REMEDYING THE MALADIES OF ‘LESSER MEN OR WOMEN’: THE PERSONAL, POLITICAL AND CONSTITUTIONAL IMPERATIVES FOR IMPROVED ACCESS TO JUSTICE

Mark Heywood and Adila Hassim

ABSTRACT
The South African Constitution establishes a vision for the country that is based on fundamental individual equality and non-discrimination, supported through rigorous respect for the rule of law. This vision of the role of law in society as integral to upholding constitutional principles, however, relies on ensuring access to legal services. This is, in fact, directly provided for in s 34 of the Constitution. The recognition of the importance of access to justice has been a cornerstone of the work of Justice Edwin Cameron throughout his career as both a judge and an activist. This article examines the continuum between access to legal services and access to justice and the need for individualised access to legal services in order for constitutional rights to be enforced. The authors hold that there are positive obligations on the state, as well as the courts, to facilitate access to justice. While the state has been discharging this duty mainly in the sphere of criminal justice, there is a duty and a growing need to enable the advancement of constitutional and civil claims. Unless the need for justice and remedies for injustice are met by the courts and the law, there will be negative consequences for the popular legitimacy of the courts and indeed the Constitution itself.

I INTRODUCTION
This article aims to illustrate how the body of Edwin Cameron’s work as both a lawyer and a judge encapsulates a set of personal, political and constitutional imperatives for improving access to justice. Building on Cameron’s work in the early 1990s on AIDS and human rights, as well as on his articles and judgments, we argue that devising and implementing concrete strategies to improve access to legal services have become urgent and outstanding obligations under the Constitution of the Republic of South Africa, Act 108 of 1996.

For the purposes of this article, we begin with Cameron’s initiative in 1992 to hold the first national conference on AIDS and legal rights, co-hosted by the Centre for Applied Legal Studies (CALS).

established the AIDS Law Project (ALP) at CALS in 1993, with a view to pioneering work around HIV and access to justice. In the same year, South Africa’s first Constitution and Bill of Rights was adopted, creating a platform for both human rights advocacy and litigation on AIDS. Cameron’s observations in this regard were that:

If it is true that over the next decade AIDS will supplant race in our nation’s life as the major criterion of discrimination and exclusion, then the moral challenge to lawyers and law makers will be enormous.²

Within one year of the formation of the ALP, South Africa not only had a new Constitution, but also a democratic government, with an avowed commitment to both human rights and HIV prevention. In this context, one of the earliest achievements of the ALP, under Cameron’s leadership, was its participation in the finalisation of South Africa’s first National AIDS Plan which, in a chapter on ‘Human Rights and Law Reform’, recognised as a priority the need to ‘amend and adapt legal procedures to enable persons living with HIV and AIDS to have effective recourse to justice’.³

Since 1994, influenced by the litigation and policy work of the ALP, the individual rights of people living with HIV have been well established in law.⁴ In recent years, the needs of people with HIV have increasingly embedded themselves in issues of social and economic rights: access to grants, access to health care, access to medicines, and the rights of women facing violence and continued inequality.

This evolution, part legal and part social, is reflected in the new HIV & AIDS and STIs National Strategic Plan, 2007-2011 (NSP) which identifies one of its four key priority areas as being ‘Human rights and access to justice’.⁵

This article affirms Cameron’s prescient view regarding the need that would arise for courts to demonstrate flexibility in order to realise the constitutional vision of equality in access to the law. Drawing from the experience of enforcing the Constitution in the sphere of HIV and AIDS, we reflect upon the necessary continuum between access to legal services and access to justice; the centrality of individualised access to legal services to fulfilling

⁴ Some of the reported and unreported cases that the ALP has been involved with include: Hoffmann v SAA 2001 (1) SA 1 (CC); NS v SA Mutual Life Assurance Society t/a Old Mutual 2001 ZALC 65; A v X case no JS 597/02 (LC); Perreira v Bucceleuch Montessori Pre-School case no 4377/02 (WLD); FRM v Health Professions Council of South Africa case no 26129/01 (TPD); Costa Gazidis v Minister of Public Administration case no A 2050/04 (TPD); Naude v The Member of the Executive Council, Department of Health, Mpumalanga case no JS 331/2004 (LC); Treatment Action Campaign v Minister of Health case no 15991/04 (TPD); Treatment Action Campaign v Minister of Health 2005 (6) SA 363 (T); N v Government of the RSA 2006 (6) SA 543 (D); N v Government of the RSA 2006 (6) SA 575 (D); Minister of Health v New Clicks SA 2006 (2) SA 311 (CC); NM v Smith 2007 (5) SA 250 (CC); South African Security Forces Union v Surgeon General case no18683/2007 (TPD).
the constitutional vision and, arising from this, the duties that fall upon the
government, the courts and civil society to fulfil this vision.

II Access to Legal Services and Access to Justice

We have already referred to the 1994 recognition of the need for a new approach
to legal procedures in order to allow people to defend their rights. However,
the advances in legislation and the theoretical protection of the law referred
to above has not been accompanied by advances in access to legal services.
This fact was noted by Cameron in his judgment in Permanent Secretary,
Department of Welfare, Eastern Cape v Ngxuza (hereinafter Ngxuza), where
he stated that: ‘The law is a scarce resource in South Africa. This case shows
that justice is even harder to come by’.

