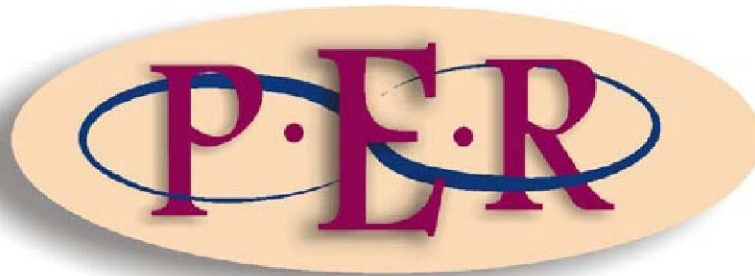


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D Erasmus* and A Hornigold**

1 Introduction

The traditional model of litigation in South Africa may be considered to be the adversarial model. Two parties, possibly more, approach the court each with his or her own desired outcome. The court is then obliged to decide in favour of one of the parties. According to Herrmann¹ the essence of the accusatorial trial is a process of dialectic dispute and challenge.

A different type of litigation is gradually emerging in South African law. This type of litigation involves actions against public institutions that are failing to comply with their constitutional mandates. In this type of litigation there is seldom a dispute about the eventual outcome that is desired. Both the applicant and the state, in its capacity as the respondent, have a broad consensus about the manner in which the institution should operate. Both parties often agree on the current shortcomings within the public institution and the transformation needed to correct the shortcomings. The primary issue relates to the details of the implementation of the transformation and the correction of the shortcomings.²

An example of this type of litigation can be found in litigation concerning the conditions in which prisoners are detained in South African prisons. The constitutional mandate for the imprisonment of offenders is contained in the *Correctional Services Act*.³

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¹ Hermann 1978 *SAJCC* 5.

² *B v Minister of Correctional Services* 1997 6 BCLR 789 (C) para 789.

³ *Correctional Services Act* 111 of 1998 (hereafter the CSA).

The nature of the detention envisaged is that it should retain all the basic human rights of the inmate except those taken away by lawful detention, expressly or by implication, or those rights which are necessarily inconsistent with the circumstances in which the inmate, as a prisoner, is placed.⁴ Furthermore, the rights of the inmate are to be limited only for the purposes of punishment.⁵ The four purposes of punishment are retribution, prevention, deterrence and rehabilitation, with particular emphasis on rehabilitation.⁶ Respect for human dignity is envisaged in this form of punishment.⁷ Any limitations of fundamental rights beyond those permitted cease to be justifiable.

However, there are ongoing human rights violations in prisons impairing the human dignity of prisoners. The causes of these violations include assaults, inadequate medical care, exposure to life-threatening diseases and unsuitable or dangerous detention conditions. These human rights violations are caused mainly by shortages of staff, shortages of medical staff and facilities, prison overcrowding, inadequate staff development, the prevalence of HIV/AIDS, infrastructure defects and maintenance problems, gangsterism, requests for prisoner transfers and problems associated therewith, the ineffectiveness of parole boards, and staff development needs that are not addressed. Human rights violations are furthermore caused by the fact that prison authorities primarily focus on maintaining security in prisons.⁸

⁴ *Goldberg v Minister of Prisons* 1979 1 SA 14 (A) para 39.

⁵ Section 4 of the CSA states that the department of correctional services must ensure the safe custody of all inmates. The limitations of the rights of prisoners are to be applied in a manner that conforms to their purpose and should not affect the prisoner to a greater degree or for a longer period than necessary. More specifically s 4 provides that the minimum rights entrenched in the Act must not be violated or restricted for discipline or any other purpose. The purpose of imprisonment is specified in s 2 of the Act which, from a societal viewpoint, is the promotion of a just, peaceful and safe society. The means envisaged to achieve this are firstly that court sentences are to be enforced. In this regard it is trite law that court sentences are a form of punishment and that the four purposes of punishment are those specified above. Secondly, it is required that prisoners be detained in safe custody whilst ensuring their human dignity. This merely emphasises the doctrine referred to in the *Goldberg* decision, which is that prisoners retain all their rights subject to the qualifications mentioned in the decision. Thirdly, it is required that prisoners are to be rehabilitated in the wider sense of the word, that is, that they are to be reintegrated into society as socially responsible people. This merely emphasises that rehabilitation is a primary goal of incarceration. No other justification for the limitation of the rights of prisoners exists and any further limitations are thus unjustifiable.

⁶ Section 2(c) of the CSA. *S v Makwanyane* 1995 3 SA 391 (CC) paras 116-131; *S v Williams* 1995 3 SA 632 (CC) para 65.

⁷ Section 2(a) of the CSA.

⁸ Compare Munting 2013 *LDD* 365-366.

This over-emphasis on security leads to a failure to implement rehabilitative and vocational training programmes. These problems are ongoing and show no sign of being addressed in a meaningful manner.⁹

Where disputes concerning the rights of prisoners have come before the courts, the courts have on occasion issued a structured interdict as an appropriate remedy. A structured interdict is a court order directing the violator of the fundamental rights of the applicant, in these cases the prisoner, to rectify the violation and report back to the court.¹⁰

However, problems arise when violations are widespread and no single order can cause the problems to be properly addressed.¹¹ Furthermore, the executive does on occasion ignore court orders or fails to implement them properly.¹²

In order to more fully understand the problem the following is important: The wrongdoing that needs to be addressed is not a wrong done to a particular person. The constitutional wrong concerned is the manner in which the institution executes its mandate *vis-a-vis* the vulnerable beneficiaries of the public service in question. It is argued that in order to execute its constitutional mandate properly the institution needs to transform so that it properly executes its mandate as set forth in the *Correctional Services Act* and that it respects the fundamental rights of prisoners as contained in the *Constitution*. There is usually no dispute about the failures of the organisation and court orders are often taken by consent. The difficulty lies in the effective implementation of the court order.¹³

It now needs to be determined how it can be ensured that a public institution such as a school, welfare department, hospital for the mentally disabled, home for the elderly, or a prison, which is designed to serve or accommodate the vulnerable, can

⁹ Judicial Inspectorate of Prisons 2006 <http://judicialinsp.dcs.gov.za/Annualreports/ANNUAL%20REPORT%202007.pdf>.

¹⁰ Currie and De Waal *Bill of Rights Handbook* 217.

¹¹ *Brown, Governor of California v Plata* 563 US (2011) 13.

¹² *Motsemme v Minister of Correctional Services* 2006 2 SACR 277 (W) 285; *Ehrlich v Minister of Correctional Services* 2009 2 SA 373 (E) para 45.

¹³ Levine 1986 *Law & Policy* 275.

be brought into conformity with its constitutional mandate where there are continual and persistent failures to do so.

Even where court orders are obtained, there are often significant problems with the implementation thereof. These relate to problems of the funding of the institution and the envisaged changes, bureaucratic obstacles, political resistance to change, conflicts both between and within departments, subtle forms of non-compliance, especially with regards to gender or racial discrimination, other non-compliance, the vested interests of various groups within the relevant department or departments, regulatory hurdles, co-ordination between different departments of state, misinterpretation of court orders, simple disregarding of court directives, lack of expertise both in regard to administration and core functions, public relations, and so forth.¹⁴

In the case of prisons, a possible solution which has been employed in the United States of America and which may be adapted for use in the South African context is that of a post-trial court-appointed supervisor, who supervises the transformation of the public institution until such time as the non-compliance has been appropriately resolved. This would be the case where the nature of the non-compliance is such that a structured interdict would be insufficient because a wide range of issues needs to be addressed and where these violations are of a persistent character showing a failure to fulfil the institution's constitutional obligations.¹⁵

In this article the role and functions of the American special master will be set out and the feasibility of importing such an office into the South African context will be evaluated. In the following paragraph the role of the American special master will be set out and considered.

¹⁴ Levine 1986 *Law & Policy* 285.

¹⁵ In South African prisons certain problems have persisted over many years and still continue. These have been identified as systemic problems and include overcrowding, staff-on-prisoner violence, prison gangs and staff corruption. Compare in this regard Hornigold *Principles of South African Prison Law* ch 6.

2 The appointment of special masters in the United States of America

The origin of the concept of a master who assists the court is to be found in fourteenth and fifteenth century England. In the equity procedure that developed under the Chancery system, Masters in Chancery assisted the Chancellor in the dispensation of equity functions. Their functions were initially to draw up writs, affidavits and certifications of deeds. The equity procedures under the Chancery were introduced to provide remedies where the rigid English common law failed to do so. The purpose of the equity jurisdiction was to protect the poor and the defenceless litigants.¹⁶

The master in chancery in England developed into what would be known in South Africa as a *curator bonis*, that is, one who administers the funds of another, such as a minor. The master would, however, have total custody and control of the funds given to him to administer, and was permitted to invest the funds for personal benefit. These positions were thus highly lucrative and sought after and were often sold for considerable sums. The abuses within the masters' offices became infamous and were noted by Charles Dickens in *Bleak House*.¹⁷

The institution of master was adopted in the United States of America, which shares the common law system.¹⁸ The terms master, special master, hybrid master, ombudsman, inspector, receiver and so forth can be traced through the American Rules of Civil Procedure including the Federal Equity Rules of 1912 and the Federal Rules of Civil Procedure of 1937.¹⁹ The role of the master was greatly amplified in the United States of America²⁰ but did include the administration of funds on behalf of others, the most famous of which is the 20 billion US Dollar compensation fund for victims of the September 11 World Trade Centre attacks.²¹

¹⁶ Brakel 1979 *ABF Res J* 547.

