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RESEARCH ARTICLE

Mediation and the Structural Interdict as Legal Options to Resolve Service Delivery Failures in South Africa

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Abstract

South African municipalities are entrusted to perform various functions, including providing basic services to communities. Recently, the auditor-general has raised concern about municipalities' overall functionality and ability to fulfil their obligations. Municipalities' service delivery failures have led to disputes between them and their communities. Moreover, South African courts have drawn attention to the impact of service delivery failures and described their catastrophic and devastating effects on communities and their local economies. In addition, it is said that the consequences of these municipal failures are more severe for the communities than any other stakeholder. For this reason, communities require legal options to resolve such disputes. This article puts forward two legal options (and potentially a third) to which communities can turn. The article examines mediation and structural interdicts and argues why these options are suitable methods for resolving disputes between a community and its municipality.

Keywords: mediation; structural interdict; local government; dispute; municipality; community

Introduction

South African municipalities are entrusted to perform a range of functions assigned to them by the Constitution of the Republic of South Africa 1996 (the Constitution), a suite of framework legislation[1] and sector-specific legislation, for the benefit of their communities. These functions include the provision of sustainable services and the promotion of both socio-economic development and a safe, healthy environment, through a democratic and accountable government structure.[2] Local government is entrusted to provide various public services deemed essential for the realization of socio-economic rights.[3] These services include providing drinking water, managing waste and distributing electricity.[4] Other services, such as the provision of housing, do not fall within the

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1 The Constitution, sec 152; Local Government: Municipal Systems Act 32 of 2000 (Systems Act).

2 The Constitution, sec 152.

3 N Twani and CB Soyapi "The legal accountability of local government in South Africa for the failure to deliver sanitation services" (2022) 38/1–2 *South African Journal on Human Rights* 92 at 96; *Rademan v Moqhaka Local Municipality and Others* [2013] ZACC 11, para 16.

4 The Constitution, sec 156(1) and scheds 4, part B and 5, part B, read with the Systems Act, sec 1.

original constitutional mandate of local government; however, because of the implementation of other national legislation,[5] the practical effect is that municipalities are by implication compelled to provide these services as well.

Recently, many municipalities have failed to fulfil these obligations as required by law.[6] The judiciary has drawn attention to the serious impact of service delivery failures and stated that the consequences for the community and the local economy are both catastrophic and devastating.[7] The court further noted that the impact of service delivery failures is mostly felt by the community, which is also often an innocent bystander (except where the community does not pay for services or where community members maliciously damage infrastructure).[8] It was argued that these innocent bystanders should not be prejudiced by the failures of municipalities and that this is one of the several reasons why communities should have access to legal redress.[9]

Although the causes of municipal service delivery failures are not universal, sustainable solutions must be found to address such failures. Community members often take to the streets to express their frustration at the lack of solutions to service delivery failures. This illustrates that failures in service delivery can lead to heated disputes between a municipality and its community. On the other hand, protests might also be an indication of a community's willingness to engage in finding sustainable solutions to municipal service delivery failures. Moreover, it should be remembered that the Local Government: Municipal Systems Act 32 of 2000 (Systems Act) defines a municipality as consisting of the municipal council, the administration and its community.[10] It can thus be said that the legislature envisioned some role for communities in the governance of municipal affairs.

It is against this background that this article aims to explore the possibility of using mediation or structural interdicts as methods to address conflicts stemming from service delivery failures, while allowing communities to make a significant contribution to the solution. The article first describes the research methodology used to evaluate mediation and structural interdicts as sustainable solutions to service delivery failures. Mediation and the structural interdict are then critically evaluated. Drawing from this discussion, a possible third solution is then explored, after which the article concludes.

Reasons for service delivery failures

It was affirmed in *Joseph and Others v City of Johannesburg and Others* that providing basic municipal services is an essential, if not the most important, function of every municipality.[11] Municipalities, with the support of other organs of state such as the National Treasury, must develop service delivery capacity so they can meet all the public service needs of their residents.[12] Despite the importance of this service delivery function, municipalities are unable to fulfil it for various reasons. Exploring some of these reasons can provide some context on how to choose sustainable solutions for these service delivery failures.

5 Prevention of Illegal Eviction Act 19 of 1998. In the practical application of this act, municipalities are required to provide adequate alternative accommodation to persons against whom an eviction order is being sought. In practice, municipalities are even cited as respondents together with the illegal occupants to ensure municipalities are aware of their duty to provide alternative accommodation for the illegal occupants.

6 *2021/22 Consolidated General Report on the Local Government Audit Outcomes* (Auditor General of South Africa) at 7; *Kgetlengrivier Concerned Citizens and Another v Kgetlengrivier Local Municipality and Others* [2020] ZANWHC 95; *Cape Gate (Pty) Ltd and Others v Emfuleni Local Municipality and Others* [2019] ZAGPJHC 39.

7 *Cape Gate*, id, para 17.

8 Ibid.

9 Ibid.

10 Systems Act, sec 2(b).

11 [2009] ZACC 30, para 34.

12 Ibid.

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In *Eskom Holdings SOC Limited v Letsemeng Local Municipality and Others*, the court highlighted some reasons why municipalities fail to provide services.[13] The court noted that, since the COVID-19 pandemic, South African local government has had to cope with many stresses, such as extensive droughts, flash floods and widespread public violence, in a short time. This resulted in the damage and loss of municipal infrastructure and very high unemployment rates.[14] These circumstances contributed to many consumers being unable to pay for their municipal services, which led to a drastic reduction in municipalities' revenue.[15] It also meant that municipalities have had to spend more on building new infrastructure and infrastructure repairs. Being financially compromised, many municipalities are unable to pay their outstanding debt to other organs of state for bulk public service providers, eventually leading to the service providers threatening to disconnect the municipality's access to bulk services.[16]

A lack of skills to draw up an effective municipal budget is another reason why some municipalities are not financially able to provide public services.[17] In the past, the National Treasury has penalized municipalities by reducing their equitable share when their budgets have been drawn up incorrectly.[18] Sometimes the National Treasury has also reduced money granted to a municipality if that municipality underspent during its previous financial year.[19] This illustrates that a municipality should have access to the proper skills to enable it to manage its financial and other planning matters to ensure that it can obtain the maximum benefit from national and provincial sources of funding.

