Forcing the Court’s Remedial Hand:

Non-Compliance as a Catalyst for Remedial Innovation

Helen Taylor

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# I Introduction

One moment of high drama in the Constitutional Court’s 2017 term was the latest episode in the protracted *AllPay* series.[[1]](#footnote-1) *Black Sash*[[2]](#footnote-2) is a stinging judicial rebuke of the South African Social Security Agency’s (SASSA) failure to comply with its undertaking to the Court that it would be able to pay social grants from 1 April 2017. Speaking for a unanimous bench, Froneman J’s judgment conveys the Court’s frustration at being forced to escalate remedial measures in order to avert the ‘national crisis’ caused by SASSA’s non-compliance.[[3]](#footnote-3) Although resembling the earlier order in *AllPay 2*, the remedy in *Black Sash* was reinforced with a range of further safeguards and the addition of a bold remedial innovation – the appointment of the Auditor-General together with independent legal practitioners and technical experts to evaluate compliance and file regular reports with the Court. Froneman J was at great pains to point out that this exercise of constitutional remedial power was done with reluctance and caution, as a last resort ‘in exceptional circumstances’.[[4]](#footnote-4)

This article characterises *Black Sash* as representative of a remedial predicament more frequently faced by our High Courts where the government’s continuing failure to implement structural reform threatens rights at a systemic level. In these cases, there is little or no dispute as to what the state’s constitutional duties require, and contestation instead revolves around questions of remedy and enforcement. Litigation progresses in multiple stages as the court is confronted with repeated non-compliance by the government that stems from incompetence, intransigence or a combination of the two in the form of wilful ineptitude. This prompts remedial escalation from the court with structural orders becoming increasingly detailed and prescriptive through each stage of the litigation, often culminating in the design of novel remedial mechanisms for compelling compliance.

This article explores the way in which non-compliance served as a catalyst for remedial innovation in two streams of serialised litigation of this kind. Both streams of litigation, which were driven by the Legal Resources Centre (LRC), sought to hold the government accountable for its systemic failure to fulfil the right to education in public schools across the Eastern Cape: *Madzodzo*[[5]](#footnote-5)concerned the provision of school furniture, while the twin cases of *Centre for Child Law*[[6]](#footnote-6)and *Linkside*[[7]](#footnote-7)concerned the appointment and payment of teachers. The argument proceeds as follows. Part II provides an overview of the government’s non-compliance with *AllPay* and the remedial innovation developed in *Black Sash* to compel SASSA’s compliance with its constitutional obligations. Part III then sets out in further detail the remedial predicament which this article addresses and identifies the need for greater remedial innovation to overcome some of the intractable accountability challenges posed by non-compliance. Part IV introduces the LRC’s education litigation by contrasting its focus on basic educational resources with the procedure-oriented education litigation that has prevailed in the Constitutional Court. Part V recovers the remedial roots of *Black Sash* through a detailed exploration of the *Madzodzo* furniture litigation, which featured the appointment of an independent auditor and a robust supervisory role for the court in responding to non-compliance. Part VI evaluates the pioneering remedial developments in the LRC’s teacher post-provisioning litigation: the use of ‘deeming’ provisions in *Centre for Child Law* involved a novel shift in onus for enforcing positive duties, while the opt-in class action in *Linkside* broke new ground as a way of scaling up systemic relief for similarly situated rights-holders. The conclusion gestures towards the potential of these remedial innovations for more general application in addressing the remedial predicament of persistent non-compliance with court orders.

# II *Black Sash*

## A The Remedial Compromise in *AllPay*

*Black Sash* takes place against the backdrop of the trilogy of *AllPay* decisions concerning an unlawful contract concluded between SASSA and Cash Paymaster Services (Pty) Ltd (‘CPS’) to provide services for the payment of social grants for a period of five years. In *AllPay 1*, the Constitutional Court found that the award of this tender to CPS was constitutionally invalid but grappled with the remedial consequences of this finding in a separate judgment, *AllPay 2*, after benefitting from a further hearing on the question of remedy. In particular, the Court had to decide whether the unlawful tender should be set aside or whether ‘just and equitable relief’ called for a deviation from the ‘default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented’.[[8]](#footnote-8) In determining whether to depart from this default ‘corrective principle’,[[9]](#footnote-9) the Court had to navigate a tension posed by competing remedial imperatives: on the one hand, the need to ensure the rights of grant beneficiaries are protected through timely and uninterrupted payment of their social grants and, on the other hand, the need to provide administrative justice and uphold the rule of law in public procurement.[[10]](#footnote-10) In *AllPay 2*, the Court struck a fine compromise between these competing remedial imperatives, with Froneman J observing that ‘a just and equitable remedy will not always lie in a simple choice between ordering correction and maintaining the existing position. It may lie somewhere in between’.[[11]](#footnote-11)

First, the Court ensured the timely and uninterrupted payment of social grants by suspending its declaration of invalidity in respect of the contract concluded between SASSA and CPS. Froneman J held that this exercise of discretionary remedial power falls squarely within the Court’s authority under section 172(1), with its explicit textual support for ‘an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.’[[12]](#footnote-12) It is worth noting that in this case, the suspension served to protect the rights of grant beneficiaries rather than its usual function of preserving comity as a ‘dialogic device’ that shows deference towards the other branches of government.[[13]](#footnote-13) By suspending the declaration of invalidity, the Court exercised its discretionary remedial power to ensure the continued operation of CPS’s contractual operations and thus also the uninterrupted payment of social grants.[[14]](#footnote-14) Moreover, Froneman held that CPS assumed constitutional obligations when it entered into the social grants contract with SASSA, acquiring public power for the performance of a public function.[[15]](#footnote-15) This means that CPS, functioning as an organ of state, ‘cannot simply walk away: it has the constitutional obligation to ensure that a workable payment system remains in place until a new one is operational’.[[16]](#footnote-16) CPS’s continuing obligation to provide services for the payment of social grants therefore arose from both constitutional and contractual sources, with the latter being sustained through the Court’s exercise of remedial power in terms of section 172(1)(ii) of the Constitution.

Second, the Court vindicated the public interest and upheld the rule of law by ordering that the tender process be re-run. This insisted that there be accountability and transparency in public procurement but did ‘not attempt to impose a final solution on SASSA’.[[17]](#footnote-17) Instead, recognising that SASSA was better placed to assess the impact of a new tender award on the range of interests implicated, the Court left it with the choice of either awarding a new five-year tender or taking over payment of social grants itself.[[18]](#footnote-18) Given the importance of the right to social security and the large number of beneficiaries affected by the public procurement of a social grant service provider, Froneman J maintained that the need for ‘disciplined accountability’ justified the imposition of a ‘structural interdict requiring SASSA to report back to the Court at each of the crucial stages of the new tender process’.[[19]](#footnote-19) The retention of supervisory jurisdiction to monitor SASSA’s progress was a forward-looking accountability mechanism aimed at securing prospective compliance once the suspension of the declaration of invalidity lapsed. In the brief judgment of *AllPay 3*, the Court clarified that it maintained supervisory jurisdiction to the exclusion of other courts until completion of the new tender process.[[20]](#footnote-20)

In November 2015, SASSA reported to the Court that it would not award a new tender but rather take over the payment of social grants itself from 1 April 2017. On the basis of this undertaking and the progress report filed in support of SASSA’s assurance that it would meet the 1 April 2017 deadline, the Court discharged its supervisory jurisdiction over the matter. On the eve of this deadline, however, it emerged that this assurance had not only been ‘without foundation’ but that the responsible functionaries of SASSA had in fact been aware for a year that it would not be able to comply with its undertaking to the Court.[[21]](#footnote-21)

## B Justifying an Escalated Remedial Response

This is the colourful backstory to *Black Sash*, with SASSA’s non-compliance bringing the country to the brink of a systemic breach of the social assistance rights of millions of people.[[22]](#footnote-22) In *Black Sash*, the Court is tasked with achieving ‘the practical avoidance of that potential catastrophe’ through the exercise of its discretionary remedial powers.[[23]](#footnote-23) Given the remedy in *AllPay 2* had sought to avoid continued reliance on the unlawful contract beyond the period of suspension, Froneman J expresses the Court’s frustration with SASSA’s intention to enter into a contract with CPS without a competitive tender process:

‘This Court and the country as a whole are now confronted with a situation where the executive arm of government admits that it is not able to fulfil its constitutional and statutory obligations to provide for the social assistance of its people. And, in the deepest and most shaming of ironies, it now seeks to rely on a private corporate entity, with no discernible commitment to transformative empowerment in its own management structures, to get it out of this predicament.’[[24]](#footnote-24)

Resigned to the inevitability of further tolerating an unconstitutional state of affairs, the question to be answered by the Court in *Black Sash* is *how* the Court may enforce the performance of SASSA and CPS’s self-acknowledged continuing constitutional obligations.[[25]](#footnote-25) As Froneman J observes, it is ‘for the Court in the exercise of crafting a just and equitable remedy to spell out the content of those obligations’.[[26]](#footnote-26)

Before delving into the details of the Court’s remedial decision-making, however, Froneman J begins his judgment by reflecting on the nature and significance of the government’s non-compliance as the direct cause of the remedial predicament confronting the Court.[[27]](#footnote-27) SASSA and the Minister’s forced reply to the Court’s directions paints a picture of institutional dysfunction, with its diffusion of responsibility and shifting of blame among absent and transient incumbents of the office of CEO of SASSA.[[28]](#footnote-28) However, Froneman J’s analysis of the evidence goes beyond identifying the ‘demonstrated inability of SASSA to get its own affairs in order’ as the underlying reason for non-compliance.[[29]](#footnote-29) His characterisation uses language that suggests this incompetence was in fact coupled with intransigence. SASSA is said to have ‘walked away from the two fundamental pillars of this Court’s remedial order in *AllPay 2*’ and ‘broken the promise in its assurance to the Court [...] which formed the basis of the withdrawal of the supervisory order’.[[30]](#footnote-30) SASSA and the Minister of Social Development showed ‘no reciprocal comity’[[31]](#footnote-31) towards the judicial branch and did not even ‘deign to inform the Court’ of its inability to meet the April 2017 deadline.[[32]](#footnote-32) Froneman J describes *Black Sash* as the ‘judicial part of that [public] accounting’[[33]](#footnote-33) which calls on government to explain its ‘conduct [that] puts grant recipients at grave risk and appears to disregard court orders’.[[34]](#footnote-34)

This searing indictment of SASSA’s conduct provides an important framing for Froneman J’s justification of the Court’s escalated remedial response. Most obviously, exposing SASSA’s intransigence allows the Court to defend its remedial order in *AllPay 2* and subsequent discharge of supervisory jurisdiction. Froneman J declares in absolute terms that the ‘conduct of the Minister and SASSA has created a situation that no one could have contemplated: the very negation of the purpose of this Court’s earlier remedial and supervisory order’.[[35]](#footnote-35) His insistence that the Court had no reason to suspect non-compliance with *AllPay 2* is emphatic:

‘There was *no constitutional tension* about social grants in November 2015. There was *no legitimate reason* for the Court not to accept the assurance of an organ of state, SASSA, under the guidance of the responsible Minister, that it would be able to fulfil an executive and administrative function allotted to it in terms of the Constitution and applicable legislation. There was *no threatened infringement* to people’s social assistance rights and *no suggestion* that the foundation of the Court’s remedial order would be disregarded. Now there is.’[[36]](#footnote-36)

While it was no doubt appropriate for the Court to defer to SASSA in the first instance, Froneman J’s characterisation is arguably overstated as the government’s conduct in *AllPay 2* did in fact give some cause for concern about compliance. Froneman J chastised SASSA in *AllPay 2* for having ‘adopted an unhelpful and even obstructionist stance’[[37]](#footnote-37) and, citing this bad character reference, remarked in *Black Sash* that, ‘Regrettably, not much has changed, except that this time around the Minister may have contributed to the continued recalcitrance’.[[38]](#footnote-38)

However, the insistence that non-compliance was not foreseen adds rhetorical force to Froneman J’s defence of the remedial order crafted in *AllPay 2* and, more importantly, provides a basis for an escalated remedial response in *Black Sash*. By foregrounding SASSA’s intransigence, Froneman J casts the Court’s remedial intervention as one of reluctance and last resort:

‘It is necessary to be frank about this exercise of our just and equitable remedial power. That power is not limitless and the order we make today pushes at its limits. It is a remedy that must be used with caution and only in exceptional circumstances. But these are exceptional circumstances. Everyone stressed that what has happened has precipitated a national crisis.’[[39]](#footnote-39)

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

## C Resorting to Independent Monitors

The first part of the remedial order in *Black Sash* resembled the remedy handed down in *AllPay 2* for enforcing the reciprocal constitutional obligations between SASSA and CPS for the payment of social grants. Drawing on its remedial powers under section 172(1)(b)(ii) of the Constitution, the Court declared that SASSA and CPS are both under continuing constitutional obligations to fulfil the right to social assistance.[[40]](#footnote-40) They were accordingly mandated to ensure the payment of social grants under the same terms and conditions of the previous contract, subject to further safeguards for protecting the personal data of grant beneficiaries and auditing CPS’s finances.[[41]](#footnote-41) The disagreement between the majority decision and Madlanga J’s dissent turns on the legal route by which these contractual obligations were arrived at. The majority opted to extend the existing contract between SASSA and CPS, and thus necessarily also to extend the suspension of the declaration of its invalidity.[[42]](#footnote-42) Describing this as ‘a tortuous route’, Madlanga J argued that section 172(1)(b)(ii) empowers the Court to bring a new contract into being as a direct order mandating CPS to fulfil its constitutional obligation to ensure continued payment of social grants.[[43]](#footnote-43) While Madlanga J’s ostensibly prefers this direct approach for its simplicity and Froneman J acknowledges it to be ‘another valid way of arriving at an identical outcome’, no principled reasons are offered in support of either preference.[[44]](#footnote-44) It falls outside the scope of this paper to problematize Froneman J’s assertion that there is no harm in the continued suspension of the invalid contract,[[45]](#footnote-45) but the implications of this preference for the rule of law and our conception of constitutional supremacy invite more considered attention to the principled basis for suspended declarations of invalidity.[[46]](#footnote-46)

The Court recognised, however, that just and equitable relief required more than simply identifying and circumscribing reciprocal obligations between SASSA and CPS. The second half of the remedial order in *Black Sash* therefore features a range of remedial mechanisms to enhance accountability for SASSA’s compliance with its constitutional obligations. First, Froneman J held that SASSA’s failure to inform the Court that it would not be in a position to assume the payment of social grants from 1 April 2017 meant that the retention of supervisory jurisdiction alone ‘has been proved not to be enough to coax SASSA into doing what it was constituted to do. More is required.’[[47]](#footnote-47) Court supervision was therefore complemented by extensive reporting requirements, with both the Minister and SASSA being mandated to file regular progress reports with the Court detailing compliance with a timetable for deliverables.[[48]](#footnote-48)

Secondly, the Court introduced a bold remedial innovation to facilitate independent monitoring of SASSA’s compliance. Not content to rely solely on SASSA’s own evaluation of its progress with a plan for systemic reform, Froneman J accepted the argument put forward by the Black Sash Trust about the importance of independent court-appointed monitors.[[49]](#footnote-49) With none of the parties objecting to this proposal,[[50]](#footnote-50) the remedial order makes provision for the appointment of the Auditor-General and suitably qualified independent legal practitioners and technical experts to jointly evaluate and report to the Court on SASSA’s compliance.[[51]](#footnote-51) This innovative remedial mechanism demonstrates institutional responsiveness to the reasons underlying SASSA’s non-compliance: the independence of the monitors offers much-needed accountability in light of SASSA’s intransigence, while the technical and legal expertise of the monitors compensates for the institutional incapacity which has so far prevented SASSA from assuming payment of social grants itself.

Finally, the remedial order mandates the Minister to file an affidavit with the Court explaining why she should not be joined in her personal capacity and why she should not be personally liable for the costs of the application.[[52]](#footnote-52) As the office-holder bearing primary responsibility for SASSA’s compliance with its constitutional obligations, the Minister was identified by the Court as the person who should be called upon to account for SASSA’s breach of its undertaking to the Court.[[53]](#footnote-53) This provision in the remedial order therefore speaks directly to Froneman J’s finding that ‘there are reasonable grounds for investigating whether this Court’s remedial order was disregarded and, if so, whether this was done wilfully’.[[54]](#footnote-54)

# III The Remedial Predicament

*Black Sash* is representative of a remedial predicament characterised by persistent non-compliance with court orders in an extended remedial process. Where a remedy requires the government to take positive action to implement structural reform, non-compliance not only poses a systemic threat to rights but also undermines the integrity of court orders and erodes respect for the rule of law. In response to the intransigence or incompetence underlying political inaction, the court’s remedial orders become increasingly detailed and prescriptive through each stage of the litigation, culminating in a resort to innovative remedial mechanisms to ensure accountability for full compliance. In short, *Black Sash* is representative of a remedial predicament in which non-compliance serves as a catalyst for remedial innovation.

This characterisation – albeit stylized for argument’s sake – finds increasing resonance in our constitutional jurisprudence from the High Courts, while accountability in the remedial process emerges as a theme in recent Constitutional Court decisions. Non-compliance with court orders has strained institutional comity in the context of corruption,[[55]](#footnote-55) institutional dysfunction[[56]](#footnote-56) and disregard for the rule of law.[[57]](#footnote-57) While non-compliance has by no means ever been a rarity,[[58]](#footnote-58) the current trend stands in stark contrast to the good track record of compliance that had informed the Court’s (misplaced) optimism in *Treatment Action Campaign* that the ‘government has always respected and executed the orders of this Court. There is no reason to believe that it will not do so in the present case.’[[59]](#footnote-59) This confidence made the Court reluctant to retain supervisory jurisdiction in *Treatment Action Campaign*, but the recent strain on institutional comity caused by non-compliance demonstrates Michael Bishop’s insight that, ‘Unlike the more structural elements of the separation of powers, this respect can be lost and earned. If the executive continuously fails to comply with court orders, the Court will feel more comfortable issuing detailed interdicts or supervisory orders.’[[60]](#footnote-60)

Besides straining institutional comity, non-compliance with remedial orders undermines the normative commitment embodied by rights and harms both successful claimants and similarly situated rights-holders. Remedies give tangible effect to the normative commitments embodied by rights – remedies ‘concretise’ rights, as it were. In the realm of remedial discretion, courts cannot hide behind the abstractions of rights adjudication, but are required to respond to social context in a way that gives practical effect to rights.[[61]](#footnote-61) It is in their crafting of remedies that courts most closely engage with the contextual realities of the state’s failure to fulfil rights, including the intransigence or incompetence that may underlie such a failure and jeopardize future compliance efforts. Furthermore, on a practical and immediate level, non-compliance severely depreciates the ‘cash value’ of a right for successful claimants, for whom the practical value of a right amounts to remedial relief that has tangible effect. Non-compliance therefore harms both the authority of the courts and the interests of rights-holders.[[62]](#footnote-62)

Courts need to develop innovative remedies that enhance accountability for compliance with court orders and so ensure rights are realised. This imperative is captured by the oft-repeated call for remedial innovation issued by the Court in *Fose*:

‘Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to “forge new tools” and shape innovative remedies, if needs be, to achieve this goal.’[[63]](#footnote-63)

Courts are equipped with broad discretionary remedial power to accomplish this.[[64]](#footnote-64) Section 172 of the Constitution empowers South African courts deciding constitutional matters to ‘make any order that is just and equitable’.[[65]](#footnote-65) A cursory glance at the remedial provisions of several comparative jurisdictions demonstrates the flexibility and discretion accorded to courts in exercising their constitutional remedial power: for example, the Canadian Charter approves any ‘such remedy as the court considers appropriate and just in the circumstances’;[[66]](#footnote-66) the Indian Constitution provides that a court ‘may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it’;[[67]](#footnote-67) and the ‘judicial power of the United States’ conferred by article III of the US Constitution grants federal courts hearing cases ‘in…Equity’ the power to issue equitable remedies.[[68]](#footnote-68) Exercising this broad remedial power, courts need to look beyond the traditional remedial repertoire to find creative ways of overcoming the intractable remedial challenges that threaten compliance with court orders.[[69]](#footnote-69)

Remedial innovation most commonly occurs in our High Courts, who are on the frontline of efforts to enforce compliance with court orders. With accountability for compliance being a relatively recent preoccupation for the Constitutional Court, its remedial intervention in *Black Sash* is described by Froneman J as ‘a remedy that must be used with caution and only in exceptional circumstances’,[[70]](#footnote-70) while Mogoeng CJ similarly characterized *Electoral Commission v* *Mhlope* as ‘an exceptional case that cries out for an exceptional solution or remedy to avoid a constitutional crisis’.[[71]](#footnote-71) By contrast, the High Courts are more experienced campaigners, and much inspiration is to be found by exploring the remedial predicaments faced by our lower courts in which non-compliance has served as a catalyst for remedial innovation. Moreover, this broader perspective offers an enriched understanding of our constitutional jurisprudence as it uncovers the cross-fertilisation between the different tiers of courts. The appointment of a special master by the Land Claims Court to deal with the government’s persistent non-compliance in *Mwelase* is an important case in point.[[72]](#footnote-72) While the Supreme Court of Appeal has gestured towards the value of a special master for court supervision,[[73]](#footnote-73) it is the Land Claims Court in *Mwelase* that draws on comparative inspiration from the United States and India to flesh out the potential of this remedial mechanism within our local context.

This article foregrounds this dynamic of remedial development through a contextualised analysis of two streams of education litigation undertaken by the LRC in the Eastern Cape. Part V traces the remedial roots of *Black Sash* through an exploration of the High Court case cited by Froneman J as authority for appointing the Auditor-General and independent monitors to evaluate SASSA’s compliance.[[74]](#footnote-74) In *Madzodzo*, reporting requirements served a valuable function for detecting non-compliance, but the unreliability of the government’s self-reporting undermined compliance and triggered the appointment of an independent auditor. Part VI features what is arguably the most radical remedial innovation granted yet by our courts for compelling compliance. The use of ‘deeming’ provisions in *Centre for Child Law* anticipated non-compliance by shifting the onus for the enforcement of positive duties, such that effective relief was premised on the government’s continuing *failure* to act. This relief was then expanded in *Linkside* through the use of an opt-in class action, the first of its kind in South Africa. My analysis contextualises these remedial innovations by tracing the episodic development of litigation, emphasising in each case how persistent non-compliance with a court-approved remedy culminated in a scathing judicial rebuke and the resort to novel remedial mechanisms to compel compliance.

