Contempt and execution in vindicating the right to education

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1 Introduction

In other jurisdictions, the judge almost seems to have magic powers – a solemn utterance, a bang of the gavel[1] – and her orders solidify into reality. In South Africa,[2] however, one is disabused of this illusion rather quickly and nowhere so swiftly as in the Eastern Cape, where the courts have on numerous occasions lamented their vanishing influence on public officials.[3] Vindicating the constitutional right to an

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[1]Judges in South Africa, and indeed anywhere in the British Commonwealth, have never used gavels. To my knowledge, they feature only in American courtrooms.

[2]See, eg, *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); *Democratic Alliance v Acting NDPP* 2012 6 BCLR 613 (SCA); Gibson and Caldeira 'Defenders of democracy? Legitimacy, popular acceptance, and the South African Constitutional Court' (2003) 65 *Journal of Politics* 1; Booysen 'Twenty years of South African democracy: Citizen views of human rights, governance and the political system' (2014) *Freedom House* available at http://www.freedomhouse.org/report/special-reports/twenty-years-south-african-democracy (accessed 2014-02-10). Despite having won a resounding victory in her claim based on her right to housing in the celebrated case of Grootboom, Irene Grootboom was still living in a shack when she died eight years later. See Joubert 'Grootboom dies homeless and penniless' *Mail and Guardian* (2008-08-08) available at http://www.mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless (accessed 2014-02-10). In *Democratic Alliance*, the Supreme Court of Appeal ordered the Acting NDPP to produce a record of a decision to discontinue the prosecution of President Jacob Zuma. This order has been consistently ignored. Gibson and Caldeira presented evidence (now dated) that the Constitutional Court enjoys less popularity than even the Russian Constitutional Court. The recent study of citizen views conducted by Freedom House finds, at 37 and 40, that while the Constitutional Court now enjoys a 'generally favourable impression', the judiciary on the whole is perceived as 'inept and incapable of dealing with crime and justice'.

[3]See, eg, *MEC for the Department of Welfare v Kate* 2006 4 SA 478 (SCA) para 4, which stated that 'the result (of the provincial government's non-compliance) has been a plethora of litigation in the High Court between the poor of that province and the provincial administration ... At times it lies even in disregard of court orders for the payment of moneys that are due'; *Magidimisi v Premier of the Eastern Cape* [2006] ZAECHC 20 (ECB) para 3, observed that 'this court has given a number of judgments ordering the

education requires going beyond the mere establishment of a violation of section 29 of the Constitution. The post provisioning litigation carried out by the Legal Resources Centre (LRC) in the Eastern Cape in 2013 demonstrated that the next and crucial step is to devise ways to ensure government compliance with the court orders that follow. In such cases, the choices facing litigants and counsel ultimately boil down to sending recalcitrant officials to prison or executing on government property, access to which is governed by the law of contempt of court and the State Liability Act 20 of 1957 respectively. It is hoped that the insights gained from the experience of the LRC case will prove useful to lawyers and litigants seeking effective and meaningful enforcement of court orders concerning the right to education.

From the broader point of view, the episode throws into relief both the potential and the limits of what the judiciary can do to render socio-economic justice, bring about transformative change, and uphold the rule of law.

2 The 2013 post provisioning litigation

The public education sector in the Eastern Cape Province has been in a state of slow-motion collapse for over a decade, with problems running the gamut from insufficient educators and inadequate building infrastructure to a shortage of basic furniture. In May 2012, the Centre for Child Law and the governing bodies of a number of schools – all represented by the LRC – decided to address the first of these problems: teacher shortages.

After numerous fruitless attempts to contact the Minister for Education and officials at the national and provincial levels, an application was brought against the national Minister of Basic Education[4] (the 'Minister') and the Eastern Cape Department of Education (the 'Department'), demanding that all teaching and non-teaching posts be filled in accordance with the '2012 educator post establishment', that is, the plan according to which schools throughout the province have their teaching needs assessed and their teacher allocations determined. The plan had already been 'declared' by the Department so it was simply a matter of carrying it out. This, however, the Department had consistently failed to do.

As a result of the teacher shortage, thousands of learners across the province suffered and continue to suffer. Some schools ceased instruction in certain basic subjects;[5] in other schools, learners were taught by educators accustomed to teaching

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provincial government … to pay certain sums of money to the individuals involved. The province has thus far failed to do so in most instances'; Nkabinde J (dissenting) in *Nyathi v MEC for the Department of Health Gauteng* 2008 5 SA 94 (CC) para 124, observed the 'endemic non-compliance with court orders by state officials, more particularly in the Eastern Cape Province ...'.

[4]The Minister was cited as a respondent because of her decision to place the Department under the administration of the national government in terms of s 100(1)(b) of the Constitution.

[5]Case no 1749/2012 *Centre for Child Law v Minister for Basic Education*, Certificate of Urgency (26 February 2013), para 12.1 available at http://lrc.org.za/images/stories/CourtPapers/2013%2002%2025%20Certificate%20of%20Urgency%20Post%20provisioning%20v2%20(CLEAN)%20JB%20CHANGES.pdf

in a different language; and in yet others, learners spent the majority of school periods each day without supervision. The situation continues to be particularly dire in no-fee schools catering to impoverished communities; unlike their fee-charging counterparts servicing more affluent communities, the governing bodies of such schools cannot afford to appoint and pay educators to fill vacant posts out of their own pockets.[6] As a result, no-fee schools either had to reduce their teaching staff or oblige them to work without pay, or cut back on essential services such as meals, textbooks, and transport. The brunt of these failures was borne by learners taking school-leaving examinations – their understandably dismal Matric scores bear witness and will negatively affect their career prospects for the rest of their lives. During the course of preparing for the litigation, lawyers for the LRC met numerous unpaid temporary educators at affected schools who, rather than stay home, preferred to come to work in return for their bus fares paid for by learners and parents.[7]

In July 2012, Plasket J, sitting in the Eastern Cape High Court, Grahamstown, rendered judgment for the applicants in *Centre for Child Law v Minister of Basic Education*[8] *('Centre for Child Law*'), and observed that:

> (i)t is no exaggeration to say that as a result of what, on the respondents' own admission, is a crisis of immense and worrying proportions, the right to basic education of those who attend public schools in the Eastern Cape Province is affected or threatened.