¹⁷ Levine 1985 *Hastings LJ* 147.

¹⁸ Levine 1985 *Hastings LJ* 148.

¹⁹ Brakel 1979 *ABF Res J* 549.

²⁰ See para 4 below.

²¹ Library of Congress Congressional Research Service 2003 <http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RL31716pdf>.

Rule 53 of the Federal Rules of Civil Procedure in the United States of America provides that a court may appoint a master only for purposes relating to the performance of duties to which the parties have consented. A master may also conduct trial proceedings without a jury where an exceptional condition is present and make or recommend factual findings. Masters are in addition appointed to perform accounting functions or determine or resolve the amount of damages to be awarded. Lastly masters are appointed to facilitate pre- and post-trial matters that cannot effectively and in time be addressed by the available presiding officers of the relevant district.²²

Masters are usually appointed in matters that are complex or technical and involve knowledge or skills which the judge would normally not possess or that would involve a large amount of time-consuming work.²³ The master is considered to have a quasi-judicial role and to be carrying out the work of the judiciary. This role has been described as an "arm of the court".²⁴

Masters are not regularly appointed and their appointment is something of an exception to the rule.²⁵ Even in such matters the court or the parties have considered such an appointment in only 7% of the cases.²⁶

A special master could be employed in a wide range of civil case management situations and fact-finding functions at various stages during the litigation process. These would include the pre-trial, trial, and post-trial stages. Judges appoint special masters to deal with disputes regarding discovery, to address technical issues of fact, to deal with accounting disputes, to administer class settlements, and to implement and monitor consent decrees, including those dealing with long-term

²² United States 2013 <http://www.uscourts.gov/uscourts/rules/civil-procedure.pdf>.

²³ Brakel 1979 *ABF Res J* 555.

²⁴ Brakel 1979 *ABF Res J* 551.

²⁵ Research has shown that in about 3 cases out of 1,000 (0.3%), judges or parties considered formally whether a special master should be appointed, and out of those cases the judges appointed special masters in 60% of these cases. Thus, in fewer than 2 cases in 1,000 (0.2%) are special masters appointed. Compare Willging, Hooper, Leary *et al Special Master's Incidence and Activity Report* 3.

²⁶ Willging *et al Special Masters' Incidence* 3.

institutional change. It is this last category of appointments that is of interest to this research.²⁷

3 Public law or public interest litigation

It has been argued that policy making is a standard and legitimate function of modern courts. It is further argued that litigation against the government will often result in the judiciary having to resort to making public policy. This function of the courts has been described as not only a right but an obligation of the courts in a constitutional state. A constitution, it is submitted, creates different agencies of government, details their functions and relationships, but also instructs on which values should inform and limit the operation of those agencies. When dealing with litigation against the government, the courts ensure that the agencies adhere to those values, and where there is a conflict between those values the courts prioritise them.²⁸ The role of the courts has been described as one of implementing, monitoring and managing public institutions with deep judicial involvement.²⁹

Litigation aimed at compelling government agencies to fulfil their constitutional mandate led to a new understanding of the concept "litigation". The new concept of litigation is different from the adversarial model referred to above. The model was proposed by Professor Chayes³⁰ and labelled "public law litigation".³¹ In this form of litigation the dispute is not about a particular right or wrong, but is concerned with the implementation of public policy by a public or quasi-public programme or entity. It furthermore deals with the enforcement or implementation of public policies as set out in Acts of Parliament or the *Constitution*.³²

This type of litigation has four prominent characteristics: Firstly, the parties and the court create the "shape" of the lawsuit, that is, the legal action is not a strict bilateral or accusatorial action; all parties to the litigation have the same goal in

²⁷ Willging *et al Special Masters' Incidence* 4.

²⁸ Rubin and Feely 2002 *U Pa J Const L* 618.

²⁹ Brakel 1979 *ABF Res J* 556.

³⁰ Chayes 1976 *Harv L Rev* 1281.

³¹ For a comprehensive discussion on public interest legislation compare Klaaren, Dugard and Handmaker 2000 *SAJHR* 1-182.

³² Appel 2000 *Wash U LQ* 220; Brakel 1979 *ABF Res J* 557.

mind. They seek a favourable outcome that will improve conditions in the relevant institution and strive to find the financial resources for this purpose.³³

Secondly, the relevant set of facts is not based on past occurrences but is also premised on future predictions. The court order is also not merely an order to govern future relations but is an ongoing remedy that seeks to manage the staff, the beneficiaries of the public service in question, and their relationship on an ongoing basis in order to bring the institution in line with its constitutional mandate.³⁴

Thirdly, the litigation is launched by a particular incident, but thereafter takes on a wider dimension where the participants, relevant authorities and beneficiaries of the public service become involved in an ongoing lawsuit, which includes the ongoing management of the relationship of those parties by the court. This then involves the totality of conditions in the institution with right and remedy becoming intertwined.

Finally, the lawsuit is not a dispute between private individuals, but is a grievance about public policy and the implementation thereof. There is no winner in the traditional sense. In a traditional legal action, the plaintiff is awarded compensation if he or she is successful. If the plaintiff loses the claim, the defendant is awarded costs. In public law litigation, the litigation affects or impacts on a far wider group than the parties to the action. The remedy is ongoing and the means of improving the institution tends to be negotiated by the parties and the court, rather than simply ordered by the court, and involves changes in public policy and practice.³⁵

The role of the judge is no longer purely one of a neutral adjudicator, but becomes one of active involvement (possibly via the intermediary of a special master) so as to collect information, develop and implement solutions, and manage the process of institutional transformation. This is also the rationale for the appointment of a Special Master.³⁶

³³ Appel 2000 *Wash U LQ* 220; Brakel 1979 *ABF Res J* 557.

³⁴ Appel 2000 *Wash U LQ* 220; Brakel 1979 *ABF Res J* 557.

³⁵ Appel 2000 *Wash U LQ* 220; Brakel 1979 *ABF Res J* 557.

³⁶ Brakel 1979 *ABF Res J* 557.

4 Examples of appointments of special masters in the United States of America

4.1 *General difficulties experienced*

There are various difficulties that a court may encounter when a public interest matter is brought before it in which it is alleged that a particular public institution does not comply with its constitutional mandate. Firstly, neither the *Constitution*, nor the relevant legislation, is likely to give guidance regarding the remedial steps to be taken.³⁷

Secondly, the problems that public interest litigation seeks to address have no simple solutions. Thus, it may be argued that there is wide-scale gender discrimination within a particular institution or that the manner in which prisoners are treated in prison is not consistent with constitutional guidelines, but the remedy to these large-scale problems is seldom simple. Often the types of abuse or discrimination have many causes, and addressing them may prove difficult. For example, violence experienced by prisoners on an ongoing basis has many causes. An institutional culture may exist in which the assault of prisoners by staff is considered normal. Staff can allow gangs in prison to flourish for personal aggrandisement, but the consequence of this is ongoing physical abuse of prisoners.³⁸ Assaults may also occur for reasons other than staff negligence or intent, such as dated architecture (where violence cannot be monitored), overcrowding, insufficient staff, lack of training, lack of funding, management problems or many other possible problems or combinations of them.³⁹

Thirdly, the problems may be hard to detect or prove. Often issues like gender or racial discrimination would be difficult to prove. In prisons, for example, the assault of prisoners is widespread but may often be clouded in the language of the necessary use of force. However, given the number of complaints, even if the official rhetoric were *prima facie* valid, which it is submitted is highly unlikely, the frequency

³⁷ Reynolds 1979 *Fordham Urb LJ* 695.

³⁸ Jali 2005 http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/061016jalireport_0.pdf (hereinafter referred to as the *Jali Report*) 159.

³⁹ *Jali Report* 453.

of the assaults points to deeper problems, since such a widespread use of force indicates that there are serious problems within the institution if such an extensive use of force is required.⁴⁰

Fourthly, judges are not trained to deal with problems of this nature. They do not have the necessary expertise to detect these problems nor are they able to become directly involved in the management of a public institution which is failing to fulfil its constitutional mandate. In order to avoid unduly burdening the public institution it is preferable that any court order be fashioned with the assistance of the defendant. It is preferable if this decree is by consent and negotiated by the parties.⁴¹

The final problem is that the defendant institution needs to properly comply with its constitutional mandate. As noted above, non-compliance can occur on a number of levels. There could be a simple refusal to comply, then more subtle forms of non-compliance such as in cases of gender discrimination, and finally there may be an impossibility to comply due to a lack of funding. In order to address all forms of non-compliance, especially subtle forms of large scale non-compliance, intensive management intervention may be required, which a judge will be unable to provide.⁴²

In complex organisational structures, power relations, the distribution of resources and everyday operating procedures on their own will not guarantee that the rights of citizens will be upheld. It is necessary that these operating procedures are closely supervised, and compliance with court orders may even have to be coerced when necessary.⁴³

Even where the fundamental rights of those involved have not been infringed, the implementation of the required transformation may be slowed by administrative conflict. This may also be caused by a separation of policy and funding and the interaction between the departments charged with these separate functions within a

⁴⁰ Judicial Inspectorate for Correctional Services 2012 <http://judicialinsp.dcs.gov.za/Annualreports/Annual%20Report%202011-2012.pdf> 41.

