

**THE ONCOLOGY CRISIS IN KZN DURING THE PERIOD 2015–2017 –  
DO CERVICAL CANCER PATIENTS HAVE A CIVIL REMEDY ?**



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## **DECLARATION**

By submitting this dissertation, I hereby declare that the entirety of the work contained therein is my own original work, unless specifically indicated to the contrary in this text and that the work, in its entirety or in part, has not been previously submitted to any other university in full or partial fulfilment of the academic requirements of any other degree or other qualification.

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I would lastly like to quote the following words that have been my confidence throughout this degree:

‘This is my command—be strong and courageous! Do not be afraid or discouraged. For the Lord your God is with you wherever you go.’ – Joshua 1:9 (NLT)

This dissertation is dedicated to Baby Ezekiel Jude. Until I see you again, sweet boy.

## **ABSTRACT**

Through our history, South African women have been a disadvantaged and vulnerable group in our society. Therefore, they still require the protection of their fundamental rights afforded by the Constitution. This dissertation sets out to evaluate civil remedies that are appropriate for cervical cancer patients, who have suffered and continue to suffer, from harm caused by the recent oncology crisis in the KZN public health sector.

This dissertation explores the impact of delayed oncology treatment on cervical cancer patients, during the period 2015 – 2017. This has been done through the findings of the SAHRC's investigation into the crisis, as well as other key individuals who have been advocates for the health rights of South African women.

It also highlights the various constitutional and legislative breaches, particularly the right of access to health care as envisaged by section 27 of the Constitution. The actions of the KZN Health Management have also been evaluated using the findings of the KZN Treasury and advocacy groups, to determine these member's contribution to the breakdown of oncology services in KZN. This may be used as a guide to evaluate who may be held liable for the harm caused to cervical cancer patients. The dissertation also goes on to emphasise the need for disciplinary action by the HPCSA, for members of the KZN Health Management who are also practicing medical practitioners.

Finally, this dissertation proposes civil remedies that are available to cervical cancer patients, as well as, the dependants of women who have died as a result of not receiving timeous treatment. This has been done against the complex backdrop of socio-economic right violations, and the need for effective relief under such circumstances.

## ABBREVIATIONS

ADR	Alternative Dispute Resolution
CANSA	The Cancer Association of South Africa
CESCR	The Committee on Economic, Social and Cultural Rights
CT (scan)	Computed Tomography Scan
CIPC	Companies and Intellectual Property Commission
DA	Democratic Alliance
HoD	Head of Department
HPCSA	Health Professions Council of South Africa
HTS	Health Technology Services
ICESCR	International Covenant on Economic, Social and Cultural Rights
MEC	Member of the Executive Council
MeRAN	Medical Rights Advocacy Network
MPL	Member of Provincial Legislature
NHA	National Health Act
NPA	National Prosecuting Authority of South Africa
OSI	Oncology Services International
PFMA	The Public Finance Management Act
SAHRC	South African Human Rights Commission
SAPS	South African Police Service
SAMA	South African Medical Association
SOPs	Standard Operating Procedures
UDHR	The Universal Declaration of Human Rights
VRALA	Varian Rapid Arc Linear Accelerator Machines
WHO	World Health Association

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## CHAPTER ONE: INTRODUCTION

‘Health care is an essential safeguard of human life and dignity and there is an obligation for society to ensure that every person be able to realise this right’

– Joseph Bernardin

### 1.1 Background & Overview of Oncology Crisis in KZN

Recently there has been mounting public concern about the current oncology crisis in KwaZulu-Natal, particularly in Durban. This is a manifestation of the build-up of maladministration and other related factors in the Provincial Department of Health for a considerable time, as published in the South African Human Rights Commission (herein referred to as SAHRC or the commission) report on this issue.<sup>1</sup>

The public’s concern increased when a complaint was submitted to the SAHRC by Democratic Alliance (DA) MPL Dr. Imran Keeka. ‘The report came in the wake of revelations that Durban’s government-run oncology services had been stripped of practitioners, with doctors leaving for the private sector because of unsatisfactory working conditions that included a lack of functioning equipment for cancer treatment’.<sup>2</sup> The written complaint to the SAHRC by Dr. Keeka, was submitted on or about 19 February 2016.<sup>3</sup>

Following the investigations carried out by the SAHRC, recommendations were made to all persons mentioned in the report<sup>4</sup> in June 2017.<sup>5</sup> Despite several claims by the Provincial Health MEC, Dr. Sibongiseni Dhlomo, that inoperative machines used for diagnosis and treatment would be repaired and new machines would be installed, the situation at oncology units of the public health sector in Durban has worsened. More than 6 months had passed since the SAHRC handed down recommendations,<sup>6</sup> and Dr Keeka has stated that currently there are no oncologists in the Durban metro area, with the KZN Health Department only expecting a specialist oncologist from the Western Cape pending successful results in the student’s final examinations.<sup>7</sup>

It is submitted that owing to the current challenges in public health care, the provision of oncology services in KwaZulu-Natal is in turmoil. Due to the care of cancer patients being compromised, the liability of public health officials is in question. Curable cancers have

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<sup>1</sup> E Lotriet ‘Bleeding Oncology Dry’ (2017) (17) 6 *The Specialist Forum*, 4-4.

<sup>2</sup> Lotriet *op cit* (2017) Volume 17 Number (6) 4.

<sup>3</sup> South African Human Rights Commission (SAHRC) *Investigative Report in to complaint by Dr. Imran Keeka relating to both shortages of staff and a lack of functional health technology machines for screening, diagnosing and treating cancer in the KwaZulu-Natal Province (KZN Province)* (2017) 4.

<sup>4</sup> The Department of Health, KwaZulu-Natal, The MEC: Department of Health, KwaZulu-Natal, Addington Hospital and Inkosi Albert Luthuli Central Hospital.

<sup>5</sup> SAHRC *Investigative Report op cit* (note 3) 64-67.

<sup>6</sup> ‘Oncology machines and staff still lacking in KZN – DA’ *News24 Online*, 17 January 2018 accessed from <https://www.news24.com/SouthAfrica/News/oncology-machines-and-staff-still-lacking-in-kzn-da-20180117>, (accessed on 28 March 2018).

<sup>7</sup> *Ibid.*

become terminal due to delayed treatment or no treatment at all. In addition to this, a lack of oncologists due to poor working conditions are amongst the concerns.

This research examines the oncology crisis in KwaZulu-Natal during 2015-2017, to evaluate the liability of public health officials in the KwaZulu-Natal Health Department, focusing on the impact of deteriorating oncology care for women living with cervical cancer during 2015-2017. Furthermore, the research suggests possible civil remedies which are available to the survivors of cervical cancer during this period. It is important to note that this research only considers harm suffered, as well as, the waiting periods for treatment, during the period 2015-2017.

## **1.2 Literature Critique**

Due to the topical nature of this research, there is limited academic and peer-reviewed literature available. As a result, the research will rely heavily on newspaper articles and other forums of current news to gather data on the research area.

The following review attempts to provide an understanding of the literature that is available on the oncology crisis during 2015-2017. It further highlights the gap in literature, that this research aims to cover here.

### **1.2.1 Current State of oncology care in KZN**

Writing for *The Specialist Forum Journal*<sup>8</sup>, Lotriet discusses the lack of oncology staff, including oncologists in KZN.<sup>9</sup> The article highlights that there are currently two oncologists in Pietermaritzburg and no oncologists in Durban - KZN's largest city.<sup>10</sup> This dilemma forces oncology patients to relocate so that they receive oncology treatment, or face the reality of death.<sup>11</sup> This position was emphasized by Dr. Mvyisi Mzukwa, the spokesman and chairman of the SA Medical Association in KZN. The crisis has built up over a period of time, says Noel Desfontaines the Health and Other Service Personnel Trade Union of South Africa General Secretary, who claimed that the Public Health sector in KZN has been on the brink of collapse for many years. Further, lack of staff can be attributed to the working conditions, because such working conditions in the public sector are untenable.<sup>12</sup>

Inoperative oncology machines, ineffective referral systems and corruption scandals are amongst the issues that have led to the deteriorating state of oncology care.<sup>13</sup> It is submitted that Lotriet describes the views of individuals who hold senior positions in the Health Sector, and whose opinions carry weight and will add value to this research.

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<sup>8</sup> 'The Specialist Forum is a monthly journal for all medical specialists. Our content is sourced from key opinion leaders as well as international peer-reviewed journals. Articles focus on the latest developments in medical treatment and diagnostics', available at [https://journals.co.za/content/journal/nm\\_specf](https://journals.co.za/content/journal/nm_specf) (accessed on 27 April 2018).

<sup>9</sup> Lotriet, E 'Bleeding Oncology Dry' (2017) 17 Number 6 *The Specialist Forum*, 4-4.

<sup>10</sup> Lotriet *op cit* 4-4.

<sup>11</sup> Lotriet *op cit* 4-4.

<sup>12</sup> Lotriet *op cit* 4-4.

<sup>13</sup> Lotriet *op cit* 4-4.

In an account of the investigations conducted by the SAHRC<sup>14</sup> into two health institutions in Durban, the commission has found that the KZN Health Department, the MEC of the KZN Health Department and other public health officials have violated oncology patients' right of access to health care services, by their failure to comply with national legislation and policy.<sup>15</sup>

The above public officials have failed to evaluate the need for functional oncology equipment within a reasonable period, and have failed to procure alternative equipment for treatment programmes.<sup>16</sup> The report further notes that the KZN health authorities have not retained or recruited oncology staff and specialist oncologists, and have failed to properly determine the health needs of oncology patients or to put in place interim measures including sufficient public-private partnerships.<sup>17</sup>

### 1.2.2 Disproportionate effect on cervical cancer patients

The oncology crisis during 2015-2017 has had a disproportionate effect on oncology patients diagnosed with cervical cancer. This is because 'unlike other diseases cervical cancer is preventable and remains the most common cause of cancer deaths in women in KZN'.<sup>18</sup> Cervical cancer has been the second leading cancer in women of KZN states Lorraine Govender, who is the National Advocacy Co-ordinator for the Cancer Association of South Africa<sup>19</sup> (CANSa).<sup>20</sup> Govender also notes that cervical cancer has the highest morality rates nationwide.<sup>21</sup> This observation was confirmed by the KZN Health MEC – Dr. Sibongiseni Dhlomo who provided that cervical cancer featured amongst the top five cancers prevalent in KZN.<sup>22</sup>

During the investigations into the KZN health department and health institutions<sup>23</sup>, vulnerable women diagnosed with cancer were provided an opportunity to share their experience with the KZN health care system. One such woman who remained anonymous (Patient 1) gave an account of her diagnosis with cervical cancer in June 2015, that required both chemotherapy and radiotherapy treatment.<sup>24</sup> However, due to inoperative machines which should have provided both these treatments at the Inkosi Albert Luthuli Central Hospital, she was

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<sup>14</sup> 'The South African Human Rights Commission is the national institution established to support constitutional democracy. It is committed to promote respect for, observance of and protection of human rights for everyone without fear or favour' available at <https://www.sahrc.org.za/index.php/about-us/about-the-sahrc> (accessed on 27 April 2018).

<sup>15</sup> SAHRC Investigative Report *op cit* (note 3), 64.

<sup>16</sup> SAHRC Investigative Report *op cit* (note 3), 64.

<sup>17</sup> SAHRC Investigative Report *op cit* (note 3), 64.

<sup>18</sup> 'KZN GETS 15 CERVICAL CANCER MACHINES AMID ONCOLOGY CRISIS' *EYEWITNESS NEWS*, 5 April 2018 available at <http://ewn.co.za/2018/04/04/kzn-gets-15-cervical-cancer-machines-amid-oncology-crisis> (accessed on 21 April 2018).

<sup>19</sup> 'A leader in the fight against cancer in SA, the purpose of the Cancer Association of South Africa (CANSa), is to offer a unique, integrated service to the public and to all people affected by cancer' available from <http://www.cansa.org.za/cansas-unique-role-service-delivery/> (accessed on 27 April 2018).

<sup>20</sup> 'More Oncologists, hope for KZN' *Independent Online*, 17 February 2018 available from <https://www.iol.co.za/ios/news/more-oncologists-hope-for-kzn-cancer-patients-13331307> (accessed on 18 April 2018).

<sup>21</sup> 'More Oncologists, hope for KZN' *Independent Online op cit*.

<sup>22</sup> 'More Oncologists, hope for KZN' *Independent Online op cit*.

<sup>23</sup> Addington Hospital and Inkosi Albert Luthuli Central Hospital.

<sup>24</sup> SAHRC Investigative Report *op cit* (note 3), 31.

informed that there would be a waiting period and would have only received radiotherapy treatment in December 2016.<sup>25</sup> Further, in December 2016 her treatment was interrupted for three days due to the machine undergoing service.<sup>26</sup>

The Bhekisisa Centre for Health Journalism<sup>27</sup>, gave an account of a woman diagnosed with cervical cancer, Ms. Sibiya. Ms. Sibiya's appointments were delayed because of broken oncology machines, and her last admission to the hospital saw her wait hours for a doctor's consultation, only to receive more pain killers and no treatment for her cancer.<sup>28</sup> As a result of the disproportionate effect on women, this dissertation will focus on cervical cancer patients.

### 1.2.3 Liability of KZN Health Department and other public health officials

The Medical Rights Advocacy Network (MeRAN), a grouping of bioethicists and other medical experts, believe that public health officials who have violated the rights of oncology patients should be charged with culpable homicide, at the very least, for those patients who have died due to the crisis.<sup>29</sup>

McQuoid-Mason, argues that the KZN Health MEC and other public health officials were negligent in failing to ensure that oncology equipment was serviced and intentionally awarded a service contract to an unauthorised service provider.<sup>30</sup> This has resulted in the oncology machines remaining inoperative with the consequence that patients did not receive treatment, which has led to delayed treatment and even deaths.<sup>31</sup> McQuoid-Mason has also explained the criminal offences that health officials can be found guilty of.

McQuoid-Mason, further argues that public health officials may be held personally liable for harm caused to patients, resulting from their indifference, maladministration or negligent conduct.<sup>32</sup> Departments are sued, and employees escape liability due to the principle of vicarious liability.<sup>33</sup> However, McQuoid-Mason argues that instead irresponsible public

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<sup>25</sup> SAHRC Investigative Report *op cit* (note 3), 31.

<sup>26</sup> SAHRC Investigative Report *op cit* (note 3), 31 – Unfortunately, the stage of Patient 1's cancer is not mentioned in the interview.

<sup>27</sup> 'Bhekisisa is currently the M&G's largest specialist editorial desk. It has seven full-time staff members, including a director/editor, news editor, senior multimedia journalist and three health journalists. Bhekisisa also has a part-time Africa editor and monitoring and evaluation specialist' available at <http://bhekisisa.org/page/about-us/> accessed on 27 April 2018.

<sup>28</sup> 'KZN cancer patients sent home with panados as treatment waiting lists grow' Mail and Guardian Online Bhekisisa Centre for Health Journalism, 21 September 2017 available at <http://bhekisisa.org/article/2017-09-21-the-malignant-province-kzn-and-the-unbearable-wait-to-die>, (accessed on 22 February 2018). – This report does not mention if Ms. Sibiya's cancer was terminal.

<sup>29</sup> 'Fighting the cancer of corruption' The Mercury 28 March 2018, at 9.

<sup>30</sup> McQuoid-Mason DJ, 'Public health officials and MECs for health should be held criminally liable for causing the death of cancer patients through their intentional or negligent conduct that results in oncology equipment not working in hospitals' (2017) 10 No. 2 *The South African Journal of Bioethics and Law* (SAJBL), 83.

<sup>31</sup> McQuoid-Mason *op cit*, 83.

<sup>32</sup> McQuoid-Mason DJ, 'Public health officials and MECs should be held liable for harm caused to patients through incompetence, indifference, maladministration or negligence regarding the availability of hospital equipment' (2016) 106 No. 7 *The South African Medical Journal* (SAMJ), 681.

<sup>33</sup> 'Vicarious liability may in general terms be defined as the strict liability of one person for the delict of another' available at <http://www.dejure.up.ac.za/index.php/volumes/45-vol-2-2012/106-article-1.html> c.f. Neethling, Potgieter & Visser *Law of Delict* (2010) 365.

officials should be sued in their personal capacity.<sup>34</sup> The state however, can also be held vicariously liable and make payment.<sup>35</sup> Where an individual official cannot afford to pay compensation, and in the case of more than one health official being liable, the damages may be apportioned amongst them.<sup>36</sup>

This article is beneficial for the research as it illustrates that those officials directly liable for the oncology crisis, may be held accountable. This approach will prevent future negligence by health officials, because of the possibility of personal liability for damages.

In the case of *N v MEC for Health, Gauteng*<sup>37</sup>, the MEC denied all allegations brought by the plaintiff, against the Department of Health in Gauteng for a malpractice suit. Due to the insistent denial by the MEC, the court ordered that the he is liable for costs and damages in both his representative and personal capacity.<sup>38</sup> This case demonstrates how an MEC may be held personally liable for costs and damages owing to the way he approached the matter.

The literature available on the oncology crisis in KZN provides a general overview of oncology care in the public health sector and the possible criminal liability of health officials for oncology-related deaths due to the crisis. It also recommends personal liability for health officials for the harm caused to oncology patients.

However, the impact of the oncology crisis during 2015-2017 on surviving cervical cancer patients, (who are one of the most affected groups), and the possible civil remedies available to them, have not yet been addressed. This dissertation aims to investigate the issue by updating the scholarly literature on the issue and provide appropriate recommendations.

### 1.3 Research Questions

1. What caused the oncology crisis in Kwa Zulu-Natal during 2015 – 2017 ?
2. What constitutional rights of cervical cancer patients have been violated ?
3. What steps have been taken by the KZN Health Department during the period 2015 – 2017 to address the oncology crisis ?
4. What civil remedies are available to the cervical cancer survivors or their families for the lack of oncology services during 2015-2017 ?
5. Who can be sued for these civil remedies, brought by cervical cancer patients or their dependents ?
6. Conclusion – Appropriate recommendations ?

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<sup>34</sup> McQuoid-Mason *op cit* 681.

<sup>35</sup> McQuoid-Mason DJ, 'Public health officials and MECs should be held liable for harm caused to patients through incompetence, indifference, maladministration or negligence regarding the availability of hospital equipment' (2016) 106 No. 7 The South African Medical Journal (SAMJ), 682

<sup>36</sup> McQuoid-Mason *op cit*, 682.

<sup>37</sup> *N v MEC for Health, Gauteng* (2015) ZAGPPHC 645.

<sup>38</sup> *N v MEC for Health supra*.

## 1.4 Aim of research

The objective of this study is to analyse the impact of the oncology crisis during 2015 – 2017 in Kwa Zulu-Natal on cervical cancer patients, to determine which constitutional rights have been violated, and whether the actions by public officials in the Kwa Zulu-Natal Health Department were unethical.

The crisis in Kwa Zulu-Natal is an ongoing phenomenon. Oncology machines are still out of order, and there is still a lack of oncology staff including specialist oncologists.<sup>39</sup> Owing to the shortage in machinery and staff, treatment has been delayed for lengthy periods of time and the failure to provide proper health care services has resulted in patient deaths.<sup>40</sup>

Many of the delayed treatments has led to the deaths of women who have been diagnosed with cervical cancer. This should be viewed against the backdrop that globally, cervical cancer is the second most common cancer in women and is mostly prevalent in low and middle-income countries<sup>41</sup>, like South Africa.

In addition, The International Agency for Research on Cancer<sup>42</sup> estimates that cervical cancer is predominantly caused by the sexually transmitted disease – human papillomavirus (HPV), and is the leading cause of cancer deaths in women of South Africa.<sup>43</sup> HPV is one of the most prevalent sexually transmitted viruses.<sup>44</sup> A first time study in a rural setting of South Africa has determined that the prevalence of HPV was 70.5 %, with more than 100 types of the virus identified, of which eighteen types have been associated with cervical cancer. HPV 16 and

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<sup>39</sup> *Op cit* (note 6).

<sup>40</sup> DJ McQuoid-Mason, 'Public health officials and MECs for health should be held criminally liable for causing the death of cancer patients through their intentional or negligent conduct that results in oncology equipment not working in hospitals' (2017) 10 (2) *SAJBL*, 83.

<sup>41</sup> C J Chibwesha et al. 'Estimating the burden of cervical disease among HIV-infected women accessing screening services in South Africa: A model-based analysis' (2018) 108(3) *SAMJ*, 235.

<sup>42</sup> 'The International Agency for Research on Cancer (IARC) is the specialized cancer agency of the World Health Organization. The objective of the IARC is to promote international collaboration in cancer research. The Agency is inter-disciplinary, bringing together skills in epidemiology, laboratory sciences and biostatistics to identify the causes of cancer so that preventive measures may be adopted and the burden of disease and associated suffering reduced. A significant feature of the IARC is its expertise in coordinating research across countries and organizations; its independent role as an international organization facilitates this activity. The Agency has a particular interest in conducting research in low and middle-income countries through partnerships and collaborations with researchers in these regions' available at <https://www.iarc.fr/en/about/index.php> (accessed on 1 May 2018).

<sup>43</sup> 'KZN cancer patients sent home with panados as treatment waiting lists grow' *Mail and Guardian Online* Bhekisisa Centre for Health Journalism, 21 September 2017 available at <http://bhekisisa.org/article/2017-09-21-the-malignant-province-kzn-and-the-unbearable-wait-to-die>, (accessed on 22 February 2018).

<sup>44</sup> World Health Organization 'Human papillomavirus and HPV vaccines: Technical information for policy-makers and health professionals' (2007) Munoz N et al. 'Epidemiologic classification of human papillomavirus types associated with cervical cancer' *New England Journal of Medicine* (2003) c.f. Ebrahim S et al. (2016) 'High Burden of Human Papillomavirus (HPV) Infection among Young Women in KwaZulu-Natal, South Africa' *PLoS ONE*, 19 January 2016 available at <https://doi.org/10.1371/journal.pone.0146603>, accessed on 2 April 2018.



HPV 18 are high-risk/oncogenic types which are linked with the development of cervical cancer.<sup>45</sup>

The state of oncology care in Kwa Zulu-Natal also constitutes violations of patient's constitutional rights, as highlighted in the SAHRC Report. The report investigated two health institutions<sup>46</sup> in Durban, both of which have specialised oncology units. The commission found that the cervical cancer patients' constitutional rights of access to health care<sup>47</sup>, human dignity<sup>48</sup> and to life<sup>49</sup> have been violated.<sup>50</sup>

## 1.5 Research Methodology

This research will use qualitative methods in the form of desktop research. The various sources of data include: The Constitution of the Republic of South Africa, 1996, legislation, policy, regulations, common law, legal ethics, international law instruments, newspaper articles, journal articles and an investigative report by the South African Human Rights Commission.

The application of the Constitution of the Republic of South Africa on the oncology crisis in Kwa Zulu-Natal will be examined. The relevant sections provide that every person has the right of access to health care services<sup>51</sup> and the right to dignity<sup>52</sup>. The constitution also imposes the obligation on the state to uphold these rights.<sup>53</sup>

The law that was passed<sup>54</sup> to realise the constitutional right of access to health care<sup>55</sup> is the National Health Act.<sup>56</sup> The Act, which is applicable to all levels of government, relates to health care services and other connected matters.<sup>57</sup>

Using the law of delict in South Africa, the following civil remedies will be investigated in this research: damages, mandamus interdict, including structural interdicts.

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<sup>45</sup> Ebrahim S et al. (2016) 'High Burden of Human Papillomavirus (HPV) Infection among Young Women in KwaZulu-Natal, South Africa' PLoS ONE, 19 January 2016 available at <https://doi.org/10.1371/journal.pone.0146603>, (accessed on 2 April 2018).

<sup>46</sup> Addington Hospital and Inkosi Albert Luthuli Central Hospital.

<sup>47</sup> S27 of the Constitution of the Republic of South Africa, 1996.

<sup>48</sup> Constitution of 1996 (note 16 above) Section 10.

<sup>49</sup> Constitution of 1996 (note 16 above) Section 11.

<sup>50</sup> SAHRC Investigative Report *op cit* (note 3), 64.

<sup>51</sup> Constitution of 1996 *Ibid* (note 16 above).

<sup>52</sup> Constitution of 1996 (note 16 above) Section 10.

<sup>53</sup> Constitution of 1996 (note 16 above) Section 7(2).

<sup>54</sup> Constitution of 1996 (note 16 above) Section 27(2).

<sup>55</sup> Constitution of 1996 (note 16 above) Section 27(1).

<sup>56</sup> The National Health Act 61 of 2003.

<sup>57</sup> Preamble of The National Health Act 61 of 2003.

Case law will be used to investigate aspects of socio-economic rights.<sup>58</sup> The elements relevant to this research include the meaning of ‘reasonableness’<sup>59</sup>, ‘progressive realisation’<sup>60</sup> and the relationship of the right of access to health care with the constitutional rights of human dignity and to life.<sup>61</sup>

This research will also investigate the policies<sup>62</sup> and regulations<sup>63</sup> that are applicable to the health sector. Under national policy the preamble to the National Core Standards reads that ‘The National Core Standards for Health Establishments have been expressly created as a statement of what is expected, and required, to deliver decent, safe, (sic) quality care’.<sup>64</sup> Further, the National Policy on Quality in Healthcare provides for units in each provincial department which are required to manage quality assurance, quality improvement and to provide continuous monitoring of compliance with standards to ensure quality health care.<sup>65</sup>

Under the health regulations in South Africa, regulation 4 of the Norms and Standards Regulations<sup>66</sup> states that ‘the purpose of the regulations is to guide, monitor and enforce the control of critical risks to the health and safety of users by means of the required systems and relevant supportive structures within different categories of health establishments, so to provide safe quality services to the citizens’.

It will also analyse international law instruments such as the Universal Declaration of Human Rights<sup>67</sup>, The International Covenant on Economic, Social and Cultural Rights<sup>68</sup>, The African Charter on Human and Peoples' Rights<sup>69</sup>, The World Health Organisation (WHO) and the Committee on Economic, Social and Cultural Rights (CESCR) General Comment on the Right to Health (General Comment 14), all of which describe the universal norms and standards of health care. These must be considered when interpreting the right of access to health care services.<sup>70</sup>

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<sup>58</sup> South African Human Rights Commission (SAHRC) ‘Investigative Report in to complaint by Dr. Imran Keeka relating to both shortages of staff and a lack of functional health technology machines for screening, diagnosing and treating cancer in the Kwa Zulu-Natal Province (KZN Province)’ (2017), 46.

<sup>59</sup> Government of the Republic of South Africa and Others v Grootboom and Others (CCTI 1100) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).

<sup>60</sup> Grootboom *supra*, at para 46.

<sup>61</sup> Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development (CCT 13/03, CCT 12/03) [2004] ZACC 1 1 ; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (4 March 2004).

<sup>62</sup> National Policy on Quality in Healthcare (2007) (National Policy); National Core Standards for Health Establishment in South Africa (2011) (National Core Standards).

<sup>63</sup> Norms and Standards Regulations in terms of Section 90 (1)(b) and (c) of the National Health Act, 61 of 2003, Applicable to Certain Categories of Health Establishments No. R. 109 (18 February 2015).

<sup>64</sup> Preamble of The National Core Standards for Health Establishment in South Africa (2011).

<sup>65</sup> SAHRC Investigative Report *op cit* (note 3), 40-41.

<sup>66</sup> Norms and Standards Regulations in terms of Section 90 (1)(b) and (c) of the National Health Act, 61 of 2003, Applicable to Certain Categories of Health Establishments No. R. 109 (18 February 2015).

<sup>67</sup> Universal Declaration of Human Rights, 1948.

<sup>68</sup> International Covenant on Economic, Social and Cultural Right, 1976.

<sup>69</sup> African Charter on Human and Peoples' Rights, 1986.

<sup>70</sup> Constitution of 1996 (note 16 above) Section 39(1)(b).

Lastly, ethical guidelines such as in the Health Professions Council of South Africa<sup>71</sup> (HPCSA), that provide ethical rules and guidelines for good practice will be referred to. These include the Ethical and Professional Rules of The Health Professions Council of South Africa as promulgated in Government Gazette R717/2006<sup>72</sup>, General Ethical Guidelines for Health Professions<sup>73</sup>, The National Patients' Rights Charter<sup>74</sup>, and the General Ethical Guidelines for Reproductive Health.<sup>75</sup>

## 1.6 Outline of chapters

This research paper begins by setting out the background of the oncology crisis, and the objective, need and method of this research, in chapter one.

Chapter two details the constitutional right violations of cancer patients due to the oncology crisis. These violations have been investigated and confirmed by the SAHRC.

Chapter three then goes on to set out and comment on the various sources of national and international law which exists as the South African legal framework, in relation to the right of access to health care services.

Chapter four of the research paper provides the possible civil remedies that are available in the law of delict, to those cervical cancer patients who have suffered harm during the oncology crisis.

Furthermore, this chapter will analyse the appropriateness of the remedies in the context of the oncology crisis. Finally, it will investigate the procedures used to bring restitution to victims of other health crises, in order to determine the effectiveness of the procedures for those cervical cancer patients who have suffered harm, during the oncology crisis in KZN.

Chapter five of the research paper identifies the public officials who may be sued for harm caused to cervical cancer patients and their families, during the oncology crisis from 2015 – 2017.

Chapter six concludes the research paper by making appropriate recommendations regarding the relief available to cervical cancer patients, who suffered harm during the oncology crisis in KZN.

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<sup>71</sup> 'The HPCSA, in conjunction with its 12 Professional Boards, is committed to promoting the health of the population, determining standards of professional education and training, and setting and maintaining excellent standards of ethical and professional practice' available at <http://www.hpcsa.co.za/About> (accessed on 2 May 2018).

<sup>72</sup> Health Professions Council of South Africa. Guidelines for Good Practice in the Healthcare Professions. Booklet 2. *Ethical and Professional Rules of The Health Professions Council of South Africa as promulgated in Government Gazette* (2007).

<sup>73</sup> Health Professions Council of South Africa. Guidelines for Good Practice in the Healthcare Professions. Booklet 1. *General Ethical Guidelines for Health Professions* (2016).

<sup>74</sup> Health Professions Council of South Africa. Guidelines for Good Practice in the Healthcare Professions. Booklet 3. *National Patients' Rights Charter* (2016).

