What to Expect When You're Expecting: Considering a Supervisory Constitutional Remedy to Address Obstetric Violence in Public Healthcare

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Abstract

Obstetric violence is perpetrated against birthing or pregnant people and includes verbal abuse, performing procedures without consent, physical violence, denial of pain medication, and neglect. This conduct violates various constitutional rights, including the right to dignity, equality, healthcare, bodily integrity, privacy and, in some cases, the right to life, as research has established a link between maternal mortality rates and obstetric violence. This problem appears to be systemic and if litigated on, may require a remedy aimed at bringing about structural change. The constitutional provisions on remedies provide for appropriate relief which is just and equitable. The remedy prescribed must also be effective. In instances where systemic issues arise, our courts have used supervisory constitutional remedies to bring about effective relief. The focus of this article is to consider the use and development of supervisory constitutional remedies and to look at other instances where systemic failures have occurred, identifying how the courts have used different supervisory remedies such as structural interdicts, independent oversight over compliance and the appointment of a special master, to address a systemic problem. I show that the specific circumstances that were present in the cases where supervisory constitutional remedies were used, also exist in a case dealing with obstetric violence.

Keywords

Constitutional remedies; court supervision; obstetric violence.

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1 Introduction

On the first of January each year the Minister of Health congratulates mothers who give birth at public healthcare facilities across South Africa. The tone of the media statement is always celebratory, speaking of "bundles of joy" being born on the stroke of midnight.[1] One wonders how the mothers actually feel. What about those birthing mothers who were slapped during delivery, denied pain medication during labour or humiliated by nursing staff? The literature indicates that this is commonplace behaviour in obstetrics; Some refer to this as obstetric violence. Freedman and Kruk[2] suggest that any type of obstetric violence "is not the phenomenon of a few bad apples but is inflicted by health systems as a whole."[3] The Department of Health itself recognises that "reports from patients on their experiences in health facilities point to a deficit in respectful care, trampling on their right to dignity, privacy and confidentiality."[4]

Various reasons have been put forward as to why this kind of violence continues, including healthcare paternalism, the patriarchal attitudes of healthcare workers, lack of resources, excessive workloads, and a lack of support for healthcare practitioners.[5] It appears that there are a number of institutional factors that have led to a healthcare system in which obstetric violence regularly occurs, and it is these factors that need to be addressed. Ultimately, this requires systemic change.

Obstetric violence is perpetrated against birthing or pregnant people and includes verbal abuse, performing procedures without consent, physical violence, denial of pain medication, and neglect.[6] It infringes on birthing

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1 DoH 2024 https://www.health.gov.za/wp-content/uploads/2024/01/minister-phaahla-welcomes-2024-new-years-babies.pdf.

2 Freedman and Kruk 2014 *Lancet* 43.

3 Freedman and Kruk 2014 *Lancet* 43.

4 DoH 2021 https://knowledgehub.health.gov.za/system/files/elibdownloads/2021-06/SA%20MPNH%20Policy%2014-6-2021%20v9%20signed%20Web%20Version.pdf 1, 25.

5 Honikman, Fawcus and Meintjes 2015 *SAMJ* 284-286.

6 Pickles 2015 *Crime Quarterly* 6-7.

people's[7] right to healthcare, including reproductive healthcare,[8] bodily integrity,[9] dignity,[10] privacy[11] and in some cases even the right to life.[12] Obstetric violence continues to occur in South Africa and there is a need to look at ways in which to bring about structural change.[13] The principle that where there is a right there is a remedy tells us that there must be a remedy for those who suffer rights abuses whilst pregnant or giving birth, but what would be the appropriate remedy in this instance? It appears that this problem is largely systemic and so consideration is needed of a remedy which addresses structural change.[14]

The problem of obstetric violence is a complex one. Despite legislation and policy aimed at protecting and promoting patient rights, obstetric violence continues to occur.[15] The stated objects of the *National Health Act* (hereafter the *NHA*)[16] are to regulate the provision of health services, including protecting, respecting, promoting and fulfilling people's right to healthcare in

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7 The term "person" who is pregnant or birthing is used for inclusivity to include those who identify as women or men or those who are non-binary. Where I refer to women at any point, I simply use the word "women" for ease of reference and because the majority of people who face obstetric violence are women. It should, however, be read to include birthing people who do not identify as women but may still be the victims of obstetric violence.

8 Section 27 of the *Constitution of the Republic of South Africa*,1996 (hereafter the *Constitution*). When women endure any form of violence during obstetric care, they are not receiving adequate healthcare. Denial of pain medication and neglect are specific examples of the violation of this right. See Pickles 2015 *Crime Quarterly* 7, Honikman, Fawcus and Meintjes 2015 *SAMJ* 284.

9 Section 12 of the *Constitution*. Some women are assaulted or medical procedures are performed without their informed consent. Specific reference is made as well in s 12(2)(a) to the right to take decisions concerning reproduction, because in some instances women endure forced or coerced sterilisations. Pickles 2015 *Crime Quarterly* 7, 9; Honikman, Fawcus and Meintjes 2015 *SAMJ* 284.

10 Section 10 of the *Constitution.* Women often endure verbal and other forms of abuse which infringe on the right to dignity. Honikman, Fawcus and Meintjes 2015 *SAMJ* 284; Pickles 2015 *Crime Quarterly* 9.

11 Section 14 of the *Constitution*. Many women report having their medical information shared without their consent and medical examinations being performed in full view of other patients. Pickles 2015 *Crime Quarterly* 10; Honikman, Fawcus and Meintjes 2015 *SAMJ* 285.

12 Section 11 of the *Constitution*. In cases where neglect and failure to provide medical assistance are so severe that they lead to the death of the birthing person. Pickles 2015 *Crime Quarterly* 10.

13 See the following news reports of cases of obstetric violence: Ledwaba 2022 https://www.news24.com/citypress/news/obstetric-violence-is-a-growing-concern-as-pregnant-women-continue-to-suffer-20220524; Charles and Solomons 2022 https://www.news24.com/news24/southafrica/news/watch-pregnant-women-sleeping-on-the-floor-at-joburg-hospital-20220402.

14 Smith-Oka, Rubin and Dixon 2022 *Violence Against Women* 2702; Pickles 2015 *Crime Quarterly* 12.

15 See Embrace *Counting What Matters* 7. This recent quantitative survey on obstetric violence found that 53% of respondents said that they had experienced some type of obstetric violence.

16 *National Health Act* 61 of 2003 (hereafter the *NHA*).

a manner that is not harmful to their health or well-being.[17] The *NHA* specifically mentions vulnerable groups, including women.[18] The Patient Rights Charter also speaks to providing for the special needs of pregnant women, patients in pain and persons living with HIV, among others.[19] Provisions around ensuring informed consent of patients can also be found in the *NHA.*.[20] The confidentiality and non-disclosure of person's health status are explicitly provided for in the right to privacy in the *NHA*.[21] The Patient Rights Charter goes further in terms of providing that healthcare services should be delivered by providers who display a "positive disposition" and "demonstrate courtesy, human dignity, patience, empathy and tolerance."[22] The Health Ombud established by the *NHA* has investigative powers to deal with complaints.[23]

In addition there are documents that specifically provide information on aspects of maternity care. The Guidelines for Maternity Care in South Africa provides that all women in labour must be treated with respect and courtesy, that privacy must be ensured as far as possible, that a woman in labour should be allowed a companion during active labour, and that healthcare providers should "be supportive and encouraging".[24] The South African Maternal, Perinatal and Neonatal Policy, which aims to reduce maternal mortality in line with the Sustainable Development Goals, aims to promote access to the respectful and non-judgmental care of pregnant people and speaks to protecting and promoting patient rights.[25]