Specifically, he ordered the Minister and the other defendants to implement the 2012 post establishment, fill all vacant educator posts by November 2012, appoint temporary educators pending the full implementation of the plan by September 2012, pay all salaries by mid-August 2012, and reimburse those schools whose governing bodies had been paying for teachers out of their own pockets, by November 2012. In addition, the defendants were also required to formulate and declare the educator post establishment for 2013, as well as issue a post establishment for 'non-educator staff' such as administrators, groundsmen, and therapists for children with special needs.[9] The court issued a structural interdict requiring the Minister to file regular reports on their progress in carrying out the orders.

The substantive orders were totally ignored by the Department. The compliance

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(accessed 2014-02-10). The certificate testifies that Mary Waters High School had no educators to teach English, Mathematics, or Natural Sciences classes for the junior grades at the school.

[6]Christie 'The complexity of human rights in global times: The case of the right to education in South Africa' (2010) *International Journal of Educational Development* 3 at 8-9.

[7]Case No 1749/2012 *Centre for Child Law v Minister for Basic Education*, Founding Affidavit, para 33 (5 March 2013) ('Founding Affidavit') available at http://lrc.org.za/images/stories/CourtPapers/FA_-_Part_1.pdf (accessed 2014-02-10).

[8]2012 4 SA 35 (ECG).

[9]*Id* paras 35(1)-(10). All the orders were obtained on consent, except the orders relating to a non-educator post establishment.

reports, filed from time to time, merely stated the fact of the Department's non-compliance, and raised no legal defence, but listed internal incompetence and resistance by teachers' unions as excuses.[10] As of early March 2013, hundreds of schools throughout the province were facing closure because of the failure to fill 8 479 substantive vacant posts. Incredibly there were 7152 'educators in excess' of their schools' teaching requirements.[11] What would simply have been a matter of moving the educators from where they were in excess to where they were direly needed had metastasised into a systemic crisis spanning decades, with the provincial education budget spiralling out of control because teachers at under-resourced schools were appointed to fill vacant posts on a temporary basis. Admittedly, the government and the Department had been thwarted by a number of significant extraneous factors, chiefly obstruction by certain school principals and SADTU, the main teachers' union. In December 2012, the Department issued an internal memorandum seeking to move some 5 012 educators to schools where they were needed, but SADTU stopped the process and instructed its members not to comply with the memorandum, resulting in only 839 educators being moved to points of need.

However, for its own part, the Department failed to carry out numerous simple steps which would not have required cooperation by third parties. For instance, with regard to filling a post establishment for 2013, the LRC discovered from personal interviews with numerous schools that the Department failed in certain districts to advertise for educator posts, refused in other districts to release to the schools the names of the applicants responding to advertisements so that they could be interviewed, and refused to appoint educators recommended by the schools in yet other districts.

After exploring a number of ideas, the LRC decided upon a piecemeal strategy of seeking compliance with the orders in *Centre for Child Law*, with respect to individual or small groups of schools in the vicinity of Grahamstown and Port Elizabeth, with the worst-affected schools being placed first in line. The priority was to ensure that current learners had educators teaching in classrooms, and accordingly, in late February 2013, the LRC brought an application on behalf of the Centre for Child Law and the governing bodies of five schools, demanding that Plasket J's order to issue a 2013 post establishment be fulfilled with respect to those particular schools, as well as nine others facing identical problems. The Notice of Motion in that case listed a number of educators who had started working in the schools involved[12] and had either not received any pay, or who had been paid out of the funds of the school governing body, that is, funds collected privately from parents. The specific relief requested was an order firstly, requiring the defendants to appoint

[10]Founding Affidavit (n 7) para 18.
[11]*Id* para 29. Relying on statistics provided by the Department, on file with the LRC.
[12]The educators had begun work at the behest of the schools after the Department failed to appoint them as expected.

educators to the vacant posts at the schools involved retrospectively to the beginning of 2013, and secondly, that they pay those educators all remuneration due to them by 3 April 2013.

On 7 March 2013, the Department and the applicants arrived at a settlement, confirmed by the Grahamstown High Court as an order by consent (the '7 March 2013 Order').[13] The 7 March 2013 Order required, at paragraph 1, that the educators specified in the Notice of Motion be appointed on a temporary basis retrospectively from the date of their assumption of duty in 2013, and observed, at paragraph 1.7, that both the Minister and the Head of Department, the Department itself, as well as the other respondents undertook to pay those educators all remuneration due to them by 3 April 2013, provided that the applicant schools provided necessary documentation specified in the Order by 15 March 2013. The applicant schools complied with the document submission requirement on multiple occasions, because the Ministry and the Department repeatedly lost the documents submitted, or capriciously changed their demands for information required. When pressed for further particulars as to why their forms were rejected, some educators were told by officials at District Offices that they had used tippex on them. Meanwhile, numerous other educators were blithely and repeatedly told by their district offices that their forms had simply been lost. Nevertheless, the educators managed to receive their official letters of appointment by the Department, stating their rank, salary, and work station that would come into effect on 1 January 2013.

As of 3 May 2013, a considerable number of those educators had not received any salary or backpay, not even for the months of March and April 2013. Having gone without pay for the entire year, many of these educators had seen their credit ratings deteriorate, and others were being sued by their children's schools for unpaid fees. In one memorable instance, an educator was compelled to postpone her wedding plans, while another had to turn down a chance to send her grandson to a prestigious Grahamstown school on a scholarship because she could not afford to buy him shoes. Many feared that these hardships would lead educators to vent their frustrations on their learners and felt guilty at not doing the best by their charges.