In Ngxuza, Cameron affirmed the right of the applicants to bring a class
action, in part because the claimants lacked access to ‘individualised legal
divisions, with small claims unsuitable for if not incapable of enforcement in
isolation’. This case illustrated the difference in the types of legal services
that are necessary. On the one hand, there is litigation that seeks to provide
individual vindication of rights, on the other there is the litigation that seeks
to give content to a right in relation to a concrete demand. Minister of Health v
Treatment Action Campaign (No 2) (hereinafter ‘the TAC case’), is an example
of the latter: the applicants sought to vindicate, within the broad parameters of
s 27 of the Constitution, a right to a drug that would prevent transmission of
HIV from mother to child during childbirth.

Having succeeded in this, the subsequent denial of this aspect of the right
required individualised legal services to ensure enforcement. In this case,
however, the fact that the TAC was instrumental in bringing the precedent-
setting litigation meant that it was able to monitor the implementation of the
Constitutional Court judgment and, where necessary, use its legal nous to
maintain pressure on recalcitrant parts of government to implement the order. Without knowledge of human rights and continued access to legal services,
the right given effect to by the Court would not have been felt amongst those
who most needed its protection.

This resonates with the warning by Cameron to law students at the
University of the Witwatersrand in February 2000:

The less our Constitution succeeds in fulfilling for all South Africans the promise of genuine
equality, the less chance it has of surviving as the basis of our public life in an uncertain
future.

6 2001 (4) SA 1184 (SCA).
7 Ibid para 1.
8 Ibid para 14.
9 2002 (5) SA 721 (CC).
10 Treatment Action Campaign v MEC for Health, Mpumalanga case no 35272/02 (TPD).
Cameron went on to say that there was a need for the legal profession to invest in the debate about our country’s future and pay attention ‘to the absence of legal services to the great majority of our population’ because:

If the legal system does no more than protect the affluent, and serves as no more than a mechanism for the accumulation of copious wealth by some senior practitioners, it has little chance of surviving as the common foundation of our country’s future.

In these passages, Cameron links access to legal services with access to justice. Access to legal services is often a necessary tool for the resolution of disputes amongst private parties and between government and the governed. Via the rule of law, which the Constitution describes as one of its founding values, the rights in the Bill of Rights can be made real. Equal access to law is necessary because, as Chief Justice Langa observed:

if we did not have the rule of law then it would be the law of the jungle, the survival of the fittest … some of our people … have been weakened by the previous systems of government here, and they cannot afford to face, and get fairness when pitted against, the strongest among us. That is why the rule of law is important – it’s important because it’s an equalising process between those who are in authority and the ordinary citizen.

But while the ‘equalising’ role of law may seem obvious, the reality is that – 14 years after the advent of constitutional democracy – the overwhelming majority of people still do not have access to affordable legal services and hence access to legal systems. This is lamentable in and of itself. But it is even more so in a context of growing social inequality. When people are poor, individual incidents of unjust administrative action, unfair labour practices or unfair denial of access to services, can tip them into greater poverty and widen inequalities. In such cases individual remedies, achieved through individual access to law, are vital to dignity and well-being. Although less visible, they are as important as sweeping orders of courts to government to abide by its positive duties, such as in the TAC case, that are achieved when social justice litigation uses the law to hold government to its positive social obligations.

Unfortunately however, the evidence shows that, despite the constitutional architecture, law and justice are not yet the same. The distinction between the two was made nearly 30 years ago, by the late Justice Didcott in In Re Dube. Didcott was dealing with one of the countless victims of arbitrary apartheid laws. A man who was decreed as an ‘idle person’ because he could not find employment could be summarily deported by order to the farms. Because Dube was disabled by epilepsy and therefore not capable of being employed,

12 Ibid 376.
13 Ibid.
14 ‘Confidence in the Judicial System is a Fragile Asset, Says the Chief Justice’ Business Day (21 October 2008).
15 The growth and character of the new inequalities are described in the following way: ‘after the base changes with the elimination of apartheid, it seems that those historically well off, in terms of income and assets, have taken better advantage of the benefits of growth’. Government Communication Information Service Towards a Fifteen Year Review (2008) 102. See also B Pottinger The Mbeki Legacy (2008) 237–38.
16 In Re Dube 1979 (3) SA 820 (N).
Didcott found a loophole to frustrate Dube’s deportation. Nonetheless he warned that: ‘Parliament has the power to pass the statutes it likes, and there is nothing the Courts can do about that. The result is law. But that is not the same as justice’.\(^ {17}\) In this instance however, Didcott was in his own words able to ‘apply the Act and to do justice simultaneously’.\(^ {18}\)

Under apartheid the separation of law and justice minimised the importance of access to the courts for people’s lives. In fact, the courts were a blight on people’s lives. Successful political trials that began to chip away at apartheid law did not alter this. Today, however, the supremacy of the Constitution makes access to the law for ordinary people more important – and thus also the challenge of overcoming the barriers that inhibit access to the law. The ability to utilise the law becomes an important (although not the exclusive) tool for making real the rights and duties in the Constitution.

In the post-apartheid constitutional era, the legal system has begun a process of transformation. There has been a partial demographic transformation of both the judiciary and the legal profession.\(^ {19}\) To a limited extent there has also been a conscientising of the judiciary regarding the values of the Constitution. Today, therefore, it should be possible to do more to challenge injustice, because unlike in Dube’s day, law and justice are supposed to reinforce each other.

But do they?

