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Mahlangu, Siyabonga

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BALANCING LEGALITY AND CERTAINTY: THE OUDEKRAAL PRINCIPLES AND THEIR DEVELOPMENT

SIYABONGA MAHLANGU

Thesis submitted in fulfilment of the requirements of the degree of

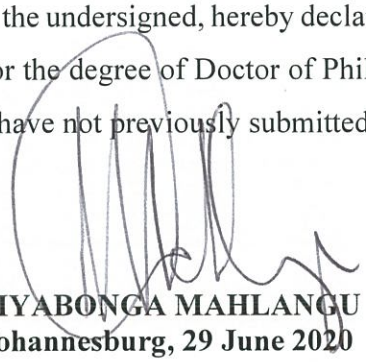
DOCTOR OF PHILOSOPHY

in the School of Law of the University of the Witwatersrand

June 2020

DECLARATION

I, the undersigned, hereby declare that this thesis is my own, unaided work. It is being submitted for the degree of Doctor of Philosophy at the University of the Witwatersrand, Johannesburg. I have not previously submitted it, in whole or in part, at any university for a degree.



SIYABONGA MAHLANGU
Johannesburg, 29 June 2020

ABSTRACT

This thesis is a study of the Oudekraal principles and their development. In *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA), the Supreme Court of Appeal fundamentally transformed the approach of South African law to the anomaly that an unlawful administrative act may have legal consequences. The court rejected past explanations for this phenomenon, such as the presumption of validity, the distinction between voidness and voidability, the theory of legal relativity and, where the courts have declined to set aside unlawful acts on grounds such as delay, judicial pragmatism. Instead, the court developed a principled approach by which it sought to strike a careful balance between the competing rule-of-law values of legality and certainty.

Four principles emanating from this seminal judgment are identified in the thesis. These are that an unlawful act may have legal effect for so long as it has not been set aside; that the legal effect depends on whether the validity of an originating act is a precondition for the validity of the subsequent act; that an unlawful act which compels a person to do or not to do something must be valid, and a person affected by it is entitled to challenge its invalidity collaterally; and that the court reviewing an unlawful act has discretion to refuse the remedy of setting aside even if a ground of review has been established.

The thesis investigates how the courts since *Oudekraal* have interpreted, applied and developed these four principles. It concludes that there is an interplay between the various principles. In this interplay the Constitutional Court has recently tended to emphasise the value of legality over that of certainty, resulting in a lack of clarity as to what it means for an unlawful act to have legal effect prior to its being set aside.

ACKNOWLEDGEMENTS

Flaws in public administration are inherent. They are mainly due to an unlawful administrative act of one sort or other. Unaware of the legal deficiencies in an administrative act, a person may rely on it to fashion his or her affairs. A reviewing court may decline to set it aside an unlawful act because, under certain circumstances, doing so would prejudice an innocent person who had relied on it. The court's refusal in this regard results in a conundrum that, uncertain certain circumstances, an unlawful act may have legal consequences.

It was during my time as a candidate attorney at Webber Wentzel Bowens (WWB) under the tutelage of Moshoeshoere Thulare (late) that I first came into conscious contact with the conundrum that an unlawful act may have legal consequences. In the year 2000, Mosh granted me the rare privilege to influence the legal strategy in the review application we brought on behalf of the South African Telecommunications Regulatory Authority (SATRA) to review and set aside the decision of the Minister of Communications. The Minister had purportedly withdrawn the Interconnection and Facilities Leasing Guidelines when she had no statutory authority to do so. In seeking to understand the consequences of the Minister's decision, I came to appreciate the double-edged impact of the presumption of regularity. On the one hand, it facilitated the enforcement of discriminatory apartheid laws whilst on the other it provided much needed certainty in public administration. I owe Mosh a great deal of gratitude for introducing me to this fascinating area of law.

Throughout my career as an attorney, I have dealt with the adverse consequences an unlawful administrative act may have on commerce, human rights and the daily life of citizens. In my brief tour of duty in government, I spent four years as a Special Advisor to a Minister. I experienced the day-to-day challenges administrators face when they have to make far-reaching decisions in a complex and uncertain environment. Now, as Group Executive responsible for regulation at Telkom, I continue to experience complex situations where an unlawful administrative act may be left intact through industry indifference, acquiescence or calculated inaction.

In the final analysis, I have come to understand that, for good or ill, unlawfulness in administrative decisions is inevitable and that society is, at times, governed on this basis. It is for this reason that I undertook this study.

From my fascination with the effect of the presumption of regularity, my supervisor, Professor Cora Hoexter, guided me to an intellectually rewarding journey with *Oudekraal Estates v City*

of Cape Town. Her invaluable critique and guidance have helped me improve my analysis and appreciate the gaps in my argument. I wish to thank her for her guidance and support.

I wish to thank Mzi Mgudlwa, the CEO of Edward Nathan Sonnenberg Inc, for allowing me, as former director at the firm, the privilege to access the library when I worked on my proposal. I am also grateful to Corlett Manaka of Werkmans and his partners for allowing me to use their library throughout the last five years. I thank their librarians for responding to my endless queries. I appreciate the countless breakfasts I have had with Matodzi Ratshimbilani, my former business partner at Mahlangu Nkomo Mabandla Ratshimbilani, who had the misfortune to debate different aspects of *Oudekraal* instead of enjoying his scrumptious meals.

Throughout my studies, I have had the privilege to test my views with eminent senior counsels in public law, Advocates Danny Berger SC, Sesi Baloyi SC, Gilbert Marcus SC, Vincent Maleka SC, and Muzi Sikhakhane SC. I thank Gilbert for looking at some of my written work in the early days of my research and nudging me to finish. I thank Vincent for his feedback on my research on collateral challenge. I wish to thank Muzi for gifting me with three editions of Sir William Wade's book on Administrative law.

A special thanks to Bruce Mujeyi, my long-time friend from Rhodes University. I am forever indebted to him for spending his time poring over each iteration of every chapter and diligently commenting on them. He is a true friend, scholar and gentleman.

Lastly, I wish to thank my wife Mandlesilo Msimang who has had to endure a five-year soliloquy on *Oudekraal*. I appreciate her willingness to engage in debates about esoteric finer points of law and query some of my propositions despite the fact she is not a lawyer. I thank our children, Bume, Akhani, Dedani and Thari, and my little niece Usekhona, for allowing me to steal their time to write this thesis.

This thesis states the law as at 31 December 2019. In the citation of cases in the body of the thesis and footnotes, I have omitted additional and joined parties. Full details are provided in the table of cases.

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LIST OF ABBREVIATIONS

Acting HoD	-	Acting Head of Department
AD	-	Appellate Division, predecessor to the SCA
AJ	-	Acting Judge
AJA	-	Acting Judge of Appeal
CCR	-	Constitutional Court Review
CJ	-	Chief Justice
Constitution	-	Constitution of the Republic of South Africa, Act 103 of 1996
Conversion Act	-	Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988
DCJ	-	Deputy Chief Justice
DJP	-	Deputy Judge President
ECA		Environmental Conservation Act 73 of 1989
ed(s)	-	editor(s), edition
EFF	-	Economic Freedom Front
et al	-	and others
GG	-	Government Gazette
GN	-	Government Notice
HoD	-	Head of Department
ILJ	-	Industrial Law Journal
Income Tax Act	-	Income Tax Act 68 of 1962, as amended.
Interim Constitution	-	Constitution of the Republic of South Africa, Act 200 of 1993
J	-	Judge
JA	-	Judge of Appeal
JJ	-	Judges

JP	-	Judge President
MEC	-	Member of the Executive Council of a Province
NDPP	-	National Director of Public Prosecutions
NEMA	-	National Environmental Management Act 107 of 1998
PAJA	-	Promotion of Administrative Justice Act 3 of 2000, as amended
para(s)	-	paragraph(s)
PFMA	-	Public Finance Management Act 1 of 1999
President	-	President of the Republic of South Africa
Premier	-	Premier of a province of the Republic of South Africa
Proc	-	Proclamation
reg(s)	-	regulation(s)
s(s)	-	section(s)
SALJ	-	South African Law Journal
SARFU	-	South African Rugby Football Union
SCA	-	Supreme Court of Appeal
SGBs	-	School Governing Bodies
SITA	-	State Information Technology Agency SOC Ltd
Systems Act	-	Local Government: Municipal Systems Act 32 of 2000.
VAT Act	-	Value Added Tax Act 89 of 1991

CHAPTER 1

INTRODUCTION

1.1 BACKGROUND TO THE THESIS

In *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*, the SCA changed the approach of the South African courts in determining the legal consequences of an unlawful administrative act.[1] The appeal court departed from previous reliance by the courts on the presumption of regularity, Wade's theory of legal relativity, and the effect of a refusal by a court to set aside an unlawful act.[2] Instead, the SCA found Forsyth's theory of the second actor more compelling in its explanation of how an unlawful act may have legal consequences.[3] Based on this theory, the appeal court formulated principles that help courts to determine the legal consequences of an unlawful act prior to its being set aside.

In *Oudekraal*, the Administrator of the then Cape Province had granted Oudekraal's predecessor-in-title an approval to develop its property into a township. The applicable provincial Ordinance prescribed four successive stages for obtaining development rights: permission from the Administrator to establish a township; an appropriate endorsement on the title deed and the opening of a township register by the Registrar of Deeds; approval of the general plan by the Surveyor-General within a certain period; and the lodging of the approved general plan with the Registrar of Deeds within three months of the approval. Oudekraal's predecessor-in-title complied with the procedural requirements for obtaining the approval. The only outstanding procedural step before development could commence on the property was the approval of an engineering services plan by the Cape Metropolitan Municipality, the predecessor to the City of Cape Town.

In 1965, Oudekraal purchased the property. Thirty-one years later, in 1996, Oudekraal submitted its engineering services plan to the Cape Metropolitan Municipality for approval. The municipality refused to consider and approve the plan. It contended that the development rights had lapsed since the Administrator of the Cape Province had approved the general plan outside the time limits stipulated in the applicable provincial Ordinance. In the view of the

[1] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) ('*Oudekraal*').
[2] Ibid paras 27–8.
[3] Ibid para 29 with reference to Christopher Forsyth ' "The Metaphysic of Nullity": Invalidity, Conceptual Reasoning and the Rule of Law' in Christopher Forsyth & Ivan Hare (eds) *Essays in Public Law in Honour of Sir William Wade QC* (2005) 141.

municipality, the Administrator's approval, the basis upon which it could consider and approve the engineering services plan, was ultra vires and of no legal force or effect.

Oudekraal approached the High Court to enforce the Administrator's approval.[4] In response, the municipality challenged the validity of the approval contending that it had been granted outside the statutory time period. The High Court upheld the municipality's contention. It ruled that, in the circumstances, granting Oudekraal the declaratory order sought would have had the effect of transforming an unlawful act into a lawful one contrary to the principle of legality.[5] The municipality had challenged the invalidity of the Administrator's approval collaterally. Though it had allowed a long time to elapse before doing so, the High Court nevertheless exercised its discretion to allow the municipality to raise the collateral challenge.[6]

On appeal, the SCA found the approval of the general plan invalid because the Administrator had granted the approval without taking into account material information, namely, the existence of certain important Muslim graves and Kramats on the property which the general plan would see destroyed.[7] That being so, the court found it unnecessary to enquire into the validity of the extensions of time granted by the Administrator.[8] The SCA went on to enquire whether the municipality was entitled simply to disregard the approval of the general plan and treat it as having no legal effect by reason of its invalidity.[9] The SCA answered this question in the negative[10] and emphasized that until it was set aside, the approval existed in fact and had legal consequences that could not simply be disregarded.[11]

According to the appeal court, the Cape Metropolitan Municipality's refusal to consider the engineering services plan and the basis for such refusal presented it with the following questions: '[W]hether, or in what circumstances, an unlawful administrative act might simply be ignored, and on what basis the law might give recognition to such acts'.[12] These questions arose in the context of an age-old conundrum that an unlawful administrative act may, in certain circumstances, have legal effect or provide a basis for later legally competent administrative acts.[13]

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[4] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2002 (6) SA 573 (C) ('*Oudekraal HC*').
[5] Ibid 593C–D.
[6] Ibid 595D–E.
[7] *Oudekraal* (note 1 above) para 25.
[8] Ibid para 13.
[9] Ibid para 26.
[10] Ibid.
[11] Ibid.
[12] Ibid para 1.
[13] Ibid para 26.

In answering these questions, the SCA opined that '[t]he proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question'.[14] Following this conclusion, the court assumed the principal task of finding an objective measure to determine the legal consequences of unlawful administrative acts and to explain the conundrum.

In this latter regard, the SCA briefly canvassed various possible explanations, including the presumption of regularity,[15] the effects of a court's exercise of its discretion to refuse to set aside an unlawful administrative act,[16] Professor Wade's theory of legal relativity[17] and Professor Forsyth's theory of the second actor.[18] At the centre of these different approaches is a debate whether an unlawful administrative act is void or voidable. The protagonists of this distinction argue that a voidable administrative act has legal effect until set aside, whilst a void administrative act is devoid of any legal effect from inception. The SCA found Forsyth's theory of the second actor to be the most illuminating explanation of the conundrum. [19]

Forsyth's theory of the second actor accepts that, although an unlawful administrative act may not exist in law, it exists in fact and as a result may be acted upon by those who are not aware of its invalidity.[20] Forsyth contends that the distinction between fact and law, which is the crux of the conundrum, is enough to explain the anomaly that an unlawful act may provide a basis for a legally effective later act.[21] This theory starts from the premise that all unlawful acts are void. Despite this voidness, however, a person who is unaware of the unlawfulness of the act may rely on it and alter their circumstances accordingly. As a result, a reviewing court may decline to set aside the unlawful act because of the prejudice that may be visited on persons who have relied on the apparent validity of that act. In this event, an unlawful act has the consequences of a lawful act. Drawing from the theory of the second actor, the SCA formulated the Oudekraal principles. In this thesis, four Oudekraal principles are identified and discussed.

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[14] Ibid.
[15] Ibid para 27 with reference to Lawrence Baxter *Administrative Law* (1984) 355.
[16] *Oudekraal* (note 1 above) para 27 with reference to *Harnaker v Minister of Interior* 1965 (1) SA 372 (C) 381C.
[17] *Oudekraal* (note 1 above) para 28 with reference to HWR Wade & Christopher Forsyth *Administrative Law* 7 ed (1994) ('Wade & Forsyth 7ed') 342–4.
[18] *Oudekraal* (note 1 above) para 29 with reference to Forsyth (note 3 above).
[19] *Oudekraal* (note 1 above) para 29.
[20] Forsyth (note 3 above) 159.
[21] Ibid 148.

The first principle states that until an official act is set aside, it exists in fact and has legal consequences that should not simply be disregarded.[22]

The second principle requires that the initial enquiry into the legal effect of an unlawful administrative act should be directed at whether the validity of an earlier act is a precondition for the validity of a subsequent act.[23] If not, the subsequent act has legal effect, but only for so long as the initial act is not set aside.

The third principle states that, unless the statutory context determines otherwise, a person who is being coerced to comply with an unlawful administrative act by a public authority may ignore it with impunity and raise its invalidity as a collateral challenge.[24] A collateral challenge is one that allows the invalidity of an unlawful administrative act to be raised in proceedings where it is not directly in issue, for example it may be raised in proceedings where the public authority seeks to enforce an administrative act.[25] The availability of collateral challenge means that an unlawful administrative act need not necessarily be challenged in a judicial review.[26] Where a collateral defence or challenge is available, the court has no discretion to allow or disallow its being raised.[27]

The fourth and final principle to be discussed states that a court seized with judicial review of an unlawful administrative act has discretion to withhold the remedy of setting aside even if a ground of review has been established.[28] This discretion is the moderating tool which the court employs to avoid or minimize injustice 'when legality and certainty collide'.[29]

As to the outcome in *Oudekraal*, the SCA criticised the High Court for holding that it had discretion to allow the collateral challenge to be raised.[30] The High Court had exercised its discretion to condone the lateness of the collateral challenge.[31] The SCA insisted that where the requirements of a collateral challenge are met, a court has no discretion whether to allow it.[32] On the facts before it, however, the SCA held that the municipality was not entitled to raise

[22] *Oudekraal* (note 1 above) para 26.
[23] Ibid para 31.
[24] Ibid para 32.
[25] Ibid with reference to *Boddington v British Transport Police* [1999] 2 AC 143 (HL) ('*Boddington*').
[26] *Oudekraal* (note 1 above) paras 34.
[27] Ibid para 36.
[28] Ibid.
[29] Ibid.
[30] Ibid.
[31] *Oudekraal HC* (note 4 above) 595D–E.
[32] *Oudekraal* (note 1 above) para 36.

a collateral challenge because it was not being coerced by any public authority and the approval of the general plan was nothing more than permission to develop the appellant's property.[33]

Nevertheless, the court dismissed the appeal because the subdivision of the property, if allowed, would violate constitutionally protected cultural and religious rights and the protection afforded to burial sites by the National Heritage Resources Act of 1999.[34]

Oudekraal marks an inflection point in South African administrative law on the treatment of the legal consequences of an unlawful administrative act. *Oudekraal* introduced a new approach that emphasizes the use of principles rather than legal maxims or rules of thumb to determine the legal effect of such acts. A plethora of cases since *Oudekraal* has considered the principles established by it. Pretorius aptly observes that in South African administrative law, *Oudekraal* is arguably the most annotated SCA judgment of recent times.[35] This thesis examines the cases after *Oudekraal* to establish how they have understood, applied or modified its approach to the legal consequences of an unlawful act.

1.2 NATURE AND SCOPE OF THE THESIS

1.2.1 *Title and aim of thesis*

The title of this thesis is '*Balancing Legality and Certainty: The Oudekraal Principles and their Development'.* The thesis aims to provide the first comprehensive critique of the content, meaning and extent of the Oudekraal principles viewed through the prism of the many cases decided since judgment was handed down in *Oudekraal*. This mass of case law based on the Oudekraal principles has not yet been systematically catalogued and critiqued.

1.2.2 *Significance of the research*

Grant correctly points out that the art of government is a difficult one.[36] The appalling mistakes made by successive public administrators throughout history bear testimony to this fact.[37] Imperfect administrative acts are inherent in the art of governing.[38] Our Constitution envisages the possibility of imperfect administrative acts and subjects them to judicial oversight and correction.[39]

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[33] Ibid para 39.
[34] Ibid para 41–2.
[35] DM Pretorius '*Oudekraal* after fifteen years: The second act (or, a reassessment of the status and force of defective administrative decisions pending judicial review)' (2020) 31 *Stellenbosch Law Review* 3.
[36] Cicero *On Government* (trans Michael Grant) (1993) 1.
[37] Ibid.
[38] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* 2014 (3) SA 481 (CC) ('*Kirland*') para 88.
[39] Ibid.

In that regard, administrative law is a branch of law that impacts directly on the day-to-day affairs of the public. Hoexter highlights how, under apartheid in South Africa, this area of law was instrumental in the implementation of unjust government policies.[40] In the current constitutional order, maladministration and corruption have been the main causes of unlawfulness in official acts.[41] For instance, in the context of social welfare, an unlawful refusal of a social grant could have a catastrophic effect on the livelihood of an indigent person.[42] A flawed tender may threaten continued delivery of an important public service such as the payment of social grants[43] or collection and disposal of hazardous medical waste.[44]

An unlawful administrative act infringes on the affected person's constitutional right to administrative action that is lawful, reasonable and procedurally fair.[45] This right underpins good public administration. Therefore, a discussion of the legal consequences of unlawful administrative acts, ie the meaning, content and extent of the *Oudekraal* principles, is of crucial practical importance and is a matter of concern to administrators, legal scholars, legal practitioners and the courts. In some measure, too, by highlighting the principles in terms of which the legal consequences of unlawful administrative acts are determined, this thesis will help to promote good public administration.

At present there is surprisingly little scholarly work on *Oudekraal* itself, and very little commentary exists on the cases after *Oudekraal.* There is certainly no systematic analysis of the mass of case law which has followed *Oudekraal*. As far as texts on administrative law are concerned, De Ville, writing before the outcome of the appeal in *Oudekraal*, comments on the judgment of the High Court in his discussion of indirect challenges;[46] and Burns merely refers to, but does not discuss or critique, the Oudekraal principles.[47] Hoexter provides an instructive introduction to the Oudekraal principles, but like other authors of general texts on

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[40] Cora Hoexter *The Transformation of South African Administrative Law Since 1994 with particular reference to the Promotion of Administrative Justice Act 3 of 2000* (unpublished PhD thesis, University of the Witwatersrand, 2009) 10–13.
[41] *Aquila Steel (South Africa) (Pty) Ltd v Minister of Mineral Resources* 2019 (3) SA 621 (CC) para 3.
[42] See for instance *Bacela v Member of the Executive Council for Welfare, Eastern Cape Provincial Government* [1998] 1 All SA 525 (E); for a general discussion on the impact of unlawful administrative acts on social welfare, see the preface to Clive Plasket *The Fundamental Right to Just Administrative Action:*
Judicial Review of Administrative Action in the Democratic South Africa (unpublished PhD thesis, Rhodes University, 2002).
[43] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (4) SA 179 (CC) ('*Allpay II*') paras 36, 38 and 40.
[44] *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA) ('*Millennium Waste*') paras 28 and 31.
[45] Section 33 of the Constitution.
[46] J R de Ville *Judicial Review of Administrative Action in South Africa* revised 1 ed (2005) 394–5.
[47] Yvonne Burns *Administrative Law* 4 ed (2013) 229.

administrative law, she does not embark on a comprehensive critique of the mass of case law which discusses the *Oudekraal* principles.[48]

Similarly, there is no systematic analysis in the law journals of the case law since *Oudekraal.* For example, Pretorius devotes time largely to earlier common-law authorities supporting the proposition that the author and a subject may, in certain circumstances, disregard an unlawful administrative act.[49] In his second instalment on *Oudekraal*, Pretorius recaps some of his earlier propositions and updates his views in light of the developments since he last wrote on the subject.[50] Importantly, he concurs that there is more than one Oudekraal principle, and highlights that it is erroneous to refer to 'the Oudekraal principle' in the singular.[51]

Other scholarly contributions have been of a fairly specific nature. For example, Saller discusses the impact of a retrospective order of constitutional invalidity of an administrative act on the application and effect of the Oudekraal principles.[52] Forsyth, on the other hand, compares the Oudekraal principles with his theory of the second actor and comments on them insofar as they support, or differ from, this theory.[53]

Quinot and Maree question the soundness of locating in s 172(1) of the Constitution the reviewing court's discretion not to set aside an invalid act.[54] Freund and Price show how the conundrum that an unlawful act has legal effect pervades 'all stages of the application of administrative law'.[55]

Boonzaier decries the logic in the court's willingness to hear applications which have been unreasonably delayed where there is no reason for them to be condoned.[56] The contribution by Brickhill et al canvasses cases since *Oudekraal* as part of their critique of the judicial disagreement in the apex court about whether an unlawful act can ever have legal effect.[57]

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[48] Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) 547–51.
[49] Daniel Malan Pretorius 'The status and force of defective administrative decisions pending judicial pronouncement' (2009) 126 *South African Law Journal* 537.
[50] Pretorius (note 35 above).
[51] Ibid 4.
[52] Karla Saller 'When worlds collide: Implications of the Constitutional Court's decision in *Jaftha v Schoeman* when viewed through the lens of the second actor theory accepted in *Oudekraal Estates (Pty) Ltd v City of Cape Town'* (2005) 122 *South African Law Journal* 725.
[53] Christopher Forsyth 'The theory of the second actor revisited' 2005 *Acta Juridica* 209 at 224.
[54] Geo Quinot & PJH Maree 'The puzzle of pronouncing on the validity of administrative action on review' (2015) 7 *Constitutional Court Review* 27 at 41.
[55] Daniel Freund & Alistair Price 'On the legal effects of unlawful administrative action' (2017) 134 *SALJ* 184 at 186–99.
[56] Leo Boonzaier 'A decision to undo' (2018) 135 *SALJ* 642 at 672.
[57] Jason Brickhill, Hugh Corder, Dennis Davis & Gilbert Marcus 2016 'Administration of justice' *Annual Survey of South African Law* 1 ('Brickhill et al') at 9.

Lastly, Van Eetveldt's analysis of the case law since *Oudekraal* is the most comprehensive study of the subject so far.[58] However, Van Eetveldt focuses only on collateral challenge and does not comprehensively canvass other Oudekraal principles.

While each of these contributions has undoubtedly been valuable, none has attempted a comprehensive discussion of the mass of case law that came after *Oudekraal*.

This thesis contributes, to this small body of knowledge, the first comprehensive and systematic critique of the case law decided since *Oudekraal,* and will explain how the courts have understood and developed the content, meaning and extent of the Oudekraal principles.

1.2.3 *Research and questions to be explored*

The overarching question that this thesis grapples with is how the South African courts have understood and developed the content, meaning and extent of the *Oudekraal* principles. In answering this question, the thesis considers the following more specific questions:

(1) Prior to *Oudekraal*, how did the courts and legal scholars approach the conundrum that a legally defective administrative act could provide a basis for legally competent later act? Why did the SCA in *Oudekraal* find it necessary to depart from these previous approaches in resolving the conundrum? In other words, how and why is the approach in *Oudekraal* different from those adopted by the courts and legal scholars before it?

(2) How have the courts since *Oudekraal* interpreted, applied or developed the test for determining whether the validity of an originating act is a precondition for the validity of a subsequent act?

(3) Have the courts since *Oudekraal* identified any exceptions to the first Oudekraal principle?

(4) What happens when an unlawful act is eventually set aside on review?

(5) What has been held to be the rationale for collateral challenge or defence? What kind of statutory contexts have been held to justify or prevent collateral challenge? And in the absence of an instructive statutory context, what factors or circumstances support or exclude the availability of a collateral challenge or defence in a given case? How have the courts defined coercion by a public authority for the purposes of a collateral challenge or defence?

[58] Henri-Willem van Eetveldt *The Indirect Review of Administrative Action in South African law* (unpublished LLM Thesis, Stellenbosch University, 2018) 26.

(4) What is the difference between the discretion enjoyed by the reviewing court at common law and the one under the fourth Oudekraal principle with respect to remedy?

(5) How have the courts since *Oudekraal* exercised the discretion not to set aside an unlawful act? What factors have swayed the courts to exercise their discretion to grant or withhold the remedy?

1.2.4 *Terminology*

As explained in Chapter 2, the Oudekraal principles apply to any official acts of an executive or administrative nature,[59] including but not limited to administrative action as defined in the PAJA.[60]

In *Oudekraal,* the SCA refers to the official act in issue in that case as an 'administrative act' rather than 'administrative action'.[61] This may perhaps be attributed to its heavy reliance on English administrative-law theory[62] and legal precedent that uses 'administrative act' as its preferred nomenclature.[63]

Before 1994, the terms administrative act and administrative action were often used interchangeably in South African law to refer to a range of official acts.[64] Section 24 of the Interim Constitution then formalized the concept of administrative action, and s 33 of the 1996 Constitution retained the concept. The term is defined closely in s 1 of PAJA,[65] the statute enacted in terms of s 33(3) of the Constitution in order to give effect to the rights in s 33(1) and (2).

However, the Constitutional Court has made it clear that the Oudekraal principles apply not only to administrative action as defined, but also to acts of the executive that fall outside the definition.[66] Accordingly, where this thesis refers to an administrative act, it means an official act of an administrative or executive nature.

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[59] *Economic Freedom Fighters v Speaker, National Assembly* 2016 (3) SA 580 (CC) *('EFF')* para 74.
[60] *Corruption Watch NPC v President of the Republic of South Africa* 2018 (2) SACR 442 (CC) ('*Corruption Watch*') para 31 n 31.
[61] *Oudekraal* (note 1 above) para 1.
[62] Ibid para 29 with reference to Forsyth (note 3 above).
[63] See for example *Oudekraal* (note 1 above) para 32 with reference to *Boddington* (note 25 above) 160C–G.
[64] See eg Baxter (note 15 above) 344–82.
[65] Section 1 of PAJA defines an administrative action as any decision taken or failure to take a decision by (a) an organ of state, when (i) exercising power in terms of the Constitution or Provincial Constitution; or (ii) exercising public power or performing a public function in terms of any legislation; or (b) a natural or juristic person, other than an organ of state, when exercising public power or performing a public function in terms of an empowering provision. In addition, the decision must adversely affect rights, have a direct, external legal effect and not fall within any of the listed exclusions.
[66] *Corruption Watch* (note 60 above) para 31 n 31.

This thesis also frequently refers to an 'unlawful' administrative act. The determination whether an act is unlawful is the sole preserve of the court.[67] It may not be usurped by anyone including the government. Thus, although an unlawful act is unlawful from the outset,[68] this fact needs to be confirmed by a court. For this reason, Van Eetveldt aptly observes that the term 'unlawful' administrative act is an artificial and rather meaningless label unless and until a court has actually pronounced on the lawfulness of the act in question.[69]

An act may be invalid because it is unlawful, ie not authorized by an empowering provision. If it is an administrative action, such act would be reviewable in terms of s 6(2) of PAJA. Such administrative action necessarily breaches s 33 of the Constitution, which is justiciable chiefly through PAJA.[70] By contrast, if an administrative act involved is not authorized by the enabling legislation but it is not administrative action, it would be unlawful for contravening the constitutional principle of legality.[71]

1.2.5 *Methodology*

This thesis is confined to desktop research. It is informed primarily by the contribution of the South African courts, particularly the SCA and the Constitutional Court, to the development of the Oudekraal principles. Through the analysis of this case law, this thesis attempts to decipher the meaning, content and extent of the Oudekraal principles and how the courts have developed them to date. In addition, this thesis draws on scholarly work in administrative and constitutional law.

1.3 THE EVOLUTION OF THE LEGAL CONSEQUENCE OF AN UNLAWFUL ACT

At common law, an official act exceeding statutory (or other) authority is ultra vires and of no force or effect.[72] The ultra vires doctrine is the converse of the broader doctrine of legality, ie an official performing an administrative act must be authorized to perform it by an enabling

[67] *Kirland* (note 38 above) para 103; see also *Merafong City v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC) ('*Merafong*') para 41; *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) ('*Tasima*') para 147.
[68] *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) ('*Ferreira*') paras 27–9; *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) ('*Fose*') para 94.
[69] Van Eetveldt (note 58 above) 67.
[70] *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) ('*New Clicks*') para 95–6; see also *Zondi v Member of the Executive Council for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) ('*Zondi*') para 99.
[71] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) ('*Fedsure*') paras 40, 41 and 59.
[72] Baxter (note 15 above) 301–5.

legislation (or another source of authority) and must do so in accordance with the terms of the enabling legislation.[73]

The common-law doctrine of ultra vires is now part of the South African Constitution.[74] In accordance with it, an ultra vires act is void in the sense that it does not exist in law and does not have any legal consequences.[75] However, the invalidity of an unlawful administrative act is not always obvious.[76] On the assumption of its validity, those who are unaware of the legal flaws in an administrative act may rely on it and take legal steps that alter their circumstances.[77] The lawfulness of the act may or may not be challenged. Even if it is, the prejudice that can visit those who have relied on the unlawful act might persuade the court not to set it aside. The result is a conundrum that an unlawful act may, in certain circumstances, have legal effect. The various possible explanations for the conundrum canvassed in *Oudekraal* are discussed below.

First, the SCA examined the presumption of regularity expressed in the maxim *omnia praesumuntur rite esse acta*.[78] This presumption has been part of administrative law in South Africa for more than a century.[79] Its import is that unless the contrary is proved, all formal procedural requirements of an administrative act are presumed to have been duly fulfilled by the official performing it.[80] In some cases, it is based on the assumption that what regularly happens is likely to have happened again.[81] In an attempt to understand the presumption of regularity, the SCA referred to Baxter's remarks where he explains that the rationale for the presumption is that 'until the act in question is found to be unlawful by a court, there is no certainty that it is'.[82]

Prior to *Oudekraal* but after the commencement of the new Constitution, the presumption of regularity played a pivotal role in the determination of the legal consequences of an unlawful

[73] Ibid 301; G E Devenish, K Govender & D Hulme *Administrative Law and Justice in South Africa* (2001) ('Devenish et al') 224.
[74] *Fedsure* (note 71 above) paras 58–9; *Pharmaceutical Manufacturers Association of South Africa: In re President of the Republic of South Africa* 2000 (2) SA 674 paras 50; *Member of the Executive Council for Local Government and Development Planning, Western Cape v Paarl Poultry Enterprise CC t/a Rosendal Poultry Farm* 2002 (3) SA 1 (CC) paras 9–10.
[75] De Ville (note 46 above) 327.
[76] *Smith v East Elloe Rural District Council* [1956] AC 736 (HL) at 769–70.
[77] Forsyth (note 3 above) 146; See also Christopher Forsyth 'Showing the fly way out of the flybottle: The value of formalism and conceptual reasoning in administrative law' (2007) 66 *Cambridge law Journal* 325 at 336.
[78] *Oudekraal* (note 1 above) para 27.
[79] *Worcester Municipality v Colonial Government* (1906–1909) 3 Buch AC 538 at 552.
[80] Baxter (note 15 above) 738.
[81] D T Zeffertt & A P Paizes *South African Law of Evidence* 2 ed (2009) 212.
[82] Baxter (note 15 above) 355 referred to in *Oudekraal* (note 1 above) para 27.

administrative act.[83] For instance, it was used to sustain the legal effect of an invalid certificate of outcome of conciliation to enable a dismissed employee to challenge the fairness of his or her dismissal in the next stage of the labour dispute resolution hierarchy.[84]

Devenish et al argue that the presumption of regularity is a bedrock upon which public administration rests, and that without it public administration would be untenable.[85] This assertion is informed by their view that the presumption renders an unlawful administrative act voidable instead of void.[86]

Baxter espouses a different view to Devenish et al. He asserts that the presumption of regularity is not a source of validity but is merely an evidentiary presumption of limited application.[87] He suggests that although its exact scope is unclear, the presumption is confined to resolving doubt about the fulfilment of formal procedural requirements of an administrative act until a court has ruled on it.[88] In addition, it has been held that the presumption of regularity is not intended to presume jurisdictional facts where none exist.[89] It is therefore not surprising that in *Oudekraal* the SCA found it inadequate as an explanation for an anomaly that, in certain circumstances, an unlawful administrative act may have legal effect or provide a basis for the legality of a subsequent act.[90]

The second explanation canvassed by the SCA in *Oudekraal* was the effect of the refusal by a court, in the exercise of its discretion, to set aside an unlawful administrative act.[91] A court may refuse to set aside an unlawful administrative act because the applicant has waived his or her right to challenge it, lacks standing to bring the application or has delayed unreasonably in doing so.[92] This refusal results in an unlawful administrative act's retaining legal force equivalent to that of a lawful one.[93] Wade and Forsyth argue that this result obfuscates the effect of the court's ruling that the administrative act is unlawful.[94] Another criticism levelled

[83] *Okes v Minister of Justice* (288/02) [2003] ZANWHC 1 (1 January 2003) para 22; *Special Investigation Unit v Nadasen* [2002] 2 All SA 170 (A) para 15; *Fidelity Guards Holdings (Pty) Ltd v Epstein NO* (2000) 21 *ILJ* 2382 (LAC) ('*Fidelity Guards')* para 13.
[84] *Fidelity Guards Holdings* (note 83 above) paras 12–13
[85] Devenish et al (note 73 above) 228.
[86] Ibid.
[87] Baxter (note 15 above) 355.
[88] Ibid 738; See also *Byers v Chinn* 1928 AD 322 at 332–3 for requirements that must be met before the presumption applies.
[89] *Kellerman v Minister of Interior* 1945 TPD 179 at 191.
[90] *Oudekraal* (note 1 above) para 29.
[91] Ibid para 27.
[92] *Harnaker* (note 16 above) 381C.
[93] Ibid.
[94] H W R Wade & C F Forsyth *Administrative Law* 11 ed (by Christopher Forsyth) (2014) 251.

against this approach is that, contrary to the rule of law, it leaves the determination of the legal effects of an unlawful administrative act in the sole domain of the judges.[95] By contrast, the rule of law requires that the law be known beforehand by those who are subject to it.[96]

Thirdly, the SCA in *Oudekraal* turned to Professor Wade's theory of legal relativity for an explanation.[97] According to this theory, 'void' in administrative law is meaningless in absolute terms.[98] Its meaning depends on the court's willingness to set aside an unlawful administrative act.[99] This theory recognizes that a court may exercise discretion not to set aside an unlawful administrative act for a variety of reasons that do not impact on the lawfulness or otherwise of the administrative act.[100] In this theory, an administrative act may be void for one purpose and not another; it may be void against one person and not another.[101] For instance, where a collateral challenge has been raised successfully, an administrative act will be void insofar it relates to the affected person but for all other purposes it retains its legal effect until set aside. The theory of legal relativity has also been criticized for its inability to provide an objective way in which the legal effect of an unlawful administrative act may be determined prior to its being dealt with by a court[102] and its failure to adequately explain why an unlawful administrative act is void for one person and not another; or for one purpose and not another.[103]

The theories and approaches canvassed by the SCA to explain the conundrum that an unlawful act may, in certain circumstances, have legal effect represent strands in a very complex and protracted debate about whether an unlawful administrative act is void or voidable.[104] In the pre-democratic South Africa, this debate was characterized by two divergent schools of thought represented by Wiechers and Baxter.

Wiechers embraces the dichotomy between void and voidable administrative acts.[105] He is of the view that it is only in exceptional circumstances that an unlawful administrative act is void ab initio, such as in the absence of statutory power or jurisdictional facts necessary to perform

[95] Forsyth (note 3 above) 145–6.
[96] Ibid.
[97] *Oudekraal* (note 1 above) para 28 with reference to Wade & Forsyth 7ed (note 17 above) 342–4
[98] Wade & Forsyth (note 94 above) 251; see also HWR Wade 'Unlawful administrative action: void or voidable?' (1967) 83 *LQR* 499 at 512.
[99] Ibid.
[100] Ibid.
[101] Wade & Forsyth 7ed (note 17 above) 343. This passage is omitted in the 11th edition, Wade & Forsyth (note 94 above).
[102] Forsyth (note 3 above) 144.
[103] Ibid.
[104] The Right Hon the Lord Woolf; Sir Jeffrey Jowell QC; Andrew Le Sueur; Catherine Donnelly & Ivan Hare *De Smith's Judicial Review* 8 ed (2018) para 4-058 ('De Smith').
[105] M Wiechers *Administrative Law* (trans Gretchen Carpenter) (1985) 155.

the administrative act[106] or in the presence of mala fides.[107] In Wiechers's view, other defective administrative acts are voidable in a sense that they have legal force until set aside by a court.[108]

Wiechers also contends that if a court eventually finds a voidable act invalid, the order of invalidity is not retrospective.[109] Judicial recognition of this approach may be found in *Coalcor (Cape) (Pty) Ltd v Boiler Services CC*.[110] In this case, pending the determination of an application to review and set aside the decision of the municipality to rezone the respondent's property to allow trade in coal at its premises, the applicant approached the High Court for an interim interdict preventing the respondent from trading in coal or coal products at its premises. The municipality rezoned the property without affording the applicant, an interested party, a fair hearing. On the authority of *Winter v Administrator-in-Executive Committee,*[111] the court dismissed the application and held that the applicant had failed to establish a prima facie right because non-compliance with procedural fairness rendered the rezoning of the property voidable instead of void.[112] More explicitly, in *Minister of Education, Transkei v Mogole*, the court approved Wiechers's remarks that only serious non-compliance with the requirements for validity, such as a clear excess of power, should result in the nullity of an administrative act.[113] In this case, the court had found the dismissal of a school principal for misconduct void because it was premised on the criminal charge on which he was acquitted by a court of law.

The court in *Transnet Bpk h/a Coach Express v Voorsitter, Nasionale Vervoerkommissie* rejected the validity of the distinction between void and voidable administrative acts.[114] In particular, it rejected the correctness of the view in *Coalcor* that *Winter* is authority for the proposition that there is a distinction between void and voidable administrative acts in South African law.[115] Consequently, it held that any non-compliance with the requirements of legality rendered an administrative act void.[116] However, the court also endorsed Baxter's approach as the correct one.[117]

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[106] Ibid 156–7.
[107] Ibid 284.
[108] Ibid 155.
[109] Ibid 157.
[110] *Coalcor (Cape) (Pty) Ltd and Others v Boiler Services CC* 1990 (4) SA 349 (C) ('*Coalcor'*).
[111] *Winter v Administrator-in-Executive Committee* 1973 (1) SA 873 (A) 891A–C.
[112] *Coalcor* (note 110 above) 355E–356B.
[113] *Minister of Education, Transkei v Mogole* 1994 (1) SA 612 (TkA) 615B–D.
[114] *Transnet Bpk h/a Coach Express v Voorsitter, Nasionale Vervoerkommissie* 1995 (3) SA 844 (T).
[115] Ibid 846F.
[116] Ibid.
[117] Ibid 846G–847D.

Baxter postulates that the distinction between void and voidable acts is not suitable for application in administrative law.[118] He submits that the validity of administrative acts may be viewed either according to the theory of the principle of legality or its practical application.[119] In his view, an ultra vires act is void when it offends the principle of legality but the practical application of the principle may mean that it is legally effective until set aside.[120] The practical application of the principle recognizes that the court may exercise its discretion to refuse a remedy for any reason recognized in law that does not go to the validity of the administrative act.[121] Baxter also accepts that in practical terms, although invalid, administrative acts are performed by administrators clothed with the necessary authority or at least who appear to possess it.[122] At best, according to Baxter, there are degrees of invalidity or annullability, taking to account that some administrative acts may be more easily annulled than others.[123]

Baxter concludes that when a court refers to an administrative act as 'void', it should be understood to be mean that when judged against the principle of legality, the act fails to pass muster.[124] 'Voidable', he submits, should be understood in the context that it signifies the court's position as the final arbiter on the legal consequences of invalidity.[125] He asserts that 'voidable' does not mean or imply that an invalid administrative act is valid until set aside or that a refusal by a court to grant a remedy validates an otherwise invalid act.[126]

The court in *Spier Properties (Pty) Ltd v Chairman, Wine and Spirit Board*[127] confirmed the correctness of the approval of Baxter's approach by the court in *Transnet Bpk*. In particular, *Spier Properties* held that because most defective administrative acts are not 'void' in the absolute sense, a determination of their legal consequences by a court is necessary.[128]

Baxter's approach is similar in effect to Professor Wade's theory of legal relativity in English administrative law.[129] Both recognize that despite the unlawfulness of an administrative act, it is the court's willingness to quash it that determines its legal effect.[130] Similarly, the criticism

[118] Baxter (note 15 above) 355.
[119] Ibid 356.
[120] Ibid 357.
[121] Ibid 355.
[122] Ibid.
[123] Ibid 357.
[124]Ibid 358.
[125] Ibid.
[126] Ibid.
[127] *Spier Properties (Pty) Ltd v Chairman, Wine and Spirit Board* 1999 (3) SA 832 (C) at 845F–846B.
[128] Ibid 846A–B.
[129] Wade & Forsyth (note 94 above) 251.
[130] Ibid.

levelled against the theory of legal relativity discussed above applies equally to Baxter's theory of degrees of annullability.

Fourth and finally, the SCA in *Oudekraal* tested Forsyth's theory of the second actor for its adequacy as an explanation for the conundrum.[131] The court found that the theory explained it convincingly and that the theory's distinction between fact and law was appealing.[132] According to the theory, there is no need to resort to presumptions of law or the distinction between void and voidable acts to explain the conundrum. The distinction between fact and law is enough.[133] The distinction recognizes that, although an unlawful administrative act may not exist in law, it exists in fact and may be acted upon by those who are not aware its invalidity.[134]

In the theory of the second actor, a second act based on the unlawful initial act is legally effective if the legal existence of the initial act is not a precondition for the legal existence of the second act.[135] Ordinarily, the second actor relies on the factual existence of the first act and assumes its legality.[136] The legal existence of the initial act is clearly necessary where the second act is by a public authority seeking to coerce a person to comply with the initial act.[137] In this instance, the affected person is entitled as of right to raise the invalidity of the first act as a defence to the enforcement proceedings against him or her.[138] The rule of law demands that there be a lawful basis for state compulsion.[139]

Drawing from the theory of the second actor, the SCA ruled in *Oudekraal* that the enquiry into the legal effect of an unlawful administrative act should initially be directed at whether the validity of the first act is necessary for the legal existence of consequent acts.[140] In other words, is the legal existence of the initial act a precondition for the validity of subsequent acts? If the answer is no, the subsequent act will have legal effect for so long as the initial act is not set aside by a court.[141] If the answer is yes, the unlawful administrative act has no legal force or effect.[142] Where a person is coerced by a public authority (being the second actor) to comply

[131] *Oudekraal* (note 1 above) para 29.
[132] Ibid.
[133] Forsyth (note 3 above) 148.
[134] Forsyth (note 53 above) 210.
[135] Forsyth (note 3 above) 147.
[136] Ibid.
[137] Ibid 157–8.
[138] Ibid.
[139] Ibid.
[140] *Oudekraal* (note 1 above) para 31.
[141] Ibid.
[142] Ibid para 32.

with the initial act, the initial act must be valid. Otherwise, the affected person may disregard the second act with impunity and raise the invalidity of the first act as a collateral challenge or defence.[143]

In *Oudekraal*, the SCA ruled that the Cape Metropolitan Municipality was not being coerced by any public authority to do or not to do anything, and that the consideration by it of the application for approval of the engineering services plan required no more than the mere factual existence of the approval of the general plan.[144] Consequently, the court held that the approval of the general plan existed in fact and had legal effect until set aside and that the municipality's contention that it was entitled to a collateral defence was misplaced.[145] Despite this finding, as alluded to above, the SCA dismissed the appeal for a different reason.

1.4 THE PRINCIPLED APPROACH INTRODUCED BY *OUDEKRAAL*

1.4.1 *An unlawful act has legal effect for so long as it has not been set aside*

The importance of *Oudekraal* lies in its acceptance of Forsyth's premise that an unlawful administrative act may have legal effect without losing its invalidity.[146] Instead of an attempt to find a matching theory of voidability or legal maxims that predict an outcome, the SCA opted for a principled or conceptual approach.[147]

In English law, an unlawful administrative act may enjoy legal effect for so long as it is not set aside if collateral challenge against it is excluded. It may be expressly excluded by the enabling statute[148] or by a proper construction of it.[149] Where a statute is silent, English courts have upheld the legal effect of an unlawful act if the enabling statute provides the affected person with a comprehensive internal appeal process to challenge its validity before it is enforced.[150]

Wade and Forsyth observe that there are also instances where there is no internal statutory remedy but where the scheme of the Act requires that an unlawful administrative act be given full legal effect until set aside.[151] For example, the intent of the legislature in a statute granting a magistrate summary powers to order the removal of children with communicable diseases

[143] Ibid.
[144] Ibid para 39.
[145] Ibid.
[146] Forsyth (note 77 above) 340.
[147] *Oudekraal* (note 1 above) para 29.
[148] Wade & Forsyth (note 94 above) 237 with reference to *Manchester City Council v Cochrane* [1999] 1 WLR 809.
[149] *R v Wicks* [1998] AC 92 (HL) ('*Wicks*) 117A–C; See also *Boddington* (note 25 above) 161G.
[150] *Wicks* (note 149 above) 122D–F; see also Wade & Forsyth (note 94 above) 237–8.
[151] Wade & Forsyth (note 94 above) 238.

from their parents and placing them in a hospital has been construed to mean that the removal order must be obeyed until set aside.[152]

In the theory of the second actor, Forsyth suggests that there are three categories of administrative acts whose mere factual existence is sufficient to provide a basis for the legality of subsequent acts.[153] These are (1) licences or permits allowing an individual to do what would otherwise be unlawful; (2) an act permitting an official to do what is otherwise unlawful, such as an order authorizing entry and search of private premises; and (3) an act ordering an official to do or not to do a particular act, such as payment of compensation by the Criminal Compensation Commission to a person who suffered loss as a result of crime.[154] A common feature amongst these categories is the absence of coercion of an individual by a public authority.

In South Africa, Hoexter explains that whilst legality requires an act to exist in law for it to have effect, certainty favours the recognition of the legal effect of an unlawful act.[155] She counsels that the particular context in which a court is asked to pronounce on the validity of an administrative act must be taken into account to ensure that there is a relationship between the validity or invalidity of the administrative act and 'the consequences it is said to have produced'.[156]

As in English law, in South Africa, the courts have recognized that a statute may expressly provide for the legal consequence of an unlawful act. For instance a tax assessment made in terms of the Income Tax Act has legal effect for so long as it is not set aside; therefore the assessed tax must be paid by the taxpayer notwithstanding any objections it may have.[157] The courts have also held that a statute, upon its proper construction, may require that an unlawful administrative act be accorded legal effect for so long as it is not set aside.[158] Where a statute is silent, the courts have held that the availability of a comprehensive appeal process is an indication that the legislature intended the unlawful act to have legal effect for so long as it is not set aside.[159] The High Court has also advanced the protection of the environment and the

[152] Ibid, with reference to *R v Davey* [1899] 2 QB 301.
[153] Forsyth (note 3 above) 154–5.
[154] Ibid.
[155] Hoexter (note 48 above) 548.
[156] Ibid 548–9.
[157] *Capstone 556 (Pty) Ltd v Commissioner, South African Revenue Service* 2011 (6) SA 65 (WCC) ('*Capstone*') para 37 and 48.
[158] *Khabisi NO v Aquarella Investment 83 (Pty) Ltd* 2008 (4) SA 195 (T) ('*Khabisi*').
[159] Ibid para 22.

vindication of the constitutional right to a clean environment as part of the reasons for upholding the legal effect of an unlawful official act.[160]

Consistent with their English counterparts, since *Oudekraal,* South African courts have held that, owing to their mere factual existence, administrative acts such as official permissions or licences;[161] those permitting officials to do what is otherwise unlawful[162] and those ordering officials to do or not to do a certain act have legal effect until set aside. Such acts may not be disregarded.[163]

The proposition that an unlawful administrative act has legal effect until it is set aside has, however, divided the Constitutional Court in recent years.[164] On the one hand, a minority has protested that given the doctrine of objective invalidity and the supremacy of the Constitution, an unlawful act can never have legal effect.[165] On the other hand, the majority has held that the legal effect of an unlawful act is necessary and consistent with the Constitution.[166] According the majority, this principle affirms the role of the court as the sole arbiter of legality.[167]

1.4.2 *Determination of the legal effect of an unlawful act*

According to *Oudekraal,* the focus of an enquiry into the legal consequences of an unlawful act should, at least at first, not be on whether the initial act is valid but on whether its validity is a precondition for the validity of the subsequent act.[168] If the validity of the prior act is not a precondition, mere factual existence of it is sufficient to clothe the subsequent act with legal effect for so long as it has not been set aside.[169] Conversely, if the legal existence of the prior act is a precondition for the validity of the later act, the subsequent act has no legal effect.[170]

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[160] Ibid.
[161] *Kirland* (note 38 above) (licence to build and operate a private hospital); *Offit Enterprises (Pty) Ltd and Another v Coega Development Corp (Pty) Ltd* 2009 (5) SA 661 (SE) at 671I–J (a permit to operate an Industrial Development Zone); *Camps Bay Ratepayers' and Residents' Association v Harrison* 2011 (4) SA 42 (CC) ('*Harrison*') para 62 (building permit).
[162] *Capstone* (note 157 above) para 37–8 (income tax assessments); *Jacobs v Baumann NO* 2009 (5) SA 432 (SCA) para 20 (administration of deceased estates).
[163] *Road Accident Fund v Duma and Three Similar Cases* 2013 (6) SA 9 (SCA) para 24 (determination of eligibility for benefits from the Road Accident Fund); *Head of Department, Department of Education, Free State Province v Welkom High School* 2014 (2) SA 228 (CC) ('*Welkom High School')* para 70 (determination of learner pregnancy policy).
[164] *Merafong City Local Municipality v AngloGold Ashanti Limited* 2017 (2) SA 211 (CC) ('*Merafong*'); *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) ('*Tasima*').
[165] *Merafong* (note 164 above) para 114; *Tasima* (note 164 above) para 79.
[166] *Merafong* (note 164 above) para 36; *Tasima* (note 164 above) paras 147–8.
[167] *Tasima* (note 164 above) para 147.
[168] *Oudekraal* (note 1 above) para 31.
[169] Ibid.
[170] Ibid para 32

The SCA ruled that where a subject is compelled to comply with an administrative act, the validity of such act is a necessary precondition for the validity of the enforcement action.[171]

In the cases that came after *Oudekraal,* the SCA used the presence or absence of coercion by a public authority to determine the legal effect of an unlawful act.[172] This became known as the category approach.[173] Simply put, an unlawful act will be held to have legal effect for so long as it has not been set aside if it falls within a category of acts that do not coerce a subject to comply with its terms. The Constitutional Court rejected the category approach as the main measure to determine whether an unlawful act has legal effect.[174] It opted for a flexible approach based on based on the circumstances of each case and the interests of justice.[175]

1.4.3 *Collateral challenge*

South African law on collateral challenge bears similarities with English law. In English law, the rule of law demands that where a public authority seeks to compel a person to comply with an administrative act, not only is the enforcement act required to be valid but also the administrative act that it seeks to enforce.[176] As a corollary, a person who is compelled to comply with an unlawful administrative act is legally entitled to disregard it and to raise its invalidity as a collateral challenge.[177] English courts have been grappling with the concept of collateral challenge for over three centuries.[178] Their decisions on the subject are instructive on understanding of collateral challenge. In *Boddington v British Transport Police,* the more recent leading English law authority on collateral challenge, the House of Lords upheld an accused person's right to raise as a collateral defence, the invalidity of the by-law under which he was charged.[179]

Forsyth submits that for collateral challenge to hold, an unlawful act must be void and not voidable.[180] According to him, if it were voidable, a collateral challenge against it would not be possible because its validity and consequent legal effect would withstand any challenge before a reviewing court. His view is supported by *Anisminic Ltd v Foreign Compensation*

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[171] Ibid.
[172] See for example *Kwa Sani Municipality v Underberg/Himeville Community Watch Association* 2015 2 All SA 657 (SCA) para 16; *Merafong City v AngloGold Ashanti* 2016 (2) SA 176 (SCA) ('*Merafong SCA'*) paras 15–17; *Tasima (Pty) Ltd v Department of Transport* 2016 1 All SA 465 (SCA) ('*Tasima SCA*') paras 26–7.
[173] *Merafong* (note 67 above) para 25.
[174] Ibid paras 25 and 55.
[175] Ibid.
[176] De Smith (note 104 above) para 3-123.
[177] Ibid.
[178] Paul Craig *Administrative Law* 8 ed (2016) para 24-002.
[179] *Boddington* (note 25 above) 162C–D; see also *Oudekraal* (note 1 above) para 32.
[180] Christopher Forsyth 'Collateral challenge and the rule of law' (1999) 4 *Judicial Review* 165 at 166.

