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Making accountability work: Reflections on Edwin Cameron's accountability jurisprudence

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1 Introduction

> Being accountable means being answerable to someone or something for one's actions or conduct.[1]

As a lawyer, activist, scholar and jurist, Justice Edwin Cameron has made a lasting contribution to advancing accountability in South Africa. As a young academic, Cameron raised eyebrows for his forthright assessment of the role of judges under apartheid and call for judicial accountability.[2] As an advocate, he pursued accountability for human rights abuses in ground-breaking cases.[3] In the transition to democracy, he made far-reaching contributions to private and public sector accountability in

1 E Cameron 'Judicial accountability in South Africa' (1990) 6 *South African Journal on Human Rights* 251 at 253.

2 His eviscerating critique of Chief Justice LC Steyn's 'lamentable' judicial legacy is well-known: E Cameron 'Legal chauvinism, executive-mindedness and justice – LC Steyn's impact on South African law' (1982) 99 *South African Law Journal* 38 at 40. He followed it, in 1987, with two articles on pro-apartheid judicial complicity and the need for accountability: E Cameron 'Judicial endorsement of apartheid propaganda: An enquiry into an acute case' (1987) 3 *South African Journal on Human Rights* 223; 'Nude monarchy: The case of South Africa's judges' (1987) 3 *South African Journal on Human Rights* 338, concluding at 346 '[w]ithout our insistence on proper public standards of judicial accountability we stand in danger of losing the institution itself.'

3 An early example is his contribution to *More v Minister of Co-Operation and Development* 1986 (1) SA 102 (A), which 'dealt a lethal blow to the evil of forced removals': G Marcus 'Courage, integrity and independence: Edwin Cameron's contribution to the law' (2019)(Aug) *Advocate* 24 at 26. From 1986 he was a dedicated human rights lawyer at the Centre for Applied Legal Studies, housed at the University of the Witwatersrand.

response to HIV/AIDS.[4] Shortly after the country's first democratic elections, he led a commission of inquiry exposing a systematic lack of accountability in the country's arms trade.[5] Even once appointed as a Judge of the High Court,[6] Cameron played a public role in holding government accountable.[7] He did so mindful of his position in judicial office and with careful reflection on when judges should 'speak out' and avoid '"omission, silence and inaction" in the face of injustice'.[8] Having retired from the bench, he now serves as judicial watchdog over prisons across the country.[9]

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4 Highlights include his contribution to the negotiation of a comprehensive AIDS agreement for the mining industry, and his role in drafting the Charter of Rights on AIDS and HIV. He also led precedent-setting litigation challenging HIV/AIDS discrimination. A notable example is *Jansen Van Vuuren v Kruger* 1993 (4) SA 842 (A) (establishing that a medical practitioner cannot publicly disclose the HIV/AIDS status of their patient without their consent). Significantly, Cameron also played a crucial institution-building role during this period. He co-founded and served as the inaugural chair of the AIDS Consortium and was the first director of the AIDS Law Project (ALP). The ALP helped found the Treatment Action Campaign (TAC), one of South Africa's most influential social movements. The ALP transitioned into SECTION27, which today serves as one of the foremost public interest law organisations, seeking accountability in relation to health and education rights. The history and development of the ALP and TAC has been meticulously documented in D Moyle *Speaking truth to power: The story of the AIDS Law Project* (2015). For a personal account, see E Cameron *Witness to AIDS* (2005).

5 Commission of Inquiry into Alleged Arms Transactions between Armscor and one Eli Wazan and Other Related Matters, Government Notice R1801, *Government Gazette* 16035 of 14 October 1994. Gilbert Marcus observes that Cameron's decision to conduct the Commission's hearings in public was an early reflection of his 'profound understanding of the new constitutional order', and his 'articulation of constitutional norms before the newly established Constitutional Court had rendered its first judgment': see Marcus (n 3) 28.

6 He was one of the first four judges that President Nelson Mandela appointed to the High Court in 1994: E Cameron *Justice: A personal account* (2014) 114-115.

7 Cameron openly critiqued President Thabo Mbeki's shameful AIDS denialism. In a public lecture, later published in the weekly *Mail & Guardian*, Cameron criticised the President's unconscionable stance: E Cameron 'The dead hand of denialism' *Mail & Guardian* (17 April 2003). For an account of the controversy following this publication, see Cameron *Witness to AIDS* (n 4) 138-148.

8 Cameron *Witness to AIDS* (n 4) 151-152, quoting the Truth and Reconciliation Commission's (TRC) findings on judicial complicity during apartheid. These findings were informed by Cameron's own submission to the TRC: see E Cameron 'Submission on the role of the judiciary under apartheid' (1998) 115 *South African Law Journal* 436.

9 In his position as the Inspecting Judge of the Judicial Inspectorate of Correctional Services (JICS), a statutory body established under the Correctional Services Act 111 of 1998. Cameron's three-year appointment commenced in 2020. In that period, he has been active in calling for an end to solitary confinement, the abolition of minimum mandatory sentencing, and revision of bail conditions. See,

These are snapshots of Cameron's commitment to advancing accountability both inside and outside the courtroom. In tribute, this essay reflects on Cameron's contributions to accountability jurisprudence in South Africa. I suggest that there are two ways in which his jurisprudence 'makes accountability work'. The first is by making accountability do significant jurisprudential work as a constitutionally entrenched value underpinning and advancing a 'culture of justification'.[10] The second is by developing a jurisprudential scaffolding within which the conditions necessary for democratic accountability can be secured. But to start: what is accountability?[11]

2 Public accountability

Described as a 'popular',[12] but 'fuzzy'[13] concept, accountability is not easy to define.[14] There has, of course, been some effort to offer precision to the concept. Scholars have distinguished between accountability as a broad, political ideal, on the one hand, and accountability as a narrower set of normative commitments, on the other.[15] Others have considered various forms of accountability (such as political, bureaucratic, legal, and social accountability)[16] and dimensions of accountability (as transparency,

eg, E Cameron 'Solitary confinement is illegal. So why is it happening in South Africa?' *Groundup* (23 February 2022); D Steyn 'End solitary confinement, Edwin Cameron tells parliament' *Groundup* (11 November 2022); and K Moshikaro 'Taking legality and just punishment seriously', this volume, ch 12.

10 As envisioned by E Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31 at 32, discussed further below.

11 This echoes the question a younger Cameron asked in his article on judicial accountability published in 1990: Cameron 'Judicial accountability' (n 1) 253.

12 J Waldron 'Accountability: Fundamental to democracy' NYU School of Law, Public Law Research Paper (2014) 1.

13 As Schedler notes, 'accountability represents an underexplored concept whose meaning remains evasive, whose boundaries are fuzzy, and whose internal structure is confusing': A Schedler 'Conceptualizing accountability' in A Schedler, L Diamond & MF Plattner (eds) *The self-restraining state: Power and accountability in new democracies* (1999) 13 at 13.

14 A Price 'State liability and accountability' (2015) *Acta Juridica* 313 at 315, for example, has suggested that accountability is 'often referred to but seldom defined'.

15 See M Bovens 'Analysing and assessing accountability: A conceptual framework' (2007) 13 *European Law Journal* 447 at 449-450; A Psygkas 'Accountability' in P Cane and others (eds) *The Oxford handbook of comparative administrative law* (2020) 443 at 444-445.

16 Psygkas (n 15) 448-449.

liability, controllability, responsibility and responsiveness).[17] There are also distinctions made along lines of vertical and horizontal, and first and second-order accountability.[18]

For present purposes, I take as my starting point Jeremy Waldron's contention that central to any democracy is the notion of 'agent-accountability': the duty owed by those exercising public power (as agents of the people) to account to the public for the exercise of such power.[19] Crucial here is the recognition that democratic accountability makes those who wield power vulnerable to the assessments of those who would otherwise be powerless.[20] Public accountability in this sense has at least three inter-related dimensions.

First, responsiveness. Those exercising public power must engage, respond, and justify their actions to those on whose behalf they act. Admittedly, responsiveness is itself an 'ambiguous idea'.[21] Some have referred to the requirement of justifying one's decision-making as 'answerability'.[22] But responsiveness arguably conveys a more textured notion, requiring not only reactive justification in relation to demands, but also proactive justification in relation to needs.[23] Indeed, the Constitution[24] requires the public administration to be governed by the principle that '[p]eople's needs must be responded to',[25] and includes 'responsiveness' as a founding value of South Africa's democracy.[26] A constitutionally thickened understanding of democratic accountability is therefore inextricably linked to the demand for responsiveness.