### III Individualised Access to Legal Services as a Cornerstone of Fulfiling the Constitutional Vision

We want to analyse this question by returning to issues about rights that have arisen in relation to HIV. It is possible to examine the interconnectedness of law and justice through the case of *NM v Smith* (hereinafter *NM*).\(^ {20}\)

The applicants were three unemployed women – all living with HIV – who live in informal settlements in and around Atteridgeville, Tshwane. The case arose as a result of the disclosure of their identities and HIV status in a biography of Independent Democrats’ Patricia de Lille, written by Charlene Smith.
a journalist who has written extensively about women, gender-based violence and HIV/AIDS.

NM and her co-applicants argued that the disclosure of their names and HIV status in the book—without their consent—was an invasion of their rights to privacy, dignity and psychological integrity, having a significant impact on their mental and intellectual well-being. Initially, all they sought from the defendants was an apology and the removal of the offending passages from all unsold copies of the book. But when this was denied, they approached the Witwatersrand High Court asking for an order directing the defendants to issue a private apology to each of them; ensure that the offending passages in all unsold copies of the book were excised or removed; and pay damages of R200 000 to each plaintiff.

It was common cause that the three women had not, in fact, consented to their names and HIV status being made public. Yet they lost. The High Court’s Justice Schwartzman found that neither Smith nor De Lille had intended to invade the privacy of the three women, that they had both acted reasonably and that there was no legal duty on them to have obtained express informed consent from the women. However, the fact that the women had asserted their rights through legal action after the publication of the book meant that they were entitled to have their names removed from the book and to limited damages from the publisher. Each woman was awarded R15 000.

NM is relatively rare in post-apartheid legal history, because it involves three women who are black, poor, and barely literate asserting their rights via the legal system. However, their attempt to prove that their rights to privacy and dignity had been violated only succeeded after a five-year battle through every tier of the legal system. After a nine-day trial at the High Court, Schwartzman J found that their rights to privacy had been violated, but only by the publisher. He proceeded to award limited damages of R15 000 to each woman, based on their socio-economic status, finding that the women’s fears ‘of a likelihood that the disclosure of their status in the book will lead to this fact becoming well known is more imagined than real’ because they had little formal education and were illiterate in English.21 According to Schwartzman J:

The English literacy level of the community in which they live was not explored in evidence. What is known is that some of the people with whom some of them associate read magazines and newspapers … [B]iographies, especially those about politicians, are directed at and read by a limited number of people. This limited readership is unlikely to include people with whom the plaintiffs come into regular contact or may come into contact.22

However, even the damages were effectively nullified after it was revealed to the Court that, on the eve of the trial, the women had declined an offer of a financial settlement that was higher than the damages awarded. The result of this was an amended order of costs, in terms of Rule 34, awarding costs against the women from the first day of the trial. Below we return to the ques-

21 NM v Smith [2005] 3 All SA 457 (W) para 51 (hereinafter Schwartzman).
22 Ibid paras 51.1, 51.3.
tion of the application of Rule 34 in these circumstances, and the duty of the court to interpret court rules in accordance with s 39 of the Constitution.

After the women decided to appeal the judgment, their application was declined first by the High Court in August 200523 and then by the Supreme Court of Appeal (SCA) (without reasons and with costs) in November 2005. Eventually, however, in December 2005 the Constitutional Court granted application for leave to appeal, and heard the matter in May 2006.

The women’s effort, and trust that the Constitution would provide them with a remedy, was ultimately vindicated in May 2007. The Court upheld the appeal on the grounds that ‘it was in the interests of justice’.24 In the majority judgment the Court found that the women’s right to privacy had been violated.25 Referring to the right to dignity, Madala J commented that:

The indignity experienced by the applicants as a result of the disclosure of their names, seems to have been treated lightly by the court a quo. The case of the applicants was reduced to a malady that had befallen ‘lesser men or women’. They were regarded as poor, uneducated, coming from an insignificant informal settlement and their plight disclosed in the book was not likely to spread far beyond the community where they resided. There was, in my view, a total disregard for the circumstances of the applicants and the fact that because of their disadvantaged circumstances their case should have been treated with more than ordinary sensitivity.26

Referring specifically to Schwartzman J’s reasoning on the issue of damages, Madala J also noted that ‘if the applicants were disadvantaged it does not mean that they should not fight for the restoration of their dignity damaged by the disclosure of their names and HIV status’.27

What is the meaning of ‘more than ordinary sensitivity’ when it comes to legal process and adjudication? Is Madala J suggesting that if plaintiffs are very poor, uneducated, or obviously intimidated by legal process that the courts should factor this into their legal reasoning and rulings? Is Madala J hinting that, because courts are also bound by the Bill of Rights, they should reflect dignity in their judgments? Had Schwartzman J thought outside of the spirit and purpose of the Constitution?

The adoption of the Constitution ushered in a new normative era in relation to the application of law. The consequence is that all law, including the common law, is to be interpreted and applied in a manner consistent with the values protected by the Constitution. This requires a significant shift by judges, at all tiers of the judicial system, in the adjudicative and deliberative process. Indeed the development of the common law may be required even when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects. Then, the common law must be

23 NM v Smith case no 24948/02 (WLD) (unreported judgment available at <http://saflii.org>).
24 NM (note 4 above) para 31.
25 Ibid para 47.
26 Ibid para 53.
27 Ibid para 75.
adapted so that it grows in harmony with the ‘objective normative value system’ found in the Constitution.\textsuperscript{28}

We believe that a similar consideration applies when applying rules of procedure that may fundamentally affect a person’s access to justice. We explore this below, in the context of the duty on courts.