# IV Litigating a Legacy of Education Inequality

A large part of the emerging Constitutional Court jurisprudence on education has been sidetracked by the power struggle between school governing bodies and the Department of Education. Rather than focusing on the normative content of the right to education, much of this litigation has concerned procedural fairness where schools have vigorously defended their independence against what they regard as the Department’s heavy-handed interventions.[[75]](#footnote-75) Key cases have involved the contestation of decisions by schools to refuse admission to learners on the basis of alleged capacity constraints[[76]](#footnote-76) or their language policy,[[77]](#footnote-77) or to exclude learners on the basis of a pregnancy policy.[[78]](#footnote-78) The courts have mainly found in favour of the school governing bodies in these cases, holding that the Department failed to act in a procedurally fair manner.[[79]](#footnote-79) Owing to the procedural framing of these cases, however, the courts have not had to engage squarely with the more substantive issues underlying these disputes. The power struggle and ensuing procedural disputes between school governing bodies and the Department of Education have been a distraction from the important constitutional vision of achieving equality in education.

The education litigation by the LRC featured in this article offers a much-needed foil to the procedure-oriented litigation that has so far dominated the education jurisprudence in our apex courts. Squarely focused on the normative commitment embodied by the right to education, the LRC has attempted to address the backlog of infrastructure and absence of basic resources at some of the poorest schools in the Eastern Cape and indeed the whole of South Africa. The issues they have tackled include the elimination of mud schools, the setting of norms and standards for school infrastructure, the provision of basic furniture such as desks and chairs, the supply of textbooks and other learner-teacher support materials, the appointment and payment of teachers, scholar transport, and the provision of sanitation facilities. The LRC’s litigation therefore strikes at the heart of education inequality in South Africa, strategically targeting those substantive aspects that constrain the transformative potential of education. While these inequalities are rooted in South Africa’s long history of colonialism, the institutionalised racism of apartheid systemically deprived black children of educational opportunities in a way that directly mirrors the current structural inequalities in the education system. In contrast to the line of cases in which school governing bodies have challenged the procedural fairness of decisions taken by the Department of Education, arguably using litigation strategically to protect their privilege in the form of both financial and social capital, the LRC has sought to leverage the courts to improve the particularly bleak prospects faced by children in Eastern Cape schools. The LRC has built up a body of cases with a strategic eye to past and future litigation, tactically choosing claimants and formulating their claims to foreground the most urgent needs of the worst-off schools, while simultaneously drawing attention to the systemic nature of the state’s failure to fulfil the right to education.

The education system’s dependency on the capacity of provincial governments has compounded the structural inequalities left by apartheid.[[80]](#footnote-80) An acknowledgment of these historical complexities is central to an understanding of the institutional dynamic that animates the LRC’s litigation against the Eastern Cape Department of Education in *Madzodzo*, *Centre for Child Law* and *Linkside*. The weak institutional functionality of the Department engenders an institutional inertia that makes the implementation of systemic reform in education a most difficult task. The government’s lack of compliance with court orders primarily stems from a debilitating lack of capacity and competence in the Department, but it is tinged with intransigence in the familiar forms of irregular tender awards (*Madzodzo*) and the distortion of teacher post-provisioning processes (*Centre for Child Law* and *Linkside*). This article will explore remedial strategies that have sought to counteract the lack of capacity and accountability which are the root causes of the Department’s routine non-compliance with court orders.

# V *Madzodzo*

## A The Two-Track Remedy

*Madzodzo* concerns the LRC’s attempt to address the severe furniture shortages in schools across the Eastern Cape. Having undertaken extensive site visits over a period of several years, the LRC realised the enormity of the problem, noting that ‘thousands of children still sit on the ground because their classrooms have no, or an insufficient number of, desks and chairs. They hunch over workbooks and crane their necks to see the blackboard. They often get sick from sitting for hours on cold, dirty floors.’[[81]](#footnote-81) In August 2012, the LRC filed an urgent application in the Mthatha High Court, representing a combination of individual and institutional clients – three individual schools acting in their own interest and the Centre for Child Law acting in the public interest. The relief sought was also structured to address both the urgent furniture needs of the individual applicant schools and the systemic shortage of furniture in schools across the province. In answering the LRC’s notice of motion, the government did not challenge either the extent of the furniture crisis or the claim that desks and chairs were a vital component of the right to education.[[82]](#footnote-82) Through the negotiations that followed this exchange of pleadings, the LRC reached a settlement with the government and Griffiths J granted a remedial order by agreement on 29 November 2012.

A two-track remedy emerged from the settlement due to the LRC’s coupling of individual and institutional clients. The first track of the court-approved remedy was an order directing the government to provide the three applicant schools with adequate furniture.[[83]](#footnote-83) The granting of immediate, individual relief amounted to a recognition that the immediately realisable right to education requires the provision of desks and chairs. The second track of the remedy was a two-stage plan for providing systemic relief. As a first step, the government was directed to complete a comprehensive audit to record the furniture shortages of all schools in the Eastern Cape.[[84]](#footnote-84) Rather than simply ordering the government to ensure that all schools in the province have sufficient desks and chairs, the auditing requirement prompted the government to follow a systematic plan with several stipulations: (i) the appointment of a ‘Furniture Task Team’; (ii) the publication and communication of a circular informing all schools in the province of the audit and inviting them to submit their furniture needs to the ECDOE; and (iii) the verification of furniture requests through visits to these schools to ensure their furniture needs are accurately recorded.[[85]](#footnote-85) These detailed stipulations were aimed at ensuring the audit would be comprehensive and accurate, so that the progress of implementing systemic relief could be tracked. Deadlines for each of these stages were set, thus creating a clear timeline for the audit. As the second stage of the plan for providing systemic relief, the court order noted that the government would ‘endeavour to ensure’ that the furniture needs established through the audit would be delivered to schools throughout the province by 30 June 2013.[[86]](#footnote-86) This structured relief, involving an auditing stage and a delivery stage, reflects a recognition that the government’s progress in implementing systemic relief cannot be monitored unless the scale of the problem is first ascertained.

The LRC’s strategy of foregrounding the needs of particular individual schools to bring home the extent of the systemic infrastructure crisis yielded tangible results, as the urgency of these schools’ furniture needs precluded individual relief being folded into the broader question of systemic relief. The focus on particular, representative instances of the state’s breach also served an important function in paving the way for establishing the need for systemic improvement. Personal stories elicit judicial sympathy more readily than cold statistics, and establishing a specific representative breach can make a generalised claim more compelling. The inclusion of the Centre for Child Law as an institutional client acting in the public interest was crucial for expanding the scope of the claim from specific schools in desperate need to the systemic nature of the government’s failure, thereby requiring the scaling up of relief from the client schools to all schools in the province. The government was required to put into place a concrete plan for systemic reform and a complementary budget for achieving it.

The settlement sought to ensure accountability for compliance by allowing the parties to return to court on an urgent basis without needing to start fresh litigation.[[87]](#footnote-87) This was fortified with extensive reporting requirements. First, the Department had to furnish the LRC with a copy of the completed audit report, along with a detailed plan and timeline for the delivery of desks and chairs to all schoolchildren in the province.[[88]](#footnote-88) Second, it had to report to the LRC on their compliance with the implementation of systemic relief, including their progress with the actual delivery of furniture to schools.[[89]](#footnote-89) These reporting requirements, bolstered by deadlines, sought to ensure that the LRC could monitor the government’s implementation of systemic relief. To ensure transparency, the Department was further required to give written notice to all the schools due to receive furniture, detailing what specific desks and chairs they had been allocated and when such furniture would be delivered.[[90]](#footnote-90) A deadline was also attached to this notice requirement.

## B Resorting to an Independent Auditor

### Reporting as a diagnostic tool for detecting non-compliance

In spite of the LRC’s careful design of a remedy in the *Madzodzo* settlement that offered a blueprint for the Department to follow, the government’s compliance was partial and begrudging. The individualised relief was implemented as required – the government duly delivered desks and chairs to the three applicant schools.[[91]](#footnote-91) By contrast, little had been done by the Department to implement the structural relief, and much of what had been done was either ineffectual or inadequate. The LRC was able to establish the extent of non-compliance when the Department submitted an incomplete and inaccurate audit of the province’s furniture needs.[[92]](#footnote-92) The Department had not made its task any easier by failing to issue a circular informing schools of the audit and inviting them to submit their furniture needs, as required by the court order.[[93]](#footnote-93) It was therefore unsurprising that many schools had been excluded from the audit and that the furniture needs recorded for those schools that were included in the audit had not been verified.[[94]](#footnote-94) Confidence in the accuracy of the audit was further undermined by glaring data irregularities, with similarities across school districts raising strong suspicions of data falsification.[[95]](#footnote-95)

The Department had failed to comply with the court order in other key respects too. It failed to present the LRC with a comprehensive plan setting out when it would deliver the furniture recorded in the (inaccurate and incomplete) audit,[[96]](#footnote-96) and also failed to inform those schools due to receive furniture what they would receive and when it would be delivered.[[97]](#footnote-97) Another obstacle to implementation was the inadequacy of the furniture budget, with less than 10% of the required R360 million having been allocated to addressing the furniture shortage in 2013/2014.[[98]](#footnote-98) Having failed at this first stage of the plan for implementing structural relief, it was unlikely that the delivery phase of the plan would have been complied with, and indeed, by August 2013 no furniture had been delivered to schools using the R30 million budget that was in place.[[99]](#footnote-99) In short, it was clear that the Department had no reliable mechanism to ascertain or fund the actual furniture needs of schools in the province. Although the reporting requirements did not prevent non-compliance, they nevertheless functioned as a valuable diagnostic tool for detecting the extent and reasons for such non-compliance. By exposing these problems through regular reporting deadlines, the LRC was able to pick up on non-compliance relatively quickly and had clear grounds for returning to court.