Obstetric violence appears to be a systemic problem, with policy and legislation not being effectively implemented. In fashioning a remedy, a court would need to consider *inter alia* the following: providing better training to healthcare professionals,[26] including ethics training which sensitises healthcare providers to power relations and social norms which contribute

17 Section 2(c) of the *NHA*.
18 See s 2(c)(iv) of the *NHA*.
19 DoH 2016 https://knowledgehub.health.gov.za/elibrary/patients-rights-charter-english.
20 Section 7 of the *NHA*.
21 Section 14 of the *NHA*.
22 DoH 2016 https://knowledgehub.health.gov.za/elibrary/patients-rights-charter-english.
23 Section 81A(1) of the *NHA*.
24 DoH 2016 https://knowledgehub.health.gov.za/system/files/elibdownloads/2020-08/CompleteMaternalBook.pdf 41-42.
25 DoH 2021 https://knowledgehub.health.gov.za/system/files/elibdownloads/2021-06/SA%20MPNH%20Policy%2014-6-2021%20v9%20signed%20Web%20Version.pdf 1, 25.
26 *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences on a Human Rights-Based Approach to Mistreatment and Violence Against Women in Reproductive Health Services with a Focus on Childbirth and Obstetric Violence* UN Doc A/74/137 (2019) (hereafter the *Report of the Special Rapporteur*) 21.

to obstetric violence,[27] ensuring healthcare professionals are sufficiently qualified and that there are enough healthcare workers in maternity wards to prevent overwork,[28] guaranteeing sufficient budget allocation to maternal care,[29] establishing monitoring and accountability mechanisms which ensure that legal sanctions are imposed,[30] allocating sufficient resources to regulatory bodies such as the Health Ombud[31] and ensuring effective systems are in place for reporting violence and guaranteeing access to justice for victims.[32] Lastly, it is suggested that there be increased state messaging around what constitutes obstetric violence.[33] Some authors also suggest that the remedy include law and policy reform.[34]

This paper aims to consider the use of a supervisory constitutional remedy to address obstetric violence, considering the use and development of supervisory constitutional remedies, where the courts have previously dealt with structural problems and how they have created systemic solutions. I have broadly identified three different categories of supervisory constitutional remedies, namely, structural interdicts, independent oversight over compliance (there are various forms) and thirdly, the appointment of a special master. I will begin with a general discussion of the nature of constitutional remedies, particularly those which are aimed at bringing about structural change, and will then turn to consider separately the categories of these remedies which I have identified, tracking their development and critically examining the cases in which they were used. I will then identify similarities across these cases to provide some insight into the circumstances which give rise to the use of a supervisory constitutional remedy. Lastly, I will show that these identified circumstances are also present in the case of obstetric violence and that a supervisory constitutional remedy may, therefore, be appropriate.

2 Constitutional provisions on remedies

The South African *Constitution* provides some guidance on remedies. In section 38, anyone listed in that section has the right to approach a court in

27 Chadwick 2017 *Feminism and Psychology* 506; Bowser and Hill 2010 https://www.hsph.harvard.edu/wp-content/uploads/sites/2413/2014/05/Exploring-Evidence-RMC_Bowser_rep_2010.pdf 37-38 suggests training which humanises childbirth and promotes caring behaviour; Honikman, Fawcus and Meintjes 2015 *SAMJ* 285 discusses training aimed at improving "empathetic engagement skills" for healthcare workers as one way to improve maternity care.

28 *Report of the Special Rapporteur* 21; Van den Broek 2019 *International Health* 354.

29 Yamin 2010 *Sur Int J Hum Rights* 100.

30 *Report of the Special Rapporteur* 22.

31 *Report of the Special Rapporteur* 22.

32 *Report of the Special Rapporteur* 22.

33 *Report of the Special Rapporteur* 22; Odhiambo 2011 https://www.hrw.org/sites/default/files/reports/sawrd0811webwcover.pdf 62.

34 Pickles 2015 *Crime Quarterly* 12. Specific discussion of law and policy reform fall outside the scope of this paper.

instances where a constitutional right has been infringed or threatened, and the court "may grant appropriate relief". Section 172(1)(b) provides that in constitutional cases, a court "may make any order that is just and equitable". The *Constitution* is vague in terms of the kind of relief which can be granted by a court, indicating only that relief must be appropriate, just and equitable. The Constitutional Court provided some guidance on the meaning of appropriate in *Fose,* indicating that "[a]ppropriate relief will in essence be relief that is required to protect and enforce the Constitution."[35] In *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* the court also indicated that appropriate relief must be effective,[36] whilst in *Sanderson*,

> appropriateness require[s] 'suitability' which is measured by the extent to which a particular form of relief vindicates the Constitution and acts as a deterrent against further violations of rights enshrined in chapter 3.[37]

In considering the meaning of "just and equitable" courts have indicated that there is a need to balance the interests of the relevant parties.[38] Bishop suggests that appropriateness envisages a victim-centred approach, whilst "just and equitable" requires an overall evaluation of a potential order on all the parties involved.[39]

The kind of relief granted has developed and changed with time. Our courts have emphasised the importance of effective relief and a responsibility to innovate in instances where previously used remedies would not ensure effective relief for the litigants.[40] In deciding on an appropriate remedy, Roach and Budlender suggest that effectiveness should be one of the key tests, particularly as ineffective remedies can erode trust in the courts and result in violations of the rule of law and the *Constitution*.[41]

Constitutional damages and structural interdicts were the first innovative remedies which emerged in South Africa's constitutional democracy. The structural interdict was the first supervisory constitutional remedy used by our courts. This remedy has since developed to allow for more direct court supervision, usually where a structural interdict has proven to be ineffective. This development is imperative, as pointed out by the Supreme Court of

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35 *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) (hereafter *Fose*) para 19.

36 *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA, Amici Curiae)* 2005 5 SA 3 (CC) 57.

37 *Sanderson v Attorney-General, Eastern Cape* 1998 2 SA 38 (CC) para 38.

38 See *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) para 33.

39 Bishop "Remedies" 9-15.

40 *Fose* paras 888-889.

41 Roach and Budlender 2005 *SALJ* 351.

Appeal (SCA) in *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality*:[42]

> Both this Court and the Constitutional Court have stressed the need for courts to be creative in framing remedies to address and resolve complex social problems, especially those that arise in the area of socio-economic rights.[43]

In South Africa courts have grappled with a government which has in some instances failed to fulfil or uphold rights and has shown a consistent failure to change the status quo, indicating a need for systemic relief. As a response the courts have, with increasing frequency, begun to adopt more robust supervisory remedies.[44] These supervisory remedies have taken different forms but all ensure that the court retains a supervisory role over the implementation of the court order and the fulfilment of rights.

3 Remedies which bring about structural change

Bishop identifies and sets out three kinds of constitutional remedies which are used to bring about structural change where there is a systemic problem: declarations, interdicts and supervisory orders.[45] In situations where government has consistently fallen short in upholding rights, a declaration becomes a significant starting point. It not only acknowledges the violation of rights but also sets the groundwork for further remedies. These may include specific directives to the government to address the issues, implement policies, or allocate resources to ensure the protection and fulfilment of rights.[46] Such a remedy, if it is not coupled with another, can be seen as being safe as it ensures that the court is not interfering with the role or function of the executive. The quote below from *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*[47] illustrates this:

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42 *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality* 2015 2 SA 413 (SCA) para 35.

43 The quote was cited as authority in *Linkside v Minister of Basic Education* (3844/2013) [2015] ZAECGHC 36 (26 January 2015) (hereafter *Linkside*) para 19 to justify the appointment of a claims administrator.

