Article

The Constitutional Principle of Accountability: A Study of Contemporary South African Case Law*

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Abstract

'Accountability' is one of the democratic values entrenched in the Constitution of South Africa, 1996. It is a value recognised throughout the Constitution and imposed upon the law-making organs of state, the Executive, the Judiciary and all public functionaries. This constitutional imperative is given pride of place among the other founding values: equality before the law, the rule of law and the supremacy of the Constitution. This study therefore sets out to investigate how the courts have grappled with the interpretation and application of the principle of accountability, the starting point being the relationship between accountability and judicial review. Therefore, in the exercise of its judicial review power, a court may enquire whether the failure of a public functionary to comply with a constitutional duty of accountability renders the decision made illegal, irrational or unreasonable. One of the many facets of the principle of accountability upon which this article dwells is to ascertain how the courts have deployed that expression in making the state and its agencies liable for the delictual wrongs committed against an individual in vindication of a breach of the individual's constitutional right in the course of performing a public duty. Here, accountability and breach of public duty; the liability of the state for detaining illegal immigrants contrary to the prescripts of the law; the vicarious liability of the state for the criminal acts of the police and other law-enforcement officers (as in police rape cases and misuse of official firearms by police officers), and the liability of the state for delictual conduct in the context of public procurement are discussed. Having carefully analysed the available case law, this article concludes that no public functionary can brush aside the duty of accountability wherever it is imposed without being in breach of a vital constitutional mandate. Further, it is the constitutional duty of the courts, when called upon, to declare such act or conduct an infringement of the Constitution.

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Introduction

The term 'accountability' in the constitutional context is not simply a political jargon or a moral wish. It carries with it moral obligations, political responsibilities and a wide-ranging array of legal implications.[1] In contemporary South Africa, alongside the supremacy of the Constitution and the rule of law, accountability is one of the founding constitutional values;[2] it is therefore a constitutional principle of great importance. As Mogoeng CJ recently put it, accountability stands, along with constitutionalism and the rule of law to 'constitute the sharp and mighty sword' ever 'ready to chop the ugly head of impunity off its stiffened neck'.[3] It is a signpost for good governance and fundamental to that democratic state envisaged by the founders of the 1996 Constitution of South Africa. For, apart from the protection afforded the individual by the rights entrenched in the Bill of Rights as the cornerstone of South Africa's democracy—which, in turn, imposes duties and responsibilities on the state[4]—there is the additional burden placed upon the government to account for the duties and responsibilities entrusted to it by the Constitution and 'we the people of South Africa'.[5] Accountability as an obligation imposed on all holders of public office is entrenched in so many words and in different parts of the 1996 Constitution.

For instance, accountability, responsiveness and openness form part of the founding provisions of a system of democratic government in section 1(*d*) of the Constitution. Similarly, it is a fundamental principle of co-operative governance and intergovernmental relations that each of the three spheres of government must provide effective, transparent, accountable and coherent government for the benefit of the country as a whole.[6] In terms of section 55(2)(*a*) and (*b*), the National Assembly must

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1 For instance, Madala J said in *Nyathi v MEC, Department of Health, Gauteng* 2008 (6) SA 94 (CC) para 80 that: 'Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a State predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy.'

2 Section 1(*c*) and (*d*), Constitution, 1996.

3 Per Mogoeng CJ in *EFF v Speaker, National Assembly*; *DA v Speaker, National Assembly* 2016 (3) SA 580 (CC) para 1.

4 Section 7(1) and (2), Constitution, 1996.

5 See the opening sentence of the Preamble, Constitution, 1996.

6 Section 41(1)(*c*), Constitution, 1996.

provide for mechanisms to ensure that all executive organs of state in the national sphere are accountable to it; it must also maintain oversight of: (i) the exercise of national executive authority, including the implementation of legislation, and (ii) any organ of state.[7] Again, section 92(2) and (3)(*a*) and (*b*), which deals with the accountability and responsibilities of the deputy president and the cabinet, provides that members of the cabinet are accountable collectively and individually to parliament for the exercise of their powers and the performance of their functions. Not only must the members of the cabinet act in accordance with the Constitution; they must also provide parliament with full and regular reports concerning matters under their control. Furthermore, one of the nine fundamental values and principles of good public administration set to govern the South African democracy is that 'public administration must be accountable'.[8] Public accountability therefore literally features in every facet of governmental activity.

Scope of the Investigation

The scope of the subject of this investigation is indeed very wide, since an enquiry into how the courts have grappled with the interpretation and application of the principle of accountability has several constitutional as well as jurisprudential ramifications. Firstly, there is the relationship between judicial review and accountability. This is because a court, in the exercise of its function of interpreting and applying the Constitution, is obliged to give guidance as to what accountability means or represents in any particular context. Secondly, if accountability is tantamount to liability as one of its offshoots, then how the courts have deployed that expression in making the state, the public authority or their agents compensate the injured citizen for their transgressions which have caused the individual harm should be interrogated.

Thirdly, there is the intersection between public accountability, corruption and maladministration. Public accountability reassures the citizenry of the government's protection of their rights and personal security; it is, therefore, the antithesis of corruption. Public accountability requires that persons in position of authority take responsibility for their conduct even if the action or decision taken turns out to be wrong or unlawful. In constitutional democracies such as South Africa's, public administrators and state institutions in every sphere of government, organs of state and public enterprises are guardians of the members of the public. Bearing in mind the apparent weaknesses of the human being, the founders of the Constitution thought it wise to establish such offices as that of the Public Protector ostensibly to keep a watchful eye

7 See also s 114(2)(*a*) and (*b*), Constitution, 1996 in respect of the oversight powers of the provincial legislatures *vis-à-vis* the provincial executive.

8 Section 195(1)(*f*), Constitution, 1996.

over those same administrators and institutions entrusted with the responsibility of guarding our welfare, our wellbeing and our security.[9]

Fourthly, when the Constitution states that the national executive is accountable to the National Assembly as to how it exercises its constitutional obligations or implements legislation, what does that mean?[10] This question and the third point raised above appear to run into each other, so much so that both questions could, to some extent, be said to have been answered by the Constitutional Court's final word on this crucial matter in its recent judgment in *Economic Freedom Fighters v Speaker of the National Assembly*.[11] The *EFF* judgment has more than clarified the 'frustration and confusion' introduced in the interpretation and, more accurately, the misinterpretation of the relevant constitutional and statutory instruments by the president, his cabinet ministers and the governing political party. It has made clear the president's failure to implement the law with respect to the Public Protector's remedial action as it concerned the public expenditure in the purported security upgrade of the president's private homestead. Suffice it to say that, among the issues deliberated upon in that judgment, the Constitutional Court has expounded on the various implications of accountability with particular regard to: (*a*) executive conduct in relation to an independent institution of state established by the Constitution to investigate the conduct of public affairs; and (*b*) the constitutional obligation imposed on the National Assembly to exercise an oversight power over the president as head of the national executive, that is, the accountability of the president to parliament in a truly separation-of-powers arrangement.

Fifthly, the foundational values of accountability, responsiveness and openness apply to the Judiciary in the performance of their judicial functions as much as to the other branches of government.[12] Here, we encounter such contrasting issues as judicial accountability and judicial immunity; whether a judicial officer can be held liable in damages for the manner in which such officer carried out a judicial function; the intersection between the foregoing and the common-law principle of judicial immunity from liability for judicial errors committed in rendering a judgment coupled with the principle that the state is not vicariously liable in damages for judicial errors; the tension between judicial immunity and the violation of personal liberty rights arising from judicial error,[13] and the dilemma of casting aside these lofty ideals by holding the state

9 *SABC v Democratic Alliance* 2016 (2) SA 522 (SCA) paras 1–2.

10 See Chuks Okpaluba, 'Can a Court review the Internal Affairs and Processes of the Legislature? Contemporary Developments in South Africa' (2015) XLVIII CILSA 183.

11 2016 (3) SA 580 (CC).

12 *SABC v NDPP* 2007 (1) SA 523 (CC) paras 30–31.

13 See Chuks Okpaluba, 'Adjudicators Immunity from Liability in Negligence: The Case of the Advertising Authority of South Africa' (2007) 17 Lesotho LJ 41; Chuks Okpaluba, 'Constitutional and Delictual Damages for Judicial Acts and Omissions: A Review of *Claassen* and Recent Common-law Decisions' (2011–2012) 19 Lesotho LJ 1.

directly liable in constitutional damages for judicial errors in adjudication, as enunciated by the Privy Council in *Maharaj v Attorney General of Trinidad and Tobago (2).*[14] Also implicated in this context is the concept of open justice, a topic that has generated a good amount of debate in recent times.[15]

In the light of the above, and given space constraints, it is neither possible nor practicable to investigate the various areas of the democratic architecture permeated by the principle of accountability in a discussion of this nature. All one can do in the present article is to highlight the many ramifications of the principle of accountability and to emphasise the pride of place that the Constitution of South Africa has accorded it. Accordingly, this article is confined to the investigation of public accountability and judicial review by way of introduction. It goes further, to show the link between accountability, openness and transparency. In the final analysis, public accountability and public authority liability are the main thrust of this enquiry. The conclusion that clearly emerges from the jurisprudence of the Constitutional Court is that the refrain of the rule of law that 'no one is above the law' resonates in this field of learning more than in any other. This is because whenever accountability is mandated, the public functionaries concerned cannot take their duties or the public for granted; they have no choice but to yield to the constitutional imperative; they must not only 'obey' the dictates, but must also 'observe, uphold and maintain the Constitution and all other law of the Republic'.[16] It is important, however, that before embarking on this investigation, the meaning of accountability must first be explored.

The Meaning of 'Accountability'

Although the Constitution has used the word 'accountability' in the many instances identified above, it does not define the term anywhere. So the question remains what the term means in simple English, what it connotes, and what the framers of the Constitution might have intended it to represent. The first and basic principle of statutory or constitutional interpretation is to seek the ordinary, literal meaning of the

14 *Maharaj v Attorney General of Trinidad and Tobago (2)* [1979] AC 385 (PC) at 409D–G. See the discussion by Chuks Okpaluba, 'Constitutional Damages, Procedural Due Process and the *Maharaj* Legacy: A Comparative Review of Recent Commonwealth Decisions (Part 1)' (2011) 26 SAPL 256 and Chuks Okpaluba, 'Constitutional Damages, Procedural Due Process and the *Maharaj* Legacy: A Comparative Review of Recent Commonwealth Decisions (Part 2)' (2012) 27 SAPL 136.