⁴¹ Reynolds 1979 *Fordham Urb LJ* 697.

⁴² Reynolds 1979 *Fordham Urb LJ* 698.

⁴³ Hunt 1985 *Maine LJ* 89.

complex administrative system.⁴⁴ Incompetence or deliberate resistance to court orders may result in the slow implementation of institutional reform. The administrative complexity of large organisations is an even more serious impediment to institutional reform. Large numbers of disparate organisations, which have complex relations to one another, create resistance to change. Each department or organisation within the structure has its own goals, perceptions, interests, constitutional mandate, regulations and so forth.⁴⁵ All of these factors indicate the need for a court-appointed manager or management team in the form of a special master with necessary expertise to supervise the transformation of a public institution in order to render it constitutionally compliant.

What follows is an exposition of instances where special masters were appointed by courts in the United States of America:

4.2 *Brown, Governor of California v Plata*

The extensive problems that can arise in an institutional setting in the context of prisons is evident in the matter of *Brown, Governor of California v Plata*⁴⁶ These problems led to massive human rights abuses and a complete failure of the institution to carry out its constitutional mandate. In an attempt to remedy the problem, a Special Master was appointed by the court. The powers granted to the Special Master will be outlined below.

California's prisons operated at 200% of capacity for the 11 years prior to the case being heard by the Supreme Court.⁴⁷ The consequences of this were that prisoners with serious mental illnesses did not receive adequate care. The State of California conceded constitutional violations (in terms of the Eighth Amendment) in failing to provide proper medical treatment, but undertook to remedy those conditions. The court issued an order directing that these conditions be remedied and a special master was appointed by the district court to oversee remedial efforts.⁴⁸ These

⁴⁴ Hunt 1985 *Maine LJ* 89.

⁴⁵ Hunt 1985 *Maine LJ* 82.

⁴⁶ *Brown, Governor of California v Plata* 563 US (2011).

⁴⁷ *Brown, Governor of California v Plata* 563 US (2011) 4 para IA.

⁴⁸ *Plata v Schwarzenegger* Docket No 3:01-cv-01351-TEH (ND Cal).

efforts failed and the final result was that the court issued a population cap order directing that crowding be reduced to 137.5% of design capacity. The court ordered the state to formulate a compliance plan and submit it for court approval.

The court found that overcrowding was the primary cause of the human rights violations. The increase in the prison population severely impacted on the provision of care. There were high vacancy rates for medical and mental health staff and the state did not have sufficient funds to hire the necessary staff. Thus, even if there were professionals who were prepared to do the work, the state could not pay them. Mentally ill prisoners were being most severely impacted since they were housed in administrative segregation for extended periods, while waiting for transfer to scarce mental health treatment beds. Prisoners were required to wait for extremely long periods prior to seeing a doctor, because there was a backlog of up to 700 prisoners per doctor. Thus, there was excess demand and a shortage of supply of medical facilities and treatment. In addition, overcrowding was also found to cause unsafe and unsanitary conditions. Overcrowding also promoted unrest and violence that could cause prisoners with latent mental illnesses to worsen and develop overt symptoms. The increase in violence and the poor ratio of prison guards to prisoners resulted in increased reliance on lockdowns to keep order. Lockdowns bring with them other problems such as a lack of exercise time which impacts on health and provokes further delays in providing effective delivery of care. Overcrowding also impacted on reception centres, which have to receive, process and categorise prisoners. Since the prisons were processing 140,000 new or returning prisoners annually, some of the prisoners spent the entire period of their incarceration at the reception centre, which was not designed to house or care for prisoners. The court accepted the testimony of various experts, who confirmed that the primary cause of the constitutional violations was overcrowding.⁴⁹

The court further found that there was no possibility that California could build sufficient prisons to address the crisis, since the state had severe financial problems. The lack of funds further meant that professional medical staff could not be hired nor accommodated due to a lack of space. Even attempts to build sufficient prisons

⁴⁹ *Brown, Governor of California v Plata* 563 US (2011) paras 19-24.

to address the crisis would be unsuccessful because of the insufficient time necessary to do so. Thus, without a population reduction no remedy would be possible.⁵⁰

The court found that some of the consequences of the overcrowding included a substantial and increasing risk of the spreading of infectious illness, as well as a suicide rate of almost one per week.⁵¹ Seriously mentally ill prisoners were not afforded minimal or adequate care. Those prisoners who were suicidal were often held for lengthy periods in cages without toilets. This was as a result of a shortage of treatment beds. One mentally ill prisoner had been held for almost 24 hours in a cage. One such prisoner was observed standing in a pool of his own urine in a state of unresponsiveness, bordering on a catatonic state. The reason advanced in this case for the inhumane conditions of detention was a lack of alternative accommodation.⁵²

Prisoners awaiting treatment were often kept for months in administrative segregation, enduring harsh and isolated conditions. A high number of suicides resulted from the failure to provide mental health care. The waiting times for mental health care could be as high as 12 months. Prisoners with physical health problems also did not receive proper or timely care. This resulted in a 200% overcrowding in clinical space. One example which was noted was that 50 ill prisoners were detained in a twelve-foot by twenty-foot cage for five hours whilst awaiting treatment. The delay in treatment was attributed to staff shortages. One prisoner who suffered from severe abdominal pain was referred to a specialist only after a delay of 5 weeks. As a result of this delay he died. Another prisoner complained of severe and constant chest pain. He waited for 8 hours to be examined by a doctor and died as a result of the delay. In a similar incident, a prisoner who had complained of testicular pain for 17 months died of testicular cancer. The prison doctor failed to diagnose his condition.⁵³

⁵⁰ *Brown, Governor of California v Plata* 563 US (2011) paras 29-33.

⁵¹ *Brown, Governor of California v Plata* 563 US (2011) para 5.

⁵² *Brown, Governor of California v Plata* 563 US (2011) para 5.

⁵³ *Brown, Governor of California v Plata* 563 US (2011) paras 6-7.

The court cited numerous other examples of failure to treat prisoners timeously or properly due to the extreme demands placed on the medical/mental health system by overcrowding.⁵⁴

The court further found that overcrowding, combined with staffing shortages, created a culture of cynicism, fear and despair which made it very difficult to hire and retain qualified and competent staff. The situation resulted in a daily in the operation of the health system in a state of crisis which severely compromised remedial programmes. Overcrowding had other consequences including an increased incidence of infectious disease, increased prison violence, and greater reliance by prison officials on lockdowns.⁵⁵

The court accepted and relied heavily upon the expert testimony⁵⁶ of a psychologist, Professor Craig Haney.⁵⁷ The important aspects of the testimony that can be highlighted are that overcrowded prisons have been found to be criminogenic.⁵⁸ The effects of overcrowding include the following: a lack of basic resources such as blankets and beds; an increase in acts of violence between prisoners and between prisoners and staff; an increase in facility maintenance expenses and increased medical and mental health problems among prisoners.⁵⁹ Overcrowding is also seen to undermine the quality of medical and mental health care in prison⁶⁰ and causes, or contributes to, many health problems in prison, including communicable diseases and mental health problems.⁶¹

The consequences of overcrowding in prisons have been identified in that matter and in other research. These include the following: insufficient medical screening of new prisoners; delayed or no access to proper medical care, including care by

⁵⁴ *Brown, Governor of California v Plata* 563 US (2011) para 10.

⁵⁵ *Brown, Governor of California v Plata* 563 US (2011) para 11.

⁵⁶ Haney 2010 http://rbgg.com/wpcontent/uploads/_Haney,%20Dr.%20Craig%20%20283201%29,%202010-30-08,%20OCR.PDF.

⁵⁷ Haney 2010 http://rbgg.com/wp-content/uploads/_Haney,%20Dr.%20Craig%20%20283201%29,%202010-30-08,%20OCR.PDF.

⁵⁸ Haney 2010 http://rbgg.com/wp-content/uploads/_Haney,%20Dr.%20Craig%20%20283201%29,%202010-30-08,%20OCR.PDF.

⁵⁹ Haney 2010 http://rbgg.com/wp-content/uploads/_Haney,%20Dr.%20Craig%20%20283201%29,%202010-30-08,%20OCR.PDF.

⁶⁰ Walmsley 2005 *Int J Prison Health* 9.