44 Between 2014 and 2019, our courts have crafted and used at least four different innovative supervisory remedies. In *Madzodzo v Minister of Basic Education* 2014 3 SA 441 (ECM) (hereafter *Madzodzo*) the court ordered the appointment of an independent auditor; in *Linkside*, a claims administrator was appointed; in *Black Sash Trust v Minister of Social Development (Freedom Under Law NPC Intervening)* 2017 3 SA 335 (CC) (hereafter *Black Sash*) the court appointed an expert panel and in *Mwelase v Director-General for the Department of Rural Development and Land Reform* 2019 11 BCLR 1358 (CC) (hereafter *Mwelase CC*), the court ordered that a special master be appointed. In all of these cases there was a pattern of government being unable to fulfil rights. In each case, the court needed an effective remedy to bring about systemic change.

45 Bishop "Remedies" 9-176.

46 Bishop "Remedies" 9-176.

47 *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 2 SA 359 (CC) (hereafter *RCAG* case)

> It should also be borne in mind that declaratory relief is of particular value in a constitutional democracy which enables courts to declare the law, on the one hand, but leave to the other arms of government, the executive and the legislature, the decision as to how best the law, once stated, should be observed.[48]

I use the word "safe" to describe this remedy because it ensures that the court will not be criticised for getting involved in the realm of the executive. Instead, it is left up to the executive to decide how it will ensure compliance with its constitutional obligations. The result, however, is a weak remedy and in cases where only a declaration has been made, government has often not complied.[49] In such cases it can become difficult for litigants to continue to return to court to force compliance.[50]

Bishop's second category of systemic remedies is the non-supervisory interdict.[51] The court does not play a supervisory role over compliance with this order but the interdict does have more teeth than a declaratory order in that if there is non-compliance with the order, contempt proceedings can be brought.[52] This means that there is a greater chance of forcing government to comply with its constitutional mandate.

My primary focus and discussion, however, will be on the third category of systemic remedies: supervisory orders. The purpose of supervisory remedies is twofold:

> (a) to determine the terms of a more detailed future order; and (b) to ensure that the state complies with an order.[53]

The supervisory order most often used is an interdict coupled with a supervision order which requires government to report back to court at regular intervals, detailing its progress in complying with the order. The reports which government submits to court are also circulated amongst the other litigants, who are required to provide comments. Following a report-back, the court will then make a subsequent order.[54] In this way the court is able to supervise the implementation of and compliance with the order. This also means that other parties involved in the litigation, such as non-governmental organisations, can actively participate in the process.[55] Concerns about government implementation can also be raised in further

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48 *RCAG* case para 108.

49 Consider the inadequacy of the declaration ordered in *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) (hereafter *TAC case*).

50 Bishop "Remedies" 9-178.

51 Bishop "Remedies" 9-178.

52 Bishop "Remedies" 9-179.

53 Bishop "Remedies" 9-179.

54 Bishop "Remedies" 9-180.

55 Roach and Budlender 2005 *SALJ* 334. See *City of Cape Town v Rudolph* 2003 11 BCLR 1236 (C) (hereafter *Rudolph*) paras 5-6 of the order.

litigation in instances where no further report back is required.[56] In addition, there is less chance of an implementation plan merely being a tick-box exercise. Where the plan submitted has no substance or does not explain how government will comply with the order; other litigants will quickly pick up the problems with the plan and challenge it.

There may be various reasons why court orders are not implemented such as a lack of political will, funding problems, bureaucratic obstacles, difficulties arising from the need for departments to work together, and lack of expertise, to name but a few.[57] In cases where it is shown that government has failed to fulfil its constitutional mandate, the courts have often used a remedy that is supervisory in nature.[58]

In considering the level of court intervention required, it may be necessary and useful to determine the underlying reasons for government inaction.[59] Declarations, coupled in some instances with a requirement to report to the public on progress, might be sufficient where the inattentiveness of government is the reason for the issue presented to court.[60] In those cases, government's attention simply needs to be drawn to the problem. Where government incompetence is the reason for the justiciable problem, a simple declarator would probably not be effective and instead court supervision requiring report back is necessary to ensure compliance.[61] According to Roach and Budlender,

> the greater the degree of the government's incompetence or lack of capacity to provide for rights, the stronger the case for supervisory jurisdiction including requirements that the government submit a plan and progress reports for the court's approval.[62]

It is particularly in public interest litigation that supervisory remedies are considered. Usually in this kind of case the content of a right is not in dispute but rather the implementation of legislation or policy by government to ensure the fulfilment of that right. One of the benefits of a supervisory remedy is that it is an ongoing remedy which usually involves negotiations between the parties and where the court and the litigants are able to track the progress of government in fulfilling its constitutional mandate.[63]

Systemic remedies are required where there is a widespread and ongoing violation of people's rights. Bishop[64] explains that the infringement

56 Roach and Budlender 2005 *SALJ* 334.
57 Erasmus and Hornigold 2015 *PELJ* 2460.
58 See *Black Sash; Madzodzo*; *Linkside*; *Mwelase CC*.
59 Roach and Budlender 2005 *SALJ* 346.
60 Roach and Budlender 2005 *SALJ* 346.
61 Roach and Budlender 2005 *SALJ* 349.
62 Roach and Budlender 2005 *SALJ* 349.
63 Erasmus and Hornigold 2015 *PELJ* 2464.
64 Bishop "Remedies" 9-84.

frequently arises from existing policies, practices or institutional frameworks that actively or passively endorse violations of rights. In such instances remedies are often pursued not only to compensate for past losses but also to pre-emptively deter or discourage future violations.

3.1 Structural interdicts

The most common and first supervisory remedy that emerged in South African jurisprudence is the structural interdict.[65] This remedy compels compliance with a court order by supervising or monitoring the progress made by government.[66] Usually, a government official will be required to report back to court at specified intervals and detail what has been done to comply with the order.[67] In many cases this kind of remedy is used when the court is dealing with "recalcitrant or incompetent official behaviour".[68] Structural interdicts can, therefore, be useful in preventing the failure of officials to comply with an order and the court will continue to supervise compliance until the court order has been completely fulfilled.[69]

According to De Vos and Freedman,[70] there are various steps that a structural interdict will usually follow. Firstly, as part of the order the court will declare the conduct to be unconstitutional and invalid and will set out the steps that need to be taken to rectify the unconstitutional conduct. This may include, for instance, steps that must be taken in order for rights to be realised. The court will not, however, dictate the way in which government must perform its constitutional obligation and will instead require that

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65 Bishop "Remedies" 9-174 indicates that this is the most common supervisory remedy. The first time the court mentioned the possibility of supervising the implementation of an order and requiring a party to report back was in *Pretoria City Council v Walker* 1998 2 SA 363 (CC) paras 96, 139. *August v Electoral Commission* 1999 3 SA 1 (CC) (hereafter *August*) was the first case in which the court used a structural interdict.

66 *S v Zuba and 23 Similar Cases* 2004 4 BCLR 410 (E) (hereafter *Zuba* case).

67 See the *Zuba* case; De Vos and Freedman *South African Constitutional Law in Context* 508.

68 De Vos and Freedman *South African Constitutional* 508; see for instance *Sibiya v Director of Public Prosecutions: Johannesburg High Court* 2005 5 SA 315 (CC), where government continually failed to replace death sentences with other lawful sentences; also see the *Zuba* case, in which the Department of Education and the Department of Social Development in the Eastern Cape showed an ineptitude and unwillingness to ensure that juvenile offenders who had been sentenced to a term of incarceration in a reform school actually served their sentences.