IV THE DUTIES ON COURTS

According to Geoff Budlender:

Access to justice should be a core concern of the courts, for it goes to the very essence of their function. If people in need are not able to bring their cases to court and present them effectively, then the courts can not satisfactorily perform the function entrusted to them by the Constitution.\textsuperscript{29}

Access to justice takes many forms and can be influenced by many factors. Without public education people cannot take advantage of their rights. If the courts are too distant, or their procedures conducted in archaic language, if access to lawyers is unaffordable, or poor people are deterred by fears of harsh awards of costs, then they will be deterred from accessing justice. In this context, Budlender seems to suggest that the very duty vested in the courts, places upon them another duty to ensure that they are able to fulfill this responsibility. If they are not, then it is incumbent upon them to reform the legal system.

For example, as foreshadowed earlier, in \textit{NM}, one of the issues under appeal concerned whether the applicants should have been penalised in relation to costs for turning down an offer of a financial settlement, made on the eve of the trial, having chosen instead to seek a vindication of their rights.\textsuperscript{30} In this regard, in his minority judgment, Langa CJ made the following trenchant observation:

While I accept that, as the Respondents contend, Rule 34 serves an important purpose and undermining the potential to save costs would remove any impetus to make offers of settlement different principles apply to cases involving constitutional rights. This case is about the essential constitutional rights to dignity and privacy of some of the most vulnerable people in society … No matter the value of the offer, it does not give acknowledgement of wrong doing that is often far more valuable than any money could be.\textsuperscript{31}

By saying this, Langa CJ suggests that courts have duties not only in terms of measuring law and conduct against the Constitution, but also in measuring, where appropriate, the rules and procedures for access to justice. Langa’s statement implies that there is a need for the courts to consistently interpret their inherent powers so as to make the legal system and the courts themselves more accessible and affordable to poor people.

\textsuperscript{28} \textit{S v Thebus} 2003 (6) SA 505 (CC) para 28.


\textsuperscript{30} \textit{NM} (note 4 above) paras 83-9.

\textsuperscript{31} Ibid para 119.
The purpose of Rule 34 is to provide the defendant with an opportunity to avoid litigation by making an offer of settlement or to avoid the costs of litigation subsequent to the making of the offer.\textsuperscript{32} Such offer may be made unconditionally or without prejudice. The fundamental distinction being whether there is an admission or denial of liability. Where an offer that is made without prejudice is accepted that is the end of the plaintiff’s claim and there can be no further recourse. Rule 34 also aims to protect the public good by placing the risk of persistent litigation on the plaintiff.\textsuperscript{33}

The offer is therefore a relevant factor for the court to consider in relation to costs (after having given judgment). The usual result is that a judge will order a defendant to pay the costs of the plaintiff up to the date that the offer was made, and the plaintiff to pay the defendant’s costs subsequent to that date. Rule 34(12) makes it clear, however, that the court’s discretion regarding the award of costs is not affected by the rule. So, while there may be an ordinary practice in relation to the application of the rule, the court may exercise its discretion to make a different award of costs, taking into account the particular circumstances of the case.\textsuperscript{34}

It is argued here that there are two constitutional provisions which govern the interpretation of Rule 34: s 39(2), which requires courts, tribunals or like-fora to promote the spirit, purport and objects of the Bill of Rights; and s 34 concerning access to courts. The Constitutional Court’s jurisprudence on costs in constitutional matters is also pertinent.\textsuperscript{35}

Related to this is the consideration that should be given to matters that seek more than financial compensation for a wrong suffered. In defamation cases, the restoration of dignity through a public court order may be more important to the plaintiff than monetary recompense. Without prejudice offers are therefore particularly relevant in this context.

The trial judge in \textit{Naylor v Jansen} placed emphasis on the fact that the case concerned defamation stating that “in defamation actions, the quantum is largely irrelevant” and “it is well-settled law that, in a defamation action, the quantum most often, essentially, takes the form of a solatium”.\textsuperscript{36}

This reasoning was upheld by the SCA. The SCA rejected the argument that the amount awarded in a defamation case should constitute full vindication of the character of the plaintiff.\textsuperscript{37} Cloete JA, writing for the Court, stated:

\begin{itemize}
\item \textsuperscript{32} \textit{Omega Africa Plastics v Swisstool Manufacturing} 1978 (3) SA 465 (A) 477A.
\item \textsuperscript{33} \textit{Naylor v Jansen} 2007 (1) SA 16 (SCA) para 13 (quoting \textit{Findlay v Railway Executive} [1950] 2 All ER 969 (CA)).
\item \textsuperscript{34} Ibid para 14.
\item \textsuperscript{35} In \textit{Motepe v Commissioner for Inland Revenue} 1997 (6) BCLR 692 (CC) para 30, the Court stated that ‘one should be cautious in awarding costs against litigants who seek to enforce their constitutional right against the State, particularly where the constitutionality of the statutory provision is attacked, lest such orders have an unduly inhibiting or “chilling” effect on other potential litigants in this category’. See also \textit{Ex Parte Gauteng Legislature In Re Gauteng School Education Bill of 1995} 1996 (3) SA 165 (CC) para 36; \textit{Ferreira v Levin} 1996 (2) SA 621 (CC) paras 10-11; \textit{Sanderson v Attorney-General, Eastern Cape} 1998 (2) SA 38 (CC) paras 43-4; \textit{African National Congress v Minister of Local Government and Housing, KwaZulu-Natal} 1998 (3) SA 1 (CC) para 34.
\item \textsuperscript{36} \textit{Naylor} (note 33 above) para 15 (quoting \textit{Omega} (note 32 above)).
\item \textsuperscript{37} Ibid para 17.
\end{itemize}
while it is correct to say that, where a defamation has been admitted or proved, the amount awarded by the court serves, *inter alia*, to vindicate a plaintiff’s reputation, it is wrong to say that acceptance of the same amount – offered secretly, without admission of liability and coupled with a public denial of wrongdoing – achieves the same result. It manifestly does not. The attitude of the defendants that Jansen should have been satisfied with the money is reminiscent of the Roman character Lucius Veratus, who walked the streets slapping the faces of his fellow citizens, and then ordered a slave who was following him with a bag of money to pay each 25 asses (the amount prescribed by the Twelve Tables) in compensation.\(^{38}\)