<sup>75</sup> Health Professions Council of South Africa. Guidelines for Good Practice in the Healthcare Professions. Booklet 8. *General Ethical Guidelines for Reproductive Health* (2016).

## **1.7 Conclusion**

The chapter provided an overview of the oncology crisis in KZN during the period 2015-2017. It highlighted some of the challenges of the oncology crisis that have been brought to light, following investigations conducted by the SAHRC. It also examined the disproportionate effect of the oncology crisis on cervical cancer patients who are a vulnerable group in society, as well as the need for vindicating their constitutional rights.

This chapter then went on to provide a literature critique on the scholarly articles that are available on the oncology crisis, further, an objective is provided for the purpose of this research.

In addition, the methods of research used in this dissertation are explored and the outline for each of the following chapters are detailed.

## **CHAPTER TWO : CONSTITUTIONAL VIOLATIONS AND FINDINGS OF THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION ON THE ONCOLOGY CRISIS.**

### **2.1 Constitutional violations**

The right of access to health services is provided in section 27 of the Constitution, which forms part of the Bill of Rights in South Africa.<sup>76</sup> Section 27(2) states that reasonable legislative and other measures must be taken by the state, within the available resources of the state.<sup>77</sup> These measures must progressively realise the right of access to health care.<sup>78</sup> The constitutional right of access to health care further states that no person may be refused emergency medical treatment.<sup>79</sup> However, children have a stronger health right provided by the Constitution, which states that each child has a right to basic health care services.<sup>80</sup> This means that children are entitled to receive basic health care and not just the right to have access to these services.

In addition, the right to dignity is afforded to every person by their inherent virtue of being human.<sup>81</sup> Therefore, every person has the right to have their dignity respected and protected.<sup>82</sup> Section 11 of the Constitution further provides that every person has the right to life.<sup>83</sup> It also notes that there is a constitutional obligation on the state to 'respect, protect, promote and fulfil the rights in the Bill of Rights'.<sup>84</sup>

Lastly, the Constitution grants legislative competence to both the national and provincial government, and lists 'health services' as an area of concurrent legislative power, which enables both levels of government to exercise this power.<sup>85</sup> This means that both the national and provincial government must work in collaboration, regarding issues relating to health services.<sup>86</sup> This includes working together to create strategies, that address provincial health care challenges such like the oncology crisis.<sup>87</sup>

### **2.2 Determining the reasonableness of actions by public health officials**

As previously mentioned, the SAHRC was tasked to make a determination regarding the complaint put before it by Democratic Alliance MPL, Dr Imran Keeka.<sup>88</sup> The Commission had to decide on the reasonableness of the measures taken by the KwaZulu-Natal Health

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<sup>76</sup> The Constitution of the Republic of South Africa of 1996 Section 27(1)(a).

<sup>77</sup> The Constitution (note 32) Section 27(2).

<sup>78</sup> *Ibid.*

<sup>79</sup> The Constitution (note 32) Section 27(3).

<sup>80</sup> The Constitution (note 32) Section 28(1)(c).

<sup>81</sup> The Constitution (note 32) Section 10.

<sup>82</sup> *Ibid.*

<sup>83</sup> The Constitution (note 32) Section 11.

<sup>84</sup> The Constitution (note 32) Section 7(2).

<sup>85</sup> The Constitution (note 32) Schedule 4 Part A.

<sup>86</sup> SAHRC *Investigative Report op cit* (note 3) 35.

<sup>87</sup> *Ibid.*

<sup>88</sup> SAHRC *Investigative Report op cit* (note 3) 50.

Department, in their efforts to manage the oncology crisis. This determination also had to be made within the meaning and context of section 27 of the Constitution.<sup>89</sup>

The Commission had to make a finding as to whether the alleged shortage of oncologists, shortage of oncology staff, and the delay in provision of treatment to oncology patients, constituted a violation of the right of access to health care services.<sup>90</sup>

### 2.3 Findings of the SAHRC

Factual and evidentiary findings were used during the Commission's investigation to determine if the actions of the KZN Health Department, or the lack thereof, violated the right of access to health care.<sup>91</sup> The findings of the SAHRC's investigation included:

- A shortage of oncologists and oncology trained nursing staff in public hospitals, specifically at Inkosi Albert Luthuli Central and Addington Hospitals in KZN.<sup>92</sup>
- A lack of available functional equipment to diagnose, treat and screen cancer, which includes VRALA (Varian Rapid Arc Linear Accelerator) machines used for radiotherapy treatment and CT scanners.<sup>93</sup>
- A backlog of patients awaiting oncology services.<sup>94</sup>
- Delay in provision of oncology services at Inkosi Albert Luthuli Hospital and Addington Hospital.<sup>95</sup>
- Waiting periods for treatment and screening appointments that exceed 6 months.<sup>96</sup>

As previously mentioned, there is an obligation on the state to realise and promote the rights contained in the Bill of rights.<sup>97</sup> This obligation was given further interpretation by the Constitutional Court in the *Grootboom* case,<sup>98</sup> where the Constitutional court underlined that in relation to socio-economic rights, mere legislation is insufficient to realise this category of rights.<sup>99</sup> Legislation has to be supported by suitable policy measures and programmes implemented by the Executive, so that the state complies with its constitutional duties and the intended result of such rights.<sup>100</sup>

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<sup>89</sup> *Ibid.*

<sup>90</sup> SAHRC *Investigative Report op cit* (note 3) 50.

<sup>91</sup> *Ibid.*

<sup>92</sup> SAHRC *Investigative Report op cit* (note 3) 51 – The then head of the KZN Health Department, Dr Sifiso Mtshali, alleges in a written response to the commission dated 11/05/17 that the major challenge is the lack of trained doctors and not the unavailability of functional oncology equipment. He also alleges in a response dated 25/05/17, that the public sector has been losing oncologists to the private sector long before the crisis begun in Addington Hospital. He states that it is not possible to provide any oncology services without the appropriately trained specialists.

<sup>93</sup> SAHRC *Investigative Report op cit* (note 3) 51.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> The Constitution (note 32) Section 7(2).

<sup>98</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 ZACC 19.

<sup>99</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* supra at 54 para 33.

<sup>100</sup> *Ibid.*

An earlier report by the SAHRC on ‘*Public Hearings into the Right of Access to Health Services*’,<sup>101</sup> noted that the legislative and policy measures in South Africa, do conform to the international standards regarding the right of access to health care services.<sup>102</sup> It further noted that what is needed in the South African context of the right of access to health care services, is proper implementation of the measures that are in place.<sup>103</sup>

Investigations conducted by the SAHRC have revealed that oncology patients were subjected to delays in their treatment of more than 6 months in all the cases that the Commission became aware of through interviews with patients, and information by staff of Inkosi Albert Luthuli Central Hospital.<sup>104</sup> As a result of such delays in the provision of treatment, it is highly probable that oncology patients’ right of access to health care services have been denied, due to poor implementation of health policy measures.<sup>105</sup>

Despite the legislative and policy measures in place in South Africa that meet the constitutional standard of reasonableness, the SAHRC found that the implementation of these measures by the KZN health sector, cannot be deemed to have met the reasonableness standard.<sup>106</sup>

## **2.4 The shortage of oncology staff and oncology machines in KZN**

Following the investigations conducted by the SAHRC, it became apparent to the commission that the shortage of both oncology staff and machines has been a continuous problem in KZN, including at the Addington and Inkosi Albert Luthuli hospitals.<sup>107</sup>

The SAHRC was also unable to establish whether the Management Plan in place to ensure access to health services, had ever been evaluated in accordance with section 25(2) of the National Health Act since its implementation.<sup>108</sup> Further, it was not clear to the Commission if the KZN Health Department had evaluated whether the level of care set out in the Management Plan was sufficient to meet the current demands of the oncology crisis in KZN.<sup>109</sup>

The SAHRC noted that the patient referral system at Inkosi Albert Luthutli Hospital, arising from the shortage of oncologists and machines at Addington and King Edward hospitals, had created another backlog of patients awaiting oncology services.<sup>110</sup> This new backlog added to the delay of oncology services, including possible lifesaving treatment.<sup>111</sup>

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<sup>101</sup> South African Human Rights Commission (SAHRC) *A report and recommendations based on the submissions and proceedings of the Public Hearings conducted at the national office of the South African Human Rights Commission, Parktown, Johannesburg from 30 May to 1 June 2007* accessed from <https://www.sahrc.org.za/home/21/files/Health%20Report.pdf> (accessed on 6 August 2018).

<sup>102</sup> SAHRC *Public Hearings Report op cit* (note 57) c.f. SAHRC *Investigative Report op cit* (note 3) 53.

<sup>103</sup> SAHRC *Public Hearings Report op cit* (note 57).

<sup>104</sup> SAHRC *Investigative Report op cit* (note 3) 53.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*

<sup>107</sup> SAHRC *Investigative Report op cit* (note 3) 54.

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*

Through numerous interviews conducted by the SAHRC, it was established that the rescheduling of oncology patient appointments which had caused delay<sup>112</sup> in treatment, was a result of non-functioning machines and a lack of oncologists.<sup>113</sup> An increase in the prevalence of cancer patients in the KZN province, may also be recognised as a contributing factor in the demand for oncology services.<sup>114</sup>

Plans by the KZN Health Department to direct resources in aiding with patients treatment which had been backlogged at Inkosi Albert Luthuli Hospital, and other oncology units at state facilities in KZN, did not provide adequate remedy to lessening the crisis of the department's oncology services.<sup>115</sup> The plan merely created new backlogs and denied oncology services to new oncology patients, which the SAHRC described as 'unacceptable' and a further continuation of the 'crisis mode'.<sup>116</sup>

The interviews revealed that the service management agreements in place for oncology machines were not effective, since the CT scanners broke down frequently.<sup>117</sup> This hindered early diagnosis and treatment, which the World Health Organisation (WHO) has set guidelines concerning cancer diagnosis and treatment as follows:

‘diagnosing cancer in the late stages, and the inability to provide treatment, condemns many people to unnecessary suffering and early death...by taking steps to implement WHO's new guidance, healthcare planning can improve early diagnosis of cancer and ensure prompt treatment. This will result in more people surviving cancer. It will also be less expensive to treat and cure cancer patients’<sup>118</sup>

The long waiting periods for treatment and hospital transfers have had an adverse impact on diagnosis and treatment of cervical cancer, since re-diagnosis and extra appointments are needed when a patient eventually gets to see an oncologist on a delayed appointment date.<sup>119</sup> This backlog also negatively affected the working environment where staff were expected to work demanding hours, with limited human resources and equipment.<sup>120</sup> These conditions have forced staff to move away from the public sector, into the private sector.<sup>121</sup>

The reason for the shortage of functional oncology machines given by the KZN Health Department, on 8 June 2016 to the SAHRC, was contractual disputes with the service provider tasked with maintaining the oncology machines.<sup>122</sup> Resource constraints have never been mentioned as a factor in relation to the shortage on oncology machines.<sup>123</sup>

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<sup>112</sup> SAHRC *Investigative Report op cit* (note 3) 55 – An average waiting period of 5 months for an oncologist consultation, and further 8 months before receiving any radiotherapy treatment.

<sup>113</sup> SAHRC *Investigative Report op cit* (note 3) 55.

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.*

<sup>118</sup> Accessed from <http://www.who.int/en/news-room/detail/03-02-2017-early-cancer-diagnosis-saves-lives-cuts-treatment-costs> c.f. SAHRC *Investigative Report op cit* (note 3) 56.

<sup>119</sup> SAHRC *Investigative Report op cit* (note 3) 56

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

<sup>122</sup> SAHRC *Investigative Report op cit* (note 3) 57.

<sup>123</sup> *Ibid.*



The report by the SAHRC states that the denial and the delay of oncology services to patients, including those with life-threatening conditions, was a violation of their right to human dignity and their right to life.<sup>124</sup> Further, the denial and delay of treatment denied oncology patients the ability to enjoy other fundamental rights, due to their health being poor.<sup>125</sup>

The constitutional right to human dignity was interpreted by the courts in *Dawood and another v Minister of Home Affairs*,<sup>126</sup> where the courts explained that it is a right that must be respected and promoted, and is an enforceable value that usually informs the interpretation of other rights contained in the Constitution.<sup>127</sup> The SAHRC reports that an oncology patient's right to human dignity and to life is non-negotiable, and that it is the responsibility of the KZN Health Department to provide access to health care, while promoting and maintaining the standards for health care set out by the National Health Act.<sup>128</sup> However, the failure to retain and recruit oncology staff does not meet this standard.<sup>129</sup> The Commission considered this failure as an ineffectual effort to provide access to health care services, as set out by the National Health Act.<sup>130</sup>

Poor referral systems have done little to act as interim measures for public health care users, in aiding to effectively manage the oncology crisis.<sup>131</sup> The SAHRC emphasises that since the respondents were fully aware of the shortfalls in the provision of oncology services, their duty was at the very least, to take reasonable steps through recruitment of staff and management of an effective screening, diagnosis and treatment procedure for oncology patients in KwaZulu-Natal.<sup>132</sup>

Further the SAHRC points out that the shortage of oncology staff and specialists equally contributed to the deterioration of public oncology services, which had been evident in this crisis.<sup>133</sup> It is submitted that even where machines are available, it is not a solution if there are no oncology staff to properly operate such machines which treat, scan and diagnose oncology patients.

The SAHRC concluded that the respondents failed in taking reasonable measures, to ensure that human and technological resources were in place for the proper standard of care for oncology patients.<sup>134</sup> Accordingly, the KZN Health Department has failed to progressively realise the right of access to health care services in accordance with the spirit and purport of the National Health Act and the Constitution.<sup>135</sup>

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<sup>124</sup> SAHRC *Investigative Report op cit* (note 3) 58.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Dawood and Another v Minister of Home Affairs and Others ; Shalabi and Another v Minister of Home Affairs and Others ; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC).

<sup>127</sup> *Dawood and Another v Minister of Home Affairs and Others* supra at 82 para 17.

<sup>128</sup> SAHRC *Investigative Report op cit* (note 3) 58.

<sup>129</sup> SAHRC *Investigative Report op cit* (note 3) 59.

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

<sup>134</sup> SAHRC *Investigative Report op cit* (note 3) 61.

<sup>135</sup> SAHRC *Investigative Report op cit* (note 3) 61-62.

## 2.5 Steps taken thus far by the SAHRC

There has been written correspondence between the SAHRC and the KZN Health Department regarding the report.<sup>136</sup> The correspondence was initiated by the Commission for its preliminary investigative report, on 24 April 2017.<sup>137</sup> The only party to send a response to the commission was the KZN Department of Health on 25 May 2017, where it commented on the preliminary report.<sup>138</sup>

The SAHRC then sent out a written response to the KZN Health Department, on 4 May 2017. The letter listed the allegations brought against the department and provided an opportunity for them to reply to the allegations.<sup>139</sup> The KZN Health Department sent out their responses in correspondence to the commission, on 8 June 2017.<sup>140</sup>

Following the written responses, inspections *in loco* were conducted at Addington Hospital and Inkosi Albert Luthuli Central Hospital.<sup>141</sup> The SAHRC conducted site investigations at both hospitals, and interviews with staff and patients at Inkosi Albert Luthuli Hospital.<sup>142</sup>

After several calls for the KZN Department of Health to comply with the recommendations given by SAHRC following the above-mentioned investigations, the Commission conducted a hearing on 14 May 2018 at its Head Office in Braamfontein where the media were invited to attend. The MEC for Health, Dr. Dhlomo, was subpoenaed by the SAHRC to account for the ‘lack of progress’ made, following their Report.<sup>143</sup> At the hearing Dr Dhlomo reported that there were 349 deaths at Inkosi Albert Luthuli Central Hospital, and 150 deaths at Greys Hospital in Pietermaritzburg, KZN.<sup>144</sup> This total of 499 deaths from all cancers, were only those recorded at the mentioned hospitals, and excludes home/care facility deaths of oncology patients.<sup>145</sup> It was also noted at the hearing that the waiting period for treatment had been increased to as long as 12 months.<sup>146</sup> Dr Keeka, who laid the initial complaint to the SAHRC, stated that Dr. Dhlomo should ‘not escape justice for his uncaring and lethargic response which has led to the deaths of possibly more than 500 cancer patients, as a result of

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<sup>136</sup> SAHRC *Investigative Report op cit* (note 3) 5.

<sup>137</sup> *Ibid.*

<sup>138</sup> SAHRC *Investigative Report op cit* (note 3) 6.

<sup>139</sup> SAHRC *Investigative Report op cit* (note 3) 7.

<sup>140</sup> *Ibid.*

<sup>141</sup> SAHRC *Investigative Report op cit* (note 3), 19-28.

<sup>142</sup> SAHRC *Investigative Report op cit* (note 3), 29-34.

<sup>143</sup> ‘Media Statement: MEC of Health, KwaZulu-Natal, Hon. Dr Sibongiseni Dhlomo, to Appear before SAHRC in Subpoena hearing on Oncology Crisis’ 11 May 2018 accessed from <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/1326-media-statement-mec-of-health-kwazulu-natal-hon-dr-sibongiseni-dhlomo-to-appear-before-sahrc-in-subpoena-hearing-on-oncology-crisis> (accessed on 12 May 2018).

<sup>144</sup> Imran Keeka ‘#KZNOncologyCrisis: SAHRC must not allow MEC Dhlomo to escape justice’, accessed from <http://www.politicsweb.co.za/news-and-analysis/sahrc-must-not-allow-mec-dhlomo-to-escape-justice> (accessed on 15 May 2018); ‘KZN health MEC appears before human rights commission’ *Daily News*, 14 May 2018 available at <https://www.iol.co.za/dailynews/news/kzn-health-mec-appears-before-human-rights-commission-14968871> (accessed on 15 May 2018).

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.*

delays in treatment or a lack of access to proper oncology services in the province's hospitals'.<sup>147</sup>

Since the hearing at Braamfontein, some progress has been made by the KZN Health Department, in efforts to comply with the recommendations issued by the SAHRC.<sup>148</sup> Following the hearing, a site inspection conducted at Addington Hospital on 5 June 2018, by a delegation from the KZN Provincial Office of the SAHRC confirmed that one linear accelerator (VRALA) machine had been successfully repaired.<sup>149</sup>

The VRALA machine treated the first patient on 5 June 2018, and staff previously placed at Inkosi Albert Luthuli had returned to Addington Hospital to resume their duties at the oncology unit.<sup>150</sup> In addition, a newly qualified oncologist, Dr Nokwanda Zuma, had been recruited.<sup>151</sup> Dr Zuma stated that treatment would now resume for patients currently awaiting treatment, including new patients, and that she would require at least 6 specialists to run the oncology unit.<sup>152</sup> She further stated that more patients would be treated once Dr Shona Budree, the manager of oncology services in Durban, returned to Inkosi Albert Luthuli Central as head of their oncology unit in July 2018.<sup>153</sup>

In the wake of these improvements, Keeka, said it was important to remember that there is still only one senior oncologist for a lengthy patient list.<sup>154</sup> Moreover, a report compiled by the National Health Council, revealed that KZN continues to have the biggest backlog of oncology patients who await treatment in South Africa.<sup>155</sup> Approximately 8000 oncology patients await treatment at one of the three main state oncology hospitals ie. Inkosi Albert Luthuli Central Hospital, Addington Hospital and Greys Hospital.<sup>156</sup> Keeka also added that justice needs to be attained for those whose lives were lost during the crisis, due to poor standards of health care created by the actions of the public health officials.<sup>157</sup>

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<sup>147</sup> Imran Keeka '*#KZNOncologyCrisis: SAHRC must not allow MEC Dhlomo to escape justice*', accessed from <http://www.politicsweb.co.za/news-and-analysis/sahrc-must-not-allow-mec-dhlomo-to-escape-justice-> (accessed on 15 May 2018); '*#KZNOncologyCrisis: MEC Dhlomo tries to worm his way out of accountability for hundreds of deaths*' accessed from <http://www.politicsweb.co.za/news-and-analysis/sahrc-must-not-allow-mec-dhlomo-to-escape-justice-> (accessed on 17 May 2018).

<sup>148</sup> '*Media Statement: SAHRC Conducted a Site Inspection at Addington Hospital, Assessing KZN Health Department's Compliance with Commission's Recommendations*' 7 June 2018 accessed from <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/1360-media-statement-sahrc-conducted-a-site-inspection-at-addington-hospital-assessing-kzn-health-department-s-compliance-with-commission-s-recommendations> (accessed on 20 May 2018).

<sup>149</sup> Imran Keeka *op cit* (note 103).

<sup>150</sup> *Ibid.*

<sup>151</sup> 'Oncology treatment to resume at Addington Hospital' *Daily News*, 13 June 2018 accessed from <https://www.iol.co.za/dailynews/oncology-treatment-to-resume-at-addington-hospital-15454710> (accessed on 13 August 2018).

<sup>152</sup> *Ibid.*

<sup>153</sup> Imran Keeka *op cit* (note 103).

<sup>154</sup> *Ibid.*

<sup>155</sup> 'KZN has biggest cancer patient backlog' *Daily News*, 26 August 2018 accessed from <https://www.iol.co.za/dailynews/kzn-has-biggest-cancer-patient-backlog-17229453> (accessed on 27 August 2018).

<sup>156</sup> *Ibid.*

<sup>157</sup> Imran Keeka *op cit* (note 103).

## **2.6 Conclusion**

The first part of this chapter considered the constitutional violations of oncology patients, during the oncology crisis. The violations have been established by the SAHRC, following various investigations and interviews into the crisis. Shortage of staff, non-functional equipment and delays in treatment are amongst their findings.

In addition, the Commission evaluated the reasonableness of the actions of public health officials in the KZN Department of Health and, found evidence to satisfy the allegation that officials failed to act reasonably in realising the right of access to health care, for oncology patients.

It is against this backdrop that this paper will explore the position of cervical cancer patients in KZN. Although treatment has gradually resumed, the question that begs a response is what remedies are available to cervical cancer patients who have suffered harm, during 2015-2017. Furthermore, the question remains as to which public health officials should be held responsible for cervical patients not being able to access health care services. The following chapters of this research will address these questions.

## CHAPTER THREE: LEGAL AND ETHICAL FRAMEWORK OF THE RIGHT OF ACCESS TO HEALTH CARE

As previously mentioned in chapter two, there is a strong legal framework in South Africa which has been established to realise the constitutional right of access to health care services.<sup>158</sup> This chapter sets out the various forms of legal instruments relating to health care in South Africa which includes legislation, policy, regulations, ethical guidelines and refers to international law instruments which have been ratified by South Africa. The constitutional right of access to health care has been already been discussed in Chapter two.<sup>159</sup>

### 3.1 Human right norms applicable to the context of the right of access to health care

Section 39(1) of the constitution provides that a court, tribunal or forum must consider international law when interpreting the rights set out in the Bill of rights.<sup>160</sup> Therefore, the constitution is instrumental in ensuring that international law instruments are considered when interpreting the right of access to health care.<sup>161</sup> In accordance with section 39(1) several international and regional legal instruments, which have been ratified by South Africa, will be used in interpreting the right of access to health care. These include, The Universal Declaration of Human Rights, The International Covenant on Economic, Social and Cultural Rights, The African Charter, The Committee on Economic, Social and Cultural Rights and health standards provided by the World Health Organisation.

#### 3.1.1 Universal Declaration of Human Rights, 1948 (UDHR).

The Universal Declaration of Human Rights (UDHR) is a revolutionary human rights document that sets out, for the first time in history, a set of fundamental human rights that must be protected.<sup>162</sup> Chapman takes the view that the UDHR is regarded as the ‘mainspring’ of all human rights that exists today.<sup>163</sup> The document was drafted by various representatives from around the globe, with a range of different legal and cultural influences.<sup>164</sup> The Declaration has been deemed a common standard for all member states to achieve the fundamental rights and freedoms contained in the declaration, for all individuals.<sup>165</sup>

Article 25(1) of the declaration states:

‘that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary

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<sup>158</sup> SAHRC *Public Hearings Report op cit* (note 57).

<sup>159</sup> See Chapter two part 2.1 for discussion on constitutional right(s) violations as a result of the oncology crisis.

<sup>160</sup> The Constitution (note 32) Section 39(1).

<sup>161</sup> A Singh, T Maseko ‘The protection of prisoners’ rights to health care services in South African law: Is it adequate?’ 31 *Journal for Juridical Science* (2006) 87.

<sup>162</sup> The Universal Declaration of Human Rights, 1948 available at <http://www.un.org/en/universal-declaration-human-rights/> (accessed on 29 August 2018).

<sup>163</sup> AR Chapman ‘Exploring a human rights approach to health care reform’ *United States of America: AAAS Publications* (1993) 7.

<sup>164</sup> The Universal Declaration of Human Rights *op cit* (note 187).

<sup>165</sup> *Ibid.*

social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.’<sup>166</sup>

The standard of adequate living which the declaration prescribes, expressly includes medical care.

### **3.1.2 International Covenant on Economic, Social and Cultural Rights, 1966. (ICESCR)**

The International Covenant on Economic, Social and Cultural rights (ICESCR) forms part of the International Bill of Rights, together with the UDHR and the International Covenant on Civil and Political rights.<sup>167</sup> The rights contained in the ICESCR enable individuals to live a life with dignity and covers economic, social and cultural rights.<sup>168</sup> The Covenant commits its member parties to work toward achieving these rights, including the right to health. South Africa ratified the ICESCR on 12 January 2015.<sup>169</sup>

Article 12(1) of the Covenant provides for the right to health to which every individual is entitled.<sup>170</sup> Further, it states that every person should enjoy the highest standard of physical and mental health that is attainable by a member state of the Covenant.<sup>171</sup> Article 12(1) goes on to set out some guidelines that parties to the covenant should follow, so that the right to health is fully realised. These guidelines include the need to provide for:

- (a) ‘The reduction of the stillbirth-rate and infant mortality, and the healthy development of the child;
- (b) The improvement of all aspects of environmental and industrial hygiene;
- (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.’<sup>172</sup>

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<sup>166</sup> Universal Declaration of Human Rights, Article 25(1) available at [http://www.claiminghumanrights.org/udhr\\_article\\_25.html](http://www.claiminghumanrights.org/udhr_article_25.html) (accessed on 22 August 2018).

<sup>167</sup> International Covenant on Economic, Social and Cultural Rights, 1954 available at <https://www.equalityhumanrights.com/en/our-human-rights-work/monitoring-and-promoting-un-treaties/international-covenant-economic-social> (accessed on 29 August 2018).

<sup>168</sup> International Covenant on Economic, Social and Cultural Rights *op cit* (note 192).

<sup>169</sup> ‘SAHRC welcomes Government’s decision to ratify the International Covenant on Economic, Social and Cultural Rights (ICESCR)’ available at <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/305-sahrc-welcomes-government-s-decision-to-ratify-the-international-covenant-on-economic-social-and-cultural-rights-icescr> (accessed on 29 August 2018).

<sup>170</sup> International Covenant on Economic, Social and Cultural Rights, Article 12(1).

<sup>171</sup> International Covenant on Economic, Social and Cultural Rights *op cit* (note 195).

<sup>172</sup> International Covenant on Economic, Social and Cultural Rights, Article 12(2) accessed from <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx> (accessed on 22 August 2018).

### 3.1.3 The African Charter on Human and Peoples' Rights, 1986. (Banjul Charter)

Similar to the UDHR and the ICESCR, the Banjul Charter is an international law instrument that aims to promote and protect the fundamental human rights of individuals and basic freedoms, in Africa.<sup>173</sup> In addition, an African Court on Human and People's Rights has been created to protect the rights contained in the Charter.<sup>174</sup> The Banjul charter was ratified by South Africa on 9 July 1996.<sup>175</sup>

Article 16(1) provides for the right of every individual to have the 'best attainable state of physical and mental health'.<sup>176</sup> It further notes, that there is a duty on member states to protect the health of all individuals and provide individuals with medical care when they are ill.<sup>177</sup>

It is submitted, that the African Charter is the most useful instrument because it is drafted to take into account African culture and legal philosophy, that is particularly directed toward African needs and concerns.<sup>178</sup> This can be observed from the Charter's preamble.<sup>179</sup> As a result, the Charter allows member states to evaluate their responsibility in protecting individual's human rights, according to an instrument that recognises the challenges unique to Africa and its people.

### 3.1.4 World Health Organisation (WHO)

South Africa is a member of the World Health Organisation (WHO), which provides leadership to those members in the United Nations system on matters that are critical to health care.<sup>180</sup> The WHO also establishes norms and standards in health care and monitors their implementation, while assessing health trends and the evolving health situations globally.<sup>181</sup> In addition, cancer as a non-communicable disease (NCD), is an area in the health system within which WHO works.<sup>182</sup>

According to the WHO, health should be understood as a human right which creates a legal obligation on states to ensure that there is access by individuals to this fundamental human

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<sup>173</sup> African Charter on Human and Peoples' Rights, 1981 available at <http://www.achpr.org/instruments/achpr/> (accessed on 22 August 2018).

<sup>174</sup> The African Court on Human and Peoples' Rights, 2004 accessed from <http://en.african-court.org/index.php/12-homepage1/1-welcome-to-the-african-court> (accessed on 22 August 2018).

<sup>175</sup> African Commission on Human and Peoples' Rights 'State Reporting' available at <http://www.achpr.org/states/> (accessed 22 August 2018).

<sup>176</sup> African Charter on Human and Peoples' Rights, Article 16(1).

<sup>177</sup> African Charter on Human and Peoples' Rights, Article 16(2).

<sup>178</sup> N Ewunetie, A Alemayehu 'The Distinctive Feature of the African Charter' (2012) accessed from <https://www.abysiniaweb.com/about-us/item/361-the-distinctive-feature-of-the-african-charter> (accessed on 22 October 2018).

<sup>179</sup> *Ibid.*

<sup>180</sup> World Health Organisation 'What we do' accessed from <http://www.who.int/about/what-we-do/en/> (accessed on 30 August 2018).

<sup>181</sup> World Health Organisation 'What we do' *op cit* (note 205).