The Grahamstown office of the LRC drafted a new application in the name of 24 unpaid educators in the Grahamstown area to compel the Department to pay their salaries.[14] Using the monthly salary amounts listed in each educator's letter of appointment from the Department, the total amount in unpaid salary owed to each educator was calculated and claimed as debts payable by the Department. On May 15, the Department filed an answering affidavit, profusely apologising for the failure

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[13]On file with the LRC, available at http://www.lrc.org.za/images/stories/CourtPapers/2013_03_08_Court_Order.pdf (accessed 2014-02-10).

[14]Case No 1434/2013 *CL Edwards v Minister of Basic Education (ECG)*. On file with the LRC.

to pay the 24 educators, and tendering costs as a token of contrition.[15]

In mid-May, a further application was brought on behalf of the original applicants, the Centre for Child Law, to compel the payment of the salaries of the remaining unpaid educators, and to effect their permanent appointment. On 6 June, an order by consent was reached with the Department, where the Department undertook to pay the necessary salaries by 30 June 2013, failing which enforcement proceedings would be brought under section 3 of the State Liability Act 20 of 1957.[16] The consent order also allowed schools to advertise, shortlist, interview and make recommendations to the Department for hire, and further stipulated that these recommendations be deemed permanent appointments if the Department failed to process them within a reasonable time. As of early August 2013, 13 educators had not received their salaries, resulting in a writ of execution being issued that directed the sheriff in King William's Town to seize the movable goods of the Department in order to satisfy a judgment debt of R619,705.85, the costs of the writ, and of the sheriff. The writ specified that all the motor vehicles of the Department were to be attached, including that of the MEC, such that he might have found himself 'forced to use public transport to get to work'.[17] On 16 August 2013, the Grahamstown High Court ordered the Minister and the Department to pay the salaries of a further 27 educators within five days,[18] and on 23 August 2013, salaries were paid to a further 28 educators who had been working without pay for the entire year.[19] By the end of September, all the educators represented by the LRC in litigation, had received their pay. However, there were still hundreds of educators not represented in litigation who had to wait until December to receive their pay, despite having worked for most of 2013.

Given the success of this strategy on behalf of a limited number of schools, which were invariably facing yet another year of having to pay educators out of their own pocket to fill vacant substantive posts, and with no end to the impasse with the unions in sight, the LRC filed an application in November 2013 seeking:

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[15]Case No 1434/2013 *CL Edwards v Minister of Basic Education*, Filing Notice, Respondents' Answering Affidavit (17 May 2013). On file with the LRC.

[16]On file with the LRC, available at http://www.lrc.org.za/images/stories/CourtPapers/2013_06_06_Court_Order.pdf (accessed 2014-02-10).

[17]John 'EC education department assets to be attached for salaries' *Mail and Guardian* (2013-08-06) available at http://mg.co.za/article/2013-08-06-ec-education-department-assets-to-be-attached-for-salaries (accessed 2014-02-10).

[18]Case No 2508/2013 *Sarah Hanton v Minister of Basic Education (ECG)* available at http://www.lrc.org.za /images/stories/CourtPapers/2013_08_19_Court_Order.pdf (accessed 2014-02-10).

[19]Legal Resources Centre (2013) Press Statement: More EC teachers receive their salaries after court order 23 August available at http://www.lrc.org.za/press-releases/2872-2013-08-23-for-immediate-release-friday-23-august-2013-the-legal-resources-centre-lrc-and-20-eastern-cape-teachers-are-today-celebrating-the-payment-of-the-teachers-salaries-some-of-whom-have-worked-without-pay-this-entire-year-this-follows-the- (accessed 2014-02-10).

(1) to reimburse schools in the Eastern Cape that had paid specified temporary educators occupying substantive posts provided for in the provincial post establishment out of their own pockets, such amounts constituting enforceable debts under the State Liability Act 20 of 1957, and

(2) deeming those educators to have been appointed permanently within the terms of section 6 of the Employment of Educators Act 76 of 1998.[20] Importantly, the application also seeks the certification of an optional class of similarly situated educators all over the Eastern Cape, with a view to resolving the problem across the board.

The case was launched in the Grahamstown High Court and the hearing has been postponed to 20 March 2014.

3 Contempt and execution: A short history

Faced with non-compliance with a court order by an adversary, a South African lawyer's gut reaction would most likely be to turn to the law of contempt.[21] This is understandable, given the history of contempt and execution described in the following paragraphs. However, this note argues that contempt has never proved a fruitful path to take and that, with the advent of the *Nyathi* decision, litigants should instead find some way of using the *new* section 3 of the State Liability Act 20 of 1957 to levy execution against the government.

As defined succinctly by Ebersohn AJ in *Tasima (Pty) Ltd v Department of Transport*,[22] '(civil) contempt is the wilful and *mala fide* refusal or failure to comply with an order of court'.[23] In order for a court order to be enforced through a contempt action, the order must be *ad factum praestandum*; that is, to do or abstain from doing a particular act.[24] Orders *ad pecuniam solvendam* – to pay a sum of money such as an order to pay damages or make restitution – cannot be enforced through contempt proceedings, even if the respondent has the means to pay but only refuses to do so.[25] The reasons for this are quite obvious: civilised opinion generally frowns upon

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[20]Case No 3844/2013 *Linkside v Minister of Basic Education*, Notice of Motion, Founding Affidavit, Draft Notice to Class (25 November 2013) available at http://lrc.org.za/images/stories/CourtPapers/NOM.pdf, *http*://lrc.org.za/images/stories/CourtPapers/2013_11_21_FA_-_Linkside_and_others.pdf, and http://lrc.org .za/images/stories/CourtPapers/Notice_to_the_class.pdf (accessed 2014-02-10).

[21]See, eg, Swart 'Left out in the cold? Crafting constitutional remedies for the poorest of the poor' (2005) *SAJHR* 215 at 233-238.