It is this construal of the centrality of the right to dignity that is echoed in Langa’s dissent in *NM*.\(^{39}\) The interpretation by the majority, as per Madala J, suggests that the plaintiffs held out for more money due to a ‘poor assessment of damages by their counsel’.\(^ {40}\) Regardless of the questions that circle around the astuteness of the amount of damages sought by the plaintiffs, the interpretation by the majority failed to balance Rule 34 against the right of the plaintiffs to seek a vindication of rights (in addition to a damages award) and their right of access to courts. Had the offer in *NM* been made unconditionally (instead of ‘without prejudice and without admission of liability’) the decision to persist in the litigation would have been ill-advised. However, Schwartzman J took a different position, finding that the offer was ‘no more than what a court does where there is no offer – it vindicates the Plaintiffs’ rights by making an appropriate award of damages’.\(^ {41}\) The Constitutional Court made no reference of the need to interpret the Rule in the light of constitutional values that are now to infuse the interpretation of all law. However, the effect of the *Naylor* Court’s application of Rule 34 is to uphold the spirit, purport and objects of the Bill of Rights.

A similar approach may be found in *Sailing Queen Investments v Occupants La Colleen Court*.\(^ {42}\) Jajbhay J considered the application of Rule 10 of the Uniform Rules of Court (regarding joinder) in the context of evictions.\(^ {43}\) Departing from *Xantium Trading 387 v Molefe*,\(^ {44}\) he held that s 39(2) of the Constitution placed an obligation on the courts to promote the spirit and purport of the Bill of Rights when interpreting Rule 10.\(^ {45}\) Drawing from the guidelines for a court in such cases that were outlined in *Port Elizabeth Municipality v Various Occupiers*,\(^ {46}\) the joinder (of the City) was ‘necessarily incidental to the vindication of the respondent’s constitutional rights of access to adequate housing, protection from arbitrary evictions and dignity’.\(^ {47}\)

The spirit and approach that ought to be adopted by courts when faced with situations similar to those described above is well explained by Cameron.

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38 Ibid.
39 *NM* (note 4 above) paras 119-20.
40 Ibid para 89.
41 *NM* (note 23 above) para 9.
43 Ibid para 17.
44 Case no 23759/05 (WLD) 2007.
45 *Sailing Queen* (note 42 above) para 16.
46 2005 (1) SA 217 (CC) para 17.
47 *Sailing Queen* (note 42 above) para 17.
In his separate concurring judgment in *De Freitas v Society of Advocates of Natal* he stated: ‘The crisis in legal services in this country is too acute, and the threat this represents to the administration of justice too grave, for the Courts to enforce tradition without there being compelling reason in the public interest to do so’.

V. REALISING THE RIGHT TO LEGAL SERVICES?

Against that backdrop, it is now relevant to examine what the Constitution itself says about access to legal services.

In terms of s 34 of the Constitution, ‘everyone has the right to have any dispute that can be resolved by application of the law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum’. In *President of the Republic of South Africa v Modderklip Boerdery* (hereinafter *Modderklip*) the Constitutional Court highlighted the importance of s 34, stating:

The first aspect that flows from the rule of law is the obligation of the State to provide the necessary mechanisms for citizens to resolve disputes that arise between them. This obligation has its corollary in the right or entitlement of every person to have access to courts or other independent forums provided by the State for the settlement of such disputes … The mechanisms for the resolution of disputes include the legislative framework, as well as mechanisms and institutions such as the courts and an infrastructure created to facilitate the execution of court orders.

In contrast, s 35 deals explicitly with the right of detained and accused persons to legal representation, at state expense, ‘if substantial injustice would otherwise result’. In this way, the Constitution draws on a tradition of fair trial rights from other jurisdictions, particularly the United States. There, the right was made real by Black J in *Gideon v Wainwright*.

According to him, it was an ‘obvious truth’ that ‘in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him’.

The bulwark of state enterprise that is aimed at criminal justice requires that the accused is represented in order for justice to be done and in order to prevent harm to an individual unjustly accused. The state generally discharges its obligations in terms of s 35 by providing funding to the Legal Aid Board (LAB), who provide legal assistance to accused persons without the means to employ the services of a lawyer. The LAB was established in 1969, but

48 2001 (3) SA 750 (SCA).
49 Ibid para 5. Ten years earlier, and before the advent of constitutional democracy in South Africa, Cameron put this another way, writing: ‘But hierarchically directed rule-enforcement can be a poor basis for legal development in a modern society. The decisions of our courts often illustrate inability to encompass change and immunity to urgent social needs’. E Cameron ‘Judicial Accountability in South Africa’ (1990) 6 SAJHR 22, 59.
50 2005 (5) SA 3 (CC).
51 Ibid paras 39, 41.
53 Ibid.
reformed in the late 1990s with a view to enabling it to fulfill the Constitution’s mandate of improving access to justice. In 2003, the LAB launched Justice Centres throughout South Africa, and over the last decade there has been a progressive improvement in access to legal services for persons accused of criminal offences. Thus, in its Annual Report 2007/2008, Judge Dunstan Mlambo, the chairperson of the LAB, claims ‘the LAB provides legal representation in 45% to 65% of matters in District Courts, in 50% to 75% of Regional Courts and in 80% to 95% in High Courts’.\(^5\) However, Mlambo also notes that ‘representation for civil matters has lagged behind’ and that there is ‘a growing number of applicants for legal aid who fail the means test but who, although gainfully employed, are still unable to afford their own legal representation.’\(^5\)