69 See *Pheko v Ekurhuleni Metropolitan Municipality* 2016 10 BCLR 1308 (CC) para 1.

70 De Vos and Freedman *South African Constitutional Law* 510; for a practical example see *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) (hereafter *Joe Slovo* case), where the court first ordered the respondents to provide alternative accommodation to the applicants (para 8 of the order) and thereafter provided that the parties engage meaningfully and file affidavits which included a report setting out how the order would be implemented and report on the allocation of permanent housing opportunities to affected parties (para 16 of the order).

government develop a comprehensive plan indicating how it intends to remedy the constitutional infringement.[71]

Secondly, once the order has been handed down, the relevant government department is then required to develop the plan whilst considering aspects relating to human resources, budget and so forth, and must also set clear timelines indicating what outcomes it intends to achieve and by when. This is to ensure that progress can be measured. This plan must be presented to court, at which stage all interested parties are given an opportunity to submit comments.[72]

Thirdly, after the court has considered the comments it will incorporate those comments it agrees with into the plan and will make the plan an order of court.[73] It is now up to the relevant government department to implement the plan and achieve the relevant targets in the specified time frames and it is required to report back to court regularly on its progress. Any party to the litigation can also approach the court, should there be difficulties with the implementation of the plan.[74]

In some cases the order might not require government to develop a plan but rather to amend an existing policy in a manner that brings it in line with the *Constitution,* and the court will then monitor the revision of the policy.[75] Courts may have to extend deadlines and shift targets when government is not able to work in line with the initial implementation plan.[76] In some cases courts have even had to punish public officials who consistently fail to

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71 De Vos and Freedman *South African Constitutional Law* 510-511; see *August,* where the court ordered that the respondents "make all reasonable arrangements necessary" to ensure that prisoners were able to register to vote (paras 3.3 and 3.4 of the order). The court further ordered that the Electoral Commission file an affidavit setting out how it would comply with this order (para 3.5 of the order). What is evident is that the court is not providing the exact steps the respondent must take. It is simply ordering that it must act to fulfil the respective rights.

72 Usually the court order itself will make provision for commentary by the parties. See for example paras 5-6 of the order in *Rudolph,* which provide that the respondents have one month after receiving the report to comment on it and that the City of Cape Town may also deliver a reply to the commentary within one month of receiving it; also see De Vos and Freedman *South African Constitutional Law* 510-511.

73 For example, in para 7 of the *Rudolph* order, the court provides that it will make a determination in respect of the report, commentary and reply; also see De Vos and Freedman *South African Constitutional Law* 510-511.

74 See para 21 of the *Joe Slovo* order. The court provides that if the order is not complied with in any way, or if any difficulties arise, any party may approach the court for assistance.

75 See para 3 of the order in *Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School* 2013 9 BCLR 989 (CC), which provides that the respective schools must review their current pregnancy policies and then report back to court with the revised policies; also see Rautenbach and Venter *Rautenbach-Malherbe Constitutional Law* 194.

76 De Vos and Freedman *South African Constitutional Law* 512.

comply with a court order, for instance by granting personal costs orders against them.[77]

The first time that a structural interdict was used was in the case of *August v Electoral Commission,* which dealt with prisoners' right to vote. The Court found that no arrangements had been made by the Electoral Commission to register prisoners as voters, and they would, therefore, not be permitted to vote.[78] The Court ordered that the Electoral Commission ensure that arrangements be made for the registration of voters in prison, but also that the Commission file an affidavit within two weeks explaining exactly how it intended to comply with the court order.[79] In its judgment the court acknowledged that it did not have the necessary expertise or information at its disposal to be able to order the Commission to take particular steps.[80] It, therefore, ordered that the Commission determine itself how it would comply with the order and detail the steps it would take in the affidavit to be filed.[81]

Bishop suggests that there are two key factors that enabled the court to make this particular order in the *August* case: Firstly, that the supervision of the Commission would be for a relatively short, defined period and secondly, that the action that was required - ensuring the registration of voters in prison - was relatively simple and also clearly defined.[82] This was not a very complex issue to resolve. In fact, Sachs J notes that he had "no doubt that practical solutions will be found for what are essentially practical problems."[83] Although there was urgency in this case as the national elections were to be held soon, the court did not refer to the pressure of time as a justification for using this remedy. Instead, it ordered that the affidavit of the Electoral Commission detailing the steps it would take to comply with the order be filed within two weeks.

Following on from this case, the Court in *Sibiya v Director of Public Prosecutions: Johannesburg High Court*[84] also used a structural interdict to ensure compliance. Following *Makwanyane,*[85] where the death penalty was found to be unconstitutional, government was supposed to convert death sentences into other relevant lawful punishments, but it had failed to

77 De Vos and Freedman *South African Constitutional Law* 512. See *Black Sash Trust*; *South African Social Security Agency v Minister of Social Development* 2018 10 BCLR 1291 (CC) and *Black Sash Trust v Minister of Social Development* 2018 12 BCLR 1472 (CC).

78 *August* para 36.

79 *August* para 42.

80 *August* para 39.

81 *August* para 39.

82 Bishop "Remedies" 9-185.

83 *August* para 40.

84 *Sibiya v Director of Public Prosecutions: Johannesburg High Court* 2005 5 SA 315 (CC) (hereafter *Sibiya I*).

85 *S v Makwanyane* 1995 3 SA 391 (CC).

complete this process after a decade, and hence *Sibiya* was launched. In *Sibiya* the Court ordered that government submit a comprehensive plan in which it detailed how it would finalise the process of replacing sentences. There was a much more detailed supervisory process that was engaged in this case, with government being required to submit detailed information on the prisoners who had not had their death sentences converted, why this was the case and the steps they were being taken or had been taken to convert their sentences. The court commented in this case that the process had already taken such a long time, making it unwise to presume that the death sentences would be replaced as anticipated.[86] The court made it clear that government had shown it was not able to convert sentences timeously and so direct supervision was necessary to ensure compliance.

In the final *Sibiya* judgment the court reflected on the supervisory order, stating that the purpose of requiring the respondents to submit a report was firstly to obtain detailed information about the people who needed their sentences converted and why this had not been done, and secondly to ensure that steps were detailed regarding how compliance with the order would be achieved, including indicating the cases where the sentences had been converted already.[87] Supervision in this case proved to be successful, with all outstanding death sentences being replaced.

There has also been a slew of eviction cases where the use of structural interdicts has become increasingly popular. In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* the Constitutional Court coupled an eviction order with a structural interdict requiring that the parties report back to the court on the outcome of meaningful engagement between them as well as the progress in providing permanent housing for those people who had been affected by the eviction.[88] The court also provided that should the order not be complied with for any reason, any party could return to court for an amendment, supplementation or variation of the initial order.

The benefit of a structural interdict is that it is a flexible remedy and can be moulded to suit the particular case in which it is used in order to bring about effective relief. This could include, for instance, meaningful engagement between government and the other litigants.[89] Given that the court requires government to develop a plan to ensure fulfilment of the rights which have been violated, this kind of remedy means that government itself can work within its budget and resources to develop a plan which will work for it.[90]

86 *Sibiya I* para 61.
87 *Sibiya v Director of Public Prosecutions* 2006 2 BCLR 293 (CC) para 8.
88 The *Joe Slovo* case.
89 Maphosa 2020 *SAJHR* 367.
90 Maphosa 2020 *SAJHR* 368.

The remedy itself is practical because government will not develop something beyond its capacity.[91] As opposed to an instance where the court imposes a remedy that is ineffective, it is likely that there is a greater chance of the implementation of a plan which government has developed itself and which also has input from other litigants who may bring a range of perspectives to the kinds of solutions that are available for realising rights.