Moreover, non-revenue losses, where bulk services such as water and electricity are lost due to old, derelict systems or theft, is another factor contributing to service delivery failures.[20] Municipalities are unable to recover fees even though a bulk services provider will still hold the municipality accountable for such services.[21] At this point, one can start to observe a definite trend that many service delivery failures may be attributable to a lack of resources (financial, human or infrastructure) or mismanagement.

Where service delivery failures do strike, Ling[22] considers the recalcitrance of government as one of the biggest impediments to solving them.[23] To illustrate this point Ling refers to the *Government of the Republic of South Africa and Others v Grootboom and Others*,[24] where the state, two years after the decision, still did not comply with the traditional interdict that the court granted in favour of the community.[25]

13 [2022] ZASCA 26, para 57.

14 Id, para 59.

15 Ibid.

16 MP Ramutsheli and JO Janse van Rensburg "The root causes for local government's failure to achieve objectives" (2015) 17/2 *Southern African Journal of Accountability and Auditing Research* 107 at 109; PS Reddy "The politics of service delivery in South Africa: The local government sphere in context" (2016) 12/1 *Journal for Transdisciplinary Research in Southern Africa* 1 at 4; *Eskom Holdings*, above at note 13, para 59.

17 Ibid.

18 Ibid.

19 Ibid.

20 Ibid.

21 *Eskom Holdings*, above at note 13, para 60.

22 E Ling "From paper promises to real remedies: The need for the South African Constitutional Court to adopt structural interdicts in socio-economic rights cases" (2015) 9 *Hong Kong Journal of Legal Studies* 51 at 52.

23 MM Masuku and NN Jili "Public service delivery in South Africa: The political influence at local government level" (2019) 19 *Journal of Public Affairs* 1 at 4; Ling, id at 56; M Ebadolahi "Using structural interdicts and the South African Human Rights Commission to achieve judicial enforcement of economic and social rights in South Africa" (2008) 83/5 *New York University Law Review* 1565 at 1597; *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* [2002] ZACC 15 at 63; *City of Cape Town v Rudolph and Others* [2003] ZAWCHC 29.

24 [2000] ZACC 19.

25 Ling "From paper promises", above at note 22 at 56.

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Solving service delivery failures

It is undeniable that there are many ways to address failures in municipal service delivery, many of which are aimed at preventing such failures in the first place.[26] However, many municipalities in South Africa already face service delivery failures and, for this reason, this article does not address the prevention of service failures.

One can turn to many options to address service delivery failures. First, many municipalities have internal dispute resolution mechanisms, including logging online complaints such as for leaking pipes.[27] Secondly, many political channels are built into the local government structure, such as ward committees and council meetings through which communities can participate in local governance issues.[28] Thirdly, democratic and participatory mechanisms may involve voicing concerns at organized fora, signing petitions or participating in local government elections.[29] Fourthly, communities may initiate litigation for declaratory or public engagement orders.[30] Fifthly, the Constitution provides for provincial or national interventions in local government.[31] Sixthly, communities can seek the assistance of institutions listed in chapter 9 of the Constitution, such as the public protector, the auditor-general or the Human Rights Commission, which can recommend remedial measures to address deficiencies in service delivery. In addition, the law enables peaceful protests to empower community members to voice their concerns to the various government institutions.[32] These options are by no means an exhaustive list.

Notwithstanding the merit these options may have to address municipal service delivery failures, this article specifically proposes using mediation, the structural interdict, or a combination of the two, to address these issues. The purpose is to put forward methods that allow the development of sustainable solutions to service delivery problems, while allowing the community to play a more significant role in local governance. As explained more fully below, these provide enforceable solutions and meaningful stakeholder involvement, as well as securing political buy-in, while respecting local government autonomy.

Mediation has recently increased in popularity and is now preferred as a conflict resolution mechanism in various legal disputes in South Africa, including in the fields of labour law, family law, commercial contracts, environmental law and criminal law.[33] A case has also been argued for using mediation in all public disputes, some of which could involve spatial planning.[34] In the USA, for example, mediation was introduced to resolve environmental-related disputes between municipalities and communities.[35] Furthermore, some scholars argue that, in the context of non-labour-related disputes involving municipalities, mediation has been underutilized and there remains significant potential to develop and promote the use of mediation in these disputes.[36]

26 C Makanyeza, B Ikobe and H Kwandayi "Strategies to improve service delivery in local authorities" (2013) 15/1 *International Journal of Information Technology and Business Management* 1 at 2.

27 See "City connect", available at: <https://www.capetown.gov.za/City-Connect> (last accessed 25 March 2024).

28 Systems Act, secs 16, 17 and 18; Local Government: Municipal Structures Act 117 of 1998, sec 74.

29 Systems Act, secs 17, 19 and 20.

30 S Liebenberg "The art of the (im)possible? Justice Froneman's contribution to designing remedies for structural human rights violations" (2022) 12/1 *Constitutional Court Review* 137 at 146.

31 The Constitution, secs 100 and 139.

32 Id, sec 17.

33 P Pretorius *Dispute Resolution* (2016, Juta) at 73, 113, 124, 145, 163 and 176; *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7, para 40; *Nomandela and Another v Nyandeni Local Municipality and Others* 2021 5 SA 619 (ECM), para 3.

34 B McAdoo and L Bakken "Local government use of mediation for resolution of public disputes" (1990) 22/2 *The Urban Lawyer* 179 at 180; R Boden "The potential of environmental mediation for planning in South Africa" (1987) 23 *Town and Regional Planning* 18; PM Mareschal "Solving problems and transforming relationships: The bifocal approach to mediation" (2003) 33/4 *American Review of Public Administration* 423 at 424.

35 Boden, id at 19.

36 P Esterman, M Kenneally and H Protter "The benefits of alternative dispute resolution for resolving municipal disputes" (2011) 4/2 *NYSBA Dispute Resolution Section* 68 at 70.