Commission, in which the court rejected the validity of the distinction between jurisdictional and non-jurisdictional errors of law; and consequently the distinction between void and voidable administrative acts.]181 This opened the door to a collateral defence being available against an ultra vires administrative act irrespective of whether it is procedurally or substantively defective.[182]

In English law, a public authority may raise the unlawful acts of another as a collateral challenge. For instance, a local authority successfully pleaded the invalidity of its own notices to resist a claim for disbursements by a municipal tenant[183] and a utilities regulator was allowed to disregard an unlawful ministerial directive to it.[184]

English law cases on collateral challenge deal with instances where a subject of an unlawful act is compelled to comply with it.[185] Collateral challenge against this type of official conduct may be expressly excluded by a statute[186] or impliedly by its context.[187] Where a statute provides for an administrative act of general application and effect, it is construed to allow a collateral challenge. [188] The courts have reasoned that in this instance, since the administrative act affects the public in general, an affected person may not have had an occasion to interrogate the legalities of the administrative act in question. On the other hand, where a statute provides for an administrative act such as an enforcement notice directed at an individual, it is construed to exclude collateral challenge or defence.[189] A collateral challenge or defence is also excluded by the officer or judge de facto doctrine. [190] This doctrine excuses an invalidity occasioned by a defect in the appointment of the official who performed the administrative act. Finally, in English law a collateral challenge is not available against a court order.[191]

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[181] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.
[182] *Boddington* (note 25 above) 159B–F.
[183] Wade & Forsyth (note 94 above) 235–6 with reference to *R v Lambeth BC ex p Clayhope Properties Ltd* [1988] QB 563.
[184] Wade & Forsyth (note 94 above) 236, with reference to *Mossel (Jamaica) Ltd (t/a Digicel) v Office of Utilities Regulations (Jamaica)* [2010] UKPC 1.
[185] *Boddington* (note 25 above); *Wandsworth London Borough Council v Winder* [1985] AC 461; *Director of Public Prosecutions v Head* [1959] AC 83
[186] *Cochrane* (note 148 above).
[187] Wade & Forsyth (note 94 above) 238.
[188] *Boddington* (note 25 above) 161G–H & 162A–B; David Keene 'Collateral challenge: some observations' (1999) 4 *Judicial Review* 170.
[189] *Boddington* (note 25 above) 161G.
[190] Wade & Forsyth (note 94 above) 238–41; Craig (note 177 above) para 24-009; De Smith (note 103 above) para 3-115.
[191] Wade & Forsyth (note 94 above) 238 with reference to *Director of Public Prosecutions v T* [2007] 1 WLR 209 (DC); See also Craig (note 178 above) para 24-006; De Smith (note 104 above) 3-128.

In South Africa, collateral challenge has its origins as a criminal law defence which enabled a person accused of a statutory crime to challenge the validity of the statutory provision concerned.[192] It later evolved to administrative law. In this regard, the courts before *Oudekraal* displayed a measure of flexibility in approaching collateral challenge.[193] Collateral challenge was not restricted to a person who was being coerced to comply with an unlawful act.

More recently, the SCA has interpreted *Oudekraal* to exclude collateral challenge where a subject was not coerced to comply with an unlawful act[194] and where the coercion was not by a public authority. [195] The Constitutional Court has clarified that a public authority may raise a collateral challenge and that collateral challenge may be available to a subject even where the latter is not being coerced, if the relevant official act is unlawful.[196] Thus, South Africa has two types of collateral challenge, ie classical collateral challenge (where there is state coercion of a subject) and extended collateral challenge (where coercion need not be present but the official act involved is unlawful).

In *S v Smit,* a collateral challenge in criminal proceedings was held to be consistent with the legality principle expressed in the maxim *nullum crimen sine lege*.[197] The latter prohibits the prosecution of a person for the contravention of any act that has not been made a crime by law.

In *Smit*, the accused faced two criminal charges. The first charge was for his refusal to pay toll fees for using a toll road. The second was for his refusal to obey a red traffic light erected on the relevant toll road. In his defence, Smit collaterally challenged the validity of the declaration of the road as a toll road. The court acquitted him of the first charge. It held that in the absence of a valid declaration of the toll road, there was no lawful basis to coerce him to pay the toll fees.[198] However, the court convicted Smit in respect of the second charge. In the court's view, although the setting up of the traffic light flowed from the declaration of the road as a toll road, the validity of the setting up of the traffic light required no more than the factual existence of

[192] *Attorney-General of Natal v Johnstone and Co Ltd* 1946 AD 256 ('*Johnstone*') 262.
[193] *Metal and Electrical Workers Union of South Africa v National Panasonic Co (Parow factory)* 1991 (2) SA 527 (C) ('*Panasonic*') 530G–H; *National Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry v Photocircuit SA (Pty) Ltd* 1993 (2) SA 245 (C) ('*Photocircuit*') 253E–F.
[194] *V&A Waterfront Properties (Pty) Ltd v Helicopter & Marine Services* 2006 (1) SA 252 (SCA) (*V&A Waterfront*') para 10; *Harrison* (note 161 above) para 62.
[195] See for example *Kwa Sani Municipality* (note 172 above) para 16; *Merafong SCA* (note 172 above) paras 15–17; *Tasima SCA* (note 173 above) paras 26–7.
[196] *Merafong* (note 164 above) para 55.
[197] *S v Smit* 2008 (1) SA 135 (T) ('*Smit*') 179B–E.
[198] Ibid 179G–H.

the toll plaza.[199] *Smit* highlights the difficulties faced by the courts since *Oudekraal* in discerning the content and meaning of coercion for the purposes of the Oudekraal principles.

The fact that a person has a pending review application to review and set aside an unlawful administrative act does not preclude him or her from raising a collateral challenge if there are attempts to enforce the unlawful administrative act in the meantime.[200]

As in English law, collateral defence is also a qualified defence under South African law. [201] It may be excluded expressly by statute, such as tax legislation;[202] or by the scheme or context of the statute, such as the need to protect the environment.[203] It has been excluded where a statute provides an internal mechanism to challenge the administrative act prior to its enforcement [204] and where there is no live issue in court between the applicant and the public authority relating to the enforcement of the unlawful act.[205] Lastly, similar to English law, the officer or judge de facto doctrine excludes the operation of a collateral challenge or defence.[206]

In their contribution, Freund and Price[207] briefly discuss collateral challenge and reflect on the changes brought by *Merafong* and *Tasima.* In particular, Freund and Price opine that the availability of collateral challenge raises issues about how the court deals with delay.[208] Unlike the collateral challenge where coercion is absent, a classical collateral challenge is not time-barred.

Van Eetveldt contends that cases that came after *Oudekraal* have not consistently followed it and Forsyth's theory of the second actor on the methodology to determine whether collateral challenge is available in any given case.[209] He is also of the view that by not providing guidelines or principles on how to determine the availability of collateral challenge, *Merafong,* the leading Constitutional Court judgment on the subject, missed an opportunity to clarify the

[199] Ibid 182A–F.
[200] *Airports Company South Africa Limited v Airport Bookshops t/a Exclusive Books* 2016 (1) SA 473 (GJ) ('*Exclusive Books*') paras 93 and 97.
[201] *Club Mykonos Langebaan Ltd v Langebaan Country Estate Joint Venture* 2009 (3) SA 546 ('*Club Myokonos*') paras 40–41; *V&A Waterfront* (note 195 above) paras 10–15; *ABSA Bank Ltd v Ukwanda Leisure Holdings (Pty) Ltd* 2014 (1) SA 550 (GSJ) ('*Ukwanda Leisure*') para 61.
[202] *Capstone* (note 157 above) para 48.
[203] *Khabisi* (note 158 above) para 27.
[204] Ibid para 24; *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2008 (6) SA 12 (SCA) para 12.
[205] Ibid.
[206] *Mgoqi v City of Cape Town and Another; City of Cape Town v Mgoqi and Another* 2006 (4) SA 355 (C) paras 124–6.
[207] Freund & Price (note 55 above) 190–91.
[208] Ibid 191.
[209] Van Eetveldt (note 58 above) 26–33.

law on extended collateral challenge.[210] Van Eetveldt offers an alternative approach based on s 36 of Constitution, which governs the limitation of constitutional rights.[211] According to this alternative approach, when a court upholds a collateral challenge it enforces a litigant's right of access to court, and a dismissal would be a justifiable limitation of this right.[212]

1.4.4 *The court's discretion to withhold the remedy of setting aside in a judicial review*

According to *Oudekraal,* a reviewing court has discretion whether to grant or to withhold the remedy of setting aside even if the applicant has established a ground of review.[213] The court uses this discretion to 'minimize or avoid injustice when legality and certainty collide'.[214] It is this discretion that distinguishes judicial review from collateral challenge.[215]

The review of an unlawful administrative action is governed by PAJA. An administrative act that falls outside the purview of PAJA is reviewable in terms of the principle of legality.[216] The discretion referred to in *Oudekraal* thus has to be understood in the context of the court's powers in terms of PAJA and the Constitution.

Section 33 of the Constitution guarantees everyone a right to administrative action that is lawful, reasonable and procedurally fair.[217] PAJA gives effect to this right. According to the principle of subsidiarity, a litigant that seeks to review any administrative action must invoke PAJA and not s 33. Section 6(2) of PAJA details grounds upon which a court may review an administrative action. Section 8 empowers the court to grant any just and equitable remedy, including those that are listed in that section. In *Steenkamp NO v Provincial Tender Board, Eastern Cape,* the Constitutional Court interpreted s 8 of PAJA to endow courts with a 'generous jurisdiction' when it comes to what the just and equitable remedy ought to be in any given case.[218] This remedy must be just and equitable in light of the facts of the case, the applicable constitutional principles and the specific area of law involved.[219]

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[210] Ibid 75–6.
[211] Ibid 132–41.
[212] Ibid 131–2.
[213] *Oudekraal* (note 1 above) para 36.
[214] Ibid.
[215] Ibid.
[216] *Fedsure* (note 70 above) paras 40 and 59.
[217] *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (1) SA 604 (CC) ('*AllPay I*') para 41 with reference to s 6 of PAJA.
[218] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) ('*Steenkamp'*) para 30.
[219] Ibid para 29.

In a legality review, a court is concerned with whether the impugned act is inconsistent with the Constitution or the relevant enabling legislation.[220] Section 172(1)(b) of the Constitution has been cited as authority for the court's discretion not to set aside an unlawful act,[221] including an unlawful act that is subject a legality review.[222] Section 172(1)(b) must be understood within the totality of the context of s 172.

Section 172(a) of the Constitution obliges the court to declare invalid any act or conduct that is inconsistent with the Constitution. Once it has done so, s 172(1)(b) allows the court make an order that is just and equitable. In terms of s172(1)(b), a just and equitable order includes limiting the retrospective effect of the order of invalidity or suspending it on such conditions as the court may deem fit to allow the relevant authority to correct the defect.

It has been held that in judicial review, the general rule is to uphold the principle of legality, set aside an unlawful administrative act or correct it.[223] However, the Constitutional Court has emphasised that a just and equitable remedy is not restricted to setting aside an unlawful act or leaving it intact.[224] At times, this remedy may lie somewhere in between setting aside an unlawful act or leaving it to stand.

As explained in *Allpay II*, in respect of the correction of an unlawful administrative act, the courts adopt a corrective principle with multi-dimensional aspects.[225] At one level, this principle seeks to correct the wrongs that led to the invalidity of the administrative act. At another level, it requires the prioritization of public good, ie that the public interest must be assessed both in relation to the immediate consequences of the invalidity and the effect of the order of invalidity on future action (in that instance, procurement) and the protection of any constitutional rights involved. The factual disputes involved in the matter add a further dimension at a practical level.

It is only in exceptional circumstances that a court will refuse to set aside or correct an unlawful administrative act.[226] These exceptional circumstances include avoiding uncertainty or chaotic

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[220] *Fedsure* (note 70 above) para 41.
[221] *Bengweyama Minerals (Pty) Ltd v Genorah Minerals (Pty) Ltd* 2011 (4) SA 113 (CC) para 84; *Allpay II* (note 43 above) para 39.
[222] *Khumalo v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) ('*Khumalo*') paras 53.
[223] *Eskom Holdings Limited v New Reclamation Group* 2009 (4) SA 628 (SCA) ('*Eskom Holdings')* para 9; See also *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2010 (1) SA 333 (SCA) ('*Oudekraal II*') paras 81–2; *Bengweyama* (note 221 above) para 85; *AllPay II* (note 43 above) para 30.
[224] Ibid para 39.
[225] *AllPay II* (note 43 above) paras 32.
[226] *Eskom Holdings* (note 223 above) para 9; *Valueline CC v Minister of Labour* 2013 (4) SA 326 (KZP) para 73; see also Hoexter (note 48 above) 550–51.

disruption of the status quo.[227] A court will be guided by 'considerations of public interest, pragmatism and practicality'.[228] For instance, where the contract resulting from an unlawful administrative act is near completion or is not practically severable, the court may withhold an order setting it aside.[229] In *Millennium Waste v Chairperson, Tender Board, Limpopo Province,* the threat to public health and the environment influenced the court not to set aside an unlawful award of a tender for the removal of medical waste.[230]

The general rule that an unlawful act is liable to be set aside is tapered by the Constitutional Court's remarks in *Corruption Watch NPC v President of the Republic of South Africa* to the effect that there is no preordained consequence that must follow a declaration of invalidity.[231] It all hinges on the court's discretion exercised considering the facts before it. However, Quinot and Maree question whether s 172(1)(a) of the Constitution allows the court any discretion at all when it comes to remedy of setting aside.[232] In their view, in line with the supremacy of the Constitution and the doctrine of objective invalidity, a declaration of invalidity cannot mean anything other than setting aside of the impugned act. Thus, once an act has been declared invalid, it cannot be revived through the exercise of discretion by the court.

It has been held that once an unlawful administrative act is set aside, all subsequent acts based on its mere factual existence may no longer rely on it for their legal effect, whether those acts were performed before or after the order setting it aside.[233] Importantly, the discretion of the court in a review extends to whether the order setting aside an unlawful administrative act should not be retrospective.[234]

Saller decries the drastic impact of the retrospective declaration of invalidity.[235] She uses *Jaftha v Schoeman*[236] to illustrate the injustice that may be visited on a good-faith buyer of property sold in execution pursuant to a court judgment that had since been declared invalid. Because the sale would be invalid, the buyer would not be able to prove the unlawfulness of continued

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[227] *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board, Limpopo Province* 2008 (2) SA 481 (SCA) para 31 ('*Millennium Waste'*); *Chief Executive Officer, South African Social Security Agency v Cash Paymaster Services (Pty) Ltd* 2012 (1) SA 216 (SCA) para 29 ('*Cash Paymaster'*).
[228] *Cash Paymaster* (note 227 above) para 29.
[229] *Chairperson, Standing Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA) paras 27–9.
[230] *Millennium Waste* (note 227 above) para 28.
[231] *Corruption Watch* (note 60 above) para 68.
[232] Quinot & Maree (note 54 above) 40–41.
[233] *Seale v Van Rooyen NO; Provincial Government, North-West Province v Van Rooyen NO* 2008 (4) SA 45 (SCA) paras 13–14.
[234] *Pikoli v President of the Republic of South Africa* 2010 (1) SA 400 (GNP) 408D–E.
[235] Saller (note 52 above) 733–8.
[236] *Jaftha v Schoeman* 2005 (1) BCLR 78 (CC) ('*Jaftha*').

occupation of the property by the erstwhile owner in eviction proceedings in terms of Prevention of Illegal Evictions and Unlawful of Occupation of Land Act 19 of 1998.

Secondly, because of the unlawfulness of the attachment and sale in execution, the validity of the transfer of the property may be tainted because the Sheriff would lack the necessary authority to transfer the property to the good-faith purchaser.[237] In the result, the good-faith purchaser who did not anticipate the effects of *Jaftha* would be left in limbo with no occupation and no title to the property.

In *Gundwana v Steko Development,*[238] the Constitutional Court dealt with the consequences of constitutional invalidity of a similar rule in the High Court. The Constitutional Court held that all persons affected by the order of invalidity of the High Court rule and who seek to rely on it to avoid the execution of their immovable properties must apply for a rescission of judgment and satisfy all other requirements for it as set out in the High Court rules.[239] It is submitted that, to some extent, by lessening the effect of the retrospective order of invalidity in *Gundwana,* the court has, by extension, addressed Saller's concern about the unintended consequences of the retrospective orders of this kind in *Jaftha*.

1.5 OUTLINE OF THE STUDY

This thesis is arranged into the following six chapters:

(a) Chapter 1

This introductory chapter establishes the aims and significance of the thesis by examining the law and theoretical perspectives on the consequences of unlawful administrative acts prior to the *Oudekraal* case. It highlights the significance of the contribution by the *Oudekraal* case itself. Chapter 1 also serves as an introduction to the four identified Oudekraal principles. A detailed discussion of the Oudekraal principles takes place in the subsequent chapters.

(b) Chapter 2

Chapter 2 focuses on how the courts have applied the first Oudekraal principle. This principle provides that until an official act is set aside, it exists in fact and has legal consequences that should not be disregarded. Chapter 2 examines the rationale for and objects of the first Oudekraal principle; the nature of the contemplated legal effect; the extent and limits of the first Oudekraaal principle; judicial disagreement as to whether an unlawful act may have legal

[237] Saller (note 52 above) 737.
[238] *Gundwana v Steko Development* 2011 (3) SA 608 (CC).
[239] Ibid paras 58–9.

effect; exceptions to the first principle; and the consequences of having an unlawful act set aside on review.

(c) Chapter 3

The third chapter examines the second Oudekraal principle. According to this principle, the enquiry into whether an unlawful administrative act has legal effect should not focus on whether the prior act is valid but whether its validity is a necessary precondition for the validity of consequent acts. The chapter canvasses how the courts since *Oudekraal* have determined, in any given circumstances, whether the validity of the originating act is a precondition for the legal existence of subsequent acts.

(d) Chapter 4

Chapter deals with collateral challenge. Collateral challenge is a consequence of the application of the third Oudekraal principle, which states that if the validity of an earlier act is necessary for the legal existence of a later one, a person who is being coerced to comply with the unlawful act may disregard it with impunity unless the statutory context determines otherwise. Furthermore, that person may raise the invalidity of the earlier act as a collateral challenge or defence. This chapter canvasses the evolution of collateral challenge in South Africa; the types of collateral challenge that are recognized in South African administrative law; the role and relevance of coercion of a subject of an unlawful act to comply with it; who may raise collateral challenge; and instances where courts have not permitted collateral challenge.

(e) Chapter 5

The exercise of remedial discretion in the judicial review of an unlawful administrative act is the focus of chapter 5. It examines the general approach by the courts which emphasizes the need to uphold the principle of legality; and the factors, such as public interest, finality and practicality, that have persuaded the courts to depart from this general approach and uphold certainty. This chapter catalogues and critiques the principles that emerge from the cases on how the discretion is likely to be exercised in a given case with specific reference to setting aside.

(f) Chapter 6

In this final chapter, the thesis summarizes the impact of the case law since *Oudekraal* on the meaning, content and extent of each of the identified principles. It also enquires whether any of these principles requires further development.

CHAPTER 2

THE FIRST OUDEKRAAL PRINCIPLE

INTRODUCTION

The first Oudekraal principle provides that for as long as an unlawful administrative act is not set aside, it exists in fact and has legal effect.[1] This principle recognizes that those who are unaware of the legal deficiencies in an administrative act may rely on it and act in accordance with it.[2] They act on the supposition that an act upon which their action is based is valid.[3]

In *Oudekraal,* the SCA dealt with the legal effect of an unlawful approval that the then Administrator of the Cape had granted to Oudekraal's predecessor-in-title to develop the latter's property into a township. Almost 40 years later and on the strength of this approval, Oudekraal submitted its engineering services plan to the Cape Metropolitan Council for approval. This was the final procedural step that Oudekraal had to take before it could develop the property. The council declined to consider the engineering services plan because, in its view, the approval to establish the township had been unlawfully granted. Oudekraal unsuccessfully approached the High Court to enforce the approval.[4]

On appeal, the SCA asked whether 'the Cape Metropolitan Council was entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct'.[5] The SCA held that it was not so entitled. In its view, '[t]he proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject took of the validity of the act in question'.[6] It is for this reason that South African law recognizes that, under certain circumstances, an unlawful act may have legal effect for so long as it has not been set aside.[7]

This chapter focuses on how, and in what circumstances, the courts since *Oudekraal* have determined that, in any given circumstances, an unlawful act is legally effective prior to its

[1] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) ('*Oudekraal*') para 26.
[2] Ibid para 27.
[3] *Camps Bay Ratepayers and Residents Association v Harrison* 2011 (4) SA 42 (CC) ('*Harrison*') para 62.
[4] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2002 (6) SA 573 (C) ('*Oudekraal HC*'),
[5] *Oudekraal* (note 1 above) para 26.
[6] Ibid.
[7] Ibid.

being set aside. The aim of this chapter is to establish from the judgments since *Oudekraal* what the courts have held to be the content, meaning and extent of the first Oudekraal principle. This chapter has nine sections arranged according to the following topics: (1) the objects and purport of the first Oudekraal principle; (2) judicial disagreement about whether an unlawful administrative act may have any legal effect; (3) the nature and content of the contemplated legal effect; (4) legal effect expressly provided for in a statute; (5) legal effect established through the interpretation of an enabling statute; (6) the first Oudekraal principle and the *functus officio* doctrine; (7) the extent and limits of the first Oudekraal principle; (8) the consequences of setting aside an unlawful administrative act; and (9) the conclusion.

2.1 THE OBJECTS AND PURPORT OF THE FIRST OUDEKRAAL PRINCIPLE

In *Camps Bay Ratepayers and Residents Association v Harrison,* the Constitutional Court highlighted the importance of certainty to the efficacy of public administration.[8] According to *Harrison*, a second actor or the subject of an unlawful administrative act should be entitled to assume that the originating act upon which their action is based is valid.[9]

In *Harrison,* the applicants objected to the legality of Harrison's building plans that had been approved by the City of Cape Town. On the first occasion, Harrison responded by amending her plans and submitting a rider to the municipality for approval. A rider is a revision of the original plans addressing the cause of the complaint. The municipality approved the rider. The applicants successfully challenged the approval of the rider in court[10] and in an internal appeal.[11]

Harrison submitted a fresh set of rider plans focusing on the applicants' complaint.[12] Despite the applicants' protestations, the City of Cape Town approved Harrison's second rider plans.[13] The applicants then approached the High Court to review and set aside this approval. In their replying affidavit, the applicants added a new ground of review relating to non-compliance of Harrison's building plans with the Zoning Regulations in respect of a part of the property that they had not complained about previously. The High Court dismissed both the applicants' main contention and their new ground of review.[14] In respect of the new ground of review, the court

[8] *Harrison* (note 3 above) paras 62–3.
[9] Ibid.
[10] *PS Booksellers (Pty) Ltd v Harrison* 2008 (3) SA 633 (C).
[11] *Harrison* (note 3 above) para 9.
[12] Ibid paras 9–10.
[13] Ibid para 10.
[14] *Camps Bay Ratepayers and Residents Association v Harrison* (9470/2006) [2008] ZAWCHC 316 (25 July 2008) ('*Harrison HC*') paras 61 and 67.

held that the applicants were prevented by the rules of court from making their case in reply.[15] The applicants appealed. The SCA dismissed the appeal.[16] Although the SCA overturned the decision of the High Court refusal to hear the added ground of view, it also dismissed the ground for having been raised unreasonably late.[17] Dissatisfied with this outcome, the applicants approached the Constitutional Court for relief.

At the Constitutional Court, the applicants contended that because the latest rider plans were an amendment to the original plans, the validity of the original plans depended on the validity of the rider plans.[18] The Constitutional Court disagreed with this proposition. It held that it did not follow that a fatal attack on the second rider plans automatically meant that the unaffected part of the original plans was also invalid.[19] The court concluded that a portion of the original plans that had not been successfully challenged in a judicial review had to be accepted as a fact.[20] That is because the cause of the complaint in the added ground of review was part of the original approval, it had to be accepted as fact until it was challenged and set aside. Whether it was in fact valid did not matter.[21] The recognition by the Constitutional Court that administrative acts are often built on the supposition that previous decisions on which they are based were validly taken underscores the promotion of certainty as one of the object of the first Oudekraal principle.[22]

In *Head of Department, Free State Province v Welkom High School,*[23] the Constitutional Court went further than it did in *Harrison.* It added the maintenance of the rule of law and the principle of legality to the objects and purport of the first Oudekraal principle.[24] In *Welkom High School*, the SGBs of Welkom and Harmony High Schools had adopted learner pregnancy policies that discriminated unfairly against pregnant learners. Their effect was that two learners were excluded from the school even though they had already given birth and were able to sit their examinations.

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[15] Ibid para 67.
[16] *Camps Bay Ratepayers Association v Harrison* [2010] All SA 519 (SCA) ('*Harrison SCA*').
[17] Ibid paras 52–5.
[18] *Harrison* (note 3 above) para 62–3.
[19] Ibid para 62.
[20] Ibid.
[21] Ibid.
[22] Ibid para 62.
[23] *Head of Department, Department of Education, Free State Province v Welkom High School* 2014 (2) SA 228 (CC) ('*Welkom High School*') paras 1, 70 and 86.
[24] Ibid.

Following a complaint from the parents of the affected children, the HoD, as the employer of the school principals of the affected schools, instructed them to disregard the pregnancy policies and readmit the two learners.[25] He contended that he was entitled to issue this instruction because it was his duty to protect the constitutional rights of the learners, and that the relevant pregnancy policies were contrary to provincial and national policies. The SGBs approached the High Court and obtained an interdict preventing the HoD from forcing the school principals to heed his instruction.[26] The High Court found that the HoD did not have the legal authority to instruct the school principals as he had.[27] His instruction violated the principle of legality. In the court's view, the power to make policies resided with the SGBs. [28] The HoD appealed.

The SCA upheld the High Court's decision that the HoD's instruction violated the principle of legality.[29] Unhappy with this outcome, the HoD approached the Constitutional Court for further relief. The Constitutional Court was divided on whether the HoD had the legal authority to instruct the school principals as he had. The minority judgment held that he did. One of the reasons advanced by the minority was that s 7 of the Constitution enjoined him to protect the rights of the learners from any infringement.[30]

Like the SCA, the majority judgment approached the legal issues arising from *Welkom High School* from the perspective of the principle of legality.[31] The majority found that the HoD had only supervisory powers over the schools and not powers to make policy that governed the schools.[32] As a consequence of this conclusion, the majority held that the HoD could not act as if policies adopted by a school governing bodies did not exist.[33] He had a duty to invoke statutory mechanisms available to him to address his disquiet or to approach the court for appropriate relief.[34]

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[25] Ibid paras 11–12 and 19.
[26] *Welkom High School v Head of Department, Department of Education Free State Province* 2011 (4) SA 531 (FB) ('*Welkom High School HC*').
[27] Ibid paras 33.
[28] Ibid.
[29] *Head of Department, Department of Education, Free State Province v Welkom High School* 2012 (6) SA 525 (SCA) ('*Welkom High School SCA*') para 25–7.
[30] *Welkom High School* (note 23 above) para 202.
[31] Ibid para 1.
[32] Ibid paras 70, 74–9 and 90.
[33] Ibid para 72.
[34] Ibid paras 86 and 105–6.

The majority ruled that 'the rule of law does not permit an organ of state to reach what might turn out to be a correct outcome by any means'.[35] On the contrary, the rule of law dictates 'that where clear internal remedies are available, an organ of state is obliged to use them, and may not simply resort to self-help'.[36] Thus, no matter how well-meaning, state organs must act within the powers delegated to them by law.[37] The court emphasized that this is 'the essence of the principle of legality, the bedrock of our constitutional dispensation'.[38] By insisting that those who seek to avoid the legal effect of an unlawful administrative act invoke remedies available to them in law, the first Oudekraal principle promotes adherence to the principle of legality.

In *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute,* the majority of the Constitutional Court affirmed the correctness of *Welkom High School* that the first Oudekraal principle should be approached from the perspective of the rule of law and the principle of legality.[39] It held that '[t]he fundamental notion – that official conduct that is vulnerable to challenge may have legal consequences and may not be ignored until properly set aside – springs deeply from the rule of law'.[40] According to the majority, the rule of law requires that organs of state should invoke correct processes to avoid the legal consequences of an unlawful act.[41] The majority judgment also ruled that allowing public officials to disregard unlawful administrative acts would imperil the clarity and certainty in governmental conduct which citizens need in order to plan their lives.[42] Doing so would create 'a vortex of uncertainty, unpredictability and irrationality' in public administration.[43]

In *Kirland,* an acting HoD of the Eastern Cape Department of Health, pursuant to the unwarranted dictates of the MEC for Health in that province, granted Kirland an approval in terms of the National Health Act 66 of 1977 to establish a private hospital in the Port Elizabeth area. An internal committee set up to advise the HoD on pending applications had recommended that Kirland's application be declined.[44] The HoD accepted this recommendation but before he could communicate his decision to Kirland, he was injured in a

[35] Ibid para 86.
[36] Ibid.
[37] Ibid.
[38] Ibid para 1.
[39] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC) ('*Kirland'*) paras 102–3.
[40] Ibid para 103.
[41] Ibid.
[42] Ibid.
[43] Ibid.
[44] Ibid para 7.

car accident and had to be absent from work.[45] It is during his temporary absence that the Acting HoD granted Kirland the approval.

Upon his return, the HoD withdrew the approval because, in his view, Kirland's approval had been wrongly granted.[46] He advised Kirland to appeal to the MEC if it was unhappy with his decision. Kirland did so, but the MEC dismissed Kirland's appeal. Kirland approached the High Court to enforce its original approval.

The High Court reviewed and set aside the approval on the basis that it had been influenced by the unwarranted dictates of the MEC on the Acting HoD.[47] It also set aside the purported withdrawal of the approval by the HoD because the latter had not complied with requirements of procedural fairness when he decided to withdraw the approval.[48] Kirland appealed this outcome.

The SCA held that the purported withdrawal of the approval by the HoD and the MEC's appeal decision were invalid because they disregarded the fact that the approval by the Acting HoD existed in fact and had legal effect until it was set aside.[49] The disenchanted government parties approached the Constitutional Court for relief. The Constitutional was divided on whether it could adjudicate on the validity of the approval granted.

The minority judgment focused on whether it had enough evidence before it to adjudicate on the validity of the approval granted by the Acting HoD.[50] In its view, the difference between the majority and the minority judgments was a simple fact of court process. According to the minority judgment '[t]he undisputed evidence on record illustrates that the impugned approval was not based on the merits of the applications by Kirland but was influenced by the corrupt interference of the MEC'.[51] In the view of the minority, this approval had to be set aside. The minority urged that corrupt practices should not escape the reach of the courts merely because no formal application to have them set aside has been made.[52] However, the minority did not opine directly on the first Oudekraal principle.

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[45] Ibid.
[46] Ibid para 16.
[47] *Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute v MEC for Health, Province of Eastern Cape* (870/09) [2011] ZAECGHC 78 (15 December 2011) ('*Kirland HC*') para 27.
[48] Ibid para 26.
[49] *MEC for Health, Province of Eastern Cape NO v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) 219 (SCA) ('*Kirland SCA*') paras 22–4.
[50] *Kirland* (note 39 above) para 44.
[51] Ibid para 45.
[52] Ibid para 46.

On the other hand, the majority paid particular attention to the first Oudekraal principle, its objects and purport. Cameron J, on behalf of the majority, observed that Kirland brought its court application in order to enforce the approval it had obtained.[53] The government parties had made no effort to set it aside. In their view, the approval was a non-decision that could be disregarded.[54] They resisted it on the simple basis that it was defective and therefore did not exist.[55] This, Cameron J held, was a fundamental error.[56] He ruled that the approval existed in fact and continued to exist until it was properly considered by a court and set aside.

Cameron J advanced several reasons why, in his view, the stance by the government parties was mistaken in its view that the approval was a non-decision.[57] First, the Constitution does not expect official conduct to be without flaws. 'On the contrary, the Constitution anticipates imperfection, but makes it subject to the corrections and constraints of the law'.[58] He found support for this conclusion in the language and statutory scheme of PAJA, which extends the definition of administrative action to flawed decisions and failure to take a decision[59] Thus, according to Cameron J, if the Constitutional Court 'were to hold that a decision taken under dictation is not a decision at all, and has no effect even before it is set aside, then there would be no need for PAJA'.[60]

Secondly, relying on *Welkom High School,*[61] Cameron J found that the disregard of an act of one public authority by another without recourse to the courts amounts to self-help and is inimical to the rule of law.[62] In *Welkom High School*, the Constitutional Court had emphasized the need a public authority to follow due process and cautioned against officials resorting to self-help.[63]

Thirdly, Cameron J held that allowing an official to disregard an act of another would spawn confusion and undermine efficient public administration.[64] It would also be detrimental to the court's supervision of public administration. Cameron J's reasons illuminate the promotion of the principle of legality, the pivotal role of the courts as the final arbiter of legality, the eschewal

[53] *Kirland* (note 39 above) para 66.
[54] Ibid para 87.
[55] Ibid.
[56] Ibid para 88.
[57] Ibid paras 88–9.
[58] Ibid para 88.
[59] Ibid para 93.
[60] Ibid para 96.
[61] *Welkom High School* (note 23 above) para 86.
[62] *Kirland* (note 39 above) paras 89 and 103.
[63] *Welkom High School* (note 23 above) para 86.
[64] *Kirland* (note 39 above) para 103.

of self-help and the advancement of the efficacy of public administration as some of the purposes of the first Oudekraal principle.

In *Merafong City v AngloGold Ashanti Ltd,* the majority of the Constitutional Court continued with the theme of the maintenance of the rule of law, the principle of legality and the centrality of the court's role as the sole arbiter of the validity of administrative acts.[65] In this case also, the bench was divided on whether an unlawful act can have any legal effect. The minority held that according to the supremacy of the Constitution and the doctrine of objective invalidity, an unlawful act can never have legal effect.[66] This judicial disagreement about the legal effect of an unlawful effect is canvassed more fully in a separate section below.

In *Merafong*, AngloGold operated a mine in Merafong. For a period of over 46 years, AngloGold obtained water for its industrial and domestic use from Rand Water.[67] In December 1997, the Water Services Act 108 of 1997 came into effect. It designated local governments as Water Services Authorities and granted them powers to administer water in their areas of jurisdiction.[68] On 11 February 2004, Merafong informed AngloGold that, pursuant to its new powers as the Water Services Authority, it was taking over the provision of water services to AngloGold from Rand Water.[69] However, Merafong had no capacity to provide water services itself. It contracted Rand Water to do it on its behalf.[70] In May 2004, Merafong announced new, much higher tariffs. The new tariffs included Rand Water's fees and a surcharge levied by Merafong. In this arrangement, Rand Water would collect payment from AngloGold, deduct its share and pay the balance to Merafong.[71]

AngloGold complained that the higher tariffs were not justified because Merafong added no value to any aspect of the water supply.[72] AngloGold appealed to the Minister of Water Affairs in terms of s 8(4) of the Water Services Act.[73] The Minister ruled that Merafong had no right to levy a surcharge for water for industrial use.[74] She also overturned the surcharge on water for domestic use because Merafong added no value in the provision of this service.[75] She

[65] *Merafong City v AngloGold Ashanti Limited* 2017 (2) SA 211 (CC) ('*Merafong*') para 39–43.
[66] Ibid paras 89 and 107.
[67] Ibid para 3.
[68] Ibid para 4.
[69] Ibid para 7.
[70] Ibid.
[71] Ibid.
[72] Ibid para 8.
[73] Ibid.
[74] Ibid.
[75] Ibid para 9.

directed Merafong, AngloGold and Rand Water to negotiate a reasonable tariff for water for domestic use. The negotiations failed.[76]

Merafong obtained legal advice to the effect that the Minister's decision was unlawful.[77] As a result, Merafong refused to comply with the Minister's decision.[78] Instead, Merafong threatened to discontinue AngloGold's supply of water if the latter failed to pay the disputed surcharge.[79] In order to avoid disruptions at its mine, AngloGold paid the surcharge under protest and approached the High Court for relief.[80] Merafong responded with a counter-application seeking an order declaring that s 8 of the Water Services Act did not confer authority on the Minister to interfere with a tariff set and implemented by it.[81] The High Court granted AngloGold the relief it claimed and dismissed Merafong's counter-application.[82] Merafong appealed. The SCA dismissed this appeal.[83] Both decisions were premised on the first Oudekraal principle but more importantly on the ruling that Merafong, as a public authority, was disqualified from raising a collateral challenge. Merafong approached the Constitutional Court.

At the Constitutional Court, the minority held that an unlawful act can never have any legal effect and that *Oudekraal* was not authority for the contrary proposition.[84] In the view of the minority, the SCA in *Oudekraal* laid down a narrower principle which provides that in the limited circumstances of consecutive administrative acts, an originating act may provide a basis for the lawful performance of subsequent acts provided the enabling Act requires the mere factual existence of the originating act.[85]

On the other hand, the majority judgment painstakingly unpacked the objects and purposes of allowing an unlawful act to have legal effect.[86] It ruled that the principle that an unlawful act has legal effect until it is set aside ensures that the validity of the impugned administrative act is tested in court.[87] The court emphasised that the sole power to pronounce that a decision is

[76] Ibid para 11.
[77] Ibid para 10
[78] Ibid para 11.
[79] Ibid para 10.
[80] Ibid.
[81] Ibid para 13.
[82] *AngloGold Ashanti Ltd v Merafong City Local Municipality* (23558/2011) [2014] ZAGPPHC 85 (26 February 2014) ('*Merafong HC*').
[83] *Merafong City v AngloGold Ashanti* 2016 (2) SA 176 (SCA) ('*Merafong SCA*').
[84] *Merafong* (note 65 above) paras 89 and 107.
[85] Ibid para 119.
[86] Ibid paras 41–3.
[87] Ibid para 41.

defective rests with the courts and not public bodies.[88] This is the pre-eminent and exclusive domain of the courts.[89]

Like *Kirland*[90] and *Welkom High School,*[91] *Merafong* emphasized that public authorities must follow due process if they wish to escape legal effects of unlawful administrative acts. However, the majority judgment cautioned that the insistence on due process 'does not fossilise a possibly unlawful – constitutionally invalid – administrative action as indefinitely effective'.[92] Until it is challenged by the right person in the right proceedings, 'for rule-of-law reasons, the decision stands'.[93]

In *Department of Transport v Tasima (Pty) Ltd,* again, the majority of the Constitutional Court affirmed that the principle of legality and the rule of law are part of the objects and purport of the first Oudekraal principle.[94] In *Tasima,*[95] the minority objected to this view and repeated the arguments raised by the minority judgment in *Merafong*.

In *Tasima,* the Department of Transport and Tasima had entered into a contract in terms of which the latter provided it with a comprehensive IT solution known as electronic National Traffic Information System (eNaTIS) for a period of five years ending on 31 May 2007.[96] This system enabled the Department to regulate and administer the licensing of vehicles, learner drivers and drivers' licences, vehicle roadworthiness tests as well the general implementation of road traffic legislation. The parties envisaged that Tasima would hand the system over to the Department at the end of the contract.[97] The contract provided for a mechanism to effect this handover.[98]

Toward the end of the contract, the parties renewed it from month to month to enable the Department to take over the IT solution. Inexplicably, the month to month arrangement went

[88] Ibid.
[89] Ibid para 42.
[90] *Kirland* (note 39 above) para 103.
[91] *Welkom High School* (note 24 above) paras 1 and 86.
[92] *Merafong* (note 65 above) para 43.
[93] Ibid.
[94] *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) ('*Tasima*') paras 81 and 147–50.
[95] Ibid para 87.
[96] Ibid paras 6–7.
[97] Ibid.
[98] Ibid para 8.

on for three years.[99] During this time, the contract of the serving Director-General of the Department ended and a new one was appointed.[100]

Without following due process and without satisfying himself of the soundness of the basis for extending the expired contract, the new Director-General approved the extension of the contract for five years.[101] The Auditor-General questioned the lawfulness of the extension of the contract.[102] This prompted the Director General to initiate negotiations with Tasima to terminate the extended contract.[103] The negotiations failed.

Towards the expiry of the term of the extended contract, the Department took steps to prepare for the transfer of eNaTIS to one of its agencies, the Road Traffic Management Corporation (the Corporation). In response, Tasima brought urgent proceedings in the High Court seeking an order declaring that these steps were in contempt of the High Court order it had earlier obtained, and interdicting the Department and the Corporation from going ahead with the preparations.[104] The Department and the Corporation retorted with a combination of a collateral challenge contending that the extension of the contract was void and a counter-application to have the decision to extend the eNaTIS contract reviewed and set aside.[105] The High Court upheld the Department's contentions and dismissed Tasima's application.[106]

Tasima appealed. The SCA upheld Tasima's appeal.[107] At the core of the SCA's ruling is a finding that according to the first Oudekraal principle, the extension of the contract had to be treated as if it was valid until it was set aside, even if it was actually invalid, because collateral was not available to the Department as a public authority.[108] The SCA also dismissed the Department's counter-application because it had been brought after a five-year delay. Aggrieved by this decision, the Department and the Corporation approached the Constitutional Court for relief.

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[99] Ibid para 12.
[100] Ibid.
[101] Ibid para 23.
[102] Ibid para 28.
[103] Ibid para 29.
[104] *Tasima* (note 94 above) para 45.
[105] Ibid paras 48–50.
[106] *Tasima (Pty) Ltd v Department of Transport* [2015] (44095/2012) ZAGPPHC 421 (23 June 2015) ('*Tasima HC'*) para 99.
[107] *Tasima (Pty) Ltd v Department of Transport* [2016] All SA 1 465 (SCA) ('*Tasima SCA*') para 23.
[108] Ibid para 25–7.

At the Constitutional Court, the majority held that the first Oudekraal principle is consistent with the principle of legality because it does not seek to validate that which is invalid.[109] On the contrary, '[i]n the interests of certainty and the rule of law, it merely preserves the fascia of legal authority until the decision is set aside by a court'.[110] Like *Merafong,* the majority in *Tasima* insists that the declaration of invalidity be made by a court.[111]

In summary, four objects and purposes of the first Oudekraal principle emerge from the case law since *Oudekraal*.[112] First is the exclusive and pre-eminent jurisdiction of the courts to decide on the validity of administrative acts.[113] Accordingly, public officials may not arrogate this jurisdiction to themselves. Second is the maintenance of the rule of law and the principle of legality.[114] Public officials are required to avoid self-help and invoke remedies available to them in law or approach the court for urgent or appropriate relief if no statutory remedy is available to them. Thirdly, certainty facilitates predictable and efficient public administration.[115] Certainty enables those who are affected by administrative acts and are not aware of the flaws in them to plan their lives on the assumption that they are valid. Lastly, the first Oudekraal principle ensures that those affected by an unlawful administrative act enjoy the procedural protection afforded to respondents by the court rules.[116]

2.2 JUDICIAL DISAGREEMENT ABOUT THE LEGAL EFFECT OF AN UNLAWFUL ACT

The question whether an administrative act may have legal effect for as long as it has not been set aside has divided the Constitutional Court on at least four occasions. *Welkom High School* provided early warnings of the discord in the apex court on this issue.[117] In this case, the disagreement in the court arose over whether the HoD was entitled to instruct principals of the affected schools to disregard certain learner pregnancy policies on the basis that they were

[109] *Tasima* (note 94 above) para 147.
[110] Ibid para 148.
[111] Ibid para 147.
[112] See also Daniel Freund and Alistair Price 'On the legal effects of unlawful administrative action' 2017 *SALJ* 184 at 189.
[113] *Kirland* (note 39 above) paras 65 and 89–91; *Merafong* (note 65 above) paras 41–2; *Tasima* (note 94 above) para 147.
[114] *Welkom High School* (note 23 above) paras 1 and 86; *Kirland* (note 39 above) para 103; *Merafong* (note 66 above) para 43; *Tasima* (note 94 above) para 148.
[115] *Harrison* (note 3 above) para 62; *Kirland* (note 39 above) para 103; *Tasima* (note 95 above) para 148; see also Jason Brickhill, Hugh Corder, Dennis Davis & Gilbert Marcus 2016 'Administration of justice' *Annual Survey of South African Law* 1 ('Brickhill et al') at 9.
[116] *Kirland* (note 39 above) para 82.
[117] *Welkom High School* (note 23 above).

unconstitutional.[118] These policies were indeed discriminatory and unconstitutional but no application had been brought to have them reviewed or set aside.

The minority judgment proceeded from the premise that the constitutionality of the pregnancy policies was properly and sufficiently raised in the papers.[119] It held that since it was not disputed by the majority judgment that the policies unfairly discriminated against pregnant learners, the majority judgment ought to have concluded that the conduct of the SGBs was in breach of the principle of legality, unlawful and unconstitutional.[120]

In the view of the minority, the constitutionality of the policies was intertwined with the lawfulness of the HoD's instruction to the school principals. This was because if the policies were unlawful, it had to follow that the HoD had the power to instruct the school principals not to breach the law.[121] The minority judgment reasoned that if it were to be found that the SGBs had no power to adopt or enforce discriminatory policies, that would conclude the enquiry.[122]

On the other hand, the majority judgment focused on the legality of the instruction issued by the HoD to the principals to disregard the pregnancy policies.[123] It insisted that the HoD could not simply disregard the unlawful policies because they had legal effect until they were set aside.[124] If he wished to avoid their legal effect, he had to invoke the statutory remedies available to him.[125] According to the majority, the HoD's instruction and his disregard of the existence of the policies amounted to self-help.[126] However, the majority judgment cautioned that its ruling should not be understood to mean that the SGBs of the affected schools had the right to adopt and impose the unlawful pregnancy policies.[127] The majority observed that there were objective concerns about the constitutionality of the policies but held that it was ill-placed to make a conclusive determination on the substantive content of the policies.[128] In its view, the constitutionality of the policies was not properly before court. [129] In order to address the concerns over their constitutionality, the court invoked s 172(1)(b) of the Constitution, which empowered it to grant a just and equitable remedy, and ordered the SGBs to review the policies

[118] Ibid para 1.
[119] Ibid paras 212–14 and 238.
[120] Ibid para 240.
[121] Ibid para 191.
[122] Ibid.
[123] Ibid para 28.
[124] Ibid para 72.
[125] Ibid para 105.
[126] Ibid para 86.
[127] Ibid para 106.
[128] Ibid para 110.
[129] Ibid.

and to cooperate with the HoD to ensure that review accorded with the standard demanded Constitution.[130] It refrained from making a declaration of invalidity.[131]

Although the difference between the majority and the minority judgments was on whether the lawfulness of the the pregnancy policies was properly before court, this divergence of views foreshadowed a deeper tension in the apex court that later revealed itself on the question whether an unlawful administrative act may have any legal effect at all.[132]

In *Kirland,* the minority judgment continued with the debate on whether a court may rule on the unlawfulness of an administrative act in the absence of an application to have it reviewed and set aside.[133] At issue was the unlawful approval that the Acting HoD of Department of Health had granted Kirland to establish a private hospital. It is common cause that the approval was invalid because the Acting HoD granted it following the unwarranted dictates of her MEC. When Kirland sought to enforce the approval in court, the HoD challenged its lawfulness.

At the Constitutional Court, the minority held that the issue that fell to be decided was what the response of the court had to be where serious maladministration and abuse of public power were established but there was no request for the review of the offending administrative act.[134] The minority held that although there was no formal application to have the permission reviewed, Kirland's application to have it enforced placed the validity of the approval before the court.[135] In its view, the court had a duty to rule on the validity of the approval.[136]

The minority criticized the SCA for not setting aside the approval after it had found that it was invalid.[137] It disagreed with the SCA that the latter had no jurisdiction to rule on the validity of the approval because it was not properly before it.[138] In its view, the SCA had jurisdiction because the validity of the approval was one of the issues that had been pertinently raised in the pleadings and canvassed in evidence.[139]

Consistent with the stance taken by the minority judgment in *Welkom High* School, the minority in *Kirland* insisted that a flawed decision such as the approval granted by the Acting

[130] Ibid.
[131] Ibid para 125.
[132] Ibid para 240.
[133] *Kirland* (note 39 above) para 28.
[134] Ibid.
[135] Ibid paras 36–9.
[136] Ibid para 39.
[137] Ibid para 38–40.
[138] Ibid paras 38 and 40.
[139] Ibid para 40.

HoD to Kirland should not be allowed to exist on the technical basis that no application had been brought to have it reviewed.[140] This would allow corrupt practices to escape the reach of the court. In the view of the minority, corruption and maladministration are unconstitutional and a threat to South Africa's democracy.[141]

The minority ruled that there was uncontroverted evidence on record that established the invalidity of the decision by the HoD to grant Kirland the approval.[142] Section 172(1)(a) of the Constitution dictated that the permission ought to have been declared invalid and set aside.[143] The minority held that at the core of its difference with the majority judgment was a simple fact of court process.[144] In its view, to insist on a formal review application in the face of uncontroverted evidence of invalidity placed form over substance.[145] In light of this stance by the minority judgment, it did not go further and opine on whether an unlawful act had any legal effect.

According to the majority, the question before it was whether it was competent for a court to set aside an official decision that has been communicated to those affected by it, and on whose basis they have acted, without an application to have that decision reviewed and set aside.[146] More emphatically, the majority asked whether it was competent for a court to 'exempt government from the burdens and duties of a proper review application, and deprive the subject of the protections these provide, when it seeks to disregard one of its own decisions'.[147] The majority answered these questions in the negative.[148] It proceeded from the premise that the issues relating to whether the court could adjudicate the unlawfulness of the decision of the Acting HoD had not been properly ventilated. It also maintained that the government could not disregard the unlawful approval as if it did not exist.[149]

The majority correctly pointed out that when Kirland went to court, it did so not to have its approval confirmed but to enforce it.[150] At the time Kirland launched the court application, it was not aware of the procedural flaws in the decision of the Acting HoD.[151] The majority also

[140] Ibid para 43.
[141] Ibid para 47.
[142] Ibid.
[143] Ibid para 46.
[144] Ibid para 44.
[145] Ibid para 50.
[146] Ibid para 64.
[147] Ibid.
[148] Ibid.
[149] Ibid para 68.
[150] Ibid para 79.
[151] Ibid.

observed that if the government had brought an application to review and set aside the impugned approval, it would have had to explain its delay of seven months.[152] This had not been canvassed in the papers filed in court.

The majority also observed that even if it were to assume that the validity of the Acting HoD's decision to grant Kirland approval was properly before court, the parties had not placed enough evidence before court to enable it to exercise its discretion whether to set aside the impugned administrative act.[153] For instance, not enough evidence was placed before the court for it to understand the nature and extent of the prejudice that a decision to set aside the approval would bring about.[154] Insofar as Kirland might have addressed prejudice, it did not do so with reference to a decision to set aside the approval.[155] Kirland asserted prejudice in order to resist a delay that would ensue if the court did not decide on the validity of the purported withdrawal of the permission by the HoD.[156] As for the remarks by the SCA that the approval was invalid, the majority held that these were incautious since the permission was not before the appeal court.[157]

The majority proceeded to explain the legal effect of an administrative act.[158] According to it, the fundamental notion that an unlawful act has legal consequences is derived from the rule of law.[159] The majority incautiously interpreted the first Oudekraal principle to mean that an 'invalid administrative action may not simply be ignored, but may be *valid* and effectual, and may continue to have legal consequences, until set aside by proper process'.[160] This sparked rebuke from the minority in *Merafong*[161] to which Cameron J responded and clarified that he choice of terminology was imprecise. He meant that an unlawful act was legally effective and not valid.[162]

Unlike *Welkom High School* where the Constitutional addressed the concerns it had with the constitutionality of the learner pregnancy policies,[163] the majority in Kirland was not moved

[152] Ibid paras 71 and 83.
[153] Ibid para 86.
[154] Ibid para 75.
[155] Ibid.
[156] Ibid.
[157] Ibid para 81.
[158] Ibid para 100–105.
[159] Ibid para 103.
[160] Ibid para 101. The term valid has been italicised for emphasis.
[161] *Merafong* (note 65 above) para 128.
[162] Ibid para 43 n 63 with reference to *Kirland* (note 39 above) para 106.
[163] *Welkom* (note 23 above) para 106.

by the uncontroverted evidence of the corruption in the decision of the Acting HoD.[164] Consistent with its earlier caution in *Welkom High School* that public authorities should desist from self-help and that they should invoke remedies available to them in law,[165] the majority in *Kirland* reiterated that an unlawful administrative act remains valid until it is set aside.[166]

In *Merafong,* the minority took issue with proposition that an unlawful act can ever have legal effect.[167] It advanced five reasons for its criticism. First, the minority opined that an assertion that an unlawful administrative act could ever be valid offends the principle of legality.[168] This principle deprives an unlawful act of any legal force or validity.[169] Secondly, the supremacy of the Constitution expressly declares invalid conduct that is inconsistent with it.[170]

Thirdly, the proposition that failure to challenge an unlawful act turns it into a valid one is not sound.[171] For instance, at what point does the failure to challenge an unlawful act trigger validity or binding effect?[172] At what point does the principle of legality cease to operate?[173] Fourthly, the minority reiterated that in line with the doctrine of objective invalidity,[174] the declaration of invalidity of law or conduct does not invalidate the law or conduct in question; it merely confirms the pre-existing legal status of the relevant law or conduct.[175]

Fifth and lastly, the minority held that *Oudekraal* did not rule that an unlawful act had legal effect.[176] According to it, the court in *Oudekraal* had no power to convert an unconstitutional and invalid act with no legal force into a valid act with binding effect.[177] The supremacy of the Constitution prevented this.