15 See, for example, *Cape Town City v SANRAL* 2015 (3) SA 386 (SCA) paras 12–20; *Independent Newspapers: In re Masetlha v President of the Republic of South Africa* 2008 (5) SA 31 (CC) paras 39–40; *A v BBC* [2014] UKSC 25 paras 23–26; *CR (On application of C) v Secretary of State for Justice* [2016] UKSC 2 (27 January 2016) paras 1 and 36.

16 See the 'Oath or solemn affirmation of the President or Acting President', Schedule 2(1), Constitution, 1996.

term sought to be interpreted.[17] It is only when that fails that other principles of interpretation should be resorted to. Therefore, where the language of a provision is clear, the court need not interpret the particular provision through the liberal or any other approach. An analogy can be taken from planning law, where the term 'municipal planning' appears and the Supreme Court of Appeal (SCA), grappling with its meaning in *Johannesburg Municipality v Gauteng Development Tribunal*,[18] endorsed the recourse to authoritative dictionaries as permissible and often a helpful method for the courts to ascertain the ordinary meaning of words because, as a rule, every word or expression must be given its ordinary meaning.[19] Agreeing with the SCA that, in relation to municipal matters, the Constitution employed 'planning' in its commonly understood sense, Jafta J for the Constitutional Court held in that same case[20] that although the Constitution provided no definition of the term 'planning', in the context of municipal affairs that expression has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships. In that context, the term has been commonly used to define the control and regulation of the land use:

> There is nothing in the Constitution indicating that the word carries a meaning other than its common meaning which includes the control and regulation of the use of land. It must be assumed, in my view, that when the Constitution drafters chose to use 'planning' in the municipal context, they were aware of its common meaning.[21]

Arising from the foregoing is the question: is there anything in the Constitution to suggest that 'accountability' should convey a meaning other than its common meaning? Alternatively, when the Constitution drafters used the word 'accountability' in the context of the performance of public functions, were they aware of its common meaning? There seems to be no reason why the first question should not be answered in the negative while the alternative question is answered in the affirmative. It does mean that when the ordinary-meaning approach is applied, the necessary intention of the term 'accountability' becomes crystal clear.

Let us then ascertain the plain meaning of this word from the *Thesaurus* and *Black's Law Dictionary*. The *Thesaurus* likens 'accountability' to: 'answerability'; 'responsibility'; 'liability' and 'culpability'. In *Black's Law Dictionary*, 'accountability' means: a 'state of being responsible or answerable'. *Black* says that 'accountable' means

17 Chuks Okpaluba, *Judicial Approach to Constitutional Interpretation in Nigeria* (Matt Madek & Co. 1992) 40.

18 *Johannesburg Municipality v Gauteng Development Tribunal* 2010 (2) SA 554 (SCA) para 39.

19 See also *per* Hefer JA, *Fundtrust (Pty) Ltd (in Liquidation) v Van Deventer* 1997 (1) SA 710 (A) at 726H–727A.

20 *Johannesburg Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC) para 57.

21 *Johannesburg Municipality* (n 20) para 57.

'subject to pay; responsible; liable'.[22] On the other hand, 'liable' or 'liability' is a legal term. Whereas 'liable' means 'bound or obliged in law or equity; responsible; chargeable; answerable; compellable to make satisfaction, compensation, or restitution',[23] 'liability' is a broad legal term[24] of the most comprehensive significance, including 'almost every character of hazard or responsibility, absolute, contingent, or likely … all character of debts and obligations'.[25] It means an obligation that one is bound in law or in justice to perform.[26] In effect, accountability is an elastic, all-embracing word such that where a functionary is said to be accountable, it means that they must be answerable and responsible both politically and legally as well as being morally bound. Above all, the functionary is liable in terms of the law of the Constitution, in both delict and criminal law.

Public Accountability and Judicial Review

One of the main functions of the superior courts is to interpret the Constitution and the law and to apply them to real-life issues that are brought before them. In the constitutional-law and administrative-law setting, the courts undertake their judicial review function according to the principles of legality, rationality and reasonableness. The central basis of the power of judicial review stems from the notion that the Constitution, the organic and fundamental law, is the supreme law of the land[27] and that it takes precedence over all other laws, including the legislation of parliament.[28] By the operation of this concept, Parliament, the Executive and the Judiciary are bound to abide

22 *Black's Law Dictionary* 6 edn (West Publishing Company 1990) 19.

23 *Black's Law Dictionary* (n 22) 195.

24 *Black's Law Dictionary* (n 22) 194. See *Mayfield v First National Bank of Chattanooga, Tenn*, CCA Tenn 137 F2d 1013, 1019.

25 *Public Market Co of Portland v City of Portland* 171 Or 522, 130 P2d 624, 643.

26 *State ex rel Diederichs v Board of Trustees of Missoula County High School* 91 Mont 300, 7 P2d 543, 545.

27 Section 1(1), Constitution of Nigeria, 1999; s 52(1), The Constitution of Canada, 1982; art 1(6), Constitution of the Republic of Namibia, 1990; s 2, and the Preamble to the Constitution of the Republic of South Africa, 1996. The insertion into the Constitution of the supreme-law clause is not restricted to Commonwealth Constitutions. See, for example, s 98, Constitution of Japan; s 1(3), German Basic Law. See particularly the informative and extensive analysis of the 'predominance of the constitution' in Francois Venter, *Constitutional Comparison: Japan, Germany, Canada and South Africa as Constitutional States* (Juta 2000) 53–126.

28 Speaking in the Nigerian landmark case on judicial review of legislation, *Attorney General of Bendel State v Attorney General of the Federation* [1982] 3 NCLR 1 at 101, Eso JSC stated: 'It has to be accepted that our Constitution has *undisguisedly* put the Judiciary in a "pre-eminent" position, a position unknown to any other Constitution under the common law, where the Judiciary has to see to the correct exercise of Legislative powers by the National Assembly (section 4(8)). There is no doubt that this is a grave responsibility, in the exercise of which, though the court has to interpret the constitutional provisions broadly, it should also accept the corresponding attendant responsibility with equal graveness.'

by the dictates of the Constitution.[29] The supreme law clause, among other express and implied provisions of the Constitution, has put to rest the common-law concept that parliament is the ultimate lawgiver.[30]

The guiding principle of judicial review since the coming of the democratic dispensation is premised on the principle that '[t]he exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law.'[31] The Constitutional Court further held in *Pharmaceutical Manufacturers Association of SA* that it is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Such decisions must be rationally related to the purpose for which the power was given, otherwise they would be arbitrary and inconsistent with this requirement. In order to pass constitutional scrutiny, therefore, the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. Failure so to comply would mean that the power was exercised below the standards demanded by the Constitution for such action.[32] Similar sentiments have been expressed by the court in relation to the principle

29 The full implications of the supreme-law clause enshrined in s 2 of the South African Constitution were put in simple terms by Mahomed CJ when he was speaking in relation to the exercise of the South African National Assembly of its so-called privilege to discipline a member whose speech on the floor of the House the Speaker considered to be 'unparliamentary'. Mahomed CJ said in *Speaker of the National Assembly v De Lille & Another* 1999 (4) SA 863 (SCA) 863 para 14 —that the 'enquiry must crucially rest on the Constitution of the Republic of South Africa Act 108 of 1996. It is supreme—not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however *bona fide* or eminent its membership, no President, however formidable be his reputation or scholarship, and no official, however efficient or well-meaning, can make any law or perform any act which is not sanctioned by the Constitution … No Parliament, no official and no institution is immune from Judicial scrutiny in such circumstances.'

30 cf Albert Dicey, *The Law of the Constitution* (10 edn, ECS Wade 1959) 1; Owen Hood Phillips, *Constitutional and Administrative Law* (7 edn, Sweet & Maxwell 1987) 41; ECS Wade and GG Phillips (AW Bradley and T St JN Bates), *Constitutional and Administrative Law* (9 rev edn, Longman 1977) 55; Gretchen Carpenter, *Introduction to South African Constitutional Law* (3 edn, Juta 1987) 133.

31 *Pharmaceutical Manufacturers Association of SA & Another: In re Ex parte President of the RSA & Others* 2000 (2) SA 674 (CC) para 20. It was emphasised in *Merafong Democratic Forum v President of the Republic of South Africa* 2008 (5) SA 171 (CC) para 63 (*Merafong*) that as much as rationality was an important requirement for the exercise of power in a constitutional state, it did not in any way indicate that a court would take over the functions of the other arms of government in the formulation and implementation of policies.

32 Paragraph 85. Again, in *Pepcor Retirement Fund v Financial Services Board* 2003 (6) SA 38 (SCA) para 47, where the facts were not dissimilar from those in the *Pharmaceutical Manufacturers Association of SA* case, the question was whether a material error of fact should be a basis upon which a court could review an administrative decision taken in the public interest. At the Supreme Court of Appeal (SCA), Cloete JA reiterated the place of the doctrine of legality in the constitutional scheme of things and held that the doctrine required that the power conferred on a functionary to make decisions in the public interest should be exercised properly on the basis of the true facts; it should not be

of the rationality of legislative authority. Quite recently, Ngcobo CJ, while reiterating the constitutional imperative that parliament was bound only by the Constitution and must act in accordance with, 'and within the limits of, the Constitution',[33] stated in *Glenister v President of the Republic of South Africa*:[34]

> But, like all exercise of public power, there are constitutional constraints that are placed on Parliament. One of these constraints is that 'there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose'.[35] Nor can Parliament act capriciously or arbitrarily. The onus of establishing the absence of legitimate governmental purpose, or of a rational relationship between the law and the purpose, falls on the objector. To survive rationality review, legislation need not be reasonable or appropriate.[36]

In evaluating service delivery and the lawfulness, reasonableness and procedural fairness of administrative action in South Africa today, it is critical to take into account the basic values and principles governing public administration as envisaged by the founders of the democratic state. For instance, the actions of prosecutors were in issue in *Reuters Group plc v Viljoen NO*.[37] The court was reviewing the actions of the prosecutors in obtaining information from some journalists in purported reliance on the International Co-operation in Criminal Matters Act 1996.[38] The Cape High Court highlighted the clandestine and deliberate acts of the respondents in embarking on a procedure in which they set out to circumvent the provisions of the Act as they attempted to justify their failure to notify the applicants. In doing so, the court adverted to the constitutional principle of accountability that 'the state and its officials must be subject to public scrutiny'.[39] Building on the constitutional principles of accountability and the rule of law accompanied by its vital components of legality[40] and non-arbitrariness,[41] the court took 'special cognisance' of the role of the prosecuting authorities, which is not to secure a conviction by all means 'but to assist the court in

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confined to cases where the common law would categorise the decision as *ultra vires*. See also *Minister of Public Works v Kyalami Ridge Ratepayers Association* 2001 (3) SA 1151 (CC) para 34; *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) para 148; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) paras 55–59.