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On the other hand, the structural interdict can be considered as a possible remedy where mediation fails. Globally, the roots of the structural interdict can be found in US law.[37] The remedy was developed to provide a means for the direct adjustment of behaviour within an institution.[38] Hirsch states that it is a medium used by the courts to address ongoing non-compliant behaviour of bureaucratic organizations and is mainly used in instances where a systemic failure is present or when socio-economic rights are infringed.[39]

This article critically analyses both mediation and the structural interdict, by examining inter alia their definitions, main advantages and shortcomings, and why they would offer sustainable solutions instead of the other available legal options. The discussion also shows how these two legal avenues can be used in combination with each other for a third legal avenue to resolve these disputes.

Mediation

Mediation can be described as an alternative to litigation where the aim is to resolve a dispute between two or more parties, with the help of a neutral party who facilitates an amicable solution for all the parties.[40] Some writers also refer to mediation as "assisted negotiation".[41] This dispute resolution method is informal and adaptable, which enables all stakeholders in the dispute to participate in the process.[42] Other features of mediation are the voluntary participation of all parties, the joint exploration of all interests and problems, the search for a solution acceptable to all, and the presence of a neutral third party who is an expert on the subject of the main dispute.[43] Mediation is said to have many advantages over conventional litigation,[44] although this article specifically explores those that contribute to sustainable solutions for service delivery failures.

One of the main advantages of mediation is its potential to make a significant contribution to participatory governance because of its emphasis on stakeholder involvement.[45] Mediation allows a dispute to be resolved in a non-isolated manner. This means that the dispute is viewed as part of a broader social context, so it provides the opportunity to investigate the history of the preceding

37 C Mbazira "From ambivalence to certainty: Norms and principles for the structural interdict in socio-economic rights litigation in South Africa" (2008) 24/1 *South African Journal of Human Rights* 1 at 3; N Swanepoel "Die aanwending van die gestruktureerde interdik in die Suid-Afrikaanse konstitusionele regsbedeling: 'n Eiesoortige beregtingsproses" [Application of the structural interdict in the South African constitutional context: A unique adjudication process] (2015) 12/2 *LisNet Akademies* 374 at 379; DE Hirsch "A defense of structural injunctive remedies in South African law" (2007) 9 *Oregon Review of International Law* 1 at 18.

38 Mbazira, id at 4; Hirsch, ibid.

39 Hirsch, ibid; Mbazira "From ambivalence to certainty", above at note 37 at 8.

40 Esterman, Kenneally and Protter "The benefits of alternative dispute resolution", above at note 36 at 70; DM Funk "Can municipalities afford not to mediate?" (date unknown) 26/1 *Municipal Advocate* 30 at 31; E Beck, S Madan and S Sahay "On the margins of the 'information society': A comparative study of mediation" (2004) 20/4 *The Information Society* 279; Boden "The potential of environmental mediation", above at note 34 at 18; Pretorius *Dispute Resolution*, above at note 33 at 39.

41 Ibid.

42 Funk "Can municipalities afford", above at note 40 at 31; Boden "The potential of environmental mediation", above at note 34 at 19; Pretorius *Dispute Resolution*, above at note 33 at 39; *Port Elizabeth Municipality*, above at note 33, para 42.

43 Funk, ibid; Boden, ibid; Pretorius, ibid; McAdoo and Bakken "Local government use", above at note 34 at 179.

44 BE Ray "Extending the shadow of the law: Using hybrid mechanisms to establish constitutional norms in socio-economic rights cases" (2009) 3 *Utah Law Review* 797 at 801; McAdoo and Bakken, id at 185; RJ Figura "Why local government needs to mediate" (2010) *Michigan Bar Journal* 36; "Guidance for effective mediation" (2012, UN), available at: <https://peacemaker.un.org/sites/peacemaker.un.org/files/GuidanceEffectiveMediation_UNDPA2012%28english%29_0.pdf> (last accessed 25 March 2024).

45 McAdoo and Bakken, id at 179; "Conflict resolution in public participation" (2022, US Environmental Protection Agency), available at: <https://www.epa.gov/international-cooperation/conflict-resolution-public-participation> (last accessed 25 March 2024).

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events from which the dispute arose.[46] During mediation, a wider investigation is thus conducted into the circumstances surrounding the dispute, which may involve more than the parties to the dispute and possible consequences for others. In other words, the parties, their families, extended social networks and the interests of future generations can be taken into consideration during the mediation process.[47]

Mediation provides all stakeholders with the opportunity to interact with each other, to reduce the scope, intensity and effects of the conflict underlying the dispute.[48] Mediation, through formal and informal meetings of stakeholders, allows for a reassessment of the interests involved as a foundation for finding options to resolve a crisis and reconcile divergent points of view.[49] One can, therefore, say that mediation has the added benefit of increasing public participation, improving communication and making local government more responsive to community needs.[50] In mediation, the parties and stakeholders to the dispute decide what the solution will be, instead of having solutions imposed on them, which may be politically laden or ill-suited to providing both immediate and long-term relief.[51]

In South Africa, municipalities consist of an administration and a municipal council.[52] The latter consists of elected politicians.[53] The successful resolution of disputes through mediation can be accompanied by substantial political gain for the municipal council. All municipalities, at one time or another, are confronted with highly sensitive and potentially volatile disputes with their communities that receive significant public and media attention.[54] These disputes are often accompanied by unwanted and negative publicity, which leads to a decrease in public confidence in the municipality's ability to govern.[55] It is therefore in the interest of the municipality (more specifically, the municipal council) to resolve these disputes as quickly and effectively as possible.[56] Mediation can be used in these instances for expedient solutions and can preserve the relationship between the community and municipality.[57]

South African law and case law have shown the place of mediation in disputes between the community and municipality. The Uniform Rules of Court were amended in 2014 to include provisions that regulate mediation.[58] The purposes of these rules are to promote access to justice, encourage restorative justice, safeguard relationships, facilitate a speedier and cost-effective solution for a dispute, and provide solutions that are beyond the scope of the judiciary.[59] Although the judiciary prefers that complex disputes, which are not solely founded on a question in law, be first subjected to mediation before litigation is initiated, the Uniform Rules affirm that mediation is a voluntary process.[60] In particular, rule 41A, which came into force in March 2020, provides that, in any new matter, each party to the dispute must inform the other party whether or not it agrees that the dispute

46 Boden "The potential of environmental mediation", above at note 34 at 19; Pretorius *Dispute Resolution*, above at note 33 at 39; Funk "Can municipalities afford", above at note 40 at 31.