Some authors argue that a structural interdict is considered to be an invasive remedy because the court inspects and comments on the plans that are presented to it, particularly to ensure constitutional compliance.[92] It is important to note, however, that the court still allows the executive branch of government to develop the plans presented and in this way avoids violating the separation of powers doctrine.[93] Roach and Budlender suggest, for instance, that in the High Court decision of *Grootboom*[94] it was separation of powers concerns which led the court not to make a specific order regarding how government should provide shelter to the applicants, leaving the "how"' to the executive.[95] Allowing the executive to determine how the problem will be solved alleviates separation of powers concerns. Structural remedies were introduced specifically in cases where there was systemic government failure rather than just to vindicate an individual's rights.[96]

Although the structural interdict was lauded as an exciting development in the remedies granted by South African courts, some litigants found that they still did not receive fulfilment of their rights in spite of the court assuming a supervisory role.[97] A structural interdict is the weakest of all the supervisory

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91 Maphosa 2020 *SAJHR* 368.

92 De Vos and Freedman *South African Constitutional Law* 508; Ebadolahi 2008 *NYU L Rev* 1596. Also see Mbazira 2008 *SAJHR* 14, where the author suggests that because of separation of powers concerns, structural interdicts should be seen as last resorts.

93 See De Vos and Freedman *South African Constitutional Law* 508; Mbazira 2008 *SAJHR* 9.

94 *Grootboom v Oostenberg Municipality* 2000 3 BCLR 277 (C).

95 Roach and Budlender 2005 *SALJ* 329.

96 For example, in *Komape v Minister of Basic Education* (1416/2015) [2018] ZALMPPHC 18 (23 April 2018) the High Court rejected the damages claim made by the family in respect of the death of a five-year-old who fell into a pit latrine at school, but used a structural interdict to address the systemic problem of pit latrines in schools. The SCA later reversed the High Court order in respect of the damages claim. This case was able to provide relief not only for the individual family but also more widespread relief; also see De Vos and Freedman *South African Constitutional Law* 509.

97 Consider the structural interdict used by the Land Claims Court in *Mwelase v Director-General for the Department of Rural Development and Land Reform* 2017 4 SA 422 (LCC) (hereafter *Mwelase LCC*), which required the Department of Rural Development and Land Reform to provide information regarding the number of outstanding labour tenant claims. Government continuously failed to provide the relevant information or to process the outstanding claims. Government and the

constitutional remedies and so it is usually only in cases where government has not complied with a structural interdict initially ordered that a stronger remedy such as independent oversight over compliance will be considered.

3.2 Independent oversight over compliance

Having looked at the weakest supervisory remedy, I now turn to the more invasive and stronger supervisory constitutional remedies available. In a few cases the court has provided for independent oversight in the monitoring of compliance with its order. The first case to use this kind of remedy was *Madzodzo*, which dealt with the provision of school furniture, in which the court ordered that an independent auditor be appointed. This was an attempt to bring about systemic relief instead of only servicing the applicant schools. A systemic shortage of school furniture across the Eastern Cape province led to an order which required that an independent auditor fully establish the extent of the furniture shortages in schools, and thereafter the Department was required to ensure the delivery of the furniture.[98] Following continued non-compliance on the part of the Department of Basic Education, which had committed to appointing an independent auditor but had failed to provide a completed audit report, the court also exercised a more robust supervisory role, specifying clear deadlines for the implementation of the order and requiring that an independent auditor be appointed to provide guidance on the furniture needs of the relevant schools.[99] A few years later, in a consent order, a task team was appointed by the Department to ensure the delivery of furniture to those schools which required it, and there has been success in meeting the needs of Eastern Cape schools.[100]

Secondly, in the case of *Linkside* the court ordered that a claims administrator be appointed to deal with the payment of teachers in the Eastern Cape. This class action was to provide relief for those schools that had teachers who had not been formally appointed by the Department of Basic Education and were, therefore, not being paid by the Department. These teachers were, however, deemed to have been appointed by relevant school governing bodies and had been appointed to vacant posts which had not been filled by the Department. The Department had a poor track record

litigants returned to court many times and the court tried to supervise the implementation of its order. It became clear that the order would not be adhered to by government and thereafter the court ordered that a special master be appointed to deal with the outstanding claims.

98 *Madzodzo* paras 3-5.

99 *Madzodzo* orders 3 and 4, para 41.

100 See *Madzodzo* 26 January 2016 Court Order as referred to in Taylor 2019 *CCR* 265. See Xolo 2020 https://iafrica.com/litigating-the-right-to-education-in-sa-an-overview-of-some-of-the-most-important-cases-of-the-last-10-years/ where it is indicated that "by 2020 the ECDOE has provided the vast majority of the learners in the province with desks and chairs."

of reimbursing schools for money outlaid to those teachers who were not formally appointed and so the court appointed a claims administrator to process reimbursements. A firm of chartered accountants was appointed to perform the role of a claims administrator. The claims administrator, once appointed, was required to verify schools' entitlements to reimbursement and make payments to those schools. It was also required to report back to the court on the steps it had taken.[101] Here was another example of an independent supervisory mechanism to ensure that the court order was effectively implemented.

Lastly, in *Black Sash* the court ordered that a panel of experts be established, including the Auditor-General, to be responsible for evaluating the progress made by the South African Social Security Agency (SASSA) in complying with a court order. This case dealt with SASSA's failure to comply with a previous order of court in *All Pay,*[102] which concerned the tender process in relation to appointing a service provider to administer the payment of social grants. SASSA was expected either to appoint a new service provider through a fair tender process or to administer the social grants itself. SASSA gave the court an assurance that it would take over the payment of the social grants itself and that it would meet the 1 April 2017 deadline set out in its previous progress report. However, the day before the deadline it came to light that SASSA would not be able to comply with the undertaking it had made in the progress report, and that the relevant officials had been aware of this for some time.[103] In this case it was necessary for the court to first declare that SASSA and Cash Paymaster (the payment service provider) had a constitutional duty to ensure the payment of social grants.[104]

As a response to the persistent non-compliance of SASSA and to ensure accountability the court developed an innovative remedy that included independent oversight in the form of an expert panel.[105] The court stated that this panel must comprise suitably qualified experts and legal practitioners and was expected to evaluate SASSA's progress in ensuring the payment of the social grants and the steps taken by SASSA to appoint a new service provider to pay the grants in future. The panel was to report back to court on the steps it had taken to evaluate SASSA and was to provide the results and recommendations arising from the evaluations.[106]

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101 *Linkside* para 1.3.

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

103 *Black Sash* paras 5-6.

104 *Black Sash* para 76.

105 *Black Sash* para 12 of the order.

106 *Black Sash* para 12 of the order.

The court recognised in this case that millions of people depend on social grants to survive and that if the court order was not implemented, millions would go hungry. This was also a case where SASSA had shown a continued lack of compliance with court orders and government had admitted that it was not able to fulfil its constitutional obligation to provide social assistance to South Africans in need.[107] The court further pointed to the urgency of the situation.[108]

In elaborating on the direness of the circumstances, the Court quotes the *Mhlope* judgment:

> It bears emphasis that this is an exceptional case that cries out for an exceptional solution or remedy to avoid a constitutional crisis which could have grave consequences. It is about the upper guardian of our Constitution responding to its core mandate by preserving the integrity of our constitutional democracy. And that explains the unique or extraordinary remedy we have crafted.[109]

I emphasise this point because it appears that the court is alive to the realities of everyday South Africans and the role it plays in upholding rights. The court ought to consider a solution where a severe rights violation will occur if it does not intervene. In *Black Sash* the court was able to prevent a constitutional crisis by ensuring that social grants would be paid out.