Instead, according to the minority, *Oudekraal* laid down the principle that in the limited situation of consecutive administrative decisions, and if the empowering provision requires merely that the first act be in existence for the second act to be made, the mere factual existence

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[164] *Kirland* (note 39 above) para 104.
[165] *Welkom* (note 23 above) para 1.
[166] *Kirland* (note 39 above) para 103.
[167] *Merafong* (note 65 above) paras 89 and 128 (for a summary of the basis of the criticism by the minority judgment).
[168] Ibid paras 89 and 107.
[169] Ibid para 109 with reference to *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) ('*Affordable Medicines*') paras 48–9.
[170] *Merafong* (note 65 above) para 114.
[171] *Merafong* (note 65 above) paras 131–3.
[172] Ibid para 132.
[173] Ibid para 133.
[174] *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) ('*Ferreira*') paras 27–9; *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 94.
[175] *Merafong* (note 65 above) para 136.
[176] Ibid para 116
[177] Ibid.

of the first act would be enough for the validity of the second act.[178] However, if the second act is unlawful for any other reason, it cannot have any legal effect by reason of its mere factual existence or that of the originating act.[179]

If the view of the minority is taken to its logical conclusion, it means that every official act must exist in law for it to have legal effect. If this view holds, the narrow construction of *Oudekraal* by the minority is as flawed as the proposition by the majority that an unlawful act has legal effect until it is set aside. This is because, as the logic of the minority goes, the initial act has to be lawful for it to provide any basis for a legally competent later act.

On the other hand, in *Merafong,* the majority explained that the absence of a legal challenge against an unlawful administrative act does not transform it into a valid one.[180] In the view of the majority, 'the import of *Oudekraal* and *Kirland* [is] that government cannot simply disregard an apparently binding ruling or decision on the basis that it is invalid'.[181] Only the court can declare an unlawful act invalid.[182] None should usurp its role: not even the government.[183]

The majority ruled that the legal effect of an unlawful act is consistent with the Constitution and necessary.[184] For example, the suspension of the order of invalidity in terms of s172(1)(b) of the Constitution means that an invalid act would be effective until the judicially set period of suspension of the order invalidity came to an end.[185]

The majority also explained that the court's obligation in terms of s 172(1)(a) to declare conduct that is inconsistent with the Constitution invalid arises only when it is deciding a constitutional matter within its jurisdiction.[186] In that sense, s 172(1) contemplates that a court may decline to decide a matter because the right complainant is not before it or because the challenge is not warranted in the particular proceedings before it.[187] In each of these instances, an unlawful decision would stand.

[178] Ibid para 119.
[179] Ibid para 125.
[180] Ibid para 43.
[181] Ibid para 41.
[182] Ibid para 42.
[183] Ibid.
[184] Ibid para 36.
[185] Ibid.
[186] Ibid para 37.
[187] Ibid.

The majority concluded that Merafong's disregard of the Minister's decision and its threat to cut off the water supply to AngloGold amounted to self-help.[188] As a public authority, once Merafong disputed the Minister's decision and decided that it was not going to comply with it, Merafong owed AngloGold a duty to seek clarification from the courts.[189] It was not open to it to defy the Minister's decision by enforcing its own unilateral view.[190]

Despite the authoritative ruling in *Merafong* that an unlawful administrative act has legal effect prior its being set aside,[191] in *Tasima,* the minority persisted with a contrary view.[192] In *Tasima,*[193] the minority repeated the arguments that had been defeated in *Merafong.* The majority was disappointed by this stance.[194] In response, the majority sought to explain the basis for the legal effect of an unlawful act and its consistence with the principle of legality.[195]

In *Tasima HC,* the Department had successfully resisted the enforcement of the unlawful contract through a counter-application and a collateral challenge.[196] On appeal, the SCA dismissed the Department's counter-application because the latter had instituted it after a delay of five years in circumstances where no case was made out for condonation in terms of the PAJA.[197] The SCA also held that because the Department was a public authority, it was barred from raising a collateral challenge.[198]

At the Constitutional Court, the minority found the time limit in s 7(1) of PAJA not to be a bar to the court declaring an unlawful act invalid.[199] The minority reasoned that because the Constitution is the supreme law and PAJA is derived from it, PAJA could not override it.[200] In the view of the minority, a refusal to condone an application to review and set aside an unlawful act is against the principle of legality. In its interpretation of this principle, the minority judgment held that no amount of delay can turn an unlawful act into a valid one.[201]

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[188] Ibid para 60.
[189] Ibid para 63.
[190] Ibid.
[191] Ibid para 43.
[192] *Tasima* (note 94 above) para 80.
[193] Ibid para 90.
[194] Ibid paras 145–6 and 224–31 for a separate judgment by Froneman J concurring with the majority and rebuking the minority.
[195] Ibid paras 147–8.
[196] *Tasima HC* (note 106 above) para 96.
[197] *Tasima SCA* (note 107 above) para 38.
[198] Ibid paras 26–7.
[199] *Tasima* (note 94 above) para 78.
[200] Ibid.
[201] Ibid para 81.

The minority judgment also opined that '[t]he approach adopted by the Supreme Court of Appeal did not only deviate from s 172(1)(a) but resulted also in that Court enforcing conduct that was in violation of the Constitution'.[202] It stressed that it was against the supremacy of the Constitution for an invalid decision to have any legal force and effect.[203]

The majority took time to explain why the PAJA limit and the delay rule are consistent with the Constitution. First, the majority addressed the criticism by the minority that a court may not rely on PAJA as justification for shying away from its obligation in terms s 172(1)(a) of the Constitution. Relying on *Khumalo v Member of the Executive Council for Education, KwaZulu-Natal,* the majority ruled that by allowing a public authority to challenge an unlawful act, the court had not 'dispensed with the basic procedural requirement that review proceedings are to be brought without undue delay or with a court's discretion to condone the delay'.[204] On the contrary, the court observed that s 237 of the Constitution demands timeous and diligent performance of constitutional obligations. In the view of the majority, '*Khumalo* made it perspicuous that timely performance of constitutional obligations is itself a constitutional concern'.[205] Consequently, the court concluded that s 172(1)(a) of the Constitution cannot automatically assume pre-eminence over s 237 and rejected the minority judgment's opinion that delay can never prevent a court from deciding a constitutional matter.[206]

Secondly, the majority addressed the assertion by the minority that allowing an unlawful administrative act to have legal effect offends the supremacy of the Constitution and the doctrine of objective invalidity.[207] The court explained that its view does not derogate from these principles. In particular, the majority affirmed the authority of *Affordable Medicines* and *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* that any law or conduct that is inconsistent with the Constitution is invalid and of no force or effect.[208] However, the majority stressed that, as a result of a long string of Constitutional Court judgments, it is now settled law that a declaration of invalidity must be made by a court.[209] Only the courts are constitutionally empowered to rule on

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[202] Ibid para 79.
[203] Ibid.
[204] Ibid para 142 with reference to *Khumalo v Member of the Executive Council for Education, KwaZulu Natal* 2014 (5) SA 579 (CC) ('*Khumalo*') para 45.
[205] *Tasima* (note 94 above) para 144
[206] Ibid.
[207] Ibid paras 147–8.
[208] Ibid para 147 with reference to *Affordable Medicines* (note 170 above) paras 45–50 and *Pharmaceutical Manufacturers Association of South Africa: In re ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) ('*Pharmaceutical Manufacturers*') paras 8–9.
[209] *Tasima* (note 94 above) para 147.

legality.[210] It is for this reason that until a court has adjudicated upon the validity of administrative act, an otherwise unlawful act has legal effect merely because of its factual existence.[211]

In a separate judgment, Froneman J,[212] who concurred with the majority judgment, criticized the minority for persisting with a legal position that had been overruled in *Merafong*. He observed that it was an individual judicial choice how a judge reacts to a majority judgment that she or he originally disagreed with, but that such choice must be exercised through the prism of established doctrine.[213] This doctrine, as espoused in *Turnbull-Jackson v Hibiscus Coast Municipality*, makes it clear that for a court to depart from a previous decision, the latter must not be merely wrong – it must be clearly wrong.[214] Froneman J concluded that it was not appropriate for the minority in *Tasima* to depart from the majority judgments in *Kirland* and *Khumalo,* and by extension *Merafong,* because these were neither clearly wrong nor wrong at all. According to Froneman J, these cases established 'an important bulwark for the rule of law, to prevent administrative and executive self-help, and provide a flexible criterion to ensure that state organs correct perceived wrongs timeously'.[215] Froneman J decried the continued opposition by the minority because it only served to cast unnecessary doubt on a settled statement of the law.[216]

Brickhill et al[217] observe that the disagreement in the apex court in *Merafong and Tasima* over the legal effect of an unlawful act was unnecessary because, earlier, in *President of the Republic of South Africa v South African Dental Association,*[218] the Constitutional Court had unanimously accepted the authority of *Oudekraal* on this point. Brickhill et al also criticise the minority judgments in *Merafong* and *Tasima* for their failure to address the frequent occurrence of unlawful acts and for enabling chaos in public administration.[219]

After *Tasima,* in *State Information Technology Agency v Gijima Holdings,* the Constitutional Court considered the legal consequences of an unlawful act in the context of an unreasonably

[210] Ibid.
[211] Ibid paras 147–8.
[212] Ibid para 226.
[213] Ibid.
[214] Ibid with reference to *Turnbull-Jackson v Hibiscus Municipality* 2014 (6) SA 592 (CC) ('*Turnbull-Jackson'*) para 57.
[215] *Tasima* (note 94 above) para 226.
[216] Ibid para 227.
[217] Brickhill et al (note 115 above) 11–12.
[218] *President of the Republic of South Africa v South African Dental Association* 2015 (4) BCLR 388 (CC) ('*SA Dental Association*') para 12.
[219] Brickhill et al (note 115 above) 11–12.

late application to have it reviewed and set aside.[220] Remarkably, the Constitutional Court's approach to delay in this case gives credence to the views of the minorities in *Merafong* and *Tasima* that delay can never clothe an unlawful act with any legal force or effect. In effect, *Gjima* casts doubt on the correctness of the precedent established by the majority in *Merafong* and *Tasima*.

SITA is a specialist state organ responsible for the procurement of IT services on behalf of the South African government. Gijima and SITA had a contract in terms of which the former provided certain IT services to the South African Police Services.[221] SITA terminated this contract. Gijima challenged the termination of this contract in court. This led to an out-of-court settlement in terms of which SITA granted Gijima a contract to provide IT services to the Department of Defence (DoD) for three months.[222] SITA did not follow any public procurement process when it awarded the DoD contract to Gijima. This made Gijima question the lawfulness of the award.[223] SITA assured it that the award was valid.

The parties extended the DoD contract three times.[224] Towards the end of the third extension, SITA informed Gijima that it was not going to extend the agreement any further.[225] Gijima claimed from SITA certain moneys that were allegedly owed to it as result of the DoD agreement.[226] SITA disputed liability and contended that the DoD contract and its subsequent extensions were unlawful for want of compliance with s 217 of the Constitution.[227]

SITA approached the High Court for an order to review and set aside the DoD contract. The court dismissed SITA's application on the basis that the latter sought a review of an administrative action outside the time periods stated in s 7(1) of PAJA without setting out basis for the court to condone its lateness.[228] SITA appealed this judgment. It contended that an application by an organ of state to have its own decisions reviewed is beyond the reach of PAJA.

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[220] *State Information Technology Agency v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) ('*Gijima*').
[221] Ibid para 4.
[222] Ibid paras 5–7.
[223] Ibid para 6.
[224] Ibid para 8.
[225] Ibid.
[226] Ibid para 9.
[227] Ibid.
[228] *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* ([2015] ZAGPPHC 1079 (*'Gijima HC'*) paras 22 and 24.

On appeal, the majority of the SCA held that a decision by an organ of state to award an agreement for services constitutes administrative action in terms of PAJA.[229] It also held that, where PAJA applies, a litigant cannot rely on s 33(1) of the Constitution or common law when reviewing unlawful administrative action. In light of this, the majority dismissed SITA's appeal.[230]

On the other hand, the minority opined that it was legally permissible for SITA to launch review proceedings under the principle of legality as there was no clarity whether organs of state were obliged to review their own acts under PAJA.[231] The minority also remarked that it would be subversive of the obligation contained in section 7(2) of the Constitution for a court to deny an applicant its right to attack the constitutionality of an agreement simply because it opted for an attack based on the principle of legality and not on PAJA.[232] Dissatisfied with the outcome of the appeal, SITA approached the Constitutional Court.

The Constitutional Court held that the right to administrative action that is lawful, reasonable and procedurally fair applies to private persons and not to organs of state.[233] This meant that SITA could not rely on PAJA for the review of its own decision.[234] It followed that the timelines in PAJA did not apply to the review application brought by SITA.[235] An organ of state must rely on the legality principle when seeking to have its own decisions reviewed.[236] It was common cause that the award of the DoD contract to Gijima by SITA had not been pursuant to a competitive bidding process as contemplated in s 217 of the Constitution.[237] This was at odds with the principle of legality and liable to be reviewed and set aside.[238] The question was whether the court should review and set aside the award of the DoD contract in light of the 22-month delay by SITA in bringing the review.

The Constitutional Court restated the legal principle that reviews should be instituted without undue delay to ensure certainty and promote legality.[239] The court found that SITA had failed

[229] *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2017 (2) SA 63 (SCA) ('*Gijima SCA*') para 16.
[230] Ibid para 33.
[231] Ibid paras 63 and 67.
[232] Ibid para 55.
[233] *Gijima* (note 220 above) paras 18–29.
[234] Ibid para 35.
[235] Ibid.
[236] Ibid para 40.
[237] Ibid para 41.
[238] Ibid.
[239] Ibid paras 43–4.

to explain its delay.[240] This raised the question whether despite this failure, the court should exercise its discretion to overlook the delay.[241] The courts do not exercise this discretion lightly or outside the specific factual context.[242] In *Gijima,* the court found no basis to exercise its discretion to overlook the delay.[243] Ordinarily, this would be the end of the matter. The applicant would be non-suited.[244] Despite this, the court found that it was compelled by s 172(1)(a) of the Constitution, which enjoins a court to declare invalid any law or conduct that it finds to be inconsistent with the Constitution, to declare invalid the DoD agreement and its extensions.[245] In essence, *Gijima* seems to mean that the obligation of a court in terms of s 172 of the Constitution takes precedence over unwarranted delay in bringing an application for review or the court's refusal to overlook the delay. This effectively negates the import of the delay rule and, presumably, the need for condonation of a PAJA-based review application.

In *Buffalo City Metropolitan Municipality v Asla Construction,*[246] the majority followed *Gijima*. The facts in *Asla Construction* were similar to those in *Gijima.* The municipality had extended a contract for the construction of certain residential dwellings to cover a geographical area that was outside the scope of the original contract. Asla Construction discharged its obligation to the municipality in respect of the additional area. When it presented its invoices for payment, the municipality questioned the validity of the extension of the contract and approached the court to review and set aside the extension. This application was brought unreasonably late.[247] The court condoned the lateness of the application and upheld it. The SCA found that the delay was inadequately explained and that there were no reasons to condone the unreasonable delay. It allowed the appeal to succeed. The municipality approached the Constitutional Court.

The approach to delay divided the Constitutional Court. The majority in *Asla Construction*[248] considered itself bound by *Gijima.* In the view of the majority, despite absence of reasons to condone an unreasonable delay, if the unlawfulness is clear and undisputed the court has an obligation to declare the impugned act invalid.[249] The minority in *Asla Construction*

[240] Ibid para 45.
[241] Ibid para 47.
[242] Ibid paras 48–9.
[243] Ibid para 49.
[244] *Cape Town City v Aurecon SA (Pty) Ltd* 2017 (4) SA 223 (CC) para 51.
[245] *Gijima* (note 220 above) para 52.
[246] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) ('*Asla Construction*').
[247] Ibid para 11.
[248] Ibid paras 65 and 122.
[249] Ibid para 66.

acknowledged academic criticism against *Gijima.*[250] However, the minority opted for an alternative that fell within the broad frame of *Khumalo* on delay. In the view of the minority, where the delay is unreasonable, the court must decline to determine the lawfulness of the impugned act unless the seriousness of the unlawfulness warrants overlooking the delay.[251]

The approach in *Gijima* and *Asla Construction* is consistent with the minority views in *Tasima*[252] that delay has no bearing on the status of an unlawful administrative act, ie it remains of no force or effect. This view was expressly rejected by the majority in that case.[253]

In summary, judicial discord in the Constitutional Court first presented itself as a difference of opinion as to whether a court may rule on the validity of an administrative act despite there being no application to have it reviewed and set aside.[254] The tension arose because the minority in *Kirland* held that if corruption is established on the papers before court, it should not escape the court's attention merely because no formal application has been brought to set it aside.[255] On the other hand, the majority in *Kirland* showed that adopting the minority approach involves a real risk of sacrificing some of the procedural protections afforded to litigants and promoting self-help on the part of administrators.[256]

The tension escalated into discord about whether an unlawful administrative act may have any legal effect at all.[257] The minority insisted that according an unlawful act legal effect is against the principle of legality, the doctrine of objective invalidity and the supremacy of the Constitution.[258] The majority held that the legal effect of an unlawful act is consistent with these principles and doctrines.[259] All that is required is that the declaration of invalidity of an unlawful act be made by a court. Until then, for rule-of-law reasons, an unlawful act stands.[260]

The courts have inherent powers to regulate their own procedures.[261] Through this power, they can call for additional information from the parties and address any outstanding issues. The

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[250] Ibid para 112 with reference to Leo Boonzaier 'A decision to undo' (2018) 135 *SALJ* 642 at 672.
[251] *Asla Construction* (note 246 above) para 127.
[252] *Tasima* (note 94 above) para 78.
[253] Ibid paras 141–44.
[254] *Welkom High School* (note 23 above) paras 110 and 240; see also *Kirland* (note 39 above) para 44.
[255] *Kirland* (note 39 above) para 46.
[256] Ibid paras 70–72, 86 and 103.
[257] Ibid para 106; see also *Merafong* (note 65 above) paras 119.
[258] *Merafong* (note 65 above) 130; see also *Tasima* (note 94 above) para 87.
[259] *Merafong* (note 65 above) para 36; see also *Tasima* (note 94 above) para 147.
[260] *Merafong* (note 65 above) para 43; see also *Tasima* (note 94 above) para 148.
[261] Section 173 of the Constitution; see also *Oosthuizen v Road Accident Fund* 2011 (6) SA 31 (SCA) paras 13–17; Jeroldt Tait *The Inherent Review Jurisdiction of the Supreme Court* Vol 1, (Unpublished PhD Thesis, University of Cape Town, 1983) at 6–7.

procedural challenges and the information gap in in *Welkom High School* and *Kirland* are matters of court process. [262] It is submitted that a failure to invoke these powers in the context such as that of *Welkom High School* and *Kirland* elevates form over substance.

In *Kirland,* the Constitutional Court could have issued an appropriate directive to the parties to address it on issues such as the reasons why it should entertain the respondent's challenge to validity of the permission in the light of the time that had lapsed since the permission was granted, whether it was necessary for the respondents to bring a counter-application for review, whether any prejudice would result if it were to entertain the challenge to the validity of the approval, and the basis for challenging the validity of the approval. In this way, the invocation of the court's inherent powers could have addressed the need identified by the minority for the court to intervene early to curb corruption and maladministration, on one hand,[263] and the centrality of the role of the court as the arbiter of the validity of an administrative acts advocated by the majority, on the other.[264]

Another flaw in the minority judgments is their premise that an unlawful administrative act is objectively invalid.[265] As De Ville correctly observes, this statement of principle by the Constitutional Court creates the impression that invalidity is there for everyone to see without the need for interpretation or court's intervention.[266] On the contrary, an unlawful administrative act bears no brand of invalidity on its forehead.[267] Those unaware of its flaws may well act on it and change their circumstances in accordance with it.[268]

In reality, invalidity is brought about by a court's authoritative pronouncement after interpretation of the applicable law and consideration of issues such as standing, ripeness, mootness and jurisdiction.[269] This reinforces the correctness of the majority view that only the court should pronounce on the validity of an administrative act, not public officials.[270] The majority view is pragmatic and responds to practicalities of public administration.[271] The

[262] See *Kirland* (note 39 above) paras 43, 71–72, 74, 80, 82–86 for evidence that the court could have called for exercising its inherent powers.
[263] Ibid para 46.
[264] Ibid paras 100–101.
[265] *Merafong* (note 65 above) 114; see also *Tasima* (note 94 above) para 77–9.
[266] J R de Ville *Judicial Review of Administrative Action in South Africa* revised 1 ed (2005) 329–30.
[267] *Smith v East Elloe Rural District Council* [1956] AC 736 (HL) ('*Smith*') 769–70.
[268] *Oudekraal* (note 1 above) para 29 with reference to Forsyth (note 5 above) 159.
[269] De Ville (note 266 above) 330.
[270] *Merafong* (note 65 above) paras 41–2; *Tasima* (note 94 above) paras 147–8.
[271] Brickhill et al (note 115 above) 9.

opposite view introduces uncertainty where anyone is entitled to disregard an administrative act if they believe it to unlawful, despite that they may be wrong.

The insistence by the minority that an unlawful act can never have legal effect does not take into account the consequences of a court's refusal to set aside an unlawful act for a reason that is not related to the validity of the act, eg lack of jurisdiction.[272] In such an instance, an unlawful act remains as effective a lawful one.[273]

2.3 THE NATURE OF THE CONTEMPLATED LEGAL EFFECT

In *V&A Waterfront Properties (Pty) Ltd v Helicopter & Marine Services (Pty) Ltd*, the SCA dealt with the legal effect of a temporary grounding order issued by the South African Civil Aviation Authority (CAA) suspending the flying of a helicopter belonging to the respondent.[274] In this case, the SCA had its first opportunity to explain the nature of the legal effect contemplated in the first Oudekraal principle.

In *V&A Waterfront,* the parties had an agreement in terms of which the appellant leased certain property to the respondent to carry on the business of ferrying tourists by a helicopter. In terms of the lease agreement, the respondent undertook strictly to comply with the regulations and rules of the South African Civil Aviation Authority. The lease also forbade the respondent from contravening any regulations relating to or affecting the carrying on of business at the leased premises.

Controversy arose when the Civil Aviation Authority issued an order grounding the respondent's helicopter until it was inspected for airworthiness.[275] The respondent defied this order because it believed that the order was unlawful. It insisted on carrying on its business, which entailed taking off and landing at the leased premises. This prompted the appellant to demand that the respondent should cease operating the helicopter contrary to the grounding order. The respondent refused.[276] The appellant lodged an application in the High Court to interdict the respondent from breaching the terms of the grounding order. The High Court

[272] *Smith* (note 267 above) 769–70.
[273] Ibid.
[274] *V&A Waterfront Properties (Pty) Ltd v Helicopter & Marine Services (Pty) Ltd* 2006 (1) SA 252 (SCA) ('*V&A Waterfront*').
[275] Ibid para 3.
[276] Ibid para 9.

declined to grant the interdict because the appellant had failed to establish a reasonable apprehension of harm, ie that the helicopter was in fact not airworthy. [277]

On appeal, the respondent argued that disregarding the grounding order was not acting in breach of the lease agreement because the order was a product of an unlawful administrative act.[278] The SCA dismissed this contention and held, rather curiously, that collateral challenge was not available to the respondent because the latter was not being coerced by a publ;ic authority to comply with an unlawful act.[279] The appeal court concluded that, in the absence of such coercion, the grounding order existed in fact and could not be disregarded.[280] It had to be treated as if it were valid.

The judgment highlights two key elements of the contemplated legal effect. They are that despite its flaws, an unlawful administrative act may not be disregarded as if it does not exist and that it must be treated as if it were valid until it is set aside. What may be also be gleaned from *V&A Waterfront* is that a court may look at the contemplated legal effect from the perspective of the obligation that it imposes on the *subject* of an unlawful administrative act, ie the *subject* may not disregard the unlawful act despite its flaws.

In *Reader v Ikin,* although the full bench did not specifically comment on the nature of the legal effect of an unlawful administrative act, it carried forth the theme that a subject of an unlawful administrative act may not disregard it as if it does not exist.[281] In this case, the City of Cape Town had approved the respondent's buildings plans without affording the appellants, as persons affected by its decision, an opportunity to be heard. Aggrieved by this decision, the appellants approached the High Court to have this decision reviewed and set aside. The High Court dismissed their application. It held that the appellants had failed to exhaust internal remedies available to them in terms of s 62 of the Systems Act.[282] Section 62(1) of the Act allows a person who is affected by a decision of a municipal functionary to appeal against it. However, s 62(3) of the Systems Act bars the appeal authority from varying or revoking any decision if the variation or revocation would detract from any right that might have accrued as

[277] *V&A Waterfront Properties (Pty) Ltd and Another v Helicopter & Marine Services (Pty) Ltd* [2004] 2 All SA 664 (C) ('*V&A Waterfront HC*') para 31.
[278] *V&A Waterfront* (note 274 above) paras 8–10.
[279] Ibid para 10.
[280] Ibid paras 8 and 10.
[281] *Reader v Ikin* 2008 (2) SA 582 (C) ('*Reader')* para 31.
[282] Ibid para 2.

a result of the impugned decision. Disenchanted by the decision of the High Court, the appellants appealed against it.

Before a full bench, the appellants contended that they had no internal remedy because the approval of the respondents' plans by the City of Cape Town granted the respondents a right to build a house identified in the plans and that s 62(3) prevented the appeal authority from affecting this right.[283] In response, the first respondent contended that if the decision to approve the building plans was unlawful then City of Cape Town had acted ultra vires, and thus no right accrued to the respondents.[284] The full bench disagreed with this proposition.[285] The court recognized the legal effect of the decision to approve the plans and upheld the appellants' contention that they had no internal remedy.[286] On a further appeal to the SCA by the City of Cape Town, the appeal court confirmed the correctness of the full bench's decision.[287] Consistent with *V&A Waterfront, Reader* viewed the legal effect through the prism of the obligation it imposed on the subject of an unlawful administrative act not to disregard it until it was set aside.

In *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd,* the High Court explained the legal effect of an unlawful administrative act from the perspective of the benefit that it accorded to the beneficiary of an unlawful administrative act.[288] In *Offit,* the applicants were owners of certain properties in the Coega Industrial Development Zone (the IDZ). They had earlier averted attempts by the Eastern Cape Provincial Government to expropriate their properties for incorporation into the IDZ. Although it was idle, the threat of expropriation lingered on. Seeking to address this threat, the applicants approached the High Court for an order declaring that any expropriation of their properties in the IDZ for the benefit of Coega Development Corporation was impermissible and unlawful.[289] The applicants contended that any expropriation for the benefit of Coega would be for an unlawful purpose because the latter operated the industrial development zone on the basis of unlawfully issued permits.[290] Coega operated the IDZ on the basis of certain provisional permits until the Minister of Trade and

[283] Ibid para 21.
[284] Ibid para 30.
[285] Ibid.
[286] Ibid para 31.
[287] *City of Cape Town v Reader* 2009 (1) SA 555 (SCA) paras 35–6.
[288] *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* 2009 (5) SA 661 (SE) (*'Offit'*) 672B.
[289] Ibid 670D–H.
[290] Ibid.

Industry issued it with a final one. Offit queried the validity of these permits but never challenged them by means of judicial review.

The High Court focused on the final permit held by Coega and declined to comment on the provisional permits.[291] Although the court concluded that the final permit had been validly issued, it went on to hold that even if it was somehow faulty, it had legal effect until it was set aside.[292] It is in the course of this obiter dictum that the court explained the nature of the legal effect that flowed from the factual existence of the final permit.[293] The court held that the legal effect accorded to an unlawful administrative act in the first Oudekraal principle means that the beneficiary of an unlawful administrative act is entitled, as matter of law, to act on the assumption that it is a valid act for so long as it has not been set aside.[294] Thus, Coega was entitled as a matter of law to assume the validity of the permits.[295] On appeal, the SCA upheld the High Court's finding that the final permit was valid.[296] The SCA found it unnecessary to opine on the legal effect of an unlawful administrative act.

Although *Offit* approached legal effect from the position of the beneficiary of an administrative act, it is consistent with *V&A Waterfront* and *Reader*. All these cases emphasize recognition of the legal consequences of the factual existence of an unlawful act, albeit from different angles.

In *Coal of Africa Limited v Akkerland Boerdery (Pty) Ltd*, the High Court approached the legal effect of an unlawful administrative act from a different perspective.[297] It focused on the administrative act itself instead of its subject or beneficiary. In this case, the Minister of Mineral Resources, acting in terms of the Mineral Resources and Petroleum Development Act 28 of 2002 (MPRPDA), had granted Coal of Africa prospecting rights in respect of the minerals beneath Akkerland Boerdery's land. The prospecting rights entitled Coal of Africa to enter that land and to explore it for identified minerals. Akkerland Boerdery denied Coal of Africa access to the land because, in its view, the prospecting rights were invalid and of no force or effect.

[291] Ibid 670I–J.
[292] Ibid 672A–G.
[293] Ibid.
[294] Ibid.
[295] Ibid 672A–H.
[296] *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* 2010 (4) SA 242 (SCA) (*'Offit SCA'*) para 35.
[297] *Coal of Africa Limited v Akkerland Boerdery (Pty) Ltd* (38528/2012) [2014] ZAGPPHC 195 (5 March 2014) (*'Coal of Africa')* paras 67 and 133.

[298] Coal of Africa brought an application in the High Court to enforce its right to enter Akkerland Boerdery's land and prospect for the relevant minerals.

The question before the High Court was whether Akkerland was entitled to disregard Coal of Africa's prospecting rights because it believed them to be invalid.[299] Like *V&A Waterfront,* the High Court held that for so long as the prospecting rights were not set aside, they had to be treated as if they were valid.[300] Consistent with *Waterfront,* the court also endorsed Hoexter's understanding of the first principle that even an obvious illegality should not simply be ignored (in the sense of being treated as invalid).[301] Importantly, the court held that for so long as an unlawful administrative act has not been set aside, it has the intended legal consequences.[302] This perspective by the court focused squarely on the administrative act itself, independent of its subject or beneficiary.

In *Kirland,* the Constitutional Court introduced some confusion, albeit temporarily, in the terminology by holding that 'legal effect' in the context of the first Oudekraal principle meant that an unlawful act was *valid* until it was set aside.[303] In *Merafong,* the Constitutional Court cleared up this confusion and explained that legal effect means that an unlawful administrative act has to be treated as if it were valid, and not that it is actually valid.[304]

The principle that an unlawful administrative act may not be disregarded until it is set aside has been reinforced by the courts since *Oudekraal* against a tide of requests to the courts to disregard invalid administrative acts because they were inconsistent with s 33 of the Constitution. For instance, in *Coal of Africa,* the respondents had urged the High Court to disregard the applicant's prospecting rights because the Minister of Mineral Resources had not followed due process when he granted the applicant these rights.[305] The court disagreed with this proposition and endorsed Hoexter's view that even if an administrative act is palpably unlawful, it cannot simply be disregarded (as in assumed to be invalid).[306]

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[298] Ibid paras 11–15.
[299] Ibid para 56.
[300] Ibid paras 62–4.
[301] Ibid para 64 with reference to Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) 547.
[302] *Coal of Africa* (note 297 above) para 67.
[303] *Kirland* (note 39 above) para 106; see also *Merafong* (note 94 above) para 128.
[304] *Merafong* (note 65 above) para 41 n 63.
[305] *Coal of Africa* (note 297 above) para 56.
[306] Ibid paras 62–4 with reference to Hoexter (note 301 above) 547.

In *Road Accident Fund v Duma and Three Similar Cases*,[307] the SCA followed the same approach as *Coal of Africa*. In this case, the four respondents had lodged individual claims in terms of s 17(1) of the Road Accident Fund Act 56 of 1996 for non-pecuniary loss alleging that they had sustained serious injuries from motor vehicle accidents. The Road Accident Fund Regulations of 2008 required a claim for general damages to be supported by a medical assessment in the prescribed form, form RAF 4. These regulations entitled the fund to reject a claim if it was not satisfied with the medical assessment and give reasons for rejecting claim. The fund had rejected all four claims because the supporting medical assessments were not based on a physical examination by a medical practitioner.[308] The claimants sued the fund for general damages. The High Court upheld their claims.[309] It held that it was apparent from the medical evidence presented at the trial that the claimants (the plaintiffs at the trial) had indeed suffered serious injuries as contemplated in the regulations.[310]

Notably, in *Duma,* the High Court also held that the fund's rejection of the RAF 4 forms was invalid and could be disregarded because it had failed to reject the forms within a reasonable time and had given insufficient or invalid reasons for the rejection.[311] Accordingly, the court concluded that the decision of the fund did not constitute a proper rejection in terms of reg 3(3)*(d)*(i) of the Regulations.[312]

On appeal, the SCA held that the Road Accident Fund Act gave the fund the power to decide whether a claimant's injury was so serious as to satisfy the threshold for the award of general damages and not the court.[313] The appeal court ruled that the fund's decision is an administrative action and should not simply be disregarded.[314] It has legal effect until it is set aside. The court emphasized that it was irrelevant that the fund gave no reasons for its decision or that the reasons given were not persuasive or were not based on sound legal grounds.[315] It also did not matter whether the fund's decision was wrong.

Subsequent cases have consistently maintained that a defect in an administrative act does not detract from its having legal effect until set aside. For instance in *Joint Owners, Erf 5216*

[307] *Road Accident Fund v Duma and three similar cases* 2013 (6) SA 9 (SCA) ('*Duma*').
[308] Ibid para 14.
[309] Ibid para 15.
[310] Ibid.
[311] Ibid.
[312] Ibid.
[313] Ibid para 19.
[314] Ibid para 24.
[315] Ibid.

Hartenbos v Minister for Local Government, Environmental Affairs and Development Planning, Western Cape, the High Court dealt with the legal effect of an administrative act that lacked a necessary precondition.[316] In this case, the applicants sought an order from the High Court declaring that their activity of filling in a depression at their property was exempted from s 24F(1) of NEMA. Section 24F(1) of NEMA requires any person who intends to undertake an activity listed in terms of s 24(2)(a) to obtain an environmental authorization. The correction of this depression was such an activity. In addition to their main submission that they were exempted from NEMA, the applicants contended that they needed to fill the depression in order to construct an access road to the property.

The court held that the applicants could not rely on the construction of the road because that activity fell afoul of item 1(d) of Schedule 1 to the regulations promulgated in terms of s 21 of the ECA.[317] Sections 21 and 22 prohibited the undertaking of any activity identified by the Minister as being detrimental to the environment. In item 1(d) of Schedule 1 to the regulations, the Minister of Environmental Affairs identified, as a prohibited activity, any road or track in an area regarded by the relevant authority as a sensitive area. The applicants questioned the validity the Minister's notice because the relevant authority had not published its 'regard'.[318] This publication was a necessary procedural step to ensure that the Minister's notice was valid. However, the court enforced the Minister's notice despite this procedural flaw.

Similarly, in *Missouri Trading v ABSA Bank Ltd*, the High Court had to determine the legal effect of a notice reinstating the registration of a close corporation which did not comply with certain pre-publication procedural steps.[319] In this regard, the High Court held that whatever its view might have been, the notice remained a valid administrative act until it was set aside.[320] It also held that because the respondents had not attacked the validity of the notice of reinstatement, the court was not entitled to go behind it.[321]

In a nutshell, the cases since *Oudekraal* have not regarded procedural unfairness[322] or any other misstep in the performance of an administrative act as a bar to an invalid administrative act

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[316] *Joint Owners, Erf 5216 Hartenbos v Minister for Local Government, Environmental Affairs and Development Planning, Western Cape* 2011 (1) SA 128 (WCC) ('*Hartenbos'*) paras 8–13.
[317] Regulations regarding activities identified under section 21(1) of the Conservation Act 1989, GN 1182 GG 8261 of 5 September 1997.
[318] *Hartenbos* (note 316 above) para 44.
[319] *Missouri Trading CC and Another v ABSA Bank Ltd* 2014 (4) SA 55 (KZD) ('*Missouri'*).
[320] Ibid para 15.
[321] Ibid.
[322] *Coal of Africa* (note 297 above) para 62; see also *Duma* (note 307 above) para 24.

having legal effect until it is set aside.[323] The post-*Oudekraal* courts have viewed the legal effect of an administrative act through different prisms, ie from the perspective of the obligation it imposes on its subject, the benefits it bestows on its beneficiary or the utility of the administrative act itself. Despite these different angles of emphasis, there is concurrence that the legal effect of an unlawful administrative act means that it should not be disregarded or treated as if it does not exist. For as long as an unlawful administrative act has not been set aside, it must be treated as if it is valid.[324] While it is not necessarily valid, it has the intended legal effect of a valid act.

2.4 LEGAL EFFECT EXPRESSLY PROVIDED FOR IN A STATUTE

A statute may state that the mere factual existence of an administrative act is sufficient to grant it legal authority. For instance, s 36 of the VAT Act and s 88 of the Income Tax Act oblige a taxpayer to pay tax that is payable before the determination of any objection to, or appeal against, a tax assessment. This is known as the 'pay now, argue later' principle. It is underpinned by considerations of 'public interest in obtaining full and speedy settlement of tax debts and the need to limit the ability of recalcitrant taxpayers to use objection and appeal procedures strategically to defer payment of their taxes'.[325] This concept has been held to pass constitutional muster.[326]

Sections 40(1) of the VAT Act and 91(1)(b) of the Income Tax Act complement the 'pay now, argue later' principle. They empower the Commissioner of the Revenue Service to exact payment of the tax payable by filing a statement in court and executing on it. Although this statement has been described as nothing more than a recovery mechanism, it has the effect of a court judgment.[327] Only the Commissioner may suspend the operation of the 'pay now, argue later' provisions of the tax laws.[328] The Commissioner's decision in this regard constitutes an administrative action.[329]

In *Capstone,* the Commissioner of the South African Revenue Service reassessed the taxpayers and informed them that additional tax was payable in respect of past tax years. The affected taxpayers requested the Commissioner to suspend their obligation to pay whilst their objections

[323] *Hartenbos* (note 316 above) paras 43–4; *Missouri* (note 319 above) paras 15.
[324] Ibid.
[325] *Capstone 556 (Pty) Ltd v Commissioner, South African Revenue Services* 2011 (6) SA 65 (WCC) ('*Capstone*') para 9.
[326] *Metcash Trading Ltd v Commissioner for South African Revenue Services* 2001 (1) SA 1109 (CC).
[327] *Singh v Commissioner, South African Revenue Service* 2003 (4) SA 520 (SCA) para 9.
[328] Section 88 of the Income Tax Act.
[329] *Capstone* (note 325 above) para 11.

were being processed. He declined their request. The taxpayers brought an application to review and set aside the Commissioner's decision to refuse their request. In order to preserve the status quo, the applicants also applied for an interim interdict to restrain the Commissioner from exacting payment of tax payable in terms of s 91(1)(b) of the Income Tax.

The High Court held that, in line with the first Oudekraal principle, the decisions of the Commissioner were effective until they were set aside.[330] It also ruled that because tax is payable despite an appeal or objection, it was not open to a taxpayer to resist payment by raising a collateral challenge.[331] A challenge is collateral when it is raised in proceedings that are not designed to impeach the validity of the act in question.[332] Collateral challenge is canvassed in detail in chapter 4.

Tax legislation shows how Parliament may expressly provide for the legal effect of unlawful administrative acts. Through the 'pay now, argue later principle', an unlawful tax assessment is given temporary validity and may not be disregarded. In order to balance legality with certainty, in the Income Tax Act, the legislature requires that an aggrieved party be fully restored to its earlier legal position if they eventually succeed in challenging the unlawful tax assessment.[333]

2.5 LEGAL EFFECT UPON THE INTERPRETATION OF A STATUTE

Statutes governing the exercise of public power seldom spell out in sufficient detail whether the validity of an administrative act is dependent on no more than the factual existence of an earlier originating act.[334] They are often cast in open-textured language. In that event, a court is called upon to interpret an enabling statute and discern whether it intends the relevant unlawful administrative act to have legal effect until it is set aside.[335]

A statute may, upon its true construction, grant legal effect to an act which appears formally valid and has not been set aside.[336] When that obtains, nothing but the formal validity of the act is relevant. In this section, this thesis canvasses how the courts since *Oudekraal* have discerned from legislation, where it is silent on this issue, that it intended an unlawful administrative act to have legal effect.

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[330] Ibid para 48.
[331] Ibid para 49.
[332] *Merafong* (note 65 above) para 23.
[333] Section 83(13) and (14) of the Income Tax Act.
[334] Forsyth 'The theory of the second actor revisited' 2006 *Acta Juridica* 209 at 219.
[335] *Oudekraal* (note 1 above) para 30 with reference to *Regina v Wicks* 1998 AC 92 (HL) ('*Wicks*') 117A–C.
[336] *Wicks* (note 335 above) at 117A–C.

Section 39(1)(a) of the Constitution provides guidance. It enjoins a court interpreting legislation to do so in a manner that promotes the values that underlie an open and democratic society based on human dignity, equality and freedom. For instance, in *Khabisi NO v Aquarella Investments 83 (Pty) Ltd,* the High Court relied on the policy underlying NEMA and the constitutional right to a clean and safe environment to uphold the legal effect of the environmental enforcement notices and directives until they were set aside.[337]

In *Khabisi*, the HoD of Agriculture and Environmental Affairs in Gauteng, acting in terms of s 31L of the NEMA and s 31A of the ECA, issued notices and directives to Aquarella directing it to cease all construction on its property because the latter was situated on an environmentally sensitive ridge.[338] Aquarella elected not to comply with the HoD's notices and directives because it believed them to be invalid. The Gauteng MEC for Agriculture and Environmental Affairs and the HoD approached the High Court on an urgent basis to enforce the notices and directives.

The High Court found that Aquarella could not simply disregard the notices and directives and treat them as if they did not exist.[339] It arrived at this decision having surveyed the constitutional obligations of the MEC and the HoD and the objects of NEMA. The court held that s 24 of the Constitution and preamble of NEMA oblige the state to promote conservation and protection of the environment and that the state is required to execute this duty for the present and future generations.[340] The court also noted that the state owes the public a 'constitutional duty to ensure ecologically sustainable development and the use of natural resources that is consonant with the ethos of the Constitution'.[341] It cautioned that the if the state failed in its duty, 'the resultant harm to the environment would have far-reaching and irreversible consequences for the broader society which would nullify the government's lofty ideals, encapsulated in the Constitution, of a healthy environment for everyone'.[342] The promotion of the constitutional ideals of a healthy environment for everyone as elaborated in NEMA and the ECA persuaded the court to hold that the notices and directives issued by the Heads of Department to Aquarella had legal effect.

[337] *Khabisi NO v Aquarella Investments 83 (Pty) Ltd* 2008 (4) SA 195 (T) ('*Khabisi*').
[338] Ibid para 16.
[339] Ibid para 30.
[340] Ibid para 27.
[341] Ibid.
[342] Ibid para 30.

In *Economic Freedom Fighters v Speaker, National Assembly,*[343] the Constitutional Court followed the same approach as *Khabisi* in its analysis of the legal effect of the Public Protector's binding remedial action. The Public Protector is an institution established by the Constitution to strengthen constitutional democracy in South Africa.[344] The Public Protector Act 23 of 1994 grants the Public Protector power to investigate any conduct in state affairs or in the public administration in any sphere of government; report on that conduct; and take appropriate remedial action.[345]

In *EFF*, the Public Protector had found that certain of the 'security' improvements made at public expense to the private residence of the country's President were not related to security.[346] Consequently, she recommended that the President ought to repay a reasonable percentage of the costs of the non-security improvements. She directed that the National Treasury and the South African Police Service should quantify the exact amount to be paid by the President.[347] The Public Protector reported her findings to the National Assembly. However, instead of complying with the Public protector's remedial action or approaching the courts to have it set aside, the President initiated a parallel investigation led by the Minister of Police. The report that the Minister of Police compiled exonerated the President from any liability.

When the National Assembly considered the Public Protector's report, it also had regard to the report by the Minister of Police. The majority of the Members of the National Assembly disregarded the Public Protector's binding recommendations and accepted the Minister of Police's report which absolved the President of any liability.[348] Aggrieved by this, two opposition parties, the Economic Freedom Fighters and the Democratic Alliance, approached the Constitutional Court directly to enforce the remedial actions of the Public Protector.

The Constitutional Court had to adjudicate on whether the remedial actions of the Public Protector in issue were binding on the President and the National Assembly or were merely recommendations that could be disregarded.[349]

Initially, both the President and the National Assembly suggested that because the Public Protector was not a judge, her remedial action had no binding effect.[350] By implication, a person

[343] *Economic Freedom Fighters v Speaker, National Assembly* 2016 (3) SA 580 (CC) *('EFF').*
[344] Section 181 of the Constitution; see also *EFF* (note 343 above) para 49.
[345] Section 182(1) of the Constitution.
[346] *EFF* (note 343 above) para 6.
[347] Ibid para 10.
[348] Ibid paras 12–13.
[349] *EFF* (note 343 above) para 4.
[350] Ibid para 72.

affected by the remedial action could disregard it if he or she believed it to be wrong. The President later abandoned this proposition.[351]

In its analysis, the Constitutional Court distinguished between binding and non-binding remedial actions of the Public Protector.[352] In respect of the former, the court held that compliance with them was not optional, the reservations that an affected party might have about their fairness, appropriateness or lawfulness are irrelevant to the legal effect of the Public Protector's remedial actions.[353] The Constitutional Court proceeded from the premise that 'one of the crucial elements of South Africa's constitutional vision was to make a decisive break with the unchecked abuse of state power and resources that was virtually institutionalised during the apartheid era'.[354] According to the court, it was in light of the need to avoid repeating this past that accountability, the rule of law and, the supremacy of the Constitution were adopted as values underpinning South Africa's constitutional democracy.[355]

The Constitutional Court concluded that the Public Protector is 'one of the most invaluable constitutional gifts to our nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in state affairs and for the betterment of good governance'.[356] It also observed that in a society characterized by high levels of poverty, the office of the Public Protector allows everyone including those with lesser means to hold the government accountable.[357]

Because of the sensitivity and far-reaching implications inherent in the issues that the Public Protector might investigate, the Constitutional Court observed that it was unavoidable that there would be tension between the Public Protector and those against whom adverse findings might be made.[358] Thus, '[i]f compliance with remedial action taken were optional, then very few culprits, if any at all, would allow it to have any effect'.[359] The court observed that the very *raison d'etre* of the office of the Public Protector would be undermined.[360] It is for this reasons that the court held that the binding remedial actions of the Public Protector had to have legal effect until they are set aside.

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[351] Ibid.
[352] Ibid para 73.
[353] Ibid.
[354] Ibid para 1.
[355] Ibid.
[356] Ibid para 52.
[357] Ibid.
[358] Ibid para 55.
[359] Ibid para 56.
[360] Ibid.

In summary, the courts since *Oudekraal* have sought guidance from the Constitution and its values, the policy, objects and purposes of an enabling statute to determine whether the latter intended an allegedly unlawful administrative act to have legal effect until set aside.[361] The courts have upheld the legal effect of an allegedly unlawful administrative act where it promotes constitutional values and vindicates the objects and purposes of the enabling legislation and its underlying policy.[362]

2.6 THE FIRST OUDEKRAAL PRINCIPLE AND THE *FUNCTUS OFFICIO* DOCTRINE

This section examines how the courts since *Oudekraal* have approached the first Oudekraal principle in relation to the *functus officio* doctrine as they encountered it. According to the *functus officio* doctrine, unless an administrator is authorised to do so by the enabling legislation, once he or she has made a final decision, he or she may not revoke or vary it.[363] It is irrevocable precisely because it is final.

In *Kirland SCA,* the appeal court fused the first Oudekraal principle and the doctrine of *functus officio.*[364] In this case*,* the HoD purported to withdraw a decision taken by the Acting HoD in his absence. When the matter came before the SCA, the HoD contended that he was entitled to revoke the earlier decision because it was unlawful. The court dismissed this contention. On one hand, the SCA held that for as long as the decision taken by the Acting HoD was not set aside on review, it existed in fact and had legal consequences.[365] On the other hand, it held that because the HoD 'had no authority arising from the empowering legislation to revoke final decisions already taken — much less in the absence of a hearing being granted to Kirland Investments — he was, in relation to the decisions taken by Diliza in her capacity as acting superintendent-general, *functus officio'*.[366]

What may be gleaned from the latter judgment is that the *functus officio* doctrine is consistent with the first Oudekraal principle and reinforces it. However, the Constitutional Court did not pronounce on the issue as it did not arise when *Kirland* came before the highest court.

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[361] *Khabisi* (note 337 above) para 30; *EFF* (note 343 above) paras 48–56.
[362] *Khabisi* (note 337 above) para 30; see also *EFF* (note 343 above) para 56.
[363] Daniel Malan Pretorius 'The origins of the *functus officio* doctrine with specific reference to its application in administrative law' (2005) 122 *SALJ* 832 at 832–5.
[364] *Kirland SCA* (note 49 above) para 22.
[365] Ibid.
[366] Ibid.

In *Manok Family Trust v Blue Horison Investment (Pty) Ltd,* soon after *Kirland*, the SCA also blended the first Oudekraal principle and the *functus officio* doctrine.[367] In this case, the Regional Land Claims Commissioner had declined Kgoshi Manok's claim for restitution of certain land because he had not been dispossessed of this land and thus failed to meet the qualifying criterion set out in section 2 of the Restitution of Land Rights Act 22 of 1994.[368]

Later, following certain representations on behalf of the Manok family to the Regional Land Claims Commissioner, the latter reinstated the claim and published a notice in the *Government Gazette* to that effect.[369] The respondents protested without success. They approached the Land Claims Court to set aside the reinstatement decision of the Regional Land Claims Commissioner. The Land Claims Court reviewed and set aside the Commissioner's decision on the basis that he was *functus officio*.[370] The Manok family Trust appealed.

The SCA found that although the Commissioner had power to reconsider his decision in relation to compliance with statutory criteria for accepting a claim, he did not have a corresponding power to reconsider a decision to decline a claim.[371] On this basis, the court concluded that because the Commissioner had no power to reverse his decision to decline a claim, that decision was final.[372] He was *functus officio*.[373] In addition, the court remarked that until set aside by a court, the Commissioner's earlier decision existed in fact and had legal consequences.[374] It simply could not be overlooked or reversed.[375]

Kirland SCA and *Manok* indicate that the SCA found the first Oudekraal principle and the *functus officio* doctrine to be complementary of each other. It remains to be seen how the Constitutional Court will deal with the first Oudekraal principle and the *functus officio* doctrine in a case where they both arise.

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[367] *Manok Family Trust v Blue Horison Investment (Pty) Ltd* 2014 (5) SA 503 (SCA) ('*Manok*') para 17.
[368] Ibid para 4.
[369] Ibid paras 5–6.
[370] *Blue Horison Investment v Regional Land Claims Commissioner, Mpumalanga* (LCC 115/2010) [2012] ZALCC18 (30 January 2012) ('*Manok LCC'*) para 42.
[371] *Manok* (note 367 above) para 12.
[372] Ibid para 17.
[373] Ibid.
[374] Ibid.
[375] Ibid.

2.7 THE EXTENT AND LIMITS OF THE FIRST OUDEKRAAL PRINCIPLE

2.7.1 Whether the first Oudekraal principle applies to all official acts

One of the questions that arose in *EFF* was whether it was legally competent for the President of the Republic to disregard the remedial action of the Public Protector provided that the latter was unlawful.[376] Relying on *Kirland,* the Constitutional Court in *EFF* held that because our Constitution is founded on the rule of law, 'no decision grounded on the Constitution or law may be disregarded without recourse to a court of law'.[377] According to the court, it did not matter whether the Public Protector's remedial action qualified as administrative action: its disregard by those adversely affected by it amounted to taking the law into their own hands and was illegal.[378] The court emphasized that '[n]o binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly'.[379] *EFF* suggests that the first Oudekraal principle applies to all official acts including those that are not administrative actions.

In *Corruption Watch v President of the Republic of South Africa,* the Constitutional Court is more explicit.[380] It held that the first Oudekraal principle applies to administrative action but that there is no reason in principle why the Oudekraal principles should not apply to all conduct of the executive as well.[381] In this case, the Constitutional Court dealt with the consequences of the unlawful vacation of the office of the NDPP by Mr Mxolisi Nxasana. It made its remarks on the reach of the first Oudekraal principles as it examined the conduct and decisions of the President in relation to Nxasana's vacation of office as NDPP.

On the basis of the Constitutional Court's approach in *EFF* and *Corruption Watch*, there appears to be no reason in law or logic for the first Oudekraal principle not to apply legislative actions as well.

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[376] *EFF* (note 343 above) para 72.
[377] Ibid para 74 with reference to *Kirland* (note 39 above) para 103.
[378] *EFF* (note 343 above) para 74.
[379] Ibid.
[380] *Corruption Watch NPC v President of the Republic of South Africa* 2018 (2) SACR 442 (CC) ('*Corruption Watch)* para 31 n 31.
[381] Ibid.

2.7.2 Is the first Oudekraal principle restricted to consecutive acts or does it apply to a standalone administrative act?