Second, openness. As agents of the public, those in power are expected to provide information in relation to their actions. Some

17 JG Koppell 'Pathologies of accountability: ICANN and the challenge of "multiple accountabilities disorder"' (2005) 65 *Public Administration Review* 94.
18 See, eg, Schedler (n 13) 25-27.
19 Waldron (n 12) 3-4.
20 Waldron (n 12) 27.
21 E Mureinik 'Reconsidering review: Participation and accountability' (1993) *Acta Juridica* 35 at 35; see also Bovens (n 15) 450, referring to responsiveness as an 'umbrella concept'.
22 DM Chirwa & L Nijzink 'Accountable government in Africa: Introduction' in DM Chirwa & L Nijzink (eds) *Accountable government in Africa: Perspectives from public law and political studies* (2012) 1 at 5.
23 Koppell (n 17) 98-99.
24 Constitution of the Republic of South Africa, 1996.
25 Section 195(1)(e) of the Constitution.
26 Section 1(d) of the Constitution.

scholars consider 'transparency' as an aspect of answerability,[27] or as only a means to achieving accountability but not constitutive of it.[28] In contrast, Waldron offers compelling recognition that access to information is not only a condition for but also 'part and parcel' of accountability.[29] His approach finds constitutional grounding in access to information being an enumerated right,[30] in addition to 'openness' being an independent constitutional value. In other words, openness is itself a value to which those in power must account, but also a means to advancing the interrelated values of accountability and responsiveness.[31]

Third, responsibility. Where there is a failure to properly exercise publicly entrusted power, then enforcement of obligations or consequences should follow.[32] This can be through political or legal means. Some may refer to this aspect of accountability as 'enforceability'.[33]

I trace these dimensions of accountability across various themes in Justice Cameron's jurisprudence. First, I reflect on his engagement with accountability, responsiveness and openness as mutually reinforcing values informing minimum obligations on all exercises of public power. Second, I turn to his development of the right of access to information as a mechanism for advancing openness and accountability. Third, I consider his contribution to developing accountability both by and of oversight institutions, as well as his jurisprudence on consequences for public wrongdoing. I conclude by reflecting on common threads throughout Cameron's accountability jurisprudence and how these speak to his wider jurisprudential legacy.

3 Accountability and responsiveness

The late Etienne Mureinik, a close friend of Cameron,[34] famously described South Africa's emergent constitutional order as premised on

27 See, eg, Schedler (n 13) 13; Chirwa & Nijzink (n 22) 5.
28 Bovens (n 145) 450.
29 Waldron (n 12) 27-28; further discussed in part 3 below.
30 Section 32 of the Constitution.
31 Section 1(d) of the Constitution, with the right of access to information set out in s 32.
32 Price (n 14) 315 notes that 'to hold people to account means to hold them responsible for their actions'.
33 See, eg, Schedler (n 13) 15-17; Chirwa & Nijzink (n 22) 5.
34 For Cameron's tribute to Mureinik, see E Cameron 'Academic criticism and the democratic order' (1998) 14 *South African Journal on Human Rights* 106.

a 'culture of justification',[35] with accountability and participation serving as mutually reinforcing struts of a 'responsive democracy'.[36] In Mureinik's words, a culture of justification is

> a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command.[37]

The Constitution entrenches commitment to a culture of justification by recognising that the values of 'accountability, responsiveness and openness' and the 'rule of law' are foundational to South Africa's democracy.[38] The two cases discussed in this section illustrate Cameron's articulation of accountability, responsiveness and openness as mutually reinforcing values underpinning the constitutional conception of what, at minimum, is required from those wielding public power. In *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal*,[39] Cameron J develops a new legal remedy based on the Constitution's demand for rationality and accountability in government action. In *Electronic Media Network Limited v e.tv (Pty) Limited*,[40] Cameron J (together with Froneman J) 'umbilically link' rationality, as a requirement of the rule of law, to the values of accountability, responsiveness and openness.[41] Both cases demonstrate his commitment to advancing Mureinik's vision of a responsive democracy based on a culture of justification.

35 Mureinik 'A bridge to where?' (n 10) 32, endorsed by the Constitutional Court in *Prinsloo v Van der Linde* [1997] ZACC 5 para 25.

36 Mureinik 'Reconsidering review' (n 21) 46. Mureinik's use of 'accountability', 'participation' and 'responsiveness' may suggest strict delineation between these concepts. However, as Dyzenhaus suggests, participation and accountability for Mureinik are not necessarily 'operationally distinct' political principles, but rather 'different institutional ways' of articulating the basic principle that all decisions invoked on behalf of 'the people' are 'legitimate only if they can be shown to be justifiable': D Dyzenhaus 'Law as justification: Etienne Mureinik's conception of legal culture' (1998) 14 *South African Journal on Human Rights* 11 at 35.

37 Mureinik 'A bridge to where?' (n 10) 32.

38 Section 1 of the Constitution. Various other provisions of the Constitution reinforce the requirement of accountability and transparency in government. Particularly noteworthy is s 195(1), which provides that public administration must be governed by, amongst others, principles of responsiveness, accountability, transparency and participation.

39 [2013] ZACC 10 (*KZN JLC*).

40 [2017] ZACC 17 (*Electronic Media*).

41 *Electronic Media* (n 40) para 97.

3.1 *KZN Joint Liaison Committee*

Whether government should be held accountable for its promises through judicial enforcement of its undertakings has been a contentious issue in South African law.[42] When serving on the Supreme Court of Appeal (SCA), Cameron JA kept open the possibility of such enforcement,[43] even though the court had suggested limited scope for its incorporation.[44] In *KZN JLC*, the Constitutional Court, with Cameron J on the bench, was presented with an opportunity to test the boundaries of such a claim.

A provincial education department had notified schools of approximate subsidy allocations for a particular academic year. The schools budgeted accordingly. Then, a few months later, the department announced that, owing to budget cuts, the subsidy allocation would be slashed by up to a third of the anticipated amount. Notice of this reduction was issued only *after* the first tranche of the original subsidy allocation had become due.[45] The schools sought to enforce the original subsidy for the full school year. Having formulated their claim in contractual terms – that a promise had been made with the intention of creating enforceable obligations – the schools were unsuccessful in the High Court and SCA.[46] In the Constitutional Court, an *amicus curiae* intervened recasting the applicants' case as a public law claim for the enforcement of a legitimate expectation. Even though this was not the schools' pleaded case, the *amicus* submitted that the facts giving rise to such a claim had been adequately ventilated.[47]

42 For an overview of relevant case law and debate on the substantive enforcement of legitimate expectations, see C Hoexter & G Penfold *Administrative law in South Africa* 3 ed (2021) 585-596.

43 *South African Veterinary Council v Szymanski* [2003] ZASCA 11 para 15.

44 In *Meyer v Iscor Pension Fund* [2002] ZASCA 148 para 27, Brand JA (with Cameron JA concurring) sounded caution against 'simply transplanting a legal concept from one system of law to another'. Hoexter and Penfold (n 42) 592 note that Cameron's judgment in *Szymanski* (n 43) hinted at a 'a slightly more welcoming tone'.

45 *KZN JLC* (n 39) paras 2-8.

46 The High Court and Supreme Court of Appeal refused leave to appeal: *KZN JLC* (n 39) para 13.

47 Written submissions on behalf of the *amicus curiae* in *KZN JLC* (2 November 2012) at 15-40, 50.

In a divided judgment, four of the Court's justices[48] would have held that the schools should be made to stand or fall by their contractual claim as pleaded (in this case, fall). Astonishingly, three of those justices would not even grant the schools leave to appeal.[49] The case, as they saw it, involved a 'narrow question' that did 'not extend to the whole country' and would be 'unlikely to arise again'.[50] For Cameron J, however, broad questions of accountability and responsiveness, with far-reaching consequences, were squarely in issue and could not be ignored merely because of the form of the applicants' case.

As one of his law clerks at the time, I recall his determination to forge a principled basis on which the state could be held accountable to its promises. Following the hearing of the matter, we gathered around the conference table in his office, as was routine. It was at these meetings, with the proceedings of the day fresh in mind, that he would dictate his post-hearing note. If he was appointed the writing judge for the case, this would effectively serve as the first draft of his judgment. After some preliminary debate, during which he would listen intently and engage seriously with our views, there would come a moment where he set to focus. Drawing almost entirely from memory (recalling minute details of the record), he would, precisely and poetically, craft his note. He consulted his papers only fleetingly for a specific quote or reference. Usually, within an hour or two, he would be ready to circulate his thoughts to colleagues.

After the *KZN JLC* hearing, we debated and agonised longer than usual. The contractual claim was not sustainable; of that Cameron was certain.[51] But the demand for accountability by those entrusted with public power could not be left unanswered. And it was here that the point crystallised: the subsidies were not only reduced after the promise had been made; the reduction was announced only after the first payment had, by regulation, become *due*. This was after the schools had relied on and expended what had been promised. This, held Cameron J, could not be countenanced for 'reasons of reliance, accountability and rationality'.[52]

48 Mogoeng CJ, Nkabinde J, Jafta J, and Zondo J.
49 See the judgment by Zondo J and that co-authored by Mogoeng CJ and Jafta J.
50 *KZN JLC* (n 39) para 184 (Mogoeng CJ and Jafta J).
51 *KZN JLC* (n 39) para 36.
52 *KZN JLC* (n 39) para 63.