47 A Ajayi and LO Buhari "Methods of conflict resolution in traditional African society" (2014) 8/2 *Ethiopia Multidisciplinary Journal* 138 at 152.

48 Id at 151; Figura "Why local government needs", above at note 44 at 36.

49 Ajayi and Buhari, ibid.

50 Esterman, Kenneally and Protter "The benefits of alternative dispute resolution", above at note 36 at 71.

51 Boden "The potential of environmental mediation", above at note 34 at 21.

52 Systems Act, sec 2.

53 Ibid.

54 Funk "Can municipalities afford", above at note 40 at 31; McAdoo and Bakken "Local government use", above at note 34 at 182; Figura "Why local government needs", above at note 44 at 36.

55 Funk, ibid; Beck, Madan and Sahay "On the margins", above at note 40 at 279.

56 Funk, id at 30; McAdoo and Bakken "Local government use", above at note 34 at 182.

57 Funk, id at 31.

58 Government notice 37448 R183 (18 March 2014) *Government Gazette* 3.

59 Id, sec 71.

60 Id, sec 74; *Nomandela*, above at note 33, para 10.

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should be referred to mediation.[61] This means that the parties to a dispute must seriously consider the use of mediation before the dispute can be brought before a court.

Mediation is often criticised because the power relationships among the stakeholders are almost always unequal, especially in respect of access to information and access to resources to support the resolution of the dispute.[62] This unequal balance of power (often in favour of the municipality) may be the cause of an unjust outcome that adversely affects the sustainability of the solution.[63] However, mediating service delivery disputes where the party with the weaker bargaining power (in this case the community) has access to a legal remedy such as a structural interdict may remove this imbalance.

Ray refers to this phenomenon as mediating in the "shadow" of the law.[64] The likelihood of litigation and court involvement is thus an incentive for fair, meaningful and ultimately successful engagement by both the community and the municipality. Simply put, it refers to parties being more open to mediation and more likely to adhere to all constitutional values and norms when engaging with each other.[65] The "shadow" of the law may therefore help to balance the unequal bargaining power between the community and the municipality. In addition to the motivation of mediating in the "shadow" of the law, parties can agree to make the agreement (which is considered contractually binding) and solution emanating from mediation an order of the court.[66] This provides an added layer of enforceability that may contribute to the overall sustainability of the solution.

A solution tailored through mediation is also more sustainable than one developed through other processes, such as a mandatory provincial intervention, because it is not imposed by other entities.[67] Instead of an imposition, parties see the solution as a collaboration. Municipalities can keep their autonomy and still make their own decisions while the community has a meaningful opportunity to voice its concerns.[68] All of this takes place within a framework in which the rights and duties of all parties are determined.[69] It is often the case that the duties of communities are downplayed in these solutions; after all, communities are considered to be part of a municipality under the Systems Act.[70] For example, residents have the duty to pay their rates and taxes. Another example could be that residents are expected to put out their solid waste at a designated location in their street to ease the task of the municipality gathering solid waste, where it is impossible for the community to gain access to several waste trucks. This solution could have alleviated Ekurhuleni's uncollected solid waste problem in 2022.[71]

So, how can one envision mediation playing out in service delivery disputes? McAdoo and Bakken show that public disputes, including those of service delivery problems, follow the same "uncontrollable spiral" if left unmanaged.[72] A service delivery failure emerges as a problem for the community, which leads to the formation of sides with the municipality seen as being on the

61 Id, sec 41A; *Nomandela*, id, paras 3 and 9.
62 Boden "The potential of environmental mediation", above at note 34 at 21; E Tippet *Discussions in Dispute Resolution* (2021, Oxford University Press) at 10.
63 Tippet, ibid.
64 Ray "Extending the shadow", above at note 44 at 828.
65 Ibid.
66 Government notice 37448 R183, above at note 58, sec 82(4).
67 RH Mnookin and K Kornhauser "Bargaining in the shadow of the law: The case of divorce" (1979) 88 *Yale Law Journal* 950; Tippet *Discussions in Dispute Resolution*, above at note 62 at 10.
68 Ibid.
69 Ibid.
70 Systems Act, sec 2.
71 L Mkentane "Ekurhuleni blames shortages of trucks for uncollected rubbish in metro" (12 September 2022) *Business Live*, available at: <https://www.businesslive.co.za/bd/national/2022-09-12-ekurhuleni-blames-shortages-of-trucks-for-uncollected-rubbish-in-metro/> (last accessed 25 March 2024).
72 McAdoo and Bakken "Local government use", above at note 34 at 193.

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"wrong" side.[73] Without intervention, positions against the municipality harden and communication inevitably breaks down.[74] At this point, community members will stop reporting the service delivery problem and will resort to group actions, such as protests. This conflict then spills outside the community and may encourage actions that escalate to national strikes and "shut-downs". At this stage, perceptions have become distorted to the point where a sense of crisis emerges.[75]

Mediation of service delivery disputes should preferably take place before communication between the municipality and community breaks down completely. There is nothing to suggest which party should initiate the process. The municipality (administration and politicians) carries the primary duty to deliver services, but it is the community that will be disadvantaged most if the service delivery problem remains unsolved.[76] Both parties therefore have much to lose should the dispute continue. Although competing interests will always be present in these disputes, there will also always be a common goal from which the mediation process can build. The immediate common goal should be to prevent the complete collapse of the specific service. This will provide the common ground for parties to explore realistic options to minimize the impact of the service delivery failure, while safeguarding the municipality's ability gradually to restore the service to an adequate level. Unrealistic demands from the side of the community could lead the municipality to de facto bankruptcy, for example. Mediation should develop a written medium- to long-term plan that contains this immediate goal and the incremental steps that both parties will take to secure the restoration of an adequate level of service delivery. The commitments from both parties involving both actions and sources should be clearly stipulated in this plan. Successful implementation of such plans can motivate more of these initiatives and local governance can eventually move away from the destructive dispute resolutions that include violent protests.[77]

Although mediation has many benefits, it also has some potential pitfalls. One such pitfall is that participating in mediation remains voluntary. Even where mediation is compulsory, the emphasis in South African law is on the stakeholders' participation, not on finding a sustainable solution. Where parties were actively engaged in mediation, but unsuccessful in finding a solution, a treasury of information should be available that was gathered during the mediation process. The community at this point may consider approaching a court to obtain a structural interdict against the municipality.