<sup>182</sup> *Ibid.*



right.<sup>183</sup> This obligation means ensuring access to health care that is timely, appropriate, acceptable, affordable and of appropriate quality.<sup>184</sup>

The Constitution of WHO further reaffirms the standard of health care provided by the UDHR, ICESCR and the African Charter, by providing that ‘the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition’<sup>185</sup>

Further, WHO has released a draft global strategy on eliminating cervical cancer and has named this type of cancer a global health priority.<sup>186</sup> The strategy covers the plan for the next century (2020 – 2030) and proposes key interventions that will lead to elimination of cervical cancer as a public health problem.<sup>187</sup>

These approaches include HPV vaccinations, screening and treatment of pre-cancer, early detection and prompt treatment of invasive cervical cancers and palliative care.<sup>188</sup> WHO is set to establish a further framework to monitor implementation and validate elimination of cervical cancer as a public health concern.<sup>189</sup>

This draft policy is in addition to the existing ‘Comprehensive cervical cancer control: a guide to essential practice’<sup>190</sup> published in 2014, which also deals with HPV vaccinations, use of HPV tests as a tool for early detection of cervical cancer and wider education of this disease, specifically in rural areas where there is clear inequity regarding health care services.<sup>191</sup>

### **3.1.5 Committee on Economic, Social and Cultural Rights, 1985 (CESCR).**

The Committee on Economic, Social and Cultural rights (CESCR) was established to monitor the application of the International Covenant on Economic, Social and Cultural Rights by its member states.<sup>192</sup> The Committee consists of 18 independent experts with high moral

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<sup>183</sup> World Health Organisation ‘Human Rights and Health’ accessed from <http://www.who.int/mediacentre/factsheets/fs323/en/> (accessed on 30 August 2018).

<sup>184</sup> World Health Organisation ‘Human Rights and Health’ *op cit* (note 208).

<sup>185</sup> World Health Organisation – Statement by Dr T.A Ghebreyesus, WHO Director-General ‘Health is a fundamental human right’ 2017 accessed from <http://www.who.int/mediacentre/news/statements/fundamental-human-right/en/> (accessed on 22 August 2018).

<sup>186</sup> World Health Organisation ‘Global Strategy towards the elimination of Cervical Cancer as a public health problem – Draft’ accessed from <https://www.who.int/docs/default-source/documents/cervical-cancer-elimination-draft-strategy.pdf> (accessed on 26 February 2020).

<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid.*

<sup>189</sup> *Ibid.*

<sup>190</sup> World Health Organisation ‘Comprehensive cervical cancer control: a guide to essential practice’ accessed from <https://www.who.int/reproductivehealth/publications/cancers/cervical-cancer-guide/en/> (accessed on 26 February 2020).

<sup>191</sup> *Ibid.*

<sup>192</sup> Committee on Economic, Social and Cultural Rights, 1985 accessed from <https://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx> (accessed on 30 August 2018).



standing and renowned competence in the area of human rights.<sup>193</sup> The Committee adopted General Comment 14 ‘The right to the highest attainable standard of health’ (Article 12), which confirms the common position on the right to health, by the above international instruments.<sup>194</sup> General Comment 14 states that health care facilities must be physically and economically accessible to the population, culturally and ethically acceptable to the environment, and must provide an appropriate quality of medical care.<sup>195</sup>

In addition, General Comment 14 provides that:

- There is an obligation on a state party to respect an individual’s right to health and therefore, it should not deny or limit his/her access to health care services.<sup>196</sup> These health services must also be available to all individuals and free from discrimination.<sup>197</sup>
- It is the duty of a state party to protect the right to health and ensure equal access to health care services to all individuals.<sup>198</sup> This duty entails, inter alia, adopting legislation and other measures to achieve equal access to health care services, particularly access for vulnerable groups like women.<sup>199</sup>
- There is an obligation on a state party to promote and fulfil the right to health, by fostering research, distributing appropriate information and implementing measures including policy plans, that realise the right to health.<sup>200</sup>
- Finally, it is a duty of a state party to provide for people in need of a health care service, in the absence of a group or individual who is able to provide the specific service that is required.<sup>201</sup> In addition, state parties must recognise the needs of vulnerable groups and realise their right to health using within the means at their disposal.<sup>202</sup>

Unlike the above international instruments, General Comment 14 specifically provides the duty of member states, to adopt measures that achieve equality in health care, particularly for women as a vulnerable group.

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<sup>193</sup> Committee on Economic, Social and Cultural Rights ‘Membership’ accessed from <https://www.ohchr.org/EN/HRBodies/CESCR/Pages/Membership.aspx> (accessed on 30 August 2018).

<sup>194</sup> CESCR General Comment No. 14: ‘The Right to the Highest Attainable Standard of Health’, Article 12 accessed from <https://www.refworld.org/pdfid/4538838d0.pdf> (accessed on 24 August 2018).

<sup>195</sup> CESCR General Comment No. 14 General comment *op cit* (note 213) para 12.

<sup>196</sup> CESCR General Comment No. 14 General comment *op cit* (note 213) para 34.

<sup>197</sup> *Ibid.*

<sup>198</sup> CESCR General Comment No. 14 General comment *op cit* (note 213) para 35.

<sup>199</sup> *Ibid.*

<sup>200</sup> CESCR General Comment No. 14 General comment *op cit* (note 213) para 36-37.

<sup>201</sup> CESCR General Comment No. 14 General comment *op cit* (note 213) para 37.

<sup>202</sup> *Ibid.*

It is submitted, that the general position on the right to health in terms of the above international and regional human rights instruments, is that there is a duty on the state to ensure that individuals have access to health care. The provision of health care must be of the ‘highest attainable standard of health’. This can be done by adopting appropriate measures to ensure that the right to health is realised.

## **3.2 Legal Framework**

The relevant legislative framework regulating the right of access to health care as it pertains to the issues of the oncology crisis include the National Health Act, the Public Finance Management Act and the Hazardous Substances Act.

### **3.2.1 The National Health Act**

The National Health Act<sup>203</sup> was enacted to give effect to section 27(2) of the constitution which provides that the state must take legislative and other measures, to ensure that the right of access to health care is progressively realised within the available resources of the state.<sup>204</sup>

The purpose of the National Health Act is set out in section 2 and provides that the objective of the act is to regulate health care services in South Africa, in both the public and private sector.<sup>205</sup> Further, the Act aims to establish a health system that provides equitable and progressive realisation of the right of access to health care.<sup>206</sup> Section 2 also states that the National Health Act sets out the rights and duties of health personnel,<sup>207</sup> including the specific duty to protect and promote the rights of ‘vulnerable groups such as women, children, older persons and persons with disabilities’.<sup>208</sup>

The duties of the Minister of Health are dealt with in section 3 and places a duty on the Minister to fulfil these duties, within the resources available to the state.<sup>209</sup> These ministerial obligations include:

- Protecting and maintaining the health of the population.<sup>210</sup>
- Determining the policies and measures required to ensure provision of essential health care services that must include primary health services, as determined after consultation with the National Health Council.<sup>211</sup>
- Equitably arranging and prioritising health services which the state is able to provide, including advocating for the inclusion of health services in the socio-economic plan of the Republic.<sup>212</sup>

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<sup>203</sup> The National Health Act 61 of 2003.

<sup>204</sup> The Constitution (note 32) Section 27(2).

<sup>205</sup> The National Health Act (note 116) Section 2(a)(i).

<sup>206</sup> The National Health Act (note 116) Section 2(a)(ii).

<sup>207</sup> The National Health Act (note 116) Section 2(b).

<sup>208</sup> The National Health Act (note 116) Section 2(c)(iv).

<sup>209</sup> The National Health Act (note 116) Section 3(1).

<sup>210</sup> The National Health Act (note 116) Section 3(1)(a).

<sup>211</sup> The National Health Act (note 116) Section 3(1)(c)-(d).

<sup>212</sup> The National Health Act (note 116) Section 3(1)(e)-(b).

In addition to the aforementioned duties of the Minister, section 3(2) sets out the duty of the National and Provincial Health Departments, together with every local municipality, to equitably provide health care services that are required in terms of the National Health Act, within the state's available resources.<sup>213</sup>

Further, the MEC for health in every province of the Republic must ensure that National Health policy, norms and standards are enforced in that province.<sup>214</sup> It is also stated that the relevant head of a Provincial Health Department must provide health services that is in accordance with both National Health policy, and the health policy of that province.<sup>215</sup> The health services relevant to the oncology crisis in KZN include, the provision of specialised hospital services, efficient management of finance and human resources and the control of the quality of health care services and facilities.<sup>216</sup>

### 3.2.1.1 Duty of transfer

Where a public health establishment is unable to provide the necessary treatment needed by a user<sup>217</sup>, such user must be transferred to another public health facility which can provide the required treatment.<sup>218</sup> The relevant MEC for health in a province may determine the terms and manner in which the treatment or care is provided, and the MEC must make this decision in a procedurally fair, economic and prompt way.<sup>219</sup>

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<sup>213</sup> The National Health Act (note 116) Section 3(2).

<sup>214</sup> The National Health Act (note 116) Section 25(1).

<sup>215</sup> The National Health Act (note 116) Section 25(2).

<sup>216</sup> The National Health Act (note 116) Section 25(2):

'The head of a provincial department must, in accordance with national health policy and the relevant provincial health policy in respect of or within the relevant province—

- (a) provide specialised hospital services;
- (b) plan and manage the provincial health information system;
- (f) plan, co-ordinate and monitor health services and must evaluate the rendering of health services;
- (i) plan, manage and develop human resources for the rendering of health services;
- (j) plan the development of public and private hospitals, other health establishments and health agencies;
- (k) control and manage the cost and financing of public health establishments and public health agencies;
- (l) facilitate and promote the provision of comprehensive primary health services and community hospital services;
- (n) control the quality of all health services and facilities;
- (o) provide health services contemplated by specific provincial health service programmes;
- (p) provide and maintain equipment, vehicles and health care facilities in the public sector;
- (w) provide services for the management, prevention and control of communicable and non-communicable diseases.'

<sup>217</sup> The National Health Act (note 116) Section 1:

'**"user"** means the person receiving treatment in a health establishment, including receiving blood or blood products, or using a health service, and if the person receiving treatment or using a health service is (a) below the age contemplated in section 39 (4) of the Child Care Act, 1983 (Act No. 74 of 1983), **'user'** includes the person's parent or guardian or another person authorised by law to act on the firstmentioned person's behalf; or (b) incapable of taking decisions, **'user'** includes the person's spouse or partner or, in the absence of such spouse or partner, the person's parent, grandparent, adult child or brother or sister, or another person authorised by law to act on the firstmentioned person's behalf.'

<sup>218</sup> The National Health Act (note 116) Section 44(2).

<sup>219</sup> *Ibid.*

### **3.2.1.2 Provision of human resources**

Section 48 deals with development and provision of human resources in the National Health system. It provides that the National Health Council must establish policy and guidelines for human resources, and effectively monitor the utilisation, provision, distribution and management of the human resources in the National Health system.<sup>220</sup>

The policy and guidelines established by the National Health Council must, inter alia, advance and enable: (a) the necessary distribution of human resources, (b) the provision of appropriately trained staff at every level of the health system, (c) making sure that the health needs of the population are met and (d) ‘the effective and efficient utilisation, functioning, management and support of system to meet the population’s health care needs; and human resources within the National Health system’.<sup>221</sup>

It is submitted, that the National Health Act recognises the importance of protecting the rights of women since they are a vulnerable and marginalised group. Therefore, the rights of cervical cancer patients are recognised by the National Health Act as rights that need promotion and protection by health personnel.

In addition, the National Health Act also prescribes, in detail, the duties of the MEC for health in a province and the Minister of Health in the Republic. This is useful in determining the accountability of these public health officials in the oncology crisis in KZN, particularly in the issues relevant to the oncology crisis, such as the need for effective management of human resources and the duty to transfer patients to a different health care facility when a certain facility is unable to provide the required treatment.

### **3.2.2 The Hazardous Substances Act**

In South Africa oncology equipment like the VRALA machines, which are used to treat cervical cancer patients, are regulated by the Hazardous Substances Act 15 of 1973. These machines contain radio-active material and are categorised as Group IV substances, according to the Hazardous Substances Act.<sup>222</sup> The Hazardous Substances Act and its regulations will be discussed further in Chapter five.<sup>223</sup>

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<sup>220</sup> The National Health Act (note 116) Section 48(1).

<sup>221</sup> The National Health Act (note 116) Section 48(2)(a)-(c)

<sup>222</sup> The Hazardous Substances Act 15 of 1973 Section 2(1)(c).

<sup>223</sup> See Chapter 5 Part 5.1.2 for discussion on the Hazardous Substances Act, and the sections that have been breached during the oncology crisis between 2015 – 2017.

### 3.2.3 The Public Finance Management Act

The Public Finance Management Act<sup>224</sup> regulates the management of finances at both national and provincial government.<sup>225</sup> It provides the procedures that should be used to ensure ‘efficient’ and ‘effective’ management of revenue, assets, liabilities and expenditure.<sup>226</sup> Further, it establishes the responsibilities of public officials who hold positions of managing finance.<sup>227</sup>

The Public Finance Management Act aims to secure accountability and transparency in managing public and government institutions.<sup>228</sup> The relevance of this Act in relation to the oncology crisis will be discussed in Chapter five.<sup>229</sup>

### 3.3 Regulations

Regulations have equal legal force as legislation in South Africa.<sup>230</sup> The relevant regulation concerning health care, within the context of the oncology crisis, is the Norms and Standards Regulations in terms of Section 90 (1) (b) and (c) of the NHA, applicable to certain categories of Health Establishments.

#### 3.3.1 Norms and Standards Regulations in terms of Section 90 (1) (b) and (c) of the NHA, applicable to certain categories of Health Establishments (Norms and Standards Regulations), 2003.

The Norms and Standards Regulations intend to monitor, guide and implement control of risks to health care.<sup>231</sup> To achieve risk control in various categories of health care facilities, necessary health systems and support structures are required so that the provision of safe, quality health care is achieved.<sup>232</sup>

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<sup>224</sup> The Public Finance Management Act 1 of 1999.

<sup>225</sup> ‘Summary of the Public Finance Management Act, no. 1 of 1999 (With Amendments)’ accessed from [https://ossafrica.com/esst/index.php?title=Summary of the Public Finance Management Act%2C no. 1 of 1999 %28With Amendments%29](https://ossafrica.com/esst/index.php?title=Summary_of_the_Public_Finance_Management_Act%2C_no._1_of_1999_%28With_Amendments%29) (accessed on 13 November 2018).

<sup>226</sup> The Public Finance Management Act 1 of 1999 – Long title.

<sup>227</sup> *Summary of the Public Finance Management Act op cit* (note 138).

<sup>228</sup> *Summary of the Public Finance Management Act op cit* (note 138).

<sup>229</sup> See Chapter 5 Part 5.7.1 for discussion on the Public Finance Management Act and its relevance to the oncology crisis.

<sup>230</sup> ‘The Policy and law making process’ accessed from <http://www.etu.org.za/toolbox/docs/govern/policy.html> (accessed on 22 October 2018).

<sup>231</sup> Norms and Standards Regulations in terms of Section 90 (1) (b) and (c) of the National Health Act, applicable to certain categories of Health Establishments (Norms and Standards Regulations) 2003 Regulation 4.

<sup>232</sup> Norms and Standards *op cit* (note 144) Regulation 4.

Regulation 5 of the Norms and Standards Regulations, refers to all rights contained in the Patients' Rights Charter,<sup>233</sup> and states that these rights must be respected and protected by a health establishment to ensure that patients are treated with dignity.<sup>234</sup>

With respect to referral systems, a health establishment must also establish and maintain referral systems and discharge planning for further care, which guards health users from unnecessary costs whilst promoting continuity of care without disruption.<sup>235</sup> In addition, a health establishment must reduce delays for a patient accessing health care by ensuring that a patient is taken care of in a manner that conforms with the nature and severity of a patient's health condition and his/her specific needs.<sup>236</sup>

In accordance with Regulation 11(1) of the Norms and Standards Regulations, a health establishment must make certain that users who are booked for a specific health service or treatment must receive these services within the agreed stipulated time frame.<sup>237</sup> This will protect users from delays in treatment, which could result in morbidity and mortality.<sup>238</sup> To protect against delays in treatment, regulation 11(2) states that a health establishment must:

- '(a) Monitor and manage waiting lists for elective procedures;
- (b) Monitor and manage waiting lists for users who are accessing outpatient services at higher levels of care;
- (c) Implement measures to reduce waiting lists; and
- (d) Monitor and manage that in-patients referred for specialist care receive the needed service.'<sup>239</sup>

Further, health establishments must also provide health services, essential equipment and orchestrate plans that are appropriate to the category of a health establishment and the relevant needs of the population, which the health establishment serves.<sup>240</sup> Section 35 of the National Health Act lists features that may be used to categorise health establishments.<sup>241</sup>

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<sup>233</sup> Patient Rights' Charter accessed from <http://www.kznhealth.gov.za/Patientcharter.htm> (accessed on 3 May 2019).

<sup>234</sup> Norms and Standards *op cit* (note 144) Regulation 5(1).

<sup>235</sup> Norms and Standards *op cit* (note 144) Regulation 9(1).

<sup>236</sup> Norms and Standards *op cit* (note 144) Regulation 10(1).

<sup>237</sup> Norms and Standards *op cit* (note 144) Regulation 11(1).

<sup>238</sup> *Ibid.*

<sup>239</sup> Norms and Standards *op cit* (note 144) Regulation 11(2).

<sup>240</sup> Norms and Standards *op cit* (note 144) Regulation 14(1) and (2) (b)-(f).

<sup>241</sup> The National Health Act (note 116) Section 35 - The Minister may by regulation

(a) classify all health establishments into such categories as may be appropriate, based on

- (i) their role and function within the national health system;
  - (ii) the size and location of the communities they serve;
  - (iii) the nature and level of health services they are able to provide;
  - (iv) their geographical location and demographic reach;
  - (v) the need to structure the delivery of health services in accordance with national norms and standards within an integrated and coordinated national framework; and
  - (vi) in the case of private health establishments, whether or not the establishment is for profit or not; and
- (b) in the case of a central hospital, determine the establishment of the hospital board and the management system of such central hospital.

Lastly, regarding medical equipment, a health establishment must make certain that functional equipment is available to provide effectual care and treatment to the user.<sup>242</sup> For this to be achieved the health establishment must:

- ‘(a) Develop medical equipment management plans to meet the needs of the health establishment;
- (b) Demonstrate that medical equipment needs will be fulfilled within budget allocations;
- (c) Ensure that —
  - (i) licensed medical equipment is available and functional across all service areas;
  - (ii) medical equipment has a planned maintenance schedule and it is followed;
  - (iii) the medical equipment is documented as being functional compliant with manufacturer operational specifications; and
  - (iv) medical equipment is disposed of in accordance with applicable legislation; and monitor the service level agreement for the maintenance of medical equipment and report any contractual breaches in the maintenance of medical equipment to the relevant authority.’<sup>243</sup>

It is submitted that the Norms and Standards regulate the areas of health care which have been contributing factors to the oncology crisis, and that public officials have failed to manage these areas. These include, referral systems, delays in treatment and the availability of functional medical equipment.

Further, the Norms and Standards regulate the importance of the functioning of these areas in health care. The effects of mismanagement in these areas, are evident in the oncology crisis.

### **3.4 Policy**

Policy is enacted by ministerial authorities with the purpose of outlining methods and principles, so that laws are fully enforced.<sup>244</sup> In essence, it sets out the goals of a ministry.<sup>245</sup> The policies that will be discussed include, the National Policy on Quality in Healthcare and the National Core Standards for Health Establishment in South Africa.

#### **3.4.1 National Policy on Quality in Healthcare (2007) (National Policy)**

The National Policy identifies and lists some of the issues that hinder quality in health care.<sup>246</sup> These issues include, inter alia, inadequate diagnosis and treatment, inefficient use of

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<sup>242</sup> Norms and Standards *op cit* (note 144) Regulation 38(1).

<sup>243</sup> Norms and Standards *op cit* (note 144) Regulation 38(2)(a), (b) and (c) (i)-(iii).

<sup>244</sup> ‘The Policy and law making process’ *op cit* (note 143).

<sup>245</sup> *Ibid.*

<sup>246</sup> A National Policy on Quality in Health care for South Africa (2007) 3 accessed from [http://www.cohsasa.co.za/sites/cohsasa.co.za/files/publication\\_pdfs/qhc.pdf](http://www.cohsasa.co.za/sites/cohsasa.co.za/files/publication_pdfs/qhc.pdf) (accessed 20 August 2018).

resources, an inadequate referral system and an overall disregard for human dignity.<sup>247</sup> These challenges are stated as ‘shortcomings’ which reduce productivity, increase health care costs, and ultimately put a patient’s health and life at risk.<sup>248</sup>

The National Policy also focuses on the need for equity in health care, particularly concerning the needs of disadvantaged groups like women.<sup>249</sup> To ensure that these vulnerable groups have access to quality health care, there must be a redistribution of health expenditure, redistribution of human resources (doctors and nurses) and implementation of standards to make certain that the whole population receive an ‘acceptable quality of care’.<sup>250</sup> Equity in health care also requires the monitoring of such progress in these vulnerable groups.<sup>251</sup>

The National Policy then goes on to provide measures which may be used to overcome the above challenges that hinder quality health care.<sup>252</sup> These measures aim to engage with the health care workforce, so that adequate training and professional development are established.<sup>253</sup> Moreover, the National Policy provides for the creation of units at all provincial health departments that will manage and monitor quality health care in the public sector.<sup>254</sup>

Similarly, to the National Health Act it is submitted, that the National Policy reaffirms the need for equity in providing health care services, particularly for vulnerable groups.

The National Policy also establishes measures that can be adapted when challenges arise in health care. These measures may be used as a benchmark, against which the efforts of public officials may be measured. The challenges listed in the National Policy also cover those issues experienced in the oncology crisis in KZN. These challenges include, *inter alia*, inadequate referral systems, inefficient use of resources and disregard for human dignity.

### **3.4.2 National Core Standards for Health Establishment in South Africa (2011) (National Core Standards)**

The National Core Standards ‘assist in setting a benchmark against which delivery of services can be monitored’.<sup>255</sup> The aim of the National Core Standards is said to develop a common definition of quality of care that should exist in all health establishments, as a guide to health personnel when they provide health care services to users.<sup>256</sup> In addition, the National Core Standards sets out to establish a standard against which health establishments may be accessed and as a result, identifies gaps and strengths of each health establishment.<sup>257</sup> Lastly,

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<sup>247</sup> A National Policy on Quality in Health care for South Africa (2007) *op cit* (note 159).

<sup>248</sup> *Ibid.*

<sup>249</sup> A National Policy on Quality in Health care for South Africa (2007) 10.

<sup>250</sup> A National Policy on Quality in Health care for South Africa (2007) *op cit* (note 162).

<sup>251</sup> *Ibid.*

<sup>252</sup> A National Policy on Quality in Health care for South Africa (2007) 12 and 17.

<sup>253</sup> A National Policy on Quality in Health care for South Africa (2007) 14.

<sup>254</sup> A National Policy on Quality in Health care for South Africa (2007) 17 – 22.

<sup>255</sup> National Core Standards for Health Establishment in South Africa (2011) 8 accessed from <http://www.rhap.org.za/wp-content/uploads/2014/05/National-Core-Standards-2011-1.pdf> (accessed on 20 August 2018).

<sup>256</sup> National Core Standards for Health Establishment in South Africa (2011) *op cit* (note 168).

<sup>257</sup> *Ibid.*



the standards makes it mandatory for health establishments, who meet mandatory standards, to receive national certification.<sup>258</sup>

In addition to the above, the National Core Standards provide seven ‘domains’ which refer to areas in health care where quality or safety may be at risk, as defined by the World Health Organisation (WHO).<sup>259</sup> The scope of each domain contains standards for the delivery of quality health care, and sets out the criteria that must be complied with to achieve the stipulated standard in each domain.<sup>260</sup>

The following domains, including their corresponding standards and criteria, are relevant to the oncology crisis in KZN:

- (a) Domain 1 (Patient rights) sets out the steps and criteria a health establishment needs to follow, so that the rights of a patient are upheld and protected.<sup>261</sup>
- (b) The criteria are established in accordance with the Batho Pele Principles<sup>262</sup> and the Patient Rights Charter.<sup>263</sup>
- (c) Domain 2 (Patient safety, clinical governance and clinical care) deals with ensuring quality nursing, quality clinical care and ethical practice, particularly in cases of health care that is associated with greater clinical risk.<sup>264</sup>

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<sup>258</sup> *Ibid.*

<sup>259</sup> National Core Standards for Health Establishment in South Africa (2011) 10.

<sup>260</sup> National Core Standards for Health Establishment in South Africa (2011) 13.

<sup>261</sup> National Core Standards for Health Establishment in South Africa (2011) 18.

<sup>262</sup> ‘The Batho Pele (‘People First’) principles are aligned to the Constitution – know the service you’re entitled to. Government officials must follow the ‘Batho Pele’ principles which require public servants to be polite, open and transparent and to deliver good service to the public.

**1. Consultation**

Citizens should be consulted about the level and quality of the public services they receive and, wherever possible, should be given a choice about the services that are offered.

**2. Service standards**

Citizens should be told what level and quality of public service they will receive so that they are aware of what to expect.

**3. Access**

All citizens should have equal access to the services to which they are entitled.

**4. Courtesy**

Citizens should be treated with courtesy and consideration.

**5. Information**

Citizens should be given full accurate information about the public services they are entitled to receive.

**6. Openness and transparency**

Citizens should be told how national and provincial departments are run, how much they cost and who is in charge.

**7. Redress**

If the promised standard of service is not delivered, citizens should be offered an apology, a full explanation and a speedy and effective remedy; and when complaints are made, citizens should receive a sympathetic, positive response.

**8. Value for money**

Public services should be provided economically and efficiently in order to give citizens the best possible value for money.’ accessed from <http://localgovernmentaction.org.dedi6.cpt3.host-h.net/content/batho-pele-principles> (accessed on 28 August 2018).

<sup>263</sup> National Core Standards for Health Establishment in South Africa (2011) 18.

<sup>264</sup> National Core Standards for Health Establishment in South Africa (2011) 22.

- (d) Domain 3 (Clinical support services) covers services that are essential for the provision of clinical care, diagnostic and therapeutic clinical support services, and medical technology and systems which are required for monitoring efficiency of care to patients.<sup>265</sup> Under the sub-domain ‘Pharmaceutical services’, the standard of readily available medical supplies at all times is emphasised in the National Core Standards.<sup>266</sup>
- (e) Domain 5 (Leadership and governance) may be the most relevant to the oncology crisis. It deals with ‘proactive’ leadership and planning, together with risk management and support of supervisory structures, to further quality improvement in health care services.<sup>267</sup> In addition, the sub-domain ‘Strategic management’ sets a standard for budget allocation and staffing, which will make certain that health services are provided as they have been planned.<sup>268</sup> To achieve this standard, the criteria required includes a human resources allocation plan so that there is sufficient staff to meet the relevant service level.<sup>269</sup>
- (f) Finally, under Domain 6 (Operational Management) the standards and criteria are set for the effective management of, *inter alia*, human resources and finances to achieve the intended result of safe and effective patient care.<sup>270</sup> The criteria include:
- ‘(i) An approved staffing plan is in place, in accordance with occupancy rates, utilising rates and patient profiles,
  - (ii) A human resource retention strategy is in place in order to ensure adequate and motivated staff.’<sup>271</sup>

It is submitted, that the National Core Standards deal with various sectors in health care and provides a definition for quality of health care within each. The standards go on to provide guidelines, that can be used to achieve the requisite quality of health care. This makes it possible to establish the liability of public officials and facilities, by determining if the prescribed quality of care concerning each standard has been achieved.

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<sup>265</sup> National Core Standards for Health Establishment in South Africa (2011) 26.

<sup>266</sup> National Core Standards for Health Establishment in South Africa (2011) 27.

<sup>267</sup> National Core Standards for Health Establishment in South Africa (2011) 34.

<sup>268</sup> National Core Standards for Health Establishment in South Africa (2011) 34.

<sup>269</sup> National Core Standards for Health Establishment in South Africa (2011) 35.

<sup>270</sup> National Core Standards for Health Establishment in South Africa (2011) 37.

<sup>271</sup> National Core Standards for Health Establishment in South Africa (2011) 38.

### 3.5 Ethical Guidelines promulgated by the Health Professions Council of South Africa (HPCSA)

The Health Professions Council of South Africa is a regulatory body that sets the standards for professional conduct and ethical behaviour of registered health professionals (eg. practitioners, dentists, psychologists etc).<sup>272</sup>

Booklet 8 of the guidelines deals with reproductive health of women.<sup>273</sup> The guidelines provide that health practitioners must deliver quality health care to all women with equal consideration, regardless of their socio-economic status.<sup>274</sup>

In addition, the guidelines place an ethical duty on health practitioners to be advocates for women's health.<sup>275</sup> It also obliges practitioners to make the public aware of health issues that plague women, so that the public becomes sensitized to these challenges.<sup>276</sup> Practitioners should also organise professional groups and their own practices to make certain that essential health services are made available and accessible to disadvantaged, impoverished and underprivileged women.<sup>277</sup>

Lastly, there is an ethical duty on health professionals to deal responsibly with resources that are scarce and limited, and to refrain from participating in improper financial agreements which disadvantage users.<sup>278</sup>

It is submitted, that the ethical guidelines assist all health practitioners in the Republic to act ethically, and to advocate for the rights of women and their socio-economic rights.

### 3.6 Conclusion

There are numerous duties and guidelines imposed by the legal framework in South Africa, on the right of access to health care. It is clear from the above discussion that there are various legislative, policy and regulatory measures in place, to realise the right of access to health care for all individuals in the Republic.

This chapter explored the different legal instruments which cover the obligations of public health officials and public health personnel. Furthermore, the legal framework covers challenges in health care which are relevant to the oncology crisis in KZN, including poor referral systems, mismanagement of resources, and delays in provision of treatment. It was

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<sup>272</sup> 'Overview of Health Professions Council of South Africa' accessed from <http://www.hpcsa.co.za/About> (accessed on 23 August 2018).

<sup>273</sup> Health Professions Council of South Africa. Guidelines for Good Practice in the Healthcare Professions. Booklet 8. *General Ethical Guidelines for Reproductive Health* (2016).