What is important to note here is the disjunction between the LAB’s contribution to the progressive realisation of the s 35 right, and the de facto erosion of the s 34 right, as a result of an inability to meet the continually growing need for access to courts. This is evidenced in the data captured by the LAB which show that of the 396 068 new matters that reached the Legal Aid Board in 2007-08, only 38 755 were civil cases. As the following table illustrates a similar situation exists in relation to finalised matters:\(^5\)

<table>
<thead>
<tr>
<th>New matters total</th>
<th>Finalised matters total</th>
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<tbody>
<tr>
<td>Criminal</td>
<td>Civil</td>
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<tr>
<td>357 313</td>
<td>38 755</td>
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<tr>
<td>90%</td>
<td>10%</td>
</tr>
<tr>
<td>Criminal</td>
<td>Civil</td>
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<tr>
<td>359 124</td>
<td>40 614</td>
</tr>
<tr>
<td>90%</td>
<td>10%</td>
</tr>
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Mlambo refers to ‘unequal resourcing from the fiscus’ for civil and criminal legal aid, but does not comment on the legality of the budgetary choices that are being imposed on the LAB.\(^5\) However, the reality is that in terms of s 7(2), the state has a duty to respect, protect, promote and fulfil all rights in the Bill of Rights. We interpret this as meaning that, as with all other rights, the state bears a positive obligation in relation to s 34. The state’s obligations go beyond merely providing criminal legal aid, or the court infrastructure that is described in the Fifteen Year Review.\(^5\) The duty must include addressing the barriers that prevent access to the courts. Thus we return to our main theme: One of the greatest barriers to access to justice is the lack of access to legal services and it is incumbent upon the state to put in place the necessary legislative, policy and budgetary framework to ensure the realisation of the right to access to justice.

It is not in dispute that a legislative framework alone is not enough. Indeed, in Modderklip, the Court stated that the state’s obligation

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55 Ibid 2.
57 Ibid 3.
goes further than the mere provision of the mechanisms and institutions referred to above … The precise nature of the state’s obligation in any particular case and in respect of any particular right will depend on what is reasonable, regard being had to the nature of the right or interest that is at risk, as well as on the circumstances of each case.59

This is why we argue that, with an incontrovertible need for and risk of not providing access to the courts, there is a duty to increase access to civil legal aid. It should be obvious that it is not only in a criminal justice context that ‘substantial injustice’ may result from the absence of access to legal services. For example, recently, the LAB was requested by the Cape High Court (in the case of MEC for Health, WC v Goliath60) to provide legal services to patients who had been forcibly isolated at Brooklyn Chest Hospital because they had XDR-TB. The legal team was dedicated to providing legal representation, but due to budgetary constraints were not able to put up their own expert evidence to respond to the expert evidence put up by the state. As a result, the evidence of the state went unchallenged.61

In this case, the involvement of the LAB was as a result of the court order, as opposed to a structural requirement that in all cases involving a deprivation of freedom and security of the person legal representation should be provided. A similar situation arose in the Johannesburg High Court.62 Here Satchwell J had to twice make an order that the provincial Department of Health must procure legal representation for the respondent patients. As a result a private law firm was appointed to represent the respondents.63

The difference that legal representation and access to courts make has been demonstrated in a range of cases involving socio-economic rights. In the TAC case, access to legal services for HIV positive pregnant women meant that they were able to challenge government policy so as to prevent irreparable harm to the health of their children. Similarly, in the judgments in favour of TAC seeking execution orders of the original judgment of Botha J, it was explicitly recognised that the risk to pregnant women with HIV of not getting Nevirapine would lead to ‘irreparable harm’ to their children.64 Thus it is that, whether in relation to health, housing, education, food or access to social assistance access to legal services is often the lever that enables the realisation of rights.

It is in recognition of this and hopefully because it is cognisant of its constitutional duties that the LAB has repeatedly requested additional funding from the Department of Justice and Constitutional Development to expand access to

59 Modderklip (note 50 above) para 43.
60 Case no 13741/07 (CPD) (unreported judgment available at <http://saflii.org>).
61 We were advised that this was the case by a member of the legal team. However, it has subsequently been disputed whether the lack of expert evidence was due to budgetary constraints. No other reason has been provided for the decision not to lead expert evidence.
63 Paragraph 2 of the order of 4 April 2007 states: “The MEC of Health, Gauteng Province, the Applicant, is (for the Second time) to procure and provide, at cost to the Applicant, non legalaid [sic] or pro-bono legal representation in the form of at least one [sic] attorney and one advocate to the respondents in this matter. Such legal representation shall be appointed and have consulted with the respondents by 11:30 am Thursday 5th April 2007”.
64 TAC v Minister of Health case no 21182/2001 (TPD) (8 March 2002) paras 12-3.
legal services to civil matters. The need for civil representation increases year on year. Indeed, in its 2006 submission on the Legal Services Charter, it identified the following as areas where there is a growing need for civil legal aid:

- The unmet rural demand for legal assistance, which is largely civil in nature.
- Vulnerable circumstances of farm workers need legal support. Meeting the challenges created by rapid urbanisation.
- HIV/AIDS impacting on the nature and scale of the demand for legal services.
- An increase in the level of crimes against women and children and high levels of under reporting in relation to these crimes. Civil legal aid support for women and children.
- The high cost of private legal services making them unaffordable to the majority of the people.
- An increase in the demand for legal assistance in civil legal matters, including from emerging entrepreneurs in the small, medium and micro enterprises (SMME) sector, and the growing pressure for legal assistance with the progressive realisation of all rights enshrined in the Constitution.
- An increased demand for legal services in the area of the enforcement of administrative rights.
- The growing illegal immigrant and refugee population impacting on the nature and scale of the demand for legal services.
- Language and literacy barriers impeding the quality of the legal service.
- A shrinkage in available donor funding and an increased demand on the Legal Aid Board to provide services previously provided by the non-governmental organisation (NGO) sector.
- A reduction in funding for NGOs resulting in a growing expectation for the State to finance NGOs.\(^65\)

Something of the precise nature of the need for civil legal aid is reflected in the following breakdown of the civil legal aid that was provided by the LAB in 2007 according to category:\(^66\)

<table>
<thead>
<tr>
<th>Type of civil matter</th>
<th>Granted – Internal</th>
<th>Granted – Judicare</th>
<th>Grand Total</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Civil – Divorce</td>
<td>10,347</td>
<td>1,032</td>
<td>11,379</td>
<td>30%</td>
</tr>
<tr>
<td>Civil – Claim sounding in money (excl RAF)</td>
<td>5,749</td>
<td>276</td>
<td>6,025</td>
<td>16%</td>
</tr>
<tr>
<td>Civil – Other</td>
<td>3,386</td>
<td>142</td>
<td>3,528</td>
<td>9%</td>
</tr>
<tr>
<td>Civil – PIE</td>
<td>2,156</td>
<td>333</td>
<td>2,489</td>
<td>7%</td>
</tr>
<tr>
<td>Category</td>
<td>New Matters</td>
<td>Reopen</td>
<td>Total</td>
<td>Percentage</td>
</tr>
<tr>
<td>------------------------------------------------------</td>
<td>-------------</td>
<td>------------</td>
<td>-----------</td>
<td>------------</td>
</tr>
<tr>
<td>Civil – Maintenance</td>
<td>1,197</td>
<td>84</td>
<td>1,281</td>
<td>3%</td>
</tr>
<tr>
<td>Civil – Property Rights/Title Deeds disputes</td>
<td>1,099</td>
<td>85</td>
<td>1,184</td>
<td>3%</td>
</tr>
<tr>
<td>Civil – Domestic Violence</td>
<td>1,042</td>
<td>122</td>
<td>1,164</td>
<td>3%</td>
</tr>
<tr>
<td>Labour – Unfair dismissal (Labour Court)</td>
<td>950</td>
<td>382</td>
<td>1,332</td>
<td>4%</td>
</tr>
<tr>
<td>Children – Maintenance</td>
<td>939</td>
<td>103</td>
<td>1,042</td>
<td>3%</td>
</tr>
<tr>
<td>Children – Custody</td>
<td>853</td>
<td>191</td>
<td>1,044</td>
<td>3%</td>
</tr>
<tr>
<td>Civil – Interdict</td>
<td>580</td>
<td>52</td>
<td>632</td>
<td>2%</td>
</tr>
<tr>
<td>Children – Claim sounding in money</td>
<td>574</td>
<td>20</td>
<td>594</td>
<td>2%</td>
</tr>
<tr>
<td>Children – Administration of estate</td>
<td>516</td>
<td>13</td>
<td>529</td>
<td>1%</td>
</tr>
<tr>
<td>Civil – Credit Agreement Act disputes</td>
<td>449</td>
<td>16</td>
<td>465</td>
<td>1%</td>
</tr>
<tr>
<td>Civil – Rescission of judgment</td>
<td>382</td>
<td>50</td>
<td>432</td>
<td>1%</td>
</tr>
<tr>
<td>Civil – Application for Spoliation</td>
<td>371</td>
<td>21</td>
<td>392</td>
<td>1%</td>
</tr>
<tr>
<td>Civil – ESTA</td>
<td>360</td>
<td>62</td>
<td>422</td>
<td>1%</td>
</tr>
<tr>
<td>Labour – Unfair labour practices (Labour Court)</td>
<td>353</td>
<td>17</td>
<td>370</td>
<td>1%</td>
</tr>
<tr>
<td>Labour – Review (arbitration awards – Labour Court)</td>
<td>267</td>
<td>169</td>
<td>436</td>
<td>1%</td>
</tr>
<tr>
<td>Children – Access</td>
<td>262</td>
<td>106</td>
<td>368</td>
<td>1%</td>
</tr>
<tr>
<td>Other</td>
<td>2,070</td>
<td>296</td>
<td>2,366</td>
<td>6%</td>
</tr>
<tr>
<td>Total</td>
<td>33,902</td>
<td>3,572</td>
<td>37,474</td>
<td>100%</td>
</tr>
</tbody>
</table>

The figures provided by the LAB are far from representative of the total demand for civil legal aid, or indeed the need. There are other organisations that provide legal services on a pro bono basis, both in the NGO sector as well as the private sector. However, the capacity of the LAB to take on new matters and provide quality representation will depend on the budget that is allocated for this by the Department of Justice and Constitutional Development. It cannot be left to the LAB to meet this need alone. In addition to the role of the sector, there may well be a need to establish and/or strengthen institutions closer to the ground that can provide access to remedies for individuals with rights claims that have already been well-defined by law. For example, in relation to social grants or access to particular health-care services – services where a delay in remedy may be a life and death matter for the claimant.\(^67\)