3.3 Special master

The remedy of appointing a special master was used for the first time in South Africa in *Mwelase v Director-General for the Department of Rural Development and Land Reform*.[110] The remedy used in this case was different from those discussed above in that the role of the special master was not only to oversee compliance with a court order but also to lead the preparation of an implementation plan, in collaboration with stakeholders.[111] The court indicated that "sustained, large-scale systemic dysfunctionality and obduracy" were the circumstances which gave rise to the appointment of a special master, as opposed to in *Black Sash,* where the responsible Minister was largely to blame.[112] The special master is seen as an agent of the court and an extension of the court's supervisory jurisdiction.[113]

The appointment of a master may be appropriate in instances where there is a need for supervision over institutional transformation in order to resolve

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107 *Black Sash* para 18.
108 *Black Sash* para 36: "it is difficult to conceive of a matter more urgent on a national scale."
109 *Electoral Commission v Mhlope* 2016 5 SA 1 (CC) para 137.
110 *Mwelase LCC.*
111 *Mwelase CC* paras 58-64.
112 *Mwelase CC* para 39.
113 *Mwelase CC* paras 61-63.

systemic issues.[114] In many instances the implementation of a court order which requires structural change may be complex for various reasons, including resistance to change, burdensome institutional bureaucracy and so forth.[115] In order to navigate this, someone with specific expertise, that is, a special master, may be best placed to ensure swift institutional transformation with minimal disruptions.

Mwelase dealt with the inability of the Department of Rural Development and Land Reform to process labour tenant claims in terms of the *Land Reform (Labour Tenants) Act* 3 of 1996. After multiple government failures the Land Claims Court (LCC) ordered that a special master be appointed to supervise the processing and adjudication of these claims.[116] The special master is seen as an independent entity that has the mandate of devising an implementation plan to ensure compliance with the court order and, thereafter, to monitor the execution of that plan.[117]

The decision of the LCC was appealed to the SCA, where the decision of the court a quo was overturned.[118] The SCA indicated that the appointment of a special master was a "textbook case of judicial overreach" and interfered with the separation of powers doctrine.[119] There were various other reasons for the court's overturning the decision of the LCC, including concerns around budget allocation, the lack of authority under the *Restitution of Land Rights Act* 22 of 1994 for the LCC to appoint a special master or any other South African law governing this, and that a senior manager had already been appointed by the Department to deal with the outstanding claims.[120] There was particular concern, however, that the appointment of a special master was a violation of the separation of powers doctrine as this master would be taking on existing functions of the department and using a budget to do this.[121]

On appeal the Constitutional Court reinstated the order of the LCC and emphasised the need to remedy the ongoing systemic failure of the Department.[122] The Court also emphasised that the special master was an agent of the court and thus the LCC retained control over its mandate and scope.[123] Although the appointment of a special master has been lauded by some, others criticise the Constitutional Court's judgment for its brevity and

114 Erasmus and Hornigold 2015 *PELJ* 2480.
115 Erasmus and Hornigold 2015 *PELJ* 2467.
116 *Mwelase LCC.*
117 *Mwelase LCC* para 28.
118 *Mwelase v Director-General for the Department of Rural Development and Land Reform* 2019 2 SA 81 (SCA) (hereafter *Mwelase SCA*).
119 *Mwelase SCA* para 51.
120 *Mwelase SCA* paras 44-45.
121 *Mwelase SCA* paras 48-49.
122 *Mwelase CC* para 69.
123 *Mwelase CC* para 59.

insufficient explanation regarding why this remedy is appropriate to vindicate the particular rights at risk.[124]

The overarching theme in the *Mwelase* case was an inability by the Department to ensure that labour tenant claims were dealt with. In fact, it was shown by the applicants that it would take 40 years for the Department to process outstanding claims at the rate it was going.[125] In instances like this, it would not be just and equitable for the court to just sit back and wait for the Department; instead it must act. If that means having an independent entity to assist with the process, then this must be done. Ultimately the court is required to protect and uphold rights and it cannot allow rights violations to go unchecked simply because government is failing in its duties. The court in *Mwelase* commented that it cannot hide behind the separation of powers doctrine to avoid its obligation to provide just and equitable relief.[126] It went on to reiterate that the separation of powers envisages a relationship of accountability between branches of government where intrusions and tensions are inevitable.[127] In times when there is severe executive failure and the most vulnerable and marginalised must be protected, the courts must ensure that the remedy granted is effective.[128]

4 Declining to grant a supervisory remedy

Although in the cases discussed above the court granted a supervisory remedy, it is also useful to consider instances where the court refused to grant one. Although the court in the *TAC* case rejected the government's argument that an order dictating how it must comply would be an infringement of the separation of powers doctrine, the court still declined to grant a supervisory order. It emphasised that it is "under a duty to ensure that effective relief is granted" and, therefore, must have the power "to make orders that affect policy as well as legislation."[129] Yet despite this sentiment, the Court still decided not to grant the supervisory interdict. This was despite the High Court having formulated an order which required government to develop a plan on how it would provide Nevirapine to HIV-positive mothers and submit this plan to the court for approval.[130]

In declining to grant a supervisory order, the court provided a test for when such a remedy should be used:

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124 Mukherjee and Tuovinen 2020 *SAJHR* 391.
125 *Mwelase CC* para 27.
126 *Mwelase CC* para 36.
127 *Mwelase CC* para 47.
128 *Mwelase CC* paras 48-49. Also see Taylor 2019 *CCR* 269.
129 *TAC* case paras 106, 113.
130 *Treatment Action Campaign v Minister of Health* 2002 4 BCLR 356 (T).

> [Courts] should exercise such a power if it is necessary to secure compliance with a court order. That may be because of a failure to heed declaratory orders or other relief granted by a Court in a particular case.[131]

The court added that government had always respected and executed orders.[132] Of course, this reasoning may have been sound in 2002 but it is unlikely that a court today would agree that government always respects and executes orders of the Constitutional Court. The difficulty, however, is that the court requires that the litigant show that granting a supervisory order is necessary for compliance, meaning that such a litigant would need to show incompetence or bad faith on the part of government.[133]

In *United Democratic Movement v Eskom Holdings SOC Ltd*[134] the court declined to grant an order appointing a special master. It appears that where the court thinks that accountability may be achieved through existing structures it will not adopt an intrusive remedy such as the appointment of a special master. In the *UDM* case the court accepted that the newly appointed Minister of Electricity could ensure that the Electricity Action Plan was implemented, but further that this was not a case where previous orders had been ignored or not implemented.[135] It still remains unclear, however, what or how much non-compliance is necessary in order for a court to consider a stronger supervisory remedy.

5 Circumstances which give rise to the use of a supervisory constitutional remedy

Whilst there has been litigation to claim damages for violence suffered during birth or post-natal care in South Africa,[136] there has not yet been any litigation to bring about systemic change in the area of obstetric care. Given the nature of the problem of obstetric violence, which is complex, systemic and multi-faceted, the use of a systemic remedy should be explored. Across the cases in which the courts have engaged a supervisory constitutional remedy, there are various common factors and circumstances that prevail. I show below that these circumstances may also be present in respect of a case on obstetric violence. I focus almost entirely on the stronger forms of supervisory remedies, namely independent oversight over compliance and the appointment of a special master. The purpose of this exercise is to show that these circumstances may also be present in a case aimed at dealing

131 *TAC* case para 129.
132 *TAC* case para 129.
133 Bishop "Remedies" 9-183.
134 *United Democratic Movement v Eskom Holdings SOC Ltd and Related Matters* [2023] JOL 62346 (GP) (hereafter *UDM*).
135 *UDM* para 33.
136 *Sithole v MEC for Health and Social Development* (Gauteng Local Division, Johannesburg) (unreported) case number 19744/2012; *Pandie v Isaacs* (A135/2013, 1221/2007) [2013] ZAWCHC 123 (4 September 2013).

with the systemic nature of obstetric violence, even though it is unlikely that litigants would request a stronger supervisory order in their initial application. They would more probably ask for a structural interdict. This remedy would allow the relevant government department to develop an implementation plan indicating ways in which it would address the problem of obstetric violence, which could include, for instance, training initiatives for healthcare providers, improved resource allocation and better monitoring and accountability mechanisms. Below I discuss seven identified circumstances which are present in cases where the court has used a supervisory remedy and apply each circumstance individually to a potential case on obstetric violence.