<sup>274</sup> Health Professions Council of South Africa. Guidelines for Good Practice in the Healthcare Professions. Booklet 8. *General Ethical Guidelines for Reproductive Health* (2016) 5 c.f. 'Recommendations on Ethical Issues in Obstetrics and Gynaecology by the FIGO Committee on the Ethical Aspects on Human Reproduction and Women's Health' 2003 available at <http://www.figo.org> (accessed on 30 August 2018) - These guidelines have in the main been drawn from the FIGO recommendations.

<sup>275</sup> HPCSA Booklet 8 *op cit* (note 223) 6.

<sup>276</sup> *Ibid.*

<sup>277</sup> *Ibid.*

<sup>278</sup> Health Professions Council of South Africa. Guidelines for Good Practice in the Healthcare Professions. Booklet 1. *General Ethical Guidelines for Health Professions* (2016) 12.

also noted that the guidelines and criteria set out for managing these challenges in health care, may be used to determine the liability of public health officials.

This chapter went on to consider international instruments on the human right to health. The chapter established that the accepted quality of health care in a state, is the 'highest attainable standard of care' that the state can provide. It was further established, that women are recognised as a vulnerable and marginalised group, and that their right to health requires protection. This position on women is also emphasised by the ethical guidelines of the Health Professions Council of South Africa, which states that health practitioners must advocate for women's reproductive rights.

The chapter evaluated the legal framework on the right of access to health care in South Africa, by outlining the various legal instruments realising this right. The following chapter will investigate the civil remedies available to cervical cancer patients and their dependants, who suffered harm due to the oncology crisis in KZN during 2015-2017. Further, it will discuss the appropriateness of each remedy in bringing relief to cervical cancer patients.

## CHAPTER FOUR: APPROPRIATE AND EFFECTIVE RELIEF FOR CERVICAL CANCER PATIENTS

### 4.1 Introduction

The previous chapter discussed the legal framework in relation to the right of access to health care, as it pertains to cervical cancer patients. The chapter then set out to explain the various forms of legal instruments available to support the protection and enforcement of an individual's right to health and other fundamental rights, that are contained in the Bill of Rights. Focus was given to women who are regarded as a vulnerable group in our society.

This chapter will evaluate with the need for effective and appropriate relief in respect of socio-economic right violations. The first part of this chapter considers two constitutional remedies which are available to cervical cancer patients ie. Constitutional damages and the Structural Interdict. In this research paper, there is more focus given to constitutional remedies, since there have been constitutional right violations of cervical cancer patients. It will also illustrate the circumstances under which the courts have granted these constitutional remedies.

The second part of this chapter will consider two common law remedies ie. the Mandamus and Common Law damages, that may be used by cervical cancer patients whose constitutional rights have been violated during 2015-2017, as a result of the oncology crisis in KZN. It will also illustrate how courts have granted these common law remedies.

The third part of this chapter will discuss alternative dispute resolution, particularly the arbitration procedure used in the Life Esidimeni hearing.<sup>279</sup>

The oncology crisis in KZN deals with a violation of a socio-economic right ie. the right of access to health care. This violation is part of a systemic violation of the health rights of poor and marginalised people who are dependent on the public health sector.<sup>280</sup> Therefore, before these remedies are considered, a discussion on what will constitute appropriate and effective relief in socio-economic right cases, that are systemic in nature, is necessary.

#### 4.1.1 Appropriate and effective relief for socio-economic right violations

Section 38 of the Constitution provides that the remedy for a violation of a right contained in the Bill of Rights must be appropriate.<sup>281</sup> Aside from the guidelines provided in section

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<sup>279</sup> 'No funds, yet Life Esidimeni dispute resolution process to go ahead' *BusinessDay*, 13 September 2017 accessed from <https://www.businesslive.co.za/bd/national/health/2017-09-13-no-funds-yet-life-esidimeni-dispute-resolution-process-to-go-ahead/> (accessed on 5 November 2018).

<sup>280</sup> 'SAHRC releases report on trends in human rights violations in South Africa' 9 January 2018 accessed from <https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/1088-media-statement-sahrc-releases-report-on-trends-in-human-rights-violations-in-south-africa> (accessed on 5 November 2018); 'Free healthcare is a human right' *Mail & Guardian*, 17 May 2013 accessed from <https://bhekisisa.org/article/2013-05-17-00-comment-free-healthcare-is-a-human-right> (accessed on 5 November 2018).

<sup>281</sup> The Constitution (note 32) Section 38 c.f. I Currie & J De Waal *Bill of Rights Handbook* (2013) 180.

172<sup>282</sup> and section 8(3)<sup>283</sup> of the Constitution, there is no definite rule as to what will constitute appropriate and effective relief for a claimant.<sup>284</sup> Therefore, Currie and De Waal argue that this could mean section 38 of the Constitution sanctions a flexible approach to remedies.<sup>285</sup>

Swanepoel notes that human rights litigation by the courts helps in alleviating inequalities, and thus conforms to the spirit of the Constitution.<sup>286</sup> The Constitution also grants the court discretion to make any order that is just and equitable.<sup>287</sup>

The Constitutional court in *Minister of Health v TAC* case,<sup>288</sup> explained ‘appropriate relief’ to be relief that is just and fair regarding the issue before the court.<sup>289</sup> The court went on further to provide in *Fose v Minister of Safety and Security*<sup>290</sup>, that the relief granted must also strike effectively at the root cause of the right violation.<sup>291</sup> Since the *Treatment Action Campaign* case,<sup>292</sup> the courts have shown an increasing willingness to employ flexible remedies, like structural interdicts, to ensure enforcement of socio-economic rights.<sup>293</sup>

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<sup>282</sup> The Constitution (note 32) Section 172 - ‘(1) When deciding a constitutional matter within its power, a court— (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable, including— (i) an order limiting the retrospective effect of the declaration of invalidity; and (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect. (2) (a) The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court. (b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct. (c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court. (d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.’

<sup>283</sup> The Constitution (note 32) Section 8(3) - ‘When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court— (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)’.

<sup>284</sup> I Currie & J De Waal *Bill of Rights Handbook* (2013) 180.

<sup>285</sup> *Ibid.*

<sup>286</sup> Swanepoel P ‘*The potential of structural interdicts to constitute effective relief in socio-economic rights cases*’ LLM Dissertation, Stellenbosch University (2017) 7.

<sup>287</sup> The Constitution (note 32) Section 172(1)(b).

<sup>288</sup> *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC).

<sup>289</sup> *Minister of Health v Treatment Action Campaign* supra (note 238) para 48 c.f. Swanepoel P *op cit* (note 236) 17.

<sup>290</sup> *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).

<sup>291</sup> *Fose v Minister of Safety and Security* supra (note 240) para 96 c.f. Swanepoel P *op cit* (note 236) 17.

<sup>292</sup> *Minister of Health v Treatment Action Campaign* supra (note 238).

<sup>293</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* (2010) (3) SA 454 (CC); *Centre for Child Law v Minister of Basic Education* (2012) 4 All SA 35 (ECG) c.f. I Currie & J De Waal *op cit* (note 234) 597.

#### 4.1.2 Systemic violations of socio-economic rights

Mbazira<sup>294</sup> and Sturm's<sup>295</sup> description of systemic right violations mirror the view taken by Rodriguez-Garavito<sup>296</sup>, who states that systemic violations of socio-economic rights are instances when government agencies fail to comply with public policy.<sup>297</sup> This failure by the state contributes to socio-economic right violations.<sup>298</sup> Rodriguez-Garavito further argues that socio-economic right violations adversely affect large groups of individuals in society.<sup>299</sup> An example of this type of right violation is a failing public health system due to non-compliance by the state, and which is relied on by majority of a state's population.<sup>300</sup>

How courts have identified and dealt with systemic violations of socio-economic rights can be seen in the recent judgment of *Sonke Gender Justice v Government of the Republic of South Africa*.<sup>301</sup> This case concerned the appalling conditions of the Pollsmoor Remand Detention Facility (Pollsmoor), in which detainees were living in.<sup>302</sup> The Public Service Commission similarly described the conditions of the facility in 2016, as alarming and not fit for human habitation.<sup>303</sup>

The High Court alluded to the systemic nature of the rights violations when it stated that over-crowding was one of the key problems that had persisted and even worsened, over a period of time.<sup>304</sup> The court also noted that Pollsmoor was notorious for these inhumane and untenable living conditions, even before 1994.<sup>305</sup> The court concluded that these living conditions were a manifestation of an ineffective justice system.<sup>306</sup> This means that the current state of Pollsmoor did not result from actions by a particular group, but rather the acts of various people and many departments, over an extended period of time.<sup>307</sup> It is submitted that this ongoing failure of public officials in carrying out their duties, makes the violation systemic in nature.

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<sup>294</sup> C Mbazira *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (2009) 110.

<sup>295</sup> S P Sturm 'A Normative Theory of Public Law Remedies' (1990) 79 *Georgetown Law Journal* 1377.

<sup>296</sup> C Rodríguez-Garavito 'Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America' (2010) 89 *Texas Law Review*.

<sup>297</sup> Rodríguez-Garavito *op cit* (note 246) 1671 c.f. Swanepoel P *op cit* (note 236) 57.

<sup>298</sup> *Ibid.*

<sup>299</sup> Rodríguez-Garavito *op cit* (note 246) 1671 c.f. Swanepoel P *op cit* (note 236) 59.

<sup>300</sup> *Ibid.*

<sup>301</sup> *Sonke Gender Justice v Government of South Africa* (2017) 24087/15.

<sup>302</sup> *Sonke Gender Justice v Government of South Africa* supra at note 251 para 2 c.f. Swanepoel P *op cit* (note 236) 34.

<sup>303</sup> *Ibid.*

<sup>304</sup> *Sonke Gender Justice v Government of South Africa* supra at note 251 para 27 - 33 c.f. Swanepoel P *op cit* (note 236) 35.

<sup>305</sup> *Sonke Gender Justice v Government of South Africa* supra at note 251 para 1 c.f. Swanepoel P *op cit* (note 236) 35.

<sup>306</sup> *Sonke Gender Justice v Government of South Africa* supra at note 251 para 119 - 128 c.f. Swanepoel P *op cit* (note 236) 35.

<sup>307</sup> Swanepoel P *op cit* (note 236) 35.

In this case, the Constitutional Court granted a strong structural interdict requiring immediate action, together with a stringent reporting-back condition, so that the infringed rights of detainees would be rectified.<sup>308</sup>

Due to continuous non-compliance from the state, as illustrated in *Sonke*<sup>309</sup>, the remedy that is required must enable structural changes, where there have been a systemic violation of rights.<sup>310</sup> Swanepoel notes that these changes need to aim at improving the interests of the affected individual or group.<sup>311</sup> Furthermore, the remedy must have a deterrent effect that would lead to an end of the systemic violation.<sup>312</sup>

#### 4.1.3 Overarching norms for the remedial process

Sturm argues that due to the ongoing nature of several public law violations, traditional remedies are usually ineffective.<sup>313</sup> Sturm suggests applying the normative theory for public law remedies.<sup>314</sup> This theory states that certain norms need to be present during the remedial process, so that the resultant remedy constitutes appropriate and effective relief.<sup>315</sup> ‘These norms are participation, impartiality, respect for the separation of powers doctrine, reasoned decision-making and remediation’.<sup>316</sup>

##### (a) Participation

This norm states that parties who will be affected by the remedy, should be given a meaningful opportunity to contribute to the design of the remedy.<sup>317</sup> Sturm suggests that participation serves two purposes:

1. Allowing affected parties to participate in the remedial process will enhance their dignity, which may have been infringed as a result of the socio-economic right(s) violation.<sup>318</sup> It may also contribute to the perceived fairness of the remedy adopted.<sup>319</sup>
2. Participation is also likely to contribute to the effective compliance by the parties involved, since they were a part of the process.<sup>320</sup> In addition, it helps the decision-maker understand and define the group of people which the remedy will affect.<sup>321</sup>

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<sup>308</sup> *Sonke Gender Justice v Government of South Africa* supra at 251 para 160 c.f. Swanepoel P *op cit* (note 236) 34.

<sup>309</sup> *Sonke Gender Justice v Government of South Africa* supra at 251.

<sup>310</sup> Swanepoel P *op cit* (note 236) 59.

<sup>311</sup> *Ibid.*

<sup>312</sup> Swanepoel P *op cit* (note 236) 63.

<sup>313</sup> Sturm *op cit* (note 245) c.f. Swanepoel P *op cit* (note 236) 21-22.

<sup>314</sup> *Ibid.*

<sup>315</sup> Sturm *op cit* (note 245) 1410 c.f. Swanepoel P *op cit* (note 236) 21-22.

<sup>316</sup> Sturm *op cit* (note 245) 1390 c.f. Swanepoel P *op cit* (note 236) 21-22.

<sup>317</sup> Sturm *op cit* (note 245) 1410 c.f. Swanepoel P *op cit* (note 236) 21-22.

<sup>318</sup> Sturm *op cit* (note 245) 1392 c.f. Swanepoel P *op cit* (note 236) 23.

<sup>319</sup> *Ibid.*

<sup>320</sup> Sturm *op cit* (note 245) 1393 c.f. Swanepoel P *op cit* (note 236) 23.

<sup>321</sup> *Ibid.*



The need for participation in the decision-making process was emphasised in *Doctors for Life v Speaker of the National Assembly*,<sup>322</sup> where the Constitutional court stated that our constitutional order ‘envisages an active, participatory democracy’.<sup>323</sup> The court also noted that participatory democracy is significant for individuals who are poor and marginalised.<sup>324</sup> Therefore, allowing participation of affected parties also conforms to the transformative nature of the Constitution.<sup>325</sup>

(b) Respect for the separation of powers doctrine

The remedial process must respect state institutions and their authority, so that the judiciary does not exceed their boundaries.<sup>326</sup> In this regard, participation by the individuals involved could also be effective in democratising the remedial process, so that separation of power concerns is mitigated.<sup>327</sup>

(c) Impartiality

Sturm states that impartiality and objectivity must be used in the decision-making process, so that an effective remedy is established.<sup>328</sup> This also means that the remedy chosen should not unfairly favour one party over the other(s).<sup>329</sup>

(d) Reasoned decision-making

Appropriate and effective relief can only be a result of reasoned decision-making.<sup>330</sup> Swanepoel argues that this will require reasons to be provided as to why a certain remedy was chosen as the most effective and appropriate, in the circumstances.<sup>331</sup> This principle will also ensure impartiality from the decision-maker, since he/she would have to provide reasons for their decision.<sup>332</sup>

(e) Remediation

Sturm notes that for the remedial process to be legitimate and effective, it must be aimed at ensuring compliance with the violated constitutional principles.<sup>333</sup> She does however, acknowledge that not all these norms can be completely satisfied since each issue has its own unique demands and constraints.<sup>334</sup> As a result, certain circumstances may require these norms to be balanced against each other.<sup>335</sup>

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<sup>322</sup> *Doctors for Life International v Speaker of the National Assembly* 2006 (12) BCLR 1399 (CC).

<sup>323</sup> *Doctors for Life International v Speaker of the National Assembly* supra at 272 para 235 c.f. Swanepoel P *op cit* (note 236) 24.

<sup>324</sup> *Doctors for Life International v Speaker of the National Assembly* supra at 272 para 15 c.f. Swanepoel P *op cit* (note 236) 23.

<sup>325</sup> *Doctors for Life International v Speaker of the National Assembly* supra at 272 para 235 c.f. Swanepoel P *op cit* (note 236) 24.

<sup>326</sup> Sturm *op cit* (note 245) 1410 c.f. Swanepoel P *op cit* (note 236) 24.

<sup>327</sup> Swanepoel P *op cit* (note 236) 24.

<sup>328</sup> Sturm *op cit* (note 245) 1410 c.f. Swanepoel P *op cit* (note 236) 25.

<sup>329</sup> Sturm *op cit* (note 245) 1398 c.f. Swanepoel P *op cit* (note 236) 25.

<sup>330</sup> Sturm *op cit* (note 245) 1410 c.f. Swanepoel P *op cit* (note 236) 25.

<sup>331</sup> Swanepoel P *op cit* (note 236) 25.

<sup>332</sup> Sturm *op cit* (note 245) 1411 c.f. Swanepoel P *op cit* (note 236) 25.

<sup>333</sup> Sturm *op cit* (note 245) 1399 c.f. Swanepoel P *op cit* (note 236) 26.

<sup>334</sup> Sturm *op cit* (note 245) 1411 c.f. Swanepoel P *op cit* (note 236) 27.

<sup>335</sup> *Ibid.*

## 4.2 Remedies available to cervical cancer patients

### 4.2.1 Constitutional remedies

Currie and De Waal state that the purpose of constitutional remedies is to (a) grant relief, (b) vindicate infringed constitutional right(s) and (c) deter future infringements.<sup>336</sup> They also note that harm caused due to a constitutional right violation, is harm caused to the entire society, and not just to the individual applicant.<sup>337</sup>

The authors argue that vindication of a constitutional right is vital, because such an act will diminish society's trust and reliance on the Constitution, if not dealt with appropriately.<sup>338</sup> Furthermore, a constitutional right violation negatively impacts on realising a just and democratic society, as envisaged by the Constitution.<sup>339</sup>

Currie and De Waal emphasise that it is the duty of the court to strike 'effectively at the source of the infringement'.<sup>340</sup>

### 4.2.2 Constitutional damages

Despite, that in several instances, common law damages may be sufficient to bring effective relief when a person suffers harm, another type of damages may be claimed when an individual's fundamental human rights listed in the Bill of Rights<sup>341</sup>, are violated. This type of damages is categorised as 'constitutional damages' and are relevant to cervical cancer patients, because their right of access to health (ie. a fundamental right) has been violated. The Supreme Court of Appeal in *MEC for Department of Welfare v Kate*,<sup>342</sup> held that constitutional damages may be raised as a remedy, not only as a last resort to vindicate constitutional rights, but whenever it is just and equitable to do so, depending on the circumstances of the case.<sup>343</sup>

De Vos and Freedman define constitutional damages as a sum of money which can be paid to an individual as compensation for harm caused, due to a violation of the individual's constitutionally protected right(s).<sup>344</sup> Due to shocking and frequent failure of the state to

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<sup>336</sup> I Currie & J De Waal *op cit* (note 234) 181.

<sup>337</sup> *Ibid.*

<sup>338</sup> *Ibid.*

<sup>339</sup> *Ibid.*

<sup>340</sup> *Ibid.*

<sup>341</sup> The Constitution (note 32) Chapter 3.

<sup>342</sup> *MEC for Department of Welfare v Kate* 2006 (4) SA 478 SCA.

<sup>343</sup> *MEC for Department of Welfare v Kate* supra at 292 para 27 c.f. M Toxopeüs 'Constitutional damages: Recent decisions in focus' 14 June 2018, *Helen Suzman Foundation* accessed from <https://hsf.org.za/publications/hsf-briefs/constitutional-damages-recent-decisions-in-focus> (accessed on 20 September 2018).

<sup>344</sup> P De Vos & W Freedman et al (eds) *South African Constitutional Law in Context* (2015) 409.

meet its constitutional obligations, the concept of constitutional damages is more relevant now, than ever before.<sup>345</sup>

The Constitution provides no exception to constitutional damages being awarded as relief when fundamental rights are violated.<sup>346</sup> This position has been confirmed by the Constitutional Court in *Fose v Minister of Safety and Security*.<sup>347</sup> In this case the court stated *obiter* that in principle, there is no reason why appropriate relief should not include an award for constitutional damages, where such an award would protect and enforce rights contained in the Bill of Rights.<sup>348</sup>

*Fose*<sup>349</sup> was the initial case since the inception of the Constitution, to consider constitutional damages as a means to bring appropriate relief.<sup>350</sup> With regard to ‘appropriate relief’, the Constitutional court in *Fose* highlighted the following:

- The facts and circumstances of each case must be assessed, to establish what relief would ensure protection and enforcement of rights enshrined in the Constitution.<sup>351</sup> The courts may also formulate any new remedy that would be needed to achieve protection of these rights.<sup>352</sup>
- Where it is necessary to protect and enforce rights contained in the Bill of Rights, appropriate relief may include an award of constitutional damages.<sup>353</sup>
- When a claimant has already been compensated by common law damages for any loss, a court must not award an additional punitive award using constitutional damages.<sup>354</sup> This guideline is particularly relevant in a state like South Africa, where there are several constitutional obligations to fulfil with limited resources.<sup>355</sup>

Further guidelines were set out by the Supreme Court of Appeal in *MEC for the Department of Welfare v Kate*<sup>356</sup> to help determine when an award of constitutional damages would constitute appropriate relief.<sup>357</sup> A court must consider, *inter alia*:

- (i) The nature and relative importance of the right(s) in dispute before the court.<sup>358</sup>

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<sup>345</sup> M Toxopeüs ‘Constitutional damages: Recent decisions in focus’ 14 June 2018, *Helen Suzman Foundation* accessed from <https://hsf.org.za/publications/hsf-briefs/constitutional-damages-recent-decisions-in-focus> (accessed on 20 September 2018).

<sup>346</sup> I Currie & J De Waal *op cit* (note 234) 200.

<sup>347</sup> *Fose v Minister of Safety and Security* *supra* at 240.

<sup>348</sup> *Fose v Minister of Safety and Security* *supra* at 240 para 60 c.f. Toxopeüs *op cit* (note 295).

<sup>349</sup> *Fose v Minister of Safety and Security* *supra* at 240.

<sup>350</sup> Toxopeüs *op cit* (note 295).

<sup>351</sup> *Fose v Minister of Safety and Security* *supra* at 240 para 19 c.f. Toxopeüs *op cit* (note 295).

<sup>352</sup> *Ibid.*

<sup>353</sup> *Fose v Minister of Safety and Security* *supra* at 240 para 60 c.f. Toxopeüs *op cit* (note 295).

<sup>354</sup> *Fose v Minister of Safety and Security* *supra* at 240 para 72 c.f. Toxopeüs *op cit* (note 295).

<sup>355</sup> *Ibid.*

<sup>356</sup> *MEC for Department of Welfare v Kate* *supra* at 292.

<sup>357</sup> Toxopeüs *op cit* (note 295).

<sup>358</sup> *MEC for Department of Welfare v Kate* *supra* at 292 para 25 c.f. Toxopeüs *op cit* (note 295).

- (ii) The existence of any alternative remedies that could be used to assert and vindicate the infringed constitutional right(s).<sup>359</sup>
- (iii) The consequences of the breached rights for the claimants before the court.<sup>360</sup>

#### 4.2.2.1 Appropriateness of constitutional damages for socio-economic rights violations

Mbazira argues that awarding constitutional damages for loss to non-patrimonial interests, is the most likely remedy to constitute appropriate and effective relief.<sup>361</sup> In addition, Mbazira states that damages could serve as a deterrent that may lead to ending the systemic violation of constitutional rights, while simultaneously vindicating these rights.<sup>362</sup> It could serve as a deterrent for public officials who contribute to systemic violations of constitutional rights, because their actions may result in payable damages being sought if they are held personally liable.<sup>363</sup>

Mbazira's view is dismissed by Sturm, who argues that constitutional damages will not constitute appropriate relief in cases of systemic violation of rights.<sup>364</sup> Sturm bases her argument on two grounds:

1. It is difficult to accurately quantify constitutional damages and there is a risk of undervaluing the harm caused by the violation of rights.<sup>365</sup> The remedy of damages could also be viewed as the easier route to take, since it would be more onerous for the state to comply with their legal obligations, than to simply pay damages.<sup>366</sup>
2. The second reason provided by Sturm is that, usually the parties responsible for constitutional violations are public officials, however, they are not held personally liable for payment of damages to aggrieved individuals.<sup>367</sup> Therefore, since public officials are not paying from their own pockets, the deterrent effect of this remedy is not achieved.<sup>368</sup> Furthermore, the payment of damages to affected individuals in socio-economic could have detrimental implications for the 'public purse'.<sup>369</sup> This financial disadvantage could have an adverse impact on the state's ability to properly realise their constitutional obligations.<sup>370</sup>

However, there has been a recent judgment by the High Court, where the MEC for Health in Gauteng was ordered to pay damages and costs to the plaintiff, in both his personal capacity and his representative capacity.<sup>371</sup> The court held that the MEC

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<sup>359</sup> *Ibid.*

<sup>360</sup> *Ibid.*

<sup>361</sup> Mbazira *op cit* (note 244) 144 c.f. Swanepoel P *op cit* (note 236) 71.

<sup>362</sup> *Ibid.*

<sup>363</sup> *Ibid.*

<sup>364</sup> Sturm *op cit* (note 245) 1379 c.f. Swanepoel P *op cit* (note 236) 72.

<sup>365</sup> *Ibid.*

<sup>366</sup> Swanepoel P *op cit* (note 236) 72.

<sup>367</sup> Sturm *op cit* (note 245) 1379 c.f. Swanepoel P *op cit* (note 236) 72.

<sup>368</sup> Sturm *op cit* (note 245) 1379 c.f. Swanepoel P *op cit* (note 236) 72.

<sup>369</sup> Swanepoel P *op cit* (note 236) 72.

<sup>370</sup> Mbazira *op cit* (note 244) 154 c.f. Swanepoel P *op cit* (note 236) 72.

<sup>371</sup> *N v MEC for Health, Gauteng* 2015 ZAGPPHC 645.

should be personally liable for the negligence of a gynaecologist, employed by the Gauteng Department of Health.<sup>372</sup> The rationale given by the High Court was that the MEC played an essentially obstructive role in this case, continuously disputed facts that were not in dispute, and persisted in his approach of bare denial.<sup>373</sup>

Despite the apprehensions raised by Sturm, the courts have recognised certain socio-economic right violations that have constituted constitutional damages, as appropriate relief. The first case related to the right of access to adequate housing.<sup>374</sup> The Supreme Court of Appeal in *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*,<sup>375</sup> awarded direct constitutional damages following failure by the state to comply with two *bona fide* court orders.

The facts of this case involved an eviction from private property and the state's failure to comply with section 26<sup>376</sup> of the Constitution, by not providing alternative land for the unlawful occupiers.<sup>377</sup> As a result, the Constitutional court concurred with the Supreme Court of Appeal's decision to award constitutional damages.<sup>378</sup>

The Supreme Court of Appeal again awarded constitutional damages in *MEC for the Department of Welfare v Kate*,<sup>379</sup> which involved the delay in payment of social grants. The court dealt with an infringement of section 27(1)(c) of the Constitution, which provides for the right of access to social assistance.<sup>380</sup> The infringement was regarded as systemic in nature by the court, and one that required constitutional damages as the appropriate and effective remedy.<sup>381</sup> In this case constitutional damages were the only appropriate and effective relief, since a *mandamus* or declaratory order would not suffice due to non-compliant behaviour from the government.<sup>382</sup> Moreover, the grant beneficiaries would not have the resources or the education to enforce a *mandamus*.<sup>383</sup>

Usually, it is the poor and most vulnerable members of society who require protection and enforcement of their socio-economic rights, by the courts. As previously mentioned, the

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<sup>372</sup> *N v MEC for Health, Gauteng* supra at 321 para 28.

<sup>373</sup> *N v MEC for Health, Gauteng* supra at 321 para 27.

<sup>374</sup> The Constitution (note 32) Section 26(1).

<sup>375</sup> *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 (6) SA 40 SCA.

<sup>376</sup> The Constitution (note 32) Section 26 – '(1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

<sup>377</sup> *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* supra at 325.

<sup>378</sup> *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 CC para 60 ; *Fose v Minister of Safety and Security* supra at 240 para 69: 'where the Court stated that the granting of constitutional damages is supported by the judicially recognised need for effective relief' c.f. Swanepoel P *op cit* (note 236) 73.

<sup>379</sup> *MEC for Department of Welfare v Kate* supra at 292.

<sup>380</sup> *MEC for Department of Welfare v Kate* supra at 292 para 10.

<sup>381</sup> *MEC for Department of Welfare v Kate* supra at 292 para 5 and 22 c.f. Swanepoel P *op cit* (note 236) 74.

<sup>382</sup> *MEC for Department of Welfare v Kate* supra at 292 para 31 c.f. Swanepoel P *op cit* (note 236) 74.

<sup>383</sup> *Ibid*.

Constitution gives discretion to the courts to make any order that would give appropriate and effective relief to a claimant.<sup>384</sup>

Hence, in *Kate*<sup>385</sup> an award of constitutional damages was granted by the Supreme Court of Appeal based particularly on two grounds. Firstly, there had been unreasonable delay in the provision of social grants, and this delay amounted to a direct violation of the constitutional right to social assistance.<sup>386</sup> Secondly, the breach of the right to social assistance extended beyond the circumstance of the individual before the court ie. *Kate*.<sup>387</sup> *Kate* was an example of the state's continuous failure to meet their constitutional obligations.<sup>388</sup>

It is submitted that there has also been a continuous failure by the state to fulfil their constitutional obligations during the oncology crisis in KZN.

#### **4.2.2.2. Recent awards of constitutional damages**

There have been two recent judgments which have considered if an award of constitutional damages would bring appropriate and effective relief. Despite both judgments involving tragic circumstances due to failure by the state to fulfil their constitutional obligations, the courts have granted different relief in each case.

##### **4.2.2.2.1 The Life Esidimeni tragedy**

The Life Esidimeni arbitration hearing illustrated the tragic outcome that followed the decision by the Gauteng Health Department to terminate a long-standing contract with the Life Esidimeni Care Centre, that provided care and treatment to mental health patients.<sup>389</sup>

The decision to terminate the contract resulted in a transfer of 1 400 mental health patients to several non-governmental organisations, who were unqualified and unlicensed to provide care to these patients.<sup>390</sup> The transfer resulted in 144 deaths, causing immense trauma to the survivors of this tragedy and families of the deceased.<sup>391</sup>

Due to the magnitude of suffering and trauma caused by the state's disregard for its constitutional duty to provide access to health care of an appropriate standard, the arbitrator held that an award for constitutional damages was the only means to fully vindicate the

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<sup>384</sup> The Constitution (note 76) Section 172(2)(a).

<sup>385</sup> *MEC for Department of Welfare v Kate* supra at 292.

<sup>386</sup> *MEC for Department of Welfare v Kate* supra at 292 para 27 c.f. *Toxopeüs op cit* (note 295).