It must be remembered that *Oudekraal* dealt with the legal effect of an originating act (the Administrator's granting permission to establish a township) in a series of consecutive acts (culminating in the approval of engineering services plan).[382]

In *Kirland,* the majority of the Constitutional Court applied the first Oudekraal principle to a self-standing unlawful administrative act, viz permission granted by the Acting HoD to Kirland to establish a private hospital.[383] In *Merafong,* the minority took issue with the ruling by the majority in *Kirland.* [384] According to this minority, the first Oudekraal principle applies only in the limited situation of consecutive administrative decisions.[385] In this instance, a second or subsequent act is allowed to have legal consequences despite the flaws in the originating act if the enabling Act requires the originating act only to exist in fact. In accordance with this view, it would not be sufficient to challenge the validity of the second act on the basis that the first act is invalid. [386] However, if the second act is unlawful or invalid for any other reason, it could never have legal effect flowing solely from mere factual existence.[387]

The minority judgment argued that it is illogical and impractical for a standalone unlawful administrative act to have legal effect.[388] First, if the legal effect of an unlawful administrative act derives not from the unlawful exercise of power but from the failure to have it set aside, at what point exactly does the failure to act by a public authority trigger validity?[389] Secondly, the proposition that a standalone unlawful administrative act might have legal effect is at odds with the principle of legality.[390] At what point does the principle of legality cease to exist? The minority judgment noted that the majority judgments in *Kirland* and in *Merafong* did not offer answers to these questions.[391] These two propositions by the minority disregard an instructive

[382] *Oudekraal* (note 1 above) paras 2–3.
[383] *Kirland* (note 39 above) para 106.
[384] *Merafong* (note 65 above) paras 128 and 133
[385] Ibid para 119.
[386] Ibid para 125.
[387] Ibid.
[388] *Merafong* (note 65 above) paras 132–4.
[389] Ibid para 132.
[390] Ibid paras 133–4.
[391] Ibid para 134.

contribution by Forsyth that this point exists.[392] For instance, what happens when a review court declines to set aside an unlawful act?[393]

In *Merafong,* the minority judgment also observed that the proposition that an invalid act could have legal effect because it has not been successfully challenged was riddled with contradictions and irony.[394] For instance, by imposing a duty on public authorities to approach the court to set aside an invalid act, *Kirland* sought to deal with the uncertainty inherent in self-help; but by adding that a failure to do so resulted in unlawful administrative acts being legally effective, it introduced uncertainty as to when exactly an unlawful administrative act would attain such legitimacy in law.[395] Furthermore, whilst on the one hand *Kirland* invoked the rule-of-law requirement of certainty in support of the proposition that an invalid administrative act has legal effect for so long as it has not been set aside, on the other hand an invalid administrative act would breach the principle of legality which also forms part of the rule of law.[396]

Another irony identified by the minority is that whilst the purpose of the principle of legality is to constrain and discipline the exercise of public power, the recognition of the legal effect of an unlawful act effectively 'creates space for corrupt public officials to abuse public power for their selfish interest'. [397]

In the view of the minority judgment, *Kirland* must be construed as having laid down a principle that 'for the sake of certainty in law and to prevent innocent parties from acting on invalid acts', public authorities must approach the court to set aside administrative acts which they consider to be invalid.[398] However, that their failure to do so does not transform an invalid act into a valid one.[399] The minority judgment held that there is no constitutional or other legal basis for the transformation of an unlawful act into a valid one.[400]

In *Merafong,* the Constitutional Court accepted the application of the first Oudekraal principle to a standalone administrative act, the appeal decision by the Minister of Water Affairs. Although *Tasima* mainly dealt with the availability of collateral challenge, the administrative

[392] Forsyth (note 334 above) 225.
[393] Ibid at 210.
[394] *Merafong* (note 65 above) paras 138.
[395] Ibid.
[396] Ibid para 145.
[397] Ibid.
[398] Ibid para 131.
[399] Ibid.
[400] Ibid.

act in issue was the unlawful extension of a tender, a standalone administrative act. In essence, the remarks of the Constitutional Court in the two cases on the legal effect of an unlawful act refer to a standalone act. In any event, despite the spirited opposition by the minority judgments in *Merafong* and *Tasima*, it is now beyond doubt that *Kirland* extended the reach of the first Oudekraal principle to self-standing unlawful administrative acts.[401]

Early academic commentary on the subject confirms that *Oudekraal* dealt with a series of administrative acts and not a self-standing act. For instance, according to Saller, *Oudekraal* sought to provide a principled framework for determining the consequences of unlawful administrative acts that are part of a chain of administrative decisions.[402] On the same score, Pretorius observes that *Oudekraal* dealt with a multi-staged administrative decision-making process.[403] In particular, he questions whether the ruling in *Oudekraal* that the Cape Metropolitan Council could not disregard the Administrator's approval applies universally to all administrative acts that are believed to be invalid.[404] In his view, *Oudekraal* does not provide authority for such an expansive principle.[405] However, in Pretorius' view, 'although *Oudekraal* was concerned mainly with ''second actor'' cases, there is no reason why these principles should not find equal application in cases where no consequent acts have been performed pursuant to the initial, allegedly invalid act'.[406]

A later commentator, McKenzie, prefaces his attack on the minority judgment in *Merafong* by taking issue with Pretorius's contention that *Oudekraal* does not confer legal effect on unlawful standalone acts until they are set aside.[407] In Mckenzie's view, because *Oudekraal* ruled that the Cape Metropolitan Council was not entitled to disregard an initial approval for the establishment of the township, this is sufficient authority that an unlawful act may have legal effect pending a review.[408] This conclusion by Mckenzie disregards the factual context in *Oudekraal*. *Oudekraal* involved a multi-staged administrative decision process. In his further analysis, McKenzie submits that Pretorius misunderstands *Oudekraal* in respect of the essence

[401] *Tasima* (note 94 above) para 147.
[402] Karla Saller 'When worlds collide: Implications of the Constitutional Court's decision in *Jaftha v Schoeman* when viewed through the lens of the second actor theory accepted in *Oudekraal Estates (Pty) Ltd v City of Cape Town'* (2005) 122 *SALJ* 725 at 725.
[403] Daniel Malan Pretorius 'The status and force of defective administrative decisions pending judicial pronouncement' (2009) 125 *SALJ* 537 at 544.
[404] Ibid.
[405] Ibid.
[406] Ibid 545.
[407] Angus McKenzie *Merafong City Local Municipality v Anglogold Ashanti Limited: the development of collateral review and the status of unlawful acts in South African law* (unpublished LLM dissertation, University of the Witwatersrand, 2017) 24 with reference to Pretorius (note 403 above).
[408] Ibid 24.

of the difference between consequent administrative acts whose legal force depends on the validity of the originating administrative act and those that do not.[409]

In his view, the court did not draw this distinction for the purposes of determining what acts would be effective and must be obeyed pending a review. Rather, it was for the purposes of determining what acts are lawful and can be enforced through legal proceedings if necessary. This view cannot be correct because, in *Oudekraal*, the court made two distinct determinations: (1) that the unlawful approval granted by the Administrator could not be disregarded for as long as it was not set aside, ie it had legal effect;[410] and (2) the approval could not be enforced in a manner sought by the appellants because it violated the constitutional right to freedom of religion and offended against the common law.[411] The first of these determinations dealt directly with the legal effect of a subsequent act in a chain of administrative acts. McKenzie focuses only on the second determination.

McKenzie mounts the same attack on the minority judgment in *Merafong.*[412] His critique of the minority judgment does not the answer charges of irony and contradictions that the judgment contends are inherent in the proposition that an unlawful standalone act may have some legal effect.[413] McKenzie's arguments are not only contradicted by the factual context in *Oudekraal* but also go against the grain of English law authorities on which *Oudekraal* is predicated.[414] However persuasive McKenzie's arguments may be, this debate is now moot. *Kirland*[415] and *Tasima* have endorsed the extension of the first principle to self-standing acts.[416]

2.8 THE EFFECT OF AN ORDER SETTING ASIDE AN UNLAWFUL ADMINISTRATIVE ACT

This section examines how the courts since *Oudekraal* have dealt with consequences of reviewing and setting aside an unlawful administrative act.

In *Jacobs v Baumann NO,* the SCA dealt with the implications of a Swiss court order that set aside the appointment of the equivalent of an executor of a deceased estate.[417] The latter had a bearing on the validity of the summons issued by the said executor on behalf of the estate in

[409] Ibid.
[410] *Oudekraal* (note 1 above) paras 39–40.
[411] Ibid paras 42–3.
[412] McKenzie (note 407 above) 26–27.
[413] *Merafong* (note 65 above) paras 139–40.
[414] For example, see *Boddington v British Police* [1999] 2 AC 143 (HL); *Wicks* (note 339 above).
[415] *Kirland* (note 39 above) para 103.
[416] *Tasima* (note 94 above) para 147.
[417] *Jacobs v Baumann NO* 2009 (5) SA 432 (SCA) ('*Jacobs*').

South Africa. A Swiss magistrate had appointed this executor without consulting the first appellant, the daughter of the deceased and a co-heir, when he had a statutory obligation to do so under Swiss law.[418] The executor and the first appellant's co-heirs had instituted summons in South Africa against her for the recovery of certain moneys allegedly owing to the deceased estate.[419] The first appellant successfully challenged the appointment of the executor in the Swiss courts and had it set aside for being irregular.[420] A new executor was appointed. The new executor approved the pending action against the first appellant.

The first appellant contended in the High Court that the summons was invalid because the appointment of the initial executor had been set aside.[421] She argued that the substitution of the old executor by the new could not cure the defect in the appointment of the original executor. The High Court held that the summons was not a nullity and that the substitution did not change the essential nature of the action because the heirs had always intended to cite, as a party to the action, the administrator or trustee of the deceased estate, which the old executor was when the action was instituted.[422]

On appeal, the court drew a distinction between an executor whose appointment is lawful but is subsequently revoked and that of an executor whose appointment is unlawful.[423] The actions of the former are valid until the appointment is set aside whilst the acts of the latter are void *ab initio*. Applying this distinction to the facts, the court held that if the appointment of the initial executor was lawful then the institution of the action against the appellant stood.[424] On the other hand, if it was unlawful then the summons was a nullity which could not be amended.[425]

Despite the existence of the Swiss court order setting aside the appointment of the initial executor,[426] the appeal court held that because the only flaw in the first appointment was procedural, it did not detract from the Swiss magistrate's power to adjudicate the application for the appointment of the initial executor and to grant an order to such effect.[427] As a result, the court concluded that the executor had the authority to initiate proceedings against the

[418] Ibid para 4.
[419] Ibid paras 5–6.
[420] Ibid para 5.
[421] Ibid paras 7–8.
[422] Ibid para 8; see *Baumann NO v Jacobs* (845/2008) [2008] ZAWCHC 149 (27 February 2008) for the judgment on the leave to appeal.
[423] *Jacobs* (note 417 above) paras 14–15.
[424] Ibid para 15.
[425] Ibid.
[426] Ibid para 5.
[427] Ibid para 20.

appellant. By placing emphasis on the procedural nature of the defect in the appointment of the initial executor instead of the fact that it was unlawful according to the relevant Swiss law, the SCA erred.

Darson Construction (Pty) Ltd v City of Cape compounded the confusion introduced by *Jacobs* on what becomes of the subsequent act once the originating act is set aside.[428] Darson had unsuccessfully bid for a civil-engineering contract that the City of Cape Town awarded to the second respondent. The City of Cape Town had delegated its power to make decisions about the tenders to its Chief Financial Officer acting in consultation with its director of legal services and an appointed staff member. However, the supply-chain management committee actually made the decision to award the tender.[429] Aggrieved by the outcome of the tender, Darson approached the High Court to have the decision reviewed and set aside.

The High Court reviewed and set aside the City's decision because it had been made by an unauthorised functionary.[430] The court also held that having set aside the decision awarding the tender, all administrative steps that followed it fell away as a result.[431] However, despite having so decided, inexplicably, the High Court went on to hold that the setting aside by it of the City of Cape Town's decision to award the tender did not *per se* affect the validity of the contract that the successful tenderer and the City of Cape Town concluded as a consequence of the award of the tender.[432]

In *Seale v Van Rooyen,* the SCA finally cleared up the confusion.[433] In this case, the SCA had set aside the decision of the Premier of the North-West province to register a notarial servitude in favour of Seale. However, unbeknown to it, the notarial deed of servitude had already been registered. The Registrar of Deeds refused to cancel the registration of the notarial deed of servitude on the strength of the SCA judgment.[434] This prompted the Transvaal Yacht Club, a beneficiary of the judgment, to approach the High Court for relief. The High Court ordered the Registrar to cancel the registration of the notarial deed.[435] Dissatisfied with this outcome, Seale appealed.

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[428] *Darson Construction (Pty) Ltd v City of Cape Town* 2007 (4) SA 488 (C) ('*Darson*').
[429] Ibid 500F–G.
[430] Ibid 500C–G.
[431] Ibid 502H.
[432] Ibid 502I
[433] *Seale v Van Rooyen NO; Provincial Government, North-West Province v Van Rooyen NO* 2008 (4) SA 45 (SCA) ('*Seale*').
[434] Ibid para 2.
[435] Ibid para 3.

The SCA held that it was clear from *Oudekraal* that once the initial act is set aside, 'a second act that depends for its validity on the first act must be invalid as the legal foundation for its performance [is now] non-existent'.[436] According to the court, it is precisely because of this drastic impact of the remedy of setting aside that the reviewing court must have discretion when it comes to a just and equitable remedy.[437] Applying this ruling to the facts before it, the SCA held that the result of the Premier's decision having been set aside was that 'all acts done consequent to that decision (including the registration of the servitude) and all acts to give effect to it … are of no force or effect'.[438]

In *City of Johannesburg v Ad Outpost (Pty) Ltd,* the SCA followed its decision in *Seale.*[439] In this case, the High Court had set aside the decisions of the City of Johannesburg to decline Ad Outpost's applications to erect certain billboards on the motorway in Johannesburg. The invalidity of the City's decisions was common cause.[440] The only issue that had to be determined on appeal was the identity of the correct set of by-laws in terms of which the City of Johannesburg could reconsider Ad Outpost's application.

The unlawful decisions declining Ad Outpost's applications were made in terms of the 2001 by-laws. At the time the appeal was heard, the City of Johannesburg had replaced these by-laws with the 2008 by-laws which were in turn were replaced by the 2009 by-laws. Clause 39(3) of the 2008 bylaws provided that any application brought under the repealed 2001 by-laws that was pending on the date of commencement of the 2008 bylaws was to be dealt with in terms of the 2008 by laws.[441] The 2009 by-laws contained a similar provision in respect of applications made in terms of the 2008 bylaws which were pending on the date of commencement of the 2009 by-laws. The question that confronted the court was whether Ad Outpost's applications to the City of Johannesburg had been pending when the 2009 by-laws commenced.

The City of Johannesburg contended that the High Court order setting aside its invalid decisions on 13 October 2010 rendered these decisions a nullity retrospectively.[442] As a consequence of this nullity, the City also contended that it must be considered as not having

[436] Ibid para 13.
[437] Ibid.
[438] Ibid.
[439] *City of Johannesburg v Ad Outpost (Pty) Ltd* 2012 (4) SA 325 (SCA) ('*Ad Outpost*') para 20.
[440] Ibid para 12.
[441] Ibid para 16.
[442] Ibid para 17.

taken any decision on the renewal applications before the 2009 by-laws commenced, and that such applications were therefore 'pending' at that time.[443]

In response, it was contended on behalf of Ad Outpost that because the High Court had only declared the City's decisions invalid after the commencement of the 2009 bylaws and because the City's decision had legal effect until set aside, Ad Outpost's application could not be construed as having been pending at that time.[444] The SCA disagreed with Ad Outpost's contention. It reiterated that an administrative decision that has been declared unlawful is to be retrospectively regarded as if it had never been made.[445] Accordingly, the SCA held that if it were to set aside the decisions of the City of Johannesburg, as all the parties had agreed it should, the matter would have to be decided on the basis that no valid decisions were ever made by City of Johannesburg on Ad Outpost's applications.[446] The applications by Ad Outpost to the City of Johannesburg had to be regarded to have been pending when the 2009 bylaws came into effect.

In *Kirland*[447] *and Corruption Watch,*[448] the Constitutional Court accepted the effect of setting aside of an unlawful act as stated by the SCA in *Seale.* In *Corruption Watch,* however, the Constitutional Court, exercising its powers in terms s 172(1)(b) of the Constitution to grant a remedy that is just and equitable, went further and tampered with the effect of setting aside an unlawful act.[449]

In *Corruption Watch,* applicants sought confirmation of orders of constitutional invalidity made by the High Court. In particular, the High Court had declared invalid the settlement agreement between the President of the Republic of South Africa and Mr Mxolisi Nxasana in terms of which the latter accepted payment in exchange for vacating the position of NDPP and the appointment of Mr Shaun Abrahams as his replacement.[450]

The President and Nxasana entered into the settlement agreement after efforts by the President to subject the latter into an enquiry into his fitness failed. The question was whether the manner

[443] Ibid.
[444] Ibid para 19.
[445] Ibid para 20 with reference to *Eskom Holdings Ltd v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) para 9 and *Seale* (note 445 above) paras 13–14.
[446] *Ad Outpost* (note 439 above) para 20.
[447] *Kirland* (note 39 above) para 74.
[448] *Corruption Watch* (note 380 above) paras 32–4.
[449] Ibid paras 87–8.
[450] Ibid paras 128–9.

in which Nxasana vacated office was lawful.[451] The court established that the President wanted Mr Nxasana out at all costs.[452] In the court's view, this was an abuse of power.[453] Accordingly, the Constitutional Court concluded that the settlement agreement was invalid for having come about in a manner that was inconsonant with the constitutionally required independence of the office of the NDPP.[454] On the strength of *Seale,*[455] the Constitutional Court concluded that it had to follow from the constitutional invalidity of the Nxasana settlement agreement that Abrahams' appointment now lacked a lawful basis.[456] It was also declared constitutionally invalid.[457] This raised the question whether Nxasana was automatically back in his post as the NDPP. This question divided the court.

The majority observed that there is no preordained consequence that must flow from a declaration of constitutional invalidity.[458] What follows is a just and equitable remedy in terms of s 172(1)(b) of the Constitution. The full implications of *Corruption Watch* on the court's discretion not to set aside an unlawful act are discussed in chapter 5.

Prior to *Seale* and *Ad Outpost*, Saller had cautioned that the retrospective nature of the orders setting aside unlawful acts may have unintended consequences.[459] In her view, a retrospective order negates legal certainty.[460] She relies on *Jaftha v Schoeman* to illustrate her point.[461] In *Jaftha,* the Constitutional Court declared ss 66(1)(a) and 67 of the Magistrates Court Act 32 of 1944 inconsistent with the Constitution.[462] These sections empowered a clerk of the court to declare executable a judgment-debtor's immovable property without any further involvement of the court. In this case, the clerk of the Magistrates Court had declared the applicants' immovable properties executable after they failed to satisfy the judgment-debt with their movable assets. The affected properties were their dwellings.

The Constitutional Court found that where a person already had access to housing; neither the state nor private persons should prevent or impair such access.[463] It held that s 66(1)(a) of the

[451] *Corruption Watch* (note 380 above) para 24.
[452] Ibid paras 25–8.
[453] Ibid para 88.
[454] Ibid para 29.
[455] *Seale* (note 433 above) para 13.
[456] *Corruption Watch* (note 380 above) para 35.
[457] Ibid.
[458] Ibid para 68.
[459] Saller (note 402 above) 738.
[460] Ibid.
[461] *Jaftha v Schoeman* 2005 (1) BCLR 78 (CC) ('*Jaftha*').
[462] Ibid paras 15–16.
[463] Ibid para 31.

Magistrates Court Act 32 of 1944 was overly broad and unconstitutional insofar as it excluded any court process in the execution of the property that might result in an interference with the judgment debtor's constitutional right to a home. As a consequence, the Constitutional Court ordered that words had to be read-in to s66(1)(a) of the Magistrates Court Act to ensure that immovable property of a judgment-debtor could only be sold in execution once a court had made an order to such effect taking into account of the relevant circumstances.[464] The court did not impose any restrictions on the retrospective effect of its order. Thus, this order operated retrospectively.[465]

In Saller's view, *Jaftha* left a good-faith purchaser of property sold in execution in terms of s 66(1)(a) Magistrates Court Act before it was declared unconstitutional in an invidious position.[466] She explains that, first, the good-faith purchaser would have paid the purchase price into court as is required by s 43(14) of the Magistrates Court Act but not be able to assume ownership of the property because the sheriff would lack lawful authority to transfer the property to him or her. Second, the good-faith purchaser would also not be able to establish the unlawfulness of the occupation of the property by the original owner in eviction proceedings instituted in terms of the Prevention of Illegal Evictions and Unlawful of Occupation of Land Act 19 of 1998.[467]

In order to address this uncertainty, Saller contends that it should be the factual existence of the warrant of execution and subsequent execution procedures that provide the sheriff the power to effect the transfer of the property to the good-faith purchaser.[468] In this way, according to her, a court faced with an application for eviction of the original owner of the immovable property would accept the transfer of the property as effective and consider the original owner as an illegal occupier.[469] Saller's proposed solution to the uncertainty that she identified has now been overtaken by the subsequent emphatic remarks of the SCA in *Seale*.[470] Once an unlawful administrative act is set aside, all that was done pursuant to it becomes retrospectively invalid unless the court rules otherwise. As a result of *Seale,* subsequent to *Jaftha,* the legal basis of any prior sale in execution in terms of s66 of the Magistrates Court Act and the consequent transfer of a judgment debtor's property (factual existence of the warrant) can no

[464] Ibid para 60.
[465] Saller (note 402 above) 732.
[466] Ibid 735–8.
[467] Ibid 737.
[468] Ibid 739.
[469] Ibid.
[470] *Seale* (note 433 above) para 13.

longer be assumed. However, in *Gundwana v Steko Development,* the Constitutional Court sought to address the uncertainty that Saller alluded to.[471] In this case, the Constitutional Court dealt with the constitutionality of a High Court rule that enabled the sheriff to attach and execute immovable property of a judgment debtor without any further court intervention similar to the s 66(1)(a) of the Magistrates Court Act in *Jaftha*. The court declared this rule unconstitutional and set it aside.[472]

The Constitutional Court rejected a contention that the retrospective effect of a court order would nullify all attachments and sales in executions performed pursuant to the unconstitutional High Court rule prior to it being declared unconstitutional.[473] In this respect, it held that all persons affected by the order of invalidity of the High Court rule and who seek to rely on it to avoid the execution of their immovable properties had to apply for a rescission of judgment and satisfy all other requirements for it as set out in the High Court rules.[474] In *Gundwana* the court has, to some extent, addressed Saller's concerns by lessening the uncertainty that is inherent in retrospective orders of invalidity.

2.9 SUMMARY

This chapter has canvassed the cases since *Oudekraal* to determine how they have dealt with the meaning, content and extent of the first Oudekraal principle. The main findings are summarized below.

2.9.1 Objects and purport of the first Oudekraal principle

Three distinct objects of the first Oudekraal principle emerge from the cases. First, the first principle has been held to preserve the legal certainty of an unlawful administrative act pending judicial review.[475] Certainty is vital to maintain the integrity, reliability and efficiency of public administration. It allows administrators or those affected by an unlawful administrative act to conduct their affairs on the supposition that it is valid.[476] The counterfactual is 'a vortex of uncertainty, unpredictability and irrationality' that is detrimental to efficient public administration as well as the public.[477]

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[471] *Gundwana v Steko Development* 2011 (3) SA 608 (CC) ('*Gundwana*').
[472] Ibid para 65.
[473] Ibid paras 58–9.
[474] Ibid.
[475] *Harrison* (note 3 above) para 62–3.
[476] Ibid.
[477] *Kirland* (note 39 above) paras 101–3.

Secondly, the first Oudekraal promotes the maintenance of the rule of law and the principle of legality. It insists that officials follow due process in addressing flawed administrative acts.[478] Lastly, it ensures the pre-eminence of the courts as the final arbiters of what constitutes an unlawful administrative act.[479]

All in all, the first Oudekraal principle provides only temporary protection to an unlawful administrative act.[480] It does not fossilise it as indefinitely effective. What it requires is that the alleged unlawful act be challenged by the right actor in the right proceedings.[481] Until that happens, for rule-of-law reasons, the decision stands.

2.9.2 Judicial disagreement about the first Oudekraal principle

The cases since *Oudekraal* reveal judicial discord over whether an unlawful administrative act may have legal effect at all. The minority judgments in *Merafong*[482] and *Tasima*[483] insist that according an unlawful act legal effect would breach the principle of legality, the supremacy of the Constitution and the doctrine of objective invalidity. According to the minority in *Tasima,* despite the absence of an application to review and set aside an unlawful act, when a court confronts an unlawful act, it is enjoined by s 172(1)(a) of the Constitution to declare it invalid and set it aside.[484] Even where an application is unduly delayed, a court is not deterred from exercising this power.

On the other hand, the majority judgments in these cases maintain that the first Oudekraal principle is consistent with the principle of legality and that review applications must be brought without undue delay.[485] In their view, all that the first Oudekraal principle requires is that the invalidity of an administrative act be declared by a court.[486] A court will declare that an act is unlawful if it is challenged by the right person, in the right proceedings, at the right time.[487] The majority judgments hold that until then, for rule-of-law reasons, an unlawful administrative act stands. However, despite this view, the Constitutional Court in *Gijima*[488] tacitly endorsed the view of the minority judgment in *Tasima* that an unreasonable delay does

[478] *Welkom High School* (note 23 above) paras 89 and 103; see also *Kirland* (note 39 above) paras 102–3; *Merafong* (note 65 above) paras 39–43.
[479] *Kirland* (note 39 above) para 88; see also *Tasima* (note 94 above) para 148.
[480] *Merafong* (note 65 above) para 43.
[481] Ibid.
[482] Ibid para 109.
[483] *Tasima* (note 94 above) para 90.
[484] *Tasima* (note 94 above) para 78.
[485] *Merafong* (note 65 above) para 36; *Tasima* (note 94 above) 147–8.
[486] See for instance *Tasima* (note 94 above) para 148.
[487] Ibid.
[488] *Gijima* (note 220 above) 52.

not prevent a court from exercising its powers in terms of s 172(1)(a) of the Constitution. This has caused confusion about the role of delay in relation to the court's jurisdiction in review proceedings.

2.9.3 The contemplated legal effect

For purposes of the first Oudekraal principle, the statement that an unlawful administrative act has legal effect until set aside means that the act is legally effective, and not that it is valid.[489] It means that despite its potential invalidity, it must be treated as if it were valid.[490] It has all the intended effects of a valid act.

2.9.4 Legal effect expressly provided for in a statute

An enabling statute, such as tax legislation, may expressly provide that an unlawful administrative act, by virtue of its mere factual existence, has legal effect until it is set aside. In that event, a court does nothing more than give effect to the express intention of the legislature.[491]

2.9.5 Legal effect upon the interpretation of a statute

Where the enabling legislation is silent on whether an unlawful administrative act has legal effect until set aside, courts interpret the legislation to discern the intention of the legislature.[492] Section 39(1)(a) of the Constitution enjoins the courts to adopt an interpretation that promotes constitutional values. In addition, the courts have been aided by the underlying policy, objects and purport of the relevant enabling statutes.[493] Where the legal effect of an unlawful administrative act vindicated constitutional values or promoted the objects and underlying policy of the enabling Act, the courts have recognized and upheld it.[494]

2.9.6 The extent and limits of the first Oudekraal principle

The first Oudekraal principle applies to administrative action as defined in PAJA and all executive conduct.[495]

As originally stated, the first Oudekraal principle dealt only with the legal consequences of an originating administrative act in a chain of consecutive acts.[496] In *Kirland,* the Constitutional

[489] *Merafong* (note 65 above) para 41 n 63.
[490] *Duma* (note 307 above) para 24.
[491] *Capstone* (note 325 above) paras 48–9.
[492] *Khabisi* (note 337 above) 27–30.
[493] Ibid; see also *EFF* (note 343 above) para 49.
[494] *EFF* (note 343 above) paras 1 and 51–6.
[495] *Corruption Watch* (note 380 above) para 31 including n 31.
[496] *Oudekraal* (note 1 above) para 2.

Court expanded the scope of this principle by applying it to a self-standing unlawful administrative act.[497] The court did this to discourage self-help by public authorities, maintain legal certainty and preserve the centrality of the court's role in the declaration of invalidity of administrative acts.[498] The minority judgments in both *Merafong* and *Tasima* vehemently opposed this expansion and questioned its legal or logical basis.[499] On the other hand, the majority judgments affirmed the correctness of the expansion of the principle informed by the need for legal certainty and the need for the invalidity of administrative acts to be authoritatively pronounced by a court.[500] The persistence by the minority judgment in *Tasima* in the face of precedent established in *Merafong* raises the question how judges of the Constitutional Court who agree with the minority judgment will approach this question in the future.

2.9.7 The first Oudekraal principle and the doctrine of functus officio

In *Oudekraal,* the SCA accepted that it was no longer necessary to resort to legal maxims to determine whether an unlawful act has any legal effect, and that the distinction between fact and law is sufficient to perform this task.[501] Despite this, since *Oudekraal,* the SCA has been willing to fuse the first Oudekraal principle with the doctrine of *functus officio.*[502] For instance, in *Kirland* and *Manok,* the SCA upheld the legal effect of an unlawful administrative act relying on both the first Oudekraal principle and the doctrine of *functus officio*.[503] This observation is important because *Oudekraal* originates from the SCA. The reliance on the *functus officio* doctrine by the same court may be a signal of a lack of full appreciation of the extent of the first Oudekraal principle by the court, or at the very least that the court opted for a harmonious fusion of this principle with common-law doctrines. The Constitutional Court is yet to opine on the relationship between the first Oudekraal principle and the doctrine of *functus officio*.

2.9.8 The consequences of setting aside an unlawful administrative act

The courts since *Oudekraal* have grappled with the consequences of setting aside an originating administrative act in a chain of acts. Initially, there was confusion about the impact of setting aside the initial act on the legal effect of the subsequent act.[504] The courts had allowed a

[497] *Kirland* (note 39 above) 16 and 106.
[498] Ibid para 103.
[499] *Merafong* (note 65 above) para 131; see also *Tasima* (note 94 above) paras 90–91.
[500] *Merafong* (note 65 above) para 41–2; see also *Tasima* (note 94 above) paras 147–8.
[501] *Oudekraal* (note 1 above) para 29.
[502] *Kirland* (note 39 above) para 22; see also *Manok* (note 367 above) para 17.
[503] *Manok* (note 367 above) para 17.
[504] *Darson* (note 428 above) 502H–I.

subsequent act to remain legally effective despite the originating act's having been set aside. In *Seale,* the SCA cleared up this confusion.[505] It is now established law that once an originating act has been set aside, all acts performed pursuant to it (on which their validity depends) cease to have any legal effect.[506] It is precisely because of this far-reaching effect that a review court is endowed with discretion whether to set aside an unlawful administrative act.[507] In exceptional circumstances, a court may depart from the residual position in order to vindicate of the rule of law.[508]

Unless a court rules otherwise, an order setting aside an originating administrative act is retrospective. Saller has cautioned that the retrospective effect of an order setting aside unlawful acts may result in uncertainty, ie reopening cases that had been finalised.[509] In order to address this uncertainty occasioned by the retrospective invalidity of the High Court rule allowing the attachment of immovable property without the court's intervention, those who seek to rely on this order are required to apply for rescission of the specific orders that pertain to them. [510] They must explain the reason for their delay and satisfy the court that they are not in wilful default and that they have a bona fide defence.[511]

[505] *Seale* (note 433 above) para 13.
[506] Ibid.
[507] Ibid.
[508] *Corruption Watch* (note 380 above) paras 71 and 76.
[509] Saller (note 402 above) 738.
[510] *Gundwana* (note 471 above) paras 58–59.
[511] Ibid.

CHAPTER 3

THE SECOND OUDEKRAAL PRINCIPLE

INTRODUCTION

The second Oudekraal principle states that the enquiry into whether an unlawful administrative act has legal effect should not focus on whether it is valid but whether its validity is a necessary precondition for the validity of consequent acts.[1] This principle is a link between the first and third Oudekraal principles in that the first Oudekraal principle applies where the validity of an administrative act is *not* a precondition for consequent acts, ie an unlawful administrative act would have legal effect until it is set aside.[2] On the other hand, the third principle would apply if the validity of an administrative act *is* a precondition for the validity of subsequent acts.[3] In the latter respect, a court would be entitled to question the validity of an unlawful administrative act despite the facts that its validity has not been challenged in a review. Thus, the discussion of the second Oudekraal principle is an examination of the point of divergence between the first and the third principle. A survey of the relevant facts in *Oudekraal* provides context to the second Oudekraal principle.

It will be recalled that having its engineering services plan approved by the Cape Metropolitan Council was the last step that Oudekraal had to take before it could develop its property in accordance with the approval it had obtained from the then Administrator of the Cape province. The SCA advanced two reasons why the validity of the Administrator's approval was not a necessary precondition for the approval of Oudekraal's engineering services plan. First, it ruled that the Administrator's approval was no more than permission to the land owner to develop the land in a particular way, a type of administrative act that took effect once the various steps prescribed by the enabling Act had been complied with.[4] According to the appeal court, the validity of each of the steps in the multi-staged administrative process was not dependent on the validity of the Administrator's approval but merely on the fact that it was given.[5] In the court's view, the Surveyor-General could not have been expected first to satisfy himself that the Administrator's approval was valid before he approved the general plan or that the Registrar

[1] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) ('*Oudekraal*') para 31.
[2] Ibid.
[3] Ibid para 32.
[4] Ibid para 39.
[5] Ibid.

of Deeds first had to satisfy himself that the approval was valid before he opened a township register.[6]

Secondly, the court ruled that in the form that the matter came before it, the impugned administrative act was not sought to be applied coercively by a public authority or provide foundation for coercive action against a subject.[7] Thus there were no rule-of-law considerations that required an inquiry into its validity.[8]

The approach adopted by SCA in *Oudekraal* draws from Professor Forsyth's theory of the second actor.[9] In this theory, Forsyth identifies four types of administrative acts: (1) an administrative act that permits an individual to do something that would otherwise be unlawful; (2) an act that permits an official to do what is otherwise unlawful, for instance a right to enter an individual's premises to search for evidence of wrongdoing; (3) an act that orders an official to do or not to do something; and (4) an act that orders an individual to do or not to do something.[10] Forsyth suggests that a second actor or subject of any of the first three types of administrative acts may not disregard them. The first three types of administrative act have legal effect for so long as they are not set aside.[11] According to Forsyth, it is only in respect of the last type that a subject may question the validity of an administrative act in a collateral challenge. [12] In other words, the validity of this type of administrative act is a precondition for the validity of subsequent acts based on it. The rule of law requires that a public authority have lawful basis to command compulsion.

In a nutshell, the application of the second Oudekraal principle reveals that the validity of a permissive administrative act is not a precondition for the validity of later acts.[13] For rule-of-law reasons, the validity of an impugned administrative act is a precondition for consequent act if it amounts to coercion of a subject by a public authority.[14]

This chapter investigates how the cases since *Oudekraal* have interpreted and applied the second Oudekraal principle. First, it canvasses how the courts have dealt with permissive

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[6] Ibid.
[7] Ibid.
[8] Ibid.
[9] Christopher Forsyth ' "The Metaphysic of Nullity": Invalidity, Conceptual Reasoning and the Rule of Law' in Christopher Forsyth & Ivan Hare (eds) *Essays in Public Law in Honour of Sir William Wade QC* (2005) 141 at 154–6; see also *Oudekraal* (note 1 above) para 29.
[10] Forsyth (note 9 above) 154–6.
[11] Ibid 154–5.
[12] Ibid 156.
[13] *Oudekraal* (note 1 above) para 39
[14] Ibid.

administrative acts. Secondly, it examines administrative acts that authorise officials to do something. Thirdly, the chapter interrogates how the courts have approached coercion as a determinant of whether the validity of an administrative is a precondition for the validity of consequent acts. The chapter ends with a conclusion.

3.1 ADMINISTRATIVE ACTS THAT ARE PERMISSIONS

During the apartheid era, Black people in South Africa had limited rights to property. In urban areas, they occupied residential property in terms of a certificate of occupation issued in terms of terms of reg 8 of the Regulations governing the Control and Supervision of an Urban Black Residential Area.[15] Parliament enacted the Conversion Act to enable the conversion of these permissions to occupy into ownership or leases. In *Nzimande v Nzimande,* the High Court dealt with the legal effect of a certificate of occupation issued in terms of reg 8 of the Regulations governing the Control and Supervision of an Urban Black Residential Area.[16]

Section 2(1) of the Conversion Act empowered the Director-General of a province to conduct an enquiry to determine who the owner of the relevant property should be. Amongst other things, the Director-General had to satisfy himself that the person whom he intended to declare the owner of the relevant property was the holder of site permit or certificate of occupation in respect of such property.

Nzimande, the applicant for the conversion, had inherited his certificate of occupation from his late brother in terms of the s 23 of the Black Administration Act 38 of 1927. His brother's widow was prevented from inheriting from the deceased estate of her husband by reg 2 of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks.[17] This regulation forbade widows who were married in terms of customary law from inheriting from the deceased estates of their husbands. By the time Nzimande's application for conversion was considered, the succession laws that discriminated against widows who had been married in terms of customary law had been declared unconstitutional.[18] At all times, Nzimande had not occupied the disputed property.

[15] Regulation 8 of the Regulations governing the Control and Supervision of an Urban Black Residential Area and Relevant Matters (GN R1036 of 14 June 1968).
[16] *Nzimande v Nzimande* 2005 (1) SA 83 (W) ('*Nzimande'*).
[17] Regulations for the Administration and Distribution of the Estates of Deceased Blacks in GG 10601 of 6 February 1987.
[18] *Nzimande* (note 16 above) para 42 with reference to *Zondi v President of the Republic of South Africa* 2000 (2) SA 49 (N) ('*Zondi*').

Despite the flaw in the certificate of occupation, Nzimande sought to rely on it to have his permission to occupy converted into ownership. His brother's widow contested the conversion and claimed that she had a right to claim the ownership of the property. At all material times, she had been occupying the affected property. The administrators charged with the conversion process rejected Nzimande's claim on the basis that his certificate was invalid. They relied on *Zondi*.[19] The appeals panel also rejected his appeal. Section 3 of the Conversion Act allowed Nzimande a further appeal to the High Court. He exercised this right.

At the High Court, Nzimande contended that the proper question for determination was who the holder of the certificate was.[20] He contended that this question did not go into the vires of the certificate. In other words, he argued that the validity of the certificate was not a precondition for the validity of the conversion of permission to occupy the relevant property to full ownership.

The court proceeded from the premise that Nzimande was the holder of the certificate and restated the first Oudekraal principle that the certificate had legal effect until it was set aside.[21] However, the court found that there was nothing in the Conversion Act that prevented the administrators from considering the validity of the certificate. In its view, the Director General had discretion to determine who the beneficiary of the conversion had to be and that the certificate was one of the factors he had to consider.[22] Despite that the certificate was a permission, because of the purpose of the Conversion Act, the court concluded that the validity of the certificate was a precondition for a valid conversion.[23] In this regard, *Nzimande* departed from *Oudekraal.*

Later cases which involved administrative acts that are permissions are entirely consistent with *Oudekraal.* They did not follow *Nzimande.* In these cases, the courts have declined to enquire into the validity of the administrative acts in issue in the absence of an application to have the act reviewed and set aside.[24] Notably, in these cases, the courts did not rely on the

[19] *Nzimande* (note 16 above) para 42; see also *Zondi* (note 18 above) 58F–H.
[20] *Nzimande* (note 16 above) para 45.
[21] Ibid para 48.
[22] Ibid para 49.
[23] Ibid para 58.
[24] *Reader and Another v Ikin and Another* 2008 (2) SA 582 (C) ("*Reader')* para 31 (approval of building plans); *Loghdey v Advanced Parking Solutions* 2009 (5) SA 595 (C) ('*Loghdey*') para 34 (tender to provide services); *Camps Bay Ratepayers and Residents Association v Harrison* 2011 (4) SA 42 (CC) ('*Harrison*') para 62 (approval of buildings plans); *V&A Waterfront Properties (Pty) Ltd v Helicopter & Marine Services (Pty) Ltd* 2006 (1) SA 252 (SCA) ('*V&A Waterfront*') para 10 (suspension of helicopter licence); *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC) ('*Kirland'*) (permission to establish private hospitals).

categorization of administrative acts as permissions as a reason for refusing to question their validity.

For instance, in *Reader v Ikin,* the City of Cape Town had approved Ikin's buildings plans without giving Reader notice as a person that would be affected by the intended structure.[25] The approved plans violated the Zoning Scheme Regulations promulgated in terms of the Land Use Planning Ordinance 50 of 1985 in that the approved structure provided for more than a single residential dwelling. By the time the dispute arose, the building had been completed.

Ikin applied to the City for an amendment of the approved plans so that he could effect certain changes to his existing structure to make a second kitchen more practical. This time, the City notified Reader that it intended to approve Ikin's proposed amendment. Aggrieved by this, Reader brought an application to review and set aside the City of Cape Town's decision to approve Ikin original plans. The High Court held that Reader had not exhausted internal remedies and dismissed his application. He appealed to the full bench of the High Court.

On appeal, the question that preoccupied the court was whether s 62 of the Systems Act provided Reader, as an aggrieved person, any internal remedy within the meaning of s 7(2) of the PAJA.[26] Section 62(1) grants a person aggrieved by a decision of a municipal functionary a right to appeal to an internal appeals body but s 62(3) of the same Act prevents the latter from revoking, varying or modifying any decision if doing so would interfere with rights that accrued to the beneficiary of the decision. Whether Reader had any internal recourse hinged on whether any rights accrued to Ikin as a result of the City's decision to approve his building plans.

On appeal, Reader contended that through the approval of his building plans, Ikin had acquired a right to implement the plans and that the appeal body had no power to revoke the decision to approve the plans because the revocation would detract from this right.[27] On the other hand, Ikin retorted that if the administrative decision to approve his buildings plans was ultra vires then he did not acquire in law any right pursuant to the grant of permission by the City of Cape Town.[28]

The court ruled that although failure to comply with the obligation of procedural fairness might result in an invalid act, the consequences would have to be viewed within the prism of the principle that a void administrative act remains an act in fact and that its mere factual existence

[25] *Reader* (note 24 above).
[26] Ibid para 13.
[27] Ibid paras 20–21.
[28] Ibid para 30.

could still provide the foundation for the legal validity of later decisions or acts.[29] It concluded that until the decision to approve Ikin's plans was set aside, it could not be said that it had no legal effect.[30]

This decision is consistent with *Oudekraal* in so far as the court declined to enquire into the validity of an administrative act that was in essence a permission. The City of Cape Town appealed this decision. The SCA dismissed it and affirmed the correctness of *Reader.*[31]

In *Loghdey v Advanced Parking Solutions,* the High Court followed *Reader* on the legal effect of an unlawful decision of a municipality in the absence of a review application, ie that it grants a right to a person.[32] In this matter, the City of Cape Town had awarded a tender to Loghdey to provide it with a kerbside parking management system. Pursuant to this decision, the city and Loghdey concluded a contract regulating the terms and conditions as to how the services were to be provided.[33]

Advanced Parking Solutions, an unsuccessful bidder, appealed against this decision invoking s 62(1) of the Systems Act.[34] Advanced Parking Solutions prevailed on the City of Cape Town to hear its internal appeal. The city relented and began steps to hear the appeal. This incensed Loghdey, who brought an urgent High Court application for an order declaring that Advanced Parking Solutions had no right to appeal the city's decision in terms of s 62(3) of the Systems Act.[35]

In response, Advanced Parking Solutions contended that the award of the tender was subject to the city's supply chain management policy which made any award of a tender conditional upon a 21-day period within which an appeal against it could be lodged.[36] The High Court disagreed with this proposition.[37] It ruled that the decision to award the tender was not qualified enough to avoid the reach of s 62(3) of the Systems Act.[38] The court held that despite the alleged flaws in the city's decision, it had legal effect and thus conferred rights on Loghdey.[39]

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[29] Ibid.
[30] Ibid para 31.
[31] *City of Cape Town v Reader* 2009 (1) SA 555 (SCA) ('*Reader SCA*') paras 35–6.
[32] *Loghdey* (note 24 above) paras 25–6.
[33] Ibid para 6.
[34] Ibid para 7.
[35] Ibid para 1.
[36] Ibid para 27.
[37] Ibid para 31.
[38] Ibid.
[39] Ibid para 34.

In other words, the validity of the award of the tender was not a precondition for the validity of the contract between Loghdey and the City of Cape Town.[40]

In *Camps Bay Ratepayers and Residents Association v Harrison* the Constitutional Court confronted a similar question and, consistent with *Loghdey* and *Reader,* it declined to enquire into the validity of an unlawful act in the absence of a review application.[41] *Harrison* involved an approval of building plans by the City of Cape Town. In February 2005, the City of Cape Town had, without consulting affected parties, approved the building plans submitted by Harrison.[42] Affected parties represented by the Residents' Association complained. The City upheld their complaints, resulting in Harrison's submitting rider plans to the February 2005 plans for approval. Rider plans are revisions of the original plans focusing on the cause of the complaint.

On 8 September 2005, the City approved the rider plans. The Residents' Association also challenged these rider plans and succeeded.[43] At all times, the association queried the boundary wall and the height restrictions on the Geneva Drive portion of the property. Harrison submitted a fresh set of rider plans addressing these concerns.[44] In September 2007, despite objections by the association, the City of Cape Town approved Harrison's rider plans.[45]

The Residents' Association brought an application to review and set aside the City's decision to approve the September 2007 rider plans. In its replying affidavit, for the first time, the association added a new ground of review relating to the Blinkwater street portion of the property. The High Court dismissed this ground because the rules of court forbade a litigant from making a new case in reply.[46]

On appeal, the SCA disagreed with the High Court that the issues relating to new ground of review had not been properly addressed in the papers.[47] However, the SCA dismissed the appeal because the applicants had unreasonably delayed in raising the new ground of review.[48] The Residents' Association approached the Constitutional Court for relief.

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[40] Ibid.
[41] *Harrison* (note 24 above) para 62.
[42] Ibid paras 2–3.
[43] Ibid para 9; see also *PS Booksellers (Pty) Ltd v Harrison* 2008 (3) SA 633 (C).
[44] *Harrison* (note 24 above) paras 9–10.
[45] Ibid para 10.
[46] *Campsbay Ratepayers and Residents Association v Harrison* (9470/2006) [2008] ZAWCHC 316 (25 July 2008) ('*Harrison*') paras 62 and 67.
[47] *Campsbay Ratepayers Association v Harrison* [2010] All SA 519 (SCA) ('*Harrison SCA*') para 46.
[48] Ibid paras 52–5.

At the Constitutional Court, the association argued that a successful challenge to the September 2007 rider plans affected the validity of the February 2005 plans.[49] The February 2005 plans included the approval regarding the portion of the property on Blinkwater street. The Constitutional Court ruled that it did not follow that a fatal attack on the September 2007 plans automatically meant that the February 2005 plans were also invalid.[50] The approval of the February 2005, which included an approval in respect of the in respect of the Blinkwater street portion of the property, had legal effect until it was set aside.[51] By parity of reasoning, the validity of the February 2005 approval was not a precondition for any consequent acts.

In *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute,* the Constitutional Court had to deal with an unlawful permission.[52] Although this case focused on whether a public authority can lawfully disregard its own unlawful administrative act, insofar as it relates to the legal effect of the approval in issue, it is consistent with *Oudekraal.*

In *Kirland,* the Acting HoD of Health in the Eastern Cape had granted Kirland approval to establish a private hospital because the MEC responsible for health in that province at the time had instructed her to do so. The approval was granted during the temporary absence of the HoD.

When Kirland sought to enforce the approval, the HoD challenged the validity of the approval. Consistent with Forsyth's approach to administrative acts that are in essence permission, the court declined to question the validity of the approval in the absence of a formal application to have it reviewed.[53]

In summary, in cases involving permissions since *Oudekraal*, although the courts have not expressly relied on the type of the administrative act in issue, they have declined to enquire into its validity in the absence of a review application. They have affirmed *Oudekraal*'s stance that the initial enquiry should not focus on the validity of the administrative act. Apart from *Nzimande,* the line of cases involving permissions is also consistent with *Oudekraal* in that the courts have upheld the legal effect of these administrative acts until they were set aside. The effect of these decisions is that for so long as an administrative act that is in essence a

[49] *Harrison* (note 24 above) para 62–3.
[50] Ibid para 62.
[51] Ibid.
[52] *Kirland* (note 24 above) paras 102–3.
[53] Ibid paras 101–2.

permission has not been set aside, its validity is not a precondition for the validity of consequent acts.

3.2 AN ACT OBLIGING AN OFFICIAL TO DO OR NOT TO DO SOMETHING

Forsyth identifies a type of administrative act that orders an official to do or not to do something.[54] Like a permission, this type of administrative act has legal effect until it is set aside.[55] This means that its validity is not a precondition for the validity of subsequent acts based on it. In South Africa since *Oudekraal,* the courts encountered this type of administrative act in *Road Accident Fund v Duma and Three similar cases*.[56] In this case, the SCA dealt with the Road Accident Fund's obligation to pay compensation to road accident victims.

Section 17(1) of the Road Accident Fund Act 56 of 1996 allows a person who has sustained serious injuries from motor vehicle accidents to claim general damages from the fund. The accompanying regulations require claimants to complete and submit a medical assessment report in the prescribed form. It is on the basis of the duly completed medical assessment report forms that the fund would determine whether a claimant has sustained serious injuries. In *Duma,* the fund rejected claims for general damages by four claimants on the basis that their medical assessment reports were not informed by a physical examination of the claimants by a medical doctor.[57]

The claimants sued the fund for general damages in the High Court.[58] The court found that the claimants had indeed suffered serious injuries.[59] It also ruled that the fund's rejection of the claimants' medical assessment reports was invalid and could be disregarded because the fund had failed to reject the forms within a reasonable time and gave insufficient or invalid reasons for the rejection.[60] The fund appealed.

On appeal, the SCA found that decision whether a claimant had sustained serious injuries was the sole preserve of the fund and that the High Court had erred in assuming this responsibility.[61] By virtue of it being an administrative action, the fund's decision to reject the medical assessment reports was legally effective until it was set aside by a court on review or overturned

[54] Forsyth (note 9 above) 155.
[55] Ibid.
[56] *Road Accident Fund v Duma and three similar cases* 2013 (6) SA 9 (SCA) ('*Duma*').
[57] Ibid para 14.
[58] Ibid para 15.
[59] Ibid.
[60] Ibid.
[61] Ibid paras 18–19.

in an internal appeal.[62] The SCA emphasized that 'the fact that the fund gave no reasons for the rejection, or that the reasons given were not persuasive or not based on proper medical or legal grounds, could not detract from this principle'.[63]

Like permission cases, the effect of *Duma* is that the validity of the Fund's decision to reject or accept medical assessment reports was *not* a precondition for the validity of consequent acts in the processing of a claim. The common factor between the permission cases and *Duma* is the absence of coercion by a public authority.

3.3 COERCION BY A PUBLIC AUTHORITY

According to *Oudekraal,* where a public authority seeks to coerce a subject to do or not to do thing, the underlying administrative act must be valid.[64] In *V&A Waterfront,* the SCA relied on the absence of coercion to decide whether the validity of the administrative act in was a precondition for consequent acts.[65] In this case, V&A Waterfront had leased certain business premises to Helicopter Marine Service. The lessee conducted business of ferrying tourists by helicopter, taking off and landing at the leased premises. In terms of the lease agreement, the lessee undertook to strictly comply with the regulations and directives of the South African Civil Aviation Authority. The controversy arose when the Civil Aviation Authority ordered the grounding of the lessee's helicopter until its airworthiness was verified by the Civil Aviation Authority officials.[66] Despite entreaties by V&A Waterfront, the lessee persisted that it was going to disobey the grounding order and continue with its business. [67] V&A Waterfront approached the High Court for an interdict to compel the lessee to comply with the order. The High Court dismissed the application because, in its view, V&A Waterfont had failed to establish an apprehension of harm, ie it had not established that the helicopter was in fact not airworthy.[68] V&A Waterfront appealed.

On appeal, the SCA observed that the operation of the helicopter necessarily involved taking off and landing at the premises and constituted an activity within the course of the lessee's business.[69] According to the court, such operation conflicted with the grounding order. In the court's analysis, the grounding order was empowered by, or itself constituted, regulations and

[62] Ibid para 24.
[63] Ibid.
[64] *Oudekraal* (note 1 above) para 36.
[65] *V&A Waterfront* (note 24 above) para 10.
[66] Ibid para 3.
[67] Ibid para 4.
[68] Ibid paras 4–5.
[69] Ibid para 7.

rules of the Civil Aviation Authority as stated in the lease agreement.[70] The court concluded that the regulations, through the grounding order, affected the carrying on of the business at the premises insofar as operation of the helicopter was concerned.[71] In its view, if the grounding order had legal effect until it was set aside then a threat to disregard it entailed a threat to the lessor's rights in terms of the lease agreement.[72] The lessee contended that the grounding order was unlawful and that any disregard of it could not be unlawful or amount to a breach of the lease agreement.[73]

The court declined to focus its enquiry on the validity of the grounding order.[74] In its view, that would only have been possible if the facts before it involved the coercion of a subject by a public authority to comply with an unlawful act.[75] In light of the drastic nature of the grounding order, the correctness of the *V&A Waterfront* judgment insofar as its reading of coercion on the facts before it is doubtful.

Consistent with le *V&A Waterfront,* in *South African Heritage Resources Agency v Arniston Hotel Property (Pty) Ltd,* the High Court relied on the presence of coercion by a public authority when it concluded that the validity of the provisional protection order issued in terms of the National Heritage Resources Act 25 of 1999 was a precondition for its valid enforcement.[76] In this case, the Heritage Agency had issued a notice provisionally protecting a particular area as a potential heritage site for a period of two years.[77] The notice was issued without any consultation with those affected by it. The effect of the notice was that the property owners in the affected area were not allowed to renovate or otherwise improve their properties in any way for a period of two years.[78] The enabling Act did not require any consultation prior to the issue of a provisional protection notice. The respondent operated a hotel operated in the affected area.