⁶¹ WHO 2007 http://www.euro.who.int/__data/assets/pdf_file/0009/99018/E90174.pdf.

specialists; late responses to medical emergencies; interference with medical care by prison staff; a failure to recruit and retain enough and competent medical staff; incomplete and disorganised medical records; the absence of a proper quality control system, including quality assurance, professional peer review and death reviews; the absence of protocols dealing with chronic illnesses, such as heart disease, hepatitis, diabetes and HIV; and the failure of administrative grievance procedures to effectively deal with complaints related to medical care.⁶²

Other studies⁶³ have found that prison overcrowding can lead to a significantly worse quality of institutional life; elevated blood pressure (systolic and diastolic); a greater number of prisoner complaints; possible physical and psychological impairment; and a higher rate of disciplinary infraction (related to the restrictions on personal space).⁶⁴

Furthermore, the above studies have also demonstrated that overcrowding negatively affects mental and physical health by increasing the level of uncertainty with which prisoners must cope. This is caused by increasing the number of social interactions to which prisoners are exposed. Further consequences of overcrowding include high levels of uncertainty; goal interference; a significantly increased cognitive load; an increased probability of interpersonal conflict and assaults; higher levels of prisoner rape; a significantly higher likelihood of suicide⁶⁵ and in some cases post-traumatic stress disorder.⁶⁶

In addition, overcrowding can result in a smaller likelihood of receiving treatment for mental health problems, which in turn increases emotional, cognitive and psychological problems. There is also less likelihood of the treatment of special needs prisoners and a failure to identify or properly classify mental health disorders – or, even if they are classified, an inability to respond to special needs prisoners.⁶⁷

⁶² *Brown, Governor of California v Plata* 563 US (2011) para 9.

⁶³ Haney 2006 *Wash U J L & Pol'y* 265.

⁶⁴ Megargee 1977 *Am J Commun Psychol* 295.

⁶⁵ Ciuhodaru 2009 *RJLM* 72.

⁶⁶ Prins 2014 *Psychiatric Services* 868.

⁶⁷ DiCataldo, Greer and Profit 1995 *Bull Am Acad Psychiatry & L* 574.

The above research also shows that overcrowding leads to an increased likelihood of assaults among younger prisoners, heightened aggression amongst prisoners resulting in greater punitive approach by staff, and a lesser likelihood of the prisoners participating in training programmes. Since prisoners are not properly categorised, high- and low-risk offenders are imprisoned together. This has a criminogenic impact on the low-risk offenders.⁶⁸ A further implication is that excessive force and violence are often deployed by staff to keep control of prisoners. Moreover, harsh prison conditions as measured by isolation and levels of overcrowding have been shown to significantly increase recidivism,⁶⁹ a finding confirmed by the *Plata* matter.⁷⁰ Thus, overcrowding has many negative effects but in this context, as the research demonstrates, it is criminogenic; that is, it significantly increases the risk of recidivism.

The large-scale human rights abuses caused by overcrowding thus also lead to a frustration of the purposes of punishment, in that they lead to an increase in the likelihood of recidivism. The prison system exists to protect society *inter alia* by reforming prisoners.⁷¹ Where these conditions exist the purpose of punishment is defeated, which renders the limitation of the citizen's rights (by way of imprisonment) indefensible. It is argued that in South African law, section 36 of the *Constitution* permits the limitation of the rights of prisoners by way of punishment only where the purposes of punishment are being achieved.⁷²

⁶⁸ Bonta and Motiuk 1987 *J Res Crime & Delinq* 312.

⁶⁹ Chen and Shapiro 2007 *ALER* 1; Drago, Galbiati and Vertova 2011 *ALER* 103.

⁷⁰ *Brown, Governor of California v Plata* 563 US (2011) para 9.

⁷¹ Section 2(c) of the CSA.

⁷² See in general *S v Makwanyane* 1995 3 SA 391 (CC); *S v Williams* 1995 3 SA 632 (CC). Section 36 of the *Constitution of the Republic of South Africa*, 1996 (the *Constitution*) permits the limitation of rights only under strict conditions. These conditions are similar the world over and manifest in international law, *inter alia* in the Siracusa principles (*Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* UN Doc E/CN.4/1985/4, Annex (1985)). These are the principles of rationality and proportionality. The limitation of a fundamental right must be rationally connected to a pressing governmental concern. Where it ceases to be rationally connected then the limitation ceases to be justifiable. Rationality requires, at the very minimum, that the limitation achieve its purposes. If the limitation consistently does not achieve the stated goals or if it frustrates them or if it produces an outcome which is the opposite of that which is defined as the purpose of the limitation, then it can no longer be said to be rationally connected to it. Also see fn 5 above

Further research in the field of rehabilitation indicates that custodial sentences have been demonstrated to have a greater criminogenic effect than non-custodial sentences.⁷³ The correlation between poor conditions of detention and criminogenesis is not disputed.⁷⁴ Reasons for this correlation have been suggested and can be placed in three broad categories, *viz* the experience of incarceration; post-incarceration consequences; and third-party effects.⁷⁵

The experience of incarceration would include exposure to other offenders, i.e. a "school of crime" scenario;⁷⁶ severance of ties with the community and family;⁷⁷ and the brutalising effects of prison.⁷⁸ Post-incarceration consequences include labelling,⁷⁹ diminished employment prospects,⁸⁰ and denial of benefits.⁸¹ Third-party effects include exposure effects, that is, the deterrent effect of prisons is reduced where offenders or would-be offenders survive or know of the survival of a person who has served a prison term;⁸² effects on families of offenders such as a loss of income; and various psychological and behavioural problems for the children.⁸³

The court in the *Plata* matter finally issued a decree ordering the release of 40 000 of California's 150 000 prisoners.⁸⁴ This is referred to as a "population cap". However, prior to resorting to this remedy the court made an order allowing a special master an opportunity to attempt to remedy the constitutional non-compliance.⁸⁵

⁷³ Cullen, Jonson and Nagin 2011 *The Prison Journal* 50S.

⁷⁴ Farrington and Nutall 1980 *JCJ* 221.

⁷⁵ Hornigold *Principles of South African Prison Law* 423.

⁷⁶ Taylor 1996 *JOCJRC* 29.

⁷⁷ Maldonado 2006 *Fam LQ* 191.

⁷⁸ Braithwaite 1999 *Crime & Just* 1.

⁷⁹ Morgan 2012 *Punishment & Society* 564.

⁸⁰ Visher, Debus-Sherril and Yahner 2011 *JQ* 698.

⁸¹ For example s 69(8)(a) the *Companies Act* 71 of 2008.

⁸² Hagan and Dinovitzer 1999 *Crime & Just* 121, 146.

⁸³ Fritsch and Burkhead 1981 *Fam Relat* 83.

⁸⁴ See the order of the United States District Courts for the Eastern District of California and the Northern District of California United States District Court Composed of Three Judges Pursuant To Section 2284, Title 28 United States Code dated 08 April 2009 183.

⁸⁵ The case of *Plata v Schwarzenegger* Docket No 3:01-cv-01351-TEH (ND Cal) was consolidated with *Coleman v Schwarzenegger* docket NO 2:90-cv-00520-LKK-JFM (ED Cal) and a special master was appointed to oversee the California Department of Corrections and Rehabilitation's (CDCR) medical health care delivery system. On 23 July 2007 the matters were assigned to a three-judge court of the United States District Court for the Northern District of California. The

The powers of the special master in that matter included the right to exercise all powers of the head of the Department of Corrections and Rehabilitation in California, who is the secretary of the CDCR. The relevant powers of the special master related to the administration, management, control, operation and funding of the medical health care system in Californian prisons. In addition the secretary was required to work with the special master to assure that the order was carried out. Vast powers, including the powers of appointment, promotion, transfer and disciplining of personnel were afforded to the special master. The special master could also re-negotiate existing staff contracts and negotiate new contracts, as well as agreements with labour unions. His powers also related to infrastructure and the upgrading or replacement of equipment and premises, including information technology and medical equipment. All of these powers, however, had to be exercised within the parameters of existing law.⁸⁶

In the event that the special master was of the opinion that his duties were hampered by existing legal obligations or regulations, he could approach the Court to waive compliance with the relevant provisions. The Court therefore had to determine appropriate relief on a case-by-case basis. In order to properly exercise the duties attached to the office, the special master had broad access to information, records and files. In addition, access to all premises, including unannounced visits, was afforded.⁸⁷

South African law recognises population caps in section 81 of the *Correctional Services Act*. It is thus submitted that where conditions of incarceration fall so far short of the prison's constitutional obligations, a court should consider the appointment of a special master prior to considering the granting of an order to compel the minister to impose a population cap. It is furthermore suggested that

court ordered the imposition of a population cap. This decision went on appeal to the Supreme Court of the United States of America. During this period Schwarzenegger ceased to be governor of California and Brown became governor. The matter was thereafter cited as *Brown v Plata*. In 2011 the United States Supreme Court held that the court-mandated population limit was necessary to remedy a violation of prisoners' Eighth Amendment constitutional rights.

⁸⁶ See the court order issued by the United States District Court for the Northern District of California No C01-1351, the Order Appointing the Receiver dated 14 February 2006.

⁸⁷ See para 4 above.

such a special master should have wide-ranging powers, similar to those afforded to the master appointed in the *Plata* matter.