[22][2013] ZAGPPHC 199 (N Gauteng HC), citing *Fakie NO v CCII Systems (Pty) Ltd* 2006 4 SA 326 (SCA); *S v Sigwahla* 1967 4 SA 566 (A); S v De Bruyn 1968 4 SA 498 (C); and *S v NguBane* 1985 3 SA 677 (A).

[23]*Tasima* (n 22) para 79.

[24]*Metropolitan Industrial Corporation (Pty) Ltd v Hughes* 1969 1 SA 224 (T) 227. See also *Stellenbosch Farmers Winery (Edms) Bpk v Goldberg* 1968 2 SA 728 (T) 729; *Alison NO v Nicholson* 1970 1 SA 121 (R) 124.

[25]*Slade v Slade* (1884) 4 EDC 243; *Hawkins v Hawkins* (1908) 25 SC 784.

debtors' prisons,[26] and in any case, attaching property is a much more efficient way to collect money.

The elements of the various forms of civil contempt were settled in the leading case of *Fakie NO v CCII Systems (Pty) Ltd*, which sets out two contempt-related remedies: committals, and declarators:

- *Committals for contempt*: In order to obtain a committal for contempt, the then Cameron JA held that an applicant must prove *beyond reasonable doubt* that (a) there is a court order requiring the respondent to do or refrain from doing something, (b) that the respondent was served or otherwise put on notice of the order, and (c) that the respondent failed to comply with the order wilfully and in *mala fides*.[27] Even though contempt committals are civil proceedings, the burden of proof is set at beyond a reasonable doubt notwithstanding whether they are brought for coercive or punitive reasons, because they have the potential to result in imprisonment.[28]
- *Declarators*: '(A) declarator and other appropriate remedies remain available to a civil applicant on proof on *a balance of probabilities* ...' [emphasis added], for example, not suspending the order pending appeal, and barring the contemnor access to civil courts until the contempt is purged.[29]

The lower burden of proof ought to mean that declarators are easier to obtain than committals. However, declarations have much less bite than committals, and the benefit of the few sanctions they provide – such as that of barring the contemning government department from the civil courts – are probably rendered nugatory by the fact that government departments find themselves as respondents to actions vastly more often than as applicants.

As regards orders *ad pecuniam solvendam*, successful litigants had an even more insurmountable burden as a result of section 3 of the State Liability Act 20 of 1957, which, in its previous form,[30] expressly prohibited the levying of execution against provincial governments. The inviolability of state property was a relic from the

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[26]See eg the Abolition of Civil Imprisonment Act 2 of 1977 and *Malachi v Cape Dance Academy* 2010 6 SA 1 (CC), declaring unconstitutional the procedure of arrest *tanquam suspectus de fuga* whereby the Magistrates' Courts could order the arrest and detention of a debtor suspected of planning to leave the country, without first having to prove the existence of the debt.

[27]*Fakie* (n 22) paras 42(c) and (d).

[28]*Id* paras 30, 39, and 71 (dissent).

[29]*Id* para 42(e).

[30]The previous s 3 of the 1957 Act provided as follows:

> Satisfaction of judgment:
> No execution, attachment or like process shall be issued against the defendant or respondent in any such action or proceedings or against any property of the State, but the amount, if any, which may be required to satisfy any judgment or order given or made against the nominal defendant or respondent in any such action or proceedings may be paid out of the National Revenue Fund or a Provincial Revenue Fund, as the case may be.

colonial Crown Liabilities Act 1 of 1910, which reflected the constitutional context of parliamentary sovereignty. In *Schierhout v Minister of Justice*,[31] Innes CJ observed that in enacting the Crown Liabilities Act, 'the Legislature was content to rely upon the moral obligation which the decree of a Court was bound to exert. No process of any kind was to be exercised as against Crown representatives or Crown property'.[32] In *Jayiya v MEC for Welfare*,[33] Nugent JA explained that the 1957 Act retained this attitude, in that 'it just did not occur to the Legislators of 1957, or to those who amended the Act in 1993, that the State or a Province might not promptly comply with an order of court'.[34] Instead, such judgment debts were to be paid out of the National Revenue Fund or Provincial Revenue Funds, the process for which was not set out in any statute, and which would in any case give rise to another set of bureaucratic nightmares. This was the case in *Magidimisi*, where Froneman J observed that the Eastern Cape Province did not appear to have any process for the payment of court orders out of the Province's finances,[35] and in *Golden Arrow Bus Services (Pty) Ltd v Minister of Transport*,[36] where the government minister failed to pay a contract damages order made by agreement from the National Revenue Fund, claiming insuperable statutory impediments.

At the time *Jayiya* was decided, however, it was abundantly clear that this assumption had, at the very least, long ceased to hold water in the Eastern Cape. In view of this new reality of 'wholesale non-compliance with court orders',[37] an earlier line of case law from the Eastern Cape created an exception to the rule of prohibiting enforcement of money orders through contempt actions, where those orders were against the national or provincial government.[38] These cases were overruled by the Supreme Court of Appeal in Jayiya, where Conradie JA held that even though courts had an obligation to formulate meaningful remedies matching changed circumstances in order to vindicate constitutional rights, they could not do this by creating new forms of criminal liability.[39] By emphasising the unfairness in visiting quasi-criminal punishment upon an individual for the systemic failures of large networks of people,

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[31] 1926 AD 99.
[32] *Id* 110-111.
[33] *Jayiya v Member of the Executive Council for Welfare, Eastern Cape* 2004 2 SA 602 (SCA).
[34] *Id* para 16. See also *York Timbers Ltd v Minister of Water Affairs and Forestry* 2003 4 SA 477 (T), where Southwood J held that the rationale and effect of the 1957 Act was identical to that of the 1910 Act.
[35] *Magidimisi* (n 3) para 12.
[36] 2009 5 SA 322 (C) (W Cape HC). The decision was handed down after the Constitutional Court struck down s 3 of the 1957 Act in *Nyathi* (n 3), but before replacement legislation had been enacted. While the government eventually lost its case, the fact is that the applicants had to endure a further round of litigation in the High Court before they could collect.
[37] *Jayiya* (n 33) para 17.
[38] *Mjeni v The Minister of Health and Welfare, Eastern Cape* 2000 4 SA 446 (Tk HC) 453I-454B; *East London Transitional Local Council v Member of the Executive Council of the Province of the Eastern Cape for Health* [2000] 4 All SA 443 (Ck HC) 449G.
[39] *Jayiya* (n 33) para 18.

