounts to replacing the power of the executive with judicial discretion.¹³⁸ Such a substitution can be seen to be legitimate only when the political entities are "seriously and persistently in default".¹³⁹ In such circumstances, judicial discretion may be a necessary and acceptable replacement for political discretion.¹⁴⁰ In the same vein, it can be argued that courts typically get involved in institutional disputes due to the necessity to fill a void that the other arms of government have created due to inaction or neglect rather than to take affirmative action in opposition to them.¹⁴¹ It has become evident that government non-compliance has served as the foundation for the courts' involvement in enforcing judicial compliance.

It has been established that, in cases where an organ of state has failed to fulfil its constitutional mandate, courts have relied on structural interdicts to supervise the execution of a court order and the state's actions relative to the order. It can be stated that a structural interdict may be an appropriate remedy when a constitutional right has been breached, since it can remedy the breach by instructing the violator to take specific steps to comply with its obligations firstly and consequently to report back to the court on the extent to which it has adhered to the court's order.

It has become evident from the cases discussed above that the court order requiring perpetrators to report within a stipulated timeframe places the courts in a supervisory role in that regard. Fuo¹⁴² believes that the use of supervisory interdicts demonstrates the courts' commitment to improving the lives of impoverished, disadvantaged and often marginalised South Africans. Taking into account Fuo's perspective on structural interdicts, their application in the environmental context holds considerable importance. The adverse impacts of environmental harm disproportionately affect the poor and marginalised, especially when municipalities fall short of

¹³⁶ Werner, Wilson and De Waal 2022 <https://www.cliffedekkerhofmeyr.com/export/sites/cdh/news/publications/2022/Practice/Dispute/Downloads/Dispute-Resolution-Environmental-Law-Alert-21-April-2022.pdf>.

¹³⁷ Werner, Wilson and De Waal 2022 <https://www.cliffedekkerhofmeyr.com/export/sites/cdh/news/publications/2022/Practice/Dispute/Downloads/Dispute-Resolution-Environmental-Law-Alert-21-April-2022.pdf>.

¹³⁸ Mbazira 2008 *SAJHR* 20.

¹³⁹ Mbazira 2008 *SAJHR* 20.

¹⁴⁰ Mbazira 2008 *SAJHR* 20.

¹⁴¹ Mbazira 2008 *SAJHR* 20.

¹⁴² Fuo 2013 *Murdoch University Law Review* 32.

safeguarding the environment. This deficiency positions the courts to assist disadvantaged communities by issuing structural interdicts, thereby overseeing and assisting local authorities in fulfilling their duty of care.

7 Conclusion

The precedent set in the *Mbunduzi* case is essential in establishing that a structural interdict is an appropriate and effective remedy when the constitutional right to a healthy environment has been breached. It has been established that municipalities have a significant responsibility in realising section 24 of the Constitution. Based on the preceding discussions, it is proposed that courts can discharge their constitutional powers by issuing structural interdicts in cases where there exists a potential for non-compliance with environmental obligations by local government. An order of this sort would help local government to fulfil its environmental duties and regain the trust of the residents impacted. In this situation the court would serve as the guardian. However, structural interdicts have proven to present challenges which could be perceived as barriers. Therefore, from a theoretical standpoint this paper notes that the court's supervisory order is commendable since it may allow the court to exercise its supervisory jurisdiction to ensure that the government complies with its constitutional obligation to uphold environmental rights. However, research suggests that the success of a structural interdict depends in practice on how willingly the executive obeys the court's directives. In most cases executives tend to ignore the court's directives.

Upon ordering structural interdicts, as identified in part three above, it becomes increasingly important for the courts to prioritise sustainability in their decisions. This is because sustainability ensures that the right to a healthy environment is not a fleeting privilege but a right that can be enjoyed by generations to come. Sustainability stands as the central element in all policies pertaining to environmental rights in South Africa. Consequently, it is imperative for courts to deliver judgments that promote sustainability in the environmental context. As this paper has focussed exclusively on structural interdicts for environmental rights violations, it has become apparent that structural interdicts are necessary to ensure that the government's relevant spheres discharge their environmental duties. In this light, supervisory orders in cases of constitutional breaches concerning the right to a healthy environment are indispensable to the advancement of environmental rights.

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List of Abbreviations

CDH	Cliffe Dekker Hofmeyr
CPS	Cash Paymaster Services
ESR Review	Economic and Social Rights in South Africa
MEC	Member of the Executive Council
NEMA	National Environmental Management Act 107 of 1998
PELJ	Potchefstroom Electronic Law Journal
SAHRC	South African Human Rights Commission
SAJHR	South African Journal on Human Rights
SASSA	South African Social Security Agency
SEMA	specific environmental management act
WML	Waste Management Licence