33 Section 44(4), Constitution, 1996.

34 2011 (3) SA 347 (CC) (*Glenister*).

35 *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) para 19.

36 *Glenister* (n 34) para 55. See also *Pharmaceutical Manufacturers Association of SA* (n 31) paras 86 and 89–90; *New National Party* (n 35) para 24.

37 *Reuters Group plc v Viljoen NO* 2001 (2) SACR 519 (C) para 43.

38 Act 75 of 1996.

39 *Reuters Group plc* (n 37) para 43.

40 *President of the Republic of South Africa v SARFU* (3) 1999 (10) BCLR 1059 (CC) para 148.

41 *Pharmaceutical Manufacturers Association of SA* (n 31) paras 83–85.

ascertaining the truth'.[42] It was therefore held that the respondents were in violation of the principles of accountability, legality and the non-arbitrary exercise of public power in that they were determined to obtain the videotapes from the journalists whatever the means.

Section 195(1) of the 1996 Constitution puts the matter beyond conjecture when it states that public administration must be governed by the democratic values and principles enshrined in the Constitution. We are familiar with those values and principles embedded in the Preamble to the Constitution; the founding provisions in Chapter 1, especially sections 1 and 2; the entire Chapter 2 espousing the rights and freedoms, giving content to those values and creating duties, burdens and obligations on the state and those who may have anything to do with the rights or obligations of citizens and even non-citizens within the geographical jurisdiction known as South Africa. To avoid any doubt, section 195(1) goes further to articulate nine distinct values attached to public administration:

(1) A high standard of professional ethics must be promoted and maintained.

(2) Efficient, economic and effective use of resources must be promoted.

(3) Public administration must be development-oriented.

(4) Services must be provided impartially, fairly, equitably and without bias.

(5) People's needs must be responded to, and the public must be encouraged to participate in policy-making.

(6) Public administration must be accountable.

(7) Transparency must be fostered by providing the public with timely, accessible and accurate information.[43]

(8) Good human-resource management and career-development practices, to maximise human potential, must be cultivated, and

42 *Reuters Group plc* (n 37) para 45, citing Erasmus J in *S v Jija* 1991 (2) SA 52 (E) at 68A–B.

43 Speaking quite recently in a controversial affirmative action and employment equity dispute—*SAPS v Solidarity obo Barnard* 2014 (6) SA 123 (CC) —as to whether fairness is the appropriate standard in evaluating the application to the individual of the employer's equity plan, Cameron J, Froneman J and Majiedt AJ held that, although it was not fatal to its case, SAPS did not elaborate on its reasons for justifying its action in this instance, whereas the constitutional values of accountability, transparency and openness required it to do so—sections 1(*d*), 32, 41(1)(*c*) and 195(1)(*g*). And to truly qualify as reasons, the information should be properly informative—*Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* 2003 (6) SA 407 (SCA) para 40; *JSC v Cape Bar Council* 2013 (1) SA 170 (SCA) para 46; *Ansett Transport Industries (Operations) Pty Ltd v Wraith* (1983) 48 ALR 500 at 507. See also Cora Hoexter, *Administrative Law in South Africa* (2 edn, Juta 2012) 461.

(9) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

These nine basic values or principles of public administration are in the nature of injunctions to public bodies and officials. They must guide those charged with the responsibility for implementing government policies expressed through legislative enactments and ministerial regulations. Since the state is enjoined to respect and protect the rights, the values and the ideals embedded in the Constitution, the Legislature has, to a great extent, discharged its own obligations when it enacts the relevant laws that translate these values into realisable virtues. In this regard, it is worth mentioning the decision of Patel J in *Hardy Ventures CC v Tshwane Metropolitan Municipality*,[44] where the municipality had failed, despite repeated demands by the applicant, to consider its application for outdoor advertising. It was held that the principles of co-operative government embodied in section 41(1) and the basic values and principles governing public administration in section 195(1) and (2) were applicable and needed to be adhered to by the municipality. Having failed so to comply, the respondents, as an organ of state, were unwittingly undermining those principles and values which would ultimately result 'in a bureaucratic culture that was inimical to the constitutional ethos.' In the words of the judge, 'erratic administration often results in arbitrariness and undermines qualitative administration in a democratic state.' In *Eleveth v Minister of Home Affairs & Another*,[45] Patel J spoke of section 195(1)(*f*) and (*g*) of the Constitution as being constitutional imperatives by providing that public administration must be governed by the principles of accountable public administration and transparency, which must be fostered by providing the public with timely, accessible and accurate information.

It is important to mention in relation to the relevance of the constitutional values or their place in adjudication that, their overarching qualities notwithstanding, accountability, responsiveness, openness and transparency are not of themselves stand-alone rights capable of being enforced as such. The point has been made, reiterated and re-echoed in several cases that as much as the fundamental values of sections 1 and 195 of the Constitution provide valuable interpretive assistance, they cannot found a right to bring an action,[46] they do not give rise to discrete and enforceable rights in themselves,[47] nor do they confer upon the applicants any justiciable rights.[48] Lastly, democratic

44 *Hardy Ventures CC v Tshwane Metropolitan Municipality* 2004 (1) SA 199 (T) paras 9 and 11.

45 2004 (3) All SA 322 (T).

46 *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC) paras 74 and 76.

47 *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)* 2005 (5) SA 39 (CC) para 40.

48 *Institute for Democracy in South Africa v African National Congress* 2005 (3) SA 280 (CC) para 21.

accountability as a fundamental value of the Constitution does not generally provide the basis for fashioning individual rights outside those specifically enumerated in the Constitution and other relevant legislation.[49] These values were not meant to be enforceable rights and, like the fundamental objectives and directive principles of state policy found in some Constitutions,[50] they were not couched in the language of rights. In other words, there is no cause of action or ground of judicial review of executive conduct or administrative action as the 'duty to account'.[51]

Accountability, Openness and Transparency

Although openness and transparency are ranked along with accountability and recognised as stand-alone values in the Constitution, strictly speaking, they are offshoots of the all-embracing concept of accountability. There are two aspects of this problem that need mentioning here. The first is that since the *Pharmaceutical Manufacturers Association of SA* judgment, the courts have consistently held that, depending on the legislation involved and the nature and functions concerned, a public body may not only be entitled but also be duty-bound to approach a court to set aside its own irregular administrative act.[52] It is therefore a well-established principle of contemporary South African public law that where a functionary perceives some irregularity in his or her decision, such functionary should strive not to abide by it. Rather, the functionary should, in the spirit of openness and transparency—which, together with the free flow of information concerning the affairs of state, is the 'lifeblood of democracy'[53]—have a court pronounce upon the unlawfulness of the decision.[54]

The second aspect is in connection with public procurement for contracts and services. It is true that literally every challenge of a tender award hinges in one way or another

49 *Britannia Beach Estate (Pty) Ltd v Saldanha Bay Municipality* 2013 (11) BCLR 1217 (CC) paras 17 and 19.

50 See, for example, Ch II, Constitution of the Federal Republic of Nigeria, 1999; Ch III, Constitution of Lesotho, 1993.

51 *Britannia Beach Estate* (n 49) para 22.

52 *Municipal Manager: Quakeni Local Municipality v FV General Trading CC* 2010 (1) SA 356 (SCA) para 23; *Pepcor Retirement Fund v Financial Services Board* 2003 (6) SA 38 (SCA) para 10; Premier, *Free State v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) para 36.

53 *President of the Republic of South Africa v M & G Media Ltd* 2011 (2) SA 1 (SCA) para 1; *Helen Suzman Foundation v President of the Republic of South Africa* 2015 (2) SA 1 (CC) para 167.

54 Incidentally, the pre-constitutional era judgments of the Appellate Division in *Raja & Raja (Pty) Ltd v Ventersdorp Municipality* 1961 (4) SA 402 (A) at 407D–E and *Transair (Pty) Ltd v National Transport Commission* 1977 (3) SA 784 (A) at 792H–793G show that the court granted relief to the municipality and the commission for having granted licences irregularly.

on a lack of transparency and openness on the part of those administering the tender process,[55] but our present discussion is confined to the cases dealt with below.