Jayiya also established the rule that an official cited only nominally for the government cannot be committed for contempt in subsequent proceedings for non-compliance with the original order. As a result, in order to be sanctioned for contempt, an official must be cited personally in the original proceedings after correctly being identified as the official specifically tasked with carrying out the particular governmental task in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), or any other applicable statute. This, again, is not always easy to realise.

In addition to clarifying section 3 of the 1957 Act to prohibit execution or attachment against government property, *Jayiya* also criticised the award of 'constitutional relief' under section 38(1) of the Constitution for damages suffered as a result of the failure of officials to carry out their duties in a timely fashion.[40] As a result, Froneman J sitting in the Eastern Cape High Court in *Kate v MEC for the Department of Welfare*[41] was moved to consider if Jayiya meant that:

> persons such as the applicant [in that case] will have to be told that the courts cannot help them in the form of ordering financial compensation if public [or] State officials do not do their work properly and that, even if the courts do order compensation, there is nothing legally that the courts can do to help them if State functionaries neglect, for whatever reason, to give effect to such an order.[42]

On appeal to the SCA as *MEC for the Department of Welfare v Kate*, Nugent JA held that much of *Jayiya* was *obiter*, and suggested that the official specifically tasked with carrying out a court order could be issued a writ of *mandamus* compelling her to do so, whereupon there could be 'no doubt that a public official who is ordered by a court to do or to refrain from doing a particular act and fails to do so is liable to be committed for contempt'.[43] However, Nugent JA did not question or disturb the high burdens for a committal for contempt in *Jayiya* or *Fakie*, thereby severely limiting the efficacy of his suggestion. Moreover, Nugent JA then proceeded to observe that a *mandamus* would be of limited assistance to the vast majority of impoverished applicants who would invariably lack the legal expertise to trawl through PAJA and other statutes to determine exactly which department official should be served with the writ, and that even if an applicant got around this difficulty, all she would accomplish would be to push other applicants down the line of priority.[44] In what seemed like an admission of defeat, Nugent JA departed from the comments in *Jayiya* and held that the appropriate remedy for the applicant, who had been denied her social security payments for a decade, was an award of constitutional damages,

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[40] *Id* criticising *Mahambehlala v MEC for Welfare, Eastern Cape* 2002 1 SA 342 (SE) and *Mbanga v MEC for Welfare, Eastern Cape* 2002 1 SA 359 (SE).
[41] *Kate v MEC for the Department of Welfare, Eastern Cape* 2005 1 SA 141 (SE).
[42] *Id* para 27.
[43] *MEC v Kate* (n 3) para 30.
[44] *Id* paras 31-32.

calculated as the total sum of unpaid social security, with the statutory interest rate of 15,5% added.

Thus, the SCA in *MEC v Kate* still did not address the central question that gave rise to the litigation in the first place: what is an applicant to do when a government entity ignores or refuses to comply with a money order against it? An order awarding constitutional or other damages is all very well, but what does one do when the government likewise does not pay up on *that*?

In *Madigimisi v Premier of the Eastern Cape*, which dealt with the Eastern Cape's three year long failure to pay a money order, Froneman J tried to square the circle by issuing a '*mandamus* with a wrinkle'[45] – the *mandamus* requiring a relevant official to carry out the process of charging from the Provincial Revenue Fund, and the 'wrinkle' being an interdict requiring her to report to the court on whether and to what extent she had complied. It was understood that if the *mandamus* was not complied with, the official would be committed for contempt.[46]

Froneman J did not address the shortcomings of the *mandamus* option identified in *Kate v MEC*, nor did he address the high burdens required for a contempt committal by *Fakie*. This insurmountable gap was identified in *N v The Government of the Republic of South Africa* (no 3),[47] where Nicholson J, citing passages from the High Court decision in *Kate v MEC* and *Schierhout*, opined that 'unless and until section 3 of the State Liability Act is declared unconstitutional, there is no legal mechanism such as incarceration to enforce the court decrees. Should that situation continue, then the effect of a court order would be what the law calls a *brutum fulmen*, in other words – a useless thunderbolt'.[48]

The penny finally dropped in 2008, when the Constitutional Court struck down section 3 of the 1957 Act in *Nyathi v MEC for the Department of Health Gauteng*, as being incompatible with the following constitutional provisions: section 8(1) which provides that the Bill of Rights applies to all organs of the state, section 34 which provides that everyone has the right to have any legal dispute resolved by a fair public hearing before a court, and sections 165(4) and (5) which provide that a court order or decision binds all persons and state organs to whom it applies, and that organs of state have a duty to assist and protect the courts to ensure their independence and effectiveness. Madala J observed that 'there (could) be no greater carelessness, dilatoriness or negligence than to ignore a court order sounding in money, even more so when the matter emanates from a destitute person who has no means of pursuing his or her claim in a court of law', that 'we now have some officials who have become a law unto themselves and openly violate people's rights in a manner that shows disdain for the law, in the belief that as state officials they cannot be held responsible for their actions or inaction', and that courts 'have had to spend too much time in

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[45] *Magidimisi* (n 3) para 29.
[46] *Id* para 34.
[47] 2006 6 SA 575 (D).
[48] *Id* para 32.

trying to ensure that court orders are enforceable against the state precisely because a straightforward procedure is not available'.[49] Parliament was given 12 months to pass legislation allowing for execution and attachment against state property for the enforcement of court orders against the state.

