About the author

Professor Thulisile "Thuli" Madonsela, an advocate of the High Court of South Africa, is the law trust chair in social justice and a law professor at the University of Stellenbosch, where she conducts and coordinates social justice research and teaches constitutional and administrative law. She is the founder of the Thuma Foundation, an independent democracy leadership and literacy public benefit organisation and convener of the Social Justice M-Plan, a Marshall Plan-like initiative aimed at catalysing progress towards ending poverty and reducing inequality by 2030, in line with the National Development Plan (NDP) and Sustainable Development Goals (SGGs). She is a monthly columnist for the *Financial Mail* and *City Press*/*Rapport*, and occasionally writes for other newspapers.

A multiple award-winning legal professional, with over 50 national and global awards, Thuli Madonsela has eight honorary doctor of laws degrees, one of which was awarded by the Law Society of Canada. She holds a BA Law from Uniswa, a Bachelor of Laws from Wits University and a Harvard Advanced Leadership Certificate, and has been trained in legal drafting, leadership, strategic planning, scenario planning, gender mainstreaming, mediation and arbitration, and training facilitation, among other things.

Thuli Madonsela was the Public Protector of South Africa from 2009 to 2016. She is credited with transforming the institution by enhancing its effectiveness in promoting good governance and integrity – including ethical governance and anticorruption in state affairs – through her reports, jurisprudence on the powers of the Public Protector and introduction of ADR. She is the architect of the *OR Tambo Declaration on the minimum standards for an effective ombudsman institution and cooperation with the African Union on strengthening good governance* and co-founder of the African Ombudsman Research Centre (AORC) at the University of KwaZulu-Natal, and served as AORC's founding chairperson. As a full-time commissioner of the South African Law Commission, she supervised several investigations – among them Project 25 – on aligning all laws with the Constitution, and participated in the drafting of several laws. She chaired and later project-managed the Equality Legal Education Training Unit (ELETU), which provided foundational training for Equality Court judicial officers. She is the co-founder and one of the inaugural leaders of the South African Women Lawyers Association (SAWLA).

Named one of *Time 100*'s Most Influential People in the World in 2014, *Forbes Africa* Person of the Year in 2016 and one of BBC's 100 Women, her peer recognition includes the Commonwealth Lawyers Association's Truth and Justice Award, Transparency International's Integrity Award, the South African Law Society's Truth and Justice Award, General Council of the Bar membership, the Sydney and Felicia Kentridge Award, the SAWLA Women in Law Icon Award, Botswana Lawyers Association Honorary Bar membership, the German Presidential Medal, the German Africa Prize, the African Peer Review Mechanism Anticorruption Crusader Award, Tällberg Global Leader recognition, Rotary International's Paul Harris Fellow recognition, the Gauteng Premier's Provincial Achiever Award, and having a rose named after her in recognition of her social justice and integrity work.

Thuli Madonsela is one of the drafters of South Africa's Constitution and co-architect of several laws that have sought to anchor South Africa's democracy. Among the laws she has helped draft are the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA), the Employment Equity Act (EEA) and the Recognition of Customary Marriages Act. She also contributed to the conceptualisation and quality assurance of

laws such as the Promotion of Administrative Justice Act, the Domestic Violence Act and the Repeal of the Black Administration Act. Her policy contributions have focused on the transformation of the judicial system, the promotion of equality – particularly gender equality – and the Victims Charter. She has also participated in the drafting of several international instruments, mainly on human rights, gender, race, disability, development and gender-based violence, in addition to participating in the preparation of country reports and representing the country.

Her extensive publishing record includes books/learning resources, book chapters/forewords, journal articles, newspaper articles and papers. She is a sought-after speaker and has presented several memorial lectures, including international memorial lectures for Kofi Annan, John Wendell Holmes and Oliver Tambo, and the Desmond International Peace Lecture.

Judicial review through a social justice lens[1]

> The Constitution declares itself the supreme law of the land, establishing the basis to: "heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights". Should this declaration not be the touchstone for courts and all organs of state when making decisions, including judicial review, policy design and law making? Evidence suggests that it is not necessarily so.
>
> This lecture examines patterns in judicial review, focusing on the emergence of rationality as the touchstone for judicial review of the exercise of public power. It questions whether the emergence of rationality as the touchstone for judicial review has not unintentionally undermined jurisprudential congruence with the constitutional vision and values as reflected in the preamble and founding values. It explores the approach in *S v Makwanyane* as potentially offering a model for constitutional vision and value congruence and, in the process, better alignment with the constitutional vision of creating a democratic society founded on social justice and fundamental human rights.

1. The people *versus* democracy

When I met Palesa Musa, a black woman in her mid-fifties, she was among women gathered at the former Women's Jail at Constitution Hill for an intergenerational dialogue on "Women healing the divisions of the past" on 9 August 2017[2]. The event, organised by the Thuma Foundation, Constitution Hill and other partners, brought together five generations of women to discuss growing polarisation and the state of democracy delivery to women. The women deliberated on action women could take to heal the divisions of the past. The concern was that a campaign unleashed by a United Kingdom (UK) company at the instance of the Gupta family, to undermine an investigation I had initiated as Public Protector, was exacerbating racial polarisation.[3]

Musa looked weather-beaten but defiant. Like the other women in the room, she, at some stage, took the floor. She spoke as one of the former inmates of the Women's Jail. What struck me was Musa's statement that:

> We don't want democracy. We fought for freedom and, instead, got this thing called democracy. During apartheid, the past laws undermined our ability to live freely and to prosper, while today, poverty achieves exactly the same purpose.

Truth be told, Musa is one of millions – mostly young people and in poor communities – who feel that democracy has failed them in that the constitutional promise of a freed potential and improved quality of life has not materialised for them. A chapter in Rekgotsofetse Chikane's book screams: "We Were Sold Dreams in 1994, We want a

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[1] Paper presented by Professor Thulisile "Thuli" Madonsela, chair in social justice, for her inaugural lecture at Stellenbosch University on 11 November 2019.

[2] Constitution Hill is the seat of the Constitutional Court and a museum on apartheid incarceration atrocities.

[3] The UK PR Regulatory Agency found the Gupta family to have commissioned a UK company, Bell Pottinger, to conduct crisis communication aimed at undermining a Public Protector investigation into allegations referred to as state capture. It was alleged that the Gupta family was leveraging its relationship with then President Zuma and business partnership with his son for undue influence on him and strategic organs of state, mostly state-owned enterprises (SOEs), for private gain and evading accountability. The key allegations centred on the sudden dismissal of the minister of finance in December 2015 and his replacement with a person alleged to be a Gupta choice.

Refund."[4] Many such left behind or discontented groups and communities are increasingly finding demagogues and related extremism attractive. They are increasingly looking to political entrepreneurs that are offering alternatives to democracy to lift them out of poverty, hunger, unemployment, landlessness and related deprivation.

2. Where are the courts in all of this?

The courts have acquitted themselves admirably as the ultimate guardians of the Constitution. This has particularly been the case when people have used the Constitution as a sword to advance human rights, particularly social and economic rights, such as the right to education, the right to housing, and security of tenure for farm and other tenants, as well as informal settlement dwellers.[5]

But it has been in the area of enforcing integrity in the exercise of state power that courts, particularly the Constitutional Court, have earned their label as the ultimate guardians of the Constitution and democracy. This has been particularly so in high stakes cases involving the president. Among key cases in this regard are those about appointments in the National Prosecuting Authority, and a number arising from my reports as the Public Protector.[6] Through constitutional and administrative review, the courts have expanded the frontiers of freedom and equal enjoyment of human rights for disadvantaged groups in areas such as access to housing, education and tenants' rights.[7]

Through lawfare in the area of administrative law and the audacious decisions of the courts, particularly under the Promotion of Administrative Justice Act (PAJA), the executive and other persons exercising public power can no longer expect to make decisions without the possibility of incurring accountability. This includes justification, taking responsibility and the possibility of reversal of decisions by courts if they are found wanting.[8]

The question this paper seeks to answer is: Could the courts be doing better with regard to being part of the solution on advancing justice, particularly social justice, through administrative law? It questions whether the emergence of rationality as the touchstone for judicial review has not unintentionally undermined jurisprudential congruence with the constitutional vision and values as reflected in the preamble and founding values. I ultimately explore whether the purposive, contextual and balancing approach adopted by the Constitutional Court in *S v Makwanyane and Others*[9] – and the principle of Ubuntu venerated therein – could provide a model for more constitutionally resonant jurisprudence.

3. Reality versus the constitutional promise

During the women's dialogue alluded to earlier, Musa explained that she had been arrested on 16 June 1976 and incarcerated in a cell a few metres from where we were gathered. She explained that her only crime had been being a child activist participating in the 1976 June 16 protest rejecting an unjust education system called Bantu education. Bantu education was a component of apartheid's chief architect, Hendrik

[4] R Chikane *Breaking a rainbow, building a nation: The politics behind #MustFall movements* (2018).
[5] E Cameron, Justice: *A personal account* (2014) and D Davis and M le Roux *Lawfare: judging politics in South Africa* (2019).
[6] *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2018 2 SA 571 (CC); Public Protector *Report on state of capture* (2016/17).
[7] *Joseph & Others v City of Johannesburg & Others* 2010 4 SA 55 (CC).
[8] G Quinot *Administrative law cases & materials* (2008).
[9] *S v Makwanyane and Another* [1995] ZACC; 1995(6) BCLR 665 (CC).