Structural interdicts

A structural interdict, as the name suggests, contains an element of interdictory relief.[78] The court order therefore partially consists of positive acts or omissions necessary to remedy a constitutional violation or service delivery failure (also referred to as a remedial plan).[79] Often, the remedial plan is accompanied by specific timeframes within which certain actions must take

73 Id at 179.
74 Ibid.
75 Ibid.
76 Systems Act, sec 8.
77 McAdoo and Bakken "Local government use", above at note 34 at 179.
78 S Viljoen "The systemic violation of section 26(1): An appeal for structural relief by the judiciary" (2015) 30/1 *Southern African Public Law* 42 at 58; Swanepoel "Die aanwending", above at note 37 at 378; Hirsch "A defense", above at note 37 at 18; *Rudolph*, above at note 23 at 88; *Fose v Minister of Safety and Security* [1977] ZACC 6; P Swanepoel *The Potential of Structural Interdicts to Constitute Effective Relief in Socio-Economic Rights Cases* (LLM dissertation, Stellenbosch University, 2017) at 84.
79 Viljoen, ibid; Swanepoel "Die aanwending", ibid; Hirsch, ibid; *Rudolph*, ibid; *Fose*, id at 6; Swanepoel *The Potential of Structural Interdicts*, ibid; Liebenberg "The art of the (im)possible?", above at note 30 at 146; *South African Human Rights Commission v Msunduzi Local Municipality and Others* [2021] ZAKZPHC 35, paras 104, 105 and 106; *Van der Merwe v Safe Waterkloof NPC and Others* [2023] ZAGPPHC 101, para 17; *Oppenheimer Park Golf Club v Matjhabeng Local Municipality and Another* [2020] ZAFSHC 78, para 37.

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place.[80] Structural interdicts also involve court supervision. In other words, the implementation of the remedy is monitored by the judiciary until the court deems the failure to provide the service sufficiently remedied.[81] Sometimes it may also be necessary for the court to issue further directions at periodic intervals because of changing circumstances and as the implementation of the remedy progresses.[82] It may thus be said that structural interdicts are remedies to be implemented over a long period of time.

The purpose of the structural interdict is to eliminate systemic violations, especially those within institutional or organizational settings.[83] Instead of traditional remedies that seek deterrence or compensation, structural interdicts seek to adjust the future behaviour of the parties concerned in a manner that will prevent the root cause of the service delivery failures from resurfacing.[84]

The legal basis for using structural interdicts can be described as follows. The Constitution specifically mandates municipalities to ensure the sustainable provision of services and promote social and economic development while promoting a safe and healthy environment.[85] Additionally, section 153(a) of the Constitution determines that a municipality must give priority to the basic needs of the community. Parliamentary legislation, with which municipalities must comply, has been enacted either to give effect to a right entrenched in the Bill of Rights or other mentioned constitutional mandates, or to provide tools to empower municipalities to fulfil their constitutional mandates.[86] Therefore, disputes concerning service delivery failures should be regarded as constitutional matters.[87]

The Constitution renders courts competent to make any order that is just and equitable in the circumstances when adjudicating constitutional matters.[88] This gives courts the authority to impose a structural interdict whenever the surrounding circumstances of a service delivery dispute render it just and equitable to do so.[89] Government recalcitrance and / or incompetence, or the expectation of irremediable harm without judicial intervention are some of the circumstances that the judiciary has accepted as justification for a structural interdict.[90] This remedy is also used where the court is convinced that a different order will not be complied with promptly or where further non-compliance will have a severe negative impact on the community.[91] Additionally, Swanepoel believes that a structural interdict must be employed where a general mandatory interdict would be too broad to enable the municipality to comply with it effectively and therefore a structural interdict would

80 Ibid.

81 Ibid.

82 Viljoen, ibid; Swanepoel "Die aanwending", ibid; Hirsch, ibid; *Rudolph*, ibid; *Fose*, ibid; Swanepoel *The Potential of Structural Interdicts*, ibid; *Van der Merwe*, ibid.

83 Viljoen, id at 59; Liebenberg "The art of the (im)possible?", above at note 30 at 165; *Msunduzi*, above at note 79, paras 104, 105 and 106.

84 Swanepoel *The Potential of Structural Interdicts*, above at note 78 at 84; Liebenberg, ibid; *Van der Merwe*, above at note 79, para 17.

85 The Constitution, sec 152(1).

86 Structures Act, preamble; Local Government: Municipal Finance Management Act 56 of 2003, sec 2; Systems Act, preamble; National Environmental Management Act 107 of 1998, preamble; Protection of Personal Information Act 4 of 2013, preamble; Promotion of Access to Information Act 2 of 2000, preamble; and Promotion of Administrative Justice Act 2 of 2000, preamble. This is not a finite list, but illustrates the statement made.

87 S Van der Berg "A capabilities approach to remedies for systemic resource-related socio-economic rights violations in South Africa" (2019) 19/1 *African Human Rights Law Journal* 290 at 296.

88 The Constitution, sec 172.

89 Swanepoel *The Potential of Structural Interdicts*, above at note 78 at 83; *Oppenheimer*, above at note 79, para 37. Although the legal basis for a structural interdict is mostly established in literature and case law involving socio-economic rights, the principles may be equally applicable in service delivery failures, since the fulfilment of most socio-economic rights involves service delivery by municipalities.

90 Swanepoel, id at 88; Liebenberg "The art of the (im)possible?", above at note 30 at 150; Twani and Soyapi "The legal accountability", above at note 3 at 96; Van der Berg "A capabilities approach", above at note 87 at 300; *Msunduzi*, above at note 79, paras 104, 105 and 106.

91 Viljoen "The systemic violation", above at note 78 at 59; *Msunduzi*, ibid; *Van der Merwe*, above at note 79, para 17.