### The need for an independent auditor

The LRC filed an urgent application in August 2013 with the bold request that the Department be directed to appoint and pay an independent auditor.[[100]](#footnote-100) This remedial strategy was not newly envisaged by the LRC, as it had sought the appointment of an independent administrator during the early negotiations leading up to the initial settlement.[[101]](#footnote-101) The Department had strongly resisted this move at the time, however, claiming that an independent auditor was unnecessarily intrusive as they had already undertaken an audit which simply needed updating.[[102]](#footnote-102) Relying on this expression of political will by the government, the LRC conceded that an independent auditor need not be appointed. The inaccurate and incomplete audit subsequently presented by the Department led the LRC to regret this concession, as noted by Ann Skelton’s Supplementary Founding Affidavit during the second round of litigation in *Madzodzo*: ‘We negotiated in good faith with the respondents and granted their request to leave the audit process in their hands. This has proven a grave error.’[[103]](#footnote-103)

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

the granting of a structured order and the appointment of an independent auditor is within the South African court’s power in this matter. Moreover, it is believed that such an order is warranted and necessary in light of the ECDOE’s repeated violations of the immediately realisable, constitutional right to a basic education.[[104]](#footnote-104)

The order subsequently granted by Makaula J on 26 September 2013 identified the specific tasks that the independent auditor would have to undertake in order to remedy the Department’s failed audit. This involved receiving reports from schools that had been left out of the audit and visiting the schools to verify their furniture needs.[[105]](#footnote-105) The Department was directed to file the revised audit at court and present a comprehensive plan for procuring and delivering the furniture as recorded by the independent auditor to all schools in the province.[[106]](#footnote-106)

## C Supervisory Jurisdiction over Deadlines

Following the appointment of an independent auditor to ascertain and verify the furniture needs of schools across the Eastern Cape, the LRC continued to closely monitor the Department’s implementation of systemic relief in *Madzodzo*. In spite of the appointment of the independent auditor, the institutional inertia in the Department continued to impede any meaningful progress from being made. By February 2014, children were still sharing desks and sitting on makeshift chairs such as beer crates, empty paint cans and sacks.[[107]](#footnote-107) It was clear that the Department was dragging its feet, and that its readiness to settle on the terms proposed by the LRC had not been accompanied by a genuine intention to comply with the court orders. A third round of litigation therefore ensued and the intransigence displayed by the Department received a sharp judicial rebuke.

### Affirming the immediately realisable right to education

The judgment of Goosen J in *Madzodzo* represents an important milestone in the LRC’s furniture litigation as it constituted explicit judicial recognition, in contrast to the implicit recognition of a court-approved settlement, that the state had a positive duty to provide desks and chairs to all schoolchildren across the province. At the outset, Goosen J pointed to the textual framing of section 29(1) of the Constitution to confirm that the right to education was unqualified and therefore immediately realisable.[[108]](#footnote-108) He observed in relation to the nature of the right that:

‘This has important implications for determining whether the state is in compliance with its constitutional obligations in respect of the right to basic education. In the first instance the nature of the right requires that the state take all reasonable measures to realise the right to basic education with immediate effect. This requires that all necessary conditions for the achievement of the right to education be provided.’[[109]](#footnote-109)

Goosen J therefore inferred from the immediately realisable nature of the right that the state has a positive duty to take all reasonable measures to ensure the provision of all necessary conditions for giving immediate effect to the right. Importantly, this was not confined to access to education because it also ‘necessarily requires the provision of a range of educational resources: schools, classrooms, teachers, teaching materials and appropriate facilities for learners.’[[110]](#footnote-110) He therefore concluded that inappropriate or insufficient furniture, like desks and chairs, constituted a breach of the state’s positive duties.[[111]](#footnote-111)

### Rejecting excuses for non-compliance

Having clarified the nature and content of the right to education and its implications for the state’s corresponding positive duty, Goosen J turned to consider the Department’s defence of their non-compliance with the second *Madzodzo* settlement in which an independent auditor had been appointed and a deadline for delivery of all furniture was set. The argument put forward by the Department was two-fold, and resembled the justifications frequently offered in relation to the failure to fulfil socio-economic rights: firstly, that budgetary constraints and the availability of resources had constrained their ability to satisfy the basic requirements of the right to education immediately and, secondly, that is was unreasonable to impose a fixed deadline by when the furniture needs of all public schools must be met.[[112]](#footnote-112) In rejecting the first argument, Goosen J relied on the Constitutional Court’s holding in *Blue Moonlight*:

‘The court’s determination of the reasonableness of measures within available resources cannot be restricted by budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or statutory obligations. In other words, it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations.’[[113]](#footnote-113)

The government’s failure to ensure that an adequate budget was made available for providing desks and chairs to all schoolchildren in the province was rejected as a defence for not giving immediate effect to the right to education. In respect of the Department’s second argument, Goosen J was scathing of the government’s resistance to a fixed deadline for furniture delivery because ‘the effect of the open-ended approach’ that they propose ‘offers little or no prospect that the furniture crisis will be addressed in the foreseeable future.’[[114]](#footnote-114) The judgment strongly holds that the immediately realisable nature of the right to education requires a clear timetable for the provision of relief.

Although the Department relied on these defences of budgetary constraints and impossibly short deadlines to claim that their non-compliance was not wilful,[[115]](#footnote-115) Goosen J maintained that these excuses ‘must be viewed against the backdrop of what has transpired since this application was first brought by the applicants in October 2012.’[[116]](#footnote-116) Contextualising the ostensible reasons for non-compliance within this longer perspective, he described their reliance on the unreasonableness of the deadlines in the settlement as ‘extraordinary in light of the fact that the terms of the order made by Griffiths J were negotiated between the parties and were accepted by the department’s officials as reasonable at the time that Griffiths J granted the order’.[[117]](#footnote-117) Goosen J therefore implied that the Department’s *post hoc* excuses exposed their lack of any genuine intention to comply with the terms of the settlement. In so roundly dispensing with these excuses, Goosen J demonstrated a robust response to the repeated non-compliance of the Department with the terms of the settlement. He justified his strong stance with reference to the constitutional mandate on courts to ensure the government fulfills rights, arguing that ‘[t]his court, in the exercise of its jurisdiction, is obliged to give effect to the fundamental rights enshrined in the Constitution and to make appropriate orders to vindicate those rights where such orders are required’.[[118]](#footnote-118) This represents an important affirmation of the need for a strong judicial role in the remedial context, especially where non-compliance is tinged with intransigence.

### Fine-tuning the remedial order

Goosen J’s judgment is an excellent example of well-reasoned remedial decision-making. His declaration that the Department was in breach of the court-approved remedy represented a refusal to allow non-compliance to undermine the normative commitment embodied by the immediately realisable right to education.[[119]](#footnote-119) The remedial order directed the Department to submit a revised independent audit to the court and the LRC, and to subsequently deliver all the furniture to schools in the province as recorded in the audit within 90 days thereafter.[[120]](#footnote-120) Goosen J justified agreeing to the LRC’s request for a 90-day deadline in the following terms:

‘It was suggested by the respondents that this cannot be achieved within a period of 90 days. The respondents however, could not and did not suggest how long it might in fact take. This court is therefore left without guidance from the respondents as to what they consider would be a reasonable period. In the light of this, I am compelled to conclude that a period of 90 days is indeed a reasonable period within which it may be expected that the identified furniture needs of public schools in the Eastern Cape Province can be met.’[[121]](#footnote-121)

This reasoning reflects an openness to receiving input from the government about what timeline would be reasonable but a refusal to allow the Department’s preference for an open-ended approach to undermine the need for a clear timeline for the provision of systemic relief.

Finally, Goosen J carefully fine-tuned the remedial order in response to the institutional dynamic that had so far animated the episodic litigation. Having exposed the Department’s *post hoc* excuses as revealing a lack of genuine intention to comply with the settlement, Goosen J was careful to tailor the remedy to this underlying intransigence. He argued in light of the Department’s non-compliance that ‘this court is called upon to exercise its supervisory jurisdiction to ensure that the executive authorities charged with responsibility for ensuring the right of access to basic education act reasonably to fulfil their constitutional obligations’.[[122]](#footnote-122) The retention of supervisory jurisdiction was therefore clearly linked to the possibility that the Department might continue to drag its feet unless a more robust accountability mechanism is included.

At the same time, however, Goosen J crafted the remedial order with sensitivity to the importance of comity by ameliorating the effect of the 90-day deadline for furniture delivery by allowing for the Department to apply for an extension of time:

‘To the extent however, that the exigencies of executing so significant a project may give rise to legitimate delays and therefore a legitimate inability to meet that projected time period, it will be appropriate to order that the time period may be extended at the instance of the respondents, subject to full disclosure as to the steps already taken to meet the deadline and the projected time period within which the needs will indeed be met.’[[123]](#footnote-123)

While still insisting on the need for a clear timeline for the provision of systemic relief, Goosen J nuanced his choice of a 90-day deadline by allowing the Department to request an extension if it presents good reasons for the court to condone the delay. The resulting order strikes a fine compromise between the need to ensure accountability for compliance and the value of flexibility to recalibrate the remedial order in response to unforeseen but legitimate implementation difficulties.

### Deadline extensions and spin-off litigation

This opening for the Department to apply for an extension of the deadline for furniture delivery should not be seen as a weakness of Goosen J’s remedy. Rather, recognising the likelihood that compliance would be patchy irrespective of any deadline, it sought to ameliorate or enhance the fixed deadline by requiring the Department to present a progress report and disclose the reasons for its non-compliance when it applied to the court for an extension. The value of this approach for increasing transparency and accountability was demonstrated when, unsurprisingly, the Department requested an extension in May 2014.[[124]](#footnote-124) While predictably relying on their staple excuse of budgetary constraints, the Department’s justification for an extension also highlighted other key reasons for their partial compliance.[[125]](#footnote-125) Firstly, they had faced a number of legal challenges to their procurement processes, including litigation by the LRC on behalf of the Centre for Child Law concerning unlawful tender processes which resulted in delays in furniture delivery and a considerable waste of money.[[126]](#footnote-126) This spin-off litigation about procurement had a knock-on effect on compliance as furniture which had been ordered and paid for sat in warehouses rather than reaching the schools that desperately needed them.[[127]](#footnote-127) A second, but related, reason for the delays in furniture delivery was that the repeated irregular procurement processes resulted in the National Treasury assuming control of procurement, leaving the Department in a position of being unable to purchase furniture.[[128]](#footnote-128)

The provision for requesting an extension of the deadline therefore underscored the multi-faceted challenge of compliance. The follow-up stages to the furniture litigation and the spin-off litigation that it generated, demonstrate that full compliance does not only require budgeting and spending, but also procurement and delivery.[[129]](#footnote-129) Problems with the implementation of any of these facets of compliance can undermine the effectiveness of a remedy. The LRC notes in *Fighting to Learn* that a significant number of desks and chairs had begun to be delivered in the months following Goosen J’s judgment.[[130]](#footnote-130) After a tortuous legal journey, the promise of systemic relief finally began to produce some tangible results.

# VI *Centre for Child Law* and *Linkside*

## A The Two-Track Remedy

The second strand of education litigation considered in this article concerns another issue that is central to the state’s positive duty to fulfil the right to education – the allocation and payment of teachers. The LRC records that by late 2012, when the LRC began litigation in *Centre for Child Law*, there were over 4,000 vacant teaching posts but also over 7,000 excess teachers in the Eastern Cape.[[131]](#footnote-131) This simultaneous shortage and surplus of teachers in the province revealed that the Department had significant difficulty complying with the national teacher post-provisioning norms that determine how many teachers should be employed and where they should be placed.[[132]](#footnote-132) The excess number of teachers holding posts at certain schools had the obvious consequence that the Department was overspending on teacher salaries. More detrimental, however, were the knock-on effects of the Department’s failure to appoint teachers to the vacant posts, as many schools were left in crisis. Schools with severe teacher shortages resorted to appointing temporary teachers at their own expense or, if they were unable to afford it, they relied on emergency donations from parents to scrape together meagre teacher salaries.[[133]](#footnote-133) The LRC notes that there were some cases where teachers received as little as a bus fare for payment or were simply unpaid for months on end.[[134]](#footnote-134) This in turn put financial strain on the ability of schools to pay for other basic provisions such as nutrition programmes, textbooks, stationery and scholar transport.[[135]](#footnote-135)In short, the systemic shortage of teachers was devastating for the prospects of children trapped within a provincial education system already in crisis, further undermining their constitutional right to education.