Aligning with Waldron's conception of agent-accountability,[53] Cameron J's judgment gives expression to the understanding that government is empowered by and accountable to the public. This requires the state to be responsive to people's needs,[54] and to provide 'timely, accessible and accurate information'.[55] Changes in its undertakings must be announced 'quickly' and 'smartly' so that those impacted can adjust their expectations.[56] Such adjustment is impossible, however, if changes are made to a promise after the date for its fulfilment has passed. For Cameron J, this is 'legally and constitutionally unconscionable'[57] because '[a]ccountability and rationality demand that government prepare its budgets to meet payment deadlines'.[58] Expressly invoking accountability and responsiveness as constitutionally embedded values, Cameron J developed a new legal remedy whereby a 'publicly promulgated promise to pay' cannot, in the absence of an overriding public interest, be reduced after payment has fallen due.[59] In subsequent jurisprudence, this remedy has been framed more broadly as a cause of action based on 'unconscionable state conduct that is in breach of reliance, accountability and rationality'.[60]

While an undoubtedly important innovation, building on and expanding the boundaries of existing law to advance state accountability, Cameron J's development is also limited.[61] The value of accountability is not employed with brute force to exact state compliance regardless of the circumstances. Instead, the remedial development is an incremental

53 Waldron (n 12).
54 *KZN JLC* (n 39) para 64.
55 Section 195(1)(g) of the Constitution, relied on by Cameron in *KZN JLC* (n 39) fn 42.
56 *KZN JLC* (n 39) para 64.
57 *KZN JLC* (n 39) para 57.
58 *KZN JLC* (n 39) para 71.
59 *KZN JLC* (n 39) paras 48, 52, 63-66. *In casu*, the fact that payment of the first subsidy tranche was prescribed by regulation 'meant that there could be no overriding public interest in the *ex post facto* retraction of the promise': *KZN JLC* (n 39) para 66.
60 *Pretorius v Transport Pension Fund* [2018] ZACC 10 para 37 (authored by Froneman J and in which Cameron J concurred). For application of the principle developed in *KZN JLC*, see *Mpungose Traditional Council v MEC for Education, KZN Province* [2019] ZAKZPHC 45.
61 Cameron J also emphasises that the remedy is 'by no means a radical intervention': *KZN JLC* (n 39) para 71.

and narrow one, with judicial recognition that governance also requires flexibility. As Cameron J acknowledged:

> Governance is hard. And the hardest part, no doubt, is budgeting. Government officials are slaves to the resources allocated to them. Budget cuts can lacerate their departmental spending plans and projections. Hence courts should respect the effect of budget cuts.[62]

Thus the value of accountability – while significant – is still employed in a relatively 'modest' sense.[63] This is especially clear in contrast to Froneman J, who would have pushed the implications of accountability even further. In a concurring minority judgment, he would have enforced the full year's subsidy payments on the basis that 'accountability is an ongoing and fundamental responsibility under the Constitution', and 'did not stop at the end of the first term'.[64] While attractively clear-cut, Froneman J's approach is far-reaching in circumstances where – given the way the case had been pleaded – the state had not explained the extent of the budgetary deficit the Department was facing and the implications of enforcing the full payment. Recognising this constraint, Cameron J held that the record of the Department's purported budgetary shortfalls – which would have been filed had the claim been pleaded differently – was 'highly pertinent' to determining such a claim.[65]

While Cameron J was willing to eschew formalism to reach the substantive issues underpinning the matter,[66] he was also unwilling to elide the importance of form and procedure altogether. Some observers

62 *KZN JLC* (n 39) para 64.

63 I draw loosely here on Schedler's framing of accountability as a 'modest' concept in the sense that '[h]olding power accountable does not imply determining the way it is exercised; neither does it aim at eliminating discretion through stringent bureaucratic regulation. It is a more modest project that admits that politics is a human enterprise … that power cannot be subject to full control in the strict, technical sense of the word': Schedler (n 13) 19.

64 *KZN JLC* (n 39) para 88.

65 *KZN JLC* (n 39) para 32.

66 Cora Hoexter notes that Cameron's 'boldly anti-formalist approach' and willingness to conduct a 'rescue operation' for the applicants serves as an instance of transformative adjudication: C Hoexter 'The enforcement of an official promise: Form, substance and the Constitutional Court' (2015) 132 *South African Law Journal* 207 at 216. Although, compare her concerns (at 223-224) regarding *KZN JLC's* contribution to the avoidance of PAJA; see also M Murcott 'A future for the doctrine of substantive legitimate expectation? The implications of *Kwazulu-Natal Joint Liaison Committee v MEC for Education, Kwazulu Natal*' (2015) 18 *Potchefstroom Electronic Law Journal* 3132 at 3150-3153.

argue that Cameron J should have gone further and decided the schools' claim fully under the Promotion of Administrative Justice Act (PAJA).[67] This, it is suggested, would have fully embraced a substantive approach to adjudication and better achieved the aims of a culture of justification. But this approach fails to recognise that the procedures of judicial review, by requiring the state to account for and justify its approach to decision-making, may also contribute to a culture of justification. In this sense, Cameron J's insistence on the importance of the record of the decision, and the state's explanation on budgetary constraints, is in service of, rather than antithetical to, the promotion of accountability and responsiveness.[68]

By requiring the state to be accountable, responsive and open in its dealings with the public, Cameron J's approach in *KZN JLC* offers a distinct contribution to entrenching the Constitution's commitment to a culture of justification.[69] However, while Cameron J managed to muster a majority in *KZN JLC*, his vision of a responsive democracy would be fiercely resisted in *Electronic Media*.

3.2 *Electronic Media*

Electronic Media involved a heated challenge to South Africa's long-awaited digital television migration plans. With significant commercial interests at stake, a policy determination providing for the roll-out of government subsidised 'set-top boxes' became the subject of much

67 Act 3 of 2000. See, for example, Murcott (n 66) 3152.

68 This aligns with Mureinik's view that the value of rationality review, 'properly practised', is that the *process* of requiring decisionmakers to anticipate objections and seek to justify their decisions advances accountability and participation: Mureinik 'Reconsidering review' (n 21) 42-43.

69 In addition to this principled contribution, I came to appreciate the practical relevance of Cameron's innovation in my role as the Director of the Equal Education Law Centre. In one of the first cases I supervised, a provincial education department (the same one appearing in *KZN JLC*) failed to deliver on a promise to provide scholar transport to three rural schools. Faced with a legal demand premised on the remedy in *KZN JLC*, the province quickly delivered on its undertaking just before formal proceedings had to be launched. See N Ally and others 'Legal mobilisation and state incapacity: Successes and challenges in the struggle for scholar transport in South Africa' in I Westendorp (ed) *Human rights strategies: Benefits and drawbacks* (2024).

dispute.[70] The focal point of contestation was around whether set-top boxes should have the capability to unscramble encrypted digital signals.[71] Initially, the Minister of Communications included decryption capability. A new Minister then changed tack and excluded it on the basis that it was too costly.[72] Before amending the policy on this basis, inputs were invited from interested parties, as required by legislation.[73] In addition to this formal process, the Minister engaged in further consultations with select stakeholders, the identities of whom she – strangely – did not disclose.[74] The amended policy was challenged by e.tv (Pty) Ltd, a commercial broadcaster, which had, at some stage, tendered the outlay costs for inclusion of decryption capability. E.tv contended that its exclusion from the Minister's further consultation process rendered the determination irrational.

The majority of the Court dismissed this challenge.[75] Mogoeng CJ, penning the main judgment, bristled at the prospect of judicial intrusion in the policy-determination domain. South Africa is a 'constitutional democracy, not a judiciocracy',[76] he warned, and rationality is not a 'master key that opens any and every door, any time, anyhow'.[77] According to Mogoeng CJ, the Minister's unexplained choice of engaging only a select, and undisclosed set of stakeholders in further consultations, while 'inappropriate' and 'frowned upon',[78] did not offend the Constitution's demands for openness and accountability. Instead, the Minister was 'free

70 A set-top box would enable a household with analogue television sets to receive digital broadcast signals. Without the device, the majority of South Africans would be thrown into a digital black hole when the migration came into effect.

71 Depending on their business model, inclusion of decryption capability could either significantly benefit or disadvantage commercial broadcasters.

72 The government's position oscillated according to the stance of each of the three Ministers that occupied the portfolio over a period of some seven years. For relevant background, see *Electronic Media* (n 40) paras 9-17.

73 Although, whether this requirement was, in fact, met was disputed: *Electronic Media* (n 40) 153-154.

74 *Electronic Media* (n 40) para 59.

75 The order by Mogoeng CJ held majority support, even though his opinion did not. Jafta J wrote a separate opinion concurring in the order of the Chief Justice and on some aspects of the reasoning.

76 *Electronic Media* (n 40) para 1.

77 *Electronic Media* (n 40) para 6.

78 *Electronic Media* (n 40) para 61.

from any constitutional constraints' when undertaking consultations beyond those required by legislation.[79]

This suggestion that the exercise of public power can be altogether free from *any* constitutional constraints is jarring. It is well-established that all exercises of public power must comply with the principle of legality, which includes the requirement that such power be exercised rationally.[80] For Mogoeng CJ, however, executive power can seemingly, at some point, be insulated from the values of accountability, responsiveness and openness. In radical contrast, Cameron J and Froneman J underscore that rationality, as an aspect of the rule of law, can *only* be properly understood with reference to accountability and its related constitutional values. For them, 'rationality in process and substance is umbilically linked to the pulse-beat of our constitutional democracy, one based on accountability, responsiveness and openness'.[81] They firmly hold that these foundational values are not optional 'add-ons' in South Africa's constitutional democracy.[82] Instead, they are woven together as part of the fabric of the rule of law and 'our own brand of constitutional democracy'.[83] In the case at hand, the rule of law (based on the values of accountability, responsiveness and openness) required the Minister to explain why she consulted with some stakeholders (and not others), to explain who those stakeholders were, and to explain 'why this is not an instance that opens the door to "secret lobbying and influence-peddling"'.[84] This she did

79 While Mogoeng CJ recognises that the Minister's secret consultations potentially 'taints the process in some way', he inexplicably concludes that this has no legal implications for the validity of the policy: *Electronic Media* (n 40) para 60.