Verwoerd's, system of laws and policies. It sought to lobotomise black people as part of a polycentric apartheid strategy aimed at subjugating black people and depriving them of economic freedom and related prosperity for the benefit of the white population.[10] As she told her story, Musa started sobbing uncontrollably, and, between sobs, she explained how her human development had been arrested and her life ruined by detention without trial in solitary confinement for six months, as a 12-year-old child. There was not a single dry eye in the room. We promptly collected a R7 000 donation for her, but knew that the problem was a systemic one.[11]

In Musa, we saw the face of post-apartheid poverty in South Africa juxtaposed with our privilege. Hers is the plight of multitudes of women whose reality of deprivation is buried in the data showing that 55,5% of the population is poor. The racially disaggregated figures are 1% white, 64,2% African, 41.3% coloured and 5.9% Indian/Asian.[12] She and other micro-business owners are practically self-employed, without the social security and related benefits of formal employment. Formal employment is not an option, given that Statistics South Africa places official unemployment at about 30%, and unofficial unemployment – inclusive of those "Not in employment, education or training" (NEETs) – close to 40%. Like many who have waited since 1996 for social housing, called Reconstruction and Development Programme (RDP) housing, she has no assets, not even an RDP house, while banks need collateral, usually in the form of immovable property, for loans.[13]

You must agree with me that Musa's life stands in contrast to the constitutional vision and promise. Her life is a far cry from the promise of improved quality of life for all in a new society based on social justice, among other foundational tenets. It should be a source of great concern to all of us that the World Bank's 2018 report asserted that "South Africa is not only one of the most unequal societies in the world, but inequality has increased since the end of apartheid in 1994"[14]. When people like Palesa Musa say they do not want democracy, they are speaking to the contrast between their lives and the promise of democracy, particularly one like ours, whose constitutional preamble states:

> We, the people of South Africa,
> Recognise the injustices of our past;
> Honour those who suffered for justice and freedom in our land;
> Respect those who have worked to build and develop our country; and
> Believe that South Africa belongs to all who live in it, united in our diversity.
> We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to
>
> - Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
> - Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
> - Improve the quality of life of all citizens and free the potential of each person; and
> - Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

[10] S Liebenberg and G Quionot (eds) *Law and poverty perspectives from South Africa and beyond* (2011).
[11] The Thuma foundation has since donated R30k to help create something more sustainable for Musa.
[12] Statistics South Africa, 2018.
[13] MN Smith (ed) *Confronting inequality – The South African crisis* (2018).
[14] The World Bank *Annual Report* (2018).

The working definition underpinning the research of the chair and informing this paper, is influenced by the United Nations definition, and holds that:

> Social justice is essentially about the equal enjoyment of all rights and freedoms, regardless of human diversity, reflected in the fair and just distribution of all opportunities, resources, benefits, privileges and burdens in a society or group and between societies.[15]

The constitutional foundations of social justice in South Africa are found in the preamble, where the Constitution specifically states that it seeks to "establish a society based on democratic values, social justice and fundamental human rights"[16]. In addition, social justice permeates the bill of rights in chapter 2, by virtue of these rights being promised to all, with section 7 of the Constitution reiterating that the promise is to all people in the country, and requiring the state to respect, protect and fulfil the rights in the bill of rights.[17] Social justice is incorporated in the foundational values, particularly as enshrined in section 1(a), relating to "human dignity, the achievement of equality", and (b), "entrenching non-racialism and non-sexism". More specifically, social justice underpins the substantive notion of equality in section 9, the limitations and interpretation clauses of the Constitution, particularly sections 36(1) and 39(1).

At the end of that conference, a declaration was adopted that included, among other things, a commitment to designing and implementing an integrated plan modelled on the post-World War II European Recovery Program, usually known as the Marshall Plan, to accelerate inclusive economic growth, social inclusion and reduction of equality by 2030, in line with the National Development Plan (NDP) and UN Sustainable Development Goals (SDGs). That formed the basis of the Musa Plan for Social Justice, abbreviated to Social Justice M-Plan. The concept paper on the Social Justice M-Plan outlines the glaring disparities – along contours of historical injustice – in key sectors such as education, health, land and access to justice.[18]

The paper shows that systemic poverty, unemployment and inequality are endemic, mostly along the contours of apartheid.[19] This is compounded by intergenerational inequality, which can be explained with reference to the exponential nature of inequality, unless disrupted.[20] A further compounding factor is that, like epidemics, poverty feeds on other social factors, such as education, income, assets, land, health, spacial disparities, generational economic status and many more.[21]

People like Musa are increasingly rejecting democracy and looking towards so-called demagogues and strong men as saviours. I have come across many of these during my time as Public Protector, one of the cases being a group of young boys that closed down

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[15] United Nations "Social justice in an open world" (2006) *United Nations* <www.un.org/esa/socdev/documents/ifsd/SocialJustice.pdf> (accessed 15-11-2019).
[16] Preamble to the Constitution of South Africa, 1996.
[17] *Daniels v Scribante* 2017 4 SA 341 (CC).
[18] Musa Plan for Social Justice (Social Justice M-Plan) concept paper (2018).
[19] T Madonsela "Confronting inequality: Thoughts on public accountability and policy resonance" (2018) *New Agenda: South African Journal of Social and Economic Policy* 22–5.
[20] B Turok "The inequality danger: The imperative to normalize freedom in confronting accountability" in MN Smith (ed) *Confronting inequality – The South African crisis* (2018).
[21] See Social Justice M-Plan concept paper (2018) and reports of the Social Justice Stakeholder Workshop (26 June 2018), Social Justice Expert Round Table (27 October 2018), Social Justice Economic Dialogue: Towards a socially just and sustainable economy (18 March 2018), Women's Land summit (April 2019) and the Inaugural Social Justice Summit and International Conference (29–31 August 2019).

schools in Kuruman and Olifantshoek in the Northern Cape, to force the government's hand regarding addressing underdevelopment, corruption and systemic maladministration.[22] In addition to successfully mediating to get the schools in Kuruman reopened and obtaining partial private funding for tarring a road that was a source of a lot of the anger, I issued a report titled *The children shall pay*.[23]

4. Is administrative law part of the problem or the solution?

In *Makwanyane*, Mahomed J stated:

> The South African Constitution is different; it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular and repressive, and which is a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution.[24]

Has this view of what needs to be done permeated the whole of society, particularly the judicial system, from the Small Claims Court to the Constitutional Court? It is my considered view that patterns in administrative law review, particularly below the Supreme Court of Appeal (SCA) and the Constitutional Court, are not encouraging.

Having pivoted into a review of judicial reviews by happenstance, I have noted an increasing gravitation towards rationality as a core tenet of legality, as the touchstone for administrative law reviews. My research, since appointment by the University of Stellenbosch as law trust chair in social justice research and law professor, has focused on law and policy design. This was after it dawned on me that while most of my career had focused on anti-discrimination laws and remedial laws or policies that promote socio-economic inclusion, the main problem lies in the social impact blindness of the laws and policies that apply to everyone.

I concluded that the main damage is inflicted by one-size-fits-all laws and policies that perpetuate socio-economic exclusion and unfair burdens by paying no attention to existing difference and disadvantage. During my year at Harvard as an Advanced Leadership Fellow, I had an epiphany about the prospects of leveraging data analytics for purpose-driven and social justice resonant design of laws, policies and plans. This means consciously designing laws with an understanding of their likely impact on poverty and inequality, primarily whether they would exacerbate or mitigate these two in respect of some groups. To those who may be concerned about the danger of algorithms, we are also mindful.

Is it not odd that today, law requires us to conduct an environmental impact assessment before infrastructure developments are approved, yet no human impact assessment is done for the same or other laws, policies or plans? For example, as the government goes around soliciting Foreign Direct Investment (FDI), the foremost concern is jobs, but what about the impact on the country's constitutionally mandated duty to advance social justice? Even Integrated Development Plans (IDPs) mandated by law at local government level, do not include a human or social impact assessment requirement.[25]

The idea is to subject each planned law, policy or plan to a predictive data analytics exercise to assess its likely impact on different groups with disparate socio-economic circumstances in society in the short term, medium term and long term. The focus is, of course, an assessment of likely impact on poverty and inequality. If it is a planned policy or

[22] Public Protector *Report on children shall pay* (2013/14).
[23] Public Protector *Report on children shall pay* (2013/14).
[24] 1995 3 SA 391 (CC).
[25] Municipal Systems Act 32 of 2000.

law, design defects may be corrected through a compensation strategy, some tweaking of provisions or the jettisoning of the policy or law or plan in its entirety and the replacement of it with another. In the M-Plan concept paper, we posit as examples, unintended social injustice consequences of the recent 1% VAT increase, the South African Schools Act 94 of 1996 and aspects of the National Health Policy Framework, particularly the calibration of health facilities in a manner that concentrates expertise and high care in metros at the disadvantage of deep rural areas like the Northern Cape.[26]

We intended to include the courts much later in the research process. They got catapulted to the front in response to an encounter with what is colloquially referred to as a "Twitter troll"[27]. In this case, the person was celebrating the fact that a report I had issued as Public Protector, finding the National Empowerment Fund (NEF) to have acted improperly, had been successfully reviewed, and my reasoning found to be grossly irrational.[28] The case in question was one of those my team and I used to refer to as "bread-and-butter" issues or "Gogo Dlamini" matters. Gogo Dlamini is what other jurisdictions refer to as "Joe Soap", that is, an ordinary person with no or limited means and severely restricted access to justice, while miscarriage of justice could plunge them into poverty and related hardship.

The North Gauteng High Court case titled *NEF v Public Protector*[29] was a judicial review of the Public Protector report titled *Stringed along*[30]*.* I must say, I find the celebration of this judgement by those who continue to feel aggrieved by my decisions in the *State of capture*[31] and *Secure in comfort* [32] reports, deeply lacking in humanity or Ubuntu. Celebrating the crushing of the spirit of an ordinary justice seeker, particularly one at the Gogo Dlamini level, cannot be who we are as a nation.

A few weeks later, I learned during my address to the Association of Administrative Justice Professionals, that another Gogo Dlamini matter had been successfully reviewed. This concerned my resolution in favour of the complainants – a husband and wife to whom I refer as Mr and Mrs G – of a dispute over alleged non-payment for the completion of an RDP housing project. After learning from the media that my former office had advised that a number of reports issued under my hand had been successfully reviewed, we sourced more information, and found a report called *Regulating justice*[33], which was released on the same day as *Stringed along*. During a media briefing on 30 September 2014, I released four reports, among which was the one titled *Stringed along*.[34] The main or anchor report of that day was titled *Ubuntu*, about which I said:

> *Ubuntu* is an exemplary case of how the architects of our democracy wanted those who exercise public power to work cooperatively with the Public Protector and other oversight bodies to identify and remedy improper or wrongful conduct in state affairs.[35]

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[26] Musa Plan for Social Justice (Social Justice M-Plan) concept paper (2018).
[27] In social media, a troll is a label given to persons who harass or insult others.
[28] The NEF is a state-owned enterprise managing billions of rand meant to advance black economic inclusion through enterprise development and growth.
[29] *National Empowerment Fund v Public Protector* (12349/15) [2017] ZAGPPHC 610.
[30] Report no 5 of 2014/15.
[31] Report no 6 of 2016/17.
[32] Report no 25 of 2013/14.
[33] Report no 4 of 2014/15.
[34] *Polity* "PP: Thuli Madonsela: Address by the Public Protector, during the Public Protector media briefing" (30-09-2014) *Polity*. The fourth report that was released on that day was titled *Accountability*. Critics argue understandably that it should have been *Strung along.*
[35] South African Government "Address by Public Protector Adv Thuli Madonsela during the Public Protector media briefing" (30-09-2014) *South African Government* <www.gov.za/address-public-protector-adv-thuli-madonsela-during-public-protector-media-briefing> (accessed on 11-11-2019).