In May 2012, the LRC decided litigation had become necessary given that the Department had not substantially responded to any of its numerous requests to address the teacher post-provisioning problem in the Eastern Cape.[[136]](#footnote-136) The LRC therefore filed an application in the Grahamstown High Court on behalf of the Centre for Child Law and a number of schools who were in crisis as a result of the Department’s failure to appoint teachers to vacant posts. The claim was formulated in bold terms, reflecting the LRC’s anticipation that the government would continue its trend of settling out of court.[[137]](#footnote-137) This was indeed so, as the Department agreed to all of the substantive terms except one, which concerned the appointment of non-teaching posts.[[138]](#footnote-138) The judgment subsequently handed down by Plasket J on 3 August 2012 ruled in favour of the LRC on the question of non-teaching posts and made the terms of the settlement an order of the court.[[139]](#footnote-139) The relief once again took the form of a two-track remedy reflecting the LRC’s combination of individual and institutional clients.

The individualised track of the remedy in *Centre for Child Law* directed the government to back-pay the salaries of all teachers that had been temporarily appointed from the date they assumed their duties.[[140]](#footnote-140) The design of this individualised track was particularly innovative in preventing the government’s past administrative failings from being a barrier to the implementation of individualised relief. This was achieved by the mandatory interdict being accompanied by a novel ‘deeming’ provision, whereby a teacher who had been duly identified by the school governing body concerned to fill a vacant post and had been performing the functions of that post, would be *deemed* to have been appointed as a temporary teacher.[[141]](#footnote-141) This ensured that the government’s administrative failure to formally appoint temporary teachers at the recommendation of schools would not prevent those teachers from being paid under the mandatory interdict. This was aimed at alleviating the financial hardship that many schools were experiencing as a result of the government’s failure to appoint and pay temporary teachers. In implementing this individualised relief, the onus was on individual schools to provide the Department with details about teachers that should be deemed appointed and therefore paid salaries as other temporary teachers who had been officially appointed.[[142]](#footnote-142) The government was required to pay the salaries of these teachers within one month of receiving such details from the schools.[[143]](#footnote-143)

While the individualised track of the remedy sought to provide urgent relief for schools and unpaid teachers in dire financial straits, the systemic track addressed the broader problem of teacher shortages across the province. The systemic track was structured in two stages – immediate temporary relief and later permanent relief. The government was ordered to fill all vacant posts on a permanent basis within three months of the court order and, as a stepping stone to achieving this, appoint temporary teachers to those vacant posts within one month.[[144]](#footnote-144) The order also directed the government to declare the post establishments for the forthcoming year (2013) and to ensure that these posts were fully funded and teachers were appointed and assume these posts at the start of the school year.[[145]](#footnote-145) This boiled down to a mandatory interdict that the government comply with teacher post-provisioning norms in future.

The two-track remedy was fortified with reporting requirements for tracking the government’s compliance with the terms of the court order. The government was required to make a progress report available for inspection at each district office in the province at three points in the timeline set out by the court for the implementation of the individualised and systemic tracks of the two-track remedy.[[146]](#footnote-146) The LRC notes that these reporting requirements were ‘designed to enable interested parties to inspect the Department’s progress as well as facilitate constructive involvement from all sides’.[[147]](#footnote-147) Finally, the remedial order granted the parties advance leave to set the matter down for hearing on reasonable notice.[[148]](#footnote-148)

As in the *Madzodzo* case, the reporting requirements accompanying the two-track remedy in *Centre for Child Law* enabled the LRC to quickly detect the government’s non-compliance. The progress reports revealed that the government had appointed and paid some temporary teachers, but the systemic post-provisioning problem had in fact worsened – with 7,000 surplus teachers and almost 8,500 vacant posts.[[149]](#footnote-149) The Department’s non-compliance persisted in spite of having consented to the terms of the court order and in spite of the financial capacity it gained from the provincial legislature having voted for a budget to fund the posts at issue.[[150]](#footnote-150) The LRC’s repeated communications with the Department aimed at facilitating compliance also met with no success.[[151]](#footnote-151) This drew attention to the deeper institutional problems underlying the government’s inaction. The Department did not rely on any legal defence to justify their non-compliance but instead explained in their progress reports that it was caused by ‘a combination of internal inefficiency, incompetence and trade union resistance’.[[152]](#footnote-152) In the face of the institutional inertia generated by these institutional problems, it became clear that there was little prospect of progress without returning to court with more creative remedial strategies for enforcing the state’s positive duty to appoint and pay teachers.

## B The Use of ‘Deeming’ Provisions

In formulating a remedial strategy for further litigation on teacher post-provisioning, the LRC adopted a novel approach in view of the lessons learned from previous litigation, particularly the *Madzodzo* furniture litigation. Past experience had shown that the threat of being in contempt of a court order was not a strong enough incentive for the government to comply with the terms of a settlement, where its non-compliance is rooted in incompetence or intransigence.[[153]](#footnote-153) Rather, the LRC recognised that its remedial strategy should be premised on a default of non-compliance, such that the notice of motion would be crafted ‘in anticipation that the Department would likely agree to its terms, and then fail to abide by the court order’ but – crucially – that ‘the desired result would be achieved if the Department failed to act’.[[154]](#footnote-154) This rationale flowed from a key remedial challenge associated with enforcing positive duties, namely that positive action is required to fulfil rights. Where the government lacks the institutional capacity and political agency to take the positive action necessary for achieving the desired outcome, it is very difficult to design a remedy that is likely to provide effective relief. This challenge is particularly acute in the context of systemic relief where the scale of the problem is not fully known in advance.

The relief subsequently designed by the LRC represents an impressive feat in remedial innovation to meet the institutional challenges that had so far thwarted compliance with teacher post-provisioning norms. The remedy was enacted in two phases flowing from two settlements that were reached between the parties. The first phase concerned the appointment and back-pay of temporary teachers. The Department agreed to a list of over 140 named temporary teachers that the LRC had drawn up in consultation with specific schools.[[155]](#footnote-155) These individually identified teachers were formally appointed as temporary teachers in terms of the settlement and the Department was required to back-pay their salaries from the date they assumed their duties.[[156]](#footnote-156) A failure to back-pay these temporary teachers would make the Department liable for ascertainable debt that the LRC could enforce in court by threat of attaching state assets to satisfy the debt.[[157]](#footnote-157) The second phase of the remedy resulted from a settlement in terms of which the named teachers on an agreed list were to be permanently appointed and remunerated. This list of individual teachers did not preclude schools from advertising, interviewing and recommending the appointment of further permanent teachers, and if the Department failed to act on those recommendations, the teachers in question would be *deemed* to be appointed.[[158]](#footnote-158) Moreover, any failure of the Department to pay these permanently appointed teachers was declared in advance to be an ascertainable debt, and therefore subject to the threat of attaching state assets.[[159]](#footnote-159)

The remedial strategy adopted in this two-phase approach sought to provide the same relief as the initial two-track remedy approved by the court in the first *Centre for Child Law* settlement, but it did so through a more creative and careful tailoring of relief to the remedial challenges that had crystallised during the follow-up process. The success of the remedy can be attributed to its optimisation of remedial design through the following three features: (1) a shift in onus in the enforcement of positive duties; (2) a transposition of a systemic problem into individualised relief; and (3) a dynamic use of remedial mode.

### Shifting the onus in the enforcement of positive duties

In the context of enforcing positive duties, the state is required to take positive action, or actively provide a particular entitlement, to fulfil the right at stake. A lack of capacity or political will therefore generates a particularly intractable form of non-compliance in the context of positive duties, as the provision of effective relief is dependent on the government taking positive steps to comply with court orders. With this remedial challenge in mind, the LRC devised a new remedial strategy that shifted the onus in the enforcement of positive duties. Instead of requiring positive action by the government to appoint and pay teachers, their remedy was designed to ensure that a *failure* to act would trigger the same result.

This shift in the onus was utilised in both phases of the remedy. Its operation in the first phase was straightforward as it functioned in relation to payment only: a failure to back-pay temporary teachers made the Department liable for an ascertainable debt. The shift in onus was more nuanced in the second phase, however, because it functioned in relation to appointment as well as payment: firstly, a failure to appoint permanent teachers upon the recommendation of schools resulted in those teachers being *deemed* permanently appointed and – as the second shift in onus – a subsequent failure to pay those permanent teachers was declared in advance to be an ascertainable debt. Through these strategic shifts in onus, the remedy was premised on non-compliance with the court-approved settlement as the government’s default response. The remedy was accordingly structured to subvert the effects of the anticipated failure to act, with the paradoxical result that positive duties were enforced through inaction rather than positive action.

### Transposing a systemic problem into individualised relief

For this shift in onus to trigger the desired effect, however, the scope of the remedy had to be narrowed from systemic relief for all schools to individualised relief for select schools.[[160]](#footnote-160) The shift in onus from action to non-action therefore worked in tandem with the transposition of a systemic problem into individualised relief. The identification of specific teachers to be appointed and paid was required for the consequences of the government’s failure to act to be clear and contained. A further rationale for individualising relief in this way was to make the debt ascertainable and therefore subject to the threat of attaching state assets to satisfy the debt for non-payment of teacher salaries. Although this narrowed the scope of relief from all schools to select schools, the individualisation of claims was necessary for a measure of systemic relief to be effective at all. Moreover, this narrower scope was counteracted by allowing schools to advertise, interview and recommend further teachers for permanent appointment, and the accompanying deeming provision would ensure they are appointed even if the Department failed to act on schools’ recommendations. As a result, systemic relief could be expanded to schools and teachers who were similarly situated to those named on the list of permanent appointments.

### A dynamic use of remedial mode

The third feature of the LRC’s innovative strategy was their dynamic use of remedial mode.[[161]](#footnote-161) The remedy utilised the coercive remedial mode to command compliance in two related ways. Firstly, the shift in onus broke the political bind that had long compromised the Department’s compliance with teacher post-provisioning norms. Recognising that the government lacked the political will to move surplus teachers to take up vacant posts in other schools, the shift in onus meant that any undue influence exercised by the trade unions would not prevent teachers from being appointed. It also prevented the debilitating lack of competence in the Department from continuing to undermine rights. Secondly, the coercive mode is reflected in the threat of attaching state assets to satisfy the ascertainable debts owed to unpaid teachers. The LRC therefore utilised the coercive remedial mode to great effect by anticipating and leveraging non-compliance to overcome the remedial challenges posed by the government’s lack of capacity and political will.

These robust prophylactic measures were not one-dimensionally coercive, however, as they utilised remedial mode in a dynamic and nuanced way. The LRC’s reliance on coercive measures was offset by allowing for the recalibration of relief over time as the scale of the teacher post-provisioning problem became better known and by promoting the continued involvement of government and schools. The flexibility for recalibrating systemic relief over time was facilitated by the provision allowing schools to advertise, interview and recommend further teachers for permanent appointment. While the deeming provision ensured that the appointment of these teachers would not be thwarted by the government’s administrative failure to do so, the government still retained its agency to act positively by appointing them formally. Similarly, the competence of the government was respected by the fact that the Department would retain its power to terminate teacher contracts although, crucially, it would be required to act positively to do so.