Irregular Administrative Decisions

A classic illustration of the Constitutional Court's approach to irregular administrative decisions is its judgment in *Pharmaceutical Manufacturers Association of SA*, where the president was given incorrect advice by his officials and he approached the court to set the consequent unlawful decision aside. This exemplary approach was emulated recently by a KwaZulu-Natal MEC in *Khumalo v MEC, Education, KwaZulu-Natal*.[56] Although the decision in *Khumalo* turned on the delay rule in approaching the court, its decision on the MEC's approach to the court to declare the irregularities in the process of promoting certain personnel in the department unlawful is instructive in the present context. It was contended in the Labour Court that the MEC needed to approach the court in terms of section 9 of the Public Service Act 1994.[57] That section empowered her to appoint and promote persons in the department; and her oath of office required her to ensure the supremacy of the rule of law. Further, that the demands for just administrative action under section 33 of the Constitution and the Promotion of Administrative Justice Act 3 of 2000 (PAJA) required her 'to act on the purported irregularities and, in so doing, to encourage a culture of accountability, openness and transparency in the exercise of public power'.[58] The Labour Court granted the relief sought and declared the promotion and the 'protected' promotion unlawful, unreasonable and unfair.[59] Although the Labour Court of Appeal (LAC) held that the Labour Court had erred in not properly evaluating the legal effect of the MEC's delay when it considered setting aside the promotions, it nonetheless dismissed the appeal against the Labour Court judgment.[60]

Notwithstanding the split of the Constitutional Court as to whether the application was based on section 158(1)(*h*) of the Labour Relations Act 1995,[61] according to Skweyiya J,[62] or section 7(1) of PAJA, as Zondo J held in his concurring judgment,[63] both judges agreed that it was one of judicial review under the principle of legality which required that all exercise of public power must, at a minimum, be lawful and rational. It was not applicable only to the exercise of public power so described as 'administrative action

55 See the discussion of *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2014 (1) SA 1 (CC) para 5.3.

56 *Khumalo v MEC, Education, KwaZulu-Natal* 2014 (3) BCLR 333 (CC).

57 Act 103 of 1994.

58 *Khumalo* (n 56) para 12.

59 *MEC, Education, KwaZulu-Natal v Khumalo* 2011 (1) BCLR 94 (LC).

60 *Khumalo v MEC, Education, KwaZulu-Natal* (2013) 34 ILJ 296 (LAC).

61 Act 66 of 1995.

62 *Khumalo* (n 56) para 28.

63 *Khumalo* (n 56) paras 77, 92 and 94.

under PAJA'; it was applicable to *all* exercise of public power.[64] The alleged unlawful promotion and 'protected' promotion were clearly located in the realms of illegality and irrationality. Furthermore, there was the duty of a state functionary such as the MEC to rectify unlawfulness within her department. This is underlined by the dictates of the rule of law which was explained by Skweyiya J thus:

> The rule of law is a founding value of our constitutional democracy.[65] It is the duty of the courts to insist that the state, in all its dealings, operates within the confines of the law and, in so doing, remains accountable to those on whose behalf it exercises power. The supremacy of the Constitution and the guarantees in the Bill of Rights add content to the rule of law. When upholding the rule of law, we are required not only to have regard to the strict terms of regulatory provisions but so too to the values underlying the Bill of Rights.[66]

In this regard also, the Constitutional Court upheld the Labour Court's decision to the effect that section 195 of the Constitution compelled the MEC, in the public interest, to eliminate illegalities in public administration. Therefore, it held that its dictum in *Njongi v MEC, Department of Welfare, EC*,[67] that it was always open to a government official to admit, without qualification, that an administrative decision was wrongly taken, applied equally to unlawful acts committed deliberately or negligently or in good faith.[68] The LAC had held that the MEC was not only entitled but also duty-bound to approach the court to set aside the irregular administrative act.[69] The Constitutional Court then held that section 195 laid a compelling basis for the founding of a duty on the functionary to investigate and, if need be, to correct the unlawfulness through the appropriate avenues. This duty was founded on the basis of accountability and openness in section 195(1)(*f*) and (*g*) and the requirement of a high standard of professional ethics in section 195(1)(*a*). When read in the light of section 1(*c*) of the Constitution, these provisions found not only standing in a public functionary who seeks to review through a court process a decision of its own department; indeed, they found an obligation to act to correct the unlawfulness within the boundaries of the law and in the interests of justice.[70] Accordingly, the MEC's action in seeking to rectify the irregularities brought to her attention in this case must be viewed 'as a bold effort to fulfil her constitutional

64 *Fedsure Life Insurance v City of Johannesburg TMC* 1999 (1) SA 374 (CC) paras 58–59; *Pharmaceutical Manufacturers Association of South Africa* (n 31) paras 84–86.

65 Section 1, Constitution, 1996.

66 *Khumalo* (n 56) para 29.

67 *Njongi v MEC, Department of Welfare, EC* 2008 (4) SA 237 (CC) para 56.

68 *MEC, Education, KwaZulu-Natal v Khumalo & Another* 2011 (1) BCLR 94 (LC) para 38.

69 *Khumalo* (n 60) para 41, citing *Municipal Manager: Quakeni Local Municipality v FV General Trading CC* 2010 (1) SA 356 (SCA) para 23.

70 *Khumalo* (n 60) para 35, citing (para 37) section 5(7)(*a*) of the Public Service Act 1994 as fortifying, in the context of public-sector employment, the possibility of such a functionary seeking recourse in the courts.

and statutory obligations to ensure lawfulness, accountability and transparency in her Department'.[71]

In the Context of Public Procurement

Section 217(1) of the Constitution states that, in dealing with public procurement where an organ of state contracts for goods or services, such an organ of state must do so in 'accordance with a system that is fair, equitable, transparent, competitive and cost-effective'. The Supreme Court of Appeal (SCA) held in *Municipal Manager: Quakeni Local Municipality v FV General Trading CC*[72] that a municipality which intends to conclude a service-delivery agreement with an external supplier at a contract amount in excess of R200 000 has to act openly and in accordance with a 'fair, equitable, transparent, competitive and cost-effective' system, and in terms of a supply-chain management policy designed to have that effect. Failure to implement a supply-chain management policy does not mean that a municipality contracting with an external supplier is relieved of its obligation to act transparently and to follow a fair, competitive and cost-effective bidding process.[73] On the contrary, failure to comply with these precepts renders the contract invalid and open to nullification by a court, no matter the consequential harm suffered by the external supplier.[74] The municipality may not submit itself to an unlawful contract and must resist the contractor's attempt to implement it. If the contractor applies for an order enforcing performance of the contract, the municipality may ask for a declaration of unlawfulness by way of counter-application, and need not proceed by way of an application for formal review.[75]

A further insight into what the Constitution requires of the tender process by deploying the term 'transparent' was provided by the judgment of the SCA in *SANRAL v Toll Collect Consortium*,[76] where the consortium was disqualified earlier in the assessment process for failure to score sufficient points and it contended that the tender-adjudication process was neither transparent nor objective. Its contention was that the process was deficient since a more detailed breakdown in the scoring system for the quality criteria was not disclosed to tenderers. The SCA held that transparency required that public procurement take place in public view and not by way of back-door deals, the peddling of influence or other forms of corruption. Once a tender had been issued and evaluated and a contract awarded in an open and public fashion that discharges the constitutional requirement of transparency. It was not there to be used by a disappointed tenderer to find some ground for reversing the outcome or commencing the process anew, by

71 *Khumalo* (n 60) para 38.
72 *Municipal Manager: Quakeni Local Municipality* (n 69).
73 Id para 13.
74 Id paras 14 and 16.
75 Id para 26.
76 2013 (6) SA 356 (SCA).

claiming that there should have been greater disclosure of the methodology to be adopted in evaluating the tenders.[77] Objectivity, which is an aspect of the constitutional requirement that the public procurement process be fair, required that the evaluation of the tender be undertaken in a way that was explicable and clear and according to standards that did not permit individual bias and preference to intrude. Where the evaluation of a tender required the weighing of disparate factors, it would frequently be convenient for the evaluator to allocate scores or points to the different factors in accordance with the weighting that the evaluator had attached to those factors.[78] However, insofar as the basic criteria upon which tenders would have been evaluated were disclosed, the fact that the system adopted was not disclosed to the tenderers in advance does not mean that the process was not objective.[79]

Public Accountability and Public Authority Liability

Quite apart from the government and its functionaries accounting for their actions by way of judicial review, there is another aspect of public accountability that has permeated South African constitutional jurisprudence since the emergence of constitutionalism two decades ago. It is accountability through the private law of delict, which has developed along the lines of bureaucratic negligence and vicarious liability. As it has been said elsewhere:[80] Davis J has held that recognition of the norm of

77 *SANRAL* (n 76) para 18. cf in *Allpay Consolidated Investment Holdings (Pty) Ltd v CEO, SASSA* 2013 (4) SA 557 (SCA) para 21, where the SCA held that it would be gravely prejudicial to the public interest if the law were to invalidate public contracts for inconsequential irregularities. But the Constitutional Court overruled this ruling when, in *Allpay Consolidated Investment Holdings (Pty) Ltd v CEO, SASSA (No 1)* 2014 (1) SA 604 (CC) paras 22, 24, 27 and 45, it held that: (*a*) the suggestion that 'inconsequential irregularities' are of no moment conflates the test for irregularities and their import; hence an assessment of the fairness and lawfulness of the procurement process; (*b*) it undermines the role procedural fairness plays in ensuring even treatment for bidders; (*c*) it overlooks that the purpose of a fair process is to ensure the best outcome and the two cannot be severed; (*d*) deviations from fair process may themselves be symptoms of corruption or malfeasance in the process in that an unfair process might betoken a deliberately skewed process; (*e*) once a particular administrative process was prescribed by law, it was subject to the norms of procedural fairness as codified by PAJA; (*f*) the central focus is not whether the decision was correct, but whether the process was reviewable on the grounds of PAJA; (*g*) if a court found that there were valid grounds for review, it was obliged to enter into enquiry with a view to formulating a just and equitable relief; and (*h*) the enquiry must entail weighing all relevant factors, after the objective grounds for review had been established. Kruger AJ held in *KOPM Logistics (Pty) Ltd v Premier, Gauteng Province* 2013 (3) SA 105 (GNP) para 14 that procedural fairness applies to the tender process, hence the requisites of openness, transparency and *bona fide* negotiations are applicable. At the very least, the process must be procedurally fair in terms of section 3(1) of PAJA and must accord with the constitutional norms of fairness and openness.

78 *SANRAL* (n 76) paras 20–21.