I noted that Van der Westhuizen AJ, in delivering the *NEF* judgement, said that "it is trite law that the actions and decisions of the first respondent are administrative actions".[36] However, I choose not to engage on this here, save to say that in the landmark cases dealing with the powers and responsibilities of the Public Protector – being the *Mail and Guardian*,[37] *SABC*[38] and *Nkandla*[39] – the Supreme Court of Appeal and the Constitutional Court sidestepped this issue.[40]

I subsequently decided to look more closely into the courts' approach to administrative law review since the advent of the Constitution and, later, the Promotion of Just Administrative Action Act, commonly referred to as PAJA. My initial intention was to review a number of court decisions in this regard. In the end, I decided that this introductory lecture would only (academically) review the *NEF* matter. Lastly, my decision was to benchmark the *NEF* approach against that of the Constitutional court in *Makwanyane.* Of particular interest in *Makwanyane* is the purposive and contextual approach by the whole bench and the leaning towards the value of Ubuntu by a number of the judges. The benchmarking also takes into account the Constitutional Court's balancing of rights and interests of parties involved in litigation and broader public interest considerations, as apparent in *Makwanyane* and *Daniels v Scribante*[41], among others.

In our media statement accompanying the release of the *Stringed along* report, I said the following:

> *Stringed along* is a report into alleged improper conduct and maladministration by the NEF involving stringing someone along by giving her a grant and later withdrawing it on account of the fact that she does not qualify, as she does not qualify under the definition of a black person in terms of the Broad-Based Black Economic Empowerment Act. The finding is that her citizenship should have been checked upfront, not 28 months later, and that no grant letter should have been given or joint credit facility opened with her.[42]

The complainant was Ms Naomi Ngwenya (hereafter referred to as Ms N), complaining on behalf of her start-up company, *Best Care Medical Supplies CC* (hereafter referred to as B). Ms N was a South African by naturalisation, naturalised after 27 April 1994, which, by law, excluded her from the definition of a black person under the Broad-Based Black Economic Empowerment Act (BBBEEA). My finding was simply that the NEF should have conducted a screening or triaging exercise upfront to determine the "right forum" or "belonging", before going further with financial stress tests and related financial risk assessments. The screening exercise is simply to determine whether a member of the public is at the right place, and, if not, to cut their losses and save the institution and them time and wasting of resources.[43] As part of restorative justice in terms of section 182(1)(c) of the Constitution, I ordered the NEF to issue an apology to Ms N within 30 days, and also pay her a discretional amount of "sorry money" for the trouble it had put her through.

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[36] [2017] ZAGPPHC 610 par 1.
[37] *The Public Protector v Mail & Guardian Ltd* 2011 4 SA 420 (SCA). Also known as the *Oilgate* case.
[38] *South African Bureau of Standards v The Public Protector* (34290/15Â) [2019] ZAGPPHC 101 (27 March 2019).
[39] *Economic Freedom Fighters v Speaker of the National Assembly*; *Democratic Alliance v Speaker of the National Assembly* 2016 3 SA 580 (CC).
[40] It is worth noting that Van der Westhuizen AJ's reference for the trite law was a High Court matter decided a few days earlier in the same High Court where he sat when deciding the *NEF* matter.
[41] *Daniels v Scribante* 2017 4 SA 341 (CC).
[42] South African Government "Address by Public Protector Adv Thuli Madonsela during the Public Protector media briefing" (30-09-2014) *South African Government*.
[43] *Stringed along*. Report no 5 of 2014/15.

The NEF rejected the findings and remedial action, and immediately instituted review proceedings. Attempts to persuade the NEF leadership to accept the findings and fix the problem in its system, so that no one else would suffer the same fate, were rebuffed. Incidentally, it was part of our approach to fixing the problem at hand – and the system – to ensure no similar injustice or conflict occurred in the future. Rather than apologise to the complainant – referred to as respondent no 2 in the case, and her company referred to as respondent no 3 – the NEF chose to pay 2 counsels, one senior, to argue that there was no improper conduct in terms of the Constitution, or maladministration in terms of the Public Protector Act. The NEF further rejected the remedial action of an apology and a discretionary sum of money called "sorry money".[44]

When the Public Protector was taken on review by the NEF, Van der Westhuizen AJ, sitting at the North Gauteng High Court, found that there was no improper conduct or wrongdoing whatsoever by the NEF. He concluded that the Public Protector's finding to the contrary, in *Stringed along*, was irrational and unreasonable. The remedial action, which Van der Westhuizen AJ incorrectly relabelled as "Recommendations", was also set aside.[45] He further found that, being an ombudsman-like institution, the Public Protector had no adjudicative authority and, accordingly, could not lawfully order the remedy comprising an apology and discretional financial compensation for undue hardship endured by Ms N. In this regard, Van der Westhuizen AJ found the Public Protector to have acted ultra vires.[46]

On the factual front, Van der Westhuizen AJ found that the Public Protector had wrongly treated Ms N's application as a single application, thus arriving at the conclusion that it had taken 28 months for her to be told that her company did not qualify because, as its sole member, she was not black in terms of the BBBEEA. He emphasised that there had been two distinct applications, and a third process that had followed after the revived second application was declined. The material chronology, as the court saw it (modified by eschewing references to parties by respondent number), was as follows:

1. **April 2010:** Ms N applies for a R6m loan to the NEF on behalf of B.
2. **July 2010:** NEF declines loan on account of stress test (financial viability showing a likelihood of business success and loan repayment) having revealed a pending dispute between B and its major supplier.
3. **November 2011:** Ms N applies for a R4m loan on behalf of B, and NEF declines again on account of stress test concerns.
4. **February 2012:** November 2011 application is resuscitated.
5. **24 May 2012:** NEF declines application on account of unresolved creditor dispute (still part of stress test).
6. **21 May 2012:** Ms N lodges complaint with Public Protector and, on 25 May, supplements it.
7. **May 2012:** Ms N approaches the Department of Trade and Industry to help with NEF.
8. **July 2012:** Settlement is reached after DTI intervention, and Ms N is advised to open a new joint bank account with B.
9. **August 2012**: NEF approves bridging facility subject to due diligence inquiry.

[44] National Empowerment Fund "The National Empowerment Fund stands by its decision to decline the funding application by Ms Naomi Ngwenya" (2014) *NEFCorop* <www.nefcorp.co.za/wp-content/uploads/2018/07/Media-Statement-PP-Findings-Oct-2014-FINAL.pdf> (accessed on 8 November 2019).
[45] *National Empowerment Fund v Public Protector* (12349/15) [2017] ZAGPPHC 610 par 56.
[46] Par 50–2. The reference to "ultra vires" itself is the subject of another analysis, as it seems to assume that the Pubic Protector exercises statutory or delegated authority.

10. **September 2012**: Ms N tells B she does not qualify for a loan because she (Ms N) is not black under the BBBEEA.[47]

Van der Westhuizen AJ found that there was no undue delay. He held that this sequence of events did not amount to a single process, concluding that the Public Protector had wrongly concluded so. He posited the view that an undue delay inquiry should have looked only at the time lapse between each application and the decision by the NEF in respect of that application. In his view, the NEF handled each of those efficiently, and B was not prejudiced by the time lapse. He ultimately found that the Public Protector's findings constituted errors that were all material and had fundamental errors of reasoning.[48]

Van der Westhuizen AJ further drew a distinction between Ms N and B on account of B being a separate legal person, in terms of the law holding that had there been prejudice, it would have been suffered by B and not Ms N. He surmised that Ms N could only have been impacted indirectly. He went on specifically to find that:

> The irrationality and unreasonableness is further compounded by the following:
>
> (a) The applicant responded to the applications reasonably expeditiously;
> (b) The applications were declined for cogent reasons in respect of the merits of the applications.
> (c) The subsequent approval following the aforementioned negotiations was conditional. The respondent was acutely aware of these conditions. The conditional approval cannot be held to be binding between the parties. That was made clear to the second respondent/third respondent. It was common cause that a due diligence inquiry was to be undertaken.
> (d) The applicant is obliged in terms of the Public Finance Management Act, No 1 of 1998, to take effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure, etc.
>
> In my view, it is quite apparent from all the foregoing that the first respondent has misconstrued the provisions of section 6(4) and (5) of the Public Protector Act.[49]

It is worth noting that not a single one of the matters mentioned in (a) to (d) were issues in *Stringed along.* In *Stringed along*, to which all this is meant to respond, there is no finding that:

(a) The NEF did not respond to the application or applications expeditiously.
(b) The application or applications were declined for invalid reasons.
(c) The subsequent approval was absolute, and the approval was binding.
(d) The NEF should have approved the application(s) against the dictates of the Public Finance Management Act (PFMA).

The findings in *Stringed along* were simply that it unduly took 28 months from first contact with Ms N for the NEF to discover that it should never have dealt with her and B beyond a screening process, referred to as part of due diligence in the report. The findings were that failure to do so caused the complainant avoidable hardship, as she would not have reapplied if the screening exercise had thrown her out upfront. The NEF would also have saved time and resources. Is that irrational, unreasonable or flawed reasoning?

[47] Par 5.
[48] Par 14–5.
[49] Par 44–5.

The acting judge said that the requirement of the screening phase due diligence would be unreasonably onerous for the NEF, and accordingly irrational.[50] Firstly, in *Daniels*, the approach would be to conduct a balanced assessment of the hardship on both Ms N on the one hand, and the NEF on the other, taking into account resource imbalances in the process.[51] The balancing approach also underpins the *Bato Star* judgement, widely considered the gold star of administrative justice review.[52] Secondly, what resources would the NEF need to produce a checklist for an initial triage kind of assessment to determine whether further engagement and expenditure of resources were needed in respect of Ms N and, by implication, B?