### Explicit judicial approval of the deeming provision in Linkside

This shift in onus that underlies the ‘deeming’ provision was utilised again in the third phase of the teacher post-provisioning litigation, the *Linkside* case. Roberson J’s judgment gave explicit approval to the use of ‘deeming’ provisions and his remedial order included a declaration that the suitably qualified teachers listed by the applicant schools were deemed to be permanently appointed.[[162]](#footnote-162) Judge Roberson describes this deemed appointment of teachers as ‘the heart of the matter’ because it sparked disagreement as to how much leeway the court should continue to give to the government when there is an ongoing violation of rights.[[163]](#footnote-163) On the one hand, the government argued that it was currently in negotiations with the teacher trade unions (who were respondents to the litigation, but against whom no relief was sought) about moving teachers in excess at various schools to the vacant posts at other schools.[[164]](#footnote-164) It resisted the deemed appointment of teachers on the basis that it ‘compromised and derailed the implementation of the management plan flowing from the Collective Agreement’ to be reached between the Department and the teacher trade unions.[[165]](#footnote-165) On the other hand, the LRC argued for the court to step in given the ‘slow and incomplete attempts by the Department to move these excess educators’ and the perpetual delays in reaching a Collective Agreement that would be only the first step towards achieving such reallocations.[[166]](#footnote-166)

In defending the deeming provision as an appropriate form of substantive relief that takes precedence over the process of collective bargaining, Judge Roberson refers to the Constitutional Court’s holding in *Ermelo* that:

‘[The] ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements.’[[167]](#footnote-167)

By granting the deeming provision, Judge Roberson prioritises the need to ensure the claimants receive appropriate relief over considerations of comity and participation in view of the government’s continued non-compliance in spite of ‘the leeway afforded to it in previous more open-ended orders’.[[168]](#footnote-168) He gives weighty consideration to the fact that the rights-holders who are affected by the state’s failure to appoint and pay teachers are the poorest and most vulnerable children.[[169]](#footnote-169) Relying on these reasons, Judge Roberson concludes that ‘the ongoing violation of the right to basic education constitutes exceptional circumstances’ that call for the court to ‘substitute its own plan of action for that of the Department’.[[170]](#footnote-170) This bold decision comes after a carefully reasoned justification of the deeming provision as lying within the scope of the court’s appropriate remedial jurisdiction, but it undoubtedly lies nearer the outer limit of those remedial powers.

## C The Opt-In Class Action and Appointment of a Claims Administrator

### Scaling up systemic relief through an opt-in class action

While the creative remedy of shifting the onus in the enforcement of positive duties represented a major breakthrough in responding to the government’s continued failure to appoint and pay teachers, the narrower scope of relief meant that many similarly situated public schools did not benefit from the court-approved remedy. Recognising the need to scale up relief to all affected public schools in the province, the LRC decided to pursue a further round of litigation that experimented with an opt-in class action as a route to obtaining systemic relief.[[171]](#footnote-171) In arguing for the certification of a class action, the LRC clearly articulated the rationale for the class action as being securing systemic relief for the state’s failure to appoint and pay teachers:

‘It is submitted that, in the absence of a class action mechanism, the claims of schools other than the applicants are unlikely to be enforced. Individual schools are unlikely to secure legal representation to bring their own claims for appointment and payment of educators. Each individual’s claim is too small to justify litigation to enforce it. A class action is not only the most appropriate means to determine the claims, it is the only way to do so.’[[172]](#footnote-172)

The *Linkside* opt-in class action was certified on 20 March 2014, becoming the first class action of its kind in South Africa. It offered an opening for all public schools in the Eastern Cape affected by the government’s failure to appoint and pay teachers to join the proceedings and thereby receive relief. While 32 schools initially approached the court requesting vacant permanent posts to be filled and a reimbursement of the R25 million they had paid in teacher salaries, this number rose to 90 schools once the opt-in class action was certified and advertised.[[173]](#footnote-173)

While the certification of the opt-in class action was a promising start to securing systemic relief, the government was still dragging its feet with respect to appointing permanent teachers to vacant posts and reimbursing the 32 schools for the ascertainable debt that had already been established. In September 2014, the LRC therefore gave the Department a 14-day ultimatum to make these appointments and payments, after which time the LRC would issue a writ to seize state assets to satisfy the debts.[[174]](#footnote-174) This proved highly effective, as the payments were made within days of the threat to execute the movable assets of the Minister of Basic Education and top officials in the Eastern Cape Department of Education.[[175]](#footnote-175) The prospect of the government implementing similar relief in relation to the schools that had opted in to the class action remained poor, however, and the LRC identified the need to pre-empt non-compliance and its detrimental effect on those schools. This led to a further remedial innovation to strengthen the opt-in class action as a systemic remedy, namely the appointment of a claims administrator to oversee the implementation of the court order, which included the payment of R81 million in outstanding salaries to the 90 applicant schools.[[176]](#footnote-176)

### The appointment of a claims administrator

An important part of the remedial order in *Linkside* concerned the payment and administration of outstanding teacher salaries. It declared that each of the specific amounts paid by the class member schools to teachers occupying vacant posts constituted a debt against the state.[[177]](#footnote-177) Judge Roberson recognised that this declaration alone was unlikely to provide effective relief, however, given the government’s poor track record in following through with these reimbursements.[[178]](#footnote-178) To avoid the need for the LRC to issue a writ to seize the state’s assets in satisfaction of the debts, Judge Roberson granted the LRC’s request for the appointment of a claims administrator to oversee the implementation of the order. The government was accordingly directed to appoint a firm of registered chartered accountants ‘to distribute the amounts payable to individual schools as members of the class and advise the court of their identity’.[[179]](#footnote-179) The Department was required to pay R81 million to the claims administrators so that they could verify each class member’s claim and disburse payments according their respective entitlements.[[180]](#footnote-180)

The appointment of a claims administrator to oversee the implementation of the court order was a novel remedial mechanism for South African courts, but the LRC drew attention in their arguments to its use in foreign jurisdictions such as the USA, Canada and Australia.[[181]](#footnote-181) While Judge Roberson did not explore this comparative perspective in his judgment, he justified the appointment of a claims administrator on the basis of the Supreme Court of Appeal’s reference to it in *Meadow Glen* as a remedial innovation that courts should consider in future. The relevant passage from the *Meadow Glen* case is worth quoting in full as it fleshes out the remedial challenges that a claims administrator or special master may be well suited to address:

‘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. It is necessary to add that when doing so in this type of situation courts must also consider how they are to deal with failures to implement orders; the inevitable struggle to find adequate resources; inadequate or incompetent staffing and other administrative issues; problems of implementation not foreseen by the parties’ lawyers in formulating the order and the myriad other issues that may arise with orders the operation and implementation of which will occur over a substantial period of time in a fluid situation. Contempt of court is a blunt instrument to deal with these issues and courts should look to orders that secure on-going oversight of the implementation of the order. There is considerable experience in the United States of America with orders of this nature arising from the decision in *Brown v Board of Education* and the federal court supervised process of desegregating schools in that country. The Constitutional Court referred to it with approval in the *TAC (No 2)* case. Our courts may need to consider such institutions as the special master used in those cases to supervise the implementation of court orders.’[[182]](#footnote-182)

Having relied on this passage as authority for the appointment of a claims administrator being within the court’s appropriate remedial jurisdiction, Judge Roberson argued for it being the optimal remedy in this class action. He pointed to the government’s poor track record of compliance in this matter and the added complexity of the class action as evidence for the ‘strong likelihood that administrative problems will be encountered in the implementation of payment by the Department’.[[183]](#footnote-183) With this incompetence and lack of political will in mind, Judge Roberson identified a grave risk that schools would be left without meaningful relief from ‘the financial situation they have been placed in as a result of the Department’s failure to appoint educators’.[[184]](#footnote-184) He therefore held that ‘an efficient and independently accountable method of payment is essential’ to providing just and equitable relief.[[185]](#footnote-185) In prioritising the effective administration of payments, Judge Roberson dismissed the government’s objection about the cost implications of appointing a firm of chartered accountants, recognising that ‘their charges will not be insubstantial but it is unlikely they will make a significant inroad into the budget of the Department in its overall extent’.[[186]](#footnote-186) Similarly, the government’s concern about delays caused by the prescribed procurement procedures was rejected on the ground that ‘this would be a situation of urgency or emergency justifying a deviation from the competitive procedure’ for procurement.[[187]](#footnote-187)

# VII Conclusion

This article has sought to shine the spotlight on a remedial predicament involving persistent non-compliance with court orders that poses a systemic threat to rights. While *Black Sash* is representative of this remedial predicament, the remedial challenge of ensuring accountability in the remedial process is more frequently encountered in our High Courts. Identifying the need for innovative remedial interventions to overcome persistent non-compliance, this article turns to two case studies that offer inspiration for creative remedial development.

A key remedial challenge in both streams of litigation lay in ascertaining the scale of the systemic problem and developing a plan that addressed the multi-faceted challenge of achieving full compliance with systemic relief. The *Madzodzo* furniture litigation underscores the importance of auditing and reporting requirements for monitoring implementation and thus also for diagnosing non-compliance. *Centre for Child Law* demonstrates how individualising systemic relief can tighten the focus of a remedy to bypass some of these implementation difficulties, while the opt-in class action in *Linkside* breaks new ground as a way of scaling up relief for similarly situated individuals.

Where the government’s non-compliance stemmed from a lack of capacity, the LRC resorted to pragmatic remedial mechanisms to compensate for this weak institutional functioning: the appointment of an independent auditor in *Madzodzo* and a claims administrator in *Linkside*. A more intractable remedial challenge was posed by non-compliance that was tinged with intransigence, where the absence of political will results in an indomitable institutional inertia. The shift in onus for enforcing positive duties in *Centre for Child Law* and the *Linkside* class action demonstrates a dynamic use of remedial mode to overcome this intransigence. It is arguably the boldest remedial innovation yet to be granted in our courts.

Yet it also came at the point when the LRC was acutely aware of its power to dictate the remedy in settlement negotiations with the government: while settlement had come as a pleasant surprise in earlier education litigation run by the LRC,[[188]](#footnote-188) they anticipated settlement with bold demands in the *Madzodzo* case, before proactively leveraging settlement in *Centre for Child Law* by crafting a remedy in expectation of non-compliance. The shift in onus for enforcing positive duties comes in the context of repeated non-compliance by the government that left few options for fulfilling rights – it was a remedial invention born of necessity – but it nevertheless unsettles our understanding of what is required of the state to fulfil constitutional rights. Instead of mandating the state to take positive action to fulfil rights, relief for the breach of its positive duties is premised on the state’s continuing *failure* to act.