<sup>387</sup> *Ibid.*

<sup>388</sup> *Ibid.*

<sup>389</sup> 'In the Arbitration Between: Families of mental health care users affected by the Gauteng Mental Marathon Project v National Minister of Health of the Republic of South Africa' The arbitration award can be accessed from <http://www.gauteng.gov.za/government/departments/office-of-the-premier/Life%20Esidimeni%20Documents/Life%20Esidimeni%20arbitration%20award%20by%20retired%20Deputy%20Chief%20Justicein%20Dikgang%20Mosenke.pdf> (accessed on 23 September 2018). For an outline of the award see <https://hsf.org.za/publications/hsf-briefs/the-life-esidimeni-arbitration-the-legal-basis-for-granting-the-award> (accessed on 23 September 2018).

<sup>390</sup> *Toxopeüs op cit* (note 295).

<sup>391</sup> 'Life Esidimeni: Police investigation puts death toll at 144 patients' *News24*, 26 January 2018 accessed from <https://www.news24.com/SouthAfrica/News/life-esidimeni-police-investigation-puts-death-toll-at-144-patients-20180126> (accessed on 24 September 2018).

infringed rights.<sup>392</sup> The order for relief in the form of constitutional damages was granted over and above the common law damages for shock and trauma.<sup>393</sup>

#### 4.2.2.2.2 Komape v Minister of Basic Education

In *Komape v Minister of Basic Education*<sup>394</sup> a 5-year-old boy drowned in a faeces-infested pit toilet at his rural school in the Limpopo province. The family of the deceased sought relief, inter alia, in the form of constitutional damages owing to the failure of the Department of Education, to provide proper sanitation at rural schools.<sup>395</sup> The failure of the state department violated several rights enshrined in the Constitution, including the right to life,<sup>396</sup> rights of the child,<sup>397</sup> the right to human dignity,<sup>398</sup> the right to equality<sup>399</sup> and the right to education<sup>400, 401</sup>

The High Court of Polokwane held that an award of constitutional damages in this case, would amount to an award of punitive damages.<sup>402</sup> The court went on further to state that this would result in the Komape family being over-compensated, while not serving the needs of the society.<sup>403</sup> Instead, the High Court awarded a structural interdict that obliged the Department of Education to install proper sanitation facilities in rural schools of Limpopo.<sup>404</sup> In the courts view, this remedy would better serve the interests of the public, and was the effective and appropriate remedy to vindicate the rights that had been infringed.<sup>405</sup>

Toxopeüs argues that while the structural interdict may be effective in enforcing and protecting the rights of children in Limpopo, this remedy does very little to directly address and vindicate the rights of the Komape family.<sup>406</sup> In addition, the ongoing and systemic failure of the state to fulfil their constitutional obligations in this case extends beyond the circumstances of just one child.<sup>407</sup> Therefore, an award for constitutional damages would not have been an over-compensation to the family.<sup>408</sup>

It is submitted that the view taken by Toxopeüs is agreed with because constitutional damages was necessary to vindicate the constitutionally protected rights of the Komape family, as well as to hold the state accountable for failure to meet their constitutional duties.

Although there will always be alternative remedies well suited to fulfil constitutional obligations, the courts should not shy away from directly awarding constitutional damages.<sup>409</sup>

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<sup>392</sup> The Arbitration award *op cit* (note 339).

<sup>393</sup> *Ibid.*

<sup>394</sup> *Komape and Others v Minister of Basic Education* 2018 ZALMPPHC 18.

<sup>395</sup> *Ibid.*

<sup>396</sup> The Constitution (note 76) Section 11.

<sup>397</sup> The Constitution (note 76) Section 28.

<sup>398</sup> The Constitution (note 76) Section 10.

<sup>399</sup> The Constitution (note 76) Section 9.

<sup>400</sup> The Constitution (note 76) Section 29.

<sup>401</sup> Toxopeüs *op cit* (note 295).

<sup>402</sup> *Komape and Others v Minister of Basic Education* supra at 344 para 67 c.f. Toxopeüs *op cit* (note 295).

<sup>403</sup> *Komape and Others v Minister of Basic Education* supra at 344 para 68 c.f. Toxopeüs *op cit* (note 295).

<sup>404</sup> *Komape and Others v Minister of Basic Education* supra at 344 para 74 c.f. Toxopeüs *op cit* (note 295).

<sup>405</sup> *Komape and Others v Minister of Basic Education* supra at 344 para 70 and 74 c.f. Toxopeüs *op cit* (note 295).

<sup>406</sup> Toxopeüs *op cit* (note 295).

<sup>407</sup> *Ibid.*

<sup>408</sup> *Ibid.*

<sup>409</sup> *Ibid.*

This remedy should be awarded particularly in cases where there have been ‘glaring and continuous state failure to adhere to its constitutional obligations’, as seen in the *Komape* case.<sup>410</sup> In *Komape*<sup>411</sup>, the structural interdict only vindicated the infringed constitutional rights, but failed to provide compensation for the gross negligence and inaction experienced by the family.<sup>412</sup>

Lastly, it is submitted that in some instances where constitutional rights have been severely violated, as in the *Komape* case and the oncology crisis in KZN, constitutional damages might be required to constitute appropriate and effective relief to those that have suffered harm. Swanepoel also importantly notes that since granting an award of constitutional damages will almost always have a negative impact on the public purse, such an award will depend on the facts and circumstances of a case.<sup>413</sup> It is submitted that where public officials are held personally liable, the public purse will not be adversely affected.

### 4.2.3 Structural interdict

A structural interdict is an order of a court that instructs a violator to rectify an infringement of a fundamental right contained in the Constitution, under court supervision.<sup>414</sup> It usually consists of in part, interdictory relief and implements time frames within which certain stipulated steps must be taken.<sup>415</sup> Failure to comply essentially amounts to a contempt of court order.<sup>416</sup> The structural interdict differs from other type of interdicts in that recipients are subjected to judicial review, for the purpose of ensuring compliance.<sup>417</sup>

To effect judicial review, courts may issue periodic directives and continuously approve steps, to achieve complete remediation of the infringed right(s).<sup>418</sup> The nature of a structural interdict is an ‘ongoing regime of performance’, which means that the court stays involved until the constitutional right(s) have been rectified.<sup>419</sup> Mbazira states that the purpose of this remedy, according to the view taken by Currie and De Waal<sup>420</sup>, is that a structural interdict aims to deter future violations and facilitate structural change in institutional design, so as to end systemic violations.<sup>421</sup>

In addition, Mbazira comments on the flexibility of the structural interdict design. He states that the structural interdict design is intended to adjust to the legal harm suffered at the time of litigation, and also designed to adjust future behaviour of the parties involved.<sup>422</sup> Similar to

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<sup>410</sup> *Ibid.*

<sup>411</sup> *Komape and Others v Minister of Basic Education* supra at note 344.

<sup>412</sup> *Toxopeüs op cit* (note 295).

<sup>413</sup> *Swanepoel P op cit* (note 236) 75.

<sup>414</sup> *I Currie & J De Waal op cit* (note 234) 199.

<sup>415</sup> *Sibiya v DPP, Jhb* (2005) (5) SA 315 (CC) para 7-9 - Time may be extended, if it within the interest of justice to do so c.f. *I Currie & J De Waal op cit* (note 234) 199.

<sup>416</sup> *I Currie & J De Waal op cit* (note 234) 199.

<sup>417</sup> *I Currie & J De Waal op cit* (note 234) 199 c.f. *Swanepoel P op cit* (note 236) 85.

<sup>418</sup> *I Currie & J De Waal op cit* (note 234) 199; S Liebenburg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) Pretoria University Press, 424 c.f. *Swanepoel P op cit* (note 236) 85.

<sup>419</sup> *Mbazira op cit* (note 244) 176 c.f. *Swanepoel P op cit* (note 236) 85.

<sup>420</sup> *I Currie & J De Waal op cit* (note 234) 181 c.f. *Swanepoel P op cit* (note 236) 85.

<sup>421</sup> *Mbazira op cit* (note 244) 176 c.f. *Swanepoel P op cit* (note 236) 85.

<sup>422</sup> *Ibid.*



a structural interdict, a ‘reporting order’ issued by a court, requires parties to report-back to the court on the progress achieved concerning the infringements.<sup>423</sup> However, these two orders differ in that a structural interdict contains a supervisory element, whereby, the court monitors the violator’s progress until the constitutional right is vindicated.<sup>424</sup> In other words, the key difference between these orders, is the role of the court. For a structural interdict the court is a participant in the remedial process, whereas for a report order, the court is merely an observer of the progress made.<sup>425</sup>

#### 4.2.3.1 Important features of the structural interdict

Mbazira places emphasis on two unique features of a structural interdict, which sets it apart from other constitutional remedies:

1. Flexibility – Owing to the complexity and polycentric nature of socio-economic rights cases, it is common for further consequences and factors to develop after the initial remedy has been designed and ordered by a court.<sup>426</sup> Therefore, the structural interdict remedy allows for adaptation during the remedial process, so that new challenges and new changes can be accommodated.<sup>427</sup>
2. Supervisory role of the court – supervision by a court enables accountability of respondents and gives the court the capacity to deal with unforeseen issues.<sup>428</sup> Moreover, supervisory jurisdiction is beneficial to both the applicant and respondent.<sup>429</sup> This is because applicants can approach the court without having to issue new proceedings, if there is non-compliance with the initial order granted by the court.<sup>430</sup> In the same way, respondents may also approach the court on the same papers, to clarify any challenges with the order containing the initial directives issued by the court.<sup>431</sup>

The unique features of the structural interdict remedy work collaboratively to contribute in the efficacy of this remedy, so that systemic violations of socio-economic rights are corrected.<sup>432</sup> In addition, the effective remediation of socio-economic right violations requires proper interaction and co-operation between the government, civil society and the courts.<sup>433</sup>

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<sup>423</sup> S Liebenburg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) Pretoria University Press, 85.

<sup>424</sup> Liebenburg *op cit* (note 372) 424 c.f. Swanepoel P *op cit* (note 236) 85.

<sup>425</sup> Liebenburg *op cit* (note 372) 424 c.f. Swanepoel P *op cit* (note 236) 86.

<sup>426</sup> Mbazira *op cit* (note 244) 180 c.f. Swanepoel P *op cit* (note 236) 86.

<sup>427</sup> Mbazira *op cit* (note 244) 180 c.f. Swanepoel P *op cit* (note 236) 86.

<sup>428</sup> Mbazira *op cit* (note 244) 181 c.f. Swanepoel P *op cit* (note 236) 87.

<sup>429</sup> *Ibid.*

<sup>430</sup> *Ibid.*

<sup>431</sup> *Ibid.*

<sup>432</sup> Van der Berg S A ‘*Capabilities Approach to the Judicial Review of Resource Allocation Decisions Impacting on Socio-Economic Rights*’ LLD dissertation, Stellenbosch University (2015) 303-304 c.f. Swanepoel P *op cit* (note 236) 87.

<sup>433</sup> Swanepoel P *op cit* (note 236) 88.

Therefore, the unique features of this remedy as discussed above, have the potential to meet this criterion.<sup>434</sup>

Currie and De Waal note that this remedy must be designed in a flexible manner, to guard against supervision by the court becoming too intrusive and blurring the lines between the executive and judicial powers.<sup>435</sup>

#### **4.2.3.2 Appropriateness of the structural interdict remedy for the oncology crisis in KZN**

Roach and Budlender argue that the structural interdict constitutes appropriate and effective relief for violations caused specifically where there is (a) government intransigence, (b) incompetence of the government and (c) a risk of irreparable harm.<sup>436</sup> This view is also supported by De Vos *et al.*<sup>437</sup> The authors state that the greatest hurdle in rectifying systemic violations, is that public officials intentionally fail to meet their positive obligations imposed by the Bill of Rights.<sup>438</sup> Therefore, they submit that it is also likely that public officials are unlikely to comply with a mere court order.<sup>439</sup> Following the findings of the SAHRC investigation, the following issues are also relevant in the oncology crisis of KZN:

##### *(a) Government intransigence – City of Cape Town v Neville Rudolph*

In *City of Cape Town v Neville Rudolph*,<sup>440</sup> there had been a violation of the right of access to adequate housing as set out in section 26 of the Constitution, due to government intransigence. The factual context of *Rudolph* indicated that the state failed to provide proper housing for unlawful occupiers, who had been living in unbearable conditions with no alternative.<sup>441</sup>

The court in this case considered the nature of the right violated, a balance of the parties' interests, the reason given by the state for the violation, and the practicability of the structural interdict remedy.<sup>442</sup> These factors were considered in light of the government's unwillingness to accept responsibility for the infringement of rights in this case. Ultimately, the court in *Rudolph* granted a structural interdict, which included a report-back-order requirement, so that progress in the provision of housing could be monitored.<sup>443</sup>

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<sup>434</sup> *Ibid.*

<sup>435</sup> I Currie & J De Waal *op cit* (note 234) 200.

<sup>436</sup> Roach K & Bunlender G 'Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable' (2005) 122 *South African Law Journal* 350 c.f. Swanepoel P *op cit* (note 236) 87.

<sup>437</sup> P De Vos & W Freedman *et al op cit* (note 294) 407.

<sup>438</sup> Roach K & Bunlender G *op cit* (note 385) 350 c.f. Swanepoel P *op cit* (note 236) 89.

<sup>439</sup> Roach K & Bunlender G *op cit* (note 385) 350 c.f. Swanepoel P *op cit* (note 236) 89.

<sup>440</sup> *City of Cape Town v Neville Rudolph* 2003 (11) BCLR 1236 (C).

<sup>441</sup> *City of Cape Town v Neville Rudolph* *supra* at 389.

<sup>442</sup> *Ibid.*

<sup>443</sup> *City of Cape Town v Neville Rudolph* *supra* at 389 para 218.

(b) Government incompetence - *Section 27 v Minister of Education*

Roach and Budlender state that in cases of government incompetence, the structural interdict remedy should not be viewed as a punishment by the court.<sup>444</sup> Rather, it should be seen as an invitation for state departments to comply with their constitutional obligations with the support, guidance and supervision of the court.<sup>445</sup>

This is illustrated in *Section 27 v Minister of Education*<sup>446</sup> where failure by the Department of Education to provide textbooks to students in Limpopo, within a reasonable time, constituted a violation of a child's right to basic education. Kollapen J stated that merely ordering delivery of textbooks would not suffice to vindicate the right to education.<sup>447</sup> Consequently, the relief needed to go beyond the delivery of textbooks and was also required to address the negative impact that the lack of textbooks had created.<sup>448</sup> In this regard, the court granted a structural interdict that directed the Department of Education to develop a 'catch-up' plan for all students affected by the non-delivery of textbooks.<sup>449</sup> In this way, full and effective remediation of the right to basic education was ensured.

(c) Risk of irreparable harm – *EN v Government of the Republic of South Africa & Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency*

Lastly, Roach and Budlender consider that a structural interdict would also be appropriate and effective in circumstances of violations, that could result in irremediable harm.<sup>450</sup> In some circumstances, it would not be adequate to solely vindicate the right because of the grave consequences that may be imminent and thus require urgent relief.<sup>451</sup>

Considering that remedial action is sometimes achieved during a lengthy process through a structural interdict, it may not be ideal in circumstances where there are severe consequences imminent.<sup>452</sup> For this reason, Roach and Budlender suggest that when granting a structural interdict in cases that have urgent interests, a detailed and immediate relief order should form part of the structural interdict.<sup>453</sup> This immediate directive could prevent any further irremediable harm from occurring.<sup>454</sup>

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<sup>444</sup> Roach K & Budlender G *op cit* (note 385) 350 c.f. Swanepoel P *op cit* (note 236) 107.

<sup>445</sup> *Ibid.*

<sup>446</sup> *Section 27 v Minister of Education* 2013 (2) BCLR 237 (GNP).

<sup>447</sup> *Section 27 v Minister of Education* *supra* at 395 para 36 c.f. Swanepoel P *op cit* (note 236) 108.

<sup>448</sup> *Ibid.*

<sup>449</sup> *Section 27 v Minister of Education* *supra* at 395 para 43 c.f. Swanepoel P *op cit* (note 236) 109.

<sup>450</sup> Roach K & Budlender G *op cit* (note 385) 333 c.f. Swanepoel P *op cit* (note 236) 117.

<sup>451</sup> *Ibid.*

<sup>452</sup> *National Association of Welfare Organisations and Non-Governmental Organisations v MEC for Social Development* 2010 ZAFSHC 73.

<sup>453</sup> Roach K & Budlender G *op cit* (note 385) 340; Liebenburg *op cit* (note 372) 391 c.f. Swanepoel P *op cit* (note 236) 118.

<sup>454</sup> *Ibid.*

Roach and Budlender state that this immediate relief can take the form of an interim relief order.<sup>455</sup> The court stated in *President of the Republic of South Africa v United Democratic Movement*,<sup>456</sup> that when an action is likely to cause irreparable prejudice or serious harm, interim relief could be designed to prevent this prejudice. The purpose of this relief is to provide immediate aid to those already affected, and to ensure further harm does not ensue.<sup>457</sup> This safeguard will allow the court the necessary time to create a remedy that will eventually effect gradual structural changes, that will meet the obligations imposed by the Constitution.<sup>458</sup>

*EN v Government of the Republic of South Africa*,<sup>459</sup> dealt with conditions that had underlying urgent interests. This case concerned the right of access to health care, involving prisoners who required ARV treatment.<sup>460</sup> The court took note that this matter hinged on life or death of the prisoners who were severely ill at the time of the judgment.<sup>461</sup> As a result, urgent rectification was needed.<sup>462</sup>

The court in the *EN* case stated that there was an apparent degree of recalcitrance coupled with lack of commitment and inattentiveness by the state.<sup>463</sup> The state had no workable plan in place to assist in meeting their duty to provide health care to prisoners.<sup>464</sup> In addition, the state's attempt to fulfil their obligations in this case had been 'characterised by delays, obstacles and restrictions'.<sup>465</sup>

The court also commented on the nature of the infringement, which alluded to evidence of a continuous violation of prisoners' rights.<sup>466</sup> It was concluded that this ongoing systemic violation of the health rights of prisoners, who are a vulnerable group in society, require

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<sup>455</sup> *Ibid.*

<sup>456</sup> *President of the Republic of South Africa v United Democratic Movement* 2003 (1) SA 472 (CC) para 28 c.f. I Currie & J De Waal *op cit* (note 234) 198.

<sup>457</sup> Roach K & Budlender G *op cit* (note 385) 340; Liebenburg *op cit* (note 372) 391 c.f. Swanepoel P *op cit* (note 236) 118.

<sup>458</sup> *Ibid.*

<sup>459</sup> *EN v Government of the Republic of South Africa* 2007 (1) BCLR 84 (D).

<sup>460</sup> Section 27 of the Constitution provides that '(a) Everyone has the right to have access to health care services, including reproductive health care (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment'.

Section 35(2)(e) further provides that 'Everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.'

<sup>461</sup> *EN v Government of the Republic of South Africa* supra at 408 para 18 c.f. Swanepoel P *op cit* (note 236) 120.

<sup>462</sup> *EN v Government of the Republic of South Africa* supra at 408 para 6, 18 and 32.

<sup>463</sup> *EN v Government of the Republic of South Africa* supra at 408 para 32 c.f. Swanepoel P *op cit* (note 236) 121.

<sup>464</sup> *Ibid.*

<sup>465</sup> *Ibid.*

<sup>466</sup> *EN v Government of the Republic of South Africa* supra at 408 para 32 c.f. Swanepoel P *op cit* (note 236) 120.

protection and promotion of their fundamental rights by the court.<sup>467</sup> Furthermore, the court concluded that other infected prisoners seeking HIV treatment, would also benefit from the structural interdict issued, thus adding to the effectiveness of the remedy in this case.<sup>468</sup>

Swanepoel does however note some pitfalls in the *EN* judgment. He states that the deterrent component, which was indeed required in the circumstances of this case, was overlooked.<sup>469</sup> Moreover, the court failed to allow participation from the prisoners infected by HIV, as this would have ensured that varied interests were considered.<sup>470</sup>

Lastly, the judgments<sup>471</sup> of the SASSA saga concerned the delay in social assistance payments to grant beneficiaries. The court ultimately granted a strongly managerial remedy in the form of a structural interdict.<sup>472</sup> This order was granted because of SASSA failing to retain plans to meet their payment obligations to social grant beneficiaries.<sup>473</sup> The circumstances of this issue required urgent relief, since no payment of grants had grave consequences for many individuals who relied on the payment to survive.<sup>474</sup>

The Constitutional Court,<sup>475</sup> highlighted that it is essential for courts to retain their supervisory role until full vindication is achieved.<sup>476</sup> If courts fail to retain their supervisory jurisdiction, state entities are likely to not comply with the orders of court and this will render the remedy ineffective for the poor and marginalised, who may not have access to the courts for addressing non-compliance.<sup>477</sup> Therefore, Swanepoel argues that participation of parties and supervision by the court is vital for the effectiveness of a structural interdict.<sup>478</sup>

The above-mentioned cases demonstrate circumstances under which urgent relief may be required. Moreover, it shows the need for the inclusion of a detailed mandatory interdict within a larger structural interdict, so that irreparable harm is avoided, and structural change is gradually achieved.<sup>479</sup>

It is submitted that the structural interdict could potentially bring effective relief for cervical cancer patients. This is because the model is designed to ensure that actions and remedies are effectively carried out, under the supervision of the courts. Therefore, these elements would

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<sup>467</sup> *EN v Government of the Republic of South Africa* supra at 408 para 18 c.f. Swanepoel P op cit (note 236) 120.

<sup>468</sup> *EN v Government of the Republic of South Africa* supra at 408 para 4 and 35 c.f. Swanepoel P op cit (note 236) 121.

<sup>469</sup> Swanepoel P op cit (note 236) 123.

<sup>470</sup> *Ibid.*

<sup>471</sup> *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (1) SA 604 (CC); *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* (No 2) 2014 (4) SA 179 (CC); *Black Sash Trust v Minister of Social Development* 2017 ZACC 8 (CC).

<sup>472</sup> *Black Sash Trust v Minister of Social Development* 2017 ZACC 8 (CC) para 58 c.f. Swanepoel P op cit (note 236) 129.

<sup>473</sup> Swanepoel P op cit (note 236) 127.

<sup>474</sup> *Black Sash Trust v Minister of Social Development* 2017 ZACC 8 (CC) para 58 c.f. Swanepoel P op cit (note 236) 129.

<sup>475</sup> *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* 2014 (1) SA 604 (CC).

<sup>476</sup> Swanepoel P op cit (note 236) 135.

<sup>477</sup> *Ibid.*

<sup>478</sup> *Ibid.*

<sup>479</sup> *Ibid.*

be necessary to make certain that public health officials face the recommended disciplinary action.<sup>480</sup>

### 4.3 *Mandamus*

A *mandamus* is an order issued by the court, that declares the legal position on a particular matter in law and also instructs a party to act.<sup>481</sup> The purpose of the *mandamus* is to regulate future conduct.<sup>482</sup> Liebenburg argues, that a *mandamus* may be appropriate in bringing effective relief when socio-economic rights are infringed, as a result of the state's failure to give effect to their positive obligation in realising such rights.<sup>483</sup>

In regard to co-operation from public officials in realising socio-economic rights, Mbazira argues that a *mandamus* would not be necessary where compliance from the government is expected.<sup>484</sup> In other words, where there is no evidence that public officials would not show compliance with a mere court order.<sup>485</sup> Therefore, Swanepoel argues that a *mandamus* would then be an appropriate choice of relief where non-compliance by public officials is 'reasonably expected'.<sup>486</sup>

However, there have been some instances where a *mandamus* has been granted even when compliance by the state was expected. This is illustrated in *Minister of Health v TAC*<sup>487</sup>, where the court granted a *mandamus* in the absence of evidence that the state would be non-compliant.<sup>488</sup> The court ordered a *mandamus* due to the urgent relief which was required to prevent irreparable harm being caused to infants at risk of HIV infection.<sup>489</sup>

An additional feature of the *mandamus* that supports the requirement of urgent relief, is that when there is non-compliance, a *mandamus* may be followed by a contempt of court order.<sup>490</sup> A declaratory order, however, differs in this respect because it cannot be followed by a contempt of court order if non-compliance arises.<sup>491</sup>

A pitfall to the *mandamus* in bringing appropriate and effective relief, is that this remedy requires further litigation when the initial *mandamus* is not complied with. The additional litigation when there is non-compliance, makes it difficult for the poor and marginalised groups of society to get effective relief from this remedy because it may difficult for them to access courts (eg. women).<sup>492</sup> However, it is submitted, that these marginalised groups have the option of obtaining help from Legal Aid South Africa.<sup>493</sup>

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<sup>480</sup> See Chapter Five for discussion on the recommended disciplinary action for KZN public health officials.

<sup>481</sup> Liebenburg *op cit* (note 372) 408.

<sup>482</sup> Liebenburg *op cit* (note 372) 409.

<sup>483</sup> Liebenburg *op cit* (note 372) 410 c.f. Swanepoel P *op cit* (note 236) 70.

<sup>484</sup> Mbazira *op cit* (note 244) 17.

<sup>485</sup> Mbazira *op cit* (note 244) 17 c.f. Swanepoel P *op cit* (note 236) 70.

<sup>486</sup> Swanepoel P *op cit* (note 236) 70.

<sup>487</sup> *Minister of Health v Treatment Action Campaign* *supra* at note 238.

<sup>488</sup> *Minister of Health v Treatment Action Campaign* *supra* at note 238 para 129.

<sup>489</sup> Swanepoel P *op cit* (note 236) 70.

<sup>490</sup> *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 38 c.f. Swanepoel P *op cit* (note 236) 70.

<sup>491</sup> *Ibid.*

<sup>492</sup> Swanepoel P *op cit* (note 236) 70.

<sup>493</sup> Legal Aid South Africa Act 39 of 2014.

### 4.3.1 Common Law damages

Neethling *et al* describes a delict as a wrongful and culpable act which results in a harmful consequence.<sup>494</sup> Damages is an element of a delictual action, since there must be some damage for which the law makes compensation available.<sup>495</sup> Neethling *et al* goes on to define ‘compensation’ as the ‘monetary equivalent of the damage caused’.<sup>496</sup> In addition, the authors submit that the purpose of compensation is to place an aggrieved party in the position he/she would have been in, before the delict occurred.<sup>497</sup> Damages aim to restore as fully as possible, the past and future loss of a person.<sup>498</sup> They are always expressed in money.<sup>499</sup> In addition to compensation for harm already suffered, they also cover payment for expected future loss.<sup>500</sup>

The court defined damages in *Van der Merwe v Road Accident Fund*,<sup>501</sup> as the detrimental impact on any patrimonial or non-patrimonial interest which the law has deemed worthy to protect.<sup>502</sup> Damages can also be described as the decrease in the utility of an interest, due to an unexpected event.<sup>503</sup>

A downfall to this common law remedy, is that it is limited to the law of prescription. Prescription will run as soon as the debt is due (i.e. a debt is due once the creditor can identify the debtor and the facts from which the debt arises) or when the creditor becomes aware of the existence of the debt<sup>504</sup>, for a period of three years for a delictual debt.<sup>505</sup>

Prescription is also delayed for minors, in this case for dependants of cervical cancer victims, who are below 18.<sup>506</sup> The prescription period will begin the day after a minor’s 18<sup>th</sup> birthday.<sup>507</sup>

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<sup>494</sup> J Neethling, JM Potgieter & PJ Visser *Law of Delict* (2015) 221.

<sup>495</sup> *Road Accident Fund v Krawa* 2012 (2) SA 346 (ECG) para 2 c.f. Neethling, Potgieter & Visser *op cit* (note 442) 221.

<sup>496</sup> Potgieter, Steynberg and Floyd *Law of Damages* (2012) 185 c.f. Neethling, Potgieter & Visser *op cit* (note 442) 221.

<sup>497</sup> Neethling, Potgieter & Visser *op cit* (note 442) 221.

<sup>498</sup> *Van der Merwe v Road Accident Fund* (2006) (4) SA 230 para 252 c.f. Neethling, Potgieter & Visser *op cit* (note 442) 245.

<sup>499</sup> *Radell v Multilateral Motor Vehicle Accidents Fund* (1995) (4) SA 24 (A) c.f. Neethling, Potgieter & Visser *op cit* (note 442) 245.

<sup>500</sup> Neethling, Potgieter & Visser *op cit* (note 442) 245.

<sup>501</sup> *Van der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC).

<sup>502</sup> Neethling, Potgieter & Visser *op cit* (note 442) 245.

<sup>503</sup> Neethling, Potgieter & Visser *op cit* (note 442) 223.

<sup>504</sup> The Prescription Act 68 of 1969 Section 12.

<sup>505</sup> The Prescription Act (note 452) Section 11(d).

<sup>506</sup> The Prescription Act (note 452) Section 3(1).

<sup>507</sup> The Prescription Act (note 452) Section 3(1)(c)

#### 4.3.1.1 Patrimonial and non-patrimonial loss

Patrimonial loss refers to a reduction in value of a positive asset or an increase in the negative patrimony of a person (eg. debt).<sup>508</sup> In other words, it is the detrimental impact on any patrimonial loss for which the law offers protection.<sup>509</sup> Furthermore, even a reduction in the utility of a right that is protected by law, is viewed as a patrimonial loss.<sup>510</sup> This means that not only would a person's 'loss in profit' be categorised as a patrimonial loss, but loss also includes a detrimental impact on a person's earning capacity.<sup>511</sup>

The Supreme Court of Appeal in *Transnet v Sechaba*<sup>512</sup> applied the 'sum-formula approach' to determine the patrimonial loss of the claimant. This approach requires that the current patrimonial position of the claimant, be deducted from the position the claimant had been in before the harm occurred.<sup>513</sup>

In addition to the above-mentioned approach, the courts are likely to apply the 'once-and-for-all rule' which requires a claimant to state all their claims in a single cause of action.<sup>514</sup> These claims should include harm already sustained, as well as harm expected in the future.<sup>515</sup> An exception to this rule however is 'where there is a continuing wrong that causes damage, there is a series of rights of action (damages) that manifests, and the plaintiff is not expected to claim once and for all'.<sup>516</sup>

On the other hand, non-patrimonial loss is defined by Neethling *et al* as the 'detrimental impact on personality rights, which are deemed valuable for protection by law and are rights that do not affect a person's patrimony'.<sup>517</sup> Similar to patrimonial loss, which can be seen as the reduction in utility of patrimonial interests, non-patrimonial can also be described as the reduction in utility of personality interests.<sup>518</sup> The personality rights referred to include the right to dignity, privacy, identity, feelings, physical-mental integrity, liberty and one's reputation.<sup>519</sup>

A reduction in the quality or utility of a person's personality interests implies that his/her affected interests, can no longer be used to fulfil the legally justifiable expectations of such person.<sup>520</sup>

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<sup>508</sup> Neethling, Potgieter & Visser *op cit* (note 442) 229.