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provide some guidance to the parties involved.[92] Lastly, Liebenberg argues that participatory remedies, such as structural interdicts, can be effective in remedying institutional dysfunction that cannot be addressed by traditional "once and for all" court orders.[93]

Different processes have been followed by the South African judiciary to formulate structural interdicts.[94] In the first instance, a municipality can be ordered to compile a remedial plan through negotiating with the community, and then to report back to the court to present that plan.[95] If the court is convinced that the plan will satisfactorily remedy the non-compliance, the court will transform the plan into a court order.[96] The structural interdict will thus consist of the remedial plan, accompanied by a deadline/s by when the municipality will have to report back to court on progress made.[97] The second process functions similarly, except negotiation is replaced by a hearing conducted by the municipality. Views may be expressed by the community, but the municipality can still choose to deviate from those views. The third option is to use a panel of experts to formulate the remedial plan.[98] The first approach is best suited to solving service delivery failures, as indicated by the advantages below.

Details of the application of structural interdicts can mostly be found in case law that relates to socio-economic rights and the *Msunduzi*[99] judgment, which was handed down in 2021. However, it could be argued that, since the provision of services is a method of fulfilling certain socio-economic rights, the principles used in socio-economic case law can be applied. Experience has shown that approaching structural interdicts incrementally enhances the remedy's effectiveness and overall success.[100]

Initially, a structural interdict should give the parties clear guidelines on the process to be followed to formulate a remedial plan. This initial order should set out clear timeframes to produce the initial remedial plan.[101] It is important that the timeframes are realistic; it might therefore be necessary for the court to consult the parties to establish appropriate timeframes. The guidelines should also provide some detail on the requirements for public participation and meaningful engagement. Much has been written about how meaningful engagement should take place when a structural interdict and other constitutional remedy are considered.[102] For this discussion, however, it is sufficient to emphasize that the interests of all parties who would be affected by the remedial plan must be taken into account for the structural interdict to be fair.[103] In addition, much

92 Swanepoel "Die aanwending", above at note 37 at 387; Viljoen, ibid.

93 Liebenberg "The art of the (im)possible?", above at note 30 at 165.

94 Mbazira "From ambivalence to certainty", above at note 37 at 6; C Thakur "Structural interdicts: An effective means of ensuring political accountability" (2018, Helen Suzman Foundation), available at: <hsf.org.za/publications/hsf-briefs/structural-interdicts-an-effective-means-of-ensuring-political-accountability? (last accessed 25 March 2023); *Rudolph*, above at note 23 at 88.

95 Mbazira, ibid; *Treatment Action Campaign*, above at note 23 at 63; *Rudolph*, ibid; *Adonisi and Others v Minister for Transport and Public Works Western Cape and Others, Minister of Human Settlements and Others v Premier of the Western Cape Province and Others* [2020] ZAWCHC 87; *Oppenheimer*, above at note 79, para 38.

96 Mbazira, ibid; *Treatment Action Campaign*, ibid; *Rudolph*, ibid.

97 Mbazira, ibid; *Treatment Action Campaign*, ibid; *Adonisi*, above at note 95.

98 Swanepoel "Die aanwending", above at note 37 at 378; Mbazira, id at 7; Thakur "Structural interdicts", above at note 94.

99 Above at note 79.

100 Liebenberg "The art of the (im)possible?", above at note 30 at 164.

101 Swanepoel *The Potential of Structural Interdicts*, above at note 78 at 88; *Grootboom and Others v Oostenberg Municipality and Others* [1999] ZAWCHC 1, para 58; *Msunduzi*, above at note 79, para 4; *Oppenheimer*, above at note 79, para 38.

102 S Liebenberg "Remedial principles and meaningful engagement in education rights disputes" (2016) 19/1 *Potchefstroom Electronic Law Journal* 1 at 5; L Chenwi "Meaningful engagement in the realisation of socio-economic rights: The South African experience" (2011) 26/1 *Southern African Public Law* 128.

103 Van der Berg "A capabilities approach", above at note 87 at 302; Liebenberg "The art of the (im)possible?", above at note 30 at 164.

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success has been achieved with structural interdicts where diverse stakeholders were involved in developing the remedial plan.[104]

When the parties return to court with the remedial plan, the court may: require more stakeholders to have an opportunity to comment on the plan and have the parties review it; refer the remedial plan to independent experts to assess its viability and feasibility; or accept the plan and make it an order of the court.[105] A court should not blindly adopt the product of such participation, but ensure that the content of the structural interdict can be substantiated with a sound reasoned decision-making process.[106] The ultimate decision on the specific content of the remedial plan, therefore, remains with the court. The court may continue to refer it back to the parties to make amendments until it is satisfied that the proposed plan will yield the desired results.[107] Accepting that courts are legal experts and may not have the technical knowledge to deliver municipal services, the court should appoint individual experts[108] to help assess these remedial plans.

A structural interdict must be enforceable to provide effective relief. The structural interdict ordered by the court in *Black Sash Trust v Minister of Social Development* (*Black Sash*)[109] is one of the most effective remedies issued of its kind.[110] According to Swanepoel, this success may be attributed to the care the court took to set out detailed enforcement mechanisms and safeguards.[111] This corresponds with the judgment in *Minister of Basic Education v Basic Education for All*,[112] where the court stated that an effective remedy can be enforced.[113] The enforcement mechanisms in *Black Sash* included stringent reporting requirements and the appointment of independent monitors to help supervise the practical implementation of the structural interdict.[114] Furthermore, the court required the minister, in this case, to justify why they should not be held personally liable for the legal costs incurred, as they are the officeholder and have primary responsibility for their portfolio.[115] The municipal manager was held similarly liable in *Kenton on Sea Ratepayers Association and Others v Ndlambe Local Municipality and Others*,[116] in which the court found that the municipal manager would be guilty of contempt of court should the municipality not adhere to the structural interdict.[117]

It is acknowledged that giving courts a supervisory role as part of a structural interdict will increase the judiciary's already sizeable workload. However, in *Black Sash* the court minimized the addition to its caseload by appointing independent experts to assist with the practical implementation of the structural interdict it ordered.[118] Structural interdicts should also allow for an adequate period of supervision to ensure material compliance with the potential long-term remedial goals. In *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of*