Incidentally, the Public Protector subjects all new complaints to a screening process to determine whether the person is at the right forum, before expending any further resources on a case, or requiring further particulars from a complainant. Regarding a systems review, my predecessors did the same with the Unemployment Insurance Fund (UIF), South African Social Security Agency (SASSA) and the Workers Compensation Commission. This entailed systemic interventions that improved efficiency and saved heartaches for the Gogo Dlaminis who use the service, and streamlined resources for the institutions in question. Imagine if you were to go to hospital, and, after being sent from pillar to post on account of financial suitability, only then were you told that they do not deal with your kind of illness. What if the National Student Financial Aid Scheme (NSFAS) were to do the same for students who registered before 2018, and whose threshold is accordingly R122k, as opposed to the R350k for the 2018 entrants?

Would it be fair or just for NSFAS to keep declining a student for some or other fixable defect in his or her application, only to find, 28 months later, that the student never qualified because she fell out of the permissible class, being the 2018-onward cohorts? Would it make a difference if he or she ticked "yes" in the qualification box, but stated correctly her pre-2018 registration year and included her correct letter of admission? How many people do not read the fine print and apply to wrong institutions, and then are sent back? Must they be said to be the authors of their own misfortune? What about section 195(g), requiring "transparency to be fostered by providing the public with timely, accessible and accurate information"?

Van der Westhuizen AJ alludes to PFMA obligations requiring efficient use of resources, yet, paradoxically, he finds my suggestion of a systemic review of systems that led to the stringing along debacle, perplexing. Incidentally, section 195(b) of the Constitution also directs that "efficient, economic and effective use of resources must be promoted"[53].

The key issue in *Stringed along* was whether what happened regarding the use of resources and prolonged engagement with Ms N – which could have been avoided through screening – constituted proper conduct, as envisaged under section 182 of the Constitution, and good administration, being the opposite of maladministration, as envisaged in section 6 of the Public Protector Act. Consideration was also taken of section 195(c), requiring a development-oriented approach to public service provision, and (f), referred to earlier.

The NEF was found to have acted improperly by failing to screen and advise Ms N, and by implication B, that she did not qualify, at the very outset. This had to be before a financial stress test was done. The report indicates that although she ticked affirmatively under the BBBEEA qualification question, Ms N included her ID number and a copy of her ID, which specified that she had been naturalised in 1999, thus she never concealed her

[50] Par 23–4.
[51] *Daniels v Scribante* 2017 (4) SA 341 (CC).
[52] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC).
[53] Constitution of South Africa.

place of origin. She specified in the application that she was born in Zimbabwe. It is worth noting that no finding to the contrary is made in the judgement.

The key finding was that, in engaging on the merits of her application before determining whether she was at the right forum, the NEF strung her along. It was further found that the various instances of applying presented opportunities to determine that Ms N was not at the right forum, as she did not qualify for BEE. Had the NEF done the right thing, it would have helped Ms N cut her losses and go elsewhere. It is worth noting that there is no finding or even obiter by Van der Westhuizen AJ indicating that, in compliance with section 195(g), the NEF told Ms N that if she was naturalised after 27 April 1994, she was deemed not black under the BBBEEA and, accordingly, B could not be considered for the requested financial assistance.

As indicated earlier, Van der Westhuizen AJ set aside the remedial action because, in his view, there had been no maladministration or improper conduct by the NEF and no prejudice suffered by either Ms N or B. But the main reason for setting the remedial action aside was his finding that the Public Protector, not being a court of law and having no adjudicative power, could not order financial compensation. He went on to say that compliance by the NEF therewith would be in violation of the PFMA.

This, I must say, is staggering, in the light of the clearly affirmed powers of the Public Protector in the *EFF1* case. The Public Protector was ordered to pay the costs of the proceedings.[54] If we are to accept the rationality reasoning in this judgement, all decisions of the Public Protector ordering concrete financial compensation to remedy prejudice or injustice suffered due to improper conduct or maladministration are unlawful.

In my view, the main flaw in the judgement is the lack of definition of rationality, compounded by failure to incorporate a social justice lens and other constitutional imperatives in the approach. In *Law and poverty*, Liebenberg and Quinot argue that a reconciliation of administrative justice and socio-economic rights to advance or protect the latter, is possible even in cases where a violation of human rights is not invoked.[55]

It is worth noting that the NEF was represented by seasoned senior counsel, Vincent Maleka, and junior counsel. The Public Protector had no senior counsel and only one junior counsel. Particularly worth noting is that both Ms N and her start-up company, B, were not represented by any counsel. This is the reality of poverty and inequality. It has a racial character, with black women at the bottom, as observed in *Daniels*.[56] That is why it is important for all section 34 institutions, be they courts, tribunals or other forums, to get it right at first instance. Otherwise, injustice prevails instead of justice. Does representation matter, and, additionally, does quality of representation matter? It does.

In *Makwanyane*, Chaskalson P alludes affirmatively to this reality.[57] The majority of ordinary people do not have the time and resources to pursue the litigation ladder endlessly, or even to frame their issues persuasively. Even as chair in social justice, I still get daily requests for assistance by persons in distress over access to justice.

5. A reflection on the Public Protector approach

[54] Par 57.
[55] G Quinot and S Liebenberg "Narrowing the band: Reasonableness review in administrative justice and socio-economic rights jurisprudence in South Africa (2012) in *Law and poverty perspectives from South Africa and beyond*.
[56] Par 22.
[57] *Makwanyane* par 10.

It is disconcerting that the judgement does not clarify the court's premises, including its understanding of "reasonableness" and "rational" and basis for same. Also worth noting is that the constitutional imperatives, particularly dictating what the Public Protector and the NEF owe citizens and others, are not mentioned.[58] This makes it difficult to discern the standard against which the conduct of both is being assessed by the court.[59] Herein lie some of the administrative law judgements on rationality.

It is worth bearing in mind that decisions of bodies like the Public Protector teach the state and society about right and wrong, as Mandela said in the quote about all governments having propensities for human failings.[60] That teaching does not come only from the pinnacles of relevant institutions. Every encounter with government is a learning and teaching moment. This point is made in the Public Protector report titled *Secure in comfort*.

That is why, as the Public Protector team, we had a process called "Learning and growing together". It was also for the same reason, and to standardise approaches (and hopefully consistency in the justice experience), that I prepared a Standard Operating Protocol (SOP) on Conducting Administrative Investigations. This guided investigators from triaging to enforcing remedial action, and writing clear, concise, accurate, persuasive and professional (CCAPP) reports communicating their findings, reasoning and remedies. The SOP goes as far as the pursuit of advocacy to encourage relevant organs of state to opt in regarding implementation.

This, I believe, is in line with section 195(b) of the Constitution, which outlines principles of public administration. By failing to do so, I surmised, the NEF had strung Ms N along with enormous detrimental consequences to her and her small business, B, which was already in distress. Mindful of the fact that she did not belong to the class for which the NEF is legally empowered to provide the service she had sought, I then ordered the remedial action of an apology and a discretionary amount labelled "sorry money", which could have been anything the NEF considered fair in the circumstances.

As I said on the occasion of the release of the reports, I was mindful, as Regional Court Magistrate Doreen de Waal once said, that "[e]very decision I take ... has a negative effect on one person's life and a positive effect on someone else's". I proceeded to say:

> With that in mind, we take all due care to ensure that we leave no stone unturned in establishing what happened, what should have happened, whether there is a discrepancy between the two, and whether such discrepancy qualifies to be called maladministration. Having determined there was maladministration, we seek to restore the complainant or society to as close as possible to where they would have been but for the maladministration.[61]

Whatever hardship I imposed or condoned in the name of justice, accordingly, had to be conscionable, justifiable and proportionate. More importantly, we were mindful that, as an institution meant to ensure proper conduct in state affairs, whatever was said or omitted in reports by the Public Protector, or whatever was done or not in an investigation, had implications for shaping the governance ethos in this country. There was consciousness of the fact that the state and society are systems, and whatever happens anywhere in the system has implications for the entire system or ecosystem. We were also conscious of the

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[58] Note a contrary approach proposed by D Brand: "Judicial deference and democracy in socio-economic rights cases in South Africa" in *Law and Poverty 172*.
[59] In *Helen Suzman Foundation v Judicial Service Commission* 2015 (2) SA 498 (WCC) par 16, the court highlighted the importance of judicial reasoning transparency.
[60] See no 57.
[61] South African Government "Address by Public Protector Adv Thuli Madonsela during the Public Protector media briefing" (30-09-2014) *South African Government*.

transformative dictates of the proper conduct injunction in the Constitution.[62] On release of *Stringed along* and the other reports, I recalled Nelson Mandela's statement that:

> We were mindful from the very start of the importance of accountability to democracy. Our experience had made us acutely aware of the possible dangers of a government that is neither transparent nor accountable. To this end, our Constitution contains several mechanisms to ensure that government will not be part of the problem, but part of the solution.[63]

The mandate of the Public Protector in this regard was interpreted as supporting and strengthening democracy through ensuring accountability. Furthermore, it was important that there was no impunity for those who exercised state power and control over public resources. The scrutiny of the NEF's conduct was further informed by Mandela's words of wisdom that:

> Even the most benevolent of governments are made up of people with all the propensities for human failings. The rule of law as we understand it consists in the set of conventions and arrangements that ensure that it is not left to the whims of individual rulers to decide on what is good for the populace. The administrative conduct of government and authorities is subject to scrutiny of independent organs. This is an essential element of good governance that we have sought to build into our new constitutional order. An essential part of that constitutional architecture is those state institutions supporting constitutional democracy. Amongst those [is] the Public Protector. … It was, to me, never reason for irritation, but rather a source of comfort, when these bodies were asked to adjudicate on actions of my government and office, and judged against it. ... [T]he Public Protector [Ombudsman] had on more than one occasion been required to adjudicate in such matters.[64]

The approach in *Stringed along*, accordingly, was not based on painting the NEF as a bad institution. Quite the contrary, I had hoped to provide a teaching moment for institutional growth and excellence in service to humanity. Of course, it was important that accountability and justice prevailed in the matter, while simultaneously sending out a constitutionally resonant educational message to the entire government system regarding what would be accepted as proper conduct in conducting government business, as envisaged in section 182 of the Constitution, read with section 181 and other provisions defining the character of the state. It must be stressed upfront that the principles of public administration outlined in section 195, the ethical provisions in section 96 and 136, the prioritisation clause in section 237, and the bill of rights in chapter 2, were central to the conceptualisation and determining of the propriety of impugned conduct.