4.3 *Taylor v Perini*

In *Taylor v Perini*⁸⁸ the United States Federal Court had to decide whether conditions in prison amounted to unconstitutional conduct. These complaints included the obstruction of access to courts and lawyers, racial discrimination in job assignments, the racial segregation of living quarters, and deprivations of substantive and procedural due process in the administration of discipline, including the infliction of cruel and unusual punishment. The court ruled that racial segregation may be imposed only to maintain security, discipline, and order within prisons and not for any other purposes. In this matter the court outlined the typical functions of a special master in prison matters where the master supervises compliance with a court order.

The court held that the Special Master must assume primary responsibility for implementing, coordinating, evaluating and reporting on the progress of all institutional efforts to give effect to the order of the court. These powers also included the power to hold hearings to evaluate the progress made in regard to the implementation of the court order. Should the staff of the defendant institution not co-operate with the implementation of the order as directed by the special master, the master was able to approach the court in order to obtain contempt orders against the relevant personnel. The master was entitled at all times to unrestricted access to all institutional files and staff. Moreover, the master needed to give no advance warning of an intention to exercise that power and was also entitled to have confidential interviews with any institutional staff as deemed appropriate and fit.⁸⁹

In the *Taylor*⁹⁰ matter the special master was required to deal with a number of issues. For example, in the case of interference with legal mail in the prison system, a prisoner reporting system which would identify tampering was introduced. If

⁸⁸ *Taylor v Perini* 503 F2d 899.

⁸⁹ *Taylor v Perini* 503 F2d 899.

⁹⁰ *Taylor v Perini* 503 F2d 899.

violations were detected, the relevant member of staff was confronted. A system to prevent violations from recurring was also introduced. Furthermore, disputes between prisoners and staff members resulting from a breach of the negotiated system were mediated. Another issue in which the special master intervened concerned library materials and access to those materials. A new system dealing with library materials and access thereto was introduced. The special master compiled a list of available and permissible materials, together with a list of those not permitted. The master also became involved with the human resources management of the prison. Staff sensitivity training was introduced, a staff manual was introduced, staff appointments and assignments were managed, factors to be considered for promotion were determined, and the racial aspects of human resource management and the creation of a grievance procedure were addressed by the master.⁹¹

As will be noted from the order of the courts in the matters of *Plata* and *Taylor*, the special master effectively assumes management of the department of state, or of a particular public institution or a part thereof, in order to ensure that it complies with an order of court. The court order seeks to bring the public institution into compliance with its constitutional mandate. This is a temporary state of affairs, lasting only until such time as the institution has become compliant.

4.4 *Wuori v Zitnay*

The matter of *Wuori v Zitnay*⁹² was concerned with the rights of mentally disabled patients who were cared for at an institution in Pinelands, Maine. This was a public facility that was intended to care for the inmates, including their rehabilitative treatment. There were numerous problems which indicated the delivery of an unconstitutional level of care. The institution was crowded, inmates had inadequate clothing, personal hygiene was poor, inmates were kept in restraints for long periods of time, they were over-medicated, their teeth were pulled to prevent self-harm and harm to others, there was inadequate provision of homes after release, and there were no rehabilitative programmes in place. The defendant institution admitted that

⁹¹ Brakel 1979 *ABF Res J* 554.

⁹² *Wuori v Zitnay* 75-80-P (D Me 14 July 1978).

the conditions of detention did in fact fall below the constitutionally accepted norms. The plaintiff relied on the eighth amendment (prohibition on cruel and unusual punishment) and the fourteenth amendment (procedural rights). An individual patient, Wuori, instituted action against the director of the institution, Zitnay, following an incident in which he was deprived of a job which he had performed at the institution. A settlement was reached between the parties, which formulated a remedial plan. The implementation of this plan was entrusted to a special master, who was a professor of law.

He worked closely with the judge who had appointed him. The special master reported to the judge on a regular basis. He initially met significant resistance to his efforts and was required to take action to overcome this resistance. These efforts included taking recourse to the coercive powers of the court,⁹³ having to file critical reports which received very wide coverage, lobbying politicians in order to affect regulatory challenges, and having consistent interaction with high-level government employees in order to obtain the resources necessary to address problems.⁹⁴ The master encountered a number of problems, one of which was inter-agency conflict. The departments which controlled funding were not defendants in the matter and would not assist with the necessary funding to ensure transformation. Threats of adding them as defendants to the lawsuit caused the necessary funds to be released. Over the years the master changed and the law suit ran for over 25 years.⁹⁵ The effect was a dramatic, positive change in the manner in which the mentally disabled were treated and the level of care that they received.⁹⁶

From this case it is clear that a special master should be afforded wide-ranging powers. The period over which a special master can implement an order of a court can be lengthy in term. In certain cases, the appointment of a special master would not be a "quick fix" solution.

In the next section the desirability and viability of the appointment of special masters in the South African context will be evaluated.

⁹³ Levine 1986 *Law & Policy* 283.

⁹⁴ Levine 1986 *Law & Policy* 285.

⁹⁵ *Consumer Advisory Board v Brenda Harvey* Docket No 91-CV-321-P-S.

⁹⁶ Levine 1986 *Law & Policy* 288.

5. The desirability and viability of the appointment of special masters in South African law

South African law contemplates the appointment of officers of the court to carry out certain functions of the court. Examples of these include trustees of insolvent estates,⁹⁷ partnerships and the estates of persons getting divorced. They are appointed by the court and they are ultimately responsible to the court (which may remove them from office) for the proper discharge of their duties.⁹⁸

In South Africa a civil search, seizure and preservation of evidence procedure exists which is generally known as an Anton Piller⁹⁹ order. In this process generally the court orders the sheriff to search for, then seize and preserve¹⁰⁰ evidence which is material to a matter. It will be employed where the applicant justifiably believes the respondent may destroy the evidence if no order is granted. The importance of this order in this context is the role of the supervising attorney.¹⁰¹ As in the case of a liquidator of the estate for division of a partnership or a marriage, the attorney acts as the representative of the court to ensure that its orders are properly carried out. He then files a report at court detailing the manner of the search and seizure, and what documents were collected and handed to the sheriff.

A further example in our law of an office similar to that of a special master is the office of the family advocate. The powers and duties of the Family Advocate,

⁹⁷ *Enyati Resources Ltd v Thorne* 1984 2 SA 551 (C) 556.

⁹⁸ Smith *Law of Insolvency* 200.

⁹⁹ *Anton Piller KG v Manufacturing Processes Limited* 1976 1 All ER 779 para 779.

¹⁰⁰ *Vis v Minister of Correctional Services* 2013 ZAFSHC 101 (16 May 2013) para 101.

¹⁰¹ See for example Consolidated Practice Notes, Western Cape High Court, Cape Town Rule 34: "5. The order and the accompanying notice are to be served by the sheriff and the contents explained by the supervising attorney in whose presence and under whose supervision the provisions of the order are to be carried out. The supervising attorney shall ensure that no items are removed from the premises until a list of items to be removed has been prepared, and a copy thereof has been supplied to the applicant's attorney and the person served with the order, if present, and such person has been afforded a reasonable opportunity to check such list. The supervising attorney shall not permit the premises to be subjected to a search for items not appearing on the schedule of listed items referred to in paragraph 2 of the order. 6. The supervising attorney shall file with the registrar, by no later than noon on the day but one preceding the return day of the order, a concise report describing the manner in which the order was complied with. The supervising attorney shall ensure that a copy of his/her report is delivered to applicant's attorney and to respondent (or his/her attorney, if represented)."

according to the *Mediation in Certain Divorce Matters Act*,¹⁰² include the power to institute an enquiry so as to be able to furnish the court with a report and recommendation on any matter concerning the welfare of the minor child, to appear at the trial or hearing of any relevant application, to adduce any available evidence and to cross-examine witnesses giving evidence at such trial or hearing of an application. Furthermore, in terms of the *Children's Act*¹⁰³ it is compulsory for parties to attend mediation by the Family Advocate in disputes regarding parental rights and responsibilities in regard to children born out of wedlock.

Further examples in our law of an office similar to that of a Special Master are the appointment of a commissioner for taking affidavits¹⁰⁴ in any place outside the Republic of South Africa as well as the appointment of curators in respect of persons under disability.¹⁰⁵

A final example of an individual who carries out a transformational mandate under the auspices of the court is the business rescue practitioner. The *Companies Act* provides that the court may appoint a business rescue practitioner to temporarily supervise a company, including supervision of its affairs, business and property in order to rehabilitate the company.¹⁰⁶ All material aspects including the appointment of the business rescue practitioner,¹⁰⁷ the regulation of the acceptance of the business rescue plan¹⁰⁸ and the discharge of the order¹⁰⁹ are subject to the control of the court.

In the cases of curators, supervising attorneys and the family advocate, these individuals are appointed to assist the court and are given certain powers to conduct investigations, compile reports and assist the court in making a decision. In the case

¹⁰² *Mediation in Certain Divorce Matters Act* 24 of 1987.

¹⁰³ *Children's Act* 38 of 2005.