104 Swanepoel *The Potential of Structural Interdicts*, above at note 78 at 133.
105 Mbazira "From ambivalence to certainty", above at note 37 at 24.
106 *Rudolph*, above at note 23 at 88; Mbazira, id at 25; *Oppenheimer*, above at note 79, para 38.
107 Liebenberg "The art of the (im)possible?", above at note 30 at 146; *Oppenheimer*, ibid.
108 For service delivery disputes, a court may consider National Treasury officials, officials working with capacity assessments at the Municipal Demarcation Board, the auditor-general of South Africa, or even retired municipal managers or those from well performing municipalities, for example.
109 [2018] ZACC 36.
110 Swanepoel *The Potential of Structural Interdicts*, above at note 78 at 133.
111 Ibid.
112 [2015] ZASCA 198.
113 Swanepoel *The Potential of Structural Interdicts*, above at note 78 at 112.
114 Id at 130 and 133.
115 *Black Sash*, above at note 109, para 74; Swanepoel, id at 133. In the *Oppenheimer* judgment, the municipality was also held liable for legal costs for not engaging meaningfully with the applicants: *Oppenheimer*, above at note 79, paras 53 and 54.
116 [2016] ZAECGHC 45.
117 Twani and Soyapi "The legal accountability", above at note 3 at 110; Thakur "Structural interdicts", above at note 94; Swanepoel *The Potential of Structural Interdicts*, above at note 78 at 130.
118 *Black Sash*, above at note 109, para 76.

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the South African Social Security Agency and Others,[119] the court relinquished its supervision after the first progress report had been submitted. This was too soon, and the dispute resurfaced in *Black Sash*.[120] Judicial supervision is thus both a valuable deterrent and an enforcement mechanism.[121]

Structural interdicts should be formulated to allow sufficient flexibility for the plan to be adapted when its implementation is reviewed.[122] The idea is that the implementation of these remedies will change the circumstances within which the service delivery failures took place, hopefully for the better. It may thus be necessary to adjust the initial order as implementation progresses, to ensure the continued effectiveness of the long-term implementation of the remedy.[123]

As with mediation, there are many benefits to using structural interdicts instead of more traditional remedies such as declaratory or compensation orders. However, the most relevant benefits to this discussion are those that can contribute to the overall sustainability of the solution that the structural interdict may provide. The advantages are that both the community and the municipality retain most of their autonomy, that it contains a significant element of participation and that, if formulated realistically, it can be effectively enforced.

The structural interdict, as described, embodies an effective participatory remedy.[124] This type of remedy allows all stakeholders to participate in forging a solid plan for how to move forward, which can involve the expertise of qualified persons.[125] In so doing, the court can employ the expertise and experience of all stakeholders, which will lead to an informed and evidence-based decision on what solution is best suited to remedy the service delivery failure.[126] Participation of the municipality further encourages compliance, because it is unlikely that the municipality will make commitments it knows would be impossible for it to implement within its resource constraints.

This involvement of the community further strengthens the notions of accountability,[127] as well as restoring the community's confidence in the administration of justice and governance in general.[128] Furthermore, both parties may now have more empathy for each other's situations. The participation process should also be seen as an opportunity to educate both parties on their respective duties toward service delivery, while making the judiciary aware of the obstacles that municipalities may experience when delivering services,[129] such as not being able to provide an uninterrupted supply of electricity due to the implementation of loadshedding.

It is not a remedy where the judiciary acts as a substitute for the executive, but a means to create dialogue between the court, executive and community.[130] The dialogue offered by this remedy effectively addresses concerns that the separation of powers will not be respected because of the power given to the judiciary to dictate how the executive will fulfil its functions.[131] Moreover, in *Treatment Action Campaign*[132] the court indicated that it may make orders that could affect policy and legislation or interfere with the executive's duties when the state's obligations are not performed

119 [2013] ZACC 42.
120 *Black Sash*, above at note 109, para 74; Swanepoel *The Potential of Structural Interdicts*, above at note 78 at 133.
121 Swanepoel, id at 136; *Van der Merwe*, above at note 79, para 17.
122 Van der Berg "A capabilities approach", above at note 87 at 302.
123 Swanepoel *The Potential of Structural Interdicts*, above at note 78 at 136.
124 Van der Berg "A capabilities approach", above at note 87 at 300.
125 *Treatment Action Campaign*, above at note 23 at 62; Hirsch "A defense", above at note 37 at 63.
126 Liebenberg "The art of the (im)possible?", above at note 30 at 164.
127 Mbazira "From ambivalence to certainty", above at note 37 at 8.
128 Mbazira, id at 22; Ebadolahi "Using structural interdicts", above at note 23 at 1596.
129 Van der Berg "A capabilities approach", above at note 87 at 310.
130 Swanepoel "Die aanwending", above at note 37 at 378; Mbazira "From ambivalence to certainty", above at note 37 at 8.
131 Viljoen "The systemic violation", above at note 78 at 61; *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* [2017] ZACC 47, paras 216 and 217; Swanepoel, id at 384; Ebadolahi "Using structural interdicts", above at note 23 at 1597.
132 Above at note 23.

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diligently and in a timely manner.[133] Structural interdicts can thus be seen to offer an appropriate balance between needing executive relief and maintaining the separation of powers.[134]

A structural interdict allows both the municipality and the community to retain a degree of autonomy. By retaining sufficient autonomy, the municipality is allowed to help devise a remedial plan with which it can comply within the limits of its resources and capacities.[135] Political buy-in from the municipality is enhanced because it played a significant role in the deliberations during the development of the remedial plan.[136] This facilitates mutual trust and repairs the relationship between the community and the municipality.[137] In allowing the municipality together with the community to develop a practical and amicable solution, both parties will have a better sense of justice being served: for the municipality, the remedy is, in a sense, self-imposed, while the community can experience at first-hand that non-compliant practices will change.[138]

This remedy empowers the court to supervise implementation and progress made in terms of the mandate given.[139] Supervision increases efficiency when enforcing the court order. This remedy further offers the court flexibility to be able to establish facts at each reporting interval as progress is made and for it then to alter the interdict if the new facts so require.[140] Transformative justice is enhanced because the court is enabled to prescribe acts to rectify non-compliance.[141]