Also considered, was the power imbalance between ordinary people and organs of state, particularly when the people involved are Gogo Dlaminis. In this regard, I frequently used the metaphor of the Public Protector being a balancing buffer between the David-like Gogo Dlaminis and the mighty Goliath-like state. This was particularly with regard to inequality in terms of access to litigation resources and the adverse impact of time lapses. Our institutional approach was accordingly attuned to the reality expressed when I delivered the *Desmond Tutu International Peace Lecture*, that "an avenue such as the Public Protector has the authority and ability to mediate power and resource imbalances between the

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[62] The call to investigate improper conduct in state affairs or the public administration, articulated in section 182 and read with section 181, presupposes the expectation of proper conduct as the norm and improper conduct as an aberration.
[63] South African Government "Address by Public Protector Adv Thuli Madonsela during the Public Protector media briefing" (30-09-2014) *South African Government*.
[64] Cited in <https://sanef.org.za › address_by_public_protector_adv-_thuli_madonsela_...>.

people and government. Naturally, there is a massive power imbalance between an ordinary Gogo Dlamini and state actors, whoever they may be."[65]

For this reason, we resolved the majority of maladministration or service failure cases through conciliation and mediation. I particularly found that a facilitated face-to-face dialogue between state functionaries and those who felt prejudicially or unjustly treated, yielded better results than the paperwork culture I found on assumption of office. Mediation, I believe, harnesses the humanising power of looking into a fellow human being's eyes and witnessing the hurt that has been endured due to alleged injustice. I saw this happen when the director general of the department of higher education sat in a room with us and a complainant who had lost her business through foreclosure because of the department's non-payment on account of structural changes in the Eastern Cape. She was about to lose her house the following day. I saw similar empathy in the eyes of Minister Radebe, his deputy and DG, when they locked eyes with Mrs M, who had been hounded out of her job after whistle-blowing.

It is worth noting that the judgement in question was issued after the case was argued before the watershed constitutional judgement in *EFF1*.[66] This is the case that stated clearly that a proper reading of section 184 of the Constitution together with section 181 entailed that the powers of the Public Protector are binding when she or he issues directives.[67] This means that when the Public Protector's remedial action is a recommendation, its status is not binding. The Constitutional Court, though, said nothing about the required response from state functionaries in such circumstances. Presumably, in such circumstances, we could seek guidance from the controversial, but thoughtful and purpose-conscious, Western Cape High Court judgement in the *SABC* matter[68], while being mindful that it was later overturned by the SCA.[69]

What has been the post-apartheid administrative review approach in the courts? Specifically, what has been the purpose of administrative law and its impact on the power imbalance between ordinary people – or Gogo Dlaminis – and the mighty state, and also, by implication, on the glaring gap between law and justice that characterised the apartheid state? Has administrative law moved the needle in terms of mediating the equality gap between the state and the people, particularly individual justice seekers feeling adversely impacted by the exercise of state power and control over public resources, as Ms N did? Ultimately, is the trend in administrative law helping South Africa inch closer towards the democratic society founded on social justice envisaged in the Constitution's preamble? A great South African lawyer once stated:

> We are slowly becoming a less closed society, and, increasingly, those who exercise power are being called upon to account for the way in which power is wielded. Administrative law is becoming a battleground in which norms of behaviour in different spheres of society are being established, and those who are thought to have abused their power are being required to answer the charges against them in the

[65] Address by Public Protector Adv Thuli Madonsela on the occasion of the 5th Desmond Tutu International Peace Lecture at the University of the Western Cape, Cape Town, on 8 October 2015 <www.uwc.ac.za> *PPSPEECHTUTUPEACELECTURE071015* (accessed on 08-11-2019).
[66] *Economic Freedom Fighters v Speaker of the National Assembly*; *Democratic Alliance v Speaker of the National Assembly* 2016 3 SA 580 (CC).
[67] Par 66–7.
[68] A report of the public protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, and section 8(1) of the Public Protector Act, 1994.
[69] *The South African Broadcasting Corporation (SABC) v The Democratic Alliance*, which upheld the decision of the Western Cape High Court and dismissed the SABC's appeal on behalf of its chief operating officer (COO), Hlaudi Motsoeneng, and the minister of communications.

courts. Possibly, we are becoming a more litigious society, and although that is not necessarily a good thing, the resurgence of a belief that rights do exist and that courts can protect them is all to the good.[70]

This statement, made by Arthur Chaskalson 30 years ago while he was still director of the Legal Resources Centre, remains true today. The question that arises is whether administrative law is moving the needle, so to speak, regarding the transformative constitutionalism necessary to give birth to the society envisaged in the Constitution. Put differently, is the body of administrative law and related trends, moving in the direction where a Gogo Dlamini, like Mrs N, and a formidable state-owned enterprise, like the NEF, equally understand and feel affirmed by the administrative law narrative in court – which they trust to resolve their dispute justly – and where both feel seen, heard and, above all, understood? Late Minister Dullar Omar used to say, for people to trust the courts, which is essential; for the rule of law and sustainable democracy, they must feel that their right to understand and to be understood is respected.

What I have discerned from the literature on administrative judicial review is that the tendency to be cautious when scrutinising government action or inaction is attributed to the doctrine of deference[71]. Academics such as Hoexter apparently encourage such an approach in appropriate cases, while others, like Quinot, are more circumspect.[72] The approach in the *NEF* case seems to suggest some version of the deference approach, paradoxically not in respect of the Public Protector, but in respect of the NEF. This, though, is not the focus of the paper. Of interest to me is what seems to be the trend to look to rationality as the touchstone for administrative review, making it the central focus of administrative law. The *NEF* judgement appears to fit into that administrative law trend.

Administrative law in democratic South Africa principally flows from section 33 of the Constitution, which entrenches the right to just administrative action. Radley Henrico defines administrative law as: **"that part of constitutional law which empowers those exercising public authority or performing public functions through law, and which holds accountable to rules of law all those who exercise public power or perform public functions"** (my emphasis).

Section 33 provides as follows:

Just administrative action

33. (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
    (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
    (3) National legislation must be enacted to give effect to these rights, and must:
        (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
        (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
        (c) promote an efficient administration.

[70] A Chaskalson "The past ten years: A balance sheet and some indicators for the future" (1989) 5:3 *SAJHR* 293.
[71] P Sewperdadh and J Mubangizi (2017) "Judicial review of executive and administrative decisions: Overreach, activism or pragmatism" in *Law, democracy and development*.
[72] Hoexter's 2000 seminal paper on the doctrine of deference has received much attention, and has been somewhat accepted by components of the judiciary, as reflected in Oregan's approach in *Bato Star*, seen as the gold standard of the approach.

It is important that we interpret the Constitution and the law, including section 33, purposefully and contextually.[73] In *Makwanyane*, Chaskalson P says:

> [T]he Constitution must not be construed in isolation, but in its context, which includes the history and background of the adoption of the Constitution, other provisions of the Constitution itself and, in particular, the provisions of chapter three[74]… *It must also be construed in a way which secures for "individuals the full measure" of its protection.*[10] (My emphasis)

Any reasoning that claims its roots in section 33, accordingly, must have as its central focus the justness of administrative action. I further believe that if purposeful, the reasoning should bear in mind the broader constitutional vision and purpose, including the creation of a democratic society founded on social justice. Crucial to such an approach is not seeing any parts of section 33 as distinct, but as constituent elements of the constitutional purpose of guaranteeing everyone just administrative action, in the context of creating the just, democratic society envisaged in the preamble. PAJA, passed in fulfilment of section 33 of the Constitution, and which has since become the dominant source of administrative law, should, in my view, be interpreted along the same lines.

Some authorities observe that on matters excluded by law from PAJA, there remains some reliance on the Constitution and the common law, or a fusion of both.[75] This is apparent in *Audekraal*[76], which relies wholesale on English law for interpretation of the common law on administrative review. This additional anchoring of administrative review of conduct in state affairs that transcends the scope of PAJA – forthwith referred to as the PAJA Plus pathway – is anchored on the principle of legality, with rationality being a central tenet thereof. The legality anchoring is said to stem from the entrenchment of the rule of law in the Constitution.[77]

However, Maree and Quinot argue that the only source of administrative law today is section 33 of the Constitution[78], citing the cases of *Bato Star* and *New Clicks*, among others, as evidence. According to Hoexter, the bifurcated approach to administrative judicial reviews leading to a PAJA Plus pathway is said to have been born out of judicial activism seeking to ensure that there was no impunity for impugned administrative actions falling outside PAJA.[79] It appears, though, that the legality pathway that now seems to centre on rationality preceded PAJA.

I must admit, it would be easier for everyone, particularly unrepresented Gogo Dlaminis, if administrative law precepts were to be found under one roof. More concerning for social justice is that the PAJA Plus pathway does not always consider fairness. This is another aspect of the *NEF* judgement, despite the Public Protector being required to be fair.