In due course, the State Liability Amendment Act 14 of 2011 was enacted. Section 2 of that statute amends section 3 of the 1957 Act, which now provides a mechanism for execution against state property should the National or Provincial Revenue Funds not be made available fully and quickly. Specifically, a final money order against a department must, in the absence of agreement between the judgment creditor and the accounting officer of the department, be paid within 30 days of the order becoming final,[50] and it is the accounting officer of the department who is tasked with ensuring this deadline is met and paid out of the appropriated budget of the department concerned.[51] If this is not done, the judgment creditor must serve the court order upon the executive authority and the accounting officer of the department, or upon their attorney of record, as well as to the relevant provincial or national treasury.[52] If the relevant treasury fails to satisfy the judgment debt within 14 days, the registrar or clerk of the court concerned must, upon written request by the judgment creditor, issue a writ or warrant of execution against the movable property of the department.[53] The writ may be challenged by the department or any party with a 'direct and material interest' in the property, on the grounds that execution 'would severely disrupt service delivery, threaten life or put the security of the public at risk' or is otherwise 'not in the interests of justice'.[54] If it is the department that is applying for the stay of execution, it must include a list of alternative movable property that may be attached and sold instead.[55]

4 Next steps: Is further legislation or case law necessary?

Even though contempt proceeding tends to be the first thought in the mind of a litigant faced with government non-compliance, execution has always been a preferable option, and the recent amendments to the State Liability Act unquestionably improve the position of persons seeking vindication of their socio-economic rights. In contrast, case law discloses a palpable judicial aversion to using contempt proceedings against non-compliant government officials.

The main sticking point lies in the element of wilfulness and *mala fides*.

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[49] *Nyathi* (n 3) para 63.
[50] Section 3(3)(a).
[51] Section 3(3)(b).
[52] Section 3(4).
[53] Section 3(6).
[54] Section 3(10)(a).
[55] Section 3(10)(b).

Ordinarily, wilfulness and *mala fides* is inferred from non-compliance itself, which may then be rebutted by the respondent by showing that non-compliance was due to various good faith reasons such as ambiguity in the order and honest mistake.[56] However, in *Eisenberg and Associates v Director General Department Home Affairs*,[57] Savage AJ declined to find the respondent Director-General of the Western Cape Department of Home Affairs in contempt, despite pouring considerable scorn upon the respondent's attempts to rebut the presumption of wilfulness and *mala fides*. Of these attempts, Savage AJ remarked that they were 'ill-advised and failed to display the appropriate regard for an order of court ...',[58] as well as lacking in 'any expression of an unequivocal resolve to comply and an understanding and acceptance of the importance of doing so in a constitutional democracy'.[59] Nonetheless, in rejecting[60] the applicants' contention that the Director-General Department of Home Affairs (DHA) held the mental state of *dolus eventualis*, that is, he foresaw that his conduct and those of the persons in his authority would lead to a situation where the original court order would not be fulfilled, Savage AJ effectively imposed upon the applicants the positive requirement of proving the respondent's guilty mental state when that should have been the respondent's burden to disprove. Even more astonishing is the case of *Lan v OR Tambo International Airport Department of Home Affairs Immigration Admissions*,[61] where immigration officials not only took several steps to deport an individual after service of a court order prohibiting them from doing so, but also insulted the judge when he personally telephoned them to confirm the authenticity of the court order. Du Plessis AJ held that two of the immigration officials – including the official who insulted him – were not guilty of contempt, and that the proper sanction for the third official was a mere warning. Costs were ordered against the Department of Home Affairs and not against the officials personally.

The author has been able to find only *one* instance of a court cracking the whip against a government official, and that was in *Tasima (Pty) Ltd*,[62] where Ebersohn AJ, correctly applying the presumption of wilfulness and *mala fides*, imposed punitive costs and a 30-day prison sentence upon the national Director General, Department of Transport and a civil servant, for failing to provide satisfactory reasons for why they failed to comply with an interim order. However, even this instance serves only to emphasise the shortcomings of contempt as an enforcement strategy: this was the applicant's *fourth* contempt proceeding against the respondents, and the prison sentence was to be suspended on condition that the respondents effected

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[56]See, eg, *Frankel Max Poliak Vinderine v Menell Jack Hyman Rosenberg* 1996 3 SA 355 (A) 367I-J; *Macsand CC v Macassar Land Claims Committee* [2005] 2 All SA 469 (SCA) 477; *Fakie* (n 22) para 10.

[57][2012] ZAWCHC 191 (2012).
[58]*Id* para 19.
[59]*Id* para 24.
[60]*Id* para 28.
[61]2011 3 SA 641 (GNP).
[62]*Tasima* (n 22).

compliance.

It is argued that the courts are right to be so leery of committing government officials for contempt. At least in the context of the right to education, the problems plaguing the Eastern Cape are the result of the collective failures of diverse networks of people, and it would be unjust to visit criminal liability for it upon any one public official. This province was hit particularly hard by apartheid education policy: the numberless separate education departments for each race and for each homeland, the massive disparities between the facilities at schools for whites and for blacks, the lack of qualified teachers,[63] such that even a competent and able Department would have had its work cut out for it. Blockages obtain at the micro-level as well: in the post-provisioning litigation, the Department testified in a May 2013 affidavit that its failure to declare a non-educator post establishment per the terms of the order in Centre for Child Law was due in part to the department's administrative functions being sabotaged by SADTU members who had infiltrated its ranks.[64] If true, this would indeed make the quasi-criminal sanctions of a committal for contempt unfair. There are also, as alluded to earlier in this article, prudential questions regarding the extent of the political clout of the South African judiciary. If a government official should indeed be found in contempt and sentenced to imprisonment, would the police carry out the court order? If the committal order is ignored, more damage will have been done to the rule of law than by the official's initial non-compliance. Finally, even if a court is minded to fine or imprison an official, it is doubtful that this will yield any tangible benefit for litigants if the causes of the socio-economic rights violations are systemic, as the Eastern Cape education crisis undoubtedly are. While the prospect of sending the MEC or Head of Department to prison might perhaps appeal to some, at the end of the day, 'contempt of court proceedings do not put money in the pocket or food on the table'[65] for unpaid educators, or, for that matter, motivated teachers in classrooms for learners. Fines and imprisonment are useless thunderbolts, perhaps?