80 *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* [2000] ZACC 1. The evolution of rationality review in the democratic era has, however, been controversial: see, eg, A Price 'Rationality review of legislation and executive decisions: *Poverty Alleviation Network* and *Albutt*' (2010) 127 *South African Law Journal* 580; L Kohn 'The burgeoning constitutional requirement of rationality and the separation of powers: Has rationality review gone too far?' (2013) 130 *South African Law Journal* 810; M Du Plessis & S Scott 'The variable standard of rationality review: Suggestions for improved legality jurisprudence' (2013) 130 *South African Law Journal* 597; M Tsele 'Rationalising judicial review: Towards refining the "rational basis" review test(s)' (2019) 136 *South African Law Journal* 328.

81 *Electronic Media* (n 40) para 97.

82 *Electronic Media* (n 40) para 105.

83 That brand of democracy, they add, is 'one of participatory democracy, designed to ensure accountability, responsiveness and openness': *Electronic Media* (n 40) para 96.

84 *Electronic Media* (n 40) para 157 (quoting *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11 para 115).

not do. Instead: '[n]o explanation, no reason: unreason, arbitrariness, irrationality'.[85]

While, for Cameron J and Froneman J, the threat of corruption *especially* engages the Court's accountability-affirming role,[86] Mogoeng CJ is emphatic that the Court should not be moved by such considerations. Instead, Mogoeng CJ holds that '[w]hatever its merits or demerits, actual or perceived malpractice should not be allowed or used to cloud the issues in this litigation'.[87] This hands-off deferential stance, informed by an emaciated, strictly formal conception of the separation of powers,[88] is countered by Cameron J and Froneman J's invocation of accountability, openness and responsiveness as a triumvirate of mutually reinforcing values giving texture to South Africa's responsive and participatory constitutional democracy; a democracy that is unequivocally based on and aims to foster a culture of justification.[89] Understood in this way, the spectre of democratic displacement through judicial intervention quickly fades.[90] No 'superimposed judicial stratagem of undermining separation of powers' is at play.[91] Instead, the separation of powers in South Africa's constitutional scheme *requires* courts to exercise an accountability function by ensuring that public power, when wielded, advances – rather

85 *Electronic Media* (n 40) para 157.

86 It was later revealed that the undisclosed stakeholders with whom the Minister consulted were associated with attempts at state capture, with a recommendation that the Minister be referred to the National Prosecuting Authority for abuse of office. See Judicial Commission of Inquiry into State Capture 'State Capture Report Part V, Volume 2: SABC, Waterkloof landing and PRASA' (2022) paras 1568-1571.

87 *Electronic Media* (n 40) para 56. Mogoeng CJ's deferential stance on corruption in this case (involving executive policy-making) can be contrasted to his anti-corruption fervour in cases involving challenges to legislation (in particular, *Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President of the Republic of South Africa* [2014] ZACC 32 (*Glenister III*) and *My Vote Counts NPC v Minister of Justice and Correctional Services* [2018] ZACC 17, both discussed later in this chapter).

88 A thorough overview on varying conceptions of the separation of powers doctrine is provided by S Seedorf & S Sibanda 'Separation of powers' in S Woolman and others (eds) *Constitutional Law of South Africa* 2 ed (2014).

89 For a compelling analysis on the importance of resisting a 'narrow instrumentalist version of rationality' in favour of a normatively oriented account, see JL Pretorius 'Deliberative democracy and constitutionalism: The limits of rationality review' (2014) 29 *SA Public Law* 408.

90 Compare Tsele (n 80) 349, who objects to encasing rationality review within a 'wide, protean and nebulous' value such as accountability.

91 *Electronic Media* (n 40) para 97.

than undermines – accountability, openness, and responsiveness.[92] As Cameron J and Froneman J frankly put it, '[n]either rocket science nor judicial conspiracy are needed to understand the simplicity, logic and, yes, moral suasion of it'.[93]

In *Electronic Media*, as in *KZN JLC*, Cameron J and Froneman J explicitly embed the requirement of rationality within a constitutional framework committed to the values and requirements of accountability, responsiveness and openness. Beyond a broad political ideal, they develop accountability 'as a specific set of normative commitments'[94] giving expression to the democratic principle that 'every exercise of power is expected to be justified'.[95] That this approach – of affirming and developing a constitutional framework aimed towards a responsive democracy – confronted strong resistance from some members of the Court highlights the importance of Cameron J's intervention. Similarly, as discussed next, his commitment to a culture of justification – and his substantive engagement with the value and need for accountability – stands in dramatic contrast to the rigid formalism adhered to by some of his colleagues in relation to the right of access to information.

4 Accountability and openness

The Constitution's commitment to the value of 'openness'[96] finds concrete expression in its expansive protection of the right of access to information. As discussed earlier, access to information is arguably not just a means for securing accountability, but also a constitutive aspect of accountability: in other words, it is both a 'prerequisite' for and 'part

92 Heinz Klug aptly suggests that this understanding of separation of powers is based on a recognition that the judiciary must 'act against internal breakdowns' in the branches of government as a result of 'inattention or corruption': H Klug 'Institutional integrity and the promise of constitutionalism: Justice Moseneke, judicial authority and the separation of powers' (2017) *Acta Juridica* 3 at 28. See also D Davis 'Separation of powers: Juristocracy or democracy' (2016) 133 *South African Law Journal* 258 at 270 (arguing South Africa's participatory and deliberative democracy is premised on a substantive vision of equal participation and that '[w]here the legislature or executive seek to alter these foundations, it is for the courts to ensure their preservation').

93 *Electronic Media* (n 40) para 98.

94 Psygkas (n 15) 445-446.

95 Mureinik 'A bridge to where?' (n 10) 32.

96 Section 1(d) of the Constitution.

and parcel of what accountability involves'.[97] And access to information is, as Mureinik noted, 'of utmost importance in any effort to bring about a culture of justification'.[98] The two cases discussed in this section demonstrate Justice Cameron's development of the right of access to information as a condition for and aspect of accountability.

4.1 *Unitas*

The first case, *Unitas Hospital v Van Wyk*,[99] dates to Cameron's time at the SCA. A widow, Mrs van Wyk, believed that her husband's death was negligently caused by the nursing staff at a private hospital. Before pursuing a claim for damages, she wanted access to a report, prepared by the hospital, on conditions in its intensive and high care units.[100] She requested the report in terms of the Promotion of Access to Information Act[101] (PAIA), which establishes different regimes for records held by public bodies, on the one hand, and private bodies, on the other.[102] Whereas a requester is generally entitled to the record of a public body once certain procedural requirements are met, the requester must show that records held by a private body are 'required' for the 'exercise or protection of any rights'.[103] The majority of the SCA, in a judgment penned by Brand JA, held that Mrs van Wyk did not require the report to exercise her right to claim damages. The information that she had already been provided with was sufficient, in the majority's opinion, to institute her limited action (which was focused on the specific circumstances leading up to the death of her husband and not on general conditions in the hospital).[104]

97 Waldron (n 12) 27-28. Compare Bovens (n 15) 450.
98 Mureinik 'A bridge to where?' (n 10) 43.
99 [2006] ZASCA 34.
100 The report had been prepared by one of the hospital's specialist physicians a month before Mr van Wyk's death: see *Unitas* (n 99) para 10.
101 Act 2 of 2000.
102 Sections 11 and 50 of PAIA, tracking a similar distinction in s 32(1) of the Constitution.
103 Sections 50(1)(a) of PAIA.
104 *Unitas* (n 99) para 10. Brand JA's primary concern was that allowing pre-action discovery through PAIA would encourage 'fishing expeditions' (para 21) and that the report, if relevant to the claim, should be obtained through the discovery procedures provided by the rules of court. In contrast, Cameron JA considered PAIA to be deliberately aimed at broadening pre-action access to records on a 'basis that is flexible and accommodating' (para 45). For endorsement of Cameron

Cameron JA could not agree. The question of whether a record is 'required' to exercise rights had, in his view, to be purposively interpreted with reference to PAIA's declared objective of 'promot[ing] transparency, accountability and effective governance of all public and private bodies'.[105] This statutory aim, he reasoned, impelled courts to consider the appropriateness of furthering 'transparency, accountability and effective governance' in relation to 'different kinds of private bodies'.[106] Resisting an impassable private-public divide, Cameron JA instead envisioned private entities on a spectrum along which the demand for accountability and transparency may be modulated. On the one end, there are entities, such as a small family-run business, that will be 'very private'.[107] Promoting accountability and effective governance in relation to these private bodies is 'important' but may be of 'less public significance'.[108] On the other end, there are entities whose activities have a significant public footprint (such as large companies playing a significant role in the country's economy or providing a public service). These entities are 'more amenable' to demands of accountability, transparency, and effective governance.[109] The private hospital in this case fell on the latter part of the spectrum. It provided healthcare services to the public, formed part of a publicly listed healthcare group, played a dominant role in the private healthcare field, and was large enough to require internal representative and governance structures. Taken together, said Cameron JA, these pointed to the hospital being a 'rather public private body', which provided an essential public service but was not otherwise subject to any 'direct public or political accountability' mechanisms.[110]

It was exactly this type of accountability gap that PAIA sought to remedy, and it was within this statutory context that Mrs van Wyk's request for the hospital's report had to be assessed. Adopting this purposive framework, Cameron JA held that systemic failures within the hospital may well be relevant to Mrs van Wyk's claim for damages,

JA's view, see R Baboolal-Frank & F Adeleke 'The limitation of the discovery rules of Court against the right of access to information in South Africa' (2017) 13 *Revista Direito GV* 1029 at 1042-1043.