It is in this area that my own observations and the authorities I have reviewed find a comfortable level of fluidity regarding the interpretation of rationality. The test in such cases seems not to refer to the other two elements of PAJA, or the umbrella concept of

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[73] *S v Makwanyane* 1995 3 SA 391 (CC).
[74] Chapter 3 of the Interim Constitution was the Bill of Rights, which is now in chapter 2.
[75] A Konstant "Administrative action, the principle of legality and deference – the case of *Minister of Defence and Military Veterans V Motau*" (2015) *Constitutional Court Review* 7, p 68–90.
[76] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* (41/2003) [2004] ZASCA 48; [2004] 3 All SA 1 (SCA) (28 May 2004).
[77] Ibid.
[78] P Maree and GP Quinot "The validity of administrative action on review" *Constitutional Court Review* Vol 7 No 1, 2015.
[79] Chaskalson, ibid.

administrative action that is just. The considerations informing the courts in determining whether they would give the government a pass, or a complainant a rebuff, seem rather unpredictable. Authorities agree that it is difficult to determine in advance what each court is likely to view as rational or irrational. Leo Boonzaier gives examples where legality was the dominant consideration, and even then, different interpretations ensued in each set of circumstances.[80] Incidentally, one of the cases where legality was not allowed to vitiate conduct is *Khumalo v MEC for Education: KZN*, apparently because the state's approach to the court to set aside its own unlawful action was considered nefarious.[81] Why should justice seekers on the PAJA Plus route not expect fairness? More importantly, why should the one pathway focus on administrative law, when the PAJA pathway is about administrative justice? Does this not take us to the pre-Constitution era, when law was at odds with justice?[82]

Interestingly, having determined that the Public Protector's decision constitutes administrative action, there apparently is no indication of the basis of the decision in *NEF*, except references to case law here and there. With PAJA not mentioned, it would appear that the judgement belongs to the PAJA Plus pathway. If this is true, this is an area that makes it difficult to determine which way the pendulum is likely to swing. You will agree with me that such a situation is considerably onerous to a lone lawyer, as is the case with many representing the lower economic levels of society. Consequently, it should be agreed that if a lawyer will struggle to determine what standard is being applied, what chance does Ms N, or any other Gogo Dlamini, have?

PAJA, on the other hand, retains the four constitutional elements of just administrative action, as envisaged in section 33, as:

1. lawful,
2. reasonable and
3. procedurally fair
4. reasons for adverse decision

Clearly, the underpinning idea is to ensure that justice prevails in the state's administrative interface with the people and other organs of state. It stands to reason that as the elements of just administrative action are interpreted, the justness of the impugned administrative action or conduct should be central to the inquiry. Equally important in my view, is that PAJA be interpreted in fulfilment of all of section 33, including section 33(3)(C), requiring the envisaged legislation, which, in the end, became PAJA, to promote efficient administration. But is it so in administrative review jurisprudence? Authorities do not confirm so.

Hoexter laments the tendency to approach administrative reviews with a formalistic or mechanistic approach, instead of a substantive approach.[83] She further quotes Karl Klare as positing the view that formalistic reasoning is a weakness in South African law generally, and not confined to administrative law.[84] She sees some of the formalistic approach as residual from the pre-apartheid era. Others attribute the challenge to the influence of English law, which highlights the hazards of supplementary jurisprudence. Supplementing jurisprudence involves the proverbial use of old skins to contain new

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[80] L Boonzaier "Good reviews, bad actors: The Constitutional Court's procedural drama in administrative law" (2015) 7 CCR 1.
[81] *Khumalo and Another v MEC for Education: Kwazulu-Natal* (DA 3/2011) [2012] ZALAC 26; [2012] 12 BLLR 1232 (LAC); (2013) 34 ILJ 296 (LAC) (29 August 2012).
[82] TN Madonsela "The role of the Public Protector in protecting human rights and deepening democracy" *Stellenbosch Law Review* Vol 23, No 1, 1 January 2012, p 4–15.
[83] C Hoexter "The future of judicial review in South African administrative law" (2000) *South African LJ* 484 (2000) 117.
[84] Ibid.

wine.[85] Regardless of the origins, the formalistic culture Hoexter further labels as "conceptual" is, in my view, anathema to the transformative constitutionalism demanded of administrative law under the Constitution of the Republic of South Africa, 1996 ("Constitution").

Transformative constitutionalism, I believe, dictates that administrative review of conduct in state affairs – including the decisions of the Public Protector and the Auditor General, among others – should start with embracing the humanity of Ms N and the Musas of this world, as the people for whom administrative justice provisions were meant to be a sword to help push back against improper or abusive exercise of state power and control over public resources. It should be clear that at the core of administrative law review is accountability.[86] A concomitant requirement is embracing the humanity of justice seekers such as Ms N, and generally placing the dignity and well-being of human beings at the centre. What about the state, you may be asking, and what about separation of powers?

Firstly, separation of powers is not a luxury or shield to be gratuitously invoked to evade accountability; it is a governance arrangement created to improve state functionality and accountability.[87] Administrative law review is an accountability and regulatory mechanism to keep the executive in check, while ensuring answerability and related taking of responsibility. It is part of the culture of justification ushered in by the Constitution, marking a clear break from the past, as noted in the Mandela quote mentioned earlier. The balancing of the rights and claims of parties involved and considerations regarding the functionality of government should, accordingly, drive administrative law review, regardless of whether it is undertaken under PAJA, the common law or the Constitution. You may ask whether transformative constitutionalism is elective for judges. According to Mahomed J, transformative constitutionalism is not an optional approach, but one dictated by the Constitution. In *Makwanyane*, Mahomed J states that:

> The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular and repressive, and which is a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates, and the future to which it seeks to commit the nation, is stark and dramatic. The past institutionalised and legitimised racism. The Constitution expresses in its preamble the need for a "new order".[88]

Judicial officers, including those called upon to dispense administrative justice, should eschew decisions that have the impact of sabotaging the achievement of the constitutional vision, values, and citizen or people entitlements. The principles courts adopt, be they separation of powers, legality or rationality, should not be the altar at which justice and justice seekers are sacrificed. No court judgement should unduly reinforce or exacerbate the hierarchical and extractive relations that created and reinforced the hierarchisation of humanity on the grounds of race, gender, disability, class or nationality, among others. Nor should they license impunity for state functionaries who treat poor people poorly. Courts should optimise not only justice in the

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[85] P Fitzpatrick (ed) *The abstracts and brief chronicles of time: Supplementing jurisprudence in dangerous supplements: Resistance and renewal in jurisprudence*, 1991.
[86] See Madonsela SANEF speech at <https://sanef.org.za › address_by_public_protector_adv-_thuli_madonsela_...>.
[87] Elaborated on in several papers on ethical governance, good governance and public accountability, and in some of the Public Protector reports.
[88] *S v Makwanyane* 1995 3 SA 391 (CC) par 261.

cases before them, but everyday justice in the interface between the government and the people.

At the very least, courts should do no harm. They should not teach the government that patently unjust actions will be condoned as long as the court views them as rational. This is essential for sustainable democracy, the rule of law and peace. If you agree with me, you should join me in asking whether the approach to and treatment of Ms N in the *NEF* case accords with what transformative constitutionalism dictates for administrative law review. If not, how do we transcend such a challenge?

Ronald Dworkin's view, which I endorse, is that, when adjudicating competing claims to rights relating to the conduct of those exercising state power, courts must bear in mind that each person deserves equal respect and concern from those who govern them.[89] If the answer lies in embracing the humanity of all who seek justice in court and services of the government, then I believe that anchoring all court decisions in Ubuntu is the answer. In that case, *Makwanyane* offers a model that can be emulated in administrative law judging and related lawyering. I also believe that there are similar kernels of wisdom in *Daniels*, among other cases, that have embraced transformative constitutionalism and anchored lawyering in bettering the human condition. In *Daniels*, for example, Madlanga J quotes Ngcobo J in *Bato Star* with approval, regarding the imperative to interpret law in context, including the purpose of the law being interpreted. Displaying an attitude diametrically opposed to Van der Westhuizen's one-sided concern for the NEF's convenience, Madlanga says:

> The respondents' argument places focus only on the rights of an occupier that section 6 of ESTA specifically itemises. It disregards all else: context counts for nothing; so does the purpose for which ESTA was enacted and section 39(2) of the Constitution is not taken into account at all. This reading of section 6 is unduly narrow."[90]

6. Can Ubuntu bring administrative law and social justice closer?

In a scene in the movie, *Prince of Egypt*, Moses, the adopted son of Pharaoh, has just accidentally killed a slave driver and is trying to run away, when his adoptive brother and heir to the Pharaoh throne, Rameses, approaches him.

"No, wait!" Rameses calls out.

"You saw what happened! I just killed a man," is Moses' reply.

"We can take care of that. I will make it so it never happened," Rameses reassures Moses.

"Nothing you can say will change what I've done," Moses replies.

Then, Rameses says, "I am Egypt! The morning and the evening star! If I say day is night, it will be written. And you will be what I say you are. And I say you are innocent!" he says as he places his hands on his brother, Moses.[91]

Can any parallels be drawn with judging some of the administrative law review and administrative oversight bodies' decisions today? This seems far-fetched. But the scene is essentially about public accountability. It is about an authority meant to enforce

[89] R Dworkin *Taking rights seriously* (1978) Harvard University Press.
[90] Daniels.
[91] Address by Public Protector Adv Thuli Madonsela during a meeting of the South African National Editors Forum on Saturday 23 November 2013.

accountability abusing employing its power to enable impunity. Not only is accountability compromised, but there is also a teaching moment for both parties involved, and for bystanders, about what is acceptable as proper conduct in state affairs. From this perspective, let us think about Parliament's decisions in response to the *Secure in comfort* report. What about the findings of zero impropriety in the exercise of state power and control over public resources in *NEF*?

Stickier, though, are cases such as *Khumalo*, which adopt a seemingly Machiavellian approach that says the end justifies the means. I must confess, not only is the outcome in *Khumalo* attractive, but the jurisprudence that reads from section 195 – the duty to act when put on notice about impropriety – was useful for my team and me in both the *Secure in comfort* and *State of capture* investigations.[92]

Of concern is that the common denominator between many of these cases, including *NEF*, is exalting government functionality imperative considerations above all else, with no or little consideration for implications for ordinary human beings, who expect proper conduct in the exercise of state power and control over public resources to be fair and just.