\(^67\) This idea was suggested to the authors by Justice Kate O’Regan.
VI THE DUTY TO EDUCATE AND INFORM ‘EVERYONE’ ABOUT HUMAN RIGHTS

The demand for legal services will be heavily influenced by the level of knowledge amongst the population of their constitutional rights. Without knowledge it becomes impossible for people to exercise their rights, or to hold the state to its duties. As a result, we argue that an inherent aspect of the positive obligations on the state in relation to constitutional rights is the active education of the populus regarding the Constitution. However, surveys consistently show poor knowledge of the law and human rights.

The role of civil society in this regard is equally important. The consistent invocation of the Constitution by the TAC, for example, is borne out of a growing conscience amongst its members and supporters of constitutional rights and duties.

In the TAC case, a mobilisation of civil society in relation to the constitutional right of access to health care preceded and continued during the litigation. It led to a watershed moment in legal history and in the halting of a damaging and pervasive irrationality regarding the science of AIDS. As a result, this dramatic demonstration of the utility of the law fortified the social movement, confirming Cameron’s assertion that ‘the law, though of limited utility in all too many situations of injustice and untruth, becomes when well utilised amidst minimal conditions for its success an extremely powerful force’.

However, it is important to qualify what we have just said about the TAC case. Achieving the maximum benefits from the order of the Constitutional Court ultimately required individual knowledge of rights far beyond the activist membership of TAC. It also required access to legal systems, to enforce the judgment in communities where for one reason or another it was not being implemented, and mothers were not being made aware of their rights. The fact that such knowledge did not exist, and that even where it did people lacked the means to enforce the right, meant that the order was not uniformly implemented. Six years later it is still estimated that 70 000 children annually are born with HIV.

The foregoing should prove that a court judgment is not a magic bullet that in itself will remedy dire social circumstances. It requires a synergistic

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68 It is surely significant that s 12 of the National Health Act 61 of 2003 explicitly creates a duty on ‘the national health department and every provincial department, district health council and municipality [to] ensure that appropriate, adequate and comprehensive information is disseminated on the health services for which they are responsible’. This echoes the injunction of the Constitutional Court in TAC (note 9 above) para 123 that: ‘The magnitude of the HIV/AIDS challenge facing the country calls for a concerted, co-ordinated and co-operative national effort in which government in each of its three spheres and the panoply of resources and skills of civil society are marshalled, inspired and led. This can be achieved only if there is proper communication, especially by government. In order for it to be implemented optimally, a public health programme must be made known effectively to all concerned, down to the district nurse and patients. Indeed, for a public programme such as this to meet the constitutional requirement of reasonableness, its contents must be made known appropriately’.


relationship between all organs of state in order to achieve this result. The court may provide clarity as to the duty that rests on the state, it may hold that the state is failing to meet this duty, and it may require that the state take certain steps to remedy this. But without an appropriate response by the state (both the executive and the legislature) that gives effect to the judgment, and pressure from civil society where necessary through legal services and courts, justice will only be partially achieved.

VII CONCLUSION

In this article we have set out the constitutional imperative for improving access to justice. But at the heart of the fulfillment of this duty there are also personal and political imperatives. Unless people can access courts they will be unable to protect their dignity. Without dignity, law’s legitimacy will be undermined and without the rule of law democracy and the Constitution itself will feel hollow for the poor majority in South Africa.

The personal imperative for those who are poor and unequal to have access to justice has increased since 1994. It has also been reinforced by the increase in inequality. As we have demonstrated with reference to the NM case, access to the courts is often the only way to reclaim dignity, autonomy, privacy as well as a range of other listed rights.

In Chief Lesapo v North West Agricultural Bank, Mokgoro J pointed to some of the consequences that s 34 and the rule of law seek to avoid when she stated that:

The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable.71

The connection between the personal and political has been made explicit in a range of jurisprudence including (again) by Cameron. In Tswelopele Non-profit Organization v City of Tshwane Metropolitan Municipality,72 Cameron approvingly quotes Kriegler J in Fose v Minister of Safety and Security:

the harm caused by violating the Constitution is a harm to the society as a whole, even where the direct implications of the violation are highly parochial. The rights violator not only harms a particular person, but impedes the fuller realisation of our constitutional promise. Our object in remedying these kinds of harms should, at least, be to vindicate the Constitution and to deter its further infringement.73

71 2000 (1) SA 409 (CC) para 22.
73 1997 (3) SA 786 (CC).
74 Tswelopele (note 72 above) para 26.
Cameron goes on to say that ‘the remedy should instill humility without humiliation, and should bear the instructional message that respect for the Constitution protects and enhances the rights of all’.75

Unless the need for justice and remedies for injustice are met by the courts and the law, there will be negative consequences for the popular legitimacy of the courts and indeed the Constitution itself. This creates a political imperative to improve access to justice – one that cannot be left to politicians. A loss of legitimacy for the rule of law will make the Constitution prey to corrupt politicians, particularly in the period of economic and social distress that lies ahead. Advocates for social justice depend upon improved access to justice. But if the Constitution and courts are delegitimised by a loss of belief in justice, the result will be that the instruments for holding government to account and enforcing social justice are weakened. Constitutionalism will be replaced by populism.

75 Ibid para 27.