79 Id 22.

80 Chuks Okpaluba, 'Delictual Liability of Public Authorities: Pitching the Constitutional Norm of Accountability Against the "Floodgates" Argument' (2006) 20(2) Speculum Juris 252; Chuks

accountability requires that a public authority is accountable to the public it serves when it acts negligently and without due care;[81] Cameron JA expressly agreed with Davis J in that regard;[82] and, further, Nugent JA held that accountability is a vital factor in determining whether a legal duty ought to be recognised in imposing liability against a public authority.[83] In both *Olitzki Property Holdings*[84] and *Van Duivenboden*,[85] it was emphasised that it is not in every case that the private-law action for damages will be the proper route to take to ensure state accountability. The reason for this is that, in a number of instances, there may be other remedies appropriate to achieving that same purpose. And where such is the case, an action for damages will not succeed.[86]

Accountability as a distinct factor in determining the legal convictions of the community received the approval of the Constitutional Court in *Rail Commuters Action Group v Transnet Ltd t/a Metrorail & Others.*[87] It was held that in developing the legal principles governing the state's delictual liability in respect of its constitutional obligations—and particularly those relating to the rights to dignity, life and freedom and security of the person—it was correct that the SCA considered as relevant the factor of accountability in terms of which the government and those exercising public power had to be held accountable to the broader community for the exercise of their powers. Again, in confirming the approach of the SCA to this issue,[88] the Constitutional Court held that

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Okpaluba and Patrick Osode, *Government Liability: South Africa and the Commonwealth* (Juta 2010) para 9.5.1.

81 *Faircape Property Developers (Pty) Ltd v Premier, Western Cape* 2000 (2) SA 54 (C) at 65E–F. Even though the SCA overruled Davis J on the issue of liability in *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* 2003 (6) SA 13 (SCA) para 37, Lewis JA expressly upheld the accountability aspect of the trial judgment.

82 *Olitzki Property Holdings v State Tender Board* 2001 (3) SA 1247 (SCA) para 31.

83 *Minister of Safety and Security v Van Duivenboden* 2003 (1) SA 389 (SCA) para 20.

84 *Olitzki Property Holdings* (n 82) para 31.

85 *Van Duivenboden* (n 83) para 21.

86 See *Steenkamp NO v State Tender Board, EC* 2006 (3) SA 151 (SCA). See Chuks Okpaluba, 'Negligent Bureaucratic Bungling and the Administrative Process' (2007) 17(2) Lesotho LJ 1; Chuks Okpaluba, 'Bureaucratic Bungling, Deliberate Misconduct and Claims for Pure Economic Loss in the Tender Process' (2014) 24 SA Merc LJ 387.

87 2005 (2) SA 359 (CC) paras 73–78 (*Metrorail*). Again, in *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC) para 70, where the question was whether the respondent was liable in damages arising from the plaintiff having contracted tuberculosis while in prison, Nkabinde J held that the responsible authorities' function was to execute their duties in accordance with the purposes of the relevant legislation, which, in this instance, included detaining all inmates in safe custody whilst ensuring their human dignity and providing adequate healthcare services for every inmate to lead a healthy life. The idea is that the rule of law requires that all those who exercise public power must do so in accordance with the Constitution.

88 See *Van Eeden v Minister of Safety & Security* 2003 (1) SA 389 (SCA); *Minister of Safety & Security v Carmichele* (2) 2004 (2) BCLR 133 (SCA); *Minister of Safety & Security v Hamilton* 2004 (2) SA 216 (SCA); *Minister of Safety & Security v Carmichele* 2004 (3) SA 305 (SCA); *Premier, Western*

the principle of accountability might not always give rise to a legal duty in either private or public law. O'Regan J, for a unanimous court, concluded:

> in determining whether a legal duty exists whether in private law or public law, careful analysis of the relevant constitutional provisions, any relevant statutory duties and the relevant context will be required. It will be necessary too to take into account the other constitutional norms, important and relevant ones being the principles of effectiveness[89] and the need to be responsive to people's needs.[90]

Accountability and Breach of Public Duty

Delivered a decade ago, the *Metrorail* judgment highlighted the vulnerability of rail commuters in the face of acts of violence perpetrated while a train is in motion; the precarious situation commuters often find themselves in; the need to keep coach doors closed to give secure passage to rail commuters; and the significance of failing to provide safety and security measures for them when a train is in motion.[91] But, even so, this problem was not new as there had been earlier reported cases to the same effect.[92] However, 'this underpins the utmost importance of PRASA's duty "to ensure that reasonable measures are in place to provide for the safety of rail commuters."'[93] The question before the Constitutional Court in *PRASA* was whether the conduct of the Passenger Rail Agency of South Africa was wrongful when one of its passengers suffered physical harm as a result of having been attacked and later thrown off a moving train; also in question was the sufficiency of the safety and security measures it had employed, if any.

Mashongwa v PRASA[94]

Mogoeng CJ began his judgment for the court by canvassing the wrongfulness aspect of the conduct of PRASA. He adopted the principle enunciated in *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng*[95] by Khampepe J to the effect that 'Wrongfulness is generally uncontentious in cases of positive conduct that harms the person or property of another. Conduct of this kind is *prima facie* wrongful' as applicable in the present case as well as whether one is dealing

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Cape v Faircape Property Developers (Pty) Ltd (n 81); *Olitzki Property Holdings v State Tender Board* (n 82).

89 See sections 41(1)(*c*), 195(1)(*b*) and (1)(*e*) respectively.

90 2005 (2) SA 359 (CC) para 78.

91 *Metrorail* (n 87) paras 84, 102 and 106. See also *Transnet Ltd t/a Metrorail v Witter* 2008 (6) SA 549 (SCA).

92 Mogoeng CJ in *Mashongwa v PRASA* 2016 (3) SA 528 (CC) para 18; *Ngubane v SA Transport Services* 1991 (1) SA 756 (A); *Khupa v SA Transport Services* 1990 (2) SA 627 (W).

93 *PRASA* (n 92) para 18; *Metrorail* (n 91) para 86.

94 2016 (3) SA 528 (CC).

95 2015 (1) SA 1 (CC) para 22.

with positive conduct such as assault or the negligent driving of a motor vehicle, or negative conduct where there is a pre-existing duty, such as the failure to provide safety equipment in a factory or to protect a vulnerable person from harm.[96] The Chief Justice held that public carriers such as PRASA have always been regarded as owing a legal duty to their passengers to protect them from suffering physical harm while making use of their transport services. This is true of taxi operators, bus services and the railways. That duty arises, in the case of PRASA, from the existence of the relationship between carrier and passenger, usually, but not always, based on a contract. It also stems from its public-law obligations. This merely strengthens the contention that a breach of those duties is wrongful in the delictual sense and could attract liability for damages.[97]

Further, to conclude that an incident of omission, particularly in relation to public-law duties, is wrongful and imputes delictual liability 'is an exacting exercise that requires a reflection on a number of important factors'.[98] Some of these factors identified by the Chief Justice that go to wrongfulness have, in another context, been termed 'the Constitutional Court's Seven Policy Considerations'.[99] They were drawn by the court from such SCA cases as *Premier Western Cape v Fair Cape Property Developers Ltd;*[100] *Knop v Johannesburg City Council;*[101] *Du Plessis v Road Accident Fund;*[102] and *Minister of Safety and Security v Van Duivenboden*[103] and from other common-law jurisdictions. The court then came up with the following seven-point policy considerations:

- whether the operative statute anticipates, directly or by inference, compensation of damages for the aggrieved party;
- whether there are alternative remedies such as an interdict, review or appeal;
- whether the object of the statutory scheme is mainly to protect individuals or advance public good;
- whether the statutory power conferred grants the public functionary a discretion in decision-making;

96 *PRASA* (n 92) para 19. See also *K v Minister of Safety and Security* 2005 (6) SA 419 (CC); *Carmichele v Minister of Safety and Security* (1) 2001 (4) SA 938 (CC).
97 *PRASA* (n 92) para 20.
98 *PRASA* (n 92) para 22; *Steenkamp NO* (n 86) para 37; *Le Roux v Dey (Freedom of Expression and Restorative Justice Centre)* 2011 (3) SA 274 (CC).
99 Okpaluba (n 86) 482; Okpaluba (n 86) 31–33.
100 2003 (6) SA 13 (SCA).
101 1995 (2) SA 1 (A).
102 2004 (1) SA 216 (SCA).
103 2002 (3) All SA 741 (SCA).

- whether an imposition of liability for damages is likely to have a 'chilling effect' on performance of administrative or statutory function;
- whether the party bearing the loss is the author of its misfortune; and
- whether the harm that ensued was foreseeable.[104]

Also part of South Africa's contemporary jurisprudence of delictual liability are that: (*a*) an omission will be regarded as wrongful when it similarly 'evokes moral indignation and the legal convictions of the community require that the omission be regarded as wrongful';[105] (*b*) from the foregoing emerges a legal policy question that must of necessity be answered with reference to the norms and values embedded in the Constitution that apply to South African society;[106] (*c*) every other norm or value thought to be relevant to the determination of this issue would find application only if it were consistent with the Constitution;[107] and (*d*) 'the ultimate question is whether on a conspectus of all reasonable facts and considerations, public policy and public interest favour holding the conduct unlawful and susceptible to a remedy in damages.'[108] Whereas the state and its organs exist to give practical expression to the constitutional rights of citizens, and an obligation to ensure that the aspirations held out by the Bill of Rights are realised, safeguarding the physical well-being of passengers must be a central obligation of PRASA. It reflects the ordinary duty resting on public carriers and is reinforced by the specific constitutional obligation to protect passengers' bodily integrity that rests on PRASA as an organ of state. The norms and values derived from

104 *Steenkamp NO* (n 86) para 12.

105 *Van Duivenboden* (n 83) para 13; *Carmichele (1)* (n 96) para 56; *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597A–B.

106 *Van Duivenboden* (n 83) para 16.

107 *Van Duivenboden* (n 83) para 17.