105 *Unitas* (n 99) para 40.
106 *Unitas* (n 99) para 40.
107 *Unitas* (n 99) para 40.
108 *Unitas* (n 99) para 40.
109 *Unitas* (n 99) para 40.
110 *Unitas* (n 99) para 42.

and the Court should 'be astute not to help it shroud its institutional weaknesses and failures' from scrutiny.[111] This substantive approach did not, however, prevail amongst his colleagues. Cloete JA, for example, insisted that the conceptual public-private divide remain clear cut – '[e]ither a body is a public body or it is a private body' – and the purposive demands of accountability could not cut across it.[112]

4.2 *My Vote Counts*

Whereas *Unitas* concerned access to information and securing accountability for an individual, *My Vote Counts NPC v Speaker of the National Assembly*[113] engaged the right of the public at large to information impacting on their right to vote. The central question was whether information on private funding of political parties is required for the right to vote to be meaningfully exercised and, if so, whether parliament had failed to give effect to the right to access such information. Writing the main (but minority) judgment, Cameron J firmly held that electoral accountability – the ability of the people to hold their representatives accountable through elections[114] – is compromised when citizens are unable to interrogate the private interests that elected officials may be seeking to satisfy.[115] Parliament therefore had an obligation to enact legislation providing for access to such information.

Even though parliament had enacted PAIA to give general effect to the right of access to information, the statute was neither aimed at, nor well-suited toward, securing electoral accountability. First, PAIA's architecture assumed a dichotomy between public and private bodies. While Cameron J recognised that this dichotomy was not cast in absolute terms (a position consistent with his approach in *Unitas*), its taxonomy was still constraining. The legislation failed, for example, to account for bodies such as political parties which could not fit neatly into the legislated definition of 'public' or 'private' bodies. Echoing his aversion

111 *Unitas* (n 99) para 42.
112 *Unitas* (n 99) para 51. Mrs van Wyk's application for leave to appeal to the Constitutional Court was dismissed on the basis that the inordinate delay in bringing the application could not be condoned: *Van Wyk v Unitas Hospital* [2007] ZACC 24.
113 [2015] ZACC 31 (*MVC 1*).
114 Chirwa & Nijzink (n 22) 6.
115 *MVC 1* (n 113) paras 40-42.

to a strict divide in *Unitas*, Cameron J observed that 'the public/private disjunct in PAIA appears to have been created without having political parties in mind at all'.[116] This 'gaping hole' had significant implications for democratic accountability.[117] Second, meaningful transparency could not be achieved through the request-driven and reactive regime envisaged by PAIA. Noting that the relationship between voters and political parties is not 'pairwise', Cameron J recognised that the right of individuals to apply, piecemeal, for party funding records 'could never keep the electorate as a whole meaningfully informed'.[118] Instead, for the right to vote to be meaningfully exercised, ongoing, continuous information on private funding of political parties would be required. But this was not what PAIA was designed to do. For that to be achieved, records had to be preserved and made publicly available systematically and regularly, not only upon application.[119]

On Cameron J's approach, parliament would have been required to fill the accountability gap left by PAIA through means it considered most appropriate, either by amending that statute or introducing bespoke legislation. The majority, however, dismissed the case. The point of discord was not on the merits, but the target of the applicants' challenge. In a judgment co-authored by four of the Court's justices,[120] the majority insisted that the applicants should have challenged the validity of PAIA directly. Failure to do so, they held, fell afoul of the principle of subsidiarity and threatened the separation of powers.[121] The effect of the majority's position was to require the applicants to launch their challenge afresh in the High Court, with the very same substantive issues at stake but this time clothed as a direct challenge to PAIA. Cameron J challenged the absurdity of the majority's formalistic reasoning:

> Parliament's formal defence should not impede this Court from reaching the questions of substance. ... It would be futile, and circuitous, to require the

116 *MVC 1* (n 113) para 116.
117 *MVC 1* (n 113) para 116.
118 *MVC 1* (n 113) para 96.
119 *MVC 1* (n 113) para 117-118.
120 Khampepe J, Madlanga J, Nkabinde J and Theron AJ.
121 The objection, according to Cameron J, was misplaced since the principle of subsidiarity did not apply in the circumstances (*MVC 1* (n 113) paras 72-74). For more on Cameron J's treatment of subsidiarity in *MVC 1*, see F Michelman 'Redemptive-transformative: Edwin Cameron and the point of the Bill of Rights', this volume at 541-546.

> applicant to re-start in the High Court. This Court's powers are properly invoked, and the applicant's claim to relief must be determined.[122]

As Cameron J anticipated, the applicants began again in the High Court, only to have their case eventually wind its way back to the Constitutional Court three years later. By that stage, the political scene in the country had changed significantly: former President Zuma had resigned from office, public impatience with corruption had reached new heights, and political parties themselves were no longer resisting the call for party funding regulation.[123] Probably emboldened by this changed context, Mogoeng CJ now penned a forceful judgment vindicating (albeit without direct recognition) Cameron J's earlier judgment: access to information on private party funding is necessary for the right to vote, underpinned by the Constitution's demand for accountability, responsiveness and openness.[124] As the Chief Justice now energetically put it: 'Only when transparency and accountability occupy centre stage before, during and after the elections may hope for a better tomorrow be realistically entertained.'[125] The Court then declared PAIA invalid for failing to provide for the recordal and reasonable disclosure of party funding information[126] – the very relief endorsed by Cameron J years earlier. Even more, the Court accepted that the gaps left by PAIA could be filled by *other* legislation, also a position originally adopted by Cameron J and which now undermined the Court's own rigid application of the subsidiarity principle in the first round of the case.[127]

122 *MVC 1* (n 113) para 93. For a comprehensive critique of the majority's 'formalistic and unsubstantiated version' of the subsidiarity principle, see R Cachalia 'Botching procedure, avoiding substance: A critique of the majority judgment in *My Vote Counts*' (2017) 33 *South African Journal on Human Rights* 138.

123 J Fowkes 'Dominant assumptions: Reading between the lines of a new South African party funding decision' *ICONnect blog* (26 July 2018).

124 *MVC 2* (n 87) paras 31-35. Cameron J did not sit on the case.

125 *MVC 2* (n 87) para 32.

126 Froneman J, in a minority judgment, noted that disclosure could only be rational if undertaken on a systematic and continuous basis: *MVC 2* (n 87) para 94.

127 With this concession, as Fowkes (n 123) notes, 'the game is rather up' since, if PAIA need not be amended, then 'it is tricky to argue with a straight face that the litigant was so strictly obliged to challenge PAIA rather than relying on the s 32 right directly that the whole case had to be thrown out back in 2015'.

The majority's approach in *MVC 1* has rightfully been described as 'a democratic opportunity missed',[128] an exercise in 'avoidance',[129] and simply 'misconceived'.[130] Nevertheless, following *MVC 2*, legislation regulating disclosure of private funding of political parties was eventually enacted.[131] While there are concerns around party compliance with the legislation,[132] and its effect on electoral behaviour has yet to be determined, there is no doubt that the Court's intervention, in line with Cameron J's initial position, has contributed to strengthening democratic accountability mechanisms.[133]

In *MVC 1*, as in *Unitas,* Cameron J explicitly draws out the inextricable link between access to information and accountability. Relying on the value of accountability, and with a view to establishing the conditions necessary for its effectiveness, he offers judicial recognition that access to information is, in Mureinik's terms, 'of utmost importance in any effort to bring about a culture of justification'.[134]

5 Accountability and responsibility

Finally, we consider Justice Cameron's contribution to the 'responsibility' dimension of accountability. This is reflected, first, in his engagement with accountability by and of oversight institutions; and, second, in his nuanced contribution to jurisprudence on the consequences that follow public wrongdoing.

128 J Klaaren '*My Vote Counts* and the transparency of political party funding in South Africa' (2018) 22 *Law, Democracy & Development* 1 at 4.

129 Fowkes (n 123).

130 Cachalia (n 122) 152.

131 Significantly, separate legislation was ultimately enacted. The Political Parties Funding Act 6 of 2018 and the Promotion of Access to Information Amendment Act 31 of 2019 came into effect in April 2021. For an overview of political funding framework introduced by the legislation, see I Porat 'Buying democracy: The regulation of private funding of political parties and the press after *My Vote Counts*' (2021) 11 *Constitutional Court Review* 503 at 517-519.

132 R Davis 'SA political parties were supposed to submit financial statements to IEC by 30 September – but many haven't' *Daily Maverick* (24 October 2022).

133 Porat (n 131) 504, 510-511, for example, argues that *MVC 2* does not only have relevance to the regulation of party funding, but also provides for a 'general theory of democratic funding that could be extended to other democratic institutions'.

134 Mureinik 'A bridge to where?' (n 10) 32.

5.1 Accountability by and of oversight institutions

Waldron notes that democratic accountability – or 'the vulnerability of the powerful at the hands of the powerless' – does not 'come into existence by magic'.[135] Instead, the 'proper power-relation' required by accountability must be constructed and sustained by various institutions and structures.[136] Indeed, embedded in South Africa's constitutional design is recognition that accountability requires mechanisms for monitoring and holding actors responsible for the proper discharge of public obligations. Chapter 9 of the Constitution, in particular, establishes institutions with the explicit aim of 'supporting constitutional democracy'. These 'institutions of accountability',[137] as described by Cameron J, must be independent, impartial and exercise their functions without fear, favour or prejudice.[138] But are these the only independent oversight institutions that the Constitution envisages?