¹⁰⁴ *Uniform Rules of Court: Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa* (1965), as amended (GN R48 in GG 999 of 12 January 1965) Rule 65.

¹⁰⁵ *Uniform Rules of Court: Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa* (1965), as amended (GN R48 in GG 999 of 12 January 1965) Rule 57.

¹⁰⁶ Ch 6 of the *Companies Act* 71 of 2008 (hereafter CA).

¹⁰⁷ Section 131 of the CA.

¹⁰⁸ Section 153 of the CA.

¹⁰⁹ Section 132(2)(a) of the CA.

of liquidators of partnerships and estates of persons married in community of property, they are appointed by the court for the purpose of carrying out the order of the court; that is, dividing the joint estate by liquidating assets and paying debts. *Curator boni* are appointed by the court and carry out the task of administering the affairs of the person under curatorship and are to report to the court regarding their administration. This includes the administration of the estate of the person under curatorship. In the case of the business rescue practitioner the court appoints a business rescue practitioner and supervises a procedure which allows creditors to rescue a company that is financially distressed. The business rescue practitioner is answerable to the court for the conduct of his or her duties.

It is submitted that the appointment of a special master would be an appropriate remedy in certain circumstances for the implementation of institutional transformation under judicial supervision in South Africa. A number of systemic problems have been identified in South African prisons.

Instead of issuing a structural interdict in the matter of *EN v Government of RSA*¹¹⁰ it is submitted that the court could have issued an order appointing a special master who would be empowered to take such steps as are necessary to ensure that prisoners receive the necessary medication. The special master could either be a medical doctor or a project manager, assisted by a medical doctor. The special master should have the power to appoint a team to assist in the execution of his or her duties. This team should be empowered to enter the prison, introduce those policies and procedures that are deemed necessary, and ensure that the medication is administered properly. If members of the prison staff fail to assist them, the special masters would be entitled to take disciplinary action where necessary. They would also be empowered to train the relevant medical staff in the proper means of administering the treatment. In addition, they would report to the court on a regular basis regarding progress. As noted above, this is not traditional litigation with a "winner" and a "loser", but rather litigation where both the applicant and the respondent seek transformation of a public institution which does not comply with constitutional values. This remedy may initially appear to be expensive and

¹¹⁰ *EN v Government of the RSA* 2007 1 BCLR 84 (D) para 35.

cumbersome, but a longer-term perspective may reveal that it is in fact the less expensive remedy both in financial terms and in terms of the toll on human lives.

In *Lee v Minister of Correctional Services*¹¹¹ the court found that the prison authorities had failed to take reasonable measures to prevent the contraction of tuberculosis by a prisoner in custody. The plaintiff had been arrested in November 1999 and remained in prison for a total period of four years before being acquitted and released in September 2004. The court took into account that South Africa has a high incidence of tuberculosis. It is estimated that more than half of the population have been infected with tuberculosis at some time. The fact that prisons are dark and not well ventilated creates an ideal environment for the disease to be transmitted. As prisons confine prisoners to a restricted space, they are constantly in contact with those who have the active disease. Poor nutrition and other constraints result in prisoners having weak immune systems. The court commented that this state of affairs is unacceptable, as the effective management of tuberculosis can be achieved by regular screening, the isolation of carriers of infections, and treatment with antibiotics for approximately six months. Proper management of the disease can be achieved by strict adherence to proper health care procedures and should be effective if supported by sufficient staff.¹¹²

The Pollsmoor prison authorities were aware of the risk that prisoners might contract tuberculosis. There had been a gradual and continuing breakdown of the healthcare system, however, including of the management of tuberculosis. This breakdown could partly be attributed to the employment of insufficiently qualified health-care personnel. This occurred despite pleas by health care professionals in the employ of the Department of Correctional Services for intervention and correction. These pleas were repeated to the inspecting judge, to prison authorities, and even to a parliamentary portfolio committee. Nothing came of these pleas other than the dismissal of one of the healthcare professionals who was pleading for intervention.¹¹³

¹¹¹ *Lee v Minister of Correctional Services* 2013 2 SA 144 (CC).

¹¹² *Lee v Minister of Correctional Services* 2013 2 SA 144 (CC) para 18.

¹¹³ *Lee v Minister of Correctional Services* 2013 2 SA 144 (CC) para 69.

The court found that this negligence had been the cause of the plaintiff's contracting tuberculosis.¹¹⁴ The plaintiff was therefore entitled to claim damages. The costs to the state in what is potentially a flood of litigation by prisoners is significant and presumably far more than the cost of a special master, had one been appointed to the prison or to the healthcare system of the prison.

This procedure is appropriate not only for health-related matters, but can also be employed in any matter involving conditions of detention, including, for example, overcrowding and the proper implementation of rehabilitation programmes.

6 The competency of South African courts to appoint special masters

No provision is currently made in South African law for the appointment of special masters by a court to implement its orders. In this paragraph the competency of South African courts to appoint special masters will be explored.

When a court finds that a breach or threatened breach of the rights of a person in terms of the Bill of Rights has been proven, the court may grant appropriate relief.¹¹⁵ This same principle is contained in section 172 of the *Constitution*, which empowers a court to grant just and equitable relief when deciding a constitutional matter within its jurisdiction.

The ability of the court to sculpt remedies appropriate to the circumstances was illustrated in *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*.¹¹⁶ In this matter 40,000 unlawful occupiers occupied a portion of privately owned farmland. The owner, Modderklip Boerdery (Pty) Ltd, launched an application for eviction under the *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act*.¹¹⁷ The High Court granted the eviction order, but the occupiers refused to vacate the land. The assistance of the sheriff was sought but he required a deposit of R2.2 million in order to carry out the eviction. The landowner then applied a second time to the High Court seeking an order that the state pay the costs of

¹¹⁴ *Lee v Minister of Correctional Services* 2013 2 SA 144 (CC) para 68.

¹¹⁵ Section 38 of the *Constitution*.

¹¹⁶ *President of the RSA v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC).

¹¹⁷ *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998.

eviction as it had a duty to protect his property and that it provide the occupiers with alternative land. The state opposed the application, arguing that it was not obliged to assist in the execution of civil orders and it was not obliged to provide land to illegal occupiers as it had a land policy and priorities. The court then made an order that the Department of Agriculture and Land Affairs pay compensation to the applicant in respect of the land occupied. The court allowed the occupiers to continue occupying the land until alternative accommodation was made available. The amount of the compensation was to be calculated in a manner set forth in section 12(1) of the *Expropriation Act*¹¹⁸ for the period of occupation. However, there was no actual expropriation of the property, nor was this ordered.¹¹⁹ It is submitted that the court was, in effect, ordering the state to pay damages to the applicant, because its constitutional rights had been violated.

In *M v Minister of Police of the Government of the Republic of South Africa*¹²⁰ the plaintiffs were the mothers of two minor children who instituted action for damages suffered by them as a result of the unlawful death of their husband, who was the father of the minors. The father, who was the family caregiver or breadwinner, died after sustaining serious injuries during detention by the police. The plaintiffs claimed in their personal capacities, as well as in their capacities as mothers and natural guardians of the deceased's minor children. There were two broad areas of loss claimed for, namely common law damages for the plaintiffs' loss of support and of comfort, society and services, and a claim for constitutional damages on the grounds that the children were, as a result the unlawful death of their father, deprived of the constitutional right to parental care. The court granted constitutional damages and ordered that the quantum thereof be referred back to the trial court for determination.¹²¹

It is submitted that the court is empowered to sculpt remedies that are appropriate in the circumstances. One such innovation is constitutional damages and the other is

¹¹⁸ *Expropriation Act* 63 of 1975.

¹¹⁹ *President of the RSA v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 68.

¹²⁰ *M v Minister of Police of the Government of the RSA* 2013 5 SA 622 (GNP).

¹²¹ *M v Minister of Police of the Government of the RSA* 2013 5 SA 622 (GNP) para 58.2.

the structural interdict referred to above.¹²² It is further submitted that the appointment of a special master is a natural development of the structural interdict, since the structural interdict is one way in which to ensure post-trial compliance with the *mandamus* of the court. Should this mechanism of compliance fail, then it is submitted that it would be within the court's power to appoint a special master to ensure compliance. It should be emphasised that this is not a remedy to which a court would resort easily.

The Constitutional Court in *Fose v Minister of Safety and Security*¹²³ held that the courts have a particular responsibility and are obliged to forge new tools and shape innovative remedies. The Court further held that an appropriate remedy must mean an effective remedy.¹²⁴

The ability of a court to shape innovative remedies in order to render its orders effective is not without criticism. In the next paragraph the criticism against this competency of the court will be set out.

7 Criticism against the competency of a court to shape innovative remedies

The ability of the courts to formulate appropriate and innovative remedies in order to ensure that their orders are effectively implemented has been criticised on the following grounds:

7.1 Non-democratic process

One of the criticisms that has been addressed against this type of judicial intervention is that the process is contrary to the democratic process. The argument is that change in the manner of operation of public institutions is a process which should be performed by the executive arm of government under the guidance of the legislature. Thus, where the court engages in social reform of this nature it is acting in a manner which is contrary to its role as contemplated in the *Constitution*. The

¹²² See fn 96.