As for declarators, however, certain changes in the case law might be desirable. Courts have considerable discretion as to whether or not to issue a declarator. Section 19(1)(a)(iii) of the Supreme Court Act 59 of 1959 provides that for a court to make a declaration of contempt, it must be satisfied that the applicant is a person interested in 'an existing, future or contingent or obligation'. Once this is established, the court must decide 'whether the case is a proper one for the exercise of the discretion conferred on it'.[66] An important factor that might lead a court to refuse a declaration of contempt is if it would be pointless, because the parties are already well aware of their legal obligations. In *Kate v MEC*, Froneman J opined that because declarations of contempt have no criminal connotations, it would appear that the

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[63]See, eg, Thompson *The history of South Africa* (2001) 266.
[64]Case No 1749/2012 *Centre for Child Law v Minister for Basic Education*, Answering Affidavit, paras 42-43 (14 May 2013). On file with the LRC.
[65]*Nyathi* (n 3) para 79.
[66]*Eisenberg* (n 57) para 14.

Jayiya rule against sanctioning officials cited only nominally in the underlying court order does not apply.[67] However, before the SCA in *MEC v Kate*, Nugent JA held that a declaration of contempt of court was most appropriate where 'it would serve the purpose of clarifying and settling the legal relations in issue'.[68] He then held that such a purpose was emphatically not served in that case because the 'High Court had all but exhausted its lexicon of epithets in its attempts to drive home [the] point'[69] that the respondent's actions were unconstitutional, and therefore refused to issue a declaration. Nugent JA's reasoning has the most peculiar result of making non-compliance a defence to a declaration of contempt if it is sustained for long enough. One can understand the need for the judiciary to guard its image jealously and, consequently, to refrain from making futile gestures.[70] However, this concern would be valid only where that gesture purported to require some action on the part of the person at which it was directed. A declarator does not do that: instead of creating legal relations between the parties, it merely clarifies pre-existing ones. In any event, a declarator is not a futile gesture – it shines a light upon the contemnor's lack of respect for the law, and for what it is worth, sanctions her by preventing her from access to the courts until the contempt is cured. In granting the declaratory, nothing is lost that is not already been lost as a result of government's non-compliance with the previous orders.

Execution against government property, on the other hand, avoids any potential injustice to individual officials, and provides relatively speedy and meaningful remedies to victims of governmental non-compliance. Most attractive of all, execution is relatively cold and clinical, and does not depend upon the composite mental state of the government department or its employees. After the Department was served with the writ of attachment, a spokesman for the Department announced its intention to contest the writ, declaring that 'We have clearly demonstrated our commitment to live up to expectations' and that '[a]n updated progress report on compliance with the court order was made available to Legal Resources Centre [as] a show of our goodwill and commitment to fully comply with all court orders …'.[71] Although section 3(10)(a) of the State Liability Act provides for an execution to be denied where it is 'not in the interests of justice', it is difficult to imagine these considerations entering the judicial calculus, given that unpaid educators cannot satisfy their creditors with the Department's 'goodwill' and 'commitment'. In any case, despite the Department's statement, the writ was never contested.

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[67] *Kate* (n 41) para 21.
[68] *MEC v Kate* (n 3) para 28.
[69] *Id* para 29.
[70] *Rand Water Board v Rotek Industries (Pty) Ltd* 2003 4 SA 58 (SCA) para 26: 'there is a growing misperception that there has been a relaxation or dilution of the fundamental principle ... that Courts will not make determinations that will have no practical effect'.
[71] John 'Unpaid salaries: E Cape education continues ping-pong' Mail and Guardian (2013-08-07) available at http://mg.co.za/article/2013-08-07-unpaid-salaries-e-cape-education-continues-ping-pong (accessed 2014-02-10).

Of course, execution has its own problems which lie chiefly in calculating exact sums of money. Firstly, there is the problem of documentation and record-keeping. The 2013 post-provisioning litigation required careful documentation confirming the dates when individual educators began working at their schools, their pay grades, *et cetera*, the collection and maintenance of which may be beyond the administrative capabilities of poorer schools. That said, this is probably true of all human rights litigation, or even litigation. Secondly, it will be a tricky feat to reduce the cost of government non-compliance to monetary terms. Given that execution as a strategy for enforcing socio-economic rights is still in its infancy, lawyers have spent much time and effort translating money orders into orders *ad factum praestandum* rather than the other way round. The 3 May 2013 application on behalf of the 24 Grahamstown-area educators was possible because the Department had already issued letters of appointment clearly stating the amounts their salaries involved. However, other harms resulting from the Department's non-compliance, such as the failure to appoint educators pursuant to the 7 March 2013 order, or to issue a non-educator post establishment as per the terms of Plasket J's order in *Centre for Child Law*, may not lend themselves so easily to precise reduction.

One possible solution lies in the award of constitutional damages as per *MEC v Kate*. This might provide educators with a remedy for damages suffered as a result of the failure to pay their salaries on time, such as reduced credit access, homes repossessed, and other indignities. However, the scope for this is limited, and rightly so, by Nugent JA's dicta in *Minister of Safety and Security v Van Duivenboden*, holding that the 'norm of accountability ... need not always translate constitutional duties into private law duties enforceable by an action for damages, for there will be cases in which other appropriate remedies are available for holding the state to account', such as mandatory and prohibitory interdicts and the political process.[72] The Bill of Rights is not a civil code setting out causes of action in delict. Thirdly, all money orders will be executed upon property ultimately paid for by the taxpayer, and so it is open to question whether this will provide sufficient reason for recalcitrant officials to bring themselves into habitual compliance.