This was the question that sparked much controversy in *Glenister II*.[139] Legislation was enacted to replace the Directorate of Special Operations (known as the 'Scorpions'), with the Directorate for Priority Crime Investigation (the 'Hawks'). Whereas the Scorpions had been established as a corruption-fighting unit within the National Prosecuting Authority, the Hawks were housed within the South African Police Service. Widely perceived as an attempt to weaken the independence and effectiveness of the Scorpions, a challenge was quickly mounted.[140] By a majority of one – in a judgment described as 'one of the most significant decisions on government accountability in post-apartheid South Africa'[141] – Moseneke DCJ and Cameron J prevailed in holding that the Constitution includes an implicit obligation on

135 Waldron (n 12) 27.
136 Waldron (n 12) 27.
137 *Glenister III* (n 87) para 159.
138 Section 179(4) of the Constitution.
139 *Glenister v President of the Republic of South Africa* [2011] ZACC 6 (*Glenister II*). The prequel to this case (*Glenister v President of the Republic of South Africa* [2008] ZACC 19, known as *Glenister I*) is not germane here.
140 For more on the political backdrop to the case, see E Cameron 'Constitutionalism, rights, and international law: The *Glenister* decision' (2013) 23 *Duke Journal of Comparative and International Law* 389 at 392-394; R Krüger 'The ebb and flow of the separation of powers in South African constitutional law – the *Glenister* litigation campaign' (2015) 48 *Verfassung und Recht in Übersee* 49 at 50-51.
141 Cameron 'Constitutionalism, rights and international law' (n 140) 392.

the state to establish an independent corruption-fighting institution. Emphasising that corruption fundamentally 'threatens the injunction that government must be accountable, responsive and open',[142] they interpret section 7(2) of the Constitution,[143] read together with section 39(1)(b) and binding international law,[144] as obliging the establishment of an independent anti-corruption agency.[145] The Constitution, they said, takes such an obligation 'deeply into its very heart'.[146] Ngcobo CJ, in the minority, was disquieted by this approach. Neither the text nor scheme of the Constitution could, in his view, ground a constitutionally-sourced obligation to create an independent anti-corruption agency.[147]

Moseneke DCJ and Cameron J's novel approach to the domestic effect of international law, inspired by submissions of the *amicus curiae*, has been critiqued as 'highly ambiguous',[148] and 'laboured and opaque'[149] by some, but as 'unique and progressive' by others.[150] Their

142 *Glenister II* (n 139) para 176.

143 Section 7(2) of the Constitution requires the state to 'respect, protect, promote and fulfil the rights in the Bill of Rights'. Moseneke DCJ and Cameron J interpret this section as implicitly requiring that the steps taken by the state to respect, protect, promote and fulfil rights must be 'reasonable and effective': *Glenister II* (n 139) para 189.

144 Section 39(1)(b) of the Constitution requires courts to consider international law when interpreting the Bill of Rights.

145 *Glenister II* (n 139) paras 189-194.

146 *Glenister II* (n 139) para 189.

147 *Glenister II* (n 139) paras 112-113.

148 J Tuovinen 'The role of international law in constitutional adjudication: *Glenister v President of the Republic of South Africa*' (2013) 130 *South African Law Journal* 661 at 664-665 (although Tuovinen also finds the minority's approach to s39(1)(b) unsatisfying).

149 Krüger (n 140) 56. See also S Issacharoff 'The democratic risk to democratic transitions' (2013) 5 *Constitutional Court Review* 1 at 29, 31 (critiquing the majority's reliance on international law as a 'judicial expedient', with the Court avoiding substantive theorisation of its response to the 'entrenchment of unaccountable one-party rule'). Compare T Roux 'The South African Constitutional Court's democratic rights jurisprudence' (2013) 5 *Constitutional Court Review* 33 at 72 (even though the reasoning in *Glenister II* was 'somewhat forced', the case contributes to the Court's success in 'asserting its institutional role' and 'effectively policing the most serious of the pathologies emerging from South Africa's dominant democracy'); C Powell 'Law as justification: *Glenister*, separation of powers and the rule of law' (2017) *Acta Juridica* 55 at 74 (arguing that the majority judgment upheld a 'constitutionally functional relationship' between the three branches of government).

150 C Gowar 'The status of international treaties in the South African domestic legal system: small steps towards harmony in light of *Glenister*? South African judicial decisions' (2011) 36 *South African Yearbook of International Law* 307 at 325. See also G Ferreira & A Ferreira-Snyman 'The incorporation of public international

reasoning certainly does stretch the boundaries of feasible constitutional interpretation. But the controversy surrounding the divergence between the majority and minority on the role of international law has tended to overshadow their points of agreement. Notwithstanding their significant differences on the source and specificity of the state's obligation, both opinions accepted that the Constitution requires the state to take effective measures to combat corruption.[151] Moreover, they agreed that such measures require 'sufficient structural and operational autonomy so as to shield it from undue political influence'.[152] In other words, both judgments acknowledge the need for mechanisms that can enhance accountability for, and counter the democracy-eroding effects of, corruption. They differed markedly though on their assessment of the degree of independence required for an anti-corruption mechanism to effectively carry out its accountability function. Here we see variance on the extent of *political* as compared to *public* accountability that the minority and majority were willing to tolerate or demand, informed by profoundly different understandings of the separation of powers. Whereas Ngcobo CJ adopts a strict, formalistic and decontextualised approach to the roles of the various branches of government,[153] Moseneke DCJ and Cameron J adopt a 'thicker, contextualised and politically-attuned' understanding,[154] which is alert and responsive to conditions that threaten the constitutional demand for accountability.[155]

For Ngcobo CJ, the threshold of 'structural and operational autonomy' of the Hawks had to be considered in relation to parliament's choice to house it within the police services (a choice which both judgments deemed constitutional).[156] On his approach, the yardstick for autonomy and acceptable political influence had to be based on the 'fundamental

law into municipal law and regional law against the background of the dichotomy between monism and dualism' (2014) 17 *Potchefstroom Electronic Law Journal* 1470 at 1482 (generally welcoming the majority's approach as advancing the protection of rights in the Bill of Rights).

151 Ngcobo CJ does so at *Glenister II* (n 139) para 106. He disagrees that the Constitution requires the creation of an independent anti-corruption agency as a necessary means of fulfilling this duty (para 113).

152 *Glenister II* (n 139) paras 116, 121 (Ngcobo CJ), 206 (Moseneke DCJ and Cameron J).

153 Krüger (n 140); Powell (n 149).

154 Krüger (n 140) 61. See also Powell (n 149) 73.

155 See Klug (n 92); Davis (n 92).

156 *Glenister II* (n 139) paras 65, 162.

principle of our legal system that there is political oversight over the police'.[157] Within this frame of reference, subjecting an anti-corruption agency within police services to oversight by the executive was both consistent with and 'expressly contemplated' by the Constitution.[158] Similarly, political involvement in the selection of the head of such an anti-corruption agency would not only be constitutionally palatable but also a 'constitutional imperative'.[159] With a distinctly deferential tone,[160] he emphasised that the impugned legislation's in-built checks and balances, including some degree of parliamentary and judicial oversight, were sufficient to dilute concerns over untrammelled political influence.

Moseneke DCJ and Cameron J, in contrast, developed a more robust frame of reference for drawing the line between acceptable political accountability, on the one hand, and undue political influence on the other. This framework emphasises the importance of public accountability through two mechanisms. First, by requiring consideration of the perceived independence of a corruption-busting unit from the perspective of a 'reasonable member of the public', with public confidence in an institution's independence being 'constitutive of' such independence.[161] Second, through foregrounding the role of parliament as a constitutionally envisioned 'counter-weight' to executive power and therefore the appropriate locus for oversight over an independent corruption-fighting unit.[162] Underscoring the need for public oversight of anti-corruption mechanisms, Moseneke DCJ and Cameron J note that parliamentary committees 'function in public' and are set up with the aims of achieving 'public accountability'.[163] This differs from oversight by Cabinet members who 'function out of the public gaze' exacting only political accountability.[164]

In adopting this framework, Moseneke DCJ and Cameron J contribute to making accountability work at two levels. On the horizontal plane,

157 *Glenister II* (n 139) para 129.
158 *Glenister II* (n 139) para 129.
159 *Glenister II* (n 139) para 130.
160 *Glenister II* (n 139) para 146 (where Ngcobo CJ stresses the political choice of the legislature, and that 'it is not the judicial role to dictate to other branches what is the most appropriate way to secure the independence of an anti-corruption agency').
161 *Glenister II* (n 139) para 207.
162 *Glenister II* (n 139) para 239.
163 *Glenister II* (n 139) para 243.
164 *Glenister II* (n 139) para 243.

they constitutionally entrench the need for independent accountability institutions that can hold government accountable.[165] On the vertical plane, they develop a robust threshold for the independence required of such institutions, tipping the scales in favour of *public*, rather than *political* accountability.[166] Analysing the impugned legislation against the requirement of public accountability, Moseneke DCJ and Cameron J could not countenance provisions of the Act requiring 'hands-on management' and 'hands-on supervision' of the unit by the executive,[167] and which 'diluted' parliamentary oversight.[168]

Guided by Moseneke DCJ and Cameron J's precedent, when revised legislation regulating the Hawks was challenged in the sequel to *Glenister II*,[169] there was significant agreement on the threshold for adequate independence of such an entity. Mogoeng CJ, who had joined the minority in *Glenister II*, now noted broad public agreement that the 'malady' of corruption required 'stringent measures' to be taken, and that the Court was 'in one accord' on the need for an independent agency 'dedicated to the containment and eventual eradication of the scourge of corruption'.[170] There were, however, still differences – with Cameron J once more on the side of seeking to advance public accountability even further. Foregrounding again the role of parliament in enhancing public

165 As noted above, their creative reasoning on this score is certainly open to reasonable critique. Moreover, it is not clear that expanding the accountability institution net necessarily translates into enhanced accountability. Pierre de Vos, for example, argues that the 'proliferation' of Chapter 9 institutions in South Africa has 'definitely played a role in diminishing their effectiveness in holding the legislature and executive to account': see P de Vos 'Balancing independence and accountability: The role of Chapter 9 institutions in South Africa's constitutional democracy' in Chirwa & Nijzink (n 22) 174. Compare Roux (n 149) 72, who argues that *Glenister II* serves as an example of the Court successfully asserting its role in democratic consolidation.