108 *Per* Moseneke DCJ in *Steenkamp NO* (n 86) para 42. See also Brand JA in *Hawekwa Youth Camp v Bryne* 2010 (6) SA 63 (SCA) para 22; Brand AJ in *Le Roux v Dey (Freedom of Expression and Restorative Justice Centre)* 2011 (3) SA 274 (CC) para 122. Therefore, Navsa ADP held in *Pro Tempo v Van der Merwe* [2016] ZASCA 39 (24 March 2016) para 21, that the facts of *Transvaal Provincial Administrator v Coley* 1925 AD 24 at 26 were not distinguishable from the present. In *Coley*, the planting of wooden stakes in a play area for school children was rightly considered by the Appellate Division as constituting a sufficient basis to create a duty on the part of the Adminstration to prevent there being a danger to children in the vicinity. By placing a steel rod within a playground where children engaged in ball games, the appellant had created a dangerous situation. The appellant did not take reasonable steps to prevent a foreseeable risk of harm through misadventure from materialising. Section 28(1)(*b*) of the Constitution dictates that every child has the right to appropriate alternative care when removed from the family environment. Having regard to all the circumstances of the present case, including the fact that the children in question were struggling with learning disabilities and that the school was very much aware of the hyperactivity of the particular child involved here, and considering the factors set out in *Le Roux v Dey* (n 108), the conclusion is compelled that the appellant's submission that public policy considerations demand that liability should not be extended to the appellant was wholly unfounded.

the Constitution demand that a negligent breach of those duties, even by an omission, and in the absence of a suitable non-judicial remedy, attracts liability to compensate the injured person in damages.[109] The pertinent observations of the Chief Justice were that:

> Where a constitutional duty has been breached the value of accountability assumes a prominent role in the determination of the appropriateness of transposing that breach into a private law breach leading to an award of damages. That transposition will however become an option only if there are no other appropriate non-judicial remedies available to enforce accountability. For, where a political process is best suited to facilitate the observance of the value of accountability, then separation of powers dictate that courts allow the political arms of state the leeway to fully occupy their operational space. This would be so, for example, where issues of state policy arise or the effective and efficient functioning of the affected public authority would otherwise be undermined or award of damages could have a 'chilling effect' on performance of administrative or statutory functions or more resources would be required if courts were to grant a remedy. The prospects of recognising a private law remedy following upon a breach of a public law duty would be enhanced where no other effective remedy exists.[110]

The Case of the Illegal Immigrants

The main contention in *Rahim v Minister of Home Affairs*[111] was that if the court could find that the detention of the respondents—illegal immigrants—at places not determined by the Director-General of the Department of Home Affairs as provided for in section 34(1) of the Immigration Act 13 of 2002, then that would be a breach of the subsection by the immigration officials; it would only constitute a failure to fulfil a public duty, but it would not translate into a private action for damages. The premise upon which this argument was based was that proper and lawful grounds existed for the arrest and detention of the respondents, the unlawfulness emanating only from their being detained at places not duly authorised as specified in the Act. The court recalled the judgment of Langa CJ in *Zealand v Minister of Justice and Constitutional Development*,[112] where the Chief Justice adopted the judgment of the court in *Metrorail* to the effect that whereas 'private law damages claims are not always the most appropriate method to enforce constitutional rights', it should also be emphasised 'that a public law obligation does not automatically give rise to a legal duty for the purposes of the law of delict'.[113] The court, however, cautioned that it should not be understood as suggesting 'that delictual relief should not lie for the infringement of constitutional

109 *Per* Mogoeng CJ in *PRASA* (n 92) paras 25–26.

110 *Per* Mogoeng CJ in *PRASA* (n 92) para 24. See also *Van Duivenboden* (n 83) paras 21–22 *per* Nugent JA; *Minister of Safety and Security v Carmichele (2)* (n 88) paras 37–44 *per* Harms JA.

111 2016 (3) SA 218 (CC) para 18.

112 2008 (4) SA 458 (CC) para 50.

113 Paragraphs 80–81.

rights in appropriate circumstances. There will be circumstances where delictual relief is appropriate.'[114] Langa CJ then held that when determining whether an action lies in the private law of delict where a public duty has been breached, the constitutional norm of accountability should be considered.[115] Nugent AJ held that even if the arrest and detention of respondents in *Rahim* was unassailable, the unlawfulness lying only in the places at which they were detained, the applicant cannot simply escape liability for damages. The proper enquiry is whether conduct of the kind in question attracts civil liability for any harm that might have been caused.[116] In support of the foregoing is the speech of Khampepe J in *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng,*[117] where the Lady Justice had said:

> The statement that harm-causing conduct is wrongful expresses the conclusion that public or legal policy considerations require that the conduct, if paired with fault, is actionable. And if conduct is not wrongful, the intention is to convey the converse: "that public or legal policy considerations determine that there should be no liability; that the potential defendant should not be subjected to a claim for damages" notwithstanding his or her fault.[118]

Again, speaking on the issue of omissions to perform public duties, Mogoeng CJ held in *PRASA* that:

> … whether a reasonable train operator would have foreseen the risk of harm to passengers arising from this, and taken steps to guard against that risk, are questions that fall to be answered in the enquiry into negligence. But in addressing wrongfulness the question is whether omissions of that type, in breach of PRASA's public law obligations, are to be treated as wrongful for the purposes not only of public law remedies, but also for the purpose of attracting delictual liability sounding in damages.[119]

The court held that although the respondents had entered the country illegally and were subject to summary deportation, persons in their category nonetheless enjoy the protection of the Constitution, at least, so far as the principle of legality and their right to respect for their dignity is concerned. There seems to be no basis for holding that the vulnerable and marginalised cannot vindicate their rights through a delictual claim as no reasons of principle or policy or practicality that militate against recognising a

114 Paragraph 81.
115 *Per* Langa CJ in *Zealand* (n 112) para 51.
116 *Rahim* (n 111) paras 21–22 *per* Nugent AJ.
117 2015 (1) SA 1 (CC).
118 *Country Cloud* (n 55) para 21. See also *Trustees, Two Oceans Aquarium Trust v Kantey and Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) para 12; *Gouda Boerdery BK v Transnet* 2005 (5) SA 490 (SCA) para 12; *Van Duivenboden* (n 83) para 12.
119 *PRASA* (n 92) para 21.

delictual action in their circumstances.[120] This finding is supported by the principle that: (*a*) it is only when the interests of good government outweigh the interests of the individual litigant that the court will not grant relief to a successful litigant;[121] and (*b*) the breach of section 12(1)(*a*) of the Constitution is sufficient to render the applicant's detention unlawful for the purposes of a delictual claim for damages where it is the most effective way to vindicate the applicant's constitutional right.[122] Further emphasising the guarantee of the right not to be deprived of freedom and security of the person arbitrarily or without just cause as extolled by the Constitutional Court in previous cases,[123] the court held that the detention of the respondents was indeed unlawful, entitling them to damages, as found by the SCA.[124]

Liability for Criminal Acts of Police and Other Security Officers

The Police Rape Cases

The Constitutional Court took the opportunity of the case of *K v Minister of Safety and Security*[125] to bring the law of vicarious liability into accord with the spirit, purport and objects of the Bill of Rights, including the constitutional principle of government accountability—as indeed it had done in the sphere of government liability in negligence with its ruling in *Carmichele v Minister of Safety and Security (1)*.[126] In *K*, the Constitutional Court proceeded to lay down the principle that insofar as there is an intimate connection between the delict committed by the police officers and the purposes of the employer, the employer will be vicariously liable for the wrongful conduct of the policemen. In this case, the state was held liable for the rape of a young woman by three police officers on duty who gave her a ride in a police vehicle in the early hours of the morning. Although the officers acted in their own personal interests and for their own purposes, there was a sufficiently close link between their acts and the employer's business.[127] This principle was recently applied to a situation where the police officer was off duty but had committed the rape using a police vehicle, which was instrumental in the commission of the act and which was pivotal in providing the required connection between the crime and his employment.[128] In this matter, Froneman J affirmed the foregoing judgment of the Constitutional Court and the SCA judgments

120 *Rahim* (n 111) paras 23–24 *per* Nugent AJ.

121 *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC) para 32.

122 *Per* Langa CJ in *Zealand* (n 112) para 53.

123 See, for example, *Zealand* (n 112) para 25; *per* O'Regan J, in *Bernstein & Others v Bester & Others NNO* 1996 (2) SA 751 (CC) para 145; same Judge in *S v Coetzee* 1997 (3) SA 527 (CC) para 159; *De Vos NO v Minister of Justice and Constitutional Development* 2015 (2) SACR 217 (CC) paras 23–25 *per* Leeuw AJ.

124 *Rahim* (n 111) para 29.

125 2005 (6) SA 419 (CC) paras 45 and 57.

126 2001 (4) SA 938 (CC).

127 See Okpaluba and Osode (n 80) ch 15.

128 *F v Minister of Safety and Security* 2012 (1) SA 536 (CC).

discussed earlier that the courts in South Africa have recognised that the constitutional value of accountability now informs the court's evaluation of wrongfulness. In doing so, the learned judge held in *F v Minister of Safety and Security*[129] that the constitutional norm of accountability in the determination of wrongfulness does not provide reasons independent of negligence to impose delictual liability:[130] it simply provides the proper context within which to determine whether the costs associated with the imposition of delictual liability for negligently caused harm should prevent the imposition of that liability or not.[131] Generally, accountability concerns would favour delictual liability, but that is not always the case.[132] Substantiating that general proposition of the law, Froneman J went further to hold that:

> Factors that militate against the imposition of liability include the availability of an alternative remedy,[133] the possibility that imposing liability might undermine the functioning of State organ in question,[134] the convenience of administering a rule that liability will be imposed in these circumstances,[135] the possibility of limitless liability[136] and whether the plaintiff is best placed to protect himself against loss.[137] It is generally only when all these concerns are met that the value of accountability and other constitutional values may require the recognition of a legal duty under the wrongfulness enquiry.[138]

Defence Force Employee supplying Assault Rifle for Use in Robbery

In *Minister of Defence v Von Benecke*,[139] the appellant, in his capacity as head of the Department of Defence, was held vicariously liable by the North Gauteng High Court, Pretoria, for injuries sustained by the respondent when he was shot during an armed robbery with a stolen Defence Force-issue R4 assault rifle. The perpetrator was not the appellant's employee but there was evidence that it was a Defence Force employee in charge of the safekeeping and storage of weapons and ammunitions at the military base

129 2012 (1) SA 536 (CC) paras 121–123.
130 Contra A Fagan, 'Rethinking Wrongfulness in the Law of Delict' (2005) 122 SALJ 132–134.
131 cf Francois du Bois, 'Getting Wrongfulness Right: A Ciceronian Attempt' in TJ Scott and D Visser (eds), *Developing Delict: Essays in Honour of Robert Feenstra* (Juta 2000) 31–32.
132 See, for example, *Steenkamp NO* (n 86) para 86.
133 *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) 33B; *Van Duivenboden* (n 83) para 21; *Van Eeden* (n 88) para 19.
134 *Knop* (n 133) 33C–D; *Van Duivenboden* (n 83) para 22; *Van Eeden* (n 88) para 21; *Hamilton* (n 88) para 35.
135 *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) at 833H–834A; *Van Duivenboden* (n 83) para 13; *Hamilton* (n 88) para 17.
136 *Van Eeden* (n 88) para 19; *Van Eeden* (n 88) para 22; *Fourways Haulage SA (Pty) Ltd v SANRAL* 2009 (2) SA 150 (SCA) para 23.
137 *Fourways Haulage* (n 136) para 27.
138 *F* (n 128) para 124.
139 2013 (2) SA 361 (SCA).

who had stolen and handed over the rifle parts and ammunition that were used—together with a previously stolen rifle body—to assemble the weapon used in the robbery. Was the trial court correct in holding the appellant liable despite the fact that its employee had deviated from his normal course of employment?