5.1 Justiciable socio-economic right

All the cases in which a supervisory constitutional remedy was granted with the exception of the *August* case deal with socio-economic rights litigation. Importantly, the stronger kinds of supervisory remedies all deal with socio-economic rights: the right to social security,[137] education[138] and land tenure.[139] A case on obstetric violence would deal primarily with the right to healthcare, including reproductive healthcare, and would, therefore, fall in this category.

5.2 Likelihood of grave consequences if the court does not intervene

Where there is a possibility of severe consequences if the court does not intervene to ensure the protection and promotion of rights, there is a greater chance of the court granting a stronger remedy. In respect of structural interdicts, Roach and Budlender explain that a court will be more likely to intervene

> where the consequences of even a good-faith failure to comply with a court order are so serious that the court should be at pains to ensure effective compliance.[140]

This thinking can be applied to the more robust forms of supervision as well, and where the consequences of non-compliance would be catastrophic the court must use an effective remedy that makes compliance not just probable but certain.

In *Black Sash*, millions of South Africans would have gone hungry if the payment of social grants had not been ensured, whilst in the education cases, if furniture had not been provided or schools had not been reimbursed for the capital outlaid to pay teachers, students' ability to learn would have been severely impacted. Without school furniture, for instance,

137 *Black Sash.*
138 *Madzondzo* and *Linkside.*
139 *Mwelase CC.*
140 Roach and Budlender 2005 *SALJ* 333.

school children would have been left behind and could possibly have lost years without being able to properly learn and progress to further grades. In the *Mwelase* case, many of the initial applicants had already died without having been granted land by the time the case reached the Constitutional Court. The court also makes the link between land, dignity and the realisation of other constitutional rights, acknowledging the importance of land reform in transforming our society.[141]

Similarly, in a case on obstetric violence, if the court does not ensure compliance with a court order directing systemic change grave consequences would ensue, particularly given the range of rights violations this kind of violence entails. It is also important to note the link between the maternal mortality rate and obstetric violence, a link that has been made globally, specifically where obstetric violence takes the form of neglect.[142] The maternal mortality rate in South Africa is approximately 134 per 100,000 live births, a statistic derived from the South African National Committee on Confidential Enquiries into Maternal Deaths, which further showed that 60% of these deaths were potentially preventable.[143] Further, this kind of violence affects women psychologically and in some cases leads to other health issues which have a lasting impact on the women and on the healthcare system itself.[144] Not only would the consequences of non-compliance be grave, but also irreparable. In instances where harm is irreparable, courts must "do whatever is reasonably possible" to make sure that the order is carried out and the harm avoided.[145]

5.3 Underlying systemic problem

Supervisory constitutional remedies are engaged where the problem in question is a systemic one which requires structural relief. In many instances the systemic rights infringements are perpetrated as a result of a range of factors which in various ways sanction the violations.[146] In *Mwelase* the system in place was not able to deal with the outstanding labour tenant claims and therefore a new government system needed to be adopted. Similarly, in *Madzondzo* the continued lack of school furniture was a result of poor systems at the level of the Department of Basic Education, and an independent auditor had to be appointed to provide a clear picture of what furniture was required, something which the Department had failed to ascertain.

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141 *Mwelase CC* para 1.

142 Chopra *et al* 2009 *Lancet* 835-845.

143 CGE *Submission to the UN Special Rapporteur* 5; National Committee for the Confidential Enquiries into Maternal Deaths *Saving Mothers* 6.

144 Kukura 2017 *Geo LJ* 754.

145 Roach and Budlender 2005 *SALJ* 334.

146 Bishop "Remedies" 9-84.

The literature suggests that obstetric violence is a norm of practice and is, therefore, a problem that is pervasive at a systems level.[147] An overhaul of that system is required in order to protect and promote the rights of pregnant and birthing people *inter alia* by improving the accountability mechanisms, mandating training, improving resource allocation, improving awareness efforts and ensuring sanctions for perpetrators.[148] A coordinated effort to provide a targeted response would be useful in bringing about systemic change, and a structural interdict which requires the creation of an implementation plan might assist.

5.4 Ongoing or inevitable violation

In the cases discussed above there was an ongoing violation of rights. Government showed an inability in each case to halt these violations, and it was within this context that the court was obliged to order a supervisory remedy to stop the continuing infringements of rights. Although social grants were still being paid in the *Black Sash* case, the infringement of the right to social assistance would be inevitable and ongoing if the court had not supervised the implementation of an order to ensure the efficient payment of the grants. In *Madzondzo* pupils were experiencing an environment not conducive to learning and therefore their right to education was being continuously infringed. A similar situation applied in the *Linkside* case, where schools who had not been reimbursed for the payment of salaries found that they were not able to meet their other financial needs, thus impacting on the learning environment of those pupils. Of course, the ongoing violation of rights for the litigants in *Mwelase* is clear in that all those who had legitimate labour tenant claims were unable to access their right to secure land tenure.

Obstetric violence is institutional, ongoing violence which will continue to occur without intervention. People will continue to be at risk of violence once pregnant or giving birth if there is no trigger for institutional change in healthcare facilities. It is suggested that obstetric violence is accepted as a norm of practice, and thus is something which continues to pervade medical care in obstetrics.[149] Unless there is some kind of intervention to bring about institutional transformation, it will continue.

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147 Freedman and Kruk 2014 *Lancet* 43; Smith-Oka, Rubin and Dixon 2022 *Violence Against Women* 2702; Pickles 2015 *Crime Quarterly* 12.

148 *Report of the Special Rapporteur* 21; Van den Broek 2019 *International Health* 354; Chadwick 2017 *Feminism and Psychology* 506; Bowser and Hill 2010 https://www.hsph.harvard.edu/wp-content/uploads/sites/2413/2014/05/Exploring-Evidence-RMC_Bowser_rep_2010.pdf 37-38; Honikman, Fawcus and Meintjes 2015 *SAMJ* 285.

149 See Odhiambo 2011 https://www.hrw.org/sites/default/files/reports/sawrd0811webwcover.pdf 33-35.

5.5 Widespread

It appears that in order for the court to grant a supervisory remedy, there must be widespread rights infringements. The rights violations cannot be sporadic, but instead must be extensive. For example, in *Mwelase* nearly 11 000 people were affected by the Department's failure to process outstanding labour tenant claims.[150] Although a rights violation had not yet occurred in *Black Sash*, it would have been inevitable if an effective remedy had not been granted. The result would have been millions of people not receiving their social grant and going hungry as a result.

According to research conducted in South Africa the prevalence of obstetric violence appears to be widespread.[151] Stats SA claims that 70% of the population make use of public healthcare facilities,[152] where reports of obstetric violence persist.[153] Without institutional intervention a large number of people who are pregnant or birthing continue to be at risk of being subjected to this kind of violence.