¹²³ *Fose v Minister of Safety and Security* 1997 7 BCLR 851 (CC).

¹²⁴ *Fose v Minister of Safety and Security* 1997 7 BCLR 851 (CC) 888, 889.

groups that are most affected by this process of non-democratic social reform are not fully represented and therefore this process may be inimical to their interests.¹²⁵ The counter to this argument is that in matters of public law litigation the courts are extremely lenient regarding joinder and intervention and therefore these groups are able to make representations to the court at the time of the hearing.¹²⁶ It is submitted that this is also the case in South Africa.¹²⁷

7.2 Separation of powers

A further criticism is that this type of process violates the principle of separation of powers contemplated in the *Constitution*. It would be argued that the *Constitution*¹²⁸ envisages three branches of government, namely, the legislature, the judiciary and the executive.¹²⁹

The National Assembly has the duty to provide mechanisms that will ensure that all national governmental executive organs of state are accountable to it. This includes a duty to oversee the exercise of the national executive authority and the implementation of legislation.¹³⁰

The courts are independent and subject only to the *Constitution* and the law. The courts are to apply the law. The other organs of state are required to assist and protect the courts, to ensure their independence, impartiality, dignity, accessibility and effectiveness. An order of court is binding on all persons and organs of state to which it applies.¹³¹

The manner in which the three branches of government interact and the limits on the power of any one branch to encroach upon the powers of the others has been the subject of several cases. In *Speaker of National Assembly v De Lille MP*¹³² the court was dealing with a challenge to a resolution to suspend a member of

¹²⁵ Reynolds 1979 *Fordham Urb LJ* 696.

¹²⁶ Reynolds 1979 *Fordham Urb LJ* 696.

¹²⁷ Section 38(c) of the *Constitution*.

¹²⁸ *Constitution of the Republic of South Africa*, 1996.

¹²⁹ Sections 83-100, 42-72, 165-180 of the *Constitution*.

¹³⁰ Section 55(2) of the *Constitution*.

¹³¹ Section 165 of the *Constitution*.

¹³² *Speaker of National Assembly v De Lille MP* 1999 4 All SA 241 (A).

parliament following remarks she made claiming that certain other members of parliament had been spies for the apartheid government. The Speaker was of the view that section 57 of the *Constitution* permitted the National Assembly to determine and control its internal arrangements and that he was therefore entitled to suspend the applicant. The Supreme Court of Appeals indicated that if a member of the National Assembly may be suspended for something said, freedom of expression will be adversely affected. The court accordingly held that section 58(2) should not be interpreted in a manner that will undermine that guarantee.¹³³

The important principle which emerges is that it is the role of the judiciary to protect constitutional guarantees. From this it follows that even though there is a general rule of non-intrusion between the three branches of government there is an exception where there is a need to protect an individual's fundamental rights.

In *S v Dodo*¹³⁴ the minimum sentence legislation contained in section 51 of the *Criminal Law Amendment Act* 105 of 1997 was challenged constitutionally. The court's discretion to impose sentences for certain offences was limited, unless substantial and compelling circumstances were found to exist. The court held that under the *Constitution* there was no absolute separation of powers between the judicial function, on the one hand, and the legislative and executive on the other. In relation to sentencing, the court held that the legislature's powers are not unlimited. The court should retain the power to impose the appropriate sentence which would depend on the particular circumstances of the case, but the legislature has the power to restrict that power with the imposition of a general law.¹³⁵ This was not an unconstitutional breach of the separation of powers.¹³⁶ It is submitted that if the court had not retained the power to adapt the general rule to the particular crime and criminal, then that would have been an unconstitutional breach of the rule against separation of powers.

¹³³ *Speaker of National Assembly v De Lille MP* 1999 4 All SA 241 (A) para 32.

¹³⁴ *S v Dodo* 2001 3 SA 382 (CC).

¹³⁵ *S v Dodo* 2001 3 SA 382 (CC) para 26.

¹³⁶ *S v Dodo* 2001 3 SA 382 (CC) para 51.

Similarly, even where the executive is concerned, it is possible for the court to direct the executive how to conduct itself. The decision in *Kaunda v President of the RSA*¹³⁷ provides such an example. In this case 69 mercenaries were on their way to Equatorial Guinea to stage a coup. They were arrested in Zimbabwe whilst travelling to Equatorial Guinea. The mercenaries requested the South African government to afford them diplomatic protection. This assistance was not forthcoming and the applicants approached the court for an order directing the South African authorities to assist them. The court recognised that the executive has a particular and special competence regarding the exercise of powers of diplomatic representations. Despite this competence, the exercise of the power was still justiciable. A balance needs accordingly be struck between the doctrine of separation of powers and the duty of the court to protect the fundamental rights of citizens.¹³⁸

Similarly, the court will be loath to dictate to the executive how to allocate scarce resources.¹³⁹ The court recognises that it should not attribute to itself superior wisdom in relation to matters entrusted to other branches of government. The Court has held that policies which ignore the plight of the most vulnerable will be unreasonable.¹⁴⁰ The courts recognise that the government is accountable to its constituency about the manner in which it allocates resources and how it develops policy. It is thus important that the executive is able to formulate and implement policy as mandated by the voters in a democracy. This was illustrated in *Premier, Mpumalanga v Executive Committee of State-aided Schools, Eastern Transvaal*.¹⁴¹ The court held that as a young democracy facing immense challenges of transformation the importance of the need to ensure the ability of the executive to act efficiently and promptly must be recognised. However, this must be balanced against the duty of the executive to act in a manner which is consistent with the *Constitution*.¹⁴² The court intervened in the matter and set aside the decision to

¹³⁷ *Kaunda v President of the RSA* 2005 4 SA 235 (CC).

¹³⁸ *Kaunda v President of the RSA* 2005 4 SA 235 (CC) para 144.

¹³⁹ *National Treasury v Opposition to Urban Tolling Alliance* 2012 6 SA 223 (CC) para 18.

¹⁴⁰ *Government of the RSA v Grootboom* 2000 11 BCLR 1169 (CC) para 36.

¹⁴¹ *Premier, Mpumalanga v Executive Committee of State-aided Schools, Eastern Transvaal* 1999 2 SA 91 (CC).

¹⁴² *Premier, Mpumalanga v Executive Committee of State-aided Schools, Eastern Transvaal* 1999 2 SA 91 (CC) para 41.

terminate subsidies to ex whites-only schools. This was because the decision was taken in a procedurally unfair manner. The matter illustrated the relationship between two constitutional principles, both stemming from the constitutional principle of fairness. There is firstly a need to eliminate discrimination and address the effects thereof. Secondly, the government has a constitutional duty to exercise its powers in a manner which is procedurally fair.¹⁴³

These principles are further illustrated in relation to the management of prisons. The traditional position in South African law was that a review of administrative decisions was permitted on limited grounds only, namely when the decision maker acted *ultra vires*, had an ulterior purpose or motive, had taken irrelevant considerations into account or had not taken relevant considerations into account, had acted in bad faith, or had failed to apply his mind, or had failed to apply the *audi alteram partem* rule.¹⁴⁴ Thus, the courts were reluctant to interfere with decisions of the executive branch of government, including the prison authorities.¹⁴⁵

Courts in various jurisdictions, including South Africa, have applied a "hands off" approach when dealing with cases regarding the exercise of executive powers such as the administration of prisons. The basis for this approach was the idea that the foremost responsibilities of prison administrators were the safeguarding of prisoners, the securing of internal order and discipline, and the eventual rehabilitation of prisoners. The courts regarded these duties as falling within the expertise of the relevant executives and administrators.¹⁴⁶

With the advent of the Bill of Rights in the *Constitution*, the application of a strict "hands off" principle was no longer feasible since the courts were duty bound to uphold the fundamental rights enshrined in the bill of rights. Hence a modified version of the "hands-off" doctrine emerged. At the heart of this approach was the *residuum* principle, which rejected the view that the prisoner forfeits not only his or

¹⁴³ *Premier, Mpumalanga v Executive Committee of State-aided Schools, Eastern Transvaal* 1999 2 SA 91 (CC) para 188.

¹⁴⁴ Van Zyl Smit *South African Prison Law* 96.

¹⁴⁵ Compare the decisions of *Goldberg v Minister of Prisons* 1979 1 SA 14 (A); *Hassim v Officer Commanding, Prison Command, Robben Island*; *Venkatrathnam v Officer Commanding, Prison Command, Robben Island* 1973 3 SA 462 (C).