<sup>509</sup> *Ibid.*

<sup>510</sup> Potgieter, Steynberg and Floyd *Law of Damages* (2012) 91 c.f. Neethling, Potgieter & Visser *op cit* (note 442) 230.

<sup>511</sup> Neethling, Potgieter & Visser *op cit* (note 442) 230.

<sup>512</sup> *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* 2004 ZASCA 24.

<sup>513</sup> Neethling, Potgieter & Visser *op cit* (note 442) 232.

<sup>514</sup> Neethling, Potgieter & Visser *op cit* (note 442) 235.

<sup>515</sup> *Ibid.*

<sup>516</sup> Loubser and Midgley (eds) *Law of Delict* (2012) 407-408 c.f. Neethling, Potgieter & Visser *op cit* (note 442) 236.

<sup>517</sup> *Edouard v Administrator, Natal* (1989) (2) SA 368 para 386 c.f. Neethling, Potgieter & Visser *op cit* (note 442) 250.

<sup>518</sup> Neethling, Potgieter & Visser *op cit* (note 442) 251.

<sup>519</sup> *Van de Merwe v Road Accident Fund* (2006) (4) SA 230 c.f. Neethling, Potgieter & Visser *op cit* (note 442) 251.

<sup>520</sup> Neethling, Potgieter & Visser *op cit* (note 442) 251.



#### 4.3.1.2 Subjective and objective elements of non-patrimonial loss

Non-patrimonial loss consists of both an objective and a subjective element.<sup>521</sup> The objective element refers to the recognisable or physical evidence of the loss incurred.<sup>522</sup> An example of this objective external manifestation is when an individual is unconscious in hospital and cannot enjoy the usual amenities of his/her life, regardless of whether the individual is aware of this loss.<sup>523</sup>

The subjective element deals with the loss that exists in the mind or the consciousness of an individual.<sup>524</sup> Neethling *et al* explains that this element is formed by an individual's reaction to the reduction of his/her personality interests.<sup>525</sup> An example of this internal manifestation is the feeling of pain, which Neethling *et al* explains as the physical feeling of unhappiness, misery and/or injustice.<sup>526</sup> These feelings are not capable of being assessed externally or objectively, since it experienced within an individual.<sup>527</sup>

To determine non-patrimonial loss, one may make use of the 'comparative method'.<sup>528</sup> This method determines the loss incurred, by assessing the utility of quality concerning an individual's relevant personality rights, before and after the delict occurred.<sup>529</sup> In addition to this method, other evidence may also be gathered to determine the nature, intensity and duration of both the objective and subjective elements of the loss.<sup>530</sup>

#### 4.3.1.3 Relevant forms of non-patrimonial loss

There are several forms of non-patrimonial loss, however it is submitted, that the following types are the most appropriate for the harm suffered by cervical cancer patients, during 2015 – 2017.

##### 4.3.1.3.1 Pain and suffering

This is the actual pain experienced by an individual, both physical and mental, as a result of the harm caused.<sup>531</sup> It also includes the discomfort caused by bodily injury, emotional shock, as well as, medical treatment which had been necessitated by the injuries caused.<sup>532</sup> These damages can be claimed by cervical cancer patients who have experienced this loss during 2015 – 2017, because of the treatment being unavailable.

##### 4.3.1.3.2 Emotional shock

Emotional shock is mainly associated with pain and suffering, that in turn may also cause other forms of loss such as insomnia, depression, anxiety neurosis, hysteria and other forms of

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<sup>521</sup> *Ibid.*

<sup>522</sup> *Ibid.*

<sup>523</sup> *Reyneke v Mutual and Federal Insurance Co Ltd* (1991) (3) SA 412 c.f. Neethling, Potgieter & Visser *op cit* (note 442) 251.

<sup>524</sup> Neethling, Potgieter & Visser *op cit* (note 442) 252.

<sup>525</sup> *Ibid.*

<sup>526</sup> Neethling, Potgieter & Visser *op cit* (note 442) 252.

<sup>527</sup> *Ibid.*

<sup>528</sup> *Ibid.*

<sup>529</sup> *Ibid.*

<sup>530</sup> *Ibid.*

<sup>531</sup> PJ Visser & JM Potgieter *Law of Damages* (2003) 99.

<sup>532</sup> Visser & Potgieter *op cit* (note 481) 100.

mental or physical conditions.<sup>533</sup> The shock must also have an impact on the physical or mental health of the plaintiff, and not just affect the individual for a short period of time.<sup>534</sup> It is submitted that this type of loss could be claimed by cervical cancer patients, who have experienced emotional shock and the above manifestations of this type of loss.

#### 4.3.1.3.3 Shortened expectation of life

This form of loss is when an individual's natural life expectancy is shortened and is usually taken into consideration as a loss of amenity.<sup>535</sup> It is submitted that this type of loss may be relevant to cervical cancer patients who once had curable cervical cancer, but has now advanced to a terminal stage, due to a delay in treatment during the 2015 - 2017.

#### 4.3.1.3.4 Loss of support

Common law provides that where a person has wrongfully caused the death of another, the dependants of the deceased are entitled to claim for loss of support sustained, as a result of the deceased's death.<sup>536</sup> The basis of the claim is that dependants have lost support due to the death of a breadwinner, who was under a legal duty to provide for the dependants during his lifetime.<sup>537</sup>

An example of dependants would be a wife and children, who have a legal right to be maintained, until a child becomes self-supporting.<sup>538</sup> In addition, actual, accrued and prospective patrimonial loss must be established because of the death of a breadwinner.<sup>539</sup> It is submitted that this type of loss is relevant in respect of individuals who have lost their breadwinner as a result of delayed oncology treatment, who would have otherwise survived, had treatment been available.

#### 4.3.1.3.5 Grief

In the recent cases of *Komape*<sup>540</sup> and *Life Esidimeni*<sup>541</sup> there has been a call for the development of common law, to allow for payment of damages for grief in addition to trauma and emotional shock, without showing that such grief had a psychiatric effect on the claimant.<sup>542</sup> This change would set a precedent for future cases.<sup>543</sup>

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<sup>533</sup> Visser & Potgieter *op cit* (note 481) 100 c.f. Neethling, Potgieter & Visser *op cit* (note 442) 246.

<sup>534</sup> Neethling, Potgieter & Visser *op cit* (note 442) 246 c.f. Visser & Potgieter *op cit* (note 481) 100.

<sup>535</sup> *Du Bois v MVA Fund* 1992 (4) SA 368 (T) c.f. Visser & Potgieter *op cit* (note 481) 102.

<sup>536</sup> NP Swartz & O Itumeleng 'A Discourse of The Dependant's action For Loss of Support and The Influence of The New Constitutional Dispensation' (2016) 21 (6) *IOSR Journal of Humanities and Social Science* 55.

<sup>537</sup> *Ibid.*

<sup>538</sup> *Ibid.*

<sup>539</sup> *De Vries NO and Others v Road Accident Fund* (2011) HC 215.

<sup>540</sup> *Komape and Others v Minister of Basic Education* supra at note 344.

<sup>541</sup> *Arbitration Award op cit* (note 339).

<sup>542</sup> 'Michael Komape family to appeal' *Mail&Guardian*, 31 March 2018 accessed from <https://mg.co.za/article/2018-05-31-michael-komape-family-to-appeal> (accessed on 18 February 2019).

<sup>543</sup> 'Lawyers for Michael Komape's family demand damages for grief' *News24*, 2 February 2018 accessed from <https://www.news24.com/SouthAfrica/News/lawyers-for-michael-komapes-family-demand-damages-for-grief-20180202> (accessed on 19 February 2019).

It is submitted that should such precedent be set, there will also be a possible claim for dependants who have suffered grief as a result of losing their loved one at the hands of public health officials, who have failed to uphold their constitutional duties.

#### 4.4. Alternative dispute resolution (ADR)

Following the success of the Life Esidimeni arbitration hearing, it would be useful to discuss alternative dispute resolution, particularly, the mechanism used in the Life Esidimeni hearing ie. arbitration.

Around the globe, jurisdictions have become more and more accepting of the reality, that in certain instances, court proceedings may not always be the most appropriate method to solve civil disputes.<sup>544</sup> The South African Law Reform Commission has also recommended that ADR procedures be used to resolve civil disputes.<sup>545</sup> The Commission stated that this change will enhance access to justice.<sup>546</sup>

Peté *et al* provide the fundamental objectives of the ADR process as follows:

1. Cost-cutting

Disputes that are resolved using ADR mechanisms are more efficient and cost-effective than accessing the court system.<sup>547</sup> Negotiation and mediation are the most cost-effective of all the ADR mechanisms.<sup>548</sup>

2. ADR facilitates co-operative and participatory dispute settlement

ADR procedures encourage a 'dialogue-based culture', particularly when there are diverse interests and contentious issues in dispute.<sup>549</sup> The nature of the co-operative mechanisms in ADR enable parties to work together with a neutral party, to develop a mutually acceptable remedy.<sup>550</sup>

3. ADR aids access to justice

Effective use of the ADR process offers a more affordable option to parties and quickens the resolution of disputes.<sup>551</sup> These features make the procedure more accessible to the public.

4. ADR relieves court congestion

Studies conducted on case-flow management in South African courts show that court-rolls are often congested and as a result, cases take lengthy periods of time to litigate.<sup>552</sup>

It is also important to note that alternative dispute resolution is an interest-based approach, and not a rights-based approach.

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<sup>544</sup> S Pete & D Hulme et al *Civil Procedure: A practical guide* (2016) 501.

<sup>545</sup> South African Law Commission (1997) Alternative Dispute Resolution, Project 94, Issue Paper 8 c.f. S Pete & D Hulme et al *op cit* (note 494) 501.

<sup>546</sup> S Pete & D Hulme et al *op cit* (note 494) 501.

<sup>547</sup> N Melville 'Has ombudsmania reached South Africa? The burgeoning role of ombudsman in commercial dispute resolution (2010) 22(1) *SA Mercantile Law Journal* 50 c.f. S Pete & D Hulme et al *op cit* (note 484) 503.

<sup>548</sup> S Pete & D Hulme et al *op cit* (note 494) 503.

<sup>549</sup> *Ibid.*

<sup>550</sup> *Ibid.*

<sup>551</sup> *Ibid.*

<sup>552</sup> *Ibid.*

#### 4.4.1 Types of ADR Procedures

Peté *et al* states that ‘ADR means any procedure, other than litigation or civil application procedures that may be used to resolve civil disputes’.<sup>553</sup> ADR mechanisms include, but are not limited to, negotiation, conciliation, mediation, arbitration or a combination of any of these procedures.<sup>554</sup> ADR also includes the option of hybrid ADR procedures. Hybrid ADR procedures are a blend of different ADR mechanisms.<sup>555</sup> These procedures may be useful when no single ADR mechanism is suitable to resolve a dispute.<sup>556</sup> Common hybrid ADR procedures include, a Mini-trial, Mediation-Arbitration, Arbitration-Mediation, Mediation-Reconciliation and MEDALOA.<sup>557</sup>

For the purpose of this research paper only arbitration will be discussed, owing to the recent success of its use in the Life Esidimeni hearing. All other ADR procedures are beyond the scope of this dissertation.<sup>558</sup>

#### 4.4.2 Arbitration

The arbitration procedure is adjudicated by an arbitrator, who fulfils a role that is similar to a judge in the court.<sup>559</sup> The arbitrator is an independent third party who hears oral evidence, written evidence and arguments.<sup>560</sup> He/she then makes a decision based on the evidence and by considering the applicable law.<sup>561</sup>

The decision made at an arbitration hearing is called an award.<sup>562</sup> Despite the resemblance between a court hearing and an arbitration, it still falls under the ADR procedures.<sup>563</sup> This is because arbitration falls outside the public court process, which is enabled by section 34<sup>564</sup> of the Constitution.<sup>565</sup>

A written arbitration agreement is regulated by the Arbitration Act.<sup>566</sup> The Act allows for an award to be made an order of the High Court, in terms of section 31(1).<sup>567</sup> This order then becomes binding on all individuals, including state mechanisms.<sup>568</sup> Conversely, an award

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<sup>553</sup> S Pete & D Hulme *et al op cit* (note 494) 504.

<sup>554</sup> *Ibid.*

<sup>555</sup> S Pete & D Hulme *et al op cit* (note 494) 507.

<sup>556</sup> *Ibid.*

<sup>557</sup> *Ibid.*

<sup>558</sup> See S Pete & D Hulme *et al op cit* (note 494) 504 – 509 for a discussion on other ADR and Hybrid ADR procedures.

<sup>559</sup> S Pete & D Hulme *et al op cit* (note 494) 505.

<sup>560</sup> *Ibid.*

<sup>561</sup> *Ibid.*

<sup>562</sup> *Ibid.*

<sup>563</sup> *Ibid.*

<sup>564</sup> The Constitution (note 32) Section 34 – ‘Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.’

<sup>565</sup> S Pete & D Hulme *et al op cit* (note 484) 505.

<sup>566</sup> The Arbitration Act 42 of 1965 c.f. S Pete & D Hulme *et al op cit* (note 494) 505.

<sup>567</sup> The Arbitration Act Section 31(1) c.f. S Pete & D Hulme *et al op cit* (note 494) 505.

<sup>568</sup> S Pete & D Hulme *et al op cit* (note 494) 505.

granted at an arbitration hearing cannot be enforced by the arbitrator unless it is made an order of court.<sup>569</sup>

#### **4.4.3 Advantages of arbitration over other ADR procedures**

The advantage of arbitration over the court procedure and other existing ADR mechanisms is that firstly, arbitration begins timeously whereas litigation usually takes lengthy periods of time due to legal rules and technicalities.<sup>570</sup> These rules and technicalities are relaxed during an arbitration hearing.<sup>571</sup>

Secondly, the arbitrator appointed for a dispute is usually experienced in the specific field, that is in issue.<sup>572</sup> Hence, unlike a judge who may not have such specific knowledge, the arbitrator possesses a better understanding, skill and experience of the matter in dispute.<sup>573</sup> This expertise could lead to a more effective solution.

Thirdly, the arbitration process is usually neutral in nature since the arbitrator is an independent third party.<sup>574</sup> In some hearings however, the rules may allow for parties to select the arbitrator.<sup>575</sup> Finally, arbitration is generally confidential and more cost-effective than any other civil court procedure.<sup>576</sup>

#### **4.4.4 Disadvantages of ADR procedures**

A disadvantage of using an ADR mechanism is that a party is at risk of incurring double-costs.<sup>577</sup> Since there is no guarantee that the ADR mechanism will resolve a dispute, a party would have to seek normal litigation at court which will require further time and costs, if the dispute is unresolved after ADR.<sup>578</sup> Another disadvantage of ADR is that a claim could prescribe during an ongoing ADR procedure, which should be avoided when there is a danger of prescription.<sup>579</sup> This would render the parties unable to resolve their dispute in a court, should the ADR procedure fail.

##### **4.4.4.1 Life Esidimeni Arbitration hearing**

As previously mentioned, arbitration was used in the Life Esidimeni hearing and the arbitrator appointed was Former Deputy Chief Justice, Dikgang Moseneke.<sup>580</sup> Given the

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<sup>569</sup> *Ibid.*

<sup>570</sup> *Ibid.*

<sup>571</sup> *Ibid.*

<sup>572</sup> *Ibid.*

<sup>573</sup> *Ibid.*

<sup>574</sup> S Pete & D Hulme et al *op cit* (note 494) 506.

<sup>575</sup> *Ibid.*

<sup>576</sup> For an example of confidentiality see Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another (2009) (4) SA 529 (CC) c.f. S Pete & D Hulme et al *op cit* (note 494) 506.

<sup>577</sup> S Pete & D Hulme et al *op cit* (note 494) 510.

<sup>578</sup> S Pete & D Hulme et al *op cit* (note 494) 510.

<sup>579</sup> S Pete & D Hulme et al *op cit* (note 494) 511.

<sup>580</sup> M Toxopeüs 'The Life Esidimeni Arbitration: The legal basis for granting the award' 8 May 2018, Helen Suzman Foundation accessed from <https://hsf.org.za/publications/hsf-briefs/the-life-esidimeni-arbitration->

tragic nature of the Life Esidimeni dispute, the arbitration hearing allowed the curators of survivors and families of the deceased patients, an opportunity to relay their experience.<sup>581</sup> Similarly, the hearing also allowed public health officials an opportunity to account for their actions and demonstrate their remorse to the affected families.<sup>582</sup>

After hearing all testimony, the arbitrator considered the evidence before him and concluded that the decision by the Gauteng Department of Health to terminate their contract with Life Esidimeni Care Centre was irrational, unconstitutional and led to suffering and deaths of mental health care patients.<sup>583</sup> The arbitrator was empowered to award both general and constitutional damages, which amounted to a successful award of 1.2 million rand per claimant.<sup>584</sup>

It is submitted, that given the cost-effective and impartial nature of an arbitration hearing, it could be instrumental in providing relief to cervical cancer patients and, would also prevent years of future litigation.

## 4.5 Conclusion

This chapter sought to emphasise the need for appropriate and effective relief in cases involving socio-economic right violations. This relief is particularly important in an unequal society like South Africa, that is plagued by poverty.<sup>585</sup> It also considered what constitutes appropriate and effective relief in cases of systemic right violations.

The first part of this chapter focused on two constitutional remedies that are available to cervical cancer patients. It identified the circumstances under which constitutional damages and a structural interdict, may constitute appropriate and effective relief. In addition, this chapter discussed the participatory model of the structural interdict proposed by Swanepoel, specifically for socio-economic rights cases. Further this chapter proposed the potential of combining the participatory model of a structural interdict with damages, in cases that require urgent relief and structural changes, similar to the oncology crisis.

The second part of the chapter dealt with two common law remedies that are available to cervical cancer patients, who have suffered harm during 2015-2017, as a result of the oncology crisis. It discussed the mandamus and common law damages as remedies in the context of socio-economic right cases. It also evaluated some advantages and pitfalls of each remedy, as well as how courts have granted these remedies.

This chapter concludes by discussing arbitration as an ADR mechanism. It highlighted the use of arbitration in the Life Esidimeni hearing. The hearing resulted in a successful award of damages for mental health care patients and the deceased families. In addition, the features of arbitration were evaluated to determine its usefulness for cervical cancer patients.

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[the-legal-basis-for-granting-the-award](#) (accessed on 24 September 2018). See also 3.3.1.2 for discussion on the Life Esidimeni hearing.

<sup>581</sup> Toxopeüs M 'Life Esidimeni hearing' *op cit* (note 530).

<sup>582</sup> *Ibid.*

<sup>583</sup> *Ibid.*

<sup>584</sup> *Ibid.*

<sup>585</sup> Swanepoel P *op cit* (note 236) 185.

From this chapter it is clear that there are various options available to cervical cancer patients, who wish to seek restitution for their violated constitutional rights. However, the relief chosen must be considered the most effective and legitimate by the affected persons. It is submitted, that the remedy which would constitute effective and appropriate relief for cervical cancer patients is common law damages, as well as, a structural interdict. The reason for these recommendations will be discussed further in chapter six.

## **CHAPTER FIVE: WHO CAN BE HELD LIABLE FOR HARM CAUSED TO CERVICAL CANCER PATIENTS OR THEIR DEPENDANTS**

### **5.1 Introduction**

This chapter will commence by identifying the public health officials who should be held liable for their actions, that have contributed to the breakdown of oncology services in the KZN public health sector.<sup>586</sup>

The report on the irregularities surrounding the appointment of the service provider (KZN Oncology Inc), was submitted to the SAHRC by Medical Rights Advocacy Network (MeRAN).<sup>587</sup> The MeRAN report evaluated the actions of public health officials, to determine their individual contributions to the breakdown of oncology machines at Addington Hospital.<sup>588</sup> In addition, the report predominantly summarised information gathered by the KZN Treasury, who investigated procurement irregularities relating to the appointment of KZN Oncology Inc.<sup>589</sup>

This chapter will go on to detail the view of various authors, particularly DA MPL<sup>590</sup> Dr Imran Keeka, who has been a key individual in raising awareness on the concerns of public health officials' actions. As mentioned previously, Dr Keeka initially brought a written complaint to the SAHRC, reporting on the condition of oncology services in KZN.<sup>591</sup>

The actions of public health officials in the KZN Department of Health that will be discussed include, the Minister of Health, the MEC of Health in KZN, the sole proprietor of KZN Oncology Inc, the General Manager of supply chain management, the Head of Department (HoD) who also held the position of Accounting Officer, the Chief Financial Officer and other senior members of management in the KZN Department of Health.<sup>592</sup>

### **5.2 Breakdown of machines and change of service provider**

Before the actions of the KZN public health officials are discussed, it is important to highlight the circumstances that led to the oncology crisis. Therefore, a summary regarding the maintenance of the oncology machines at Addington Hospital is required.

Following the breakdown of two oncology machines at Addington, owing to a refusal by the KZN Health Department to make payment to the original service provider Tecmed, a new company, KZN Oncology Inc whose sole proprietor is a former employee of the KZN

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<sup>586</sup> It is important to note that the actions considered will be those carried out during the research period of this dissertation ie. 2015 – 2017.

<sup>587</sup> *'MeRAN Report on Kwa-Zulu Natal Addington Hospital, Durban, oncology machine scandal'* 2018 (unpublished) 18.

<sup>588</sup> *Ibid.*

<sup>589</sup> *Ibid.*

<sup>590</sup> Member of the Provincial Legislature (MPL).

<sup>591</sup> See 1.1 for discussion on Dr. Imran Keeka's submission to the South African Human Rights Commission.

<sup>592</sup> It is important to note that this chapter refers to those individuals holding these positions during 2015-2017.



Department of Health, was awarded a tender.<sup>593</sup> The tender was awarded for repair and maintenance of two Varian machines.<sup>594</sup> The tender was also awarded at a higher amount, which was double the amount initially quoted by Tecmed, the authorised service provider for the Varian machines.<sup>595</sup>

KZN Oncology Inc was not authorised to repair or maintain these machines, which had been confirmed by Varian, the sole provider of the oncology machines.<sup>596</sup> In the appointment of KZN Oncology Inc, the Health Technology Services (HTS) were not consulted, and various laws and regulations were breached following the employment of KZN Oncology Inc.<sup>597</sup>

The attempt at repair of machines by KZN Oncology Inc resulted in one of the Varian machines operating only for a short period, while the other machine was damaged by the company's technicians who cannibalized parts from the first machine to repair the second machine.<sup>598</sup> Further, the repair was conducted before a contract was concluded between the KZN Department of Health and KZN Oncology Inc.<sup>599</sup>

Due to the irregular actions by public health officials in KZN, there have been delays in the provision of oncology treatment.<sup>600</sup> Therefore, many cancer patients have died as a result of not receiving treatment timeously.<sup>601</sup> Many of these cancer deaths have been of patients diagnosed with cervical cancer, owing to the lack of radiotherapy treatment, because of dysfunctional machines.<sup>602</sup>

The breakdown of machines at Addington led to the backlog of patients at Albert Luthuli Central Hospital and Addington Hospital. In effect, this has led to a breakdown of oncology services in KZN as a whole.

The grossly irregular actions of public health officials who held these positions during 2015 - 2017 in the KZN Department of Health are detailed as follows:

### **5.3 National Minister of Health and Department of Health Premier of KZN**

MeRAN submits that the Minister of Health and the KZN Premier who should be overseers of the Department of Health, seemingly ignore their responsibilities imposed on them as political bearers by the Constitution of the Republic of South Africa.<sup>603</sup> This responsibility is

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<sup>593</sup> *MeRAN Report op cit* (note 537) 2-3.

<sup>594</sup> *Ibid.*

<sup>595</sup> *Ibid.*

<sup>596</sup> *KZN Treasury Report on the procurement irregularities relating to KZN Oncology Inc* para 18.2.12 – 18.2.13 c.f. *MeRAN Report op cit* (note 537) 20.

<sup>597</sup> *MeRAN Report op cit* (note 537) 23.

<sup>598</sup> *MeRAN Report op cit* (note 537) 24.

<sup>599</sup> *Ibid.*

<sup>600</sup> *MeRAN Report op cit* (note 537) 35.

<sup>601</sup> *Ibid.*

<sup>602</sup> *MeRAN Report op cit* (note 537) 36.

<sup>603</sup> *MeRAN Report op cit* (note 537) 27.

imposed on the Premier by section 125<sup>604</sup>, and on the Minister of Health in terms of section 85<sup>605</sup> of the Constitution.<sup>606</sup>

### 5.3.1 National Minister of Health – KZN Department of Health

The Minister of Health has publicly stated to the National Health Portfolio Committee, that the reason for the malfunctioning machines was due to a lack of necessary skills by the Head of Department/Accounting officer, to manage the KZN Department of Health.<sup>607</sup> This was alleged by the Minister of Health, despite contradictory evidence which shows that the appointment of KZN Oncology Inc, an entity that was not qualified to repair the two machines, was done through deliberate action by senior management who bypassed procurement procedures.<sup>608</sup>

It is submitted, that the Minister of Health overlooked the corrupt actions of public health officials in KZN, in procuring the services of KZN Oncology Inc. Instead, the Minister stated that the collapse of oncology services was due to a ‘lack of skill’.<sup>609</sup>

Further, during a presentation to Parliament, the Minister failed to provide Parliament with important information on the irregular contract awarded to KZN Oncology Inc, for the attempted repair and maintenance of two machines at Addington Hospital.<sup>610</sup> In addition, he did not make available to Parliament the findings of the KZN Treasury Report which evaluated the irregular contract, all of which was within the Minister’s knowledge.<sup>611</sup>

As previously mentioned, MeRAN points out that the Minister misled the National Health Portfolio Committee, by placing the blame on the Health Technology Services (HTS), commenting on their lack of the requisite capacity.<sup>612</sup> However, it is evident from the findings of the KZN Treasury Report and MeRAN, that HTS had never been involved in the appointment of KZN Oncology Inc and were completely bypassed during the process.<sup>613</sup>

Furthermore, MeRAN’s findings show that it was HTS who stood firm and refused to condone the gross corruption that surrounded the procurement of KZN Oncology Inc.<sup>614</sup>

Lastly, according to HTS, the National Health Minister failed to inform the National Health Portfolio Committee that it was Addington Hospital that committed the Department of Health to the irregular contract with KZN Oncology Inc, which the KZN Treasury has deemed as an irregular expenditure.<sup>615</sup>

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<sup>604</sup> The Constitution (note 76) Section 125.

<sup>605</sup> For Minister’s responsibilities see also - The Constitution (note 76) Section 92(3).

<sup>606</sup> *MeRAN Report op cit* (note 537) 27.

<sup>607</sup> *MeRAN Report op cit* (note 537) 31.

<sup>608</sup> *Ibid.*

<sup>609</sup> *Ibid.*

<sup>610</sup> *Ibid.*

<sup>611</sup> *Ibid.*

<sup>612</sup> *Ibid.*

<sup>613</sup> *Ibid.*

<sup>614</sup> *Ibid.*

<sup>615</sup> *Ibid.*

MeRAN is of the view that the National Health Minister should account for why he misled the National Parliament, by placing false blame on the HTS for supply-chain management issues.<sup>616</sup> Further, he must be questioned on why he concealed the KZN Treasury Report, when he made his presentation to the National Health Portfolio Committee.<sup>617</sup>

In light of the findings of the KZN Treasury and MeRAN, it is submitted that the Minister should be held liable for breaching section 85 of the Constitution. It provides that the Minister must ensure that national legislation and policy is fulfilled, which includes health legislation that promotes access to healthcare.<sup>618</sup>

Moreover, it is the responsibility of the Minister to act in accordance with the Constitution and furnish Parliament with detailed and regular reports concerning matters that are under his supervision.<sup>619</sup> Therefore, the Minister must be held liable for his failure to present to Parliament an accurate report on the state of oncology services in KZN, misleading the National Portfolio Committee on the cause for the malfunctioning machines, excluding the KZN Treasury report during his presentation to Parliament, and for placing false blame on HTS.

It is submitted that the above actions constitute a breach of section 92 (a) and (b) of the Constitution, and the Minister should therefore face a disciplinary hearing for failing to uphold his constitutional obligations. He should also bear collective responsibility for the mismanagement of the oncology services as recommended by MeRAN and be held liable to pay damages<sup>620</sup> to cervical cancer patients and their dependants, who suffered harm as result of his failure to take effective steps to prevent the breakdown of machines.

### 5.3.2 Premier of KZN

‘MeRAN also points out that in terms of section 133(2)<sup>621</sup> of the Constitution, the Premier and the Provincial Executive Council bear collective responsibility for this gross mismanagement of oncology services and the deaths of patients which have resulted from it.’<sup>622</sup>

It is submitted, that the Premier of KZN should face a disciplinary hearing for his failure to comply with the constitutional obligation, imposed on him by section 125 of the Constitution. He should also be held personally liable to pay damages to cervical cancer patients and their dependants, who suffered harm during 2015 – 2017 as a result of the Premier’s failure to effectively manage the KZN Health Department, which has resulted in numerous cervical cancer deaths. These damages should be in the form of pain and suffering, emotional shock,

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<sup>616</sup> *MeRAN Report op cit* (note 537) 39.

<sup>617</sup> *MeRAN Report op cit* (note 537) 31.

<sup>618</sup> The Constitution (note 76) Section 85(2)(a)-(b).

<sup>619</sup> The Constitution (note 76) Section 95(a)-(b).

<sup>620</sup> The relevant forms of damages include, but are not limited to pain and suffering, emotional shock, reduced expectancy of life and loss of support for dependants of deceased patients.

<sup>621</sup> The Constitution (note 76) Section 133(2).