Initially taking the form of a court-approved remedy, this shift in onus raises many questions about how we conceive of the court’s remedial role in the context of settlement. Some of these questions linger in spite of Roberson J’s subsequent approval of deeming provisions in the *Linkside* judgment. The slippage between a court-approved remedy in *Madzodzo* (the appointment of an independent auditor) being cited as authority for a court-granted remedy in *Black Sash* (the appointment of the Auditor-General and independent monitors) underscores the relevance of these questions. Notwithstanding this scope for debate, however, there is no doubt that this novel shift in onus and the other innovative remedies featured in this article hold compelling promise for overcoming persistent non-compliance with remedial orders.

1. There were three Constitutional Court decisions on this matter prior to 2017: *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) ('*AllPay 1*'); *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) ('*AllPay 2*'); *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2015] ZACC 7; 2015 (6) BCLR 653 (CC) *(*'*AllPay* 3'). [↑](#footnote-ref-1)
2. *Black Sash Trust v Minister of Social Development and Others* [2017] ZACC 8 ('*Black Sash*')*.* [↑](#footnote-ref-2)
3. Ibid at para 51. [↑](#footnote-ref-3)
4. Ibid at para 51. [↑](#footnote-ref-4)
5. *Madzodzo and Others v Minister of Basic Education and Others* [2014] ZAECMHC 5; 2014 (3) SA 441 (ECM) ('*Madzodzo*'). [↑](#footnote-ref-5)
6. *Centre for Child Law and Others v Minister of Basic Education and Others* 2013 (3) SA 183 (ECG) ('*Centre for Child Law*'). [↑](#footnote-ref-6)
7. *Linkside and Others v Minister for Basic Education and Others* [2015] ZAECGHC 36 ('*Linkside*'). [↑](#footnote-ref-7)
8. *AllPay 2* (n 1) at para 30. [↑](#footnote-ref-8)
9. ibid at para 32. [↑](#footnote-ref-9)
10. Meghan Finn captures this tension well in her analysis of *AllPay 2*: ‘The court had to weigh the importance of ensuring that social-grant claimants are protected maximally against the need to vindicate the rule of law (including by rectifying incorrect administrative decisions’. (Meghan Finn, ‘AllPay Remedy: Dissecting the Constitutional Court’s Approach to Organs of State’ (2016) VI Constitutional Court Review 258, 261.) [↑](#footnote-ref-10)
11. *AllPay 2* (n 1) at para 39. [↑](#footnote-ref-11)
12. Section 172(1)(ii) of the Constitution. [↑](#footnote-ref-12)
13. See, for example, the landmark case of *Minister of Home Affairs v Fourie* (2006) 1 SA 524 (CC) in which the Court was split as to whether the declaration of invalidity should be suspended. Robert Leckey has recently challenged the prevailing view of suspended declarations of invalidity as a restrained and deferential exercise of remedial discretion by identifying their potential to harm rights-holders and undermine the rule of law: Robert Leckey, ‘The Harms of Remedial Discretion’ (2016) 14 International Journal of Constitutional Law 584, 597. Of particular interest in the context of *AllPay 2* is his argument that suspended declarations of invalidity require us to rethink our understanding of constitutional supremacy: ‘It becomes untenable to claim that the invalidity of legislation flows directly from the “operation” of the constitution’s supremacy clause, rather than from an exercise of judicial discretion’ (ibid 603). *AllPay 2* foregrounds the role of remedial discretion in disrupting the link between constitutional supremacy and a theory of nullity, but Froneman J’s framing of the corrective principle as the ‘default position’ arguably obscures the fact that the consequences of a constitutional inconsistency are *always* contingent on the exercise of discretionary remedial power (*AllPay 2* (n 1) at para 30). See further Kate Hofmeyr, ‘A Central-Case Analysis of Constitutional Remedial Power’ (2008) 125 South African Law Journal 521, 523. At the very least, Leckey’s insight supports Meghan Finn’s call for a more principled approach in justifying departures from Froneman J’s corrective principle (Finn (n 10) 261–262). [↑](#footnote-ref-13)
14. *AllPay 2* (n 1) at para 63. [↑](#footnote-ref-14)
15. ibid at para 59. For an excellent analysis of this grounding of CPS’ continuing constitutional obligations in its status as an organ of state, see Finn (n 10). [↑](#footnote-ref-15)
16. *AllPay 2* (n 1) at para 66. [↑](#footnote-ref-16)
17. ibid at para 40. [↑](#footnote-ref-17)
18. ibid at para 40-46. [↑](#footnote-ref-18)
19. ibid at para 71. [↑](#footnote-ref-19)
20. *AllPay 3* (n 1) at para 16. [↑](#footnote-ref-20)
21. *Black Sash* (n 2) at para 5-6. [↑](#footnote-ref-21)
22. ibid at para 43. [↑](#footnote-ref-22)
23. ibid at para 15. [↑](#footnote-ref-23)
24. ibid at para 8. [↑](#footnote-ref-24)
25. ibid at para 41. [↑](#footnote-ref-25)
26. ibid at para 48. [↑](#footnote-ref-26)
27. ibid at para 9. [↑](#footnote-ref-27)
28. ibid at para 19. See especially the answers in response to the Chief Justice’s first direction which attempts to clarify the person responsible on behalf of SASSA for ensuring compliance with *AllPay 2*. [↑](#footnote-ref-28)
29. ibid at para 57. [↑](#footnote-ref-29)
30. ibid at para 11. [↑](#footnote-ref-30)
31. ibid at para 13. [↑](#footnote-ref-31)
32. ibid at para 12. [↑](#footnote-ref-32)
33. ibid at para 15. [↑](#footnote-ref-33)
34. ibid at para 58. [↑](#footnote-ref-34)
35. ibid at para 36. [↑](#footnote-ref-35)
36. ibid at para 10, my emphasis. [↑](#footnote-ref-36)
37. *AllPay 2* (n 1) at para 75; quoted in *Black Sash* (n 2) at para 56. [↑](#footnote-ref-37)
38. *Black Sash* (n 2) at para 57. [↑](#footnote-ref-38)
39. ibid at para 51. [↑](#footnote-ref-39)
40. ibid order 4 at para 76. [↑](#footnote-ref-40)
41. ibid orders 6 and 10 at para 76. [↑](#footnote-ref-41)
42. ibid order 5 at para 76. [↑](#footnote-ref-42)
43. ibid at para 79. [↑](#footnote-ref-43)
44. ibid at para 45. [↑](#footnote-ref-44)
45. ibid. [↑](#footnote-ref-45)
46. Leckey (n 13) esp. 600-606 and discussion above at footnote 13. See also *Electoral Commission v Mhlope and Others* (2016) 5 SA 1 (CC) at para 127-137. [↑](#footnote-ref-46)
47. *Black Sash* (n 2) 62. [↑](#footnote-ref-47)
48. ibid orders 7-9 at para 76. [↑](#footnote-ref-48)
49. ibid at para 71. [↑](#footnote-ref-49)
50. ibid. [↑](#footnote-ref-50)
51. ibid orders 11-12 at para 76. [↑](#footnote-ref-51)
52. ibid order 13 at para 76. [↑](#footnote-ref-52)
53. ibid at para 73-74. [↑](#footnote-ref-53)
54. ibid at para 72. [↑](#footnote-ref-54)
55. See the Pandora’s box of accountability problems triggered by the Public Protector’s Nkandla Report: *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11; *Economic Freedom Fighters and Others v Speaker of the National Assembly and Others* [2017] ZACC 47. [↑](#footnote-ref-55)
56. *Black Sash* (n 2) is the obvious case in point. See also *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)* [2015] ZACC 10. [↑](#footnote-ref-56)
57. Ignoring a High Court order for the arrest of visiting Sudanese President Omar Hassan al-Bashir is the most striking recent example of the government’s disregard for the rule of law: *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* [2016] ZASCA 17; *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* [2015] ZAGPPHC 402. South Africa’s notification to withdraw from the International Criminal Court halted the appeal to the Constitutional Court in the Al-Bashir case. [↑](#footnote-ref-57)
58. *Nyathi v MEC for the Department of Health, Gauteng & Another* [2008] ZACC 8; *N and Others v Government of South Africa (No 3)* (2006) 6 SA 575 (D); *City of Cape Town v Rudolph and Others* (2004) 5 SA 39 (C); *Federation of Governing Bodies of South African Schools (Gauteng) v MEC for Education, Gauteng* (2002) 1 SA 660 (T); For an early example of Froneman J dealing with non-compliance in the context of social grants, see his decision in *Kate v MEC for the Department of Welfare, Eastern Cape* [2004] ZAECHC 25. [↑](#footnote-ref-58)
59. *Minister of Health v Treatment Action Campaign* [2002] ZACC 15 at para 109. For an empirical analysis of non-compliance in the early jurisprudence of the Constitutional Court, see David Hausman, ‘When and Why the South African Government Disobeys Constitutional Court Orders’ (2012) 48 Stanford Journal of International Law 437. [↑](#footnote-ref-59)
60. Michael Bishop, ‘Remedies’, *Constitutional Law of South Africa*, vol 1 (2nd edn, Juta 2014) 9-74-7–75. [↑](#footnote-ref-60)
61. Sandra Liebenberg has highlighted the importance of ‘responsive remedies’ that are attentive to the contextual realities and promote transformative responses to socio-economic violations: see Sandra Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta 2010). [↑](#footnote-ref-61)
62. *Pheko* (n 56) at para 27. [↑](#footnote-ref-62)
63. *Fose v Minister of Safety and Security* (1997) 3 SA 786 (CC) at para 69. [↑](#footnote-ref-63)
64. Bishop (n 60); Hofmeyr (n 13). [↑](#footnote-ref-64)
65. Section 172(1)(b) of the South African Constitution [↑](#footnote-ref-65)
66. Section 24(1) of the Canadian Charter of Rights and Freedoms. [↑](#footnote-ref-66)
67. Article 142 of the Indian Constitution. Section 32 also grants the Supreme Court broad powers in granting remedial relief. [↑](#footnote-ref-67)
68. Article III of the United States Constitution. [↑](#footnote-ref-68)
69. Bishop (n 60); Kent Roach, ‘The Challenges of Crafting Remedies for Violations of Socio-Economic Rights’ in Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2009). [↑](#footnote-ref-69)
70. *Black Sash* (n 2) at para 51. [↑](#footnote-ref-70)
71. *Mhlope* (n 46) at para 137. [↑](#footnote-ref-71)
72. *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Others* (2017) 4 SA 422 (LCC). [↑](#footnote-ref-72)
73. *Meadow Glen Home Owners Association and Others v City of Tshwane Metropolitan Municipality and Another* (2015) 2 SA 413 (SCA) at para 35. [↑](#footnote-ref-73)
