

COURT SUPERVISED INSTITUTIONAL TRANSFORMATION IN SOUTH AFRICA

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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.