<sup>622</sup> *MeRAN Report op cit* (note 537) 37.

reduced expectancy of life and loss of support for dependants of cervical cancer patients who have died.<sup>623</sup>

#### 5.4 Member of Executive Council (MEC) for KZN Department of Health

The MEC for Health in KZN has continually provided false information on the issues concerning the oncology machines, oncology staff and the waiting periods for oncology treatment.<sup>624</sup> Dr Imran Keeka (DA Health Spokesman), argues that the MEC's lack of interest and concern for resolving the breakdown of oncology services in KZN, has contributed to a backlog in treatment and deaths.<sup>625</sup>

Keeka states further, that the breakdown of oncology services in KZN did not happen 'overnight', nor did it happen under the sole supervision of the HoD/accounting officer.<sup>626</sup> Keeka also takes the view that the HoD is being used as a scapegoat, to take blame for the political bungle consisting of other public health officials, including the MEC for Health.<sup>627</sup>

The South African Medical Association (SAMA) chairperson, Dr Mzukisi Grootboom, also echoed the opinion of Dr. Keeka, in his statement concerning the MEC for Health in KZN. He expressed that if the suspended HoD is to be held accountable for the state of oncology services in KZN, then his political leaders which include the MEC and Premiers, should also be held accountable.<sup>628</sup>

MeRAN also argues that responses received from the MEC have been marked with several damning inconsistencies.<sup>629</sup> Firstly, MeRAN received a written response from the MEC in February 2017, concerning an internal investigation conducted by the Department into the procurement irregularities, misrepresentation and tax evasion (amongst other things) by Tecmed.<sup>630</sup> The MEC alleged that a criminal case had been opened with the South African Police Services (SAPS), and that Tecmed was being investigated by the National Treasury, Asset Forfeiture Unit, the National Prosecuting Authority (NPA) and SAPS.<sup>631</sup> Despite these allegations by the MEC, the National Treasury stated that they were never investigating Tecmed and was only aware of an internal investigation conducted by the KZN Department of Health.<sup>632</sup> Therefore such allegations by the MEC were proved to be false by the investigation conducted by MeRAN.

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<sup>623</sup> McQuoid-Mason DJ, 'Public health officials and MECs should be held liable for harm caused to patients through incompetence, indifference, maladministration or negligence regarding the availability of hospital equipment' (2016) 106 (7) *The South African Medical Journal (SAMJ)* 681.

<sup>624</sup> Imran Keeka '#KZNOncologyCrisis: SAHRC must not allow MEC Dhlomo to escape justice', accessed from <http://www.politicsweb.co.za/news-and-analysis/sahrc-must-not-allow-mec-dhlomo-to-escape-justice-> (accessed on 10 December 2018).

<sup>625</sup> *Ibid.*

<sup>626</sup> SAHRC 'Calls mount for KZN health MEC to be held accountable' 16 November 2017 accessed from <https://www.sahrc.org.za/index.php/sahrc-media/news/item/993-calls-mount-for-kzn-health-mec-to-be-held-accountable> (accessed on 1 Nov 2018).

<sup>627</sup> *Ibid.*

<sup>628</sup> *Ibid.*

<sup>629</sup> *MeRAN Report op cit* (note 537) 14.

<sup>630</sup> *MeRAN Report op cit* (note 537) 15.

<sup>631</sup> *Ibid.*

<sup>632</sup> *MeRAN Report op cit* (note 537) 15.

In the absence of any evidence of the allegations against Tecmed, the Department of Health refused to make payment to Tecmed for maintenance of the Varian machines.<sup>633</sup> As a result, the Department has put the lives of many cancer patients at risk, including cervical cancer patients, because there had been no upkeep of oncology machines.<sup>634</sup> The department has also probably condemned hundreds of cancer patients to death, by their failure to provide life-saving treatment timeously.<sup>635</sup>

MeRAN notes that in 2015, the MEC appeared before the Provincial Public Accounts Committee, stating yet again that there were three cases which had been opened against Tecmed, relating to procurement irregularities.<sup>636</sup> However, the case numbers provided by the MEC were reviewed by MeRAN against the records of SAPS, and the case numbers did correlate with investigations into procurement irregularities.<sup>637</sup> The case numbers had instead been linked to other crimes.<sup>638</sup>

It is important to note, that notwithstanding several claims by the MEC relating to corruption against Tecmed since 2012, Tecmed still remains on the National Treasury Data base.<sup>639</sup> Furthermore, the company continues to service a machine at Greys Hospital and Tecmed has never been criminally charged or convicted of any crime.<sup>640</sup> The company is also the only authorised service provider for Varian (ie. supplier of the machines at Addington Hospital).<sup>641</sup>

In addition, MeRAN also questions why the allegations of irregularities relating to Tecmed only arose when payment for maintenance was due (ie. after the first year of free services).<sup>642</sup> It has been brought to the knowledge of MeRAN, that Tecmed had continued maintaining the machines at Addington Hospital, for several months without any payment.<sup>643</sup>

This then leads to the inquiry of what happened to the millions of rands that had been provided by central government, specifically for a five-year maintenance contract with Tecmed.<sup>644</sup>

In their submission to the SAHRC, MeRAN suggested that the MEC (and other members of management) must be answerable for his actions and provide evidence as to why he led the public to believe the machines at Addington Hospital were old.<sup>645</sup> Furthermore, the MEC should be questioned on the conflicting stories, which he divulged to the National Health Portfolio Committee about the criminal investigations against Tecmed.<sup>646</sup> Lastly, he should

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<sup>633</sup> *MeRAN Report op cit* (note 537) 18.

<sup>634</sup> *Ibid.*

<sup>635</sup> *Ibid.*

<sup>636</sup> *MeRAN Report op cit* (note 537) 16.

<sup>637</sup> *Ibid.*

<sup>638</sup> *Ibid* – There had also been statements put out in May 2013 by the MEC for Health during a press conference, where he stated that he had presented Varian (ie. supplier of the machines) with a detailed report into the investigations of irregularities with the company. MeRAN points out that a copy of such a report has never surfaced.

<sup>639</sup> *MeRAN Report op cit* (note 537) 15.

<sup>640</sup> *Ibid.*

<sup>641</sup> *MeRAN Report op cit* (note 537) 18.

<sup>642</sup> *MeRAN Report op cit* (note 537) 17.

<sup>643</sup> *Ibid.*

<sup>644</sup> *MeRAN Report op cit* (note 537) 17.

<sup>645</sup> *MeRAN Report op cit* (note 537) 38.

<sup>646</sup> *Ibid.*

be held accountable for his claim that investigations against Tecmed has been completed, but never provided any evidence to support this claim.<sup>647</sup>

McQuoid-Mason suggests that the MEC and other public health officials involved in the crisis, should be held personally liable for the harm caused to cancer patients.<sup>648</sup> He adds that they should be sued in their personal capacity where there has been incompetence, maladministration, indifference and negligence by members of management in the KZN Department of Health.<sup>649</sup>

It is submitted that in light of the MEC's lack of interest in resolving the oncology crisis, he should be held liable for providing false information on the authorised service provider ie. Tecmed on several occasions, failing to hold the public health officials accountable for not ensuring that the Varian machines were maintained by ending the contract with Tecmed, and providing conflicting information on the state of the Varian Machines and waiting periods for treatment to the public of Kwa-Zulu Natal.

The MEC failed to take immediate steps to resolve the oncology crisis (ie. renew the warranty with Tecmed and prevent backlogs with several hospitals in KZN). Therefore, he is breach of section 133(3) of the Constitution which requires members of Executive Council to act in accordance with the Constitution, as well as, uphold the ethics<sup>650</sup> that is prescribed by National Legislation.<sup>651</sup>

It is submitted that the MEC be held personally liable for the pain and suffering, emotional shock, reduced expectancy of life for cervical cancer patients, who suffered harm during 2015 – 2017. Further, the dependants of cervical cancer patients who have passed on as a result of delayed treatment during the oncology crisis should also be able to claim.

Furthermore, as previously discussed, there have been recommendations from MeRAN, the SAHRC, and other concerned writers, who stated that public health officials in the KZN Department of Health must face disciplinary action for their conduct which has led to the deaths and progressed cervical cancer of many women in KZN. However, there is no evidence to show that the MEC has carried out these actions.

It is submitted that a structural interdict<sup>652</sup> should be issued against the MEC to ensure that he institutes disciplinary action against the relevant public health officials. He should also report back to the court on his progress. The court's supervision would be necessary in this case because of the non-compliance the MEC has shown, during the oncology crisis.

It is further submitted, that the MEC did not act in the interests of the cervical cancer patients and failed to act in accordance with the ethical standards of his profession. Therefore, he should also face a disciplinary hearing by the HPCSA.

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<sup>647</sup> *Ibid* – These claims were made in November 2014.

<sup>648</sup> DJ McQuoid-Mason, 'Public health officials and MECs for health should be held criminally liable for causing the death of cancer patients through their intentional or negligent conduct that results in oncology equipment not working in hospitals' (2017) 10 (2) *SAJBL* 83.

<sup>649</sup> *Ibid*.

<sup>650</sup> The Constitution (note 76) Section 136(1).

<sup>651</sup> The Constitution (note 76) Section 133(3).

<sup>652</sup> See 4.2.3 for discussion on the Structural Interdict.

## 5.5 Sole Proprietor of KZN Oncology Inc for KZN Department of Health

KZN Oncology Inc is an entity registered to Dr Nkanyiso Zwane, who completed his medical training as an oncologist at the KZN Department of Health, before starting his private practice at Parklands Hospital.<sup>653</sup> Dr Zwane is the sole proprietor of KZN Oncology Inc.<sup>654</sup>

MeRAN reports that due to the continued failure of the Department of Health to maintain the Varian machines at Addington Hospital, the sole proprietor of KZN Oncology Inc offered the services of his company to the KZN Department of Health, to repair and maintain two machines at Addington Hospital.<sup>655</sup> The quotation offered by KZN Oncology Inc was double the cost of the quote given by TecMed, who were the authorised service providers.<sup>656</sup>

As previously mentioned, the intervention by KZN Oncology Inc during early August 2015 resulted in one Varian machine working intermittently, and the other machine rendered irreparable by the end of 2016.<sup>657</sup> KZN Oncology Inc only registered with the Companies' Registration Body (CIPC) on 25 August 2015 (after conducting repairs on the machine), and was issued with a temporary registration number as a supplier on the KZN Provincial Treasury Database on 21 September 2015.<sup>658</sup> The company was not registered as a VAT vendor.<sup>659</sup>

The attempted repair of the Varian machines was conducted by Oncology Services International (OSI), technicians employed by KZN Oncology Inc.<sup>660</sup> According to the Standard Operating Procedure (SOP) of the HTS, repair of machines should only be conducted by the sole provider of the machine, that in this case is Varian.<sup>661</sup> The SOP also states that any deviation from this general rule of practice, must be done in consultation with HTS.<sup>662</sup> However, as mentioned previously, the HTS had been deliberately bypassed, according to the investigation conducted by the KZN Treasury.<sup>663</sup>

In addition, KZN Oncology Inc sourced their technicians from OSI Switzerland, to conduct the repair of machines at Addington Hospital.<sup>664</sup> This was allowed by the KZN Public Health officials despite the objection from the supplier of the machines, Varian Medical Systems International, who confirmed in writing that OSI was not authorised to 'service, provide parts and maintain Varian oncology equipment'.<sup>665</sup> This correspondence from Varian was given to the HTS on 21 August 2015.<sup>666</sup>

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<sup>653</sup> *MeRAN Report op cit* (note 537) 18.

<sup>654</sup> *Ibid.*

<sup>655</sup> *MeRAN Report op cit* (note 537) 3.

<sup>656</sup> *Ibid.*

<sup>657</sup> *Ibid* – See also 4.2 for discussion on breakdown of machines in Addington Hospital.

<sup>658</sup> *KZN Treasury Report* para 18.1 c.f. *MeRAN Report op cit* (note 528) 8.

<sup>659</sup> *Ibid.*

<sup>660</sup> *MeRAN Report op cit* (note 537) 18.

<sup>661</sup> *MeRAN Report op cit* (note 537) 20.

<sup>662</sup> *MeRAN Report op cit* (note 537) 20.

<sup>663</sup> *KZN Treasury Report* para 18.2.11 c.f. *MeRAN Report op cit* (note 528) 20.

<sup>664</sup> *Ibid.*

<sup>665</sup> *Ibid.*

<sup>666</sup> *Ibid.*

MeRAN notes, that the intervention by KZN Oncology Inc has resulted in the need of a new Varian machine needing to be replaced at great cost to taxpayers, and the second machine still requiring to be repaired at the time of their report.<sup>667</sup>

It is submitted that the sole proprietor of KZN Oncology Inc should be held liable for breaching various standard operating procedures, by offering the services of his company to conduct repairs on the Varian machines, despite being aware of HTS' disapproval of the company, who stated that the company was not authorised or equipped to repair and maintain the machines.<sup>668</sup>

The company is also in breach of the Hazardous Substances Act<sup>669</sup> which provides that individuals must be authorised to handle Group IV (four) hazardous equipment, since their technicians handled the Varian machines which contain nuclear material and fall under group IV.<sup>670</sup> The regulations also provide that individuals who handle hazardous equipment, must ensure that other persons are not exposed to the ionising radiation.<sup>671</sup> The sole proprietor could also be liable to pay a fine or imprisonment, for failing to comply with these regulations.<sup>672</sup>

It is submitted, that due to the sole proprietor's conscious actions to offer the services of KZN Oncology Inc, even though he was aware that the company was unauthorised to conduct the repair and maintenance of the Varian machines, he should be held personally liable to cervical cancer patients for the harm suffered during 2015 - 2017. This is because the sole proprietor continued with his actions, despite having reasonable foresight that it could affect the treatment of cervical cancer patients in KZN.

Further, it is submitted, that the sole proprietor of KZN Oncology Inc should be held personally liable in damages for pain and suffering, emotional shock, loss of support for dependants of patients who have died and reduced life expectancy. This will help alleviate the negative impact on the public purse<sup>673</sup> and possibly deter future actions of public health officials, that infringe on the right of access to health care.

Lastly, it is important to note that the sole proprietor of KZN Oncology Inc, as previously mentioned, is also a medical practitioner. Therefore, he has an obligation to act according to the medical ethics that his profession prescribes and serve the best interests of the patients. However, he has acted contrary to the professional standards and should therefore face a disciplinary hearing by the Health Professions Council of South Africa (HPCSA).

## **5.6 Head of Department (HoD) for KZN Department of Health**

Following their investigations, the KZN Treasury was informed that the HoD refused to renew the extended warranty, after the first year of the maintenance contract with Tecmed.<sup>674</sup>

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<sup>667</sup> *MeRAN Report op cit* (note 537) 34.

<sup>668</sup> See 5.2 for discussion on Health Technology Services' disapproval of the appointment KZN Oncology Inc.

<sup>669</sup> Hazardous Substances Act 15 of 1973.

<sup>670</sup> Regulations relating to Group IV Hazardous Substances (1993) Chapter 2.

<sup>671</sup> Regulations relating to Group IV Hazardous Substances (1993) Chapter 4 Regulation 18(2)(b) and 21(1).

<sup>672</sup> The Hazardous Act *ibid* (note 619) Section 19.

<sup>673</sup> See 4.3.1.1 for discussion by Sturm on the impact for the public purse.

<sup>674</sup> *KZN Treasury Report* para 18.2.1 – 18.2.5 c.f. *MeRAN Report op cit* (note 537) 19.



This decision by the HoD contradicts what she alleged in December 2012, where the HoD stated that there was no evidence of a maintenance contract with Tecmed, during a press report.<sup>675</sup> According to the KZN Treasury Report, payment to Tecmed had stopped because no health official from the Department had signed the maintenance contract, which had already been compiled.<sup>676</sup>

The HoD also relayed to the media that the Varian machines were 'old'.<sup>677</sup> MeRAN argues that the HoD had not bothered to check the date of manufacture on both machines, which was easily accessible, because documentation confirmed that they were new machines.<sup>678</sup>

In addition, the HoD issued a notice blacklisting Tecmed.<sup>679</sup> The reason provided by the HoD for this decision was that supply chain abuse was still under investigation.<sup>680</sup> Despite this allegation, as previously mentioned, Tecmed is still the service provider for other Varian machines (including a machine at Grey's Hospital).<sup>681</sup>

It is submitted that the misleading responses by the HoD on several occasions, including her refusal to sign the extended warranty contract with Tecmed, has put the lives of many cervical cancer patients at risk.<sup>682</sup> Furthermore, in the absence of any proof regarding the allegations surrounding Tecmed, the accused is innocent until proven guilty in our constitutional democracy.<sup>683</sup>

It is submitted that the HoD should be held liable for refusing to renew the warranty with Tecmed and backlisting the company, which has had direct impact on the breakdown of Varian machines and the unauthorised appointment of KZN Oncology Inc. Therefore, she should be held personally liable for damages in the form of pain and suffering, emotional shock, reduced life expectancy and loss of support by the dependants of cervical cancer patients who have suffered harm, as a result of the HoD failing to renew the contract with TecMed.

In addition, her conduct during the oncology crisis did not conform to the standard set by the health profession. As a medical practitioner, she owes a duty to the society to promote access

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<sup>675</sup> *MeRAN Report op cit* (note 537) 15 - 'MeRAN was informed that a copy of the contract had subsequently been supplied to the department and, an unsigned copy of the contract subsequently surfaced'. In the same press report (2012) the HoD also alleged that criminal investigations into the procurement irregularities were conducted, and several staff members had been fired in connection with the KZN Oncology tender. MeRAN reports that the question of which individuals had been fired and whether they faced criminal sanctions, remain unanswered.

Further, the HoD provided that the machines were being investigated to determine if they had been intentionally broken.'

<sup>676</sup> *KZN Treasury Report* para 18.2.1 – 18.2.5 c.f. *MeRAN Report op cit* (note 537) 18.

<sup>677</sup> *MeRAN Report op cit* (note 537) 16.

<sup>678</sup> *Ibid* - It is also important to note that in Feb 2010, a medical physicist of the KZN Health Department verified both machines when they were purchased and would have determined if they had not been new machines.

<sup>679</sup> *MeRAN Report op cit* (note 537) 16.

<sup>680</sup> *Ibid*.

<sup>681</sup> *MeRAN Report op cit* (note 537) 16.

<sup>682</sup> *MeRAN Report op cit* (note 537) 17-18.

<sup>683</sup> *Ibid*.

to healthcare<sup>684</sup>, which she has failed to fulfil. Therefore, the HoD should face a disciplinary hearing by the HPCSA.

## **5.7 Head of Department/Accounting Officer for KZN Department of Health**

On 7 July 2015, the sole director of KZN Oncology Inc requested that the accounting officer (who is also the head of department), allow a field service engineer from KZN Oncology Inc, to 'evaluate, quote and possibly repair' two Varian machines at Addington Hospital.<sup>685</sup>

MeRAN notes that the request by KZN Oncology Inc was made before the company was registered with CIPC or the provincial treasury database.<sup>686</sup> These requests were condoned by the accounting officer, who allowed the use of their services.<sup>687</sup> The sole director of KZN Oncology Inc also claimed that they were able to offer 'world class warranty services'.<sup>688</sup>

According to the MeRAN report on 10 July 2015, the Accounting officer notified the Chief Financial Officer (CFO) and the Deputy Director-General of specialised services and clinical support services, about the offer made by KZN Oncology Inc.<sup>689</sup> He also suggested that the company have access to the machines at Addington Hospital, so that the machines could be evaluated by KZN Oncology Inc's field service engineers.<sup>690</sup> However, a senior Addington-based engineer reported to MeRAN that on 10 July 2015, the field engineer conducted repairs on the machines and did not just evaluate the machines, as initially planned.<sup>691</sup> As a result, the Standard Operating Procedure had been breached by the accounting officer, by allowing an unauthorised service provider to repair the Varian machines.<sup>692</sup>

Furthermore, as previously mentioned, KZN Oncology Inc engaged technicians from Oncology Services International (OSI), to conduct the repair of machines.<sup>693</sup> This had been done despite the written objections from Varian (sole provider of machines), that OSI was not authorised to 'service, provide parts and maintain Varian oncology equipment'.<sup>694</sup>

### **5.7.1 Payment to KZN Oncology Inc**

On 29 September 2015, the sole proprietor of KZN Oncology Inc sent a written quotation to the accounting officer, stating that the cost for repair of machines would be R5 490000.<sup>695</sup>

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<sup>684</sup> Health Professions Council of South Africa. Guidelines for Good Practice in the Healthcare Professions. Booklet 1. *General Ethical Guidelines for Health Professions* (2016) 10.2.

<sup>685</sup> *MeRAN Report op cit* (note 537) 19.

<sup>686</sup> *Ibid.*

<sup>687</sup> *MeRAN Report op cit* (note 537) 24.

<sup>688</sup> *KZN Treasury Report* para 18.2.6 – 18.2.8 c.f. *MeRAN Report op cit* (note 537) 19.

<sup>689</sup> *MeRAN Report op cit* (note 537) 19.

<sup>690</sup> *Ibid.*

<sup>691</sup> *MeRAN Report op cit* (note 537) 19.

<sup>692</sup> *MeRAN Report op cit* (note 537) 23.

<sup>693</sup> *KZN Treasury Report* para 18.2.12 c.f. *MeRAN Report op cit* (note 537) 20.

<sup>694</sup> *KZN Treasury Report* para 18.2.13 c.f. *MeRAN Report op cit* (note 537) 20.

<sup>695</sup> *KZN Treasury Report* para 18.2.15 c.f. *MeRAN Report op cit* (note 537) 20.

The quotation also stated that the maintenance for both machines would be R530 000 per month.<sup>696</sup> The offer by KZN Oncology Inc was twice more than the offer made by Tecmed.

The request for payment by KZN Oncology Inc was authorised by the accounting officer, however, he did not approve the deviation from supply chain management.<sup>697</sup> The Treasury report also stated the Treasury regulations had been breached, as a result of the payment made to KZN Oncology Inc.<sup>698</sup>

In addition, the Report by KZN Treasury cited the Public Finance Management Act<sup>699</sup> (PFMA), in relation to the payment made to KZN Oncology Inc.<sup>700</sup> The Treasury Report concludes that the payment can be deemed as ‘irregular expenditure’<sup>701</sup>, in terms of the PFMA.<sup>702</sup>

The Report goes on to cite the responsibilities of an accounting officer, as provided for in the PFMA.<sup>703</sup> The Act<sup>704</sup> lists numerous responsibilities of an accounting officer, in particular, the duty to detail irregular, fruitless and wasteful expenditure in terms of section 40(3)(b)(ii) of the PFMA.<sup>705</sup> The KZN Treasury determined there was no evidence that the accounting officer reported the fruitless and wasteful expenditure for the repair of oncology machines.<sup>706</sup>

Further, the PFMA provides that an accounting officer must ‘prevent any unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct’.<sup>707</sup> The Act<sup>708</sup> also states that the accounting officer for a government department is responsible for making certain that appropriate and effective steps are taken, to prevent unauthorised expenditure.<sup>709</sup>

The KZN Treasury noted in its Report that it had conducted interviews with all senior staff members, including the accounting officer.<sup>710</sup> During these interviews, the accounting officer together with the other public health officials, claimed that they had refused to retain the services of Tecmed, due to alleged irregularities surrounding the procurement of the Varian

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<sup>696</sup> *Ibid* - It is important to note that Tecmed had given a quote of R2 579 520 (VAT inclusive) for repair of the machines.

<sup>697</sup> *MeRAN Report op cit* (note 537) 21.

<sup>698</sup> *KZN Treasury Report* para 18.2.23 – 18.2.24 c.f. *MeRAN Report op cit* (note 537) 22.

<sup>699</sup> The Public Finance Management Act *op cit* (note 137).

<sup>700</sup> *KZN Treasury Report* para 18.1.18 c.f. *MeRAN Report op cit* (note 537) 23.

<sup>701</sup> S1 PFMA

‘irregular expenditure means expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation, including— (a) this Act; or (b) the State Tender Board Act, 1968 (Act No. 86 of 1968), or any regulations made in terms of that Act; or (c) any provincial legislation providing for procurement procedures in that provincial government’.

<sup>702</sup> *KZN Treasury Report* para 18.1.18 c.f. *MeRAN Report op cit* (note 537) 23.

<sup>703</sup> *KZN Treasury Report* para 18.3.22 c.f. *MeRAN Report op cit* (note 537) 22.

<sup>704</sup> The Public Finance Management Act *op cit* (note 137).

<sup>705</sup> *KZN Treasury Report* para 18.3.22 c.f. *MeRAN Report op cit* (note 537) 23.

<sup>706</sup> *Ibid*.

<sup>707</sup> The Public Finance Management Act *op cit* (note 137) Section 38(c)(ii).

<sup>708</sup> The Public Finance Management Act *op cit* (note 137).

<sup>709</sup> The Public Finance Management Act *op cit* (note 137) Section 39(b).

<sup>710</sup> *KZN Treasury Report* para 18.2.29 c.f. *MeRAN Report op cit* (note 537) 21.

machines.<sup>711</sup> The senior officials in the KZN Department of Health maintained this claim, despite these allegations against Tecmed never being proved.<sup>712</sup>

It is submitted, that owing to the actions of the accounting officer, there has been mismanagement and irregular use of finance which has led to the deterioration of oncology services in Addington Hospital. This has had an adverse impact on the provision of oncology care in KZN.

The KZN Treasury recommended that disciplinary action should be taken against the accounting officer/head of department for his failure to:

- ‘(a) comply with provisions of HTS SOP
- (b) ensure KZN Oncology Inc had the necessary experience to repair equipment
- (c) comply with various National Treasury prescriptions
- (d) prevent irregular expenditure by paying KZN Oncology
- (e) comply with various prescripts of the PFMA.’<sup>713</sup>

It is submitted that the accounting officer is liable for failing to comply with the standard operating procedures of the Health Department, deviating from supply chain management, and breaching Treasury regulations. Furthermore, he is liable for breaching the PFMA by approving a payment to KZN Oncology Inc, that constituted an irregular expenditure in terms of section 38(c)(ii) of the Act.<sup>714</sup>

In terms of the PFMA, there is a duty on the accounting officer to prevent such expenditure. However, it is submitted, that he failed to uphold this responsibility. The Act also creates an offence for such failure in terms of section 86, which provides that any accounting officer guilty of an offence is liable to a fine or imprisonment.<sup>715</sup>

As previously mentioned, the KZN Treasury recommended that disciplinary action should be taken against the accounting officer for his misconduct. The PFMA also sets out a disciplinary procedure for failing to comply with the act in terms of section 84.<sup>716</sup> However, there is no evidence of any disciplinary action taken against the accounting officer. It is submitted that the MEC for Health must ensure that these corrective steps are taken, so that acts of misconduct can be deterred in the future. Furthermore, it is submitted that the Minister of Finance must also make certain that the accounting officer is held liable for his actions, because the money allocated for the maintenance contract with Tecmed involved funds from National Treasury.<sup>717</sup>

Due to the above actions of the accounting officer and his failure to prevent the appointment of KZN Oncology Inc, he must be held personally liable in damages for the pain and suffering, emotional shock and reduced life expectancy of cervical cancer patients who

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<sup>711</sup> *Ibid.*

<sup>712</sup> *Ibid.*

<sup>713</sup> *KZN Treasury Report* Section 20 (Annexure 20) c.f. *MeRAN Report op cit* (note 537) 25.

<sup>714</sup> The Public Finance Management Act *op cit* (note 137) Section 38(c)(ii).

<sup>715</sup> The Public Finance Management Act *op cit* (note 137) Section 86.

<sup>716</sup> The Public Finance Management Act *op cit* (note 137) Section 84.

<sup>717</sup> *MeRAN Report op cit* (note 537) 17; The Public Finance Management Act *op cit* (note 137) Section 84.

suffered harm as a result of the oncology crisis, as well as the dependants of the patients who lost support, can also claim.

Finally, it is submitted that the accounting officer should face disciplinary action by the HPCSA because he has acted contrary to the standard expected from a medical practitioner. The HPCSA guidelines state that a practitioner has a duty to society to ‘refrain from unnecessary wastage, and from participating in improper financial arrangements, especially those that escalate costs and disadvantage individuals or institutions unfairly’.<sup>718</sup> From the investigations by KZN Treasury, it is clear that the accounting officer failed to uphold this duty.

### **5.8 Chief Financial Officer (CFO) for KZN Department of Health**

The CFO of the KZN Department of Health during 2015 – 2016,<sup>719</sup> was instrumental in the irregular appointment of KZN Oncology Inc, as well as the in payment to the company.<sup>720</sup> The payment to KZN Oncology Inc was recommended by the CFO on 22 October 2015.<sup>721</sup>

The KZN Treasury Report further notes that the CFO also alleged irregularities surrounding Tecmed, when questioned by the KZN Treasury on why Tecmed had not been used as the service provider.<sup>722</sup>

Treasury also stated in their Report that disciplinary steps should be taken against the CFO for similar reasons<sup>723</sup> that action was recommended against the accounting officer/head of department.<sup>724</sup> In addition, the report suggests disciplinary action be taken against the CFO, for his failure to ensure that there were necessary systems in operation to prevent unauthorised, irregular and fruitless expenditure, as set out by the PFMA.<sup>725</sup>

It is submitted that the CFO should be held liable for recommending that payment be made to an unauthorised service provider, who bypassed procurement procedure. He should be held liable together with the accounting officer for all the reasons listed above.<sup>726</sup> It is because of the CFO’s recommendation that state funds were mismanaged, and this has led to the breakdown of oncology services in KZN. As previously mentioned, it is the responsibility of the MEC to make certain that disciplinary action is taken against the CFO.

It is further submitted, that the CFO should be personally liable for harm suffered by cervical cancer patients in the form of pain and suffering, emotional shock, reduced life expectancy and loss of support for dependants of cervical cancer patients, who have suffered harm during 2015 – 2017 and have died as a result of delayed cancer treatment.

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<sup>718</sup> Health Professions Council of South Africa. Guidelines for Good Practice in the Healthcare Professions. Booklet 1. *General Ethical Guidelines for Health Professions* (2016) 9.1.3.

<sup>719</sup> The CFO left the KZN Health department early 2017 c.f. *MeRAN Report op cit* (note 537) 25.

<sup>720</sup> *MeRAN Report op cit* (note 537) 24.

<sup>721</sup> *MeRAN Report op cit* (note 537) 21.

<sup>722</sup> *KZN Treasury Report* para 18.2.29 c.f. *MeRAN Report op cit* (note 537) 21.