¹⁴⁶ *Kruger v Minister of Correctional Services* 2005 ZAGPHC 24 (2 March 2005).

her liberty but also all of his rights save those which the law expressly grants. The modified approach stipulates that a prisoner retains all of his or her rights, except those which are removed either expressly or by necessary implication. Thus, the courts still defer to the executive, that is, the prison administrators and officials, in the running of the prisons, because of their expert knowledge in the field; but the courts retain their obligation to enforce the rights of these prisoners, should the rights be violated. The powers of the prison administrators are furthermore subject to the principle of legality. This means that any restriction of rights as a result of incarceration may be limited expressly or impliedly only by means of legislation. The restrictions must be formulated narrowly to ensure that prisoners are not subjected to wide discretionary powers of administrators.¹⁴⁷

Thus, in general the courts will not interfere with the executive in the planning and implementation of policy. However, this is not an absolute rule. It is premised upon the executive's acting in a manner which is consistent with its constitutional mandate. Where it fails in this regard it is necessary for the court to take action to protect the constitutional rights of the citizen.¹⁴⁸

It is thus submitted that the doctrine of separation of powers is not an absolute separation of the different arms of government, but rather a general principle which must yield to the imperative of the protection of human rights. Furthermore, the type of judicial action which is being proposed relates to the enforcement of an order. It is the order which violates the general principle. A special master is appointed to ensure that the order of the court is properly executed. It is a temporary action which is necessary in order to ensure that a public institution is functioning in accordance with its constitutional mandate. Furthermore, it should generally be employed only where no other action will be effective under the circumstances.

¹⁴⁷ See in general the decisions of *Minister of Correctional Services v Kwakwa* 2002 4 SA 455 (SCA); *Thukwane v Minister of Correctional Services* 2003 1 SA 51 (T); *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs* 1992 2 SA 56 (ZS); *Blanchard v Minister of Justice, Legal and Parliamentary Affairs* 1999 10 BCLR 1169 (ZS); *Van Vuuren v Minister of Correctional Services* 2012 1 SACR 103 (CC); *Ehrlich v Minister of Correctional Services* 2008 ZAECHC 94 (23 June 2008).

¹⁴⁸ *August v Electoral Commission* 1999 4 BCLR 363 (CC) para 36.

8 Conclusion

In general the courts will be loath to become involved in the management of public institutions. This is generally the work of the executive, and is to be monitored by the legislature. However, there are exceptions when dealing with the most vulnerable in society. These would include children without parents, prisoners, the elderly and the mentally disabled. These persons will often be dependent upon public institutions to care for them. Where there is a consistent failure by the institution to properly discharge its duties, a court may need to take remedial action in order to transform the institution and bring it into accord with its constitutional mandate. For a number of reasons such organisations may resist change and it may be necessary for a court to appoint a special master to work under its auspices in order to affect that transformation. This may be in the form of an expert in the relevant field, an attorney or advocate or possibly a team of several people.

The abuses suffered by these vulnerable members of society are often significant and occur over protracted periods. These could include a wide range of human rights abuses, which include but are not limited to the right to life's being compromised in various ways, including severe assaults where the perpetrators receive no punishment¹⁴⁹ and a lack of proper medication;¹⁵⁰ overcrowding, which can severely compromise human rights in a multitude of ways;¹⁵¹ and a lack of humane conditions of confinement.¹⁵²

It is submitted that the appointment of special masters by South African courts would ensure that court orders directing public institutions such as prisons to fulfil their constitutional mandate would be properly executed. Adherence to such court orders would also indirectly transform these institutions. The court would appoint a master to an institution only if there were a consistent failure to adhere to its

¹⁴⁹ Judicial Inspectorate of Prisons 2006 <http://judicialinsp.dcs.gov.za/Annualreports/ANNUAL%20REPORT%202007.pdf> 63.

¹⁵⁰ *B v Minister of Correctional Services* 1997 6 BCLR 789 (C) para 60.

¹⁵¹ Judicial Inspectorate of Prisons 2009 <http://judicialinsp.dcs.gov.za/Annualreports/Annual%20Report%202008%20-%202009.pdf>; *Brown, Governor of California v Plata* 563 US (2011); Haney 2010 http://rbgg.com/wp-content/uploads/_Haney,%20Dr.%20Craig%20%283201%29,%2010-30-08,%20OCR.PDF.

¹⁵² Judicial Inspectorate of Prisons 2008 <http://judicialinsp.dcs.gov.za/Annualreports/Annual%20Report%202007-2008.pdf>.

legislative and constitutional mandate. Once the master had carried out its task it is submitted that the proper procedures, policies, staff, training and so forth would be in place so that in future the institution would be well equipped not to deviate from its mandate. If court orders were adhered to under the supervision of a special master, current and future administrators within public institutions would become used to a culture of constitutional adherence in the exercise of their powers. Once this culture is established, the need to appoint such special masters should become less urgent.¹⁵³

¹⁵³ The term "special master" is not a well-known term in South African legal terminology and possibly the term "special curator" could be employed.

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LIST OF ABBREVIATIONS

| | |
|-----------------------------|---|
| ABF Res J | American Bar Foundation Research Journal |
| Am J Commun Psychol | American Journal of Community Psychology |
| ALER | American Law and Economic Review |
| Bull Am Acad Psychiatry & L | The Bulletin of the American Academy of Psychiatry and the Law |
| CDCR | California Department of Corrections and Rehabilitation |
| Crime & Just | Crime and Justice |
| EJC | European Journal of Criminology |
| Fam Relat | Family Relations |
| Fam LQ | Family Law Quarterly |
| Fordham Urb LJ | Fordham Urban Law Journal |
| Harv L Rev | Harvard Law Review |
| Hastings LJ | Hastings Law Journal |
| Int J Prison Health | International Journal of Prisoner Health |
| JCJ | Journal of Criminal Justice |
| JOCJRC | Journal of the Oklahoma Criminal Justice Research Consortium |
| JQ | Justice Quarterly |
| J Res Crime & Delinq | Journal of Research in Crime and Delinquency |
| LLD | Law, Democracy and Development |
| Maine LJ | Maine Law Journal |
| Pris J | The Prison Journal |
| RJLM | Romanian Journal of Legal Medicine |
| SAJCC | South African Journal of Criminal Law and Criminology |
| SAJHR | South African Journal of Human Rights |
| U Pa J Const L | University of Pennsylvania Journal of |

| | |
|--------------------|---|
| | Constitutional Law |
| Wash U J L & Pol'y | Washington University Journal of Law and Policy |
| Wash U LQ | Washington University Law Quarterly |
| WHO | World Health Organisation |

COURT SUPERVISED INSTITUTIONAL TRANSFORMATION IN SOUTH AFRICA

D Erasmus* and A Hornigold**

SUMMARY

The traditional adversarial model of litigation in South Africa operates on the basis that two or more parties approach the court, each with its own desired outcome. The court is then obliged to decide in favour of one of the parties.

A different model of litigation is emerging in South African law. This model involves actions against public institutions that are failing to comply with their constitutional mandate. In this type of litigation there is seldom a dispute regarding the eventual outcome that is desired. Both the applicant and the state, in its capacity of the respondent, have a broad consensus about the manner in which the institution should operate or be transformed. There is accordingly agreement regarding the eventual outcome and the shortcomings that should be addressed. The primary issue relates to the details of the implementation of the transformation of the institution in question, in order that the constitutional mandate of the institution in question will be met.

An example of this form of litigation can be seen in litigation concerning the conditions in which prisoners are detained in South African prisons. The constitutional mandate for the imprisonment of offenders is contained in the *Correctional Services Act*.

Ongoing human rights violations often take place in prisons. These include staff shortages, shortages of medical staff and facilities, prison overcrowding, inadequate staff development, the prevalence of HIV/AIDS, infrastructure defects and maintenance problems, gangsterism, requests for prisoner transfers and problems

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associated therewith, the ineffectiveness of parole boards, staff development needs that are not addressed, an excessive focus on security, lack of rehabilitation and vocational training programmes and assaults of prisoners.

The courts have on occasion issued a structured interdict as an appropriate remedy. However, problems arise when violations are widespread and no single order can cause the problems to be properly addressed or where the executive fails to implement or even ignores court orders.

Thus, the wrong which is complained of is not a wrong done to a particular person, but the constitutional wrong is the manner in which the institution executes its mandate vis-a-vis the vulnerable beneficiaries of the public service in question. The transformation thereof is designed to bring the institution within its constitutional duties and bounds. There is usually no dispute about the failures of the organisation and court orders are often taken by consent.

The question which arises is how it can be ensured that a public institution such as a school, welfare department, hospital for the mentally disabled, home for the elderly or prison, which is designed to serve or accommodate the vulnerable may be brought into conformity with its constitutional mandate where there are continual and persistent failures to do so.

Even where court orders are obtained, there are often significant problems with the implementation thereof. In the case of prisons, a possible solution, which has been employed in the United States of America and which may be adapted for use in the South African context, is that of a post-trial special master or court appointed supervisor, who supervises the transformation of the public institution until such time as the non-compliance has been appropriately resolved.

In this article the role and functions of the American special master will be set out. The feasibility of importing such an office into the South African context will be evaluated.

KEYWORDS: Prison law; prison conditions; violation of prisoners' rights; litigation against public institutions; failure to comply with constitutional mandate; institutional

transformation under court supervision; structured interdicts; appointment of special master; enforcement of court order; management of public institutions; special masters; vulnerable in society; children without parents; prisoners; elderly; mentally disabled; prisons; curator; receiver; public institution; school; welfare department; hospital for the mentally disabled; home for the elderly; racial discrimination.