74. *Black Sash* (n 2) at para 71, footnote 37. [↑](#footnote-ref-74)
75. See the exchange between Sandra Fredman and Yana van Leeve on the Constitutional Court’s reliance on procedure in adjudicating the right to education in several recent cases: Sandra Fredman, ‘Procedure or Principle: The Role of Adjudication in Achieving the Right to Education’ (2016) VI Constitutional Court Review 165; Yana Van Leeve, ‘Executive Heavy Handedness and the Right to Basic Education: A Reply to Sandra Fredman’ (2016) VI Constitutional Court Review 199. [↑](#footnote-ref-75)
76. *MEC for Education, Gauteng Province v Governing Body of Rivonia Primary School* (2013) 6 SA 582 (CC). [↑](#footnote-ref-76)
77. *Minister of Education (Western Cape) v Governing Body of Mikro Primary School* (2005) 3 SA 436 (SCA); *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* (2010) 2 SA 415 (CC). [↑](#footnote-ref-77)
78. *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* (2014) 2 SA 228 (CC). [↑](#footnote-ref-78)
79. The most recent case in this procedural power struggle marks a welcome break to the trend of defeats suffered by the Department of Education: *Federation of Governing Bodies for South African Schools v Member of the Executive Council for Education, Gauteng and Another* (2016) 4 SA 546 (CC). Although the case turned on procedural questions, it is worth noting that the amicus Equal Education did mount a substantive challenge against the constitutionality of default feeder zones on the ground that they risk perpetuating school admission along racial lines owing to the lingering presence of apartheid geography. Moseneke DCJ acknowledged the merit in this argument, but conveniently side-stepped the issue: ‘There is traction in the contention of the amicus. But I am uncertain that an amicus could introduce a new cause of action – unfair discrimination – and press for a remedy that none of the parties has sought. Happily I do not have to decide the issue because the order we will make will compel the MEC to formulate fresh rules for feeder zones as required by regulation 4(1).’ (ibid at para 39.) [↑](#footnote-ref-79)
80. Edward B Fiske and Helen F Ladd, *Elusive Equity: Education Reform in Post-Apartheid South Africa* (Brookings Institution Press 2004) 66–67. It is noteworthy that Fiske & Ladd’s study is a comparison between the Western Cape and the Eastern Cape as two provinces that strikingly expose the educational inequalities that persist in post-apartheid South Africa. [↑](#footnote-ref-80)
81. *Ready to Learn? A Legal Resource for Realising the Right to Education* (Legal Resources Centre 2013) 51. [↑](#footnote-ref-81)
82. *Madzodzo* Supplementary Founding Affidavit at para 9. [↑](#footnote-ref-82)
83. *Madzodzo and Others v Minister of Basic Education and Others* Case No 2144/2012 - Court Order per Griffiths J on 29 November 2012 at para 1. [↑](#footnote-ref-83)
84. ibid at para 3. [↑](#footnote-ref-84)
85. ibid at para 3.2. [↑](#footnote-ref-85)
86. ibid at para 5. [↑](#footnote-ref-86)
87. ibid at paras 6 and 7.2. [↑](#footnote-ref-87)
88. ibid at para 3.1. [↑](#footnote-ref-88)
89. ibid at para 7. [↑](#footnote-ref-89)
90. ibid at para 4. [↑](#footnote-ref-90)
91. *Madzodzo* Supplementary Founding Affidavit at para 11. [↑](#footnote-ref-91)
92. ibid at para 24. [↑](#footnote-ref-92)
93. ibid at para 23. [↑](#footnote-ref-93)
94. ibid at para 31-32. [↑](#footnote-ref-94)
95. ibid at para 33. [↑](#footnote-ref-95)
96. ibid at para 25. [↑](#footnote-ref-96)
97. ibid at para 46. [↑](#footnote-ref-97)
98. ibid at para 12.1. [↑](#footnote-ref-98)
99. ibid at para 12.2. [↑](#footnote-ref-99)
100. *Ready to Learn? A Legal Resource for Realising the Right to Education* (n 81) 52. [↑](#footnote-ref-100)
101. ‘Madzodzo Supplementary Founding Affidavit’ (n 82) at para 54. [↑](#footnote-ref-101)
102. ibid at para 55. [↑](#footnote-ref-102)
103. ibid. [↑](#footnote-ref-103)
104. *Ready to Learn? A Legal Resource for Realising the Right to Education* (n 81) 52. [↑](#footnote-ref-104)
105. *Madzodzo and Others v Minister of Basic Education and Others* Case No 2144/2012 - Court Order per Makaula J on 26 September 2013 at para 4.1. [↑](#footnote-ref-105)
106. ibid at paras 5 and 9. [↑](#footnote-ref-106)
107. *Fighting to Learn...A Legal Resource for Realising the Right to Education* (Legal Resources Centre 2015) 37. [↑](#footnote-ref-107)
108. *Madzodzo* (n 5) at para 15. [↑](#footnote-ref-108)
109. ibid at para 17. [↑](#footnote-ref-109)
110. ibid at para 20. [↑](#footnote-ref-110)
111. ibid. [↑](#footnote-ref-111)
112. ibid at para 22. [↑](#footnote-ref-112)
113. *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* (2012) 2 SA 104 (CC) at para 74. [↑](#footnote-ref-113)
114. *Madzodzo* (n 5) at para 33. [↑](#footnote-ref-114)
115. ibid at para 31. [↑](#footnote-ref-115)
116. ibid at para 23. [↑](#footnote-ref-116)
117. ibid at para 27. [↑](#footnote-ref-117)
118. ibid at para 36. [↑](#footnote-ref-118)
119. ibid orders 1 and 2 at para 41. [↑](#footnote-ref-119)
120. ibid orders 3 and 4 at para 41. [↑](#footnote-ref-120)
121. ibid at para 40. [↑](#footnote-ref-121)
122. ibid at para 36. [↑](#footnote-ref-122)
123. ibid at para 40. [↑](#footnote-ref-123)
124. *Fighting to Learn...A Legal Resource for Realising the Right to Education* (n 107) 37–38. [↑](#footnote-ref-124)
125. ibid 38. [↑](#footnote-ref-125)
126. ibid. [↑](#footnote-ref-126)
127. ibid. [↑](#footnote-ref-127)
128. ibid. [↑](#footnote-ref-128)
129. See further Ann Skelton, ‘Leveraging Funds for School Infrastructure: The South African “Mud Schools” Case Study’ (2014) 39 International Journal of Educational Development 59, 61. [↑](#footnote-ref-129)
130. *Fighting to Learn...A Legal Resource for Realising the Right to Education* (n 107) 38. [↑](#footnote-ref-130)
131. *Ready to Learn? A Legal Resource for Realising the Right to Education* (n 81) 65. [↑](#footnote-ref-131)
132. The national policy on teacher post-provisioning norms was first published as Government Notice 1676 of 1998, but has subsequently been amended in 2002 and 2005. [↑](#footnote-ref-132)
133. *Ready to Learn? A Legal Resource for Realising the Right to Education* (n 81) 65. [↑](#footnote-ref-133)
134. ibid 65–66. [↑](#footnote-ref-134)
135. *Centre for Child Law* Notice of Motion at para 32. [↑](#footnote-ref-135)
136. *Ready to Learn? A Legal Resource for Realising the Right to Education* (n 81) 66. [↑](#footnote-ref-136)
137. ibid. [↑](#footnote-ref-137)
138. ibid. [↑](#footnote-ref-138)
139. *Centre for Child Law* (n 6). [↑](#footnote-ref-139)
140. ibid order 4 at para 35. [↑](#footnote-ref-140)
141. ibid order 5 at para 35. [↑](#footnote-ref-141)
142. ibid order 6.2 at para 35. [↑](#footnote-ref-142)
143. ibid order 6.3 at para 35. [↑](#footnote-ref-143)
144. ibid orders 2 and 3 at para 35. [↑](#footnote-ref-144)
145. ibid orders 7-9 at para 35. [↑](#footnote-ref-145)
146. ibid order 10 at para 35. [↑](#footnote-ref-146)
147. *Ready to Learn? A Legal Resource for Realising the Right to Education* (n 81) 66. [↑](#footnote-ref-147)
148. *Centre for Child Law* (n 6) order 11 at para 35. [↑](#footnote-ref-148)
149. *Ready to Learn? A Legal Resource for Realising the Right to Education* (n 81) 67. [↑](#footnote-ref-149)
150. ibid 66. [↑](#footnote-ref-150)
151. ibid 67. [↑](#footnote-ref-151)
152. ibid. [↑](#footnote-ref-152)
153. ibid. [↑](#footnote-ref-153)
154. ibid. [↑](#footnote-ref-154)
155. ibid. [↑](#footnote-ref-155)
156. ibid. [↑](#footnote-ref-156)
157. ibid. [↑](#footnote-ref-157)
158. ibid 68. [↑](#footnote-ref-158)
159. ibid. [↑](#footnote-ref-159)
160. ibid 67. [↑](#footnote-ref-160)
161. The relevant distinction for purposes of this discussion is between a coercive remedial mode, which is the staple command and control mode of the law, and a reflexive remedial mode, which is ‘characterised by inducing, rather than commanding change: facilitating deliberative and co-operative problem-solving by all parties involved, and finding a balance between incentives and sanctions.’ (ibid 160–161.) [↑](#footnote-ref-161)
162. *Linkside* (n 7) order 2 at para 1. [↑](#footnote-ref-162)
163. ibid at para 22. [↑](#footnote-ref-163)
164. ibid at para 7. [↑](#footnote-ref-164)
165. ibid at para 11. [↑](#footnote-ref-165)
166. ibid at para 8-9. [↑](#footnote-ref-166)
167. *Ermelo* (n 77) at para 97. [↑](#footnote-ref-167)
168. *Linkside* (n 7) at para 24. [↑](#footnote-ref-168)
169. ibid at para 25. [↑](#footnote-ref-169)
170. ibid at para 26. [↑](#footnote-ref-170)
171. *Fighting to Learn...A Legal Resource for Realising the Right to Education* (n 107) 54. [↑](#footnote-ref-171)
172. *Linkside Founding Affidavit* at para 149. [↑](#footnote-ref-172)
173. *Fighting to Learn...A Legal Resource for Realising the Right to Education* (n 107) 54. [↑](#footnote-ref-173)
174. ibid. [↑](#footnote-ref-174)
175. ibid. [↑](#footnote-ref-175)
176. ibid. [↑](#footnote-ref-176)
177. *Linkside* (n 7) order 1.1 at para 1. [↑](#footnote-ref-177)
178. ibid at para 20. [↑](#footnote-ref-178)
179. ibid order 1.3.1 at para 1. [↑](#footnote-ref-179)
180. ibid orders 1.3.2 and 1.3.3 at para 1. [↑](#footnote-ref-180)
181. Shona Gazidis, ‘Court Makes Unprecedented Step Appointing “Claims Administrator” to Ensure State Compliance with Court Order’ (*Oxford Human Rights Hub*, 13 January 2015) <www.ohrh.law.ox.ac.uk/court-makes-unprecedented-step-appointing-claims-administrator-to-ensure-state-compliance-with-court-order/> accessed 27 July 2017. [↑](#footnote-ref-181)
182. *Meadow Glen* (n 73) at para 35. [↑](#footnote-ref-182)
183. *Linkside* (n 7) at para 20. [↑](#footnote-ref-183)
184. ibid. [↑](#footnote-ref-184)
185. ibid. [↑](#footnote-ref-185)
186. ibid at para 21. [↑](#footnote-ref-186)
187. ibid. [↑](#footnote-ref-187)
188. The so-called ‘Mud Schools’ case speaks to this point: *Centre for Child Law and Seven Others v Government of the Eastern Cape Province and Others* ECB unreported case no 504/10. For an analysis of this litigation see Skelton (n 129). [↑](#footnote-ref-188)