Another option might be to seek personal costs orders against officials. Numerous courts and commentators have remarked at the contrast between the Department's unwillingness to devote resources to fulfilling its constitutional obligation to comply with court orders, and the alacrity with which it engages in litigation at public expense to defend itself and its officers from contempt applications for non-compliance with those orders. The highest authority on this subject is *SA Liquor Traders Association v Chairperson, Gauteng Liquor Board*, where the Constitutional Court observed that '[a] court will ordinarily show its displeasure at the manner in which a litigant has conducted himself during the litigation by an award of costs on the attorney-client scale ... The MEC, as an organ of state, *bears a special obligation to*

[72]2002 6 SA 431 (SCA) para 21.

ensure that the work of courts is not impeded'.[73] Professor Kruger argues that costs *de bonis propriis* may not be granted against an official merely for incompetence or impropriety – no matter how egregious – in carrying out their official functions, but only for the bad faith conduct of litigation arising from those official functions.[74] Costs should not be imposed to address governance problems directly. This author submits that proceedings to execute on judgment debts arising from non-compliance with court orders should provide ample scope for such arguments concerning misbehaviour in the conduct of litigation. For instance, in the recent case of *GGB v MEC for Economic Development, Gauteng*,[75] the SCA found that the MEC had conducted herself in the events leading to the litigation in an inexcusable fashion, and therefore imposed costs on the attorney and client scale against the Gauteng provincial government, even though the Gauteng Department of Economic Development successfully defended itself against an action for contempt.[76] The court recognised, however, that those costs would ultimately be borne by taxpayers, and consequently, that it was 'time for courts to seriously consider holding officials who behave in the high-handed manner described (by the court) personally liable for costs incurred'.[77] In language indicating just how enthusiastically it would have ordered such costs, the court added that '[r]egrettably, in the present case, it was not prayed for and thus not addressed'.[78]

5 Conclusion

A common observation about the right to education and socio-economic rights generally is that the countries in whose constitutions they feature most prominently are precisely those countries which lack credible judicial and other institutional arrangements to vindicate them, and the reader may therefore legitimately be concerned that the suggestions made in the articles call for a dangerous game of chicken between the judicial and political branches. Even in supposedly 'mature' legal systems such as that of the United States, where judges have traditionally been accorded greater real powers than almost anywhere else, Rosenberg notes that courts 'are unlikely to hold governors, legislators, or administrators in contempt or take other dramatic action because such action sets up a battle between the branches that effectively destroys any chance of government cooperation'.[79] These concerns

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[73]2009 1 SA 565 (CC) para 48-49.
[74]Kruger 'The buck stops here: The Eastern Cape High Court and costs orders in litigation against organs of state' (2011) 1 *Speculum Juris* 72 at 83-84.
[75]2013 5 SA 24 (SCA).
[76]*GGB* involved a particular type of contempt action where the contemnor intentionally interferes with the administration of justice by taking an action which is bound to prevent the court from granting a remedy. See *Li Kui Yu v Superintendent of Labour* 1906 TS 181, and *Roberts v Chairman, Local Road Transportation Board* 1980 2 SA 472.
[77]*GGB* (n 75) para 40.
[78]*Id* para 54.
[79]Rosenberg *The hollow hope: Can courts bring about social change?* (1993) 19.

all feed into the belief – very much alive and well – that socio-economic rights are simply not justiciable. Certainly, South Africa's courts here have not been unmindful of political realities: our jurisprudence on socio-economic rights[80] and separation of powers[81] has taken shape in the light of them. In a sense, the judicial has already paid tribute to the political. If, as the argument goes, South Africans face such difficulties in vindicating their socio-economic rights even after all this caution and compromise, should lawyers not give up and leave social justice to the tender mercies of the political branches?

It is beyond the scope of this article to discuss conceptual and theoretical issues relating to the right to education or socio-economic rights generally. Indeed, in litigating education cases, it is only occasionally that decisions turn on fine constitutional questions. More likely, court orders will be based on statutes or regulations, and very often the consent of the parties. Nonetheless, it is hoped that the ideas canvassed here will give the reader hope that the problem of governmental non-compliance with court orders is not an insurmountable barrier to the vindication of rights through legal recourse, but merely an example of the teething troubles faced by any young democracy. Indeed, surveying a selection of cases, Hausman argues that the South African government on the whole complies with court orders pertaining to all constitutional rights: non-compliance obtains only in exceptional circumstances where court orders require complex administrative tasks or where those tasks are inimical to the government's political agenda.[82] Specifically, he suggests that 'to the limited extent that courts themselves can facilitate enforcement of their judgments against government, supervising courts will be least effective in the face of institutional incapacity and most effective when confronted by simple institutional inertia'.[83] The beauty of execution is that it addresses non-compliance based on either incompetence or intransigence. A writ of attachment against all departmental cars will presumably have a salutary effect upon a defiant official. It will also provide an uncomplicated remedy if, for whatever reason, a department finds the task of processing payslips too overwhelming. There is much that lawyers can do to advance the cause of education in South Africa with the materials already at our disposal.

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[80]See, eg, Sunstein *Designing democracy: What constitutions do* (2001) 234. Commenting on the reasonableness test set out in *Grootboom* (n 2) paras 41-44, Professor Sunstein notes that '(w)hat the South African Constitutional Court has basically done is to adopt an *administrative law model of socioeconomic rights*' (emphasis in original).

[81]Davis 'The relationship between courts and the other arms of government in promoting and protecting socio-economic rights in South Africa: What about separation of powers?' (2012) 15/5 *PER/PELJ* available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812012000500002&lng=en&nrm=iso (accessed 2014-02-10).

[82]Hausman 'When and why the South African Government disobeys Constitutional Court orders' (2012) 48 *Stanford J of International Law* 437 at 437.

[83]*Id* 440.