[70] Ibid.
[71] Ibid.
[72] Ibid para 8.
[73] Ibid para 9.
[74] Ibid para 10.
[75] Ibid.
[76] *South African Heritage Resources Agency v Arniston Hotel Property (Pty) Ltd* 2007 (2) SA 461 (C) ('*Arniston*') para 20.
[77] Ibid para 6.
[78] Ibid para 7.

At the time the notice was issued, the respondent was busy with major renovations to its hotel. The existence of the notice meant that it had to halt all construction activity. The respondent defied the provisional protection notice and continued with its renovations.[79]

The Heritage Agency brought a High Court application to compel the respondent to comply with the terms of the notice. In response, the respondent mounted a collateral attack against the notice. It contended that the notice was procedurally flawed because the Heritage Agency had failed to consult it, as an affected party, before issuing the notice.[80] The agency disputed that it had any obligation to consult because the notice was provisional.[81] The court ruled that this submission by the agency would have carried more weight had the period of freezing of any construction activity on the affected properties been shorter.[82] It found that two-year period of the provisional order had serious and perhaps far-reaching consequences for those affected by it.[83] According to the court, the drastic effect of the notice brought into sharp focus whether those affected by it should have been consulted. The High Court concluded that, in the particular circumstances of this case, the respondent and those affected by the notice were entitled to a hearing before the decision to protect the area was made.[84] Consequently, that not affording those affected by the notice this right rendered the decision procedurally unfair.[85] Because of the coercive effect of the notice, the court enquired into the validity of the notice when the Heritage Agency sought to enforce it.

In *Head of Department, Department of Education, Free State Province v Welkom High School,* the SCA again relied on the absence of coercion by a public authority when it declined to enquire into the validity of learner pregnancy policies.[86] In this case, it was common cause that the SGBs of Welkom and Harmony High Schools had adopted and caused the implementation of learner pregnancy policies that unfairly discriminated against pregnant learners.[87] The implementation of these policies resulted in the exclusion from school of two learners who had become pregnant. In order to address the discriminatory effects of the policies, instead of bringing a review application, the HoD instructed the principals to readmit the excluded

[79] Ibid para 8.
[80] Ibid para 10.
[81] Ibid para 20.
[82] Ibid.
[83] Ibid.
[84] Ibid para 27.
[85] Ibid.
[86] *Head of Department, Department of Education, Free State Province v Welkom High School* 2012 (6) SA 525 (SCA) para 14 ('*Welkom High School SCA*').
[87] Ibid paras 3–5.

learners. When the SGBs challenged the validity of the HoD's decision in court, he responded with a collateral challenge. He wanted the court to enquire into the lawfulness of the policies without bringing a review application. The court declined his challenge because, in its view, the validity of the learner pregnancy policies was not an issue before it.[88] It also ruled that the HoD had no statutory power to instruct the principals to readmit the excluded learners.[89] The HoD appealed.

On appeal, the HoD persisted with his challenge against the validity of the policies. The SCA ruled that what the HoD sought to do amounted to an impermissible collateral challenge because the learner pregnancy policies did not compel him to perform or refrain from performing any act.[90] Neither was there any coercive action directed at him consequent upon the implementation of these pregnancy policies.[91] Although this dictum focused on collateral challenge, it also shows that because of the absence of coercion, the validity of the learner pregnancy policies was not a precondition for their implementation insofar as they related to the HoD.

Disenchanted by the decision of the SCA, the HoD approached the Constitutional Court for relief. The majority judgment in the Constitutional court declined to rule on validity of the learner pregnancy policies because it had insufficient information before it to make a conclusive determination on the substantive content of the policies.[92] In contrast, the minority judgment entertained the HoD's proposition.[93] The minority judgment found that the SCA had erred in concluding that there was no coercion. In its view, the school principals represented the HoD. The policies obliged them to do something unlawful. Thus, according to the minority judgment, he was entitled to require them not to do something that was not lawful.[94]

In *Merafong City v AngloGold Ashanti Ltd* the Constitutional Court departed from the approach of the SCA.[95] In this case, the court dealt with the ability of an organ of state to a raise a collateral defence. A collateral challenge is available against an administrative act if its validity is a precondition for the validity of consequent acts. Thus, the court's reasoning on the

[88] *Welkom High School v Head of Department, Department of Education, Free State Province* 2011 (4) SA 531 (FB) ('*Welkom High School HC*') para 33.
[89] Ibid para 50.
[90] *Welkom High School SCA* (note 86 above) para 14.
[91] Ibid.
[92] *Head of Department, Department of Education, Free State Province v Welkom High School* 2014 (2) SA 228 (CC) ('*Welkom High School*') para 110.
[93] Ibid para 258.
[94] Ibid.
[95] *Merafong City v AngloGold Ashanti Ltd* 2017 (2) SA 211 (CC) ('*Merafong*').

collateral defence applies equally to how a court should determine whether the validity of an administrative act is a precondition for the validity of subsequent acts based on it.

In this case, the Minister of Water Affairs, acting in terms of s 8 of the Water Services Act, overturned a surcharge that Merafong sought to charge AngloGold for the supply of water for industrial and domestic use. Merafong refused to comply with this decision because it believed it to be unconstitutional. When AngloGold brought an application to enforce the Minister's decision, Merafong challenged the Minister's decision collaterally.[96] It did so through a counter-application to have the Minister's decision declared invalid.

Consistent with *Oudekraal* and Forsyth's line of reasoning that collateral challenge against this type of decision is not available, the High Court upheld AngloGold's application and dismissed Merafong's counter-application.[97] It ruled that the Minister had the necessary power to determine the appeal in terms of the enabling Act and that even if it were not so, the Minister's decision was binding until set aside. Merafong appealed.

The SCA dismissed Merafong's appeal partly because, in its view, a collateral challenge is a remedy available only to an individual threatened by a public authority with coercive action.[98] Insofar as presence of coercion is concerned, this ruling is consistent with earlier decisions of the SCA in *Welkom High School, V&A Waterfront* and *Kirland.* By this time the SCA's views had crystallized on coercion of a subject by a public authority as a prerequisite for the availability of collateral challenge. What may be extrapolated from this view is that the SCA had applied the second Oudekraal principle as it was originally formulated, ie the validity of an administrative act was necessary for the validity of consequent acts if it involved coercion of a subject by a public authority. Merafong launched a further appeal to the Constitutional Court.

In *Merafong,* the majority of the Constitutional Court rejected the category approach followed by the SCA.[99] In addition to rejecting the notion that only an individual who is threatened with coercive action by a public authority may invoke a collateral challenge and no one else,[100] the court found that at South African common law, collateral challenge has always been available

[96] Ibid para 10.
[97] *AngloGold Ashanti Ltd v Merafong City Local Municipality* (23558/2011) [2014] ZAGPPHC (26 February 2011) 85.
[98] *Merafong City v AngloGold Ashanti Ltd* 2016 (2) SA 176 (SCA) para 17.
[99] *Merafong* (note 95 above) para 25.
[100] Ibid.

in instances where there is no coercion.[101] *Merafong* opted for a flexible approach.[102] It now all depends on the interest of justice whether the validity of an administrative act is a necessary condition for the validity of consequent acts.

The effect of *Merafong* is not to exclude coercion as a factor to be considered in determining whether collateral challenge is available. What it has done is to recognize that there may be reasons other than coercion that may influence the court to hold that collateral challenge is available. The implication for the second Oudekraal principle is that the presence of coercion is also no longer the only way to determine whether the validity of an administrative act is a precondition for the validity of consequent acts.

In *Department of Transport v Tasima (Pty) Ltd,* the majority of the Constitutional Court affirmed the correctness of *Merafong* that the test for a collateral challenge was a flexible one.[103] In this case, the Constitutional Court allowed the Department of Transport to question the lawfulness of the extension of the contract between it and Tasima when the latter sought to enforce its terms. In terms of the original contract, the parties agreed that Tasima would provide the Department with an Information Technology solution, eNATIS, to manage and administer its vehicle and driver-licensing processes for five years. This contract lapsed and was renewed from month to month for further three years.[104]

The Director-General extended the contract for a further five-year term without following a public procurement process as is required by s 217 of the Constitution and s 38 of the PFMA.[105] After the Auditor-General raised queries regarding the validity of the extension of the contract,[106] the Director-General tried to extricate the Department from it without success. [107]

Towards the end of the terms of the extended contract, the Department and Road Traffic Management Corporation began processes to prepare for the transfer of eNATIS to the latter. Incensed by this, Tasima approached the High Court to interdict this process. Tasima insisted that the transfer should take place in accordance with the transfer provisions of the extended contract. The Department and the corporation opposed the application. They also lodged a

[101] Ibid para 30 with reference to *Metal and Electrical Workers Union of South Africa v National Panasonic Co (Parow Factory)* 1991 (2) SA 527 (C); *National Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry v Photocircuit SA (Pty) Ltd* 1993 (2) SA 245 (C).
[102] *Merafong* (note 95 above) para 55.
[103] *Department of Transport and Others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) ('*Tasima*') para 138.
[104] Ibid paras 10–12.
[105] Ibid paras 20–23.
[106] Ibid paras 28.
[107] Ibid para 29.

counter-application to review and set aside the extension of the contract. The department and the corporation raised a collateral challenge against the extension. The High Court found that the new Director-General did not adhere to s 217 of the Constitution in that the extension of the contract was not done in a fair, transparent and cost-effective manner.[108] Consequently, the court upheld the Department's collateral challenge.[109] Tasima appealed against this decision.

The SCA upheld Tasima's appeal.[110] It held that the interdict that Tasima sought was not founded on the extended contract but on the court orders that Tasima had obtained.[111] According to the SCA, it did not matter that these court orders were in turn founded on the extended contract.[112]

The Department urged the SCA to revisit the prohibition on public authorities from invoking a collateral challenge because in its view this approached detained the courts in a doctrinal straitjacket. It also contended the prohibition was in conflict with the reasoning of the minority judgment of the Constitutional Court in *Kirland.*[113] The SCA, relying on its own jurisprudence on collateral challenge, dismissed this contention.[114] It ruled that the recognition of a principle that a collateral challenge is not available to organs of state did not constitute an unwarranted doctrinal restriction to the courts' review jurisdiction.[115] The department had raised its collateral challenge in a counter-application. The SCA also dismissed the counter-application on the basis that it was instituted after a delay of five years in circumstances where a case for its condonation had not been made.[116] Dissatisfied with this outcome, the Department approached the Constitutional Court for further relief.

The Constitutional Court condoned the lateness of the Department's counter-application and unanimously affirmed its decision in *Merafong* that a public authority may invoke a collateral challenge against an unlawful administrative act.[117] The majority judgment observed that a public authority's competence to challenge exercises of public power, including its own, was recognised by the SCA in *Pepcor Retirement Fund and Another v Financial Services Board*

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[108] *Tasima (Pty) Ltd v The Department of Transport* [2015] ZAGPPHC 421 ('*Tasima HC*') para 96.
[109] Ibid para 99.
[110] *Tasima (Pty) Ltd v The Department of Transport Tasima (Pty) Ltd* [2016] 1 All SA 465 (SCA) ('*Tasima SCA'*).
[111] Ibid para 23.
[112] Ibid.
[113] Ibid para 26.
[114] Ibid para 26–7 with reference to *Kwa Sani Municipality v Underberg/Himeville Community Watch Association & another* [2015] 2 All SA 657 (SCA) ('*Kwa Sani*'); *Merafong* (note 95 above).
[115] *Tasima* (note 103 above) paras 26–7.
[116] Ibid paras 31–9.
[117] *Tasima* (note 103 above) paras 86 (minority judgment) and 138–140 (majority judgment).

and endorsed by the Constitutional Court in *Khumalo v Member of the Executive Council of Education*.[118] In these cases, it was noted that state functionaries are enjoined to uphold and protect the Constitution and that a court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power.[119]

Having analysed *Merafong* in the context of *Qaukeni, Pepcor* and *Khumalo,* the majority judgment concluded that it was a logical and pragmatic consequence of the developments in South Africa's public law jurisprudence to allow public authorities to challenge the lawfulness of the exercise of public power by way of reactive challenges in appropriate circumstances.[120] The majority judgment observed that there existed two types of collateral challenges in South Africa, ie a classical and an extended collateral challenge.[121] In particular, the court noted that insofar as the latter type is concerned, the application of coercive public was not a necessary element. In *Tasima,* the extent of maladministration and the impact the unlawful extension of the contract had on the fiscus influenced the court to uphold collateral challenge against the Director-General's decision to extend the eNATIS contract.[122] In essence, the court concluded that the validity of the extension was a necessary condition for the valid enforcement of the eNATIS contract.

In summary, the second Oudekraal principle has developed from its emphasis on the absence of coercion to include a flexible approach based on the lawfulness of the administrative act. In other words, the validity of the originating act may be necessary for its enforcement despite that it does not seek to coerce its subject. The collateral challenge in *Merafong* was based on the inconsistency of the Minister's decision with the Constitution.[123] In *Tasima* the court allowed a collateral challenge based on s 217 of the Constitution.[124]

3.4 SUMMARY

Although the cases since *Oudekraal* have not expressly referred to the second Oudekraal principle, they have applied it consistently with the way in which it was formulated. The courts have applied the second Oudekraal principle when they have had to decide whether an

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[118] Ibid para 139 with reference to *Pepcor Retirement Fund and Another v Financial Services Board and Another* 2003 (6) SA 38 (SCA) paras 10–5 ('*Pepcor'*) & *Khumalo v Member of the Executive Council for Education: Kwa Zulu Natal* 2014 (5) SA 579 para 32 ('*Khumalo'*).
[119] Ibid.
[120] *Tasima* (note 103 above) para 140.
[121] Ibid para 135 n 63
[122] *Tasima* (note 103 above) para 166.
[123] *Merafong* (note 95 above) para 21.
[124] *Tasima* (note 103 above) para 135.

administrative act had legal effect until it is set aside or whether a collateral challenge is available against it. Both the SCA and the Constitutional Court have declined to enquire into the validity of an administrative act unless it has been demonstrated that its validity is a precondition for the validity of later acts.[125]

Consistent with *Oudekraal,* the High Court and the SCA have applied the categorization approach. They have done so in two ways. First, in the absence of an application for review they have declined to enquire into the validity of administrative acts that are in essence permissive.[126] This means that the courts have not regarded the validity of a permission as a prerequisite for the validity of consequent acts.

Secondly, the High Court and SCA have relied on the presence or absence of coercion by a public authority to decide whether a collateral challenge is available to a respondent. If an administrative act in issue involves coercion of a subject by a public authority, the originating act has to be valid. [127] Its validity has been held to be a prerequisite for the validity of consequent acts. The High Court and the SCA have declined to question the validity of the administrative act where it did not involve coercion.[128]

Closer to permissive administrative acts are those that oblige administrators to do something. For instance, the Road Accident Fund Act obliges the fund to compensate victims of road accidents who qualify. The commonality between the two types of administrative act is that they do not involve coercion of a subject by a public authority. In *Duma,* the SCA dealt with the Road Accident fund's rejection of medical reports submitted by four claimants.[129] The court declined to enquire into the validity of the fund's decision in the absence of a review application.[130] Although the court did not expressly rely on the categorization of the administrative act in order to reach its decision, its decision is consistent with the categorization approach. According to the categorization approach, in the absence of a review application, a litigant may question the validity of an administrative act only if it involves coercion of a subject to do or not to do something.[131]

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[125] See for instance *V&A Waterfront* (note 24 above) para 10; *Kirland* (note 24 above) paras 102–3.
[126] *Reader* (note 24 above) para 36; *V&A Waterfront* (note 24 above) para 10; *Harrison* (note 24 above) para 62.
[127] *Arniston* (note 76 above) para 20; *Welkom High School* (note 92 above) para 14; *Merafong* (note 95 above) para 17.
[128] *V&A Waterfront* (note 24 above) para 10; *Harrison* (note 24 above) para 62.
[129] *Duma* (note 56 above).
[130] Ibid para 24.
[131] *Merafong* (note 95 above) para 25.

In *Merafong,* the Constitutional Court rejected the category approach by the SCA.[132] This marked a departure from the purity of *Oudekraal* that had been preserved by the Supreme Court of Appeal up to then.[133] The Constitutional Court endorsed a flexible approach that was known to our common law. [134] Importantly, it is now the interests of justice that determine whether the validity of an administrative act is a prerequisite for the validity of consequent acts. In *Tasima,* the Constitutional Court affirmed the correctness of *Merafong* and expounded on what may constitute the interests of justice. Here it was the requirements of s 217 of the Constitution and the adverse impact of the unlawful extension of the contract on the fiscus that persuaded the court to find that the decision to extend the contract had to be lawful before the extended contract could be enforced.

Importantly, *Merafong* and *Tasima* did not reject coercion as a decisive factor in the determination of whether the validity of an administrative act is a prerequisite for the validity of subsequent acts. The effect of these cases is that the absence of coercion does not automatically mean that the validity of an administrative act is *not* a prerequisite for the validity of later acts. That would depend on the interests of justice.

The flexible approach has its own challenges. The interests of justice depend on specific facts and therefore are not necessarily of universal application. It is only after a court pronounces on what constitutes the interests of justice that legal certainty emerges. This uncertainty is what Forsyth, and by extension *Oudekraal,* sought to address.[135] So far, the cases since *Oudekraal* suggest that the mandatory constitutional requirements of s 217 of the Constitution,[136] the adverse impact on the fiscus,[137] and the efficacy, policy and objects of the enabling statute are factors that will guide the courts on what constitutes the interests of justice.[138]

[132] Ibid.
[133] *Oudekraal* (note 1 above) para 32.
[134] *Merafong* (note 95 above) para 55.
[135] Forsyth (note 9 above) 145–6.
[136] *Tasima* (note 103 above) para 139 n 69.
[137] Ibid para 166.
[138] *Nzimande* (note 16 above) para 58.

CHAPTER 4

COLLATERAL CHALLENGE

INTRODUCTION

The third Oudekraal principle states that where a public authority seeks to coerce a subject to do or not to do something, the legal force of the coercive act depends on the validity of the originating administrative act.[1] If the originating act is unlawful, a person sought to be coerced may disregard it with impunity and raise its invalidity as a collateral challenge or defence in enforcement proceedings.[2]

Collateral challenge must be distinguished from direct challenge (judicial review).[3] First, in a direct challenge, the validity of an administrative act is the central focus of the court's enquiry whilst in an indirect review validity 'is incidental to the court's main subject of adjudication'.[4] Secondly, in a collateral challenge the court has no discretion not to allow it once a party has satisfied all the requirements, whilst in a direct challenge a court can decline to set aside an unlawful act despite the establishment of grounds of review.[5] A court uses this discretion to avoid or minimize injustice once it has declared an unlawful act invalid.[6] In essence, judicial review and collateral challenge are not 'interchangeable manifestations of a single remedy that arises whenever an administrative act is invalid'.[7]

Rubenstein, one of the leading authorities on the subject, defines collateral challenge as an attack on the validity of a decision in proceedings not 'specially designated by law for the purpose of having such a decision set aside, reversed or modified'.[8] In South Africa, before the advent of the democratic constitution, the provincial division of the Supreme Court[9] adopted Sir William Wade's definition of collateral challenge.[10] Similar to Rubenstein, Wade defines

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[1] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) para 32 (*'Oudekeraal'*).
[2] Ibid.
[3] Ibid para 36.
[4] Henri-Willem van Eetveldt *The Indirect Review of Administrative Action in South African Law* (unpublished LLM thesis, Stellenbosch University, 2018) 1.
[5] *Oudekraal* (note 1 above) 36.
[6] Ibid.
[7] Ibid.
[8] Jerome Rubenstein *Jurisdiction and Illegality* (1962) 37–8.
[9] *Metal and Electrical Workers Union of South Africa v National Panasonic Co (Parow factory)* 1991 (2) SA 527 (C) 530B–D; *National Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry v Photocircuit SA (Pty) Ltd* 1993 (2) SA 245 (C) ('*Photocircuit*') 253A with reference to HWR Wade *Administrative Law* 6 ed (1988) 331.
[10] Wade (note 9 above) 331.

collateral challenge as one that is raised in 'proceedings which are not themselves designed to impeach the validity of some administrative act or order'.[11] The High Court[12] and the SCA in *Oudekraal* adopted a similar definition.[13] This approach by *Oudekraal* is influenced by the court's heavy reliance on English common law[14] and administrative law theory.[15]

In South Africa, under the common law, collateral challenge could be invoked defensively or as an attack. As a defence, a person could raise collateral challenge by challenging the validity of an administrative act during enforcement proceedings.[16] As an attack, collateral challenge was invoked by proactively challenging the validity of an administrative act in a parallel application for a declaratory order.[17] For instance, in *Attorney-General of Natal v Johnstone and Co Ltd,* the earliest reported case on collateral challenge, an accused charged with a statutory offence based on an administrative act approached the civil court to have the administrative act declared invalid.[18]

The common-law courts approached collateral challenge with a measure of flexibility.[19] Whether it would be allowed in any given circumstances depended on the interests of justice. Despite the flexible common law, 'collateral' had to mean or to be associated with 'defensive' (and was seen thus in Oudekraal and later cases).[20] Furthermore, this was compounded by the fact that the first instance where the court dealt with collateral challenge as an attack was in *Kouga Municipality v Bellingan,*[21] eight years after *Oudekraal.*

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[11] Ibid 331.
[12] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2002 (6) SA 573 (C) ('*Ouderaal HC*') 591C.
[13] *Oudekraal* (note 1 above) para 32 n 22.
[14] Ibid paras 28–32 with reference to *Regina v Wicks* 1998 AC 92 (HL) ('*Wicks*'); *Boddington v British Transport Police* [1999] 2 AC 143 (HL) ('*Boddington*').
[15] *Oudekraal* (note 1 above) para 29 with reference to Christopher Forsyth ' "The Metaphysic of Nullity": Invalidity, Conceptual Reasoning and the Rule of Law' in Christopher Forsyth & Ivan Hare (eds) *Essays in Public Law in Honour of Sir William Wade QC* (2005) 141.
[16] *Photocircuit* (note 9 above) 253A–B; see also *Oudekraal* (note 1 above) para 32 with reference to *Boddington* (note 13 above).
[17] *Attorney-General of Natal v Johnstone and Co Ltd* 1946 AD 256 ('Johnstone') 262; see also *Panasonic* ('note 9 above') where the union sought to interdict a lockout on the basis that the conciliation notice, a necessary condition for the lockout, was invalid.
[18] *Johnstone* (note 17 above) 262.
[19] *Panasonic* (note 9 above) 530G–H; see also *Photocircuit* (note 9 above) 253E–F.
[20] *Oudekraal* (note 1 above) para 32; see also *V&A Waterfront (Pty) Ltd v Helicopter & Marine Services* 2006 (1) SA 252 (SCA) ('*V&A Waterfront*') para 10; *Kwa Sani Municipality v Underberg/Himeville Community Watch Association & another* [2015] 2 All SA 657 (SCA) ('*Kwa Sani*') paras 14 as an example.
[21] *Kouga Municipality v Bellingan* 2012 (2) SA 95 (SCA) ('*Kouga Municipality*') paras 18–19.

In *Merafong City v AngloGold Ashanti Limited,* the majority of the Constitutional Court tried to decipher the meaning of collateral challenge.[22] It held that '[i]t may be more descriptive to term collateral challenges "reactive", rather than "collateral". To call them "defensive" is also inapt, since the challenger may itself initiate proceedings'.[23]

Importantly, there is no substantive difference between a reactive attack in the sense used in *Merafong* and collateral challenge as it has been used at common law. *Merafong* defines 'reactive challenge'[24] broadly on the same terms as collateral challenge is defined in earlier cases[25] and in academic commentary.[26] Furthermore, there is markedly no substantive difference in the legal principles applied by the Constitutional Court in respect of a reactive attack[27] and those applied by the SCA to collateral challenge.[28] In any event, academic commentary has been referring interchangeably to this type of reaction to an unlawful act as collateral challenge, defence or attack.[29]

Because there is no substantive difference between collateral and reactive challenge and because common-law authorities and academic commentary refer to the concept as 'collateral challenge', for ease of reference, this thesis adopts 'collateral challenge' as the preferred terminology interchangeably to refer to both 'collateral' and 'reactive' attack.

Before *Oudekraal,* South African law recognized two types of collateral challenge, one where a person is being coerced to comply with an unlawful act[30] and another where invalidity is the sole basis of the challenge.[31] The first type has been described as the classical collateral challenge.[32] In this thesis, the second type is described as an extended collateral challenge.

In *Oudekraal,* the Cape Metropolitan Council raised a collateral challenge against Oudekraal's court application to enforce the approval that the then Administrator of the Cape Province had

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[22] *Merafong City Local Municipality v AngloGold Ashanti Limited* 2017 (2) SA 211 (CC) ('*Merafong*') paras 30–38.
[23] Ibid para 26 n 27
[24] *Merafong* (note 22 above) para 26; see also *Department of Transport and Others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) ('*Tasima*') para 135 n 60.
[25] See for instance *Photocircuit* (note 9 above) 253A–B.
[26] Rubenstein (note 9 above) 37–8.
[27] *Tasima* (note 24 above) paras 135–141 (in respect of collateral challenge).
[28] *Kouga Municipality* (note 21 above) paras 18–19 (in respect of a reactive attack).
[29] Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) 548 ('Hoexter'); See also Rubenstein (note 8 above) 37–8; the Right Hon the Lord Woolf, Sir Jeffrey Jowell QC, Andrew Le Sueur, Catherine Donnelly & Ivan Hare *De Smith's Judicial Review* 8 ed (2018) para 3–123 ('De Smith'); H W R Wade & C F Forsyth *Administrative Law* 11 ed (2014) 237 ('Wade & Forsyth').
[30] *Johnstone* (note 17 above); *Photocircuit* (note 8 above).
[31] *Photocircuit* (note 9 above); see also *Panasonic* (note 9 above).
[32] *Merafong* (note 22 above) para 69.

granted to it to develop its property into a township. The city contended the Administrator's approval was unlawful because the administrator had granted it after the expiry of the applicable statutory time periods.[33] The High Court upheld the city's collateral challenge.[34] It focused on the fact that the Administrator's approval was unlawful.[35] In other words, the court enquired whether the city had satisfied the requirements of an extended collateral challenge. The court emphasized that having found the approval unlawful, any order that did not uphold the collateral challenge would have undermined the principle of legality.[36] Oudekraal appealed.

The SCA ruled that coercion by a public authority is essential to invoking a collateral challenge.[37] This was because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question.[38] In this way, the court in *Oudekraal* opted for a narrow approach to collateral challenge and deviated from existing precedent.[39] As a result, *Oudekraal* blurred the distinction between classical and extended collateral challenge.

This chapter investigates how the courts since *Oudekraal* have understood the meaning, nature and scope of collateral challenge. The chapter has eight sections. It begins with an examination of the difference between collateral challenge and judicial review. This is followed by an overview of collateral challenge at common law. Thirdly, it interrogates the blurring of the distinction between classical and extended collateral challenge introduced by *Oudekraal*. The fourth part of this chapter considers whether *Oudekraal* forbade a public authority from invoking a collateral challenge. Fifthly, the chapter canvasses the impact of delay in raising a collateral challenge. In its sixth part, the chapter examines the express exclusion of collateral challenge by statute. This is followed by an investigation into the exclusion of collateral challenge upon the proper construction of a statute. The chapter ends with a conclusion.

4.1 COLLATERAL CHALLENGE VERSUS JUDICIAL REVIEW

Oudekraal explains that collateral challenge and judicial review are not interchangeable manifestations of the same remedy.[40] The fundamental distinction between the two is that in a collateral challenge, once all the requirements for its application have been satisfied, a court

[33] *Oudekraal* (note 1 above) para 4.
[34] *Oudekraal HC* (note 12 above) 587E–F.
[35] Ibid 593C.
[36] Ibid 593D.
[37] *Oudekraal* (note 1 above) para 33.
[38] Ibid para 35.
[39] *Panasonic* (note 9 above) 530G–H; *Photocircuit* (note 9 above) 253E–F.
[40] *Oudekraal* (note 1 above) para 36.

has no discretion to refuse it.[41] On the other hand, a court that is asked to set aside an invalid administrative act in proceedings for judicial review has discretion whether to withhold the remedy even though the grounds of review have been established.[42] A review court utilizes this discretion to avoid or minimize injustice where certainty and legality collide.[43]

In *Seale v Van Rooyen NO,* the SCA followed *Oudekraal* on the distinction between direct and collateral challenge.[44] In an earlier case, *Bullock*, the SCA had set aside the decision of the Premier of the North-West to register a notarial deed of servitude in favour of Seale.[45] Unbeknown to the appeal court, the deed of servitude had been registered by the time it reached its decision to set aside the Premier's decision.[46] The registrar of deeds refused to cancel it on the strength of the judgment of the SCA. He took the view that the notarial deed had legal effect until it was set aside.[47] Seale also refused to consent to the cancellation of the notarial deed. This prompted the Transvaal Yacht Club to approach the High Court to have the notarial deed cancelled. The High Court upheld this order.[48] Seale appealed.

The SCA ruled that once an unlawful act has been set aside, all acts that rely on it for their legal effect cease to be effective.[49] This means that after the *Bullock* decision, it became unnecessary to have the deed cancelled. In the view of the appeal court, it is precisely because of this far-reaching effect of setting aside an unlawful act that a reviewing court is endowed with discretion to withhold a remedy.[50] In a way that is consistent with *Oudekraal,*[51] *Seale* illustrates how discretion may be used by a review court to avoid or minimize injustice by illuminating the drastic impact of an order setting aside an unlawful act.

Kouga Municipality,[52] like *Seale,* explains the distinction between direct and collateral challenge by illustrating the importance of remedial discretion in review proceedings. In this case, Bellingan and three other liquor merchants were charged for contravening bylaws which

[41] Ibid.
[42] Ibid.
[43] Ibid.
[44] *Seale v Van Rooyen NO* 2008 (4) SA 43 (SCA) ('*Seale*').
[45] *Bullock NO v Provincial Government, North West Province* 2004 (5) SA 262 (SCA).
[46] *Seale* (note 44 above) para 2.
[47] Ibid.
[48] Ibid para 3.
[49] Ibid para 13.
[50] Ibid.
[51] *Oudekraal* (note 1 above) para 36.
[52] *Kouga Municipality* (note 21 above) para 12.

regulated liquor trading hours in their area. These bylaws were unlawful for want of compliance with the procedure prescribed for their adoption.[53]

Similar to *Johnstone,* during an interval when the criminal matter was postponed, the three accused launched an application in the High Court to have the bylaws reviewed and set aside.[54] The High Court upheld their application but suspended the operation of the order of invalidity for a period of 12 months.[55] The municipality appealed this decision.

On appeal, the effect of the suspension of the operation of the order of invalidity brought into sharp focus the difference between direct and collateral challenge. The SCA observed that the 'correct approach to the relief sought by the applicants would have been to recognise that the application was in form a direct challenge, but in substance a defensive or collateral challenge, to the validity of the by-law'.[56] Belllingan and his co-applicants sought to extricate themselves from the criminal charges levelled against them. By opting for judicial review of the bylaws (direct challenge), they misconstrued the remedy demanded by their circumstances. A direct challenge was inappropriate because a court adjudicating on a review has discretion whether to grant the relief sought.[57] In their case, the exercise of this discretion by the court a quo, far from assisting them, actually prejudiced them.[58] In particular, the suspension of the order declaring the bylaws invalid not only had the effect that the applicants could be prosecuted during the period of suspension, which was precisely the result they sought to avoid, but also meant that they were precluded during that period from mounting a collateral challenge to the validity of the bylaw. Thus, although they were successful, they were in a worse position than they would have been in had they brought no proceedings at all.[59]

The SCA remedied the problems associated with the relief sought by the applicants and the order granted by the court a quo by issuing a declaratory order that the bylaws in question were invalid for the purposes of the prosecution of any of them.[60] In granting this order, the court was informed by its understanding that a collateral challenge to the validity of a piece of

[53] Ibid paras 9–11.
[54] *Bellingan v Kouga Municipality* (Eastern Cape High Court, Grahamstown) unreported case 885/2009 of 12 November 2010 ('*Kouga Municipality HC'*).
[55] Ibid paras 59 and 69.
[56] *Kouga Municipality* (note 21 above) para 12.
[57] Ibid para 15.
[58] Ibid para 17
[59] Ibid.
[60] Ibid para 18.

legislation can be mounted at any time and that a court has no discretion to disallow such a challenge if is sought by the right person in the right proceedings at the right time.[61]

The SCA also accepted that an accused person may raise a collateral challenge through an application to a civil court for an order declaring the underlying administrative act invalid instead of raising the invalidity of an administrative act during the trial.[62] The advantages of this approach include the fact that the complex administrative law questions would be dealt with by a court that is better versed in the subject than a specialist criminal court.[63] The appeal court left open the question whether a collateral challenge by way of a declaratory order may be brought by a person who is merely liable to prosecution but has not been charged.[64]

Like *Seale*, *Kouga Municipality* also focused on the presence or absence of discretion as the distinguishing feature between direct and collateral challenge. These cases did not opine on the difference in the scope of enquiry of collateral and direct challenge. Opining on the English-law equivalent, Rubenstein observes that in a collateral challenge a court is confined to an examination of whether a decision exists in law.[65] It does not go into the merits of the case. If a court goes beyond the jurisdiction and nullity questions, its action is not merely declaratory; it invalidates an otherwise valid decision.[66] This distinction clarifies the distinct roles of the courts in a collateral and direct challenge. Rubenstein's observations are instructive on how the South African courts are likely to approach this aspect of the difference between direct and collateral when they get an opportunity to examine it.

4.2 COLLATERAL CHALLENGE UNDER COMMON LAW

Johnstone is the earliest reported South African judgment on collateral challenge.[67] In this case, Johnstone was a company that operated its business under a general dealer licence. The wages it paid to its employees were governed by Wage Determination no 70 published in terms of the Wage Act 44 of 1937. The Attorney-General criminally charged Johnstone for contravening the Wage Determination by underpaying seven Assistant Dispatch Clerks. According to the Attorney-General, in terms of the prevailing Wage Determination, these employees were, in

[61] Ibid.
[62] Ibid para 19.
[63] Ibid.
[64] Ibid para 20.
[65] Rubenstein (note 8 above) 38–9; see also *Photocircuit* (note 9 above) 253B.
[66] Rubenstein (note 8 above) 38–9.
[67] *Johnstone* (note 17 above).

essence, Shop Assistants and thus entitled to be paid at a higher rate than Assistant Dispatch Clerks.[68]

The Attorney-General, the Minister of Labour and Johnstone agreed to halt the prosecution temporarily so that Johnstone could approach the Natal Provincial Division of the Supreme Court for a declaratory order declaring that it had not contravened the Wage Act and the Wage Determination in respect of the seven employees.[69] The majority of the Supreme Court upheld the company's contentions.[70] The Attorney-General appealed.

On appeal, the then AD confronted the question whether it was legally competent for a litigant to seek a declaratory order in civil proceedings that would effectively permanently stay its criminal prosecution.[71] The AD observed that relevant law was indistinct and that it was within Johnstone's rights to ascertain its legal position.[72] The appeal court also acknowledged the possibility of an employer's being prosecuted before it had had a chance to challenge the effect of a wage determination.[73] In light of these observations, the AD held that Johnstone was entitled to approach a civil court for a declaratory order despite the commencement of criminal proceedings against it.[74]

The importance of this judgment is that it recognised that a party affected by an unlawful administrative act is not limited to raising its unlawfulness as a defence in enforcement proceedings but may also challenge it proactively. It laid a foundation of how a proactive collateral challenge may be mounted.

Later, but prior to *Oudekraal,* in *Metal and Electrical Workers Union of South Africa v National Panasonic Co (Parow factory),* the Cape Provincial Division of the Supreme Court acknowledged the application of collateral challenge in administrative law[75] but disallowed on the basis of facts before it.[76] Although *Panasonic* acknowledges the availability of a collateral challenge even in instances where a subject is not being coerced, the fact that the court dismissed the challenge resulted in there being no direct authority on this aspect until *Oudekraal*.

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[68] *Johnstone* (note 17 above) 259.
[69] Ibid.
[70] Ibid 260.
[71] Ibid.
[72] Ibid 261.
[73] Ibid 261–2.
[74] Ibid 262.
[75] *Panasonic* (note 9 above) 530C–D.
[76] Ibid 530D–I.

In *Panasonic*, an employer locked out its workers as part of an industrial action. The labour union approached the Cape Provincial Division to interdict the lockout. The union challenged the validity of the industrial council conciliation proceedings on which the validity of the lockout rested. The court dismissed the application because the union had not raised the challenge timeously.[77] In the view of the court, collateral challenge was available to a litigant when invoked by the right person, at the right time, in the right proceedings.[78] The court observed that industrial actions, strike or lockout, took time and were a test of endurance.[79] In this case, the court held that the lockout by the employer had been going on for a while and that upholding the collateral challenge would have had the effect of tilting power in favour of the union in an enduring industrial action.[80] The court saw its role as that of a boxing referee in this type of dispute. In its view, a referee may intervene if a blow is struck 'below the belt but he would be astounded while the bout is in progress to receive a complaint that something had gone wrong with the weigh-in'.[81] The court observed that whether collateral challenge is available in each case depends on the circumstances of that case.[82] Notably, the dispute in *Panasonic* did not involve coercion of a person by a public authority, or indeed a public authority at all.

In *Photocircuit*, the AD also accepted the application of collateral challenge in the administrative-law context.[83] The appeal court adopted a similar view to *Panasonic* that the availability of collateral challenge depends on the circumstances of each case.[84] In *Photocircuit*, the respondent employers challenged the legal authority of the bargaining council to extract certain contributions from them. The court allowed the collateral challenge.[85] In this case, the challenge was collateral in the sense that the invalidity of the originating administrative act was raised in enforcement proceedings. Unlike in *Panasonic*, in *Photocircuit* the subject of an administrative was being coerced to comply with an unlawful act.

Panasonic and *Photocircuit* illustrate that prior to *Oudekraal,* the South African common law recognized the existence of two types of collateral challenge, one where a person is being

[77] Ibid 530E–F.
[78] Ibid 530C–D.
[79] Ibid 530H–I.
[80] Ibid.
[81] Ibid.
[82] Ibid 530G–H.
[83] *Photocircuit* (note 9 above) 253E.
[84] Ibid.
[85] Ibid 252J–253E.

coerced to comply with an unlawful act[86] and another where invalidity is the sole basis of the challenge.[87] At common law, a person affected by an unlawful administrative act could challenge its validity defensively in enforcement proceedings[88] or proactively through an application for a declaratory order.[89] Whether collateral challenge could be successfully invoked depended on the circumstances of each case.[90]

4.3 BLURRING THE DISTINCTION BETWEEN CLASSICAL AND EXTENDED COLLATERAL CHALLENGE

Oudekraal's approach to collateral challenge is informed by Forsyth's theory of the second actor[91] and the decision of the English House of Lords in *Boddington v British Transport Police*.[92] In *Boddington,* the accused was charged with the contravention of notice prohibiting smoking in a railway carriage. In his defence, he queried the validity of the decision to post the relevant notice in the railway carriages. According to him, the relevant regulations did not authorise a total ban on smoking in the carriages. At issue was whether Boddington was entitled to raise a collateral challenge against the criminal charges brought against him. The House of Lords held that he was so entitled because the validity of the decision to post the notice was essential to the existence of the offence.[93]

Lord Irvine LC remarked that '[i]t would be a fundamental departure from the rule of law if an individual were liable to conviction for contravention of some rule which is itself liable to be set aside by a court of law as unlawful'.[94] In his view, what was important for the maintenance of the rule of law and the preservation of liberty was that 'individuals affected by legal measures promulgated by executive public bodies should have a fair opportunity to challenge these measures and to vindicate their rights in court proceedings'.[95]

In a concurring judgment, Lord Steyn held that '[p]rovided that the invalidity of the byelaw is or may be a defence to the charge a criminal case must be the paradigm of collateral or

[86] *Johnstone* (note 17 above); *Photocircuit* (note 9 above).
[87] *Panasonic* (note 9 above).
[88] *Photocircuit* (note 9 above).
[89] *Johnstone* (note 17 above).
[90] *Panasonic* (note 9 above) 530G–H; *Photocircuit* (note 9 above) 253E.
[91] *Oudekraal* (note 1 above) paras 29 and 34 with reference to Forsyth (note 15 above).
[92] *Oudekraal* (note 1 above) paras 29 and 32, with reference to *Boddington* (note 14 above).
[93] *Boddington* (note 14 above) 162G–H.
[94] Ibid 153H–154A.
[95] Ibid 161C–D.

defensive challenge'.[96] He endorsed Forsyth's explanation of why in certain circumstances an unlawful act may have legal effect.[97]

Having analysed *Boddington* and Forsyth's theory of the second actor, *Oudekraal* concluded that coercion by a public authority is a fundamental requirement for a collateral challenge.[98] By doing so, *Oudekraal* effectively collapsed the distinction between classical and extended collateral challenge. Cases immediately after it followed the same approach. For instance, in *V&A Waterfront Properties (Pty) Ltd v Helicopter & Marine Services,* the SCA dismissed a collateral challenge because, in its view, the respondent had not been coerced by a public authority.[99]

In *V&A Waterfront,* the appellant leased its property to the respondent to conduct a business of ferrying tourists on a helicopter at the leased premises. The lease agreement forbade contravention by the lessee of any statute or regulations pertinent to the operation of its business at the leased premises.[100] The South African Civil Aviation Authority temporarily grounded the respondent's helicopter pending an assessment of the aircraft's airworthiness.[101]

The lessee indicated that it intended to defy this order. In response, the lessor approached the High Court to compel the lessee to comply with the grounding order. The High Court dismissed the lessor's application.[102] In its view, the lessor had failed to show a reasonable apprehension of harm because it could not show that the helicopter was not airworthy.[103] The lessor appealed.

The SCA observed that whilst the grounding order subsisted, the operation of the helicopter business at the leased premises would be in conflict with it and that by extension the lessee would also be in breach of its obligations in terms of the lease agreement.[104] The lessee persisted with its collateral challenge impugning the validity of the grounding order.[105] The lessee argued that, in essence, the application by the lessor for an interdict was brought on behalf of the civil aviation authority which was seeking to coerce it to comply with an unlawful grounding order. The SCA rejected this proposition because despite the fact that the civil

[96] Ibid 173A.
[97] Ibid 172A–D with reference to Forsyth (note 15 above).
[98] *Oudekraal* (note 1 above) para 39.
[99] *V&A Waterfront* (note 20 above).
[100] Ibid para 6.
[101] Ibid para 3.
[102] *V&A Waterfront (Pty) Ltd v Helicopter & Marine Services* [2004] 2 All SA 664 (C) ('*V&A Waterfront HC*') para 31.
[103] Ibid para 4–5.
[104] *V&A Waterfront* (note 20 above) paras 7–8.
[105] Ibid paras 9–10.

aviation authority had joined the proceedings on its own accord, it sought no relief from the court against the respondents.[106] In its affidavit, the authority did not canvass the procedural and unfairness issues raised by the respondents but focused on the merits of the grounding order.[107]

The SCA found that the lessor was entitled, on its own, to take legal action against the lessee.[108] It could do so not to enforce the grounding order as such, but to enforce the lease.[109] In the court's view, if the grounding order were to be regarded as valid then a threat to operate the aircraft in contravention of the order also threatened the appellant's rights in terms of the lease.[110] As a result, the SCA ruled that the invocation of a collateral challenge was misconceived.[111]

The fact that the civil aviation authority's grounding order coerced the lessee to suspend the operations of the aircraft cannot be gainsaid. Therefore, the SCA's dismissal of the lessee's collateral challenge negates the essence of classical collateral challenge by allowing a subject to be coerced to comply with an unlawful administrative act through a private-law mechanism. The lessee questioned this narrow construction of collateral challenge by the SCA and approached the Constitutional Court for further relief.[112]

The Constitutional Court found it unnecessary to decide whether the SCA had construed collateral challenge too narrowly but remarked that even if it were so, this would not have assisted the lessee because it had an alternative remedy of reviewing and setting aside the decision of the regulator, which it had elected not to invoke.[113] Like the High Court, the Constitutional Court disregarded the fact that, by definition, the civil aviation authority's grounding order coerced its subject to comply with its terms. Notably, *Oudekraal* had already held that is not necessary for a person who is being coerced to comply with an unlawful act to approach the court for judicial review before he can raise a classical collateral challenge.[114] Although the Constitutional Court left open the question whether the High Court had construed

[106] Ibid paras11–12.
[107] Ibid para 11.
[108] Ibid para 11.
[109] Ibid para 13.
[110] Ibid para 8.
[111] Ibid para 14.
[112] *Helicopter & Marine Services (Pty) Ltd and Another v V&A Waterfront Properties (Pty) Ltd and Others* 2006 (3) BCLR 351 (CC) ('*V&A Waterfront CC*').
[113] Ibid para 7.
[114] *Oudekraal* (note 1 above) para 32.

collateral challenge too narrowly, the effect of this decision is that it also left the narrow approach by High Court intact.[115]

Although *V&A Waterfront* affirms *Oudekraal's* authority on the scope of collateral challenge being narrow, ie that collateral challenge is available only when a subject of an unlawful administrative act is being coerced to comply with it by a public authority, its dismissal of the lessee's collateral challenge solely because it the lessor was enforcing a term of the lease further narrowed the scope of collateral challenge.

Club Myokonos Langebaan Ltd v Langebaan Country Estate Joint Venture also followed *Oudekraal's* narrow interpretation of collateral challenge and endorsed the *V&A Waterfront* approach that collateral challenge is not available against an unlawful act if the latter is enforced through private-law means.[116] In this case, Club Myokonos and Langebaan Country Estate were property developers in the Langebaan area. The Saldanha Municipality had granted them rights to rezone and develop their respective properties subject to certain conditions.

One of the conditions of the approval was that each of the developers had to construct a road that linked their properties to the main road arteries in the area enabling each of the properties seamless access to the road network.[117] Section 28 of the applicable Land Use and Planning Ordinance (LUPO) vested the road links on the Saldanha municipality.

Club Myokonos fulfilled its obligation in respect of the required road link. Langebaan Country Estate did not. This negatively affected access to Club Myokonos' property from the Langebaan Estate side. Despite overtures to Saldanha municipality and Langebaan Country Estate by Club Mykonos, it received no cooperation.[118] As a result, Club Myokonos approached the High Court for an order declaring that Langebaan Country Estate was obliged to build the relevant link road. Langebaan Country Estate retorted with a collateral challenge that the condition obliging it to construct a road link was ultra vires. [119]

The High Court held that 'outside of direct review proceedings the circumstances in which a party may indirectly or collaterally challenge the validity of administrative action are narrow'.[120] In its view, they were limited to where 'an administrative authority seeks to enforce

[115] *V&A Waterfront CC* (note 112 above) para 7.
[116] *Club Myokonos Langebaan Ltd v Langebaan Country Estate Joint Venture and Others* 2009 (3) SA 546 (C) ('*Club Myokonos')*
[117] Ibid paras 14 and 24–6
[118] Ibid para 26.
[119] Ibid.
[120] Ibid para 38.

an invalid act against the party challenging the validity of that act'.[121] In line with this view, the court dismissed the collateral challenge because no public authority had been attempting to coerce Langebaan Estate.

Although *Club Myokonos* is based on the same legal principle as *V&A Waterfront,* it is distinguishable from it in that the administrative act involved in *Club Myokonos* did not coerce its subject to do any act. It was a permission granted by the municipality to Club Myokonos to develop its property in a particular way. The import of this decision is its implicit denial of the existence of an extended collateral challenge.

In an obiter dictum in *Offit Enterprises (Pty) Ltd v Coega Development Corporation*, the High Court endorsed *V&A Waterfront's* interpretation that collateral challenge is restricted to instances where a subject is coerced by a public authority to comply with an unlawful act.[122] In this case, owners of certain properties within the Coega Industrial Development Zone (the IDZ) challenged the threatened expropriation of their properties by or on behalf of the Coega Development Corporation (Coega). The applicants sought a declaratory order declaring that any expropriation of their properties at the instance of Coega would be unlawful because it operated the IDZ without a valid licence.[123] In the circumstances, the applicants contended that the expropriation would be unlawful because it would not be for a public purpose.[124] The High Court found that Coega was duly licensed and dismissed this contention.[125]

The court went further and held that it was impermissible for the applicants to challenge the validity of the permits collaterally.[126] According to it, the principles set out in *Oudekraal* did not permit a collateral challenge to be mounted against the validity of Coega's permit in circumstances where there was no coercion by a public authority.[127] In the court's view, had there been coercion, the applicants would certainly have had the requisite *locus standi* to challenge the validity of the Coega's permit.[128] The applicants appealed.

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[121] Ibid.
[122] *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation and Others* 2009 (5) 661 (SE) ('*Offit'*) 673D.
[123] Ibid 665E–F.
[124] Ibid 670D–E.
[125] Ibid.
[126] Ibid 673D.
[127] Ibid.
[128] Ibid 673E.

The SCA found no merit in the proposition that the permits were invalid and thus declined an invitation to opine on the availability of a collateral challenge.[129] In a further appeal to the Constitutional Court, the appellant abandoned the challenge to the validity of the permits.[130] Instead, it pursued a mandamus compelling Coega to make a decision within a specified period as to whether or not it intended to expropriate the applicants' property.[131]

More than the fact that *Offit* is consistent with *V&A Waterfront* in its affirmation of the criticality of coercion by a public authority as a requirement for collateral challenge, its importance lies in its suggestion that a mere threat of coercion by a public authority may not be enough to sustain a collateral challenge.[132]

Absa Bank Ltd v Ukwanda Leisure Holdings (Pty) Ltd[133] also followed the authority of *V&A Waterfront.* In this case, Absa instituted an action against Ukwanda Leisure to recover losses it had incurred as the clearing bank of Cortex, a trading member of the Johannesburg Stock Exchange (JSE). Ukwanda Leisure, being Cortex's client, had defaulted in respect of single stock future contracts. Ukwanda retorted that it was not in default and that according to its reading of the JSE Rules, Cortex, as a clearing agent, was in default. As a result, Ukwanda Leisure contended that any moneys that could have been due by it were to be treated as a loan by Absa to it in terms of the same rules.

Ukwanda Leisure conveyed its opinion to the JSE Stock Exchange that Cortex was in default as provided for in the Derivative Rules.[134] The stock exchange advised Ukwanda Leisure that it disagreed with the latter's contention and persisted that, in its reading of the Derivative Rules, Cortex was not in default.[135] Ukwanda Leisure did not challenge the JSE's ruling on review. In response to Absa's lawsuit, Ukwanda Leisure raised Cortex's alleged default as its defence and basis for its counter-claim.

The High Court ruled that it is settled law that administrative decisions such as that of the JSE stand until they are set aside by a court.[136] The court endorsed the *V&A Waterfront* judgment

[129] *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation and Others* 2010 (4) SA 242 (SCA) ('*Offit* SCA') para 24.
[130] *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation and Others* 2011 (1) SA 293 (CC) ('*Offit* CC') para 30.
[131] Ibid para 31.
[132] *Offit* (note 122 above) 672G.
[133] *Absa Bank Ltd v Ukwanda Leisure Holdings (Pty) Ltd* 2014 (1) SA 550 (GSJ) ('*Ukwanda Leisure'*).
[134] Ibid para 6.
[135] Ibid.
[136] Ibid para 61.

that generally, a collateral challenge may be invoked only where an administrative authority coercively seeks to enforce an invalid act against a subject.[137] This reinforced the narrow construction of collateral challenge.