166 Of course, vertical accountability in this sense is achieved through parliament (thus also including a horizontal dimension). However, as Chirwa & Nijzink (n 22) 174 note, the lines between vertical and horizontal accountability are often blurred.

167 *Glenister II* (n 139) para 235. Particularly concerning was a requirement that the operations of the Hawks had to be subject to policy guidelines determined by a Ministerial Committee (including the Ministers for Police, Finance, Home Affairs, Intelligence and Justice).

168 For example, even though the Ministerial Committee policy guidelines had to be approved by parliament, these (no matter how intrusive) would be deemed as approved if parliament failed to engage with it at all: *Glenister II* (n 139) paras 241-242.

169 *Glenister III* (n 87).

170 *Glenister III* (n 87) para 1.

accountability,[171] Cameron J would have held that provisions allowing for executive control over the appointment of the anti-corruption agency's head were unconstitutional. The majority, invoking separation of powers concerns, were unwilling to impose a parliamentary approval requirement on the appointment process.[172] Cameron J,[173] on the other hand, highlighted that the separation of powers doctrine *itself* envisions parliament as a 'significant counterweight to the power of the executive'.[174]

While Cameron J's position may not have prevailed fully in *Glenister III*, his emphasis on the need to limit executive interference in oversight institutions in order to make their accountability-seeking function effective would influence later cases.[175] Particularly notable is *Sonke Gender Justice NPC v President of the Republic of South Africa*,[176] which centred on whether the Judicial Inspectorate of Correctional Services (JICS), the statutory watchdog overseeing the functioning of correctional services, was adequately independent.[177] By the time the case came before the Court, Cameron had retired from the bench and taken up the reins as the Inspecting Judge for Correctional Services.[178] The appointment was particularly fitting given his longstanding commitment to prisoner rights and penal reform, including as a member of the Constitutional Court where he coordinated the Court's prison inspections programme.[179] When *SGJ* was heard, he had come full

171 *Glenister III* (n 87) para 166.

172 *Glenister III* (n 87) paras 72-76. The legislation provided that the head of the Hawks would be appointed by the Minister of Police with Cabinet's concurrence.

173 Supported by Froneman J and van der Westhuizen J.

174 *Glenister III* (n 87) para 165. Cameron J's approach reflects his view that judicial authority should be concerned with maintaining the 'institutional integrity' of the various branches of government: see Klug (n 92) 3-9.

175 For example, *McBride v Minister of Police* [2016] ZACC 30 (where a unanimous Court held that provisions empowering the Minister of Police to discipline and remove the Head of the Independent Police Investigative Directorate without parliamentary oversight was invalid).

176 [2020] ZACC 26 ('*SGJ*').

177 The applicant, Sonke Gender Justice, challenged legislative provisions that (i) placed JICS's budget under the control of the Department of Correctional Services (the very Department that JICS was tasked to oversee) and (ii) required matters relating to misconduct of the CEO of JICS to be referred to the Department: see *SGJ* (n 176) para 12.

178 See n 9.

179 The programme was initiated in 2009, coinciding with Cameron's appointment to the bench. According to the Court's website, he conducted at least 15 judicial inspections during his tenure.

circle, now being a party before the Court on which he had just served. In a short affidavit, Cameron supported[180] the case brought by the applicants noting that the relief sought would 'significantly enhance the independence, efficiency, operational capacity and functioning of JICS'.[181] In addition to this direct input, Cameron also featured indirectly, with the applicant's challenge relying heavily on the reasoning adopted in *Glenister II*. Theron J (writing for the majority) endorsed Moseneke DCJ and Cameron's interpretation of section 7(2) of the Constitution as 'serv[ing] the constitutional value of accountability'[182] and advancing a culture of justification (by requiring the State to account for and show that the steps it has taken to advance rights are reasonable and effective). Relying on *Glenister II*, the majority went on to hold that the Act's political accountability mechanisms undermined JICS' public accountability function.[183] In so doing, the *SGJ* judgment firmly entrenched Cameron's judicial drive for public accountability by and of independent oversight institutions, with direct implications for his own role as Inspecting Judge of JICS.[184]

In addition to mechanisms for monitoring and oversight, the responsibility dimension of accountability also requires appropriate consequences to follow breaches of such obligations. Here too Cameron has made a marked contribution, with nuanced reliance on the value of accountability when determining liability for improper exercises of public power.

180 Even though his affidavit formally indicated that he would abide by the decision of the Court, it was clear he supported the applicant's cause: see affidavit and submission by Edwin Cameron in *SGJ* (30 January 2020) para 4.

181 Affidavit and submission by Edwin Cameron (n 180) para 6.

182 *SGJ* (n 176) para 49.

183 Theron J agreed with the applicants that executive control over JICS's budget – which effectively placed the Department in a position to 'financially starve' JICS – did not pass constitutional muster: *SGJ* (n 176) para 82. She further held that allowing the executive to substantively decide disciplinary matters against the Inspectorate's CEO would be inconsistent with the Constitution: *SGJ* (n 176) para 113.

184 Jafta J sought to dilute the implications of *Glenister II*. While his deferential stance seemed to have gained ground in the last years of Cameron J's tenure, it is notable that he was in a clear minority in *SGJ* (with only one supporting concurrence).

5.2 Consequences

Public accountability requires those wielding public power to be held responsible for their actions. Where there is wrongdoing, there must be consequences.[185] But what type of consequences are appropriate in any given case? This question has been particularly challenging in relation to when and on what basis civil damages should be imposed for breaches of public-law duties. In other words, when are 'public-law wrongs' actionable through 'private-law remedies'?[186] The Constitution's explicit commitment to accountability has played a significant role in jurisprudence on this issue, with Cameron JA making an early and lasting contribution in the SCA case of *Olitzki Property Holdings v State Tender Board*.[187]

The matter centred on a claim for lost profit flowing from an allegedly improper tender process.[188] Expressly invoking the 'constitutional principle of justification', Cameron JA emphasised that remedies in response to wrongdoing by public authorities must be informed by and seek to secure public accountability.[189] Civil remedies, he recognised, undoubtedly 'play a central part' in securing accountability and 'realising our constitutional vision of open, uncorrupt and responsive government.'[190] However, Cameron JA also cautioned that there are a range of remedial mechanisms which can secure accountability. He added:

> What precise remedy or remedies within the range available, including interdict (mandatory or prohibitory), review and the award of damages (whether for out-of-pocket losses or more), will be appropriate to secure that vision [of open, uncorrupt and responsive government], depends however on the context of the statutory provision in question.[191]

185 Either political or legal: Price (n 14) 313.
186 See Price (n 14) for an illuminating treatment of this topic.
187 [2001] ZASCA 51.
188 The claim was based on the requirement that tender processes be conducted independently and impartially, as required under the Interim Constitution Act 200 of 1993.
189 *Olitzki* (n 187) para 31, endorsing Davis J's judgment in *Faircape Property Developers (Pty) Ltd v Premier, Western Cape* 2000 (2) SA 54 (C).
190 *Olitzki* (n 187) para 31.
191 *Olitzki* (n 187) para 31.

Here, Cameron JA refines the position adopted by the High Court in *Faircape Property Developers (Pty) Ltd v Premier, Western Cape*.[192] In that case, involving a claim for out-of-pocket expenses following an unlawful building-related approval, Davis J drew heavily on the guiding role of accountability as a constitutional norm that was now 'intrinsic to the legal convictions of the community' and South Africa's 'transformed legal culture'.[193] It followed, for Davis J, that in the absence of an adequate statutory remedy, negligent exercises of power by public authorities would be wrongful and actionable as a claim for damages in delict.[194] In other words, the accountability imperative created a presumption in favour of delictual liability.