<sup>723</sup> See 5.7.1 for discussion on the reasons provided for disciplinary action against the CFO and accounting officer.

<sup>724</sup> *KZN Treasury Report* Section 20 c.f. *MeRAN Report op cit* (note 537) 25.

<sup>725</sup> *Ibid.*

<sup>726</sup> See 5.7 for discussion on liability of the accounting officer.

## 5.9 General Manager of Supply Chain Management (GM of SCM Unit) for KZN Department of Health

The KZN Treasury notes that the General Manager of Supply Chain Management during the period of 2015-2017,<sup>727</sup> had also been influential in the appointment of KZN Oncology Inc as the service provider.<sup>728</sup>

The Treasury reports that on 14 October 2015, the General Manager of Supply Chain Management sent a written request to the accounting officer, for approval of payment for the repair of two machines at Addington Hospital, by KZN Oncology Inc.<sup>729</sup> The amount of R5 490 000 was quoted in the request sent by the General Manager of Supply Chain Management.<sup>730</sup> Further, the General Manager also provided a motivation in his request for the machines to be repaired and serviced by KZN Oncology Inc, despite KZN Oncology Inc being unauthorised to conduct the repair.<sup>731</sup>

The request for payment by the General Manager of Supply Chain Management was signed and dated on 20 October 2015, which was determined by the KZN Treasury as a breach of their regulations.<sup>732</sup>

According to the KZN Treasury Report, there was an agreement between the KZN Department of Health and KZN Oncology Inc in December 2015, for a period of 5 years.<sup>733</sup> The agreement also stipulated an amount of R6 850 000 that would be awarded to KZN Oncology Inc, as well as a monthly amount of R435 000 for maintaining two machines.<sup>734</sup>

In regard to the agreement entered into during December 2015, the treasury states that the National Treasury Practice Note 11 of 2008/09 is relevant, in so far as the requirements which need to be met by a company, for their proposal to be considered.<sup>735</sup> Therefore, the acceptance of an unsolicited bid from KZN Oncology Inc contravened National Treasury Practice Note 11 of 2008/09.<sup>736</sup> In addition, the prescripts of the National Treasury instructions were not complied with including, inter alia, KZN Oncology Inc not holding a VAT registration number.<sup>737</sup>

After a review of the financial breakdown of the payment to KZN Oncology Inc, the Treasury refers to an invoice submitted by the sole proprietor of KZN Oncology Inc.<sup>738</sup> The invoice reflects an amount of R5 695 641.21, which is R205 641, 21 more than the initial amount that

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<sup>727</sup> The General Manager of Supply Chain Management left the KZN Department of Health in early 2017 c.f. *MeRAN Report op cit* (note 537) 25.

<sup>728</sup> *KZN Treasury Report* Section 19 c.f. *MeRAN Report op cit* (note 537) 24.

<sup>729</sup> *MeRAN Report op cit* (note 537) 21.

<sup>730</sup> *Ibid.*

<sup>731</sup> *KZN Treasury Report* Section 19 c.f. *MeRAN Report op cit* (note 537) 21.

<sup>732</sup> *KZN Treasury Report* para 18.2.23 – 18.2.24 c.f. *MeRAN Report op cit* (note 537) 21.

<sup>733</sup> *KZN Treasury Report* para 18.2.31 c.f. *MeRAN Report op cit* (note 537) 21.

<sup>734</sup> *Ibid.*

<sup>735</sup> *KZN Treasury Report* para 18.2.32 – 18.2.33 c.f. *MeRAN Report op cit* (note 537) 21.

<sup>736</sup> *KZN Treasury Report* Section 19 c.f. *MeRAN Report op cit* (note 537) 24.

<sup>737</sup> *KZN Treasury Report* para 18.2.34 c.f. *MeRAN Report op cit* (note 537) 21.

<sup>738</sup> *KZN Treasury Report* para 18.3.5 – 18.3.7 c.f. *MeRAN Report op cit* (note 537) 22.

was quoted in the contract (ie. R5 490 000).<sup>739</sup> No variation from the initial quote had ever been approved. The initial quote of R5 490 000 (invoice dated 26 January 2016) also bears the Health Technology Service's stamp, however, the Health Technology Services had never been involved in the award made to KZN Oncology Inc.<sup>740</sup>

The Health Technology Services lists several reasons in its report to Treasury, why it did not sign in approval of the payment to KZN Oncology Inc. They raised the following concerns:

- (a) 'HTS had not been involved in the awarding of the bid.
- (b) It was not aware of what the repair entailed as it did not receive a quotation to generate an order.
- (c) KZN Oncology was not the appointed agent for the original equipment manufacturer.
- (d) The non-stock request was not generated at HTS but from Addington Hospital - it was not in line with regular SCM procedures, nor was the cash flow minutes attached.
- (e) The funds for the expenditure were allocated from Addington hospital not HTS.
- (f) HTS could not verify the invoice as an unauthorised third party was engaged to carry out the repairs.
- (g) The approved Departmental Standard Operating Procedure (SOP) prescribed that 'only services from the sole provider/supplier of the equipment shall be utilized for all repair/services' The HTS team requested that the matter be referred back to Departmental Central Supply Chain Management Services'.<sup>741</sup>

Despite the concerns raised above, on 16 March 2016 the General Manager of Supply Chain Management requested that a payment of R5 695 641.21 be made to KZN Oncology Inc.<sup>742</sup> The KZN Treasury noted that this amount was an unsolicited bid, which had been contrary to the relevant National Treasury regulations and was deemed 'irregular expenditure' as defined by section 1 of the PFMA.<sup>743</sup>

Treasury recommended that the General Manager of Supply Chain Management should face disciplinary action for his failure to prevent such expenditure.<sup>744</sup>

It is submitted that the General Manager of Supply Chain Management must be held liable for motivating the payment made to KZN Oncology Inc, and breaching Treasury regulations. Although disciplinary action was recommended against the General Manager of Supply Chain Management for his failure to prevent the irregular expenditure, no disciplinary action has been taken thus far.

Therefore, the MEC must ensure that the General Manager of Supply Chain Management faces the disciplinary action recommended by KZN Treasury.

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<sup>739</sup> *Ibid.*

<sup>740</sup> *Ibid.*

<sup>741</sup> *KZN Treasury Report para 18.3.8 c.f. MeRAN Report op cit (note 537) 22.*

<sup>742</sup> *MeRAN Report op cit (note 537) 23.*

<sup>743</sup> *KZN Treasury Report para 18.1.18 c.f. MeRAN Report op cit (note 537) 23.*

<sup>744</sup> *KZN Treasury Report Section 20 c.f. MeRAN Report op cit (note 537) 25.*

The General Manager of Supply Chain Management must be held liable for his failure to prevent the appointment of KZN Oncology Inc, because he could reasonably foresee that the company was not equipped to handle the machines, which was stated the sole provider of the machines ie. Varian. The motivation of KZN Oncology Inc by the General Manager of Supply Chain Management, has eventually led to harm being caused to cervical cancer patients in KZN.

It is submitted that the General Manager of Supply Chain Management must be held personally liable in damages for the pain and suffering, emotional shock, reduced expectancy of life and loss of support for dependants of cervical cancer patients in KZN, who lost their lives as a result delayed oncology treatment and diagnosis.

### **5.9.1 Inconsistent Figures**

It is important to highlight that the reports by MeRAN and KZN Treasury did not point out the inconsistent amounts, relating to KZN Oncology Inc contract. The Treasury report mention 3 different figures about the payment made to KZN Oncology Inc:

1. September, 2015 – A quote of R5 490 000 was given by KZN Oncology Inc to the KZN Department of Health for repair of two Varian machines, and an amount of R530 000 per month for maintenance of both machines.<sup>745</sup>
2. December, 2015 – An agreement was entered into between KZN Oncology Inc and the KZN Department of Health, which stipulated an amount of R6 850 000 for the repair of two machines, and a further amount of R435 000 per month for maintenance of machines, for a period of five years.<sup>746</sup>
3. March, 2016 – An amount of R5 695 641, 21 reflects on the invoice submitted by the sole proprietor of KZN Oncology Inc, as payment to the company for the attempted repair of the Varian machines.<sup>747</sup> It was also confirmed by Treasury that this amount had been paid to KZN Oncology Inc.

It is not clear which of these conflicting figures was the actual amount paid to KZN Oncology Inc. Even though the invoice reflects that R5695 641,21 was paid to KZN Oncology Inc, the agreement between the company and the KZN Department of Health stipulates an amount of R6 850 000. Therefore, considering the gross irregularities that has plagued the appointment of KZN Oncology Inc, the inconsistent amounts need to be clarified by the accounting officer and the CFO, to ascertain the actual amount received by KZN Oncology Inc.

More concerning is that the payment to KZN Oncology Inc reflects on the Government Gazette as a payment made for ‘private cleaning services’ and not labelled as ‘repair of machines’. It is submitted that this inconsistency must also be clarified by the public officials involved, during the disciplinary hearing conducted by the MEC.

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<sup>745</sup> KZN Treasury Report para 18.2.15 c.f. MeRAN Report op cit (note 537) 20.

<sup>746</sup> KZN Treasury Report para 18.2.31 c.f. MeRAN Report op cit (note 537) 21.

<sup>747</sup> KZN Treasury Report para 18.3.5 – 18.3.7 c.f. MeRAN Report op cit (note 537) 22.



## 5.10 Other Senior Members of KZN Department of Health Management

The Report by KZN Treasury states that other senior members of management did not support the submission by HTS, on its disapproval in the appointment of KZN Oncology Inc.<sup>748</sup> MeRAN further notes that these senior members were also implicated in a contract which had been rendered grossly irregular.<sup>749</sup> Therefore, it is submitted, that there is a pattern of irregular conduct by these public health officials.

It is submitted that these members should be held liable for supporting the appointment of KZN Oncology Inc, and failing to uphold the disapproval of the company with HTS. Their support of HTS would have prevented the appointment of KZN Oncology Inc, and thus avoided the breakdown of the Varian machines. They failed to take the necessary steps to prevent or stop the harm suffered by cervical cancer patients. Therefore, they should be held personally liable for damages.

Furthermore, the senior public health officials who are also medical practitioners must face a disciplinary hearing conducted by the HPCSA, as a result of their failure to act according to the medical ethics and standard of care the profession requires.

## 5.11 Omissions by the KZN Treasury Report

MeRAN submits that there are omissions in the KZN Treasury Report.<sup>750</sup> Firstly, MeRAN points out that according to the *Government Gazette*, the tender number provided for KZN Oncology Inc (ie. ZNQ889/15/16) is recorded as ‘private cleaning service provider’, with a corresponding quote of R5 900 000.<sup>751</sup> It is not labelled as a tender for the repair of oncology machines. Further, the tender bears the HTS stamp, however, as previously mentioned HTS refused to endorse the payment to KZN Oncology Inc.<sup>752</sup> It is alleged by a senior member of management in the KZN Department of Health, that the HTS stamp was removed from their offices and held by head office in Pietermaritzburg.<sup>753</sup>

Therefore, it is submitted, that during the disciplinary hearing of public health officials, these irregularities must be resolved and the relevant officials, held accountable.

## 5.12 Recommendations by MeRAN

Over the past 5 years, the Department of Health in KZN has been denying patients access to life-saving treatment, by making continuous allegations surrounding irregular procurements.<sup>754</sup> Despite these allegations there has never been any evidence put forward by the KZN Health Department, to support any of these allegations.<sup>755</sup> Furthermore, no

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<sup>748</sup> KZN Treasury Report para 18.3.10 c.f. MeRAN Report op cit (note 537) 22.

<sup>749</sup> MeRAN Report op cit (note 537) 25.

<sup>750</sup> MeRAN Report op cit (note 537) 26.

<sup>751</sup> Ibid.

<sup>752</sup> Ibid.

<sup>753</sup> Ibid.

<sup>754</sup> MeRAN Report op cit (note 537) 34.

<sup>755</sup> Ibid.

explanation has been provided on what happened to the funds originally allocated for the maintenance contract with Tecmed, by National Treasury.<sup>756</sup>

In addition, MeRAN emphasises that the contract with KZN Oncology Inc was not just irregular, but also put many lives in danger because it allowed unauthorised personnel (ie. technicians from KZN Oncology Inc), to interfere with nuclear machines.<sup>757</sup> The interference by KZN Oncology Inc resulted in a new machine being damaged beyond repair.<sup>758</sup>

It has also been reported by MeRAN that statistics show, one third of female cancers in South Africa are breast and cervical cancers.<sup>759</sup> Statistics also show that approximately 50% of all cancer patients require radiotherapy.<sup>760</sup> MeRAN also comments on the astounding reality that many of the members in management who have been implicated in denying access to oncology services, are doctors by profession.<sup>761</sup> The actions of these medical practitioners are a contradiction of the medical ethics they are bound by.<sup>762</sup>

Many of the cancer patients that are known to MeRAN suffer from cervical cancer, which as previously discussed, can be easily cured if treated soon after diagnosis.<sup>763</sup> Therefore, it seems that during the oncology crisis in KZN, countless number of cervical cancer patients have died due to the lack of treatment because of the dysfunctional machines.<sup>764</sup>

MeRAN strongly agrees with the findings of the KZN Treasury, in that the sole proprietor of KZN Oncology Inc must pay back the money he claimed for repairs, as well as the money for damage caused to the new Varian machine.<sup>765</sup> Furthermore, there is an offence provided by the Hazardous Substances Act which sets out a criminal charge for breaching the act.<sup>766</sup>

In addition, MeRAN also agrees with the position taken by McQuoid-Mason who states that culpable homicide is the appropriate charge for public officials, who knowingly denied cancer patients' access to health care.<sup>767</sup> McQuoid-Mason also suggests that public officials who act with 'eventual intention', ie. they subjectively foresaw their act or omission could kill someone but failed to take corrective action, then these officials may be guilty of the common law crime of murder.<sup>768</sup> McQuoid-Mason used this reasoning when commenting on the Life Esidimeni Tragedy, which also dealt with a denial of proper access to health care due

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<sup>756</sup> *Ibid.*

<sup>757</sup> *Ibid.*

<sup>758</sup> *Ibid.*

<sup>759</sup> *MeRAN Report op cit* (note 537) 35.

<sup>760</sup> *Ibid.*

<sup>761</sup> *Ibid.*

<sup>762</sup> *Ibid.*

<sup>763</sup> *MeRAN Report op cit* (note 537) 36.

<sup>764</sup> *Ibid.*

<sup>765</sup> *Ibid.*

<sup>766</sup> The Hazardous Act *ibid* (note 619) Section 19. See 5.5 for discussion on the criminal sanction.

<sup>767</sup> *MeRAN Report op cit* (note 537) 37.

<sup>768</sup> Burchell J *Principles of Criminal Law* 3<sup>rd</sup> Edition (2006) c.f. DJ McQuoid-Mason 'Life Esidimeni deaths: Can the former MEC for health and public health officials escape liability for the deaths of the mental-health patients on the basis of obedience to 'superior orders' or because the officials under them were negligent?' (2018) (11) *SAJBL* 6.

to the acts of public officials.<sup>769</sup> Furthermore, McQuoid-Mason adds that if public officials negligently fail to take reasonable steps to prevent deaths of patients, they may also be found guilty of culpable homicide.<sup>770</sup>

It is submitted that the ‘reasonable steps’ which should have taken by the KZN public health officials, was to continue the contract with the authorised service provider ie. Tecmed. This would have ensured the upkeep of oncology machines at Addington Hospital, thus preventing numerous cervical cancer deaths.

Apart from the criminal sanctions, public officials could also be liable to compensate surviving cervical cancer patients, for the physical and psychological harm caused during 2015-2017.<sup>771</sup> Further, the public officials could be asked to compensate families of the deceased patients, for the psychological harm suffered.<sup>772</sup> This was the relief granted in the Life Esidimeni tragedy. It is submitted that this is the most suitable remedy for cervical cancer patients who have suffered harm during 2015 – 2017.

It is further submitted that constitutional damages could also be a possible remedy for cervical cancer patients, whose right of access to health care was infringed upon during the oncology crisis. Although common law damages may be broad enough to provide relief for the breached constitutional right, constitutional damages may also be appropriate in this case considering the harrowing violation of cervical cancer patients’ right to access health care, and the public official’s blatant disregard for their constitutional duties.<sup>773</sup> It could also aid in vindicating the right of access to health care. This remedy was used in the Life Esidimeni Tragedy case which, like the oncology crisis, involved a termination of contract with an authorised service provider and awarded the contract to an entity who were not equipped to take care of mental health care patients.<sup>774</sup>

### 5.13 Conclusion

This chapter listed individuals in the public health sector, who were instrumental in the collapse of the Varian machines at Addington Hospital. It also considered the report by MeRAN which detailed the actions of several public health officials, that held senior positions in the KZN Department of Health, during 2015 – 2017.

The chapter went on to evaluate the findings of the KZN Treasury and MeRAN, which identifies and details the irregular tender awarded to KZN Oncology Inc. Further, it discussed

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<sup>769</sup> DJ McQuoid-Mason ‘Life Esidimeni deaths: Can the former MEC for health and public health officials escape liability for the deaths of the mental-health patients on the basis of obedience to ‘superior orders’ or because the officials under them were negligent?’ (2018) (11) *SAJBL* 5-7.

<sup>770</sup> McQuoid-Mason *op cit* (note 573) c.f. McQuoid-Mason *op cit* (note 719).

<sup>771</sup> McQuoid-Mason *op cit* (note 598) c.f. McQuoid-Mason *op cit* (note 719).

<sup>772</sup> *Ibid.*

<sup>773</sup> *Fose v Minister of Safety and Security* (1997) ZACC 6 at para 60; *Dikoko v Mokhatla* (2006) (6) SA 235 (CC) at para 91, *Law Society of South Africa and Others v Minister for Transport and Another* (2010) ZACC 25 at para 74; *Minister of Police v Mboweni and Another* (2014) 2014 (6) SA 256 (SCA). See also paragraph 156 of the Arbitration Award accessed from <http://www.gauteng.gov.za/government/departments/office-of-the-premier/Life%20Esidimeni%20Documents/Life%20Esidimeni%20arbitration%20award%20by%20retired%20Deputy%20Chief%20Justice%20Dikgang%20Mosenke.pdf> (accessed on 23 November 2018).

<sup>774</sup> See 4.2.2.2.1 for discussion on the Life Esidimeni Tragedy.

the impact of the tender award on the oncology crisis in KZN, particularly involving Addington Hospital.

In addition, it established that the allegations against Tecmed, which were used as the reason by the KZN public health officials, for terminating the service contract with the entity were never been proven to be true. The company has never been charged but rather continues to service oncology machines in KZN Hospitals.

This chapter also discussed the maladministration of funds by the finance officers in the Department of Health, and the ways in which the funds were misused. MeRAN puts forward their recommendations on who should be held liable for the breaching of numerous policies and legislation governing health care in South Africa. Furthermore, MeRAN emphasises that KZN Oncology Inc should pay back the money they received, as well as, to replace the machine that had been damaged by their technicians.

The chapter states public health officials who were involved in the irregular appointment of KZN Oncology Inc, thus contributing to the breakdown of oncology machines, must be held personally liable for damages. It also suggests that constitutional damages could be an appropriate remedy to cervical cancer patients, whose constitutional right of access to health care has been violated. Further, it provides that a structural interdict must be issued against the MEC of Health, to ensure that disciplinary action is taken against each public health official involved in the oncology crisis and whose actions have led to harm suffered by cervical cancer patients.

It is also submitted that all medical practitioners who hold positions of management in the KZN Department of Health must also face disciplinary hearings by the HPCSA, to ascertain whether their actions conform to the ethical standard of the profession.

The root cause of the oncology crisis was the irregular appointment of KZN Oncology Inc, the entity directly responsible for the breakdown of machines. This appointment has led to loss of oncology staff, poor referral systems, backlog of patients at neighbouring oncology units in KZN public hospitals, delayed treatment and loss of lives.

## CHAPTER SIX: CONCLUSION

### 6.1 Introduction

This dissertation sought to highlight the position of cervical cancer patients in KZN, during the oncology crisis between 2015 – 2017. The research focused on a marginalised group ie. women, who are recognised as previously disadvantaged in South Africa.<sup>775</sup> This was done to demonstrate the disproportionate effect that delayed oncology treatment, has had on this group of individuals.

The prevalence of cervical cancer in Kwa-Zulu Natal and South Africa as a whole, as well as the preventability and curability of the disease, influenced the reason for the study to serve the need of finding an effective remedy for these patients who have suffered harm.

In *Section 27 v Minister of Education*,<sup>776</sup> Kollapen J stated that relief for a human right violation had to also address the negative impact it created.<sup>777</sup> Therefore, although multiple reports<sup>778</sup> have stated that oncology treatment for patients has finally resumed in KZN, the primary contribution of this dissertation is to layout civil remedies for cervical cancer patients and their dependants, who did not receive timeous treatment during the crisis. The dissertation also proposes the most effective and appropriate remedies for women affected by the oncology crisis, in light of the circumstances.

Swanepoel states, that civil litigation by our courts can only successfully contribute to remedying socio-economic rights that have been infringed, if the relief granted is able to effectively deal with the human right violations.<sup>779</sup> Therefore, it is submitted, that this dissertation intended to propose a remedy that would be the most effective and appropriate to bring relief for cervical cancer patients, considering the type of harm they have experienced.

### 6.2 Recommendations

Against the backdrop of the type of harm likely suffered by cervical cancer patients, this dissertation proposes:

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<sup>775</sup> SAHRC 'Research brief on gender and equality in South Africa' (2013-2017) 6 accessed from <https://www.sahrc.org.za/home/21/files/RESEARCH%20BRIEF%20ON%20GENDER%20AND%20EQUALITY%20IN%20SOUTH%20AFRICA%202013%20to%202017.pdf> (accessed on 6 January 2019).

<sup>776</sup> *Section 27 v Minister of Education* supra at note 396.

<sup>777</sup> See 4.3.3.2. for discussion of the *Section 27* case.

<sup>778</sup> 'Oncology treatment to resume at Addington Hospital' 13 June 2018, *DailyNews* accessed from <https://www.iol.co.za/dailynews/oncology-treatment-to-resume-at-addington-hospital-15454710>, <http://www.kznhealth.gov.za/speeches/2018/Oncology-services-Addington-12062018.htm>, <https://www.iol.co.za/mercury/news/cancer-crisis-in-kzn-has-been-dealt-with-17716460>.

There have also been conflicting reports by Advocacy group, MeRAN, who claim that treatment has not fully resumed, and that patients were still not receiving timeous treatment – 'Advocacy group slams oncology claims' 18 October 2018, *MercuryNews* accessed from <https://www.iol.co.za/mercury/news/advocacy-group-slams-oncology-claims-17538846>.

<sup>779</sup> Swanepoel P *op cit* (note 236) 185.

### 6.2.1 Common law damages

Based on the conclusions drawn in chapter four and five, it was recommended that the most appropriate relief for cervical cancer patients who have experienced loss in 2015 – 2017, would be to seek common law damages in the form of pain and suffering, emotional shock, and reduced life expectancy for patients, who can show that their cancers have progressed from a curable stage to a terminal stage during the crisis, as well as, damages for loss of support for families of cervical cancer patients who have died as a direct result of delayed oncology treatment. Further, it is important to remember that a claim to common law damages is subject to the limitations of prescription.<sup>780</sup>

### 6.2.2 Constitutional damages

The study also uses authority from the Life Esidimeni tragedy to suggest that constitutional damages may be a possible remedy for cervical cancer patients, because of the blatant and consistent violation of their right to access health care, over a long period of time. The circumstances surrounding the Life Esidimeni tragedy mirror the issues present in the oncology crisis, since they both involve a termination of contract with an authorised service provider, by the deliberate actions of public health officials. In both instances, many lives were lost, and the health condition of patients deteriorated.<sup>781</sup> Constitutional damages could also be effective in vindicating their right of access to health care, while simultaneously restoring their faith and reliance on the Constitution.

### 6.2.3 Personal liability

In light of the KZN public health officials' complete disregard for their constitutional, legislative and policy duties, this dissertation recommends that health officials who have been found liable by the SAHRC and the KZN Treasury, must be held personally liable for the harm caused to cervical cancer patients.

If a public health official cannot afford to pay the full amount, McQuoid-Mason suggests that cancer patients can recover the balance from the state, by citing them as a vicarious joint wrongdoer.<sup>782</sup> Holding these officials personally liable will reduce the negative impact on the public purse and deter future infringements by public health officials.

Further, it should be noted, that public officials who have been alleged by MeRAN and SAHRC for their contribution to the oncology crisis, cannot raise the defence of obeying 'superior orders' in order to escape liability for their actions.<sup>783</sup> Therefore, a public official who obeys an order to support the appointment of the unauthorised service provider cannot

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<sup>780</sup> Prescription period for a claim of damages is 3 years from the date of the loss. For minors, the prescription runs from the day after turning 18 ie. becoming a major.

<sup>781</sup> See 1.2 for discussion on state of oncology care in 2017.

<sup>782</sup> McQuoid-Mason *op cit* (note 573).

<sup>783</sup> DJ McQuoid-Mason *op cit* (note 719) 5.

raise the defence of superior order; unless the official can prove that he or she feared death or serious bodily harm if they did not comply with the order.<sup>784</sup>

### 6.3. Structural interdict

Whilst the aim of this dissertation is to suggest a remedy for cervical cancer patients who have suffered harm, it is also important to make certain in the future, that public health officials are held accountable for their actions and for their failure to act in the interests of South African women, and our society as a whole.

Chapter four recommends that a structural interdict should be issued against the KZN MEC for Health, to ensure that he enforces disciplinary action against the various public health officials who have contributed to the root cause of the oncology crisis, ie. the appointment of an unauthorised service provider, that caused the breakdown of machines.<sup>785</sup> A structural interdict would be appropriate, because of the non-compliance shown by the KZN MEC in carrying out the recommendations of the KZN Treasury and SAHRC, which were to hold the public health officials accountable. There has been no evidence to suggest that he has complied with their recommendations.

Although this remedy may be regarded as intrusive<sup>786</sup>, such action is necessary to force the hand of the MEC, who has shown a lack of concern for holding individuals responsible for these human right violations.

In addition, it is submitted that a structural interdict has the potential to bring effective relief, if there were to be a breakdown of oncology services in the future. The remedy requires an individual to remain accountable to the court on the progress of the remedial plan, as well as, a supervisory element which enables the court to remain a part of the remedial process, until relief has been effected.<sup>787</sup> This remedy would be instrumental in ensuring that public health care is maintained.

### 6.4 Disciplinary hearing by the HPCSA

Chapter four suggests that public health officials who are also medical practitioners, must be held accountable for their unethical actions against cancer patients, during the oncology crisis. It is recommended that they should face disciplinary action by the HPCSA, for their failure to (a) deal responsibly with health resources<sup>788</sup>, (b) to refrain from financial arrangements what will disadvantage an institution<sup>789</sup>, (c) report patients' right violations as a

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<sup>784</sup> McQuoid Mason provides that this is unlikely. Burchell J *Principles of Criminal Law* (2006) c.f. McQuoid-Mason *op cit* (note 733) 6.

<sup>785</sup> See 4.5 for discussion on the structural interdict remedy to ensure disciplinary action is taken.

<sup>786</sup> Mbazira *op cit* (note 244) 166.

<sup>787</sup> See 3.2.3 for discussion the structural interdict remedy.

<sup>788</sup> Health Professions Council of South Africa. Guidelines for Good Practice in the Healthcare Professions. Booklet 1. *General Ethical Guidelines for Health Professions* (2016) 9.1.1.

<sup>789</sup> Health Professions Council of South Africa. Guidelines for Good Practice in the Healthcare Professions. Booklet 1. *General Ethical Guidelines for Health Professions* (2016) 9.1.3.

result of a health practitioner's unethical behaviour<sup>790</sup>, and (d) an overall failure to promote access to health care as required by the Constitution of South Africa, in terms of section 27.<sup>791</sup>

## 6.5 Concluding remarks

Individuals who are most dependant on reasonable assistance by the state are often the most poor and marginalised of society. It is under these circumstances that effective relief is a necessity.<sup>792</sup>

This dissertation has aimed to emphasise the need for an effective remedy for cervical cancer patients and their dependants who have suffered harm. Further, it has aimed to highlight the importance of holding individuals liable for their reckless and negligent actions, which have contributed to the oncology crisis, and has violated the constitutional rights of South African women.

Furthermore, considering that oncology treatment has gradually resumed, the dissertation has demonstrated how common law damages is the most appropriate remedy to deal with the aftermath of the harm suffered by cervical cancer patients, during 2015 – 2017. In addition, it suggests that that a structural interdict would be the appropriate remedy to ensure that public officials who were found liable, face immediate disciplinary action.

The structural interdict, in conjunction with personal liability for damages, will also aid in deterring future human right violations by public health officials. Finally, it recommends that medical practitioners who contributed to the oncology crisis, must face disciplinary hearings by the HPCSA for their failure to uphold patient's interests.

It is incumbent that the courts, the state, and those affected by the oncology crisis, work together in order to bring relief and the vindication of the rights of cervical cancer patients and the dependants of the deceased.

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<sup>790</sup> Health Professions Council of South Africa. Guidelines for Good Practice in the Healthcare Professions. Booklet 1. *General Ethical Guidelines for Health Professions* (2016) 10.1.1.

<sup>791</sup> Health Professions Council of South Africa. Guidelines for Good Practice in the Healthcare Professions. Booklet 1. *General Ethical Guidelines for Health Professions* (2016) 10.2.

<sup>792</sup> Swanepoel P *op cit* (note 236) 192.



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3 September 2018

Ms Janalene Taryn Soobramoney  
School of Law  
Howard College Campus

Dear Ms Soobramoney

Protocol reference number: HSS/1407/018M

Project title: The Oncology crisis in KZN during the period 2015-2017- Do cervical cancer patients have a civil remedy?

**FULL APPROVAL – No Risk/Exemption Application**

In response to your application received 2 August 2018, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL**.

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number.

**PLEASE NOTE:** Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully

.....  
Professor Shenuka Singh (Chair)  
Humanities & Social Sciences Research Ethics Committee

/pm

cc Supervisor: Professor D McQuoid-Mason  
cc. Academic Leader Research: Dr Shannon Bosch  
cc. School Administrator: Ms Robynne Louw/ Mr P Ramsewak

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