In *Coal of Africa v Akkerland Boerdery (Pty) Ltd,* the High Court did not expressly rely on the authority of *V&A Waterfront,* but adopted an approach that is consistent with it.[138] In this case, Coal of Africa held certain prospecting rights in respect of minerals beneath Akkerdal's land.[139] The prospecting rights entitled Coal of Africa to enter Akkerdal's land to prospect for the stated minerals as well as to bring employees and machinery onto the land for the purposes of prospecting for the minerals. Akkerdal refused Coal of Africa access to the land because it held that the prospecting rights had been invalidly issued and thus had no legal force or effect.[140] Coal of Africa sought an interdict ordering Akkerdal to grant it access to the relevant farm.[141]

In response, Akkerdal collaterally challenged the validity of the prospecting rights. It contended that the prospecting rights were invalid because Akkerdal had not been consulted prior to the rights being granted;[142] the environmental management plan was not approved;[143] the relevant farm was not zoned for prospecting or mining;[144] and that the prospecting rights had long lapsed.[145] The High Court ruled that Akkerdal was not entitled to a collateral challenge because there was no question of a public authority's seeking to coerce any subject.[146] In the court's view, Coal of Africa was not a public authority seeking to enforce any administrative act.[147]

The commonality in the *V&A Waterfront* line of cases is that there were no enforcement proceedings brought by public authorities against the subjects of the relevant administrative acts. Private parties sought to enforce their rights arising out of the impugned administrative acts against each other. The insistence by the V&A *Waterfront* line of cases that collateral challenge is available only to a subject of an unlawful administrative act that is being coerced

[137] Ibid.
[138] *Coal of Africa Limited v Akkerland Boedery (Pty) Ltd* [2014] ZAGPPHC 195 (5 March 2014) para 75 ('*Coal of Africa'*).
[139] Ibid paras 26 and 52.
[140] Ibid paras 11–16.
[141] Ibid para 11.
[142] Ibid para 12.
[143] Ibid para 13.
[144] Ibid para 14.
[145] Ibid para 16.
[146] Ibid para 76.
[147] Ibid.

by a public authority to comply with is a correct interpretation of *Oudekraal*.[148] However, the interpretation of *Oudekraal* to the effect that collateral challenge is available against an unlawful administrative act only if it is enforced by a public authority and not when it is relied on by a private party in a private-law dispute places further constraint on the scope of collateral challenge.[149]

The loyal application of *Oudekraal* in the *V&A Waterfront* line of cases affirms the latter's fusion of the classical and extended collateral challenge despite the fact that the distinction between the two forms of collateral challenge had long been part of South African law.[150]

Consistent with the interpretation of *Oudekraal* in the *V&A Waterfront* line of case, in cases decided immediately after *Oudekraal* where collateral challenge was upheld, coercion was present: the subjects of administrative acts were being coerced by public authorities to comply with unlawful acts. For instance, in *South African Heritage Resources Agency v Arniston Hotel Property (Pty) Ltd,* the High Court upheld collateral challenge against the enforcement of a provisional protection notice issued in terms of the National Heritage Resources Act 25 of 1999.[151] This notice was for two years. It prohibited any construction or renovation on properties in the affected area for that duration.[152]

The National Heritage Agency had issued a provisional protection notice identifying the Arniston area as an area to be investigated as possibly deserving protection in terms of the National Heritage Resources Act.[153] The Act obliged the agency to notify affected communities of the provisional protection but did not afford them an opportunity to be heard because the intended protection was provisional.[154] In line with the literal interpretation of the relevant statute, the agency only notified the affected parties but did not consult them prior to publishing the notice. The provisional protection would be for a period of two years, during which period any renovations or alterations to properties in the area covered by the notice were prohibited.[155] At the time the agency issued the notice, the respondent was in the middle of major renovations

[148] *V&A Waterfront* (note 20 above) para 14; *Offit* (note 121 above) 672H–673E; *Club Myokonos* (note 116 above) para 38; *Ukwanda Leisure* (note 133 above) para 62; *Coal of Africa* (note 138 above) para 76.
[149] *V&A Waterfront* (note 20 above) paras 11–15.
[150] See *Photocircuit* (note 9 above); Panasonic (note 9 above).
[151] *South African Heritage Resources Agency v Arniston Hotel Property (Pty) Ltd* 2007 (2) SA 461 (SCA) ('*Arniston*').
[152] Ibid paras 22.
[153] Ibid paras 6–7.
[154] Section 29(4) of the National Heritage Resources Act 25 of 1999.
[155] *Arniston* (note 151 above) paras 6–7.

to its hotel.[156] Invariably, these renovations contravened the notice. The respondent elected to disregard the provisional protection notice because in its view the notice was invalid.[157] This prompted the agency to interdict the respondent from continuing with renovations at its hotel contrary to the agency's notice. The High Court found that even though the notice was provisional, its effect was drastic.[158] The duration of the notice meant that respondent would have to stop all renovations to the hotel and leave it in an incomplete state for two years. Because of the coercive nature of this notice and its drastic impact on the respondent, the court found that those affected by the notice had a right to be heard before it was published.[159] The court allowed the respondent's collateral challenge.

Similar to *Arniston,* despite the absence of an express statutory provision granting the unlawful act legal effect, the High Court in *Nzimande v Nzimande* allowed collateral challenge because the relevant unlawful act coerced its subject to comply with its terms.[160] In this case, the court dealt with the legal effect of an unlawful certificate of occupation purportedly issued in terms of the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988. This statute was enacted to address restrictions on ownership of property imposed upon black people by apartheid-era property laws by means of the conversion of leaseholds and permissions to occupy into full ownership by qualifying beneficiaries.

Nzimande had inherited a certificate of occupation of the disputed property from his deceased brother through the laws of succession that applied to black people at the time. Regulation 2 of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks precluded widows from inheriting from the estate of their late husbands if they had been married in terms of customary law and had no children born of the marriage. The widow of Nzimande's brother suffered the wrath of these discriminatory laws. When Nzimande sought to convert his permission to occupy into full ownership, his brother's widow objected and challenged the validity of the certificate.

The duly delegated official upheld the objection on the basis that the widow was unfairly discriminated against when Nzimande inherited the certificate of occupation.[161] Nzimande appealed to an internal tribunal. The tribunal dismissed the appeal on the same basis.[162] The

[156] Ibid para 4.
[157] Ibid para 8.
[158] Ibid para 20.
[159] Ibid paras 22.
[160] *Nzimande v Nzimande* 2005 (1) SA 83 (W) (*'Nzimande')*.
[161] Ibid paras 40–41.
[162] Ibid para 41–42.

enabling Act allowed an aggrieved person a further appeal to the High Court, which Nzimande pursued.

The High Court had to rule on the consequences that followed from the conclusion that the certificate of occupation issued to Nzimande was in some way unlawful.[163] Relying on s 39(1)(a) of the Constitution to interpret the Conversion Act, the court concluded that in the context of an enabling provision that is aimed at transforming society in accordance with the objects of the Constitution, the legal effect of an unlawful administrative act that perpetuates past discrimination and inequality could be disregarded by a subsequent actor.[164] However, in *Nzimande's* context, the High Court found that the enabling Act allowed the Director-General a wide discretion to determine who the beneficiaries of the conversion should be.[165] The certificate of occupation was not the sole factor that the Director-General had to consider when deciding an application for the conversion.[166] Thus, the High Court allowed the widow, Mrs Nzimande, to challenge the validity of the certificate. If the court had declined to do so, Mrs Nzimande would have been forced to vacate the house.

In *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd,* a collateral challenge involving coercion of certain ratepayers by the City of Tshwane to pay regional services levies escalated to the SCA.[167] This enabled the appeal court to opine on legal questions similar to those that arose in *Arniston.* In this case, the Minister of Finance had issued a notice in the *Government Gazette* for the calculation of and payment of regional services levies. Paragraph 11(1) of this notice empowered a local council to estimate the amount of any levy prescribed by the Regional Services Councils Act 109 of 1985 where a registered levy-payer failed to furnish a return.[168] Cable City, a registered levy-payer, failed to furnish its returns. Pursuant to this failure, the City of Tshwane estimated the levies and issued Cable City with an assessment of levies payable. On the strength of this assessment, the City of Tshwane demanded payment of the assessed levies from Cable City. The latter refused to pay and contested the validity of the assessment. The City of Tshwane brought an action to recover the assessed levies from Cable City.[169] Relying on an earlier unreported decision of the High Court in *Algoa Regional*

[163] Ibid para 48.
[164] Ibid paras 60–62.
[165] Ibid paras 60–61.
[166] Ibid para 49.
[167] *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 (3) SA 589 (SCA) ('*City of Tshwane*').
[168] Ibid para 7.
[169] Ibid para 6.

Services v Buchner,[170] the High Court dismissed the City of Tshwane's claim.[171] In *Buchner,* the High Court had found para 11(1) of the Minister Finance's notice in respect of the calculation of levies ultra vires s 12 of the Regional Services Councils Act.[172]

On appeal, the SCA observed that although the validity of an administrative act is generally challenged by way of judicial review, it is not uncommon for it to be attacked collaterally in enforcement proceedings.[173] Although *City of Tshwane* is consistent with the principles set out in *V&A Waterfront* insofar as the requirement for coercion is concerned, it is distinguishable from *V& A Waterfront* in that it dealt with a classical collateral challenge.

In *City of Tshwane,* the appeal court affirmed that, 'depending on the construction of the relevant statutory instrument through the lens of the principles of the rule of law, a party has a right to raise a collateral challenge to the validity of an administrative act if he is threatened by a public authority with coercive action'.[174] A party has this right because the legal force of the coercive action depends on the legal validity of the administrative act in question.[175] Importantly, the SCA reasserted (as *Oudekraal* did) that it has no discretion to disallow a party from raising a collateral challenge once the right to do so has been established.[176] In *City of Tshwane,* the extraction of the levies from Cable City constituted the coercion necessary to sustain a classical collateral challenge.

In the criminal law context, *S v Smit* is the first reported case since *Oudekraal* where the High Court encountered classical collateral challenge.[177] It will be recalled that classical collateral challenge originates from criminal law and was later adopted by administrative law.[178] Coercion by a public authority is a precondition for the successful invocation of classical collateral challenge.[179] Smit faced 24 counts comprising two sets of statutory offences.[180] The first 12 counts related to Smit's refusal to pay tollgate fees on a toll road and the other 12 related to his failure or refusal to obey a red traffic light erected at the toll gate of the same toll

[170] *Algoa Regional Services v Buchner* (ECD) unreported case no 1150/94 (5 June 1995) ('*Buchner*').
[171] *City of Tshwane Metropolitan Municipality v Cable (Pty) Ltd* [2008] ZAGPHC 11 (18 January 2008) ('*City of Tshwane HC'*) para 22.
[172] Ibid paras 19–20.
[173] *City of Tshwane* (note 171 above) para 13.
[174] Ibid para 15.
[175] Ibid.
[176] Ibid.
[177] *S v Smit* 2008 (1) SA 135 (T) ('*Smit*').
[178] *Merafong* (note 22 above) para 30.
[179] *Smit* (note 177 above) 181B–C, with reference to *Oudekraal* (note 1 above) para 34 and Forsyth (note 15 above) 156.
[180] Ibid 140B–D

road. Smit collaterally challenged the lawfulness of the toll road and of the traffic lights erected on it.

The High Court acquitted Smit of the charge relating to his failure to pay the tollgate fees because the prosecution had failed to prove that the Nkomazi Toll Plaza, at which the alleged offence was committed, was a toll road as defined in the National Roads Act 7 of 1998.[181] In other words, there was no lawful basis to coerce Smit to pay the tollgate fees. However, the court convicted Smit on second set of counts.[182] In the court's view, the validity of the traffic lights depended on no more than the factual existence of the toll road and Smit's criminal liability rested not on the validity of the declaration of the toll road but on the lawfulness of the subsequent installation of the traffic lights on the toll road.[183] This conviction raises an anomaly in that it was rendered despite the fact that an instruction from a red traffic light is coercive in nature, and that the erection of the traffic light at the tollgate plaza stemmed from an unlawfully established toll road. Smit's criminal prosecution was effectively an enforcement of the instructions of an unlawful traffic light. This is contrary to *Oudekraal.*

According to *Oudekraal,* in an instance where a public authority seeks to coerce a subject to comply with an unlawful administrative act, the originating act must exist in law.[184] *Smit* does not represent a model treatment of 'coercion' as an element of classical collateral challenge. It is submitted that the High Court erred in convicting Smit on the second charge because the traffic lights had been erected on an unlawful toll road.

In *Nature's Choice Properties (Alrode) (Pty) Ltd v Ekurhuleni Municipality* and the SCA maintained a line of reasoning that is consistent with the *V&A Waterfront* line of cases.[185] In *Nature's Choice,* the SCA paid more attention to the unlawfulness of the act than to the fact that it coerced its subject to comply with its terms.

Nature's Choice operated a coal-fired boiler at its premises in contravention of reg 3 of the municipality's Smoke-Control Regulations promulgated under s 18 of the Atmospheric Pollution Prevention Act 45 of 1965. Instead of calling upon Nature's Choice to cease the operation of the coal-fired boiler and to remove it, the municipality chose to offer Nature's Choice an opportunity to remedy its non-compliance and submit its plans and specifications

[181] Ibid 174F–H.
[182] Ibid 182A–D.
[183] Ibid 182A–B.
[184] *Oudekraal* (note 1 above) para 32.
[185] *Nature's Choice Properties (Alrode) (Pty) Ltd v Ekurhuleni Municipality* 2010 (3) SA 581 (SCA) ('*Nature's Choice*').

for approval by the municipality. Nature's Choice obliged. The municipality rejected the application by Nature's Choice because it would only consider applications for gas-fired appliances since they caused minimal pollution.[186] Nature's Choice insisted on operating the boiler because its view was that the rejection of its application was unlawful. The municipality approached the High Court to interdict Nature's Choice from operating the boiler and to direct it to remove the boiler from its premises.

Nature's Choice collaterally challenged the vires of the Smoke Control Regulations, the regulations under which a decision to reject its application was made.[187] It also contended in the alternative that the municipality had been unreasonable and had acted with an ulterior motive when it refused to approve its plans and specifications. The High Court rejected the contentions made by Nature's Choice and granted the municipality the interdict. The court found that the regulations were intra vires and that the boiler had been installed on the property in contravention of reg 3.

On appeal, the SCA found that the Atmospheric Pollution Prevention Act did not prohibit the installation of fuel burners of any particular type.[188] It only prohibited burners that emit smoke and grit in contravention of s 15(1) of the Act. The SCA observed that the municipality had not rejected the plans and specifications because the boiler emitted smoke in contravention of s 15(1) of the Act.[189] It had done so because the application was for a coal-burner and not for a gas-burner. The court found that the municipality was wrong in this regard.[190] It concluded that the rejection of the plans and specifications submitted by Nature's Choice was unlawful. In the court's view, by seeking an interdict, the municipality now wished to revert to the situation before it made an election not to enforce the regulations and insist on the removal of the boiler.[191] The court held that the municipality could not do this.

The appeal court held that to the extent that the municipality sought to argue that Nature's Choice was not entitled to challenge the decision under the Oudekraal principle, it misunderstood the principle.[192] According to the court, '[t]here is nothing in [*Oudekraal*] which holds that a subject may not raise the defence that the underlying administrative decision is unlawful and, instead, has to comply with it while seeking to set it aside in collateral

[186] Ibid para 12.
[187] Ibid paras 4–5.
[188] Ibid para 8.
[189] Ibid para 12.
[190] Ibid.
[191] Ibid para 13.
[192] Ibid.

proceedings; the case in fact holds the contrary'.[193] Although the SCA made these remarks in a context where coercion was present, they signalled the willingness of the court to rely on the mere unlawfulness of the impugned act as a basis for collateral challenge.

In *Merafong,* the majority of the Constitutional Court settled the law on the availability of collateral challenge to a litigant.[194] Having surveyed the history of collateral challenge in South Africa, the majority of the court ruled that in South Africa the courts have not restricted collateral challenge to instances where a subject is coerced by a public authority.[195] According to *Merafong*, to insist that only an individual whom a public authority threatens with coercive action can raise a collateral challenge, and no one outside that category, 'squeezes collateral challenge into a rigid format – one that neither doctrine nor practical reason appears to warrant'.[196]

In *Merafong,* AngloGold operated a mine within the municipal jurisdiction of Merafong. For a long time, Rand Water supplied it with water for domestic and industrial use. Merafong, a newly ordained Water Services Authority in terms of the Water Services Act 108 of 1997, had no technical capacity to supply water in accordance with its statutory mandate but it took over the supply of water to AngloGold from Rand Water.[197] In order to address this shortcoming, Merafong contracted Rand Water to supply water on its behalf and levy a surcharge over and above its normal charge.[198] In this arrangement, Rand Water would pass on the surcharge to Merafong.[199] Merafong added no value in the supply of water to AngloGold. AngloGold queried this and appealed to the Minister of Water Affairs in terms of s 8(4) of the Act. The Minister upheld AngloGold's appeal and directed the parties to negotiate an appropriate tariff for water for domestic use.[200] The negotiations failed.[201]

Merafong threatened to discontinue the supply of water to AngloGold if the latter failed to pay the disputed surcharge.[202] In order to avoid disruptions at its mine, AngloGold paid the surcharge under protest and approached the High Court to enforce the Minister's decision.[203]

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[193] Ibid with reference to *Oudekraal* (note 1 above) para 34.
[194] *Merafong* (note 22 above) paras 25, 30 and 55.
[195] Ibid.
[196] Ibid para 25.
[197] Ibid para 7.
[198] Ibid.
[199] Ibid.
[200] Ibid paras 9–11.
[201] Ibid para 11.
[202] Ibid para 10.
[203] Ibid.

Merafong responded with a counter-application seeking an order declaring that s 8 of the Water Services did not confer authority on the Minister to interfere with a tariff set and implemented by it.[204] The High Court granted AngoGold the relief it claimed and dismissed Merafong's counter-application.[205] Merafong appealed. The SCA dismissed the appeal.[206] It reasoned that Merafong, as a public authority, was not entitled to raise a collateral challenge. Merafong approached the Constitutional Court.

The majority of the Constitutional Court observed that although collateral challenge was initially meant to protect private citizens from state power, it had now evolved and could 'be usefully employed in a much wider range of circumstances'.[207] The court found no reason to limit collateral challenge to private persons[208] or to where a person is being coerced by a public authority.[209] According to the court, a collateral challenge should be available where justice requires it.[210] Its permissibility depends 'on variety of factors, invoked with a "pragmatic blend of logic and experience"'.[211] The minority of the court concurred with the majority on the availability of collateral challenge against coercion by a public authority.[212] Although the minority did not expressly opine on collateral challenge where coercion is absent, its views were predicated on the rigid application of the principle of legality which supports allowing collateral challenge against all unlawful acts.[213]

The Constitutional Court affirmed the existence of two types of collateral challenge in South African law and the fact that South African courts have always preferred a flexible approach to collateral challenge.[214] By doing so, the Constitutional Court clarified the confusion caused by *Oudekraal,* where the SCA restricted the collateral challenge to instances where a subject is coerced by a public authority to comply with an unlawful act.[215] It also redirected the judicial precedent set by the *V&A Waterfront* line of cases which followed *Oudekraal's* narrow interpretation of collateral challenge.[216] Implicitly, the court's reinstatement of the pre-

[204] Ibid.
[205] *AngloGold Ashanti Ltd v Merafong City Local Municipality* (23558/2011) [2014] ZAGPPHC 85 (26 February 2014) ('*Merafong HC*').
[206] *Merafong City v AngloGold Ashanti* 2016 (2) SA 176 (SCA) ('*Merafong SCA*').
[207] *Merafong* (note 22 above) para 55.
[208] Ibid.
[209] Ibid para 25.
[210] Ibid para 55.
[211] Ibid para 56.
[212] Ibid para 92.
[213] Ibid para 95.
[214] Ibid 28–30, 69 and 72 with reference to *Panasonic* (note 9 above) and *Photocircuit* (note 9 above).
[215] *Oudekraal* (note 1 above) para 39.
[216] *V&A Waterfront* (note 20 above); *Club Myokonos* (note 116 above); *Ukwanda Leisure* (note 133 above).

Oudekraal law on collateral challenge also affirmed the correctness of the approach to collateral challenge preferred by the High Court in *Oudekraal*.[217]

In *Department of Transport v Tasima (Pty) Ltd,* the Constitutional Court endorsed *Merafong*.[218] In this case, the Department of Transaport raised a collateral challenge against the enforcement of an unlawfully extended contract. The Director-General of the Department of Transport had extended the contract between it and Tasima in terms of which Tasima provided the department with a comprehensive IT solution known as electronic National Traffic Information System (eNaTIS). The eNaTIS system enabled the department to regulate and administer the licensing of drivers and vehicles in terms of the road traffic legislation. Initially, this contract was for a period of five years ending on 31 May 2007. The parties agreed to extend it on a month-to-month basis to allow the department to take over the system. The month-to-month arrangement went on for three years. In the interim, the term of the incumbent Director-General ended. Upon his arrival, the new Director-General extended the contract for a further five-year period without following the public procurement procedures and processes mandated by s 217 of the Constitution and s 38 of the PFMA.[219]

The Auditor-General declared the extension of the eNaTIS contract irregular.[220] As a result, the Department initiated processes to cancel the contract and take over the operation of eNaTIS. The negotiations between the Department and Tasima to terminate the contract failed. The Department withheld certain payments that were due to Tasima in accordance with the extended contract. Tasima obtained a High Court order against the department for its refusal to pay for services rendered.[221] This was followed by a series of court orders declaring the department in contempt of court whenever it refused to pay Tasima.

Upon the expiry of the term of the extended contract, the department immediately took steps to prepare for the transfer of eNaTIS to one of its agencies, the Road Traffic Management Corporation. This infuriated Tasima which insisted that the transfer of eNaTIS had to be done according to the unlawfully extended contract. Tasima brought urgent proceedings in the High Court seeking an order declaring that the preparatory steps by the Department and the corporation were in contempt of the High Court order it had earlier obtained against non-payment. Tasima also sought to interdict the Department from going ahead with preparations

[217] *Oudekraal HC* (note 11 above) 593A–D.
[218] *Tasima* (note 24 above) para 23.
[219] Ibid paras 6–7.
[220] Ibid para 28.
[221] *Tasima (Pty) Ltd v The Department of Transport* (GNP) unreported case no 44095/2012 (17 October 2012)

for the transfer of eNaTIS.[222] The Department and the corporation retorted with a collateral challenge contending that the extension of the contract was unlawful.[223] They also asked the court in a counter-application to review and set aside the decision to extend the eNaTIS contract. The High Court allowed the collateral challenge and found that the extension of the contract was unlawful.[224] It dismissed Tasima's application.

Tasima successfully appealed to the SCA.[225] In the view of the SCA, according to the first Oudekraal principle, the extension of the contract had to be treated as if it was valid until it was set aside, even if it was actually invalid. The SCA also dismissed the Department's counter-application because, in its view, collateral challenge was not available to a public authority. [226] Aggrieved by this decision, the Department and the corporation approached the Constitutional Court for relief.

The majority of the Constitutional Court endorsed the existence of two types of collateral challenge.[227] Khampepe J, on behalf of the majority, reiterated that not all collateral challenges need to be made defensively under the threat of coercion.[228] She also reinforced the view that South African courts have approached collateral challenge with a measure of flexibility.[229]

There was no coercion in *Tasima.* Collateral challenge was premised on the fact that the extension of the eNaTISs contract violated the public procurement provisions of the Constitution and the PFMA.[230] The court found that the violation of the Constitution and the PFMA was blatant.[231] In light of this, the majority upheld the department's collateral challenge. From this, it may be gleaned that while coercion is an important element of classical collateral challenge, its absence does not preclude the availability of a collateral challenge based solely on the unlawfulness of the administrative act in question. *Merafong* and *Tasima* thus restored the distinction between classical and extended collateral challenge.

[222] *Tasima* (note 24 above) para 45.
[223] Ibid paras 48–50.
[224] *Tasima (Pty) Ltd v Department of Transport* (44095/2012) [2015] ZAGPPHC 421 (*'Tasima HC'*) (23 June 2015) para 99.
[225] *Tasima (Pty) Ltd v Department of Transport* [2016] All SA 1 465 (SCA) ('*Tasima SCA*') para 23.
[226] Ibid para 25–7.
[227] *Tasima* (note 24 above) para 135 n 63.
[228] Ibid.
[229] Ibid 138.
[230] Ibid para 164.
[231] Ibid.

4.4 WHETHER A PUBLIC AUTHORITY IS COMPETENT TO RAISE COLLATERAL CHALLENGE

Oudekraal held that it is part of the rule of law that, without more, a public authority cannot rely on the invalidity of an originating administrative act to justify its refusal to perform a public duty.[232] Pretorius[233] and Forsyth[234] cautioned that this dictum from *Oudekraal* could be read to mean that a public authority is forbidden from raising a collateral challenge under any circumstances.

Pretorius contends that this dictum should not be construed to lay down a rigid rule that forbids public authorities from raising a collateral challenge.[235] In his view, doing so would contradict established legal authority. For instance, South African administrative law has long recognized the right of an author of an administrative act to disregard his own act if it constitutes incomplete proceedings[236] or amounts to a flawed decision on public procurement.[237]

According to Forsyth, the availability of collateral challenge is the surest indicator that there are instances where a public authority is permitted or even bound to disregard the originating act.[238] Although instructive, Forsyth's criticism of *Oudekraal* in this regard needs to be treated with caution because the authorities supporting it are cases where a collateral challenge was raised by individuals and not public bodies.[239]

In Forsyth's view, in *Oudekraal* there is a chasm between the test that the court laid down for the determination of the legal effect of the second act and its conclusion that a public authority may not refuse to perform a public duty solely on the basis that an earlier act is unlawful.[240] According to Forsyth, this indicates that the SCA reached its decision without a close analysis of the statutory powers of the Cape Metropolitan Council.[241] He submits that the correct

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[232] *Oudekraal* (note 1 above) para 37.
[233] Daniel Malan Pretorius 'The status and force of defective administrative decisions pending judicial pronouncement' (2009) 126 *SALJ* 537.
[234] Forsyth 'The theory of the second actor revisited' 2006 *Acta Juridica* 209.
[235] Pretorius (note 233 above) 547.
[236] Pretorius (note 233 above) 548 with reference to *President of the Republic of South Africa v South African Football Rugby Union* 2001 (1) SA 1 (CC) ('*SARFU case'*).
[237] *Premier, Free State v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) para 36 ('*Firechem*'); see also *Municipal Manager: Qaukeni Local Municipality v FV General Trading CC* 2010 (1) SA 356 (SCA) para 26 ('*Qaukeni'*).
[238] Forsyth (note 234 above) 224.
[239] Ibid with reference to *Director of Public Prosecutions v Head* [1959] AC 83; *Boddington* (note 14 above).
[240] Forsyth (note 234 above) 224.
[241] Ibid.

approach is to analyse the express powers of the second actor against the background of the purposes and policies of the relevant statutes.[242]

The caution by Pretorius and Forsyth has proved prescient because in the cases that followed *Oudekraal* the courts have dismissed collateral challenges by public authorities, albeit for different reasons. This confirmed their apprehension that the *Oudekraal* dictum could be misread by future courts. For instance, in *Welkom High School v Head of Department, Department of Education, Free State Province,* the High Court declined a collateral challenge raised by the HoD of education against certain learner pregnancy policies adopted by each of the SGBs of Welkom and Harmony High Schools.[243] These pregnancy policies provided for the exclusion of pregnant learners from school for a stated duration. The HoD instructed the school principals to readmit the affected learners and insisted on compliance with his directive. The SGBs disagreed with the head of department and approached the High Court to interdict him. The High Court held that the HoD did not have statutory power to instruct the principals as he had.[244] The High Court interdicted the head of department. He appealed to the SCA.

On appeal, the HoD contended that when the lawfulness of his instructions was challenged in court he was entitled to challenge collaterally the validity of the adoption of the learner pregnancy policies by the SGBs.[245] The SCA disagreed with this proposition. It applied the legal principles applicable to classical collateral challenge.[246] In particular, the SCA held that collateral challenge was not available to the HoD because the pregnancy policies did not coerce him to comply with an unlawful act.[247] According to the appeal court, it was the learners who could have successfully invoked a collateral challenge against the implementation or enforcement of the pregnancy policies.[248]

On further appeal, a majority of the Constitutional Court rebuked the HoD for disregarding the learner pregnancy policies adopted by the SGBs but did not directly address his competence to raise a collateral defence.[249] The majority found that the HoD had ample statutory recourse to

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[242] Ibid 222–3.
[243] *Welkom High School v Head, Department of Education, Free State Province* 2011 (4) SA 531 (FB) (‘*Welkom High School HC’*).
[244] Ibid para 33.
[245] *Head, Department of Education, Free State Province v Welkom High School* 2012 (6) SA 525 (SCA) (‘*Welkom High School SCA*’) para 12.
[246] Ibid para 14.
[247] Ibid.
[248] Ibid.
[249] *Head of Department, Department of Education, Free State Province v Welkom High School* 2014 (2) SA 228 (CC) (‘*Welkom High School’*) para 72.

address his concerns or to approach the court for relief.[250] On this basis, the majority ruled that by disregarding the decisions of the SGBs, the head of department had resorted to self-help, an act that is contrary to the rule of law.[251] The Constitutional Court emphasized that where clear internal remedies are available, an organ of state is obliged to use them, and may not simply resort to self-help.[252]

On the other hand, the minority judgment opined that the HoD had the right to instruct the principals to protect himself as an employer from the commission of acts which could render him vicariously liable.[253] Insofar as collateral challenge is concerned, the minority judgment disagreed with the view expressed by the SCA.[254] It held that the effectiveness of the policies depended on the principals enforcing them.[255] The principals would do so in their capacities as employees and representatives of the HoD at the school. In light of this, the minority judgment concluded that the HoD was entitled to invoke a collateral challenge because he was objecting to his employee or representative being required to do something unlawful or something he considered to be unlawful.[256]

In *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* the Constitutional Court had a second occasion to opine on whether *Oudekraal* prevented a public authority from invoking a collateral challenge.[257] In this case, the Eastern Cape HoD of Health raised a collateral challenge against the enforcement of an approval that an acting head of the same department had granted to Kirland to establish private hospitals.[258] The Acting HoD had granted the approval during the temporary absence of the HoD. The Acting HoD did so following the unwarranted dictates of the then MEC responsible for health in that province.

According to the National Health Act 63 of 1977 and the regulations made under it, it is the HoD that has the power to grant a permission to establish a private hospital.[259] The enabling Act empowered him to do so after consultation with the director responsible for hospital

[250] Ibid.
[251] Ibid paras 1 and 86
[252] Ibid.
[253] Ibid para 193.
[254] Ibid paras 255–8.
[255] Ibid para 258.
[256] Ibid.
[257] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* 2014 (3) SA 481 (CC) ('*Kirland*').
[258] Ibid paras 7–12.
[259] Regulation 7 of the Regulations Governing Private Hospitals and Unattached Operating-Theatre Units, GN R158, GG 6832, published on 1 February 1980.

services. Once the permission is granted, the regulations require the successful applicant to submit plans for approval by the head of department.

At all times, the MEC and the acting HoD knew that a committee tasked with applications for private hospitals had recommended to the HoD to decline Kirland's application. The HoD had accepted this recommendation but was injured and thus absent from work before he could advise Kirland of his decision. Upon receipt of the approval to establish the private hospitals, Kirland requested an approval to extend the number of beds. By this time, the HoD had returned from leave. He declined Kirland's application for additional beds and, crucially, withdrew the approval granted to Kirland to establish its hospitals. [260]

Kirland approached the High Court for an order setting aside the withdrawal of the approval and enforcing the approval as it had obtained it.[261] In response, the new MEC and the HoD collaterally challenged the validity of the approval.[262] They contended that the approval was invalid because it was tainted by the unwarranted dictates of the then MEC.

The High Court set aside both the approval by the acting HoD[263] and its purported withdrawal by the HoD.[264] It reasoned that the approval was unlawful because it had been unduly influenced by the MEC and that its withdrawal by the head of department was not procedurally fair.[265] Dissatisfied by this outcome, both parties appealed to the SCA.

The SCA overturned the decision of the High Court setting aside the permission.[266] It held that although the permission was invalid, its validity was not at issue before the High Court. On the other hand, it upheld the decision of the High Court setting aside the withdrawal of the approval.[267] In its view, the HoD could not validly have withdrawn the approval because he was *functus officio*.[268] Aggrieved by this outcome of their appeal, the MEC and the HoD approached the Constitutional Court for relief. The Constitutional Court delivered a split judgment.

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[260] Ibid para 16.
[261] *Kirland Investment (Pty) Ltd t/a Eye & Lazer Institute v MEC for Health, Province of Eastern Cape NO* (870/09) [2011] ZAECGHC 78 (*Kirland HC*).
[262] Ibid para 12.
[263] Ibid para 27.
[264] Ibid para 26.
[265] Ibid.
[266] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* 2014 (3) SA 219 (SCA) ('*Kiland* SCA) paras 22–3.
[267] Ibid para 24.
[268] Ibid.

The majority judgment asked whether it was competent for a court to set aside 'a decision by a state official, communicated to the subject, and in reliance on which it acts, . . . even when government has not applied (or counter-applied) to the court to do so'.[269] According to the majority, even in the case of an unlawful administrative act, a public authority is still required to bring an application to have it reviewed and set aside and comply with all the formalities for a review application.[270] The majority explained that a public authority must bring a review application so that the court can properly consider the impact of its decision on those affected by the relevant administrative act.[271]

In *Kirland,* although the MEC and the HoD were aware of the unlawfulness of the permission granted by the acting head of department, they took no action to set it aside.[272] They simply treated it as a nullity.[273] The majority cautioned that this approach would promote chaos where officials would be entitled to disregard decisions of other public functionaries.[274] In the view of the majority, this amounted to self-help.[275] Furthermore, the majority found that to countenance this type of conduct would create uncertainty on the validity of administrative acts and thereby undermine the efficacy of public administration. [276] It also had the potential undermine the court's ability to oversee public administration.[277]

The majority judgment emphasized that 'once a subject has relied on a decision, government cannot, barring specific statutory authority, simply ignore what it has done'.[278] It must approach the court for appropriate relief. The majority observed that sound reasons may exist for the court not to set aside the unlawful act despite its glaring defects.[279]

The majority concluded that despite its flaws and vulnerability to a challenge, the approval was legally effective until it was set aside.[280] However, this does not mean that an unlawful act is immune from judicial scrutiny. The import of *Kirland* is that a public authority aggrieved by

[269] *Kirland* (note 257 above) paras 64.
[270] Ibid.
[271] Ibid.
[272] Ibid para 66.
[273] Ibid.
[274] Ibid paras 88–89 and 101–3.
[275] Ibid para 89.
[276] Ibid.
[277] Ibid para 103.
[278] Ibid para 65.
[279] Ibid.
[280] Ibid para 105.

an unlawful administrative act ought to follow due process and approach the court for appropriate relief instead of merely disregarding it.

Taken together, the insistence that an aggrieved public authority ought to bring an application to review and set aside an unlawful act,[281] the remarks by the majority on public officials who disregard acts that they view as unlawful,[282] the need to avoid uncertainty in public administration,[283] and the conclusion reached by the court[284] reinforced the view that an extended collateral challenge was not available to a public authority. On the other hand, nothing in *Kirland* suggests that the majority judgment excluded a classical collateral challenge by a public authority if it is being coerced to comply with an unlawful administrative act by another public authority. *Kirland* should not be read to exclude a collateral challenge by a public authority even where it is not being coerced by another public authority, if it does so through a counter-application. The emphasis in the majority judgment is that where a public authority seeks to avoid the consequences of its *own* unlawful administrative act, a court's intervention is necessary.[285]

The minority judgment saw the matter differently.[286] According to it, the question was what a court should do when it is confronted by evidence that an administrative act is unlawful but no formal application to have it reviewed has not been brought.[287] In the view of minority judgment, a decision flowing from an unlawful exercise of power should not be allowed to stand purely on the basis that no application was brought to set it aside.[288] This would allow corruption to escape judicial scrutiny.[289] The minority cautioned that apart from posing a serious threat to South Africa's democratic order, corruption and maladministration are also inconsistent with the Constitution.[290] In essence, the minority would have allowed an extended collateral challenge by a public authority against an unlawful administrative act if it is established on the papers before court.

[281] Ibid para 65.
[282] Ibid 103.
[283] Ibid para 89.
[284] Ibid 105.
[285] Ibid para 105.
[286] Ibid para 28.
[287] Ibid.
[288] Ibid 43.
[289] Ibid para 46–7.
[290] Ibid para 47.

Consistent with *Kirland*,[291] in *Economic Freedom Fighters v Speaker, National Assembly,* the Constitutional Court ruled that the President was not entitled to disregard the Public Protector's binding remedial action solely on the basis that he viewed it as unlawful.[292] However, *EFF* is distinguishable from *Kirland* because in the former the court found the relevant Public Protector's remedial action binding and thus excluded collateral challenge.[293] Despite the foregoing, the court's endorsement of the *Kirland*[294] dictum cautioning officials against self-help leans in favour of an interpretation of *Oudekraal* that bars a public authority from raising a collateral challenge.

In this case, the government caused certain improvements to be made at the private residence of the President of South Africa to enhance the security of the property. The public complained to the Public Protector that the upgrades went beyond the enhancement of the security of the property. The Public Protector investigated the upgrades and concluded that certain of these improvements were not security upgrades. She therefore held that the President was liable to pay for these improvements. Pursuant to advice from the Minister of Police and various other executive organs that the Public Protector was wrong and that he was not liable for any payment, the President disregarded the binding remedial action of the Public Protector. The Constitutional Court unanimously ruled that it was unconstitutional for anyone, including the President, to disregard such remedial action.[295] It held that compliance with this remedial action is not optional.[296] Any reservations about its fairness, appropriateness or lawfulness are irrelevant to its legal effect.[297]

The Constitutional Court held that our Constitution hinges on the rule of the law.[298] The latter requires that 'no power be exercised unless it is sanctioned by law and no decision or step sanctioned by law may be ignored based purely on a contrary view'.[299] In order to escape the legal effect of such a decision, a person affected must approach the court for relief.

Although the effect of *Kirland* and *EFF* is that they discourage collateral challenge by a public authority, particularly extended collateral challenge, these cases did not expressly or

[291] Ibid para 103.
[292] *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 (3) SA 580 (CC) *('EFF').*
[293] Ibid para 76.
[294] Ibid para 74 with reference to *Kirland* (note 257 above) para 103.
[295] *EFF* (note 292 above) paras 73–5.
[296] Ibid para 75
[297] Ibid para 73.
[298] Ibid para 74.
[299] Ibid para 75.

authoritatively rule whether it is competent for a public authority to invoke a collateral challenge. The prohibition is rather implied.[300] In *Merafong HC,* the High Court was more express.[301] It held that *Oudekraal* precluded a public authority from raising a collateral challenge.[302] Relying on *Kirland,*[303] the appeal court in *Merafong SCA* upheld the ruling of the court below that a public authority could not legally invoke a collateral challenge.[304] This interpretation of *Oudekraal* and *Kirland* became settled jurisprudence of the SCA.[305]

In *Merafong,* the majority of the Constitutional Court observed that the dismissal of Merafong's collateral defence by the High Court and the SCA was based on the category-approach.[306] According to this approach only an individual against whom a public authority institutes coercive action can invoke a collateral challenge, not someone who is outside the category, and never a public authority. The majority rejected this approach as not being justified by logic or doctrine.[307] It also found no reason to limit collateral challenge to private citizens[308] because it was possible for one public authority to coerce another.[309] In the latter instance, the public authority sought to be coerced should be able to invoke collateral challenge.[310]

The majority rejected the principle that disqualified a respondent from raising a collateral challenge because it is a public authority or has not been coerced.[311] In the view of the majority, collateral challenge is available to a person if justice so demands. The latter depends on the facts of each case.[312]

The majority judgment responded to Forsyth[313] and cleared up the confusion arising out of the *Oudekraal* dictum that a public authority cannot justify a refusal on its part to perform a public duty by relying, without more, on the invalidity of the originating administrative act.[314] It held

[300] *Kirland* (note 257 above) para 103; *EFF* (note 292 above) paras 74–5.
[301] *Merafong HC* (note 205 above) para 72.
[302] Ibid.
[303] *Kirland* (note 257 above) paras 98–99.
[304] *Merafong SCA* (note 206 above) para 17.
[305] See also *Kwa Sani* (note 20 above) paras 14–17 where the SCA interpreted *Oudekraal* and *Kirland* to exclude any collateral challenge by a public authority.
[306] *Merafong* (note 22 above) para 25.
[307] Ibid.
[308] Ibid para 55 and 101.
[309] Ibid para 55.
[310] Ibid.
[311] Ibid.
[312] Ibid.
[313] Forsyth (note 228 above) 224.
[314] *Merafong* (note 22 above) para 44 n 68.

that this dictum, read in its context, did not imply a rigid rule that all public authorities must accept as valid the decisions of other authorities or challenge their validity in court.[315] In the court's view, a sentence preceding this dictum in the judgment clarifies this. This sentence reads: 'While the legislature might often, in the interest of certainty, provide for consequences to follow merely from the fact of an administrative act, the rule of law dictates that coercive power of the state cannot generally be used against the subject unless the initiating act is legally valid'.[316]

McKenzie challenges the soundness of the explanation proffered by the Constitutional Court.[317] In his view,[318] *Oudekraal* does not support the interpretation accorded to the dictum by the majority in *Merafong.*[319] In particular, McKenzie contends that according to *Oudekraal,* the 'subject' of an administrative act that can raise a collateral challenge is limited to a person.[320] A closer examination of *Oudekraal* supports the contention made by McKenzie. There is a logical connection between the use of the word 'subject'[321] and its being a person.[322] The judgment refers to the conduct of the subject as 'his conduct' which suggests that the court envisaged the subject to be a person. Furthermore, the court also relies on *Boddington,* a judgment that dealt with a subject that was a person, for asserting the rights of the coerced subject to raise a collateral challenge.[323] Later in the judgment, the court explicitly held that collateral challenge is available to a 'person'.[324] From this, it can be deduced that reference to a 'subject' in the judgments means a person and not a public authority.

McKenzie's submission appears to have merit if regard is had to the fact that the majority judgment did not rely on any apposite legal authority for its finding that in certain circumstances a public authority may invoke a collateral challenge against an unlawful administrative act.[325] The fact that in *Oudekraal* collateral challenge was raised by a public authority and it was declined lends credence to McKenzie's contention. However, it is important to note that in *Oudekraal* the City of Cape Town was denied collateral challenge not

[315] Ibid.
[316] *Oudekraal* (note 1 above) para 37.
[317] Angus McKenzie 'Merafong City Local Municipality v Anglogold Ashanti Limited: the development of collateral review and the status of unlawful acts in South African law (2017 unpublished LLM dissertation) at 22–3.
[318] Ibid.
[319] *Merafong* (note 22 above) para 44.
[320] McKenzie (note 317 above) 22–3.
[321] *Oudekraal* (note 1 above) para 32.
[322] Ibid para 35.
[323] Ibid para 32 with reference to *Boddington* (note 14 above).
[324] *Oudekraal* (note 1 above) para 35.
[325] *Merafong* (note 22 above) paras 26–38.

because it was a public authority, but because it was not being coerced by a public authority to do or not to do something.[326] That is the crux of the judgment in *Oudekraal.*

Despite its emphatic ruling that a collateral challenge is available to a public authority, the majority in *Merafong* remitted the matter to the High Court to be considered afresh.[327] It held that it was necessary to do so because in that case issues still needed to be properly canvassed, such as (1) whether a collateral challenge entitles a public authority to disregard its own acts or those of another public authority; (2) the role and impact of delay on the part of Merafong; (3) Merafong's counter-application; and (4) the appropriate remedy.

On the other hand, the minority judgment proceeded from the premise that it is wrong to hold that an unlawful administrative act could have any legal effect at all because that would be in conflict with the rule of law.[328] At the root of the minority judgment is its view that if an administrative act is unlawful, it cannot be enforced because doing so would be inconsistent with the rule of law and s 33 of the Constitution.[329] In line with this view, the minority judgment does not distinguish between a private person and a public authority. Collateral challenge is available against the enforcement of all unlawful acts.[330]

Despite their differences on the legal effect of an unlawful administrative act, the minority and the majority judgment concur on the legal competence of a public authority to raise a collateral challenge. It is important to note that although the common-law cases on collateral challenge did not preclude a public authority from invoking it, their factual context involved private persons raising it.[331] Thus, the *Oudekraal* dictum did not expressly conflict with the body of established authority on collateral challenge even though it seems incapable of any other meaning other than that, absent express statutory authority, a public authority is disqualified from raising a collateral challenge.[332] In *Kwa Sani,*[333] the SCA itself adopted this interpretation of *Oudekraal*. It follows that in *Merafong,* the Constitutional Court did not merely reaffirm and adopt the common-law concept of collateral challenge but preferred an expansive view of it compared to the SCA.[334]

[326] *Oudekraal* (note 1 above) para 39.
[327] *Merafong* (note 22 above) paras 68–91.
[328] Ibid para 95.
[329] Ibid.
[330] Ibid para 101.
[331] *Panasonic* (note 9 above); *Photocircuit* (note 9 above).
[332] *Oudekraal* (note 1 above) paras 32, 35 and 37.
[333] *Kwa Sani* (note 20 above) paras 14–17
[334] *Merafong* (note 22 above) paras 25 and 55.

In *Tasima* the Constitutional Court confirmed the correctness of the *Merafong* proposition that a public authority is legally competent to raise collateral challenge.[335] In particular, the majority affirmed that it is possible for a public authority to be coerced by another to comply with an unlawful administrative act.[336] It also reiterated the ruling in *Merafong* that a collateral challenge is not restricted to instances where a subject is coerced.[337] In *Tasima,* the Constitutional Court upheld an extended collateral challenge against the enforcement of an unlawfully extended eNaTIS contract by the Department of Transport and the Road Traffic Management Corporation.

The majority judgment observed that a public authority's competence to challenge exercise of public power, including its own, was recognised by the SCA in *Pepcor Retirement Fund v Financial Services Board* and endorsed by the Constitutional Court in *Khumalo v Member of the Executive Council of Education*.[338] In *Khumalo,* the Constitutional Court held that 'a court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power'.[339] The majority concluded from the foregoing cases that it was 'a logical and pragmatic consequence of the developments in our jurisprudence to allow state organs to challenge the lawfulness of the exercise of public power by way of collateral challenge in appropriate circumstances'.[340] It is now settled law that public authorities may invoke collateral challenge, whether classical or extended.

4.5 THE IMPACT OF DELAY ON COLLATERAL CHALLENGE

In *Oudekraal HC,* the High Court considered the impact of delay in raising a collateral challenge.[341] Davis J ruled that to the extent that the delay rule was applicable, the nature and extent of the invalidity of the administrator's permission persuaded him to exercise his discretion in terms of the delay rule to allow collateral challenge to be raised.[342] The court proceeded from the premise that the lapse of time cannot transmogrify an unlawful act into a lawful one.[343] On this basis, it upheld collateral challenge by the Cape Metropolitan Council

[335] *Tasima* (note 24 above) paras 86 (minority judgment) and 140 (majority judgment).
[336] Ibid para 143.
[337] Ibid 135 n 63.
[338] Ibid para 139 with reference to *Pepcor Retirement Fund and Another v Financial Services Board and Another* 2003 (6) SA 38 (SCA) paras 10–15 ('*Pepcor'*) and *Khumalo v Member of the Executive Council for Education: Kwa Zulu Natal* 2014 (5) SA 579 para 32 ('*Khumalo'*).
[339] *Khumalo* (note 338 above) para 45.
[340] *Tasima* (note 24 above) para 140.
[341] *Oudekraal HC* (note 12 above) 590F–594H.
[342] Ibid 593E and 594F.
[343] Ibid 593D.

almost 34 years after the impugned approval was granted and over 31 years after Oudekraal purchased the property.

On appeal, the SCA focused narrowly on classical collateral challenge.[344] Its view of the impact of delay was restricted to delay in raising a classical collateral challenge. Hence, the appeal court held that a court has no discretion but to entertain a collateral challenge regardless of when it is raised.[345] The court did not opine on the impact of delay in raising a collateral challenge where coercion is not a factor.

Merafong was the first time since *Oudekraal* that the Constitutional Court confronted the question of delay in the context of an extended collateral challenge, ie where coercion is not a factor. The majority considered this question in its exposition of distinctive qualities of a collateral challenge at the hands of a public authority.[346] It observed that unlike a private person in a classical collateral challenge, a public authority may be barred by the lapse of time from invoking an extended collateral challenge.[347] It advanced two reasons. First, a public authority may be aware of the administrative act from inception.[348] For instance, Merafong was well aware of the Minister's decision since it was specifically addressed to it. It disagreed with the decision but decided merely to disregard it. Secondly, a public authority has a duty to approach a court in the event that it encounters an unlawful administrative act that impacts on its ability to discharge its functions.[349] It must do so without delay. It follows from the majority judgment that delay is a relevant factor.

The minority judgment disagreed with the majority on the relevance of delay. In the view of the minority, collateral challenge available to a public authority cannot be time-barred because the unlawfulness of the administrative act may not be cured by the lapse of time.[350] This approach is consistent with that of the High Court in *Oudekraal*.[351]

In *Tasima,* the Constitutional Court followed *Merafong* on the impact of delay in raising collateral challenge.[352] In particular, the majority confirmed that classical collateral challenge is not time-bound and that in extended collateral challenge delay is a relevant but not a decisive

[344] *Oudekraal* (note 1 above) para 39.
[345] Ibid para 36.
[346] *Merafong* (note 22 above) paras 69–77.
[347] Ibid para 72.
[348] Ibid.
[349] Ibid paras 60–64 and 74.
[350] Ibid para 150.
[351] *Oudekraal HC* (note 12 above) 593D.
[352] *Tasima* (note 24 above) para 143.

factor.[353] It took the department five years to challenge the validity of the extension of the eNaTIs contract. In this case, although the High Court ruled that the counter-application was out of time, it exercised its discretion to overlook the delay.[354] On appeal, the SCA dismissed the collateral challenge on the basis that the Department, as an organ of state, was not entitled to it.[355] Dissatisfied with this outcome, the Department approached the Constitutional Court.

The Constitutional Court was divided on the impact of delay in raising a collateral challenge. The minority held that a decision that is invalid 'can never have legal force or effect'.[356] This made it perpetually vulnerable to a collateral challenge. In the minority's view, when confronted with an unlawful administrative act, a court has a constitutional duty to declare it invalid no matter how long it took for that act to be brought before it.[357] Delay is incapable of transforming an invalid act into a valid one.[358] According to the minority, this is fundamental to the principle of constitutional supremacy.

On the other hand, the majority held that delay in raising an extended collateral challenge may be condoned.[359] The majority applied the test for the delay that was adopted by Constitutional Court in *Khumalo*.[360] *Khumalo* endorsed the SCA's approach in *Gqwetha v Transkei Development Corporation Ltd.*[361] According to this approach, an assessment of undue delay involves a court examining (1) whether, on the facts, the delay is unreasonable or undue; and, if so (2) whether it should exercise its discretion to overlook the delay. In *Khumalo,* the Constitutional Court remarked that 'a court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power'.[362] However, that this 'does not mean that the Constitution has dispensed with the basic procedural requirement that review proceedings are to be brought without undue delay or with a court's discretion to overlook a delay'.[363]

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[353] Ibid.
[354] *Tasima HC* (note 224 above) paras 66–7.
[355] *Tasima SCA* (note 225 above) paras 26–7.
[356] *Tasima* (note 24 above) para 79.
[357] Ibid.
[358] Ibid paras 81 and 87.
[359] Ibid para 143.
[360] Ibid 143 with reference to *Khumalo* (note 338 above) para 45.
[361] *Khumalo* (note 338 above) para 49; *Gqwetha v Transkei Development Corporation Ltd* 2006 (2) SA 603 (SCA) ('*Gqwetha*').
[362] *Khumalo* (note 338 above) para 45.
[363] Ibid.

In *Tasima,* the majority found that the department had delayed unreasonably.[364] It then enquired whether it should overlook the unreasonable delay. This entailed an assessment of the nature of the decision[365] and the prejudice that may be occasioned by condoning the unreasonable delay.[366] The former involved an analysis of the impugned decision through the prism of the legal challenge made against it and the merits of that challenge.[367] The majority found that the flouting of public procurement processes was blatant and that the extension of the eNaTIs contract was surrounded by a web of maladministration.[368] On these facts, the majority concluded that the merits of the challenge were compelling.[369]

The majority also observed that Tasima had been significantly enriched by the unlawful extension of the contract and that the unlawful extension had resulted in substantial unplanned public expenditure.[370] In the majority's view, it would have been naïve for it to disregard the impact of the unlawfulness on the fiscus.[371] Other factors that the majority took into account were that the delay was caused by the fact that the law on collateral challenge was unclear and that the Department did not act in bad faith.[372]

Insofar as was prejudice concerned, the majority found that the impugned extension had long expired and that Tasima had benefitted greatly from it.[373] As a result, the majority concluded that the prejudice that Tasima stood to suffer was minimal but that the department would suffer greatly if the unreasonable delay were not condoned.[374] Consequently, the majority ruled to overlook the unreasonable delay in bringing the counter-application and allowed the reactive challenge.[375]

The effect of *Tasima* is that delay is a relevant but not a decisive factor when a public authority raises an extended collateral challenge.[376] A public authority may raise an extended collateral challenge against an unlawful act provided that the delay is not unreasonable or the unreasonableness has been condoned.[377] In essence, the majority in *Merafong* and *Tasima*

[364] *Tasima* (note 24 above) para 159.
[365] Ibid paras 163–6.
[366] Ibid paras 170.
[367] Ibid 163–6.
[368] Ibid paras 164 and 166.
[369] Ibid para 166.
[370] Ibid.
[371] Ibid.
[372] Ibid paras 167–8.
[373] Ibid para 170.
[374] Ibid.
[375] Ibid para 171.
[376] Ibid para 143.
[377] Ibid.

vindicated the ruling by the High Court in *Oudekraal.*[378] The High Court had opined that, to the extent necessary, a court has discretion to condone or overlook the delay in the context of collateral challenge.

Freund and Price correctly sum up the effect of *Tasima* to be that delay in raising an extended collateral challenge may be condoned under exceptional circumstances.[379] McKenzie broadly concurs with this sentiment.[380] His comments are directed at an extended collateral challenge raised by a public authority. He contends that delay matters in such a challenge for three reasons.[381] First, the law places an obligation on a public authority to challenge any unlawful act expeditiously.[382] Secondly, a public authority is in a better position and has better resources to challenge an unlawful administrative act than an ordinary individual.[383] Lastly, there is a need to avoid uncertainty in the legal effect of administrative acts.[384] McKenzie's view resonates with the majority in *Tasima* that a public authority must invoke an extended collateral without delay.[385]

The foregoing level of clarity on the impact of delay in raising a collateral challenge has been upset by *State Information Technology Agency v Gijima Holdings.*[386] This case did not involve collateral challenge. It dealt with a review application based on the legality principle. The import of *Gijima* to collateral challenge is that it negates the *Khumalo* test for delay which the Constitutional Court adopted in *Tasima.*[387] In *Gijima,* the majority interprets s 172(1)(a) of the Constitution in a manner that equally applies to an unreasonably delayed collateral challenge that a court has declined to overlook.[388] In light of the court's pronouncement in *Gijima,* it is now open to doubt whether or precisely how the courts will apply the delay rule to determine the consequences of delay in raising collateral challenge.

In *Gijima,* SITA is the Information Technology (IT) procurement arm the South African government. SITA granted Gijima a contract to provide IT services to the Department of

[378] *Oudekraal HC* (note 12 above) 593E; see also *Oudekraal* (note 1 above) para 36.
[379] Daniel Freund & Alistair Price 'On the legal effects of unlawful administrative action' (2017) 134 *SALJ* 184 at 191
[380] McKenzie (note 317 above) 35–6.
[381] Ibid 35.
[382] Ibid.
[383] Ibid 35–6.
[384] Ibid 36.
[385] *Tasima* (note 24 above) para 143.
[386] *State Information Technology Agency v Gijima Holding* 2018 (2) SA 23 (CC) ('*Gijima*') paras 52.
[387] *Tasima* (note 24 above) para 143.
[388] *Gijima* (note 386 above) para 52.