In *Olitzki*, Cameron JA does not treat the norm of accountability as a factor that, by itself, translates breaches of public-law duties into private-law remedies. Instead, a balance is required, with the ultimate question being whether it is just and reasonable in the circumstances to secure accountability through a claim for damages.[195] In the case at hand, having regard to the statutory context, he concluded that it would not be so.[196] However, where fraud or corruption was at issue, as in *Minister of Finance v Gore NO*,[197] then Cameron JA had no difficulty holding that the demand for accountability likely tips the scales in favour of liability. As he held, in a judgment co-authored with Brand JA:

> [T]he fact that a defendant's conduct was deliberate and dishonest strongly suggests that liability for it should follow in damages, even where a public tender is being awarded. ... [W]here deliberately dishonest conduct is at issue: the cost to the public of exempting a fraudulent perpetrator from liability for fraud would be too high.[198]

Cameron JA's approach in *Olitzki* would influence both the Supreme Court of Appeal and Constitutional Court in a string of cases testing the boundaries of public authority delictual liability; although not always evenly. Whereas cases involving claims for economic loss (caused

192 See n 189.
193 *Faircape* (n 189) 65F-H.
194 As he concludes: 'Thus our law has reached the point where the legal convictions of the community would consider the negligent decisions by a public authority to represent wrongful conduct.' See *Faircape* (n 189) 65G-I.
195 *Olitzki* (n 187) paras 12-13.
196 *Olitzki* (n 187) para 30.
197 [2006] ZASCA 98.
198 *Gore* (n 197) para 88.

by negligence) have tended to emphasise Cameron's cautionary note,[199] jurisprudence responding to bodily injury claims has leaned on his recognition of the 'central' role of public accountability when determining liability.[200] Most notably, in *Van Duivenboden*,[201] determined a year after *Olitzki*, the SCA appeared to create a presumption in favour of delictual liability where the state's failure to fulfil a public-law obligation leads to physical injury. In that case, relying on *Olitzki*, Nugent JA held that in the absence of an effective remedy, the 'norm of accountability' will '*ordinarily* demand the recognition of a legal duty unless there are other considerations affecting the public interest that outweigh that norm'.[202] However, the suggestion that an accountability imperative moves the dial toward ordinarily recognising delictual liability was not quite the framing suggested by Cameron JA. Indeed, Alistair Price has noted that following *Van Duivenboden* the Constitutional Court led a 'subtle shift' away from reliance on the 'norm of accountability' as the basis of a form of default public liability.[203] In *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*,[204] with reference to *Olitzki*, the Court underscored that '[t]he principle of accountability ... may not always give rise to a legal duty whether in private or public law',[205] and emphasised that even

199 See, for example, *Premier of the Province of the Western Cape v Fair Cape Property Developers (Pty) Ltd* [2003] ZASCA 42 para 37 (with Cameron JA participating), where Lewis JA, with reference to *Olitzki*, cautioned that '[i]t will seldom be that the merely incorrect exercise of a discretion will be considered to be wrongful'. See also, for example, *Telematrix (Pty) Ltd v Advertising Standards Authority SA* [2005] ZASCA 73 (Cameron JA participating); *Steenkamp NO v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16.

200 See, for example, *Minister of Safety and Security v Van Duivenboden* [2002] ZASCA 79 (discussed further below); *Lee v Minister of Correctional Services* [2012] ZACC 30 para 100 (where Cameron J, in a minority opinion, stressed that there are 'special reasons for imposing liability to ensure accountability and responsiveness' in the case of prisoners, who are 'delivered into the absolute power of the state'; the majority opinion also relied heavily on the norm of accountability); *Mashongwa v PRASA* [2015] ZACC 36 paras 24, 36 (where the norm of accountability is referred to in the determination of wrongfulness and negligence).

201 *Van Duivenboden* (n 200).

202 *Van Duivenboden* (n 200) para 21 (my emphasis). Although Nugent JA, in the same paragraph, also recognised that the 'norm of accountability ... need not always translate constitutional duties into private law duties enforceable by an action for damages, for there will be cases in which other appropriate remedies are available for holding the State to account'.

203 Price (n 14) 329.

204 [2004] ZACC 20.

205 *Metrorail* (n 204) para 78.

where there are no alternative remedies there may be countervailing public policy considerations against recognising state liability in delict.[206]

Since *Metrorail*, the Court may well be criticised for not grappling adequately with those countervailing considerations, including cases in which Cameron J concurred.[207] Nonetheless, it is noteworthy that our jurisprudence, drawing from *Olitzki*, has developed to accept that the value of accountability has an important role in establishing state liability in delict, albeit not necessarily a determinative one. The upshot is recognition that accountability (and a 'culture of justification') can be realised through mechanisms other than judicially enforced civil remedies. This reflects and aligns with Justice Cameron's general view that judicial enforcement plays a necessary and significant, but ultimately limited, role in advancing a culture of justification. As he has emphasised, 'courts cannot achieve social justice alone: far from it'.[208] Instead, it remains 'vital for activists to remain engaged with our other deliberative bodies, and for those bodies to be held accountable through mechanisms in addition to constitutional litigation'.[209]

6 Conclusion

Accountability is one of the bedrock values animating South Africa's constitutional democracy. It provides constitutional recognition that those who wield public power are answerable to the people on whose behalf they act. This requires responsiveness in action, openness in decision-making, and responsibility for improper exercises of publicly entrusted power. As the cases discussed in this chapter have demonstrated,

206 *Metrorail* (n 204) para 77. Compare Davis J in *Faircape* (n 189) 66E-F: 'In my view, the spirit of the Constitution ... could not conceive that an aggrieved citizen who can properly prove that a public authority's negligence has caused him or her financial loss should be left without any legal recourse'.

207 See *Mashongwa* (n 200) (Cameron J participating). For an overview of the Court's developing approach to state liability for negligent omissions causing bodily injury, see L Boonzaier 'Delictual liability for injuries suffered at childcare centres' (2022) *South African Journal on Human Rights* 309 at 310-314. Surprisingly, the Constitutional Court has recently held that delictual claims for administrative failures are not available in delict at all: see *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* [2022] ZACC 41.

208 E Cameron 'A South African Perspective on the judicial development of socio-economic rights' in L Lazarus, C McCrudden & N Bowles (eds) *Reasoning rights: Comparative judicial engagement* (2014) 319 at 338.

209 Cameron 'A South African perspective' (n 208) 338.

Cameron's jurisprudence has contributed to the nuanced development of these three inter-related dimensions of accountability.

In doing so, Cameron has made 'accountability work' by, first, invoking and substantively engaging with accountability as a constitutional value informing our unique brand of democracy based on and aiming toward a 'culture of justification'. He has put the value of accountability to work in developing innovative remedies aimed at furthering the protection of rights (*KZN JLC*); resisting and responding to the corrosive effects of corruption (*Electronic Media*, *Glenister II*, *MVC 1, Gore*); emboldening the minimum obligations to which all exercises of public power must conform (*KZN JLC*, *Electronic Media*); and informing the type of consequences that follow a failure to meet those obligations (*Olitzki, Gore*). Second, he has contributed to developing the jurisprudential framework within which the conditions necessary for democratic accountability to work can be secured. He has sought to do so by expanding access to information across public and private entities (*Unitas*, *MVC 1*);[210] deepening electoral accountability (*MVC 1*); entrenching the role of independent oversight mechanisms (*Glenister II & III*); and securing public accountability over those mechanisms (*Glenister II & III*).

There are also common themes in Justice Cameron's accountability jurisprudence that speak to his wider jurisprudential legacy. The first is his transformative approach to adjudication. This includes his resistance to rigid formalism in favour of substantive reasoning[211] and willingness to transcend traditional private-public divides.[212] Second is his 'contextualised and politically-attuned'[213] approach to the role of

210 See too his approach to transparency in *President of the Republic of South Africa v M & G Media Ltd* [2011] ZACC 32, discussed in more detail in J Froneman & H Taylor 'Judicial dissent and the sceptical scrutiny of power', this volume at 396-400.

211 As seen in *KZN JLC*, *Unitas*, *Glenister II* and *MVC 1*. See further C Hoexter 'Transformative adjudication in administrative law', this volume, ch 6.

212 *Unitas* and *MVC 1* demonstrate this in the context of the right of access to information. Cameron JA's intervention in *Olitzki* also shows his balanced approach to public law considerations in the realm of private law. In a different context, see his resistance to public/private law conceptualism in *Logbro Properties CC v Bedderson NO* [2002] ZASCA 135 and *Association of Mineworkers and Construction Union v Chamber of Mines of South Africa* [2017] ZACC 3. See too C Hoexter 'Contracts in administrative law: Life after formalism?' (2004) 121 *South African Law Journal* 595.

213 Krüger (n 140) 61.

courts and the separation of powers. His jurisprudence shows conscious concern for the institutional integrity of other branches of government, and the flexibility needed in order for those branches to discharge their constitutionally mandated functions.[214] At the same time, he has not hesitated in embracing a robust judicial role when corruption and institutional malfunction have threatened the foundations of the constitutional project.[215] Often pitted against his more deferential colleagues, Cameron was consistently on the leading edge of resistance to democratic erosion. Third, and finally, is his signature flair for judicial creativity and innovation.[216] We may question the zeal of his judicial imagination in some cases,[217] but his willingness to develop the law in order to consolidate a responsive democracy and entrench a culture of justification has undoubtedly established him as one of the foremost jurists in South African history.

214 As reflected in *KZN JLC*, as well as *Olitzki*. On institutional integrity and separation of powers generally, see Klug (n 92).

215 His final judgment on the Court serves as a striking example of his boldness in responding to state incompetence: see *Mwelase v Director-General for the Department of Rural Development and Land Reform* [2019] ZACC 30. At paras 47-48, he clearly sets out his view that the branches of government are in 'a relationship of mutual accountability, responsiveness and openness' (quoting S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 67) and that 'it is crises in governmental delivery, and not any judicial wish to exercise power, that has required the courts to explore the limits of separation of powers jurisprudence'.

216 A trait reflected in *KZN JLC*, *Glenister II* and *MVC 1*.

217 See, eg, criticism of *Glenister II* at nn 148-149 above.