The SCA held that the standard pre-constitutional test for vicarious liability, that is, the so-called *Feldman*/*Rabie* test as Okpaluba and Osode described it,[140] which was designed to achieve a balance between imputing liability without fault and which ran contrary to legal principle and the need to make amends to an injured person, who might not otherwise be compensated,[141] might not have provided the claimant in *Von Benecke* with a remedy. Viewed objectively, the conduct of the employee of the Department of Defence fell outside the course and scope of his employment. This is because, when viewed from the subjective perspective of the employee, Motaung, it clearly emerges that he deliberately turned his back on his employment and its duties, pursuing instead his own interests and profit in stealing the components and ammunition for the rifle. So, too, when objectively considered, the theft and removal formed no part of his duties and there was no link between his own interests (as realised by the theft) and the business of his employer. According to Heher JA:[142]

> In the standard terminology the conduct fell outside both the course and scope of his employment; nor does the fact that Motaung was employed to safeguard the armoury provide the necessary connection—the submission of counsel being that the theft can be equated with a culpable neglect of his duties while in the course of carrying them out. There is in my view a clear distinction between a negligent performance of a task entrusted to an employee for which the employer must usually bear responsibility, and conduct which is in itself a negation of a disassociation from the employer/employee relationship. The theft committed by Motaung falls into the second category. I can find no reason to distinguish it from the facts and principles summarised by Harms JA in *Absa Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd*.[143]

Heher JA further held that the foregoing cannot be the end of the matter since a court that found that the test was not met was nevertheless bound to ask itself whether the rule did not require development and extension in order to accommodate the particular set of facts before it. In answering that question, the court had to consider the normative values of the Constitution which directed the policy that influenced the decision; and that they would do so in relation to the objective element of the test, that is, the closeness of the relationship between the conduct of the employee and the business of the employer. If the constitutional norm so dictated, it was no longer necessary to limit the

140 Okpaluba and Osode (n 80) para 14.2.
141 *Minister of Law and Order v Ngobo* 1992 (4) SA 882 (A) at 833G–H; *K* (n 96) para 21.
142 *Von Benecke* (n 139) para 13. See also *per* O'Regan J, *K* (n 96) paras 16 and 23.
143 2001 (1) SA 372 (SCA) 382I–383C.

proximity to those cases where the employee, although deviating from the course and scope of his or her employment, was nevertheless acting in furtherance of the employer's business when the deviation occurred.[144]

After a discussion of the constitutional foundations of the Defence Force and their statutory embodiment,[145] Heher JA held that the Defence Force was a special kind of employer that required a different approach to liability for the wrongful acts of its employees from that adopted in the case of ordinary civilian employers. Because of the enormous potential for public harm inherent in the inadequate preservation and control of arms, the appellant should not in general be able to avoid liability for wrongful acts of commission or omission of employees that it had appointed to carry out its duties to preserve and control its arms.[146] There certainly was an intimate connection between the employee's delict and his employment. Firstly, he had abstracted the equipment and ammunition while under a positive duty to preserve and care for the items in question; secondly, it had been the most probable inference that the opportunity to make away with them had arisen from the opportunity provided by the scope of his duties, without which he would have possessed neither access to them nor knowledge to avoid such security controls as the Defence Force must have put in place.[147]

Radical Deviation from Official Task

Apart from the rape cases where the issue of the employer being liable to account for the employee's criminal act was in issue, the other common criminal acts of police officers encountered often in the case law involve the misuse of their official firearms to kill someone or themselves. In one instance, a police reservist had used the official firearm to shoot her estranged boyfriend;[148] in another, a police officer shot himself with his service firearm;[149] and in a third instance the police officer committed suicide with his official firearm after shooting his wife.[150] However, the recently reported case of *Minister of Safety and Security v Morudu*[151] is perhaps the first in which a police officer on duty shoots and kills someone with his (the policeman's) own personal firearm. The *Morudu* case was not decided on direct liability along the lines of the other cases mentioned; it was canvassed on the basis of vicarious liability as in the rape cases. It is a case the facts of which somewhat resemble those of *Attorney General of the British*

144 *Von Benecke* (n 139) para 14.
145 Paragraphs 17–22.
146 Paragraph 24.
147 Paragraph 25.
148 *Pehlani v Minister of Police* [2013] ZAWCHC 146 (25 September 2014).
149 *Minister of Safety and Security v Madbiyi* 2010 (2) SA 356 (SCA).
150 *Minister of Safety and Security v Hlomza* 2015 (1) SACR 1 (SCA); *Dlanjwa v Minister of Safety and Security* [2015] ZASCA 147 (01 October 2015).
151 2016 (1) SACR 68 (SCA).

Virgin Islands v Hartwell[152] only to the extent that in both cases the police officers left their duty posts and travelled some distance using the employer's vehicle to the places where they shot at the alleged boyfriends of their lovers. The firearm used in *Hartwell* was the policeman's official firearm but that was not the case in *Morudu.* Otherwise, the facts of the two cases are not exactly similar.

In *Morudu*, the police officer in question was a fingerprint investigator and a member of the police unit that attended crime scenes for investigative purposes when called upon to do so. On the crucial day, believing that the deceased was his wife's lover, he drove to the deceased's home in an unmarked police vehicle that had been assigned to the unit and shot the deceased. At that time, he and another colleague were on call to attend crime scenes should the need arise. The firearm he used in perpetrating the deed was his own and not for official issue. The trial court had ruled in favour of the plaintiffs, and having regard to the Constitutional Court judgments in *K* and *F*, held that in adjudicating whether there should be vicarious liability, the focus turned on whether the connection between the conduct of the police officer and his employment was sufficiently close to render the minister liable. According to Molefe AJ, 'the establishment of this connection is assessed by explicit recognition of the normative factors that point to vicarious liability' and the fact that a member of the SAPS was on standby duty, and the question of payment for that duty, was not determinative. The trial Acting Judge held that, although murdering the deceased had nothing to do with the policeman's duty, there was a sufficiently close link between his act for his own personal gratification and the business of the employer: he used the employer's vehicle to attend to his personal matters by going to murder the deceased, which action was an intentional deviation from his duties.[153]

Even if one had to resort to the language of 'the course and scope' of employment, did the police officer, in this case, truly act in the course and scope of his employment? Did he encounter the deceased on his fingerprint duty or at the scene of a crime on a call-out? By the time he drove from where he was supposed to be on the day of the incident was he onto the employers' business or on a frolic of his own? Could the employer be held vicariously liable for this policeman's criminal conduct? The SCA answered these questions in the negative. It held, first, that it was necessary to have regard to the subjective element in the present case where the policeman was convinced that he was being cuckolded and had travelled to the home of the respondents to kill a person he considered to be his wife's lover. This was a radical deviation from the tasks incidental to his employment.[154] Second, in respect of the objective element and whether there was a sufficiently close link between the policeman's acts for his own interests and purposes

152 2004 (1) WLR 1273 (PC).
153 *Morudu* (n 151) paras 16–17.
154 Paragraph 33.

and his duties as a policeman, that none of the respondents identified the policeman as being a policeman and none placed trust in him.[155] The only police accoutrements were the radio and the police vehicle. The radio was not visible and the vehicle was unmarked.[156] Third, it was significant that the policeman was a member of a unit which interfaced with the public on only a limited basis and mainly after a crime had already been committed. This unit was not a division of the police to which the public would intuitively turn for protection.[157] Finally, the court was unable to conclude that there was a sufficiently close link between the policeman's actions for his own interests and his duties as a policeman. The appeal was thus upheld.[158] Navsa ADP quite rightly remarked:

> This is a difficult case because of the terrible consequences for the respondents. The trauma they suffered in witnessing a husband and father being gunned down in front of them is difficult to fully appreciate. Drawing a line that does not hold the Minister liable for loss of their breadwinner is in itself difficult. In *K* the Constitutional Court, in exhorting courts to keep in mind the values of the Constitution when adjudicating cases such as the present, stated that this does not mean that an employer will inevitably be saddled with damages simply because the consequences are horrendous.[159]

Could it not be argued that the police vehicle which was assigned to the unit enhanced his mobility and therefore enabled him to think of getting the job done? This was a strong factor in *F*'s case. But, unlike in *K* and *F*, the police officer in *Morudu* did not seek any assistance apart from mobility and so that aspect of trust was not a factor. Another important issue is that the policeman in *Morudu* never purported to have been performing his duties as a police officer in any way similar to the manner the Jamaican police officer had conducted himself in *Bernard v Attorney General of Jamaica*.[160]

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155 Contra in *F* (n 128) paras 79–81.

156 *Morudu* (n 151) para 34.