Defence without following public procurement procedures.[389] Gijima repeatedly queried the lawfulness of this process but SITA assured it that all was in order.[390] The parties extended this contract three times. Towards the end of the third extension, when Gijima claimed money that was owed to it in terms of the extended contract, SITA disputed liability on the basis that the contract and its subsequent extensions were invalid.[391]

Twenty-two months after the conclusion of the main contract, SITA brought an application to have it and the subsequent extensions reviewed and set aside. The High Court dismissed SITA's application on the basis that it had been brought outside the time periods that are stipulated in s 7(1) of PAJA and that there was no basis for the court to condone its lateness.[392] SITA appealed.

On appeal, SITA contended that an application by an organ of state to have its own decisions reviewed is beyond the reach of PAJA and its delay rule. The majority of the SCA disagreed. It held that the decision to award a tender was an administrative action and that PAJA was the only path available to SITA to review the decision.[393] SITA approached the Constitutional Court.

The Constitutional Court upheld SITA's contention that its application was not governed by PAJA[394] but by the principles applicable to a legality review.[395] The court found that the delay was unreasonable[396] and that there were no reasons to overlook it.[397] This should have ended the enquiry according to the delay rule. However, despite this, the court found that it was enjoined by s 172(1)(a) of the Constitution to declare invalid any law or conduct that it finds to be inconsistent with the Constitution.[398] On this basis, the court reviewed and set aside the DoD contract and its extensions. In order to ameliorate any injustice that was likely to be visited on Gijima, relying on s 172(1)(b), the court inserted a rider that 'the declaration of invalidity

[389] Ibid paras 5–7.
[390] Ibid para 6.
[391] Ibid para 9.
[392] *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* (32665/2014) [2015] ZAGPPHC 1079 ('*Gijima HC'*) (18 May 2015) para 24.
[393] *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* 2017 (2) SA 63 (SCA) ('*Gijima* SCA') paras 16 and 33.
[394] Ibid para 35.
[395] Ibid para 40.
[396] Ibid para 45.
[397] Ibid para 49.
[398] Ibid para 52.

must not have the effect of divesting Gijima of rights to which – but for the declaration of invalidity – it might have been entitled'.[399]

Gijima's approach to delay has attracted criticism from academic commentators. Boonzaier correctly questions the soundness of the ruling in *Gijima* that s 172(1)(a) of the Constitution places an obligation on a court to declare invalid any unlawful administrative act.[400] In his view, s 172(1)(a) is qualified. It only obliges a court to declare invalid an unlawful act that is within the court's power. Boonzaier contends that a review that is unreasonably delayed and has not been condoned is not properly before court and thus *not* within its power.[401] By parity of reasoning, an extended collateral challenge that is unreasonably late and has not been condoned is beyond the court's reach.

A second criticism of *Gijima* is by De Beer.[402] His analysis of *Gijima* on the impact of delay is consistent with that of Boonzaier.[403] De Beer finds *Gijima's* abandonment of the delay rule unusual.[404] In his view, the court should have non-suited SITA as soon as it declined to overlook the unreasonable delay.[405] De Beer contends that the court's reliance on s 172(1)(a) of the Constitution to determine the matter collapsed the delay enquiry into the merits of the case.[406] He correctly observes that, by doing so, *Gijima* has altered the two-staged approach that has been followed by the courts where delay was involved, whether it was a legality review or one based on PAJA.[407] An enquiry into the reasonableness of the delay is meant to determine whether a court can legitimately adjudicate over the matter at all.

In *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd,*[408] the majority of the Constitutional Court explained the essence of the legal principle set out in *Gijima* and followed it. This case also did not involve collateral challenge. In *Asla Construction,* a public authority in the form of Buffalo City municipality unlawfully extended the scope of a contract between it and Alsa Construction. Initially, the latter was contracted to construct housing units in a particular locality. The local authority extended the contract to cover additional units in a

[399] Ibid para 54.
[400] Leo Boonzaier 'A decision to undo' (2018) 135 *SALJ* 642 at 672.
[401] Ibid 671–2.
[402] Mitchell Nold de Beer 'A new role for the principle of legality in administrative law: *State Information Technology Soc Ltd v Gijima Holdings (Pty) Ltd*' (2018) 135 *SALJ* 613 at 626–7.
[403] Boonzaier (note 400 above) 672.
[404] De Beer (note 402 above) 626.
[405] Ibid 627.
[406] Ibid.
[407] Ibid.
[408] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) ('*Asla Construction*').

different locality. The contractor delivered these units and claimed payment. The local authority declined to pay, contending that the extension of scope did not comply with s 217 of the Constitution.

Fourteen months had lapsed before the local authority challenged the validity of the relevant contract on review. The High Court upheld its application.[409] Asla successfully appealed.[410] Disenchanted, the Buffalo City Municipality approached the Constitutional Court. The Constitutional Court found that the municipality's delay in launching review proceedings was unreasonable[411] and that no basis existed for the court to overlook this delay.[412] However, on the basis of the principle established in *Gijima,* the majority considered itself bound to hear the application.[413]

The majority explained that the *Gijima* principle means that '[e]ven where there is no basis for a court to overlook an unreasonable delay, the Court may nevertheless be constitutionally compelled to declare the state's conduct unlawful'.[414] According to the majority, for this principle to apply, the unlawfulness of the impugned act must be clear and not disputed.[415]

The majority viewed the *Gijima* principle as one of the factors a court should consider when it decides on the consequences of an unreasonable delay.[416] The other factors include prejudice to the affected parties,[417] the merits of the legal challenge[418] and the conduct of the applicant.[419] Because the *Gijima* principle makes inroads on existing legal authority on the consequences of unreasonable delay, the majority held that it 'should be interpreted narrowly and restrictively so that the valuable rationale behind the rules of delay are not undermined'.[420]

The difference between the majority and minority lies in the latter's reservations about the correctness of the *Gijima* principle.[421] The minority criticized the *Gjima* principle for negating

[409] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2016] 4 All SA 60 (ECG) ('*Asla Construction HC'*).
[410] *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* 2017 (6) SA 360 (SCA) ('*Asla Construction SCA'*).
[411] *Asla Construction* (note 408 above) para 80.
[412] Ibid para 100.
[413] Ibid para 65.
[414] Ibid para 63.
[415] Ibid para 66.
[416] Ibid paras 53–63.
[417] Ibid para 54.
[418] Ibid para 55.
[419] Ibid para 59.
[420] Ibid para 71.
[421] Ibid paras 136–7.

the protections afforded to litigants in the applications for review.[422] Having found that there is Constitutional Court authority of equal force both for and against the *Gijima* principle, the minority proposed an alternative approach.[423] According to this alternative approach, the court must balance the seriousness of the illegality with need to maintain finality in official decisions, ie where the delay is unreasonable, the court must decline to determine the lawfulness of the impugned act unless the seriousness of the unlawfulness warrants overlooking the delay.[424] In this regard, the court must be guided by the constitutional values of open and accountable government.[425] The approach proposed by the minority is consistent with the frame of the delay rule as it was adopted in *Khumalo* in that it still requires the court to decide whether to overlook the unreasonable delay.[426] Despite the convincing criticism of the *Gijima* principle by the minority, the judgment opted not to revisit it.[427] It concurred with the majority that the correctness of the *Gijima* principle had not been properly canvassed before the court. [428]

The minority opined that the academic criticism against the *Gijima* principle made it necessary for the court to revisit this principle in the future.[429] In particular, Cameron J acknowledged the criticism by Boonzaier to the effect that it was inexplicable how the court in *Gijima* could decline to overlook an unreasonable delay (which should have ended the matter) and go on to grant a remedy in terms of s 172(1)(a) of the Constitution. [430] Boonzaier rightly describes the ruling on delay in *Gijima* as the most alarming error in this judgment.[431] *Gijima* has created uncertainty as to the role and relevance of the delay rule. Unless it is revisited, as proposed by the minority, uncertainty will continue to linger to the detriment of those that deserve procedural protection from the delay rule. In essence, the *Gijima* principle removes the time-bar on extended collateral challenge negating the recognition in *Khumalo*[432] and *Tasima*[433] that state organs have a duty to act expeditiously and are held to a higher standard that private persons.

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[422] Ibid para 136.
[423] Ibid paras 124–7
[424] Ibid para 127.
[425] Ibid para 139.
[426] Ibid 129–31.
[427] Ibid.
[428] Ibid para 64.
[429] Ibid para 112.
[430] Ibid para 112 n 109 with reference to Boonzaier (note 400 above) 677.
[431] Boonzaier (note 400 above) 677.
[432] *Khumalo* (note 338 above) para 46.
[433] *Tasima* (note 24 above) para 142–3.

4.6 EXCLUSION OF COLLATERAL CHALLENGE

In English law, in certain circumstances, the value of certainty and stability of decisions justifies the exclusion of collateral challenge.[434] Although expressed in somewhat different terms, South African law also strives for the same balance between legality and certainty.

In South Africa the courts have held that a collateral challenge is available if it is the right remedy sought by the right person in the right proceedings.[435] Whether a collateral challenge is the right remedy in any particular proceedings depends on the proper construction of the relevant statutory instrument within the context of the rule of law. A statute may expressly exclude a classical collateral challenge. For instance, in *Capstone v Commissioner, South African Revenue Services,* the High Court construed the 'pay now, argue later' principle in taxation to exclude collateral challenge.[436]

It is not often that the legislature is as clear about the consequences of unlawful administrative acts as it is in tax legislation. More often than not, statutes are silent on whether a collateral challenge is available in any given circumstances.[437] In England, the courts have relied on the history and policy of the enabling statute, its objects, purpose and efficacy to determine if the statute intended to exclude collateral challenge.[438]

In South Africa, s 39(2) of the Constitution obliges the courts to construe legislation to promote the spirit, purport and objects of the Bill of Rights. *Oudekraal* held that the proper interpretation of a statute to determine whether collateral challenge is an appropriate remedy must be done within the context of the principle of the rule of law.[439] The emerging law from the cases since *Oudekraal* echoes sentiments similar to their English counterparts. Below are factors that the courts in South Africa since *Oudekraal* have considered to support an interpretation that excludes a classical collateral challenge.

4.6.1 Availability of internal remedies

In *Khabisi NO v Aquarella Investment,*[440] the HoD of the Gauteng Department of Agriculture had issued compliance notices in terms of s 31L of the NEMA and directives in terms of s 31A of the ECA to the respondents calling upon them to cease all construction and related activities

[434] De Smith (note 29 above) paras 3-111–3-132.
[435] *Oudekraal* (note 1 above) para 35.
[436] *Capstone v Commissioner, South African Revenue Services and Another* 2011 (6) SA 65 (WCC) ('*Capstone*').
[437] Forsyth (note 234 above) 219.
[438] *Wicks* (note 14 above) 118–22.
[439] *Oudekraal* (note 1 above) para 35.
[440] *Khabisi NO v Aquarella Investment* 2008 (4) SA 195 (T) ('*Khabisi*').

on their properties. This was because the properties in issue were situated in an ecologically sensitive ridge.[441] The respondents disregarded the compliance notices and the directive because in their view the notices were invalid and thus of no legal force or effect.[442] The respondents advised the MEC and the head of department of their stance through a letter from their attorney. This prompted the MEC and the HoD to approach the High Court to interdict the respondent from continuing with the construction at their properties. The respondents collaterally challenged the vires of the notices and the directive. The High Court dismissed the collateral challenge.[443]

The High Court held that whether a collateral challenge is available to a respondent depends on whether it is consistent with the scheme of the enabling legislation to allow it.[444] The court found that s 31 of NEMA afforded an aggrieved person an opportunity to lodge an objection against the compliance notice before it was enforced.[445] Furthermore, the Act provided an aggrieved person with an option to approach the relevant MEC to suspend the operation of the notice pending the finalization of the objection. In light of this, the court concluded that a person aggrieved by the compliance notice had an effective internal remedy.[446] In the court's view, the availability of the remedy made it self-evident that an aggrieved person could not simply disregard a compliance notice in the sense of treating it as if it did not exist.[447]

The court held that because NEMA made elaborate provision for effective internal remedies, the respondents were not entitled to raise a collateral attack against the compliance notices.[448] In the court's view, to disregard the compliance notice was 'inimical to and seriously subversive of a sound and efficient system of public administration' and had the potential to cause anarchy.[449]

4.6.2 The underlying policy of the enabling legislation

Another factor that may be extracted from *Khabisi* which militates against the availability of a collateral challenge is the underlying policy of the legislation. In *Khabisi,* the protection of the environment for current and future generations persuaded the court that NEMA excluded

[441] Ibid para 6.
[442] Ibid paras 7–8.
[443] Ibid para 28.
[444] Ibid paras 24–6.
[445] Ibid para 24.
[446] Ibid.
[447] Ibid.
[448] Ibid para 25.
[449] Ibid.

collateral challenge against the compliance notices.[450] The development contemplated by the respondents had the potential to cause serious and irreparable harm to the environment. The 'damage and harm to the environment would have far-reaching and irreversible consequences for the broader society', negating the ideals of a healthy environment for everyone as encapsulated in the Constitution.[451] In terms of the Constitution everyone has a right to have the environment protected for the benefit of present and future generations through legislative and other measures.[452]

4.6.3 Administrative act directed at a specific person

In *Boddington,* the English House of Lords held that it was the particular statutory schemes in *Wicks*[453] and *Quitelynn*[454] that justified the exclusion of collateral challenge.[455] First, the court observed that in both cases the impugned administrative acts were specifically directed at the defendants.[456] Secondly, the scheme of the relevant legislation provided the defendants with recourse against the specific administrative acts before they could be enforced.[457]

The court distinguished *Wicks* and *Quitelynn* from the situation where an administrative act 'is of a general character in the sense that it is directed at the world at large'.[458] In this instance, an individual would confront the administrative act for the first time when it is enforced against him or her. Prior to this, he or she would not have had an opportunity to challenge it. The court held that in such a case, there is a strong presumption that Parliament did not intend to deprive the individual of an opportunity to defend himself by asserting that the administrative act in question is unlawful.[459]

In South Africa, although there is no direct post-*Oudekraal* authority on the effect of an administrative act that is directed at a specific person on the availability of collateral challenge, the cases that followed *Oudekraal* are consistent with their English counterparts. For instance, in *Khabisi*[460] and *Mgoqi v City of Cape Town,*[461] the courts excluded classical collateral challenge where the relevant administrative acts were directed specifically at the respondents.

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[450] Ibid paras 27–30.
[451] Ibid para 30.
[452] Section 24 of the Constitution.
[453] *Wicks* (note 14 above).
[454] *Quietlynn Ltd v Plymouth City Council* [1988] 1 QB 114.
[455] *Boddington* (note 14 above) 161G.
[456] Ibid.
[457] Ibid.
[458] Ibid 161H with reference to *Wicks* (note 14 above) and *Quitelynn Ltd* (note 454 above).
[459] *Boddington* (note 14 above) 162B.
[460] *Khabisi* (note 440 above).
[461] *Mgoqi v City of Cape Town* 2006 (4) SA 355 (C) ('*Mgoqi*').

In *Khabisi,* the administrative acts in question were a compliance notice and directive addressed to the respondents to cease construction at an ecologically sensitive site.[462] In *Mgoqi* (a case discussed under the next heading), the council resolution that was in issue dealt with Mgoqi's employment as the City Manager and no one else.

In light of the persuasive nature of the English-law authorities and the consistency of the South African cases with them, it is likely that South African courts would consider an administrative act that is directed at a specific person to be a factor in justifying the exclusion of a collateral challenge in an appropriate case.

4.6.4 Officers and judges de facto

In *Mgoqi,* the High Court imported into South African law the English administrative-law doctrine of officers and judges de facto.[463] According to this doctrine, a collateral challenge is impermissible against an administrative act whose only flaw is the unlawfulness or legal deficiency of the appointment or authority of an official or a judge.[464] According to Wade and Forsyth, this doctrine allows an administrative act to be valid despite the flaws in the appointment of the official who performed it.[465] The office-bearer is required to have an appearance of authority.[466] The rationale for the doctrine lies in the protection which it affords the public who order their daily lives relying on decisions by public authorities.

Mgoqi was the City Manager of the City of Cape Town. During the change-over of the governing parties after the local government elections, the outgoing Executive Mayor unlawfully extended his contract as City Manager. In accordance with the relevant municipal legislation, Mgoqi, in his capacity as the City Manager, had presided over the inaugural meeting of the new council and the election of the new mayor. Upon discovery of the flaws in Mgoqi's employment, the new council terminated Mgoqi's appointment. He contended that if his appointment had indeed been extended unlawfully, this had a knock-on effect on the validity of the inaugural meeting of the council and the election of the new mayor.[467] On the strength of doctrine of official or judges de facto, the court rejected his proposition.[468]

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[462] *Khabisi* (note 440 above).
[463] *Mgoqi* (note 461 above) paras 124–5 with reference to HWR Wade & CF Forsyth *Administrative Law* 9 ed (2004) 285–8.
[464] *Mgoqi* (note 461 above) para 124; see also Wade & Forsyth (note 29 above) 238–9.
[465] Wade & Forsyth (note 29 above) 239.
[466] *Mgoqi* (note 461 above) para 125.
[467] Ibid para 73.
[468] Ibid para 124.

4.7 CRITICISM OF COLLATERAL CHALLENGE

Van Eetveldt contends that despite express mention of *Oudekraal* in the cases that came after it, these cases seldom followed the principles set out there on how collateral challenge ought to be approached.[469] According to Van Eetveldt, *Oudekraal* requires that the determination of the availability of collateral challenge should follow the theory of the second actor. Instead, the courts since *Oudekraal* have opted either for the categorical or the flexible method.

According to Van Eetveldt's categorical approach, 'collateral challenge may only be raised by a fixed category of persons, in a fixed category of situations'.[470] In essence, what Van Eetveldt defines as category method is the category-approach that the majority of the Constitutional Court refers to in *Merafong*[471] and dismisses as not being justified by legal precedent. Van Eetveldt[472] traces the category approach to *V&A Waterfront,* the earliest reported case after *Oudekraal* in which the SCA grappled with collateral challenge. However, in *V&A Waterfront* the SCA did not actually establish the categorical approach as Van Eetveldt contends; it merely applied *Oudekraal.* It will be recalled that, in *Oudekraal,* one of the reasons why the Cape Metropolitan Council could not succeed in its collateral challenge is because the SCA had held that the council had not been coerced to comply with any unlawful act.[473]

Van Eetveldt explains that 'the flexible method asks judges to exercise a broad discretion, to assess a wide array of factors, and to consider pragmatic dimensions of the dispute they are called upon to adjudicate'.[474] A closer examination of Van Eetveldt's definition of the flexible method and its context suggests that it bears the same meaning as the flexible approach that the majority endorsed in *Merafong.* In *Merafong,*[475] the majority held that whether a collateral challenge is available in any given circumstances depends on the interests of justice. The interests of justice, in turn, depend on the facts of each case.

Van Eetveldt[476] relies on *Khabisi* to show that the courts since *Oudekraal* have followed both the categorical and flexible approaches. In his view, no consistent approach has emerged from the case law. It will be recalled that the respondents in *Khabisi* raised a collateral challenge against the notices issued in terms of NEMA and the ECA calling upon them to cease

[469] Van Eetveldt (note 4 above) 32.
[470] Ibid 36.
[471] *Merafong* (note 22 above) paras 25 and 55.
[472] Van Eetveldt (note 4 above) 37.
[473] *Oudekraal* (note 1 above) para 39.
[474] Van Eetveldt (note 4 above) 55.
[475] *Merafong* (note 22 above) paras 55.
[476] Van Eetveldt (note 4 above) 55–7.

construction at an ecologically sensitive ridge. *Khabisi* represents an exception to collateral challenge even where a subject is being coerced by a public authority to comply with an unlawful act. Instructively, English law recognizes an exception to collateral challenge where the object of relevant legislation would be undermined by upholding such a challenge.[477] *Khabisi* is in fact consistent with the theory of the second actor in that its reasons for excluding collateral challenge are based on principle rather than rigid application of legal doctrine or maxims. If *Khabisi* is an exception to collateral challenge, then it can be said to be consistent with *Oudekraal* and the categorical approach.

In short, the evolution of the law on collateral challenge has progressed from *V&A Waterfront* (category-approach) to *Merafong* (flexible approach). However, the flexible approach is not a substitute for *Oudekraal,* but rather emphasizes the principled approach upon which *Oudekraal* is based.[478]

Van Eetveldt[479] correctly criticizes *Merafong* for not providing guidance on how the courts should determine the availability of collateral challenge. The lack of guidance perpetuates uncertainty in an indistinct but very important area of law, the legal consequence of an unlawful act. Despite its shortcomings, *Merafong* should however be welcomed because by leaving it to future courts to provide guidance on the determination of collateral challenge, it left these courts with enough flexibility to fashion appropriate guiding principles.

Van Eetveldt also contends that the application of the theory of the second actor, the flexible and category methods to the same set of facts can yield different results. On this basis, he suggests an alternative method. According to this method, collateral challenge can be regarded as the manifestation of the constitutional right to access courts.[480] Thus, the court can use the limitations test in s 36 of the Constitution to justify the exclusion of collateral challenge where appropriate.[481] This proposal subjects the availability of collateral challenge to the discretion of the court. Collateral challenge is available as a right.

There are two principal reasons why Van Eetveldt's grounds for departure from the current test for collateral challenge are untenable. First, the category approach is no longer applicable. Secondly, the theory of the second actor and the flexible approach should not be regarded as

[477] Wade & Forsyth (note 29 above) 238.
[478] Forsyth (note 234 above) 219–22.
[479] Van Eetveldt (note 4 above) 75.
[480] Ibid 131–2.
[481] Ibid 132–3.

separate. The flexible approach is a method for determining the powers of the second actor. This theory advocates for a flexible yet principled approach.[482] In time, much-needed clarity on collateral challenge should emerge from principles that have begun to emerge from the courts, eg the protection of the fiscus in *Tasma*.

4.8 SUMMARY

This chapter has canvassed the meaning, content and extent of the third Oudekraal principle. It has done so by examining the cases since *Oudekraal* to determine how they have interpreted, applied and developed collateral challenge. This section summarizes the findings.

4.8.1 Collateral challenge as opposed to judicial review

The courts since *Oudekraal* have been loyal to the judgment on the distinction between direct and collateral challenge.[483] At the heart of this difference is the remedial discretion that the court has in a direct challenge.[484] The court uses it to dispense justice where certainty and legality collide. If it is just and equitable to do so, a court may decline to set aside an unlawful administrative act even if a ground for review has been established.[485] On the other hand, a court does not have comparable discretion in a collateral challenge.[486] A review court is endowed with this discretion because its decision to review and set aside an unlawful act can have drastic consequences, since all acts that depend on the act that has been set aside for their legal effect cease to have such effect.[487] This explains why an applicant who invoked direct proceedings failed to avoid the enforcement of an unlawful administrative act when the court reviewed and set aside the unlawful act but suspended the operation of the order of invalidity.[488]

4.8.2 The evolution of collateral challenge

The case law examined in this chapter reveals that collateral challenge is an age-old concept in South African law.[489] It was first recognized as a valid defence against criminal charge.[490] Later it was extended to purely administrative-law cases.[491] The cases before *Oudekraal* favoured a

[482] Forsyth (note 234 above) 219–22.
[483] *Seale* (note 44 above) para 1; see also *Kouga Municipality* (note 21 above) para 12.
[484] Ibid.
[485] See for example *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA) ('*Sapela'*) para 28; *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others* 2008 (2) SA 481 (SCA) ('*Millennium Waste*').
[486] Ibid.
[487] *Seale* (note 43 above) para 13
[488] *Kouga Municipality* (note 20 above) para 17.
[489] *Johnstone* (note 16 above).
[490] Ibid.
[491] *Panasonic* (note 8 above); *Photocircuit* (note 8 above).

flexible approach to collateral challenge.[492] They were not based on the categorization approach. They recognized a collateral challenge both where a subject was being coerced by a public authority (classical collateral challenge)[493] and where coercion was absent (extended collateral challenge).[494]

By ignoring the existence of extended collateral challenge and focusing on coercion as a fundamental requirement for collateral challenge, *Oudekraal* blurred the distinction between the two types of collateral challenge. It did so by applying legal principles best suited for classical collateral challenge instead of extended collateral challenge. In particular, the SCA found that the Cape Town Metropolitan Council could not invoke a collateral challenge because the administrative act in issue was not of a nature that coerced it to do or not to do something.[495] The blurring of the distinction may be partly attributed to the Supreme Court of Appeal's heavy reliance on English administrative-law authorities dealing with classical collateral challenge.[496] In *Merafong* and *Tasima,* the Constitutional Court ultimately cleared up any confusion that may have been created by *Oudekraal* regarding the existence of the two types of collateral challenge.[497]

4.8.3 Classical collateral challenge

A classical collateral challenge is a challenge against an unlawful administrative act whereby a public authority seeks to coerce a subject to do or not to do something.[498] Historically, a classical collateral challenge was available only to a person who was being coerced by a public authority to comply with an unlawful administrative act.[499] It is now also possible for a public authority to claim a classical collateral challenge if it is being coerced by another public authority.[500] However, in *Tasima,* the Constitutional Court hinted that only in exceptional cases may a public authority invoke a classical collateral challenge.[501]

Two requirements must be fulfilled before a subject of an unlawful administrative act may successfully invoke a classical collateral challenge. First, a subject must be coerced by a public

[492] *Merafong* (note 21 above) paras 28–30 with reference to *Photocircuit* (note 8 above).
[493] *Johnstone* (note 16 above).
[494] *Photocircuit* (note 8 above); see also *Merafong* (note 15 above) para 29.
[495] *Oudekraal* (note 1 above) para 39.
[496] Ibid paras 30–32 with reference to *Wicks* (note 13 above) and *Boddington* (note 13 above).
[497] *Merafong* (note 21 above) paras 25 and 30; see also *Tasima* (note 23 above) para 135 n 63.
[498] *V&A Waterfront* (note 19 above) para 10.
[499] *Merafong* (note 21 above) para 55; *Tasima* (note 23 above) para 135 n 63.
[500] *Tasima* (note 23 above) para 143.
[501] Ibid.

authority to do or not to do something.[502] The second requirement for a classical collateral challenge is that the underlying administrative act must be invalid. In the *V&A Waterfront* line of cases, the courts dismissed claims for a classical collateral challenge where they found that a subject was not being coerced by a public authority.[503] Although this latter principle is correct, the correctness of its application in *V&A Waterfront* is doubtful. By its very nature, a grounding order by the civil aviation authority coerced its subject to comply with its terms. This should have justified the court to enquire into the validity of the order. On the contrary, it opted not to do so because, in its view, the civil authority had not taken steps to enforce it against the lessee. On this interpretation, the court allowed the lessor to rely on it to enforce its private-law rights. This construction of 'coercion' for the purposes of collateral challenge is unduly narrow and disregards the objective effect of the administrative act.

Consistent with the principle set out in *V&A Waterfront* line of cases, in *Arniston*, the High Court relied on the existence of coercion as a basis to uphold classical collateral challenge.[504] In this case, the respondents raised a classical collateral challenge against the enforcement of a provisional protection notice issued in terms of the National Heritage Act freezing any construction or improvement on properties affected by the notice for a period of two years. The coercive nature of the notice was in its interference of the rights of ownership of the affected property owners. In *Cable City,* the Supreme Court of Appeal upheld a collateral challenge against the extraction of invalidly determined levies from Cable City by the City of Tshwane.[505] *S v Smit* is the only aberration where the court dismissed a classical collateral challenge despite evidence that the subject was being coerced by a public authority.[506] It is submitted that, in this respect, the court misapplied *Oudekraal.*

The second requirement for a classical collateral challenge is that the underlying administrative act must be invalid. It is the obverse of the requirement of the third Oudekraal principle that where a subject is coerced to do or not to do something, the underlying administrative act must exist in law.[507] In *Arniston,* the High Court enquired into the procedural fairness of the processes leading to the publication of the provisional protection notice by the National Heritage Agency. The court concluded that a failure to consult those affected by the notice

[502] *V&A Waterfront* (note 19 above) para 10; *Club Myokonos* (note 115 above) para 38; *Ukwanda Leisure* (note 132 above) para 62; *Coal of Africa* (note 137 above) para 76.
[503] Ibid.
[504] *Arniston* (note 150 above) paras 22 and 27.
[505] *City of Tshwane* (note 159 above) para 15.
[506] *Smit* (note 169 above) 182A–E.
[507] *Oudekraal* (note 1 above) para 32.

prior to its publication was unfair and upheld the collateral challenge.[508] In *Cable City,* a levy-payer collaterally challenged the validity of an empowering provision. Importantly, the SCA - explained that for purposes of a collateral challenge, an enquiry into the unlawfulness of the administrative act is a limited one.[509] It is limited to establishing whether an administrative act exists in law.[510] It is not aimed at quashing or setting aside the impugned administrative act.

A classical collateral challenge is not time-barred in the sense that a subject may wait indefinitely and raise the invalidity of the relevant administrative act only once a public authority attempts to enforce it. [511] A subject could also proactively approach a court for a declaratory order that the administrative act in issue is invalid.[512] By so doing, the aggrieved person may have the benefit of a court that is more familiar with administrative-law principles than a criminal court to rule on validity or otherwise of an administrative act in issue.[513]

A classical collateral challenge is a limited defence in the sense that it must be invoked by the right person, at the right time, in the right proceedings.[514] Its availability may be expressly excluded by statute.[515] For instance, the provisions giving effect to the 'pay now, argue later principle' in tax legislation exclude a classical collateral challenge.[516]

Where a statute is silent, a court takes into account its scheme, object, purpose and underlying policy to ascertain whether it excludes a classical collateral challenge.[517] Since *Oudekraal,* the courts have developed a number of principles to assist them in interpreting a statute to determine whether it excludes a classical collateral challenge. In summary, the courts have interpreted statutes as excluding classical collateral challenge in the following instances: (1) based on the availability of internal remedies before an administrative act is enforced;[518] (2) where an administrative act is directed at a specific person and that person has an opportunity to challenge it;[519] and (3) where constitutional rights such as the right to a safe environment

[508] *Arniston* (note 150 above) para 27.
[509] *City of Tshwane* (note 137 above) para 16.
[510] Ibid.
[511] *Oudekraal* (note 1 above) para 32; *Merafong* (note 21 above) para 69; *Tasima* (note 23 above) para 135.
[512] *Kouga Municipality* (note 20 above) para 19.
[513] Ibid para 20.
[514] *Oudekraal* (note 1 above) para 35.
[515] *Capstone* (note 430 above) para 49.
[516] Ibid.
[517] *Khabisi* (note 446 above) paras 24–6.
[518] Ibid para 25.
[519] *Merafong* (note 21 above) para 70–71; see also generally *V&A Waterfront* (note 19 above); *Khabisi* (note 446 above); and *Mgoqi* (note 467 above), where the administrative acts in question were directed specifically to the relevant subjects.

militate against the availability of a classical collateral challenge.[520] In addition to these principles, in *Mgoqi*, the High Court excluded a classical collateral challenge relying on the judges or officials de facto doctrine.[521] This doctrine preserves the legal effect of unlawful administrative acts where the only defect is the discrepancy relating to the appointment of a decision-maker.

4.8.4 Extended collateral challenge

In an extended collateral challenge, coercive public power is absent.[522] Only the legality of the originating administrative act is in issue.[523] Successful attempts to invoke extended collateral challenge have been made by public authorities.[524] The court have upheld an extended collateral challenge against the validity of a public authority's own administrative act[525] or that of another public authority.[526] Notably, since *Oudekraal,* the courts are yet to entertain an extended collateral challenge invoked by a private party.

An extended collateral challenge has distinctive attributes that separate it from a classical collateral challenge. First, the fact that a public authority has a legal duty to rectify unlawfulness where it encounters it is a relevant but not a decisive factor.[527] Secondly, delay in raising a collateral challenge should not be unwarrantably undue.[528] Delay is particularly relevant where a public authority is aware of the offending administrative act or where it is specifically addressed to that authority.[529]

In determining whether delay is undue, a court will consider whether the delay is unreasonable.[530] This requires a detailed explanation for the delay to allow the court to examine whether the delay is unreasonable.[531] In *Merafong,* the court observed that the opaqueness of the law such as was involved in that case may be an acceptable reason to the court.[532] If a court concludes that a delay is unreasonable, it proceeds to determine whether it should nevertheless

[520] *Khabisi* (note 446 above) paras 27–30.
[521] *Mgoqi* (note 467 above) paras 124–5.
[522] *Panasonic* (note 9 above); *Photocircuit* (note 9 above); see also *Merafong* (note 21 above) para 29.
[523] Ibid.
[524] *Merafong* (note 21 above); *Tasima* (note 23 above).
[525] *Merafong* (note 21 above).
[526] *Tasima* (note 23 above).
[527] *Merafong* (note 21 above) para 61.
[528] *Tasima* (note 23 above) para 143.
[529] Ibid para 72.
[530] Ibid paras 152–3 with reference to *Khumalo* (note 332 above) para 49.
[531] Ibid.
[532] Ibid.

condone the unreasonable delay.[533] *Tasima* instructively observed that while a court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power, it is equally a feature of the rule of law that undue delay should not be tolerated.[534] Delay can prejudice a respondent, weaken the ability of a court to consider the merits of a review, and undermine the public interest in bringing certainty and finality to administrative action.[535] A court should therefore exhibit vigilance, consideration and propriety before overlooking a late review, reactive or otherwise.[536]

An important consideration in assessing whether a delay should be overlooked is the nature of the decision.[537] This requires an analysis of the impugned decision within the legal challenge made against it and having due regard to the merits of that challenge.[538] In *Tasima,* the Constitutional Court found that the explanation for the delay was not compelling. However, it condoned the unreasonable delay because of the unique and strong merits of the case against the validity of the extended contact.[539] The court found that the case involved a web of maladministration surrounding the granting of the extension; Tasima had been significantly enriched as a result of the unlawful extension; and that there was an adverse effect on the fiscus as a result of substantial unplanned public expenditure.[540] The court held that it would have been naïve of it to ignore these glaring facts.[541]

In *Gijima,* the Constitutional Court departed from the established test for delay which applied both in review applications and collateral challenge. In this case, despite the application for review being unreasonably late and there being no basis for the court to condone the unreasonable delay, the court nevertheless heard the application because it held itself bound by s 172(1)(a) of the Constitution to declare invalid any unlawful act.[542] Because the *Gijima* principle may be applied with equal force to a delayed extended collateral challenge, this has created uncertainty on the role and relevance of delay.

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[533] *Tasima* (note 23 above) para 152.
[534] Ibid para 160.
[535] Ibid.
[536] Ibid.
[537] Ibid para 163 with reference to *Khumalo* (note 332 above) para 57.
[538] *Tasima* (note 23 above) para 163.
[539] Ibid para 166.
[540] Ibid.
[541] Ibid.
[542] *Gijima* (note 380 above) para 52.

The majority in *Asla Construction* followed this approach.[543] It emphasized that where the unlawfulness of the act is clear and not disputed, the court must declare the impugned act invalid.[544] However, because the inroads that the *Gijima* principle makes on the delay rule, the court held that it should be construed narrowly.[545] The minority attached weight to the emerging criticism against the *Gijima* principle and held that in the future it may be worthwhile to interrogate it again.[546] However, the court was unanimous in its view that *Alsa Construction* was not an ideal case for the reconsideration of the principle.[547] The issue was not properly canvassed by the parties or 'ventilated at the hearing'.[548]

Because of the prevalence of delay in review applications and collateral challenge, it is likely that the Constitutional Court will confront this issue in the near future. Having due regard of the academic criticism of the *Gijima* principle and the desire of the majority to limit its application, the court may confine its scope.

4.8.5 Criticism of collateral challenge

Today, the availability of collateral challenge depends on the interests of justice. There is very little guidance on what constitutes the interests of justice. In *Merafong,* the Constitutional Court missed an opportunity to provide clearer guidance on factors that the courts should consider when they determine the interests of justice.[549] So far, the courts have upheld collateral challenge where a subject is coerced to comply with an unlawful act (classical collateral challenge)[550] and where there is blatant illegality by a public authority as well as an adverse impact on the public purse.[551]

The doctrine of judges de facto,[552] conservation of the environment,[553] the availability of adequate internal remedies as well as the objects and policy of the relevant legislation have emerged as factors that may militate against the availability of collateral challenge.[554]

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[543] *Asla Construction* (note 402 above) para 65.
[544] Ibid para 66.
[545] Ibid para 71.
[546] Ibid para 112.
[547] Ibid.
[548] Ibid para 64.
[549] *Merafong* (note 22 above) para 59.
[550] See for example City of Tshwane (note 167 above).
[551] *Tasima* (note 24 above).
[552] *Mgoqi* (note 461 above).
[553] *Khabisi* (note 440 above).
[554] Ibid.

These emerging principles show that there is still scope for the principle-based application of collateral challenge. *Merafong* gives the courts an opportunity to develop these principles further.

CHAPTER 5

THE FOURTH OUDEKRAAL PRINCIPLE

INTRODUCTION

According to the fourth Oudekraal principle, a court hearing an application for judicial review of an unlawful administrative act has discretion whether to grant or withhold the remedy of setting aside even if a ground of review has been established.[1] This discretion 'constitutes the indispensable moderating tool for avoiding or minimizing injustice when legality and certainty collide'.[2] The fourth Oudekraal principle recognizes that there are circumstances where a person may have relied on the apparent validity of an unlawful administrative act and setting it aside would cause that person prejudice.[3] In essence, the fourth principle is about the discretion not to set aside an unlawful act.[4]

The court in *Oudekraal* observed that a court exercising discretion whether to grant or withhold the remedy of setting aside may consider factors such as delay in bringing the review, certainty, the consequences of leaving the unlawful act to stand, and the impact on third parties of doing so.[5] Since *Oudekraal,* the Constitutional Court has developed what is now known as the 'corrective principle' to guide the exercise of the discretion.[6] Although this principle recognizes the need for an unlawful act to be corrected or set aside,[7] it also emphasizes that a just and equitable remedy is not limited to setting aside or leaving an unlawful act intact. It may lie somewhere in between.[8]

This chapter examines how the courts since *Oudekraal* have understood and applied the discretion not to set aside an unlawful act. First, the chapter investigates the conceptualization of the discretion under the current constitutional dispensation. Secondly, it canvasses the

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[1] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) ('*Oudekraal*') para 36.
[2] Ibid.
[3] Ibid para 29 where the appeal court endorsed Christopher Forsyth ' "The Metaphysic of Nullity": Invalidity, Conceptual Reasoning and the Rule of Law' in Christopher Forsyth & Ivan Hare (eds) *Essays in Public Law in Honour of Sir William Wade QC* (2005) 141 at 159; and see also para 46.
[4] *Aquila Steel (South Africa) (Pty) Ltd v Minister of Mineral Resources* 2019 (3) SA 621 (CC) ('*Aquila*') para 97. This dictum may be interpreted to mean that all Oudekraal principles are about remedy. However, its reference to *Oudekraal* (note 1 above) para 36 makes it clear that the court refers to the fourth principle.
[5] *Oudekraal* (note 1 above) para 46.
[6] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (4) SA 179 (CC) ('*Allpay II*') para 30.
[7] Ibid.
[8] Ibid para 39.

corrective principle as a guide to how the courts exercise their discretion to withhold the remedy of setting aside an unlawful act. Thirdly, the chapter examines the factors that have persuaded the courts since *Oudekraal* not to set aside an invalid act and instead to opt for another just and equitable remedy. The chapter ends with a conclusion.

5.1 THE CONSTITUTIONAL CONTEXT OF THE DISCRETION TO GRANT OR WITHHOLD A REMEDY

At common law, a reviewing court has discretion whether to grant or withhold a remedy even when the applicant has established a ground of review.[9] In the exercise of this discretion, the court takes into account all the surrounding circumstances.[10] The common-law discretion is wide yet principled.[11] Its origins may be traced back to the seminal judgment in *Johannesburg Consolidated Investment Co Ltd v Johannesburg Town Council,* where the court distinguished between its duty to enquire into the existence of the grounds of review, on the one hand, and its power to grant an appropriate remedy on the other.[12]

Under the current constitutional dispensation, an enquiry into the source of the court's discretion to grant or withhold the remedy of setting aside an unlawful administrative act involves an examination of ss 33, 38 and 172(1) of the Constitution and s 8 of PAJA. An unlawful administrative action contravenes s 33 of the Constitution. In terms of s 38 of the Constitution, this entitles an aggrieved person to appropriate relief. This section is complemented by s 172(1)(a) and (b) of the Constitution which respectively oblige a court confronting an unlawful act to declare it invalid and grant just and equitable relief. This may include suspension of the operation of the order of invalidity for a stated period. Section 172 of the Constitution applies equally to all official conduct that is inconsistent with the Constitution. Official act or conduct that is not an administrative action is reviewable by a court on the basis of the constitutional principle of legality.[13]

Judicial review of unlawful administrative action is now governed most directly by PAJA.[14] An aggrieved person may not invoke s 33 of the Constitution directly.[15] Section 8 of PAJA

[9] Lawrence Baxter *Administrative Law* (1984) 712–13.
[10] Ibid 713.
[11] Ibid.
[12] *Johannesburg Consolidated Investment Co Ltd v Johannesburg Town Council* 1903 TS 111 at 115.
[13] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1991 SA 371 (CC) ('*Fedsure*') paras 40, 41 and 59.
[14] Section 33(3) of the Constitution provides that national legislation must be enacted to give effect to a right to these rights and provide for the review of administrative action. PAJA is the envisaged national legislation.
[15] *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) ('*New Clicks*') para 95–6; see also *Zondi v Member of the Executive Council for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) ('*Zondi*') para 99.

empowers the reviewing court to grant a variety of just and equitable remedies including setting aside the impugned act. The courts since *Oudekraal* have had occasion to interrogate the meaning and effect of s 172(1) of the Constitution and s 8 of PAJA.

For instance, in *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province,*[16] the SCA reversed the decision of the High Court setting aside an invalid tender and replaced it with a carefully crafted remedy that took into account the interests of all affected parties and the public. In the view of the appeal court, the High Court had exercised its discretion incorrectly when it set aside the tender.[17] It had 'overlooked the provisions of s 8 of PAJA which require that any order granted in matters such as this be just and equitable'.[18] In the view of the SCA, this necessarily entailed an exercise of discretion to balance the interests of all affected parties.[19] The SCA looked to s 8 of PAJA and s 38 of the Constitution as the sources of the court's discretion to withhold the remedy of setting aside an unlawful act. According to the SCA, the court's discretion is wider than withholding or granting a remedy to set aside an invalid act.[20] The SCA did not canvass s 172 of the Constitution.

Unlike in *Millennium Waste,* in *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd,* the SCA referred to *Oudekraal* as the source of its discretion.[21] In this case, the appeal court exercised its discretion not to set aside an unlawfully awarded tender because it had almost run its course and starting a tender anew was fraught with difficulties. It can be important to distinguish between *Oudekraal* and s 8 of PAJA as sources of the discretion, because the latter provides for a wider discretion than the former. The former is restricted to granting or withholding a remedy of setting aside.[22]

In *Eskom Holdings Ltd v New Reclamation Group (Pty) Ltd,* the SCA relied on both *Oudekraal* and s 8 of PAJA as authority for its discretion.[23] It may be concluded from *Eskom Holdings* that according to the SCA, s 8 of PAJA and *Oudekraal* are not mutually exclusive or at least

[16] *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA) ('*Millennium Waste*') paras 22 and 32.
[17] Ibid para 22.
[18] Ibid.
[19] Ibid.
[20] Ibid.
[21] *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA) ('*Sapela')* para 28.
[22] *Oudekraal* (note 1 above) para 36.
[23] *Eskom Holdings Ltd v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) ('*Eskom Holdings*') para 9.

that they are consistent with each other. In the context of *Eskom Holdings,* s 8 of PAJA is the statutory source of the discretion whilst *Oudekraal* represents the SCA's interpretation of it.

In *Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd,*[24] although the SCA canvassed *Oudekraal,*[25] *Sapela,*[26] *Eskom Holdings,*[27] and *Millennium Waste,*[28] it was silent on the source, nature and extent of the court's discretion. In this case, the High Court had set aside an invalid tender, substituted the decision of the relevant department with its own and awarded the tender to the unsuccessful bidder.[29] The SCA exercised its discretion not to set aside and reversed the decision of the High Court because, in its view, the latter had not fully considered the implications of setting aside the affected tender.[30]

In summary, two propositions are apparent from the SCA decisions. First, in the view of the appeal court, there is no apparent discord between PAJA and *Oudekraal* on the scope of the discretion as to remedy. This view tends to ignore the clear difference between the narrow ambit of *Oudekraal*[31] and the wider scope provided by s 8 of PAJA. Secondly, the examination by the SCA of the source of the court's discretion has not included s 172 of the Constitution.

The approach of the SCA is understandable for a number of reasons. First, s 8 of PAJA is couched in broad and permissive terms. For example, the use of the word 'may' in this section suggests the existence of discretion and the use of 'include' buttresses it by showing that the listed remedies in s 8 of PAJA are not a closed list. Secondly, a person aggrieved by an unlawful administrative act does not have a choice but to vindicate their rights through PAJA.[32]

In *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd,* the Constitutional Court relied both on s 8 of PAJA and s 172 of the Constitution as the sources of the discretion of a reviewing court in granting a remedy.[33] In this case, the Bengwenyama community occupied a certain piece of land. Through its company, Bengwenyama Minerals (Bengwenyama), the community, and Genorah Resources (Genorah) both applied for prospecting rights over this

[24] *Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd* 2010 (4) SA 359 (SCA) ('*Moseme*') paras 11–18.
[25] Ibid para 11 with reference to *Oudekraal* (note 1 above) para 38.
[26] *Moseme* (note 24 above) para 15 with reference to *Sapela* (note 21 above) para 29.
[27] *Moseme* (note 24 above) paras 16 and 17 with reference to *Eskom Holdings* (note 23 above) paras 14 and 16.
[28] *Moseme* (note 24 above) para 18 with reference to *Millennium Waste* (note 16 above) para 22.
[29] *Moseme* (note 24 above) paras 9–10.
[30] Ibid para 20–21.
[31] *Oudekraal* (note 1 above) para 36.
[32] *New Clicks* (note 16 above) para 96.
[33] *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) ('*Bengwenyama'*) paras 81–85.

land. The Minister of Mineral Resources declined to consider Bengwenyama's application and granted Genorah the rights. Bengwenyama challenged the validity of this decision.

The Constitutional Court's examination of the discretion not to set aside went beyond s 8 of PAJA to the Constitution itself. In the view of the Constitutional Court, because PAJA gives effect to s 33 of the Constitution, it 'must be read in accordance with the Constitution where it is reasonably possible to do so'.[34] It is in this light that the court also canvassed s 172(1) of the Constitution. The court held that a s 172(1) enquiry is two-staged.[35] First, in terms of s 172(1)(a), the court enquires into whether the impugned act is inconsistent with the Constitution. If so, a court has a duty to declare the impugned act invalid to the extent of its inconsistency. Once it has done so, it proceeds to the second leg of the enquiry. In the second leg of the enquiry, in terms of s 172(1)(b) of the Constitution, a court determines a just and equitable remedy that must follow, which may include the suspension of the order of invalidity for a specific duration.

The Constitutional Court held that a court has no discretion in respect of the first leg of the enquiry.[36] The discretion is only in the second leg of the enquiry where the court considers a just and equitable remedy.[37] The Constitutional Court emphasised that the sequence of the two-staged approach is sacrosanct.[38] In the court's view, the principle of legality 'requires invalid administrative action to be declared unlawful. This would make it clear that the discretionary choice of a further just and equitable remedy follows upon that fundamental finding'.[39]

Bengwenyama held that s 8 of PAJA has endowed a court with a generous discretion when it comes to fashioning a just and equitable remedy.[40] This includes 'declaratory orders, orders setting aside the administrative action, orders directing the administrator to act in an appropriate manner and orders prohibiting him or her from acting in a particular manner'.[41] In the court's analysis, the constitutional authority for this 'generous' discretion is s 172(1)(b) which empowers the court to grant a just and equitable remedy.

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[34] Ibid para 82 with reference to *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO* 2001 (1) SA 545 (CC) paras 23–6
[35] *Bengwenyama* (note 33 above) para 84.
[36] Ibid.
[37] Ibid.
[38] Ibid.
[39] Ibid.
[40] Ibid para 83.
[41] Ibid.

It is apparent from this, much like the judgment of the SCA in *Millennium Waste,*[42] that there is a difference between the discretion envisaged in s 8 of PAJA and s 172(1)(b) of the Constitution on the one hand and *Oudekraal* on the other. The former provides for a wider discretion whilst *Oudekraal* adopts a narrower one which limits the discretion to a choice between setting aside or withholding this remedy.

Notably, the court in *Bengwenyama* used confusing language that is not entirely consistent with s172(1)(a). It referred to a court being obliged to declare 'unlawful' acts that are 'invalid'. Section 172(1)(a) actually enjoins a court to declare 'invalid' any law or conduct that is inconsistent with the Constitution. An administrative action such as the one in *Bengwenyama* would be liable to be declared invalid if it is inconsistent with s 33 of the Constitution by being unlawful, unreasonable or procedurally unfair. Quinot and Maree correctly observe that, by its choice of language, *Bengwenyama* conflated the finding on whether a ground of review has been established, ie that an administrative act is unlawful, and the declaration of invalidity that a court makes following this finding.[43] Quinot and Maree aptly postulate that 'a finding of unlawfulness is conceptually something different from a declaration of invalidity'.[44] It is the unlawfulness of the act, ie its inconsistency with the Constitution, that makes it liable to be declared invalid and not vice versa.

According to Quinot and Maree, the distinction between the declaration of invalidity and the consequent remedy is the most significant aspect of *Bengwenyama.* The central thesis of their contribution is that this conceptualization of the discretion is unsatisfactory.[45] The core of their argument is that 'it is not axiomatic that the declaration of invalidity can mean anything but nullifying the administrative action'.[46] Quinot and Maree observe that s 172(1)(a) is couched in mandatory terms. In terms of this section, the court is obliged to declare unlawful acts invalid. If this declaration is understood within the doctrine of objective invalidity, it must necessarily nullify the affected administrative act.[47] The doctrine of objective invalidity is rooted in s 2 of the Constitution, which provides that the Constitution is the supreme law and that any act or law that is inconsistent with it is invalid to the extent of its inconsistency.

[42] *Millennium Waste* (note 16 above) para 22.
[43] Geo Quinot & PJH Maree 'The puzzle of pronouncing on the validity of administrative action on review' (2015) 7 *CCR* 27 33–4.
[44] Ibid 34.
[45] Ibid 32
[46] Ibid.
[47] Ibid.

Section 4(1) of the Interim Constitution, the predecessor to s 2 of the 1996 Constitution, was couched in similar terms. Section 98(6) of the Interim Constitution, like its successor, s 172(1)(a) of the Constitution, required the courts to declare invalid any law, act or conduct that was inconsistent with it. In *Ferreria v Levin NO,* the Constitutional Court ruled on the meaning and effect of ss 4(1) and 98(6) of the interim Constitution[48] in the course of considering the constitutionality of s 417(1) and (2) of the then Companies Act 61 of 1973. In this case, the Constitutional Court held that when a court declares an act or conduct invalid, it does not invalidate it, 'it merely declares it to be invalid'.[49] This means that an invalid act is invalid ab initio, and the declaration of invalidity merely confirms this. In *Fose v Minister of safety and Security*[50] Kriegler J, in his separate but concurring judgment, adopted the same interpretation of s 4(1) of the Interim Constitution as in *Ferreira.* He explained that this section made 'unconstitutional conduct a nullity even before courts have pronounced it to be so'.[51] Relying on *Ferreira,* Quinot and Maree question how a declaration of invalidity can mean anything other than the setting side of the impugned act.[52] In their view, '[t]o say that the declaration of invalidity does not in effect amount to the setting aside of the administrative action seems to fly in the face of the doctrine of objective invalidity, the approach adopted in relation to remedies in judicial review of legislation and, arguably, s 172(1) itself'.[53]

Quinot and Maree also criticize *Bengwenyama* for its failure to provide clarity on the constitutional source of the discretion not to set aside an invalid act.[54] Their observation that the Constitutional Court assumed the existence of this discretion instead of interrogating it cannot be gainsaid. This is demonstrated by the court's remark that 'the apparent rigour of declaring conduct in conflict with the Constitution and PAJA unlawful is ameliorated in both the Constitution and PAJA by providing for a just and equitable remedy in its wake'.[55] The court did not ponder upon the fatal impact of the declaration of invalidity in terms of s 171(1)(a) of the Constitution.

In *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency,* the Constitutional Court had another opportunity to interrogate

[48] *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC) ('*Ferreira*').
[49] Ibid para 27.
[50] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 94.
[51] Ibid.
[52] Quinot & Maree (note 43 above) 32.
[53] Ibid.
[54] Ibid 33.
[55] *Bengwenyama* (note 33 above) para 85.

the court's discretion to withhold remedy in a judicial review.[56] It expressly endorsed *Bengwenyama* together with its somewhat curious language.[57] The court applied the bifurcated approach to remedy. It declared invalid the award of the tender to distribute social grants but suspended this order until it could be apprised of the full implications of the order on those who depended on these grants.[58] Importantly, the court remarked that the distinction between invalidity and remedy is as a result of constitutional development and thus not an inheritance from the common law.[59]

According to Quinot and Maree, this observation is an indication that there may be differences between the discretion not to set aside envisaged in *Oudekraal* and the one the courts infer from s 172(1)(b) of the Constitution.[60] Quinot and Maree assert that *Oudekraal* reflects a correct statement of the common law, and not of s 172(1) of the Constitution.[61] Although the observation by the Constitutional Court is very instructive, it is not backed by any analysis of the conceptualization of the discretion and its location in s 172(1)(b).