5.6 Non-compliance or the likelihood of non-compliance

In cases where the court has established the need for a supervisory remedy, a structural interdict is usually granted first. Where it is "inadvisable for the court to assume"[154] that government will comply with an order promptly, the court must consider a supervisory order. When the structural interdict is also not adhered to or where there is a high likelihood of non-compliance on the part of government, the court may then consider a stronger supervisory order, such as independent oversight over compliance or the appointment of a special master.[155] In all these cases, the applicants have to provide substantial detail regarding the continuous non-compliance by government in order to show the court that it has no option but to supervise compliance more substantially.

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150 *Mwelase CC* para 27.

151 CGE 2019 https://www.ohchr.org/sites/default/files/Documents/Issues/Women/SR/ReproductiveHealthCare/Commission_for_Gender_Equality_South_Africa.pdf; National Committee for the Confidential Enquiries into Maternal Deaths *Saving Mothers* 2; Jewkes *et al* 1998 *Social Science and Medicine* 1790: A senior nurse indicated that she did not know one midwife who had not slapped a patient in labour.

152 Stats SA *General Household Survey 2023 19* indicates that 73.1% of households indicate that they visit a public healthcare facility first.

153 See the following news reports of cases of obstetric violence: Ledwaba 2022 https://www.news24.com/citypress/news/obstetric-violence-is-a-growing-concern-as-pregnant-women-continue-to-suffer-20220524; Charles and Solomons 2022 https://www.news24.com/news24/southafrica/news/watch-pregnant-women-sleeping-on-the-floor-at-joburg-hospital-20220402.

154 *Sibiya I* para 33.

155 See Taylor 2019 *CCR* 247-281, where non-compliance as a catalyst for remedial innovation is discussed.

In considering litigation on obstetric violence in South Africa, it is likely that applicants would ask the court to grant a structural interdict first. A structural interdict in this case would give the state an opportunity to create and present to court an implementation plan detailing how it will transform the current system in which a culture of obstetric violence prevails.

Previous conduct of the Department of Health suggests that there may be a likelihood of non-compliance without court supervision. This Department has been specifically engaged by civil society on the issue of forced or coerced sterilisations of HIV-positive women, a form of obstetric violence, following the release of the Commission for Gender Equality's (CGE) report on this issue.[156] Years after the release of that report, the Her Rights Initiative, an advocacy group, sent a personal letter to the President, calling on him to take steps to eradicate the practice of forced and coerced sterilisation, as no effective action had been taken by government.[157] In 2019 the CGE also sent a report on obstetric violence in South Africa to the United Nations Special Rapporteur, which was made widely available.[158]

Our current healthcare system is already under significant strain, and it may, therefore, be important for the court to supervise the Department of Health to ensure that it complies with an order directing that systemic change occur.[159] The inaction on the part of government after receiving formal reports on obstetric violence indicates either recalcitrance or an inability to change the status quo. Further, the number of medico-legal claims being paid out by the Department of Health continues to increase every year,[160] with maternal and neonatal injuries representing a large number of these claims, again suggesting that the Department is experiencing difficulty in reforming the current system.

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156 CGE *Investigation Report.*

157 The Her Rights Initiative even notes that women were met with "arrogance and hostility" when they met with a Committee set up by the Department to deal with the CGE Report recommendations. Some officials also sought to justify healthcare workers' conduct and denied the validity of the women's claims. Following this meeting, no further feedback was received from the Committee. See Her Rights Initiative 2022 https://za.boell.org/en/2022/12/07/open-letter-president-forced-sterilisation-hiv-positive-women-sa.

158 CGE *Submission to the UN Special Rapporteur*.

159 Maphumulo and Bhengu 2019 *Curationis 1-9 reveals that quality service delivery in healthcare remains difficult for government in South Africa;* Abrahams, Thani and Kahn 2022 *Administratio Publica 79 indicates that "*given that most of the South African population is unable to afford private health services, public health services are strained and challenged"; also see Honikman, Fawcus and Meintjes 2015 *SAMJ* 284-286.

160 The amount of money paid out by the DoH for medico-legal claims increased by 36.8% from 2012/3 to 2019/20 with R1,740,924 being paid out in the 2019/20 year – see SALRC *Discussion Paper 154* 19 for information obtained from National Treasury.

5.7 Expertise required

The need for expertise appears to be a circumstance which is present only in the cases where stronger forms of supervision were ordered.

In cases where some kind of expert is appointed to supervise the implementation of an order, this provides an opportunity for that person to formulate and develop solutions to the problem presented with the input of relevant stakeholders.[161] In cases where a stronger form of supervision in the form of independent oversight or a special master was ordered, it was an expert that was appointed to assist with compliance. In *Mwelase* the special master appointed was Professor Richard Levin, an experienced public service leader with extensive experience in government management and formal education in political theory and institutions.[162] Parties to the litigation decided that he had the necessary expertise to assist the Department in finalising the outstanding labour tenant claims. Under his leadership the office of the special master has made significant progress.

It is undeniable that expert assistance and advice is necessary in addressing obstetric violence. Overhauling a public healthcare system which appears to have obstetric violence deeply embedded in its culture would not be an easy task. As previously indicated, applicants in an obstetric violence case would probably not ask for stronger court supervision initially. However, a court-mandated implementation plan might assist to address obstetric violence through a targeted intervention by the Department or an expert and in consultation with relevant stakeholders would be a collaborative effort. The court would be required to approve the implementation plan and ensure that progress is being made in its actual implementation.

6 Conclusion

When speaking about orders which provide a solution to a systemic problem, the Constitutional Court said the following:

> Sometimes orders of this class have taken the form of structural interdicts or supervisory orders. This approach is valuable and advances constitutional justice particularly by ensuring that the parties themselves become part of the solution.[163]

Supervisory orders which advance constitutional justice have been issued with increasing frequency in our jurisprudence. Our courts have grappled with different forms of supervision, particularly in instances where it seems

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161 Maphosa 2020 *SAJHR* 370.

162 Association for Rural Advancement 2019 https://www.polity.org.za/article/prof-richard-levin-special-master-for-labour-tenants-2019-12-09.

163 *Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) para 97.

that government is unable to fulfil its constitutional obligations. Our courts have used their broad remedial discretion to ensure that the remedies granted in cases where there is a need for structural change are appropriate, just and equitable but also effective. Where a weaker kind of supervisory remedy, such as a structural interdict, has proved to be ineffective, stronger supervisory remedies have been imposed, including different forms of oversight over compliance.

I argue that the circumstances which are present in the cases where courts have granted a supervisory remedy are also present in respect of the problem of obstetric violence: the right to healthcare is a justiciable socio-economic right, grave consequences will ensue if the ills in the system are not remedied given the harm caused by obstetric violence, there is an underlying systemic problem which gives rise to obstetric violence, the rights violations are both ongoing and widespread, and expertise may be required to assist with the institutional transformation needed. Although there is yet to be litigation on this issue, it is likely that the government will struggle to comply with an order requiring such extensive structural change. Litigation would most likely start with a structural interdict which, if not complied with, might then require more robust court supervision. Ultimately, the court must ensure an effective remedy which is just and equitable. This means that it has a responsibility to ensure that rights are upheld and protected. By its very nature, remedying obstetric violence will pose many challenges for the court, but a supervisory remedy "ensuring that the parties themselves become part of the solution" may be one of the better ways to address the systemic nature of the problem.

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List of Abbreviations

CCR	Constitutional Court Review
CGE	Commission for Gender Equality
DoH	Department of Health
Geo LJ	Georgetown Law Journal
LCC	Land Claims Court
NHA	National Health Act
NYU L Rev	New York University Law Review
PELJ	Potchefstroom Electronic Law Journal
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SALRC	South African Law Reform Commission
SAMJ	South African Medical Journal
SASSA	South African Social Security Agency
SCA	Supreme Court of Appeal
Sur Int J Hum Rights	Sur – International Journal on Human Rights