7. How do we transcend the jurisprudential patchwork?

Makwanyane, I believe, could offer a model that enhances constitutional resonance, including the advancement of justice in all administrative law decisions, regardless of whether they are PAJA-based or PAJA Plus-oriented. Of particular importance is ensuring synergy between law and justice, including social justice. At the core of social justice is equal enjoyment of the right to administrative action by all, regardless of economic or other status, including intersectionality of human diversity attributes. The beauty of the approach in *Makwanyane* is that the human being is not lost in technicalities, nor justice sacrificed at the altar of the law. Particularly encouraging, is the excavation and elevation of the ancient African value of Ubuntu, which in Sotho is Botho, and Rwandese, Ubumuntu.[93]

Ubuntu is a timeless African philosophy that is rooted in the interconnectedness and mutual dependence of humanity. Summarised in the proverb, "*Umuntu ngumuntu ngabantu*" ("A person is a person through others"), Ubuntu posits that I am because we are, that our humanity is intertwined with my humanity defined by yours, and vice versa. The majority of the judges in *Makwanyane* – being Langa J, Madala J, Mahomed J, Mokgoro and Sachs – recognised Ubuntu as constitutionally mandated and as the essence of the value and right to huma as the extract is from that case.n dignity.[94] About the content of Ubuntu, Langa J says:

> The concept is of some relevance to the values we need to uphold. It is a culture which places some emphasis on communality and on the interdependence of the members of a community. *It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of.* It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. *More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.*[95]

[92] *Khumalo v MEC for Education: Kwazulu-Natal* 2013 34 ILJ 296 (LAC).
[93] Par 130–1; 223–7; 237; 242–4; 250; 260; 263; 306–8; 310; 312; 374.
[94] Par 27; 57–61; 84; 95;136; 159; 171–2; 177; 213; 216; 218; 225; 233; 261; 270; 276; 297; 306–17; 326–30; 335.
[95] Par 224 (own emphasis).

The last part of Langa J's obiter underscores the social justice underpinnings of Ubuntu. The essence of sharing and mutual enjoyment of rights is social justice. At the core of *Makwanyane* is the balancing of the interests of society with those of the individual. This is clear in all the judgements, from Chaskalson's main judgement to the supplementary ones. For example, Madala J said:

> But, as Marshall J put it in *Furman v Georgia* (supra) at 371: "The measure of a country's greatness is its ability to retain compassion in time of crisis."
> This, in my view, also accords with Ubuntu – and calls for a balancing of the interests of society against those of the individual, for the maintenance of law and order, but not for dehumanising and degrading the individual.[96]

All the judgements mentioned in *Makwanyane* present elaborate narratives about the constitutional imperative to balance society's or public interest with the rights, mainly relating to life and dignity, of the accused.[97] If the court interprets the Constitution to require compassion for someone who has committed the ultimate crime of murder, it should follow that compassion is expected for someone like Ms N, who seeks help at the wrong door. Should compassion not include being told as soon as possible that this is not the right door for her, so that she might cut her losses?

Although *Makwanyane* interpreted the interim Constitution, in which Ubuntu was specifically mentioned in the post-amble, jurisprudence under the new Constitution has continued to recognise Ubuntu as underpinning the constitutional vision and values. Moreover, given the fact that the Constitution entrenches social justice at the centre of the democratic society for which it lays the foundation, Ubuntu remains a value as the essence of social justice.[98] The understanding of social justice and Ubuntu as two sides of the same coin finds resonance with Cornell and Van Marle, who assert that Ubuntu posits an approach where "the flourishing of one human being is not separate from the flourishing of all others. And, therefore, in this sense, individuation is valued as individuation within the greater context of a collective struggle."[99] In *Makwanyane*, Mokgoro J states that Ubuntu should be "viewed as a basis for a morality of cooperation, compassion, communalism and concern for the interests of the collective respect for the dignity of personhood, all the time emphasising the virtues of that dignity in social relationships and practices".

Another lesson worth taking from *Makwanyane* is the two-staged approach to the application of the limitation of rights, treating the limitation under section 33 of the interim Constitution as an exception rather than a rule. In administrative law review matters, this would entail starting with the understanding that each person is entitled to administration or conduct in state affairs that is just. Exceptions in terms of section 36 cannot be allowed if they erode the essence of the right involved.

In *NEF*, the starting point would be that in her interface with the NEF and the Public Protector, Ms N was entitled to administrative action that was just, fair and resonant with all she was constitutionally entitled to, including the right to human dignity and equality, before dealing with the NEF's entitlement to rationality in its interface with, and as part of administrative oversight by, the Public Protector. The interpretation of

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[96] Par 249.
[97] See no 103.
[98] See *Inter Alia Barkhuizen v Napier* 2007 5 SA 323 (CC); *Masetlha v President of the Republic of South Africa* 2008 1 SA 566 (CC); *Koyabe v Minister for Home Affairs* 2010 4 SA 327 (CC); *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 4 SA 395 (CC) par 145.
[99] D Cornell and K van Marle "Ubuntu feminism: Tentative reflections" (2015) 36 *Verbum et Ecclesia* 5.

rationality in this regard would not lose the human being, Ms N, in translation. Treating Ms N and others like her justly is essential for the rule of law.

8. When the edifice is compromised

While the rule of law is important for justice, including social justice, social injustice is a great threat to democracy, the rule of law, social cohesion and, ultimately, peace. Even economic prosperity does not thrive in societies going through conflict or fragility.[100] Adam Smith, who died about seven decades before the end of American slavery, said: "Justice … is the main pillar that upholds the whole edifice. If it is removed, the great, the immense, fabric of human society … must in a moment crumble into atoms."[101]

The collapse of the edifice is what brought apartheid to its knees. The same is happening in many societies where extreme opulence and poverty are juxtaposed, and where powerful groups have captured justice and political institutions.

In the book *Making a difference*, iconic musician turned foremost global humanitarian, Bob Geldof, alludes to an experiment where two sets of monkeys were rewarded disparately for the same task. As soon as the members of the under-rewarded group saw that their counterparts were getting a better deal, they stopped investing in the task, which was to fetch a rock.[102] Geldof opines that the monkeys reacted to what they perceived as unfair treatment, and that "[t]his demonstrates how ingrained our reaction to unfairness is; indeed, this experiment seems to suggest it is more of an instinct than an emotion".[103]

A withdrawal of enthusiastic investment of skill and, more importantly, a withdrawal from business, of their social licence to operate, do not augur well for a thriving economy. This on its own further threatens social justice, as poverty and inequality thrive more in poorly performing economies. We should be concerned that people are not prepared to tolerate injustice forever. People did not do so under slavery, colonialism and apartheid. People are, as we speak, reacting to what they see as economic injustice.

The cry for justice demands to be heard. It may start as a whisper, which, if unheard, grows into a loud cry; but, if that, too, is not heard, acting up follows. This, I believe, is what happened in connection with the Marikana massacre that followed workers' demands for a living wage and decent accommodation commensurate with human dignity.[104] The same applies to the #FeesMustFall and #OutsourcingMustFall protests by students. Developments globally suggest we have not seen the worst. Geldof further opines: "There is a societal pride in standing up for what's right." He proceeds to quote ancient stoic philosopher Seneca, as having said: "Injustice never rules forever."[105]

Injustice, indeed, is always bound to fall, though it may take time. The risk that courts need to appreciate is that when people feel there are no credible outlets to vindicate their rights, they resort to what Chief Justice Mogoeng Mogoeng refers to as self-help.[106]

Sadly, good people who hate injustice are often lured into what appears to be standing up for justice, whereas those mobilising them are using them in the pursuit of self-interest. It is easier when people are poor, because the political entrepreneurs who

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[100] K McIntosh and J Buckley *Report on economic development in fragile and conflict-affected states* (2015).
[101] H Uchida (ed) *Marx for the 21st century* (2004) 68.
[102] K Robertson and E Robertson (eds) *Making a difference* (2019).
[103] K Robertson and E Robertson (eds) *Making a difference* (2019).
[104] Gqubule, *No longer whispering truth to power* (2016).
[105] K Robertson and E Robertson (eds) *Making a difference* (2019).
[106] Annual Human Rights Lecture, University of Stellenbosch, faculty of law (2013).

harvest people's despair and related anger as ladders for their selfish advancement, give people scapegoats for their unjust circumstances. They also provide them with hope, an important reason to go on in life, believing that tomorrow will be better than today. People who call themselves classical liberals tend to overlook this.

At the Constitution Hill dialogue referred to earlier, we agreed that the extreme poverty and inequality along the contours of apartheid had created fertile ground for the racially divisive Gupta-commissioned campaign, which introduced the hashtag #WhiteMonopolyCapital and encouraged hostility towards white people. The campaign did not cause divisions; it leveraged unhealed divisions of the past by suggesting that white wealth was the sole explanation for black poverty. Needless to say, the agitators, mostly people or associates of persons implicated in state capture, never mentioned the role of corruption, maladministration and plain theft of public resources in maintaining and exacerbating poverty and inequality. It is interesting, for example, to note that nine years ago, in 2010, poverty was at 49%, suggesting that it has since grown by more than 6%.[107]

It is my considered view that social justice and integrity, both of which are constitutional imperatives, are, together with climate change, are South Africa's most pressing challenges. I further believe that as long as there is injustice somewhere, there cannot be sustainable peace anywhere. It is also my view that courts should not be part of the problem regarding perpetuating injustice and lack of integrity in state affairs. The courts' contribution in this regard can only be through jurisprudence; and, to make the right impact, jurisprudence that is resonant with the vision and ethos of the Constitution must permeate the entire court system, from the Small Claims Courts to the Constitutional Court. Such jurisprudence must contribute to healing the divisions of the past and establishing a democratic society based on social justice.

We must ask, can and has post-apartheid administrative law jurisprudence contributed to healing the division of the past and contributed to establishing the social democracy envisaged in the Constitution? This inevitably speaks to transformative constitutionalism in administrative law and its contribution to closing the gap between law and justice that characterised the apartheid state. This would bring social justice and administrative justice together through the way Quinot and Liebenberg believe is possible for administrative justice and socio-economic rights judicial review.[108] Judicial officers are required, as ultimate guardians of the Constitution, to view conduct in state affairs and the work of administrative oversight bodies, like the Public Protector, through a social justice lens anchored in the value of Ubuntu. So should lawyers. If the *NEF* case reflects a common approach or trend, we should be concerned.

9. The future: *Quo vadis* administrative law?

The judiciary has acquitted itself admirably as the ultimate guardian of the Constitution, at times clutching the country from the brink of catastrophe. Some of that admirable work happened under administrative law review. However, the jurisprudence is not consistent, and, at times, is indifferent to the circumstances of ordinary people, with the impact of reinforcing social and economic disparities. The gravitation towards legality focusing on rationality as the touchstone, with much fluidity on interpretation, seems to pose a danger to administrative law review's contribution to the advancement of constitutional imperatives on social justice. The *NEF* case is an example in this regard. The purposive, contextual and Constitution-vision-driven approach in *Makwanyane* offers

[107] "Poverty trends in South Africa: An examination of absolute poverty between 2006 and 2011", Statistics South Africa, 2014. P Lehohla "Statistician-General report no 03-10-06" (06-03-2014) *Statssa* <http://beta2.statssa.gov.za/publications/Report-03-10-06/Report-03-10-06March2014.pdf?> (accessed on 11-11-2019).
[108] *Law and Poverty* 199.

a model worth considering for closing the gap between justice, particularly social justice, and some of the judicial review outcomes, particularly below the SCA.