157 Paragraph 35.

158 Paragraphs 37–38.

159 Paragraph 36; *K* (n 96) para 23.

160 [2005] IRLR 398 (PC). In *Jewel Thornhill v Attorney General* [2015] ECarSC 75 para 33 (16 April 2015), where PC Taliam, who rendered security services to a private business entity operating in St Lucia, based on what he saw, came out of the supermarket with his police-issued firearm, identified himself as a police officer and ordered everyone involved in the fracas to get their hands up. Sensing that the appellant pointed a gun at him, the officer shot at him and wounding him in the process. Pereira CJ of the Eastern Caribbean Supreme Court held that the evidence was that PC Taliam acted on the premise that he was in every respect a police officer at the time he observed a breach of the peace was imminent, at which time he assumed the full character and responsibilities of a police officer and acted in a manner to prevent a breach of the peace. At the relevant time, there was no doubt that he was acting as a police officer and was therefore an officer of the Crown. His action in discharging the firearm was closely connected to the acts he was authorised to do which included his duty to preserve the public peace. On the facts and circumstances of this case, the Crown, barring any limiting

Liability in the Context of Public Procurement[161]

The central argument of the appellant in *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng*[162] was the constitutional value of accountability. The appellant had lent money to a third party, iLima Projects (Pty) Ltd, which had a construction contract with the department of which Mr Buthelezi was then head. When Buthelezi cancelled the contract with iLima, the latter literally went bankrupt. In an action to recover damages for the profit which Country Cloud could have made from the deal with iLima, it pointed to two sections in support of its case, namely, section 195(1), which sets out the basic values and principles governing public administration, and section 217, which regulates the conduct of public procurement for contracts for goods or services. It contended that for the department to evade liability would be to condone Mr Buthelezi's 'capricious conduct' and would be inconsistent with the principle of accountability. It argued in the alternative that permitting the claim would deter similar capricious conduct.[163] The court prefaced its judgment by reiterating the well-established principle that as much as the value of state accountability can be a reason to impose delictual liability on a state defendant,[164] this value will not always give rise to a private-law duty;[165] and that Country Cloud did little to explain how and why state accountability compelled the court to recognise a private-law duty to compensate in the circumstances of the case.[166]

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circumstances in the St Lucia Civil Code, would be liable for PC Taliam's actions if the performance of the functions he performed or purported to perform amounted to a delict or quasi-delict.

161 The conduct of the South African Social Security Authority (SASSA) was a cause for accountability concern in *Allpay Consolidated Investment Holdings (Pty) Ltd v CEO, SASSA (No 2)* 2014 (4) SA 179 (CC) paras 68–71 and 75, which the Constitutional Court took into account when it came to consider the appropriate relief to grant the appellant, having struck down the tender award as unconstitutional in *Allpay Consolidated Investment Holdings (Pty) Ltd v CEO, SASSA (No 1)* 2014 (1) SA 604 (CC). In order to ensure the much-needed disciplined accountability in the new tender process, the court had to impose a structural interdict which required SASSA to report back to the court at each crucial stage of the new tender process. The court held that, contrary to the obligations imposed on SASSA by s 195 of the Constitution, it adopted an 'unhelpful and almost obstructionist stance'. For instance, it failed to furnish crucial information to AllPay regarding the implementation of the tender, and to Corruption Watch in respect of steps it took to investigate irregularities in the bid and decision-making processes. The court deprecated its conduct having regard to the important role it plays as guardian of the right to social security and as controller of beneficiaries' access to social assistance.

162 2015 (1) SA 1 (CC).

163 Paragraph 44.

164 *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC) para 70; *F* (n 128) para 123; *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) 359 (CC) para 73; *Minister of Finance v Gore* 2007 (1) SA 111 (SCA) para 88; *Van Duivenboden* (n 83) paras 21–22.

165 *Metrorail* (n 164) para 78; *F* (n 128) para 123–124.

166 *Country Cloud* (n 55) para 45.

The court proceeded to distinguish the case of *Country Cloud* from *Minister of Finance & Others v Gore*[167] in that the present case did not raise the 'acute public policy concerns that prompted the imposition of liability in *Gore*.'[168] *Gore* involved a clear case of fraud perpetrated by two employees of the provincial government. Owing to their fraudulent activities, the tender for automated fingerprint identification and verification technology for welfare payouts was not awarded to the plaintiff, who clearly would have clinched the tender but for the conduct of the employees of the government. Damages were awarded to the plaintiff on account of the defendant's being vicariously liable for the dishonest conduct of its employees.[169] In other words, there was dishonesty that went to the root of the defendant's conduct.[170] Although the conduct of Buthelezi was objectionable or offensive, the conduct lay, at worst, in the reasons he gave for his purported cancellation of the contract. His conduct did not rise to the level of dishonesty and corruption that were encountered in *Gore*. The suggestion that the conduct complained of fell between *Gore* and *Steenkamp NO v State Tender Board, EC*[171]—where the court refused to impose delictual liability for loss caused through the cancellation of a tender award because of a negligent breach of the procurement regulations—was rejected by the court as much as was the case in *South African Post Office v De Lacy & Another*.[172] The principle of law discernible from the foregoing is that if the conduct complained of amounts to bureaucratic bungling by a public functionary, as in *Steenkamp* or *De Lacy*, the court will not be disposed to impose liability for such conduct which does not equate to wrongfulness in delict in this context. Therefore, the same powerful policy considerations that motivated the imposition of liability in *Gore* would not be present.[173]

In response to Country Cloud's argument that the department had wronged it, Khampepe J held that one could only be held accountable for doing something wrong when that wrong was coupled with the fact that one could be held accountable only to the particular person whom one has wronged. Otherwise, accountability is not fostered by holding the department liable to any randomly selected third party.[174] The defendants in *Gore* breached a public-law duty owed to the aggrieved tenderer to whom the contract should have been awarded. In that context, the question turned on whether the award of damages was the appropriate remedy and so the value of the accountability played a

167 2007 (1) SA 111 (SCA) (*Gore*).

168 *Gore* (n 167) para 46. This case has been extensively discussed by Okpaluba (n 86) 411–414.

169 In a subsequent *quantum* trial of 'unusual proportions', Prinsloo J made an award of R253 550 000 less 15% contingency deduction of R38 032 500, bringing the total award to R215 517 500—*Gore NO v Minister of Finance & Others* [2008] ZAGPHC 338 para 313.

170 *Country Cloud* (n 55) para 46.

171 2006 (3) SA 151 (SCA).

172 2009 (5) SA 255 (SCA) (*De Lacy*).

173 *Country Cloud* (n 55) para 47.

174 Paragraph 48.

vital role. This is because it compelled a finding that the defendants were delictually liable to the plaintiff for the undisputed wrong they had committed against it. Such an equivalent link between the department and Country Cloud did not exist, and so 'pointing vaguely at state accountability' would not help.[175] Of course, the department would be liable to iLima, with whom it had a contract, for breaching that contract. That being the case,

> … there are much more direct and effective ways of calling the state to account in this case, most obviously the enforcement of this contract. It seems odd and circuitous to recognise an indirect claim by a corporate entity not directly involved in the contract between the Department and its contractor, iLima, as a means of ensuring the former's accountability. In short, this is a case where imposing delictual liability on the Department for a third party's loss is not justified on the grounds of accountability because: 'the wrongdoer is already vulnerable to a claim by [its contracting partner], and the extent of that liability [is] extensive. Imposing further liability on the wrongdoer for the relational economic consequences of [its] act, therefore, cannot usually be justified on the ground of deterrence.[176]

It therefore followed that to impose on the department delictual liability to a third party, over and above its normal contractual liability, was unnecessary. To do so would have undermined its functioning. At any rate, the insufficiency of the state's reasons for cancelling the contract would have been adequately addressed by its consequent contractual liability.[177] In the final analysis, the court held that, although it was prepared to accept that Buthelezi's state of mind does help distinguish Country Cloud's claim from the others, it was not related to the wrongfulness enquiry, and that reliance on state accountability based on *Gore* could accordingly not assist the case in hand.[178]

Conclusion

As has been made clear in this article, even though openness and responsiveness are closely related to accountability, the founders of the South African democratic state found it expedient to list them as stand-alone values alongside the democratic value of accountability. As this study has shown, accountability, which is equivalent to saying that someone is answerable, responsible, liable or culpable, is expressed in various parts of the Constitution. It follows, therefore, that the emphasis placed upon this value means that, collectively, the Executive, or any member of the Executive, the Legislature or any

175 Paragraph 49.

176 Dale Hutchison, 'Relational Economic Loss (or Interference with Contractual Relations): The Last Hurdle' in TJ Scott and D Visser (eds), *Developing Delict: Essays in Honour of Robert Feenstra* (Juta 2000) 143; *Canadian National Railway Co v Norsk Pacific Steamship Co* 1992 91 DLR (4th) 289 para 164.

177 *Country Cloud* (n 55) para 50.

178 Paragraph 67.

senior member of the state bureaucracy that fails the test of accountability in the performance of public duty, is by that same act in breach of the relevant provision of the Constitution. It further means that wherever the duty of accountability is imposed upon the president as head of the national Executive or the Legislature, both are bound to discharge that constitutional obligation in the manner prescribed by the supreme document. There is no room for any organ of state to act arbitrarily or capriciously in the face of a constitutional imperative of which accountability is a species: public functionaries must act within the constraints of their powers under the Constitution and the law.

An important aspect of public accountability dealt with in this article is connected with public authority liability, the development of which has been influenced by the Bill of Rights. These developments have been in the field of bureaucratic negligence and vicarious liability, especially concerning the criminal conduct of public employees. The principle of accountability has been laid down as a factor in determining whether a legal duty should be imposed on a public authority. The courts have equally made it clear that it is not in every case that a private-law action for damages will be the proper route to take in order to ensure state accountability, since, in a number of instances, there may be other remedies appropriate to achieving that same purpose. And where such is the case, an action for damages will not succeed. The *Metrorail* and *PRASA* judgments show how the principle of accountability translated into a breach of public duty by that statutory corporation of its duty to rail commuters. Similarly, the cases of *K* and *F* illustrate the new thrust of vicarious liability where the state as an employer was held liable for the criminal acts of its police officers who had conducted themselves in a manner totally outside their normal call of duty and who, in doing so, had taken advantage of their job situations and had used their employer's facilities to perpetrate their nefarious objectives. No such close connection with the employer's business was shown to exist in *Morudu*, where, by his conduct, the employee was said to have radically and intentionally deviated from his duties.

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