Each municipality is unique in its functioning and structure, yet it is expected that they meet the same constitutional obligations. Another strength of the structural interdict is that it has the flexibility to be tailored to meet the needs of each specific municipality.[142] This increases effectiveness since the solution was specifically tailored according to the demands of that case.[143] This remedy offers a pragmatic approach to eliminate systemic violations within the municipality.[144]

In summary, this constitutional remedy contains a substantial participatory element, it enables parties to keep most of their autonomy and be able to secure political buy-in from state organs. Furthermore, detailed safeguards and accountability measures make this remedy easy to enforce, which in turn leads to an effective deterrent against non-compliance with the order. These characteristics all contribute to making a sustainable solution for service delivery failures. Despite this, neither the judiciary nor the legislature has provided guiding principles on how to use these remedies. For a complex issue such as a service delivery failure, such principles might have been useful to guide both the court and parties on how to optimize structural interdicts specifically to find solutions for service delivery failures.

Combining mediation and a structural interdict

Mediation's starkest shortcoming is that the process remains voluntary and its enforceability is limited without court intervention. A structural interdict, on the other hand, is still a relatively novel remedy in service delivery disputes and courts do not have many guidelines to which to turn in this

133 Van der Berg "A capabilities approach", above at note 87 at 297.
134 Id at 293.
135 Id at 301.
136 Liebenberg "The art of the (im)possible?", above at note 30 at 164.
137 Ibid.
138 *Rudolph*, above at note 23 at 88; Mbazira "From ambivalence to certainty", above at note 37 at 7 and 8.
139 *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)* [2015] ZACC 10, para 1; Viljoen "The systemic violation", above at note 78 at 58; Mbazira, id at 4; Ling "From paper promises", above at note 22 at 63; Ebadolahi "Using structural interdicts", above at note 23 at 1591; Hirsch "A defense", above at note 37 at 18.
140 Ling, id at 56 and 65; Mbazira, id at 5.
141 *Treatment Action Campaign*, above at note 23 at 63; *Pheko*, above at note 139, para 1; *Rudolph*, above at note 23 at 88.
142 Ling "From paper promises", above at note 22 at 56 and 65.
143 *Pheko*, above at note 139, para 1; *Fose*, above at note 78, para 19.
144 Ibid.

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regard.[145] Structural interdicts have also been critiqued as contributing to the judiciary's workload and allowing courts to make decisions on issues that fall beyond their expertise.[146] However, is there a potential third option that could harness the advantages of mediation and structural interdicts while eliminating the shortcomings of both?

Mediation offers proven principles to guide both the parties and the mediator. It shows how to facilitate communication and party participation and how to work towards a realistic plan to which both parties commit. It is also a reference to establish the responsibilities of each party to facilitate accountability and enforcement. By including mediation, the court can have the added benefit of appointing an independent mediator who can both provide expertise on service delivery failures as well as balance the bargaining power between the parties. This means that, when a court is initially approached with a service delivery dispute, it may make an order (drawing from the principles of mediation) for the parties (and other relevant stakeholders) to engage with each other and develop a remedial plan. An independent expert may be appointed as a mediator to facilitate this process.

As with the structural interdict described above, once a remedial plan is on the table, the dispute goes back to the court, which can review the plan with experts to assess its feasibility and viability in achieving the immediate and long-term goals. If satisfied with the remedial plan, the court may endorse its contents. A court order should then be drawn up setting out the plan, appropriate enforcement mechanisms and a system for monitoring performance on an ongoing basis, while also providing that the court retains oversight. This means that the final court order should contain specific consequences for non-compliance by certain individuals with the measures set out, as was done in *Kenton* and *Black Sash*. Maintaining supervision and having enforcement mechanisms in place will deter non-compliance with the order.

The remedy proposed can thus be seen as a two phased specific structural interdict. First, the court orders the parties to develop their remedial plan through a process that mimics mediation. Secondly, when the remedial plan is brought back to court, a court order is made that mimics a structural interdict usually used to remedy structural socio-economic rights violations (because most service delivery failures lead to a violation of these rights). The court then retains oversight but may appoint an agent to help fulfil this function, such as an independent expert, National Treasury or the auditor-general.

Combining mediation and a structural interdict would address most concerns involving the separation of powers. Furthermore, courts may not be equipped to deal with most service delivery issues because of their polycentric nature, because they are often accompanied by issues of municipal budgets, human skills availability and other issues that do not directly involve questions of law. It should be emphasized that not all municipalities that fail to provide services do so on purpose; often, many underlying causes must be addressed to restore the municipality to a position where it can provide services. The inclusion of experts and other stakeholders, such as the provincial departments responsible for local government and treasury or municipal managers from successful municipalities, may offer valuable expertise in these areas. As a bonus, such a process would strengthen cooperative governance.

Conclusion

Amid a popular view of the seeming collapse of municipalities' ability to fulfil their functions as prescribed by law, service delivery disputes have surfaced between municipalities and their communities. This article aimed to explore mediation and structural interdicts as possible options to resolve such disputes because they offer unique solutions that can be sustainable.

145 Mbazira "From ambivalence to certainty", above at note 37 at 4.

146 Van der Berg "A capabilities approach", above at note 87 at 300.

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Despite the strong argument for using mediation to resolve complex disputes between communities and municipalities, the reality is that mediation relies on the bona fides and voluntary involvement of all parties. Sometimes it may be necessary for the community to approach a court for a structural interdict. Many of the advantages, such as flexibility and constructive communication, that accompany mediation also go hand in hand with structural interdicts. Structural interdicts can further deter non-compliance through continued court supervision and other enforcement mechanisms.

It could be said that these two options could be used to resolve many of the disputes between municipalities and communities, but some shortcomings remain. The article has therefore proposed a third option, in which mediation and structural interdicts are used in combination to facilitate the effective resolution of service delivery failures. Be that as it may, there are other options, beyond the scope of this article, to which communities may turn to resolve these complex disputes. Future research may contribute to this important field of study by conducting empirical studies on the success of the implementation of mediation and structural interdicts, as well as exploring judicially enforced provincial interventions and private prosecutions.

Competing interests. None

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