In summary, *Makwanyane* offers a model for judicial review that embraces a social justice lens and ensures that the judiciary plays its part in using the Constitution to "heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights". In *Makwanyane*, the court places emphasis on:

1. A purposive and contextual interpretation of rights guided by the constitutional vision;
2. Fostering human dignity, underpinned by the value of Ubuntu;
3. Balancing of interests of individuals and societal interest, based on shared humanity and equality of entitlements regarding human rights;
4. Reading rights and other constitutional provisions as interdependent components of a new societal ethos sought to be ushered in, and not as isolated provisions;
5. Reconciliation and fostering social cohesion over vengeance;
6. Healing the divisions of the past, including the history of state abuse of power and related delinquency;
7. Borrowing cautiously from international and comparative law, mindful of differences in wording in the local Constitution and other texts;
8. The transformative imperatives in the Constitution;
9. A utilitarian approach to the doctrine of separation of powers; and
10. The teaching potency and societal shaping impact of state and judicial action.[109]

Going forward, consideration should be given to:

1. A review of administrative law judgements in the last 25 years, focusing on patterns and impact on the broader transformative constitutional project;
2. Establishing an Administrative Court along the lines of the Equality Court, but with stricter requirements of suitability;
3. Establishing an electronic resource system for administrative court judges;
4. Aligning the Public Protector Act with the Constitution to limit the employment of supplementary jurisprudence to review this constitutional institution's work; and
5. Providing everyday justice education for ordinary Gogo Dlaminis like Musa and Ms N, covering administrative justice, its implications for them and how to leverage social and other forms of accountability to employ administrative justice to make democracy work for them and for all.

Justice holds society together. When justice fails, the fabric of society cannot hold. Courts have much potency for playing their part not only in holding society together, but in delivering a new society where democracy works for all and no one is left behind.

Professor Thuli (Thulisile) N Madonsela
Stellenbosch, 11 November 2019

[109] *S v Makwanyane* 1995 3 SA 391 (CC).

Bibliography

Books

Cameron E *Justice: A personal account* (2014), South Africa: NB Publishers.
Chikane R *Breaking a rainbow, building a nation: The politics behind #MustFall movements* (2018), South Africa: Picador Africa.
Currie I and de Waal J The Constitution and Administrative Law (2001), South Africa: Juta
Dworkin R *Taking rights seriously* (1978), United States: Harvard University Press.
Fitzpatrick P (ed) *The abstracts and brief chronicles of time: Supplementing jurisprudence in dangerous supplements: Resistance and renewal in jurisprudence* (1991), United States: Duke University Press.
Leroux M and Davis D *Lawfare – judging politics in South Africa* (2019), South Africa: Jonathan Ball.
Liebenberg S and Quinot S *Law and poverty perspectives from South Africa and beyond* (2011), South Africa: Juta.
Robertson K and Robertson E (eds) *Making a difference* (2019), United Kingdom: Cassell Illustrated.
Smith MN (ed) *Confronting inequality – The South African crisis* (2018), South Africa: Jacana Media.
Quinot G *Administrative law cases and materials* (2008), South Africa: Juta.
Quinot G (ed) *Administrative justice in South Africa – An introduction* (2015), South Africa: Oxford University Press.
Uchida H *Marx for the 21st century* (2004), Oxfordshire: Routledge.

Chapters in edited collections

Madonsela T "Confronting inequality in confronting accountability" in MN Smith (ed) *Confronting inequality – The South African crisis* (2018).
Turok B "The inequality danger: The imperative to normalize freedom in confronting accountability" in MN Smith (ed) *Confronting inequality – The South African crisis* (2018).

Theses or dissertations

NL Moore *In a class of their own: The Bantu Education Act (1953) revisited*, MHCS thesis, University of Pretoria (2005).

Unpublished sources

Musa Plan for Social Justice (Social Justice M-Plan) concept paper (2018).
Report on the Social Justice Stakeholder Workshop (26 June 2018).
Report on the Social Justice Expert Round Table (27 October 2018).
Report on the Social Justice Economic Dialogue: Towards a socially just and sustainable economy (18 March 2018).
Report on the Women's Land Summit (April 2019).
Report on the Inaugural Social Justice Summit and International Conference (29–31 August 2019).

Journal articles

Cornell D and Van Marle K "Ubuntu feminism: Tentative reflections" (2015), 36, *Verbum et Ecclesia* <http://dx.doi. org/10.4102/ve.v36i2.>.
Davis DM "The relationship between courts and the other arms of government in protecting and promoting socio-economic rights in South Africa: What about separation of powers", Per/PELJ 212(15) 5.

Fombad C and Kibet E "Transformative constitutionalism and the adjudication of constitutional rights in Africa", *AHRJ* 2017.
Heyns et al (eds) *Discrimination and the law in South Africa Vol 1 (1994)*, South Africa Centre for Human Rights.
Himonga C and Taylor M "Reflections on judicial views of Ubuntu" (2013), *PER/PELJ* 16.
Hoexter C "The future of judicial review in South African administrative law" (2000), 117 *South African Law Journal* 484.
Hoexter C "The principle of legality in South African administrative law" (2004) *MqLawJl* 8; (2004) 4 *Maquarie Law Journal* 165.
Klare K "Legal culture and transformative constitutionalism (1998), 14*SAJHR* 146.
Madonsela T "Confronting inequality: Thoughts on public accountability and policy resonance" (2018), 68 *Sabinet* 22–5.
Madonsela T "Beyond putting women on the agenda" (1995), *Agenda*, 11:24, 27–38, DOI: 10.1080/10130950.1995.9675392.
Madonsela T "Social justice and the ideological orientation of South Africa's legal dispensation" (2019), *Umrabulo* Issue 45.

Printed media

Segal D "How Bell Pottinger, PR firm for despots and rogues, met its end in South Africa", *The New York Times* (04-02-2018).

Reports

McIntosh K and Buckley J *Report on economic development in fragile and conflict-affected states* (2015).
Pali Lehohla *Report by Statistician-General* (03-10-06)
Public Protector *Report on children shall pay* (2013/14).
Public Protector *Report on secure in comfort* (2013/14).
Public Protector *Report on state of capture* (2016/17).
Public Protector *Report on stringed along* (2014/15).
Public Protector *Report on regulating justice* (2014/15).

Cases

Barkhuizen v Napier 2007 5 SA 323 (CC).
Daniels v Scribante and Another 2017 4 SA 341 (CC).
Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly 2018 2 SA 571 (CC).
Joseph v City of Johannesburg 2010 4 SA 55 (CC).
Khumalo v MEC for Education: Kwazulu-Natal 2012 12 BLLR 1232 (LAC).
Koyabe v Minister for Home Affairs 2010 4 SA 327 (CC).
Masetlha v President of the Republic of South Africa 2008 1 SA 566 (CC).
National Empowerment Fund v Public Protector 2017 ZAGPPHC 610.
South African Bureau of Standards v The Public Protector and Another 2019 ZAGPPHC 101.
S v Makwanyane 1995 3 SA 391 (CC).
The Public Protector v Mail & Guardian Ltd 2011 4 SA 420 (SCA).
Union of Refugee Women v Director: Private Security Industry Regulatory Authority 2007 4 SA 395 (CC).

Legislation

Municipal Systems Act 32 of 2000.
Promotion of Administrative Justice Act 3 of 2000.
Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

Constitution

Constitution of the Republic of South Africa, 1996.

Internet

Anonymous "Address by Public Protector Adv Thuli Madonsela at the Sanef KZN quarterly council meeting" (23-11-2013) *SANEF* <Address by Public Protector Adv Thuli Madonsela at the Sanef KZN Quarterly Council Meeting>.
Anonymous "Definition of 'Joe Soap'" *Collins* <https://www.collinsdictionary.com/dictionary/english/joe-soap>.
Anonymous "Marikana Massacre 16 August 2012" *South African History Online* <https://www.sahistory.org.za/article/marikana-massacre-16-august-2012>.
Government of South Africa "PP: Thuli Madonsela: Address by the Public Protector, during the Public Protector media briefing (30/09/2014)" *Polity* <https://www.polity.org.za/article/pp-thuli-madonsela-address-by-the-public-protector-during-the-public-protector-media-briefing-30092014-2014-09-30>.
Mogoeng WA Mogoeng "2013 Annual Human Rights Lecture of the Stellenbosch law faculty: The implications of the office of the Chief Justice for constitutional democracy in South Africa" (25-04-2013) *Stellenbosch University* http://blogs.sun.ac.za/law/files/2013/04/2013-Annual-Human-Rights-Lecture-Stellenbosch-University-25-April-2013_FINAL.pdf.
National Empowerment Fund "The National Empowerment Fund stands by its decision to decline the funding application by Ms Naomi Ngwenya" (01-10-2014) *National Empowerment Fund* <www.nefcorp.co.za/wp-content/uploads/2018/07/Media-Statement-PP-Findings-Oct-2014-FINAL.pdf>.
Ndelu S "#Hashtag: An analysis of the #FeesMustFall movement at South African universities" *Centre for the Study of Violence and Reconciliation* <https://www.csvr.org.za/pdf/An-analysis-of-the-FeesMustFall-Movement-at-South-African-universities.pdf>.
Office of the Public Protector "Address by Public Protector Adv Thuli Madonsela on the occasion of the 5th Desmond Tutu International Peace Lecture at the University of the Western Cape, Cape Town, on 08 October 2015" (08-10-2015) *UWC* < www.uwc.ac.za>.
Stats SA "Mid-Year population estimates 2018" (23-07-2018) *Stats SA* <http://www.statssa.gov.za/?p=11341>.
World Bank "The World Bank *Annual Report* 2018" *The World Bank* <http://documents.worldbank.org/curated/en/630671538158537244/pdf/The-World-Bank-Annual-Report-2018.pdf>.
United Nations "Social Justice in an open world: The role of the United Nations" *The United Nations* <https://www.un.org/esa/socdev/documents/ifsd/SocialJustice.pdf>.