In *Allpay II,* the judgment on remedy, the Constitutional Court embraced the *Allpay I* proposition that there is a distinction between constitutional invalidity and the consequent remedy.[62] Similar to *Bengwenyama, Allpay II* did not provide the much-needed conceptual clarity as to the source of the discretion. The court adopted the view that discretion in respect of remedy relates to the court's election of a just and equitable in any given circumstances and is not necessarily limited to a choice between setting aside or withholding this remedy.[63]

Bengwenyama and *Allpay II* represent the early emergence of consensus in the Constitutional Court on the meaning of the discretion to grant a just and equitable remedy following a declaration of invalidity. Despite this, the division of the court in *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* highlights certain conceptual disagreements within the apex court on whether the discretion exists.[64] This disagreement was illuminated by the division in the court as to whether it could pronounce upon the validity of

[56] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC) ('*Allpay I*') para 56.
[57] Ibid para 25.
[58] Ibid paras 93 and 96.
[59] Ibid para 26.
[60] Quinot & Maree (note 43 above) 36.
[61] Ibid 29.
[62] *Allpay II* (note 6 above) para 31.
[63] Ibid para 39.
[64] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* 2014 (3) SA 481 (CC) ('*Kirland*').

an administrative act where there was no formal application for review to have it set aside.[65] Quinot and Maree rightly point out that 'underlying this difference on procedure was a lack of clarity as to exactly what the question of the validity of an administrative action really means'.[66]

In *Kirland*, an acting HoD had unlawfully granted Kirland approval to establish a private hospital. The HoD discovered this and sought to withdraw the approval. Kirland launched proceedings to enforce the approval and challenge the withdrawal. At the centre of Kirland's case was the validity of the withdrawal. In response, the MEC for Health and the HoD challenged the validity of the approval that Kirland had obtained from the Acting HoD. It was not in dispute that the approval was legally flawed. The question was whether its validity was properly before the court.

Zondo J, in a dissenting judgment, held that there is no difference between declaring an unlawful act invalid in terms of s 172(1)(a) of the Constitution and setting it aside.[67] In his view, 'where a litigant has asked a court to set aside an administrative decision or where he or she has asked the court to find the administrative decision to be invalid and of no force or effect, the result would be the same whichever of the two the court adopted'.[68]

On the other hand, the majority judgment remained loyal to the distinction between the declaration of invalidity and remedy made in *Bengwenyama.* In the view of the majority, the decision on remedy requires the court to consider the impact of setting aside the impugned act.[69]

According to Quinot and Maree, the majority in *Kirland* makes two valuable contributions. First, it refers to administrative action that has been found to fall foul of s 33 of the Constitution and PAJA as unjust or irregular administrative action. In Quinot and Maree's view, the adoption of this terminology by the court 'avoids the confusion, at this stage of the inquiry, of using 'lawful', which refers to only one aspect of administrative justice, or "valid" and "invalid", which refers to the subsequent declaration'.[70] Secondly, the majority cautioned that there is no right to perfect administration.[71] According to Quinot and Maree, this may provide

[65] Ibid para 43.
[66] Quinot & Maree (note 43 above) 38.
[67] *Kirland* (note 64 above) para 129.
[68] Ibid.
[69] Ibid para 86.
[70] Quinot & Maree (note 43 above) 40.
[71] Ibid.

a basis to find a suitable conceptual framework for the court's discretion.[72] It opens up the possibility of enforcing an imperfect administrative act.

More recently, in *Corruption Watch NPC v President of the Republic of South Africa,* the Constitutional Court expressed itself more clearly than before on the court's discretion to withhold the remedy in judicial review.[73] The Constitutional Court affirmed the correctness of the two-staged and bifurcated approach to remedy in respect of an unlawful act that is not administrative action.[74]

In *Corruption Watch*, the court declared invalid Mr Mxolisi Nxasana's vacation of the office of NDPP but declined to reinstate him to his position because it was not in the public interest to do so.[75] It held that 'there is no preordained consequence that must flow from our declarations of constitutional invalidity'.[76] What is to follow is at the discretion of the court. According to Madlanga J, this may be gleaned from s 172(1)(b) of the Constitution which empowers a court to make *any* order that is just and equitable.[77] He held that the word 'any' in this section gives it a wide reach that is constrained only by justice and equity.[78] This discretion is so wide that where justice and equity dictate, the court can search for a remedy beyond what is provided for in the extant law.[79]

Despite the emphatic pronouncement in *Corruption Watch*[80] on the distinction between the declaration of invalidity and remedy, the Constitutional Court has not responded to the criticism by Quinot and Maree that, in its earlier decisions, it has failed to provide conceptual clarity on the location of the discretion in s 172(1) of the Constitution.[81]

Although without reference to Quinot and Maree, Freund and Price[82] respond to some of the criticism made in their contribution. They offer two arguments against the proposition that a declaration of invalidity in terms 172(1)(a) of the Constitution makes an impugned act a nullity.[83] First, they contend that the latter construction of s 172(1)(a) is undesirable and

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[72] Ibid.
[73] *Corruption Watch NPC v President of the Republic of South Africa* 2018 (2) SACR 442 (CC) ('*Corruption Watch*').
[74] Ibid para 68.
[75] Ibid para 85.
[76] Ibid para 68.
[77] Ibid.
[78] Ibid.
[79] Ibid para 72.
[80] Ibid para 68.
[81] Quinot & Maree (note 43 above) 33.
[82] Daniel Freund & Alistair Price 'On the legal effects of unlawful administrative action' (2017) 134 *SALJ* 184 at 200–202.
[83] Ibid 200–201.

unnecessary because it 'equates declarations of invalidity with setting-aside or quashing orders'.[84] According to Freund and Price, that would deprive the court of its ability to moderate the collision between legality and certainty.[85] This strand of their argument does not, however, answer the charge that identifying discretion in the face of the mandatory language of s 172(1)(a) is problematic.[86]

In their second argument, Freund and Price contend that s 172(1)(a) can be construed in a manner that preserves judicial discretion.[87] According to these authors, this may be achieved by equating invalidity with unlawfulness.[88] Freund and Price submit that , at least in the context of s 33 of the Constitution, a declaration of invalidity would be equal to a finding that a ground of review has been established, ie that the administrative act is unlawful. However, the language of s 172(1)(a) does not accommodate the construction advocated by Freund and Price. This provision impels the court to declare invalid any unlawful act. In the context of s 172(1)(a), the declaration of invalidity follows a finding that the impugned act is unlawful.

The point made by Quinot and Maree thus seems unanswerable. Importantly, these authors do not take issue with the need for or purpose of the discretion.[89] Their argument is that s 172(1)(b) does not *allow* for it.[90] Quinot and Maree proceed from the premise that the *Oudekraal* remarks on a reviewing court's discretion with regard to remedy are a common-law position.[91] Their view is supported by the fact that the administrative act in issue in *Oudekraal,* ie the approval that the Administrator of the Cape had granted to Oudekraal to develop its land into a township, predated both the Constitution and PAJA.[92] Furthermore, the SCA relied heavily on English law, a source of South African common law.[93] The contention by Quinot and Maree that a declaration of invalidity confirms that the impugned act is a nullity ab initio is consistent with the doctrine of objective invalidity[94] and the established authority of the Constitutional Court on the legal effect of an act that has been declared constitutionally invalid.[95]

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[84] Ibid 201.
[85] Ibid.
[86] Quinot & Maree (note 43 above) 32.
[87] Freund & Price (note 82 above) 201.
[88] Ibid.
[89] Quinot & Maree (note 43 above) 41.
[90] Ibid.
[91] Ibid 29.
[92] *Oudekraal* (note 1 above) para 2.
[93] Ibid paras 28–32.
[94] Ferreira (note 48 above) para 27.
[95] *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) paras 48–9.

Du Plessis and Coutsoudis opine that the distinction between the declaration of invalidity and remedy in *Allpay II* is a welcome innovation.[96] In their view, this approach allows the court to take into account 'the facts on the ground' in fashioning a just and equitable remedy.[97] These authors do not express a view as to whether this innovation has a firm conceptual foundation, which limits the relevance of their contribution to this discussion.

In their contribution, Du Plessis and Coutsodis also contend that *Allpay II* 'made it clear that declaratory relief, which has no practical consequence, is often hollow and fails to give proper effect to the requirements of s 172 of the Constitution'.[98] This contention assumes that the declaration of invalidity has no effect on the legal status of the impugned act. That would be contrary to the authority of the Constitutional Court in *Ferreira*.[99] It is also important to place the contribution by Du Plessis and Coutsodis in its proper context. Their work does not interrogate the court's powers in terms of s 172 of the Constitution but focuses on how *Allpay I* and *II* assist in curbing corruption in public procurement.[100]

Notably, an examination of the SCA cases reveals that it is only in *Sapela* that the SCA exercised discretion not to set aside an act it had found to be invalid.[101] This case is exceptional because the unlawfully awarded tender in issue had almost run its course and its remaining components could not be severed from the main contract.[102] Where the contract was found to be severable, the SCA insisted on the full effect of its declaration of invalidity.[103] In *Eskom Holdings,* the SCA held that the principle of legality requires that 'an invalid administrative act be set aside' and that a remedy that leaves an invalid act legally effective is an exception.[104] In *Millennium Waste,* the SCA declared an unlawful tender invalid but ameliorated the impact of this order by implicitly suspending it pending the outcome of adjudication of the tender anew.[105] In *Allpay I*[106] and *II,*[107] the Constitutional Court followed a similar approach. In these three cases, the SCA and the Constitutional Court took care not to undo the declaration of

[96] Max du Plessis & Andreas Coutsoudis 'Considering corruption through the *AllPay* lens: On the limits of judicial review, strengthening accountability, and the long arm of the law' (2016) 133 *SALJ* 755 at 766.
[97] Ibid.
[98] Ibid.
[99] *Ferreira* (note 48 above) para 27.
[100] Du Plessis & Coutsodis (note 96 above) 757.
[101] *Sapela* (note 21 above) para 29.
[102] *Eskom Holdings* (note 23 above) para 16.
[103] Ibid.
[104] Ibid para 9.
[105] *Millennium Waste* (note 16 above) paras 32 & 34.
[106] *Allpay I* (note 56 above) para 98.
[107] *Allpay II* (note 6 above) para 78.

invalidity through their jurisdiction to grant a just and equitable remedy in terms of s 172(1)(b) of the Constitution.

So, notwithstanding the valid criticism by Quinot and Maree, it is now settled law that in terms of s 172(1)(b) of the Constitution and s 8 of PAJA, the court has discretion as to the remedy that follows on a declaration of invalidity.[108] This discretion is wider than the discretion not to set aside envisaged in *Oudekraal.* It is the discretion to grant a just and equitable remedy which may include the remedy of setting aside. The court exercises this discretion according to the corrective principle.

5.2 THE CORRECTIVE PRINCIPLE

In *Allpay II,* the court explained the corrective principle thus: '[L]ogic, general legal principle, the Constitution and the binding authority of this Court point to a default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented'.[109] In the court's view, although this principle accords with the rule of law and principle of legality,[110] it also operates at different levels.[111] At one level, it must be applied to correct the wrong occasioned by the unlawful act.[112] At another level, particularly in the context of public procurement and social security matters, priority must be given to the public good.[113] In the court's view, the public good means that the public interest must not only be assessed in relation to the setting aside of an unlawful act but also in relation to the effect of the court order on future public procurement and social security.[114] This complements the court's need to protect the grant beneficiaries.

The court went on to hold that at a practical level, disputes of fact add another dimension to be considered.[115] This means that a remedy that is just and equitable may not lie in a simple choice between setting aside an unlawful act or not.[116] It may lie somewhere in between, depending on the assessment of the different aspects in the multifarious dimensions of a just and equitable remedy.[117] The Constitutional Court refused to formulate a list of factors that a court should take into account when it exercises its discretion not to set aside.[118] The court explained that

[108] *Corruption Watch* (note 73 above) para 68.
[109] *AllPay II* (note 6 above) para 30.
[110] Ibid.
[111] Ibid para 32.
[112] Ibid.
[113] Ibid.
[114] Ibid.
[115] Ibid para 39.
[116] Ibid.
[117] Ibid.
[118] Ibid para 34.

doing so was not feasible or even desirable because the application of the corrective principle is not uniform.[119] In order to address uncertainty that is inherent in the flexibility of the corrective principle, Freund and Price rightly suggest that principles ought to be developed to guide the exercise of the court's discretion to ensure that the outcome of judicial review is more predictable.[120]

In the factual context of *Allpay II,* the court suspended the declaration of invalidity of the award of the tender until a new award was made; ordered the agency to constitute a new, independent committee to run a fresh tender process to reconsider the award;[121] ordered that if no new award were made then the original contract must run its full five-year term;[122] and that if a new contract were awarded, the suspension of the order invalidating the original contract would come to an end.[123] In addition, the court imposed a supervisory interdict directing the agency and the Minister for Social Development to report to the court on progress in giving effect to the court order.[124] Significantly, the wide nature of s172(1)(b) of the Constitution enabled the court to vindicate the Constitution whilst at the same time balancing the interests of the social grant beneficiaries and those of the unsuccessful bidder. The eventual remedy avoided an all-or-nothing approach.[125]

Corruption Watch illustrates another dimension of the corrective principle. This is that, despite having declared invalid Nxasana's vacating the office of NDPP, the court declined to restore him to his post, the legal consequence that should ordinarily have followed.[126]

Nxasana was appointed NDPP after the short-lived tenure of Advocate Simelane, who in turn had succeeded Advocate Pikoli, who also did not finish his term.[127] Barely nine months into Nxasana's term as NDPP, the President desired Nxasana to vacate his office. The President initially tried to suspend Nxasana but abandoned the plan.[128] He eventually negotiated a settlement in terms of which Nxasana agreed to be paid a sum of R17 million to vacate the post of NDPP.[129] The facts suggest that the President desired Nxasana to vacate the office at

[119] Ibid.
[120] Freund & Price (note 82 above) 186.
[121] *Allpay II* (note 6 above) para 78; see also Freund & Price (note 82 above) 196 for a summary of the remedy in *Allpay II*.
[122] *Allpay II* (note 6 above) para 78.
[123] Ibid.
[124] Ibid.
[125] Freund & Price (note 82 above) 195.
[126] *Corruption Watch* (note 73 above) para 85.
[127] Ibid paras 6–7.
[128] Ibid para 8.
[129] Ibid para 11.

all costs.[130] Because the settlement came about in a manner that was 'inconsonant with the constitutionally required independence of the office of the NDPP, the Constitutional Court held that the settlement was unconstitutional.[131]

When it came to the decision on a just and equitable remedy, the court affirmed that the exercise of its discretion is guided by the paramountcy of the vindication of the rule of law.[132] The court held that the default position in the corrective principle is that an invalid act ought to be set aside.[133] In *Corruption Watch,* the default position required in respect of the remedy was that with his vacation of office having been declared invalid, Nxasana was entitled to return to his position.[134] However, the court held that s 172(1)(b) of the Constitution is expansive enough to allow it to depart from this position so as to deliver justice and equity.[135] In this case, court declined to return Nxasana to his position in order to vindicate the integrity of the office of the NDPP.[136] The court emphasized the need to promote the stability of the National Prosecuting Authority which had experienced a tumultuous period.[137] While the court sympathized with Nxasana, it was critical of his conduct.[138] He had agreed to be bought out of his tenure as NDPP, a quality that was inimical to the incumbent of the office of NDPP.[139]

Having established that the default position in terms of the corrective principle is to set aside an invalid act, why is the court's discretion on remedy necessary? In *Seale v Van Rooyen,* the SCA observed that the declaration of invalidity has drastic implications in that all acts performed on the strength of the invalid act lose their legal effect retrospectively.[140] In this case the appeal court examined the meaning and effect of the declaration of invalidity in the context of a refusal by the Registrar of Deeds to cancel a certain notarial servitude on the strength of a judgment that had declared the basis of the registration invalid. In a separate case, *Bullock NO v Provincial Government, North West Province,* the High Court had set aside the decision of the Premier of the North-West Province to register a notarial deed of servitude in favour of Seale over certain land.[141] Unbeknown to it, this servitude had already been registered. When

[130] Ibid paras 25–8.
[131] Ibid para 29.
[132] Ibid para 69.
[133] *Allpay II* (note 6 above) paras 29–30.
[134] *Corruption Watch* (note 73 above) paras 69–70.
[135] Ibid para 75.
[136] Ibid para 84.
[137] Ibid para 87.
[138] Ibid paras 78, 85 and 87,
[139] Ibid para 85.
[140] *Seale v Van Rooyen* 2008 (4) SA 43 (SCA) ('Seale') para 13.
[141] *Bullock NO v Provincial Government, North West Province* 2004 (5) SA 262 (SCA) ('*Bullock*').

the Registrar of Deeds was approached to cancel the registration on the strength of this judgment, he refused. This prompted the respondents (the applicants in that case) to institute fresh proceedings to have the registration cancelled, and they were successful. Seale appealed.

Relying on *Oudekraal,* the SCA observed that because the validity of the second act (the registration of the deed) required no more than the factual existence of the first act (the Premier's decision), once the first act was set aside, the basis for validity of the second ceased to exist.[142] According to the court, 'it is precisely because of this consequence that a court asked to review the first act and set it aside has, and must have, a discretion whether or not to do so'.[143] In the view of the SCA, the effect of the High Court order setting aside the decision of the Premier is that anything that was done consequent upon or giving effect to it was of no force or effect.[144]

In *Millennium Waste,* the SCA made a similar observation on the legal effect of declaring an unlawful tender invalid and setting it aside.[145] In this case, court declared invalid a decision by the provincial tender board to award a tender for the collection and disposal of medical waste from public hospitals in Limpopo. Although the court treated the declaration of invalidity as distinct from setting aside an unlawful act, its remarks on the impact of setting aside equally apply to a declaration of invalidity when understood from the context of the doctrine of objective invalidity. The SCA observed that to 'set aside the decision to accept the tender, with the effect that the contract is rendered void from the outset, can have catastrophic consequences for an innocent tenderer, and adverse consequences for the public at large in whose interests the administrative body or official purported to act'.[146]

In her analysis of *Jaftha v Schoeman,*[147] Saller illustrates how the doctrine of objective invalidity may lead to an injustice when a person has relied on the unlawful administrative act that is eventually declared invalid.[148] In *Jaftha,* the Constitutional Court declared invalid the court rules that allowed sale in execution of immovable property without a further court sanction. Because of the retrospective nature of the declaration of invalidity, Saller opines that

[142] *Seale* (note 140 above) para 13.
[143] Ibid.
[144] Ibid.
[145] *Millennium Waste* (note 16 above) para 23.
[146] Ibid para 23
[147] *Jaftha v Schoeman* 2005 (1) BCLR 78 (CC) ('*Jaftha*').
[148] Karla Saller 'When worlds collide: Implications of the Constitutional Court's decision in *Jaftha v Schoeman* when viewed through the lens of the second actor theory accepted in *Oudekraal Estates (Pty) Ltd v City of Cape Town'* (2005) 122 *SALJ* 725.

a good-faith buyer of the property sold in execution finds himself in an unenviable position.[149] This buyer would have paid the purchase price into court but the Sheriff would not be able to pass the ownership to him or her because the sale is invalid.[150] Furthermore, the good faith-buyer would not be able to evict the erstwhile owner from the property because he or she would not be able to satisfy the requirement of unlawfulness in terms of Prevention of Illegal Evictions and Unlawful of Occupation of Land Act 19 of 1998.[151] The prevention or minimization of injustice is at the core of the court's discretion to withhold the remedy.

The declaration of invalidity may also adversely impact on public interest. For example, in *Corruption Watch,* if the enquiry ended with the declaration of the Nxasana's removal as invalid, it would have meant him returning to his position despite it not being in the public interest.[152]

The drastic impact of the declaration of invalidity is moderated by the second pillar of the corrective principle. This pillar refers to the power of the court in terms of ss 38 and 172(1)(b) of the Constitution to grant appropriate, just and equitable remedy to a person whose rights have been infringed. A remedy is appropriate if it protects the Constitution, vindicates the right involved, and deters future infringement.[153] In the context of administrative law, the second pillar of the corrective principle includes the remedies enumerated in s 8 of the PAJA, the statute enacted in terms of s 33(3) of the Constitution.

Moseneke DCJ set the tone for the corrective principle in *Steenkamp NO v Provincial Tender Board, Eastern Cape.*[154] In this case, the liquidator of the successful bidder of a tender that had been set aside sued the tender board for constitutional damages. As a result of the order setting aside the tender,[155] the company battled to remain in business and was liquidated. The liquidator sought damages from the tender board on the basis that the latter owed the company in liquidation a duty to follow due process in awarding the tender. The High Court dismissed Steenkamp's claim,[156] as did the SCA.[157] He approached the Constitutional Court for relief.

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[149] Ibid 735–8.
[150] Ibid.
[151] Ibid 737.
[152] *Corruption Watch* (note 73 above) paras 70–71.
[153] *Fose* (note 50 above) para 96.
[154] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) ('*Steenkamp*').
[155] *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province* 1999 (1) SA 324 (Ck).
[156] *Eastern Cape Provincial Administration and the Provincial Tender Board, Eastern Cape v Jurgens Johannes Steenkamp NO*, BHC case No 148/2000, 16 August 2001.
[157] *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA).

At the Constitutional Court, Moseneke DCJ identified the correction or reversal of an improper administrative function as one of the purposes of a public-law remedy.[158] He emphasized that 'the purpose of a public-law remedy is to afford the prejudiced party administrative justice, advance efficient and effective public administration and, at a broader level, to entrench the rule of law'.[159] He also remarked that an appropriate remedy for a constitutional breach must fit the injury, be fair to those affected by it and yet effectively vindicate the right violated.[160] It must be just and equitable in the light of the facts, the implicated constitutional principles, if any, and the controlling law.[161] The need to set aside an invalid act is implicit in the court's remarks that in fashioning an appropriate remedy, it must vindicate the implicated right and entrench the rule of law.

Although *Steenkamp* dealt with a claim for constitutional damages, the remarks by Moseneke DCJ set the tone for how later courts were to deal with the remedy of setting aside unlawful administrative acts.[162] For instance, in *Eskom Holdings Ltd,*[163] relying on *Steenkamp*, the SCA set aside an unlawfully awarded tender. In this case, Eskom awarded a tender for collection and disposal of non-ferrous scrap metal to Kwanda. The tender required bidders to demonstrate sound financial health. Kwanda submitted financial information of its parent company, and Eskom assessed Kwanda on this basis. An unsuccessful tenderer, New Reclamation Group (Pty) Ltd (NRG), queried this and brought an application in the High Court to have the award of the tender reviewed and set aside. The High Court upheld this application.[164] Eskom appealed.

On appeal, the SCA found that the financial ability of a tenderer to perform the contract was a prime consideration in the award of the tender and that an award based on the financial ability of a third party was illogical unless there was some obligation on the third party to provide the necessary financial assistance to the tenderer.[165] In its consideration of remedy, the court ruled that the principle of legality requires that an invalid administrative decision be set aside.[166] It also held that a court would only depart from this position if justice and equity require certainty

[158] Ibid para 29.
[159] Ibid.
[160] Ibid.
[161] Ibid.
[162] *Eskom Holdings Ltd* (note 23 above) para 18; *Bengwenyama* (note 33 above) para 83; *Allpay II* (note 6 above).
[163] *Eskom Holdings* (note 23 above) para 18.
[164] *New Reclamation Group (Pty) Limited v Eskom Holdings Ltd* (07/27391) [2008] ZAGPHC 138 (14 May 2008) ('*Eskom Holdings HC*').
[165] *Eskom Holdings* (note 23 above) para 6.
[166] Ibid para 9.

to prevail over legality.[167] In the specific factual context of Eskom Holdings, the court found no public policy considerations which militated against setting aside the award of the tender.[168] On the contrary, it found that an order short of setting aside the tender would not serve the purposes of a public-law remedy outlined in *Steenkamp.*[169] In light of this, the SCA upheld the High Court's decision.[170] *Eskom Holdings* is the first clear expression by the SCA that the corrective principle starts from the premise that an invalid act ought to be set aside, and only if setting aside would result in injustice or an inequitable outcome should a court exercise its discretion to withhold this remedy.

In *Bengwenyama,* the Constitutional Court followed *Eskom Holdings*.[171] It held that a departure from the logical consequences of a declaration of invalidity is an exception and not the norm.[172] It would arise only to address the prejudice that may be suffered by third parties who had relied on the invalid act. Even in this instance, the 'desirability of certainty' needs to be justified against the fundamental importance of the principle of legality.[173] The court emphasized that 'the rule of law must never be relinquished'.[174] The deviation from the full effect of invalidity must be justified by the circumstances of each case.[175] In *Bengwenyama,* the Constitutional Court found no circumstances which required mitigation of the consequences of invalidity.[176] It declared invalid the granting of the prospecting rights by the department to Genorah and set it aside.[177]

Steenkamp, Eskom Holdings and *Bengwenyama* are authority for the proposition that a court faced with an unlawful act has a choice, to declare it invalid and set it aside or, on the basis of justice and equity, to leave it intact despite its invalidity. In other words, these cases suggest that the corrective principle operates only at two levels, to vindicate legality or preserve certainty where justice and equity so demand.

In *Allpay II,* although the Constitutional Court acknowledged the authority of *Steenkamp* on the just and equitable remedy,[178] it clarified that the corrective principle operates at multiple

[167] Ibid.
[168] Ibid para 17.
[169] Ibid para 18.
[170] Ibid para 19.
[171] *Bengwenyama* (note 33 above) para 84.
[172] Ibid.
[173] Ibid.
[174] Ibid para 85.
[175] Ibid.
[176] Ibid paras 86–8.
[177] Ibid.
[178] *Allpay II* (note 6 above) para 29; see also *Steenkamp* (note 154 above) para 29.

levels.[179] It is not restricted to setting aside or leaving an invalid act to stand. *Allpay II* was a sequel to *Allpay I.* In *Allpay I,* the Constitutional Court declared invalid the award of a contract by the South African Social Security Agency to CPS to pay social grants to millions of beneficiaries. However, it postponed the consideration of the remedy to allow the parties to furnish it with up-to-date information regarding the impact that declaration of invalidity would have on social grant beneficiaries.[180] The court described social grant beneficiaries as 'vulnerable people living at the margins of affluence of our society'.[181]

In *Allpay II,* the court was alive to the fact that the invalidity of the award of the tender may have freed Cash Paymaster from an obligation to continue with the payment of social grants before a new tender was awarded.[182] In order to ensure that Cash Paymaster continued be bound, the court extended the suspension of the declaration of invalidity.[183] The court observed that Cash Paymaster, as the successful bidder, should not suffer loss as a result of the tender being declared invalid.[184] However, the court also ruled that it was not entitled to profit from the invalid tender.[185]

In summary, in line with the corrective principle, the court assessed all the surrounding circumstances including the interests of social grant beneficiaries in the uninterrupted payment of grants,[186] the potential loss to the successful bidder,[187] the costs of rerunning the tender process, and the principle of legality.[188] This led the court to suspend the declaration of invalidity pending the award of a new tender and to order that, if the new tender were not awarded within the time-frames set by the court, the declaration of invalidity be further suspended until the old contract ran its course subject to the court's supervision.[189] It may be extrapolated from *Allpay II* that the corrective principle is a mechanism employed by the courts to resolve the tension between certainty and legality. In its application, the starting point is that legality prevails over certainty. As Freund and Price put it, 'the law must rule after all'.[190] When

[179] *Allpay II* (note 6 above) para 32.
[180] *Allpay I* (note 56 above) para 96.
[181] Ibid para 1.
[182] *Allpay II* (note 6 above) para 61.
[183] Ibid para 63.
[184] Ibid para 67.
[185] Ibid.
[186] Ibid paras 38 and 40.
[187] Ibid para 67.
[188] Ibid para 39.
[189] Ibid para 78.
[190] Freund and Price (note 82 above) above 204–6.

the court departs from the logical consequences of a declaration of invalidity, the unlawful act retains its legal effect.[191]

5.3. FACTORS THAT HAVE PERSUADED THE COURTS NOT TO SET ASIDE AN UNLAWFUL ACT

Although the courts have shied away from prescribing a closed list of factors or laying down a formula to determine when they would exercise their discretion not to set aside an unlawful administrative act,[192] it is possible to identify factors that have been relied on in practice in refusing the remedy.[193] The following factors are some of the most prominent.

5.3.1 Considerations of pragmatism and practicality

In *Sapela,* the SCA declined to set aside an unlawful act despite good grounds for doing so having been established because, in the circumstances before it, it was not a pragmatic and practical remedy.[194] In this case*,* two unsuccessful tenderers brought an application to review and set aside the award of tenders to repair and maintain certain buildings on behalf of the Department of Public Works. Their complaint was that the successful bidder had an unfair advantage because it was privy to inside information and been allowed to revise its bid unlawfully.[195] The High Court granted the application. The department appealed.

However, by the time the SCA delivered its judgment, the repair work had been completed and a substantial part of the maintenance period had also expired.[196] The appeal court found that the repair work and maintenance components of the contracts were interrelated and intertwined.[197] Particularly, the maintenance component could not be severed from repair work because maintenance depended on the quality of the repair work. Furthermore, the guarantee the successful bidder provided in terms of the contract covered all equipment and parts supplied and installed and formed a substantial part of the maintenance component. In light of this, the court accepted that it would be impractical to attempt to start the tender process anew.[198] The court also held that setting aside the award of the tender, despite its unlawfulness, would not only be disruptive but would lead to problems in relation to the new tender and the work to be performed.[199] For instance, starting a tender process anew would have entailed interrupting

[191] Ibid 194.
[192] *Bengwenyama* (note 33 above) para 85; see also *Allpay II* (note 6 above) para 34.
[193] Freund and Price (note 82 above) above 193–6.
[194] *Sapela* (note 21 above) para 28.
[195] Ibid paras 5–10 and 16–18.
[196] Ibid para 24.
[197] Ibid para 27.
[198] Ibid para 27.
[199] Ibid.

maintenance when the contractual period for it was about to expire and attempt to separate it from the repair work, an exercise which was admittedly complex. As a result, on the basis of pragmatism and finality, the SCA declined to set aside the unlawful award of the tenders.[200]

Sapela has been held to be an exceptional case because of the difficulty of restarting the tender.[201] In *Eskom Holdings,* the SCA distinguished *Sapela*[202] because the tender before it involved *ad hoc* separate disposal agreements concluded in respect of each instruction to collect scrap metal.[203] Although the severability of a contract resulting from an unlawful tender is an important consideration (as shown in *Sapela* and *Eskom*), it is not a decisive factor.[204]

5.3.2 Disruption of an important public service

In *Millennium Waste,* the SCA declined to set aside the unlawful award of a tender because that would have disrupted the collection of medical waste.[205] Millennium Waste approached the High Court to set aside the award of the tender for two reasons. First, the Department of Health and Social Development in Limpopo Province had disqualified the appellant on a technicality, that it had not signed a declaration.[206] Secondly, the successful bidder did not satisfy the technical requirements of the tender.[207] The High Court dismissed this application. Millennium Waste appealed.

The SCA upheld the appeal.[208] The SCA observed that the difficulty with invalid administrative acts, particularly tenders, is that 'they often would have been acted upon by the time they are challenged on review'.[209] Thus, in the court's view, a retrospective order setting aside the decision to accept a tender could have detrimental effect on the innocent successful bidder and the public.[210] In the circumstances, a just and equitable remedy requires a careful balancing of the interests of the successful bidder, the aggrieved unsuccessful bidder and the public.[211]

[200] Freund and Price (note 82 above) 194–5.
[201] *Eskom Holdings* (note 23 above) paras 16–17.
[202] *Sapela* (note 21 above) para 24.
[203] Ibid para 16.
[204] *Millennium Waste* (note 16 above) para 23; see also *Moseme* (note 24 above) para 18.
[205] *Millennium Waste* (note 16 above) para 31.
[206] Ibid para 11.
[207] Ibid para 8.
[208] Ibid para 21.
[209] Ibid para 23.
[210] Ibid.
[211] Ibid.

The appeal court identified four interests that it had to take into account: (1) the interests of an unsuccessful bidder, (2) those of the successful tender, (3) public interest in the non-disruption of the removal and disposal of medical waste, and (4) the impact on the public purse.[212]

In respect of the public interest involved, the court held that the removal and disposal of medical waste had to be carried out without interruption.[213] Therefore, it was important to the court that the tender covered the removal and disposal of medical waste from all 44 hospitals in Limpopo and that the provincial government had no capacity to step in if the tender were to be terminated.[214] In light of this, the court ruled that it could not 'make an order that creates uncertainty – with no promise of gain but instead the potential for loss and chaotic disruption – when that could be avoided'.[215] Consequently, the court declared the award of the tender invalid, ordered that the tenders be re-evaluated and that the award of the tender be set aside only if the appellant's tender is accepted after the re-evaluation.[216]

In *Joubert Galpin v Road Accident Fund*,[217] the High Court adopted an approach that is consistent with *Millennium Waste*. In this case, the Road Accident Fund, a statutory body established to administer the compensation of road-accident victims, called for tenders from attorneys' firms to be placed on its panel.[218] The tender document required tenders to be open for acceptance for 90 days.[219] This period lapsed before the fund could complete the assessment and adjudication of the tenders received.[220] The fund notified the bidders that it intended to request them to amend their bids to extend the period of acceptance and invited their comments.[221] In response, the applicant questioned the legality of the fund's intended action.[222] It urged that the tender be cancelled.

After consideration of all comments and legal advice, the fund decided to go ahead.[223] The applicant duly amended its bid and extended the period within which its bid could be accepted. The fund adjudicated the tenders. The applicant was unsuccessful.[224] The applicant applied for

[212] Ibid paras 24–30.
[213] Ibid para 28.
[214] Ibid.
[215] Ibid para 31.
[216] Ibid para 32.
[217] *Joubert Galpin Searle Inc v Road Accident Fund* 2014 (4) SA 148 (ECP) ('*Joubert* Galpin').
[218] Ibid para 10.
[219] Ibid para 11.
[220] Ibid.
[221] Ibid paras 21–5.
[222] Ibid para 28.
[223] Ibid para 32.
[224] Ibid.

urgent interdict to halt the implementation of the fund's decision pending the final determination of its application to have it reviewed and set aside.

At the High Court, Plasket J ruled that the expiry of the validity period completed the tender process.[225] It was incapable of being revived.[226] On this basis, he concluded that the purported extension by the fund was invalid. Plasket J observed that in *Bengwenyama* the Constitutional Court made it clear that 'even though the courts retain discretion to refuse a remedy when unlawfulness is proved, the default position is that the principle of legality must be upheld and vindicated unless there are compelling reasons to override it'.[227]

In the specific circumstances of this case, the court found that there were compelling reasons for it to depart from the default position, as setting aside the award of the tender would have profoundly adverse effects on all of the parties.[228] The fund would have no panel of attorneys to do its litigation work. The new panellists would no longer be panellists. The old panellists would also not be panellists because their contracts would have been terminated. According to Plasket J, this would manifest itself in the courts.[229] On the one hand, plaintiffs could take default judgments against the fund if it were not represented. On the other, cases would be postponed indefinitely, frustrating the rights of plaintiffs with good prospects of success. Plasket J held that this potential for chaos was not in the public interest.[230] In order to avoid it, he declared the award invalid but suspended the operation of the order of invalidity for eight months to allow the fund to start the tender process anew and complete it.[231]

Because litigation over road accident claims is part of the fund's mandate, an order setting aside the tender would have rendered the fund unable to defend itself in the courts and result in a major disruption in the discharge of its statutory mandate. By exercising its discretion to suspend the operation of the order of invalidity,[232] the High Court approached remedy in a manner consistent with the authority of *Millennium Waste*.[233]

In *Allpay II,*[234]*,* although the Constitutional Court did not decide whether setting aside of the tender would have resulted in a disruption in the payment of social grants, the exercise of its

[225] Ibid para 70.
[226] Ibid para 74.
[227] Ibid para 97 with reference to *Bengwenyama* (note 33 above) para 85.
[228] *Joubert Galpin* (note 217 above) para 104.
[229] Ibid.
[230] Ibid.
[231] Ibid para 106.
[232] Ibid para 104.
[233] *Millennium Waste* (note 16 above) para 31.
[234] *Allpay II* (note 6 above) para 78.

decision avoided any potential for disruption.[235] The Constitutional Court's stance in this case is partly explained by the need to vindicate the constitutional rights of vulnerable persons, especially children.[236] In *Allpay II,* the South African Social Security Agency and the Centre for Child Law, an amicus curiae, latched on this sentiment and urged the apex court to balance the public interest in a procedurally correct process with a competing public interest in the uninterrupted payment of social grants to those in need.[237] According to the Centre for Child Law, greater scrutiny was required where the invalidity of the tender stood to prejudice children.[238]

The likelihood of disruption was disputed.[239] The court could not resolve the dispute. When the court fashioned a remedy, it resorted to the multi-dimensional nature of the corrective principle.[240] The court held that where the impugned administrative act involves public procurement, the emphasis should be on the public good.[241] In this case, this meant that the consequences of invalidity of the award of the tender had to be assessed in relation to its impact on future procurement and right of access to social assistance.[242] The court emphasized that 'the primacy of public interest in public procurement and social-security matters must also be taken into account when the rights, responsibilities and obligations of all affected persons are assessed'.[243] It was in light of this, the importance of social security and its impact on a large number of beneficiaries, that the court imposed a structural interdict in addition to the suspension of the order of invalidity and an order that the tender process be run afresh.[244] What may be gleaned from *Allpay II* is that even where a case for disruption has not been made but the potential for it exists, a court is likely to exercise its discretion not to set aside the invalid act in question.

Millennium Waste[245] and *Allpay II* suggest that the public interest in an uninterrupted public service takes precedence over the public interest in a procedurally correct process.[246] In *Millennium Waste,* it is not inconceivable that a failure to collect and dispose of medical waste

[235] Ibid para 38.
[236] *Allpay I* (note 56 above) para 4.
[237] *Allpay II* (note 6 above) paras 16, 26–7 and 36.
[238] Ibid para 36.
[239] Ibid para 38.
[240] Ibid.
[241] Ibid para 32.
[242] Ibid.
[243] Ibid para 33.
[244] Ibid para 71.
[245] *Millennium Waste* (note 16 above) para 28.
[246] Ibid para 71.

would have resulted in health hazards and threatened the environment. Similarly, in *Allpay II,* setting aside the tender would have left the grant beneficiaries, persons who had demonstrated that they were unable to support themselves, without any means of subsistence.

In their convincing analysis, Freund and Price aptly opine that 'the judgments in *JFE Sapela Electronics*, *Millennium Waste* and *AllPay 2* demonstrate the necessity and difficulty of managing the fundamental tension between legal constraint and certainty as sometimes competing aspects of the rule of law'.[247] According to these authors, 'although, in general, legal constraint ought to prevail at this point, in limited circumstances justice and equity may lie elsewhere'.[248]

5.3.3 Adverse impact on the public purse

In *Millennium Waste,* the SCA considered the potential adverse impact on the public purse as a relevant factor in the determination of an appropriate remedy.[249] In this case, at first glance, the price differential between the two tenders was enormous: the consortium charged a fee of R3 642 257 per month while the appellant proposed a monthly fee of R444 244.[250] In the court's view, if the appellant were indeed able to provide the service at the price that it had offered then the completion of the contract by the consortium would clearly be at an enormously unwarranted cost to the public purse that could be avoided by setting the award aside.[251] However, there was no conclusive evidence on this before it.[252] The court also observed that loss to the fiscus would occur if after the re-evaluation, the appellant's tender were found to be acceptable but the decision to accept the consortium's tender were not set aside.[253] However, if the appellant's tender was not accepted after the re-evaluation and the decision to appoint the consortium were set aside, nothing would be gained. Only loss and disruption could occur.[254] In the end, the court had to design a remedy that avoided the potential loss to the public purse but also any disruption to the collection and disposal of medical waste. The important observation to be made from *Millennium Waste* is that potential adverse impact on

[247] Freund and Price (note 82 above) 195–6.
[248] Ibid.
[249] *Millennium Waste* (note 16 above) para 29.
[250] Ibid.
[251] Ibid para 30.
[252] Ibid para 31.
[253] Ibid para 31.
[254] Ibid.

the public purse is a consideration in the exercise of the discretion not to set aside an invalid act.

In *Eskom Holdings,* the SCA again considered the potential loss to the fiscus when it considered whether it should set aside the invalid tender.[255] The successful bidder had tendered the highest amount for the scrap metal. The potential loss to the public purse from setting aside this tender was in respect of a tender offer which Eskom stood to forfeit. The appeal court held that any potential loss in this case was offset by the successful bidder's inability to prove that it had the wherewithal to discharge its obligations in terms of the contract.[256] This meant that the fiscus did not stand to suffer any loss. Partly, this was the reason why the SCA did not exercise its discretion to depart from the default remedy of setting aside the invalid tender.

In *Allpay II,* the Constitutional Court also assessed the impact on the public purse of the invalidity of the impugned administrative act.[257] The court acknowledged that a rerun of the tender for social grant payment would come at a cost of between R5 and R10 million to the government. However, it held that in light of the sums of money involved, the potential for a cost-effective solution, transparency, accountability and the maintenance of the rule of law, the expenditure involved in rerunning the tender process was justified.[258]

In summary, in the exercise of their discretion on remedy, courts take into account the potential adverse impact on the fiscus.[259] The default position is to avoid any adverse impact on the public purse.[260] Subject to other prevailing factors, where there is no such impact , the court is likely to set aside the invalid act.[261] Where an appropriate, just and equitable remedy includes incurring public expense to rerun the administrative process, the court's decision will depend on whether such remedy is justifiable in light of the redress required and the need to vindicate the rule of law.[262]

5.3.4. The interests of all affected parties

In *Millennium Waste,* the Supreme Court of Appeal ruled that it is impermissible for the court to confine itself to the interests of one party.[263] In the context of public procurement, the court

[255] *Eskom Holdings* (note 23 above).
[256] Ibid para 17.
[257] *Allpay II* (note 6 above) para 40.
[258] Ibid.
[259] Ibid para 29.
[260] Ibid para 29.
[261] *Eskom Holdings* (note 23 above) para 17.
[262] *Allpay II* (note 6 above) para 23.
[263] *Millennium Waste* (note 16 above) para 22.

observed that setting aside an unlawful tender may have disastrous consequences for the public and the innocent tenderer.[264] The innocent tenderer may have incurred costs in the discharge of its contractual obligations, and the public interest may be threatened by a disruption in the delivery of public service.[265]

The appeal court found that insofar as the unsuccessful bidder was concerned, its loss was no more than the loss of the opportunity to have its tender considered.[266] Even if its tender ought to have been accepted at the outset, the court ruled that its loss related mainly to the profit it would have realised on the contract.[267] This loss had to be considered against other prevailing interests, including the interests of the successful bidder.

The SCA also had regard to the fact that as a result of the award of the tender to it, the successful bidder had purchased 11 vehicles and other equipment at a cost of about R3,5 million, hired 35 employees and leased premises.[268] The court also noted that the successful bidder's return for providing the service took the form of a monthly fee over a period of five years structured to recover its capital, running costs and a profit.[269] The appeal court found it relevant to the exercise of its discretion that it was not clear whether, or to what extent, the capital costs would be recovered if the contract were terminated midway through its term.[270]

In *Millennium Waste,* having weighed the competing interests, the court fashioned a remedy that gave an opportunity to the unsuccessful bidder to have its tender evaluated (an order that the tender be run afresh), the successful bidder to recover a reasonable return on its investment, and avoid disruption to the collection and disposal of medical waste (suspension of the order of invalidity until adjudication of a new tender).[271]

In *Allpay II,* the Constitutional Court followed *Millennium Waste* in its characterization of the interests of an unsuccessful bidder, ie that its interest is to have its tender properly considered.[272] Unlike in *Millennium Waste*, where the SCA alluded to a possibility of the unsuccessful bidder's loss including loss of profits,[273] in *Allpay II* the Constitutional Court held

[264] Ibid para 23.
[265] Ibid.
[266] Ibid para 25.
[267] Ibid.
[268] Ibid para 27.
[269] Ibid.
[270] Ibid.
[271] Ibid para 32.
[272] *Allpay II* (note 6 above) para 72.
[273] *Millennium Waste* (note 16 above) para 25.

that if the unsuccessful bidder is entitled to further relief, it must institute separate proceedings.[274]

In relation to the interests of the successful bidder, in *Allpay II,* the court held that the latter ought not suffer loss as a result of the invalidity of the tender.[275] The successful bidder, Cash Paymaster Services, estimated that it would suffer loss in excess of R40 million if the unlawful contract were to be terminated before the end of its term.[276] The court held that the successful bidder had no right to profit from the invalid tender.[277] Because Cash Paymaster Services stood to profit from the unlawful contract, the court ordered that it must publicly account for income generated from the unlawful contract.[278]

The importance of *Allpay II*[279] is that it goes further than *Millennium Waste:*[280] it forbids the successful bidder from profiting from the invalid contract. It may be extrapolated from *Millennium Waste*[281] and *Allpay II,*[282] or argued by parity of reasoning, that generally the beneficiary of an unlawful act that is not a tender is also exempted from any loss occasioned by the invalidity of the unlawful act but may not profit from it.

The effect of an unlawful administrative act extends beyond the public body and those who are subject to it. For instance, in *Allpay I,* the Constitutional Court ruled that in the context of public procurement, the resultant contract is concluded not on behalf of the public body but of the public.[283] The court ruled that in the context of a tender relating to the payment of social grants, the interests of the unsuccessful bidder had to be assessed against the interest of the grant beneficiaries, particularly child-support grant beneficiaries, in the uninterrupted payment of grants.[284] In *Allpay II,* the Constitutional Court reiterated this position and held that the public interest in the payment of social grants is pre-eminent to the rights of all other affected parties.[285]

In summary, a court exercising its discretion not to set aside an invalid act will weigh the interests of all affected parties in reaching its decision. In the context of an unlawfully awarded

[274] Ibid para 72.
[275] Ibid para 67.
[276] Ibid para 19.
[277] Ibid.
[278] Ibid paras 67 and 70.
[279] *Allpay II* (note 6 above) paras 67 and 70.
[280] *Millennium Waste* (note 16 above) para 27.
[281] Ibid.
[282] *Allpay II* (note 6 above) paras 67 and 70.
[283] *Allpay I* (note 56 above) para 56.
[284] Ibid.
[285] *Allpay II* (note 6 above) paras 32–3 and 71.

tender, the interests of an unsuccessful bidder are confined to an opportunity to have its bid considered properly.[286] At a broader level, this means that a person aggrieved by an unlawful administrative act is entitled only to relief of a procedural nature. The interests of a successful bidder are relevant only to the extent that the latter is exempted from any loss that may be occasioned by invalidity.[287] However, the successful bidder is not allowed to profit from the invalidity.[288] This recognizes that the beneficiary of an administrative act may have altered its legal position to its detriment as a result of the invalid act. Where a tender relates to the payment of social grants, the public interest in the efficient payment of these grants is paramount.[289] It outweighs all other affected interests.

5.3.5 Complicity of the beneficiary in the unlawfulness of an administrative act

In *Allpay II,* the court took into account the fact that the successful bidder was not complicit in the irregularities that beleaguered the tender process.[290] A court is likely to take an adverse view of a successful bidder if it is complicit in the unlawfulness of the impugned act.[291] For instance, in *Eskom Holdings,* the success of a bidder hinged on its financial ability to carry out the resultant contract. All bidders had to submit their financial statements to prove this capability. The successful bidder submitted the financial statements of its parent company. No other instrument was submitted to show that the parent company was in some way bound to assist the successful bidder financially. The court declined to come to the aid of the successful bidder because it had itself to blame for the submission of incorrect information in its response to the tender.[292]

In *Bengwenyama,* the Constitutional Court took a similar view albeit in a different context.[293] In this case, the respondents were holders of unlawfully awarded prospecting rights over certain land. One of the arguments they advanced in an attempt to persuade the court that it should not set aside the unlawful prospecting rights was that the public interest demanded finality. The respondents had failed to consult the affected community. The court held that finality had to yield to the principle of legality.[294] It reasoned that the respondents knew of the community's

[286] *Millennium Waste* (note 16 above) para 27; *Allpay II* (note 6 above) paras 67 and 70.
[287] *Allpay II* (note 6 above) para 67.
[288] Ibid.
[289] *Allpay II* (note 6 above) paras 32–3 and 71.
[290] Ibid para 26.
[291] *Eskom Holdings* (note 23 above) para 14.
[292] Ibid.
[293] *Bengwenyama* (note 33 above) para 87.
[294] Ibid.

interest in prospecting the land and were cognisant of their statutory obligation to consult the community but decided not to do so.[295]

In summary, fault on the part of the beneficiary of an invalid act is a factor in the exercise of the court's discretion not to set aside an unlawful act. Freund and Price argue convincingly that a court is likely to be more sympathetic to an innocent beneficiary than to one who is complicit in the unlawfulness.[296]

5.3.6 Seriousness of the breach of s 33 of the Constitution

Freund and Price argue that a court should distinguish between mundane administrative errors and serious infringements of s 33 of the Constitution by 'paying attention to the nature of the defect in question'.[297] In their view, the more serious the inroads are to s 33, the more the court should be inclined to quash an unlawful administrative act.[298] Arguably, this proposition by Freund and Price can be applied with equal force to an official act that is not administrative action.

5.3.7 Delay in bringing a review application

Freund and Price propose that, in certain circumstances, the court should withhold a remedy where a litigant has delayed unreasonably or has not invoked alternative remedies. Under the current constitutional dispensation, the SCA has endorsed the application of the common-law delay rule in applications for judicial review based on legality.[299] In *Khumalo v MEC for Education, KwaZulu-Natal,* the Constitutional Court similarly approved the application of the common-law delay rule in such reviews.[300] In terms of this rule, 'a court has to decide (a) whether the proceedings were in fact instituted after the passing of a reasonable time and (b), if so, whether the unreasonable delay ought to be overlooked. In relation to (b), the court exercises judicial discretion taking into consideration all relevant circumstances'.[301]

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[295] Ibid.
[296] Freund and Price (note 82 above) 205.
[297] Ibid 203.
[298] Ibid 204.
[299] *Mamabolo v Rustenburg Regional Local Council* 2001 (1) SA 135 (SCA) ('*Mamabolo*') para 11; *Associated Institutions Pension Fund and Others v Van Zyl* 2005 (2) SA 302 (SCA) ('*Van Zyl'*) para 46; *Gqwetha v Transkei Development Corporation* 2006 (2) SA 603 (SCA) ('*Gqwetha*'); *Oudekraal Estate (Pty) Limited v City of Cape Town* 2010 (1) SA 333 (SCA) ('*Oudekraal II'*)
[300] *Khumalo v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) ('*Khumalo*') paras 44 & 49.
[301] *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978(1) SA 13(A) ('*Woolgroeiers*') at 44D–E.

In *Khumalo,* the MEC challenged the validity of Khumalo's promotion. Khumalo was an employee in her department who had been promoted to a higher position although he did not satisfy the requirements of that post. The MEC had delayed in bringing her application and her delay was judged unreasonable.[302] On whether it should condone the MEC's unreasonable delay, the Constitutional Court considered the consequences of doing so, including prejudice to the affected parties and the nature of the decision. Insofar as prejudice is concerned, the court found that, since his promotion, Khumalo had adapted his life accordingly and that if it were to uphold the MEC's case, Khumalo would lose his job.[303] In the view of the court, this potential prejudice to Khumalo could be addressed by the invocation of its powers to grant a just and equitable remedy in terms of s 172(1)(b) of the Constitution.[304] It concluded that its power to grant a just and equitable remedy is a relevant consideration in the assessment of prejudice.[305]

The nature of the decision involved the assessment of the merits. This entailed the court 'analysing the impugned decision within the legal challenge made against it and considering the merits of that challenge'.[306] The validity of Khumalo's promotion hinged on the statutory provision on which it was based.[307] The department had a choice between two alternative statutory provisions to support Khumalo's promotion. There was no evidence as to on which of the two statutory provisions informed the promotion.[308] The court held that the absence of relevant evidence and the passage of time hampered its ability to determine the lawfulness of Khumalo's promotion.[309] Consequently, it held that in this case the strength of the merits did not support overlooking the delay and thus declined to condone it.[310]

The import of *Khumalo* is that in the adjudication of the impact of delay, s 172(1)(b) of the Constitution is a factor that a court ought to consider when it assesses prejudice that may be occasioned by a decision to overlook an unreasonable delay.

Although in *State Information Technology Agency v Gijima Holdings*[311] the Constitutional Court relied on authority of *Khumalo,* its interpretation of s 172 of the Constitution is somewhat

[302] *Khumalo* (note 300 above) para 50.
[303] Ibid para 54.
[304] Ibid para 56.
[305] Ibid.
[306] Ibid para 57.
[307] Ibid paras 61–5.
[308] Ibid para 65.
[309] Ibid para 67.
[310] Ibid para 68.
[311] *State Information Technology Agency v Gijima Holding* 2018 (2) SA 23 (CC) ('*Gijima*') paras 46–8.

startling. In this case, the SITA challenged the validity of a contract it had with Gijima but delayed in bringing its review application. The court found the delay unreasonable and held that there were no grounds for overlooking the unreasonableness.[312] In accordance with the delay rule, this should have non-suited the applicants. Despite this, the court found that it was enjoined by s 172(1)(a) of the Constitution to declare invalid any law or conduct that it judged to be inconsistent with the Constitution.[313] On this basis, the court heard the application notwithstanding the inexcusable delay. The court used s 172(1)(b) of the Constitution to avoid any injustice that would have been visited on the respondent as a result of its hearing the application and making a declaration of invalidity.[314]

Gijima is distinguishable from *Khumalo*[315] in that in the former the court held that s 172(1)(a) obliged it to declare the act before it unlawful, whilst in the latter the court regarded s 172(1)(b) as a relevant factor in the assessment of the prejudice that may be occasioned by a decision to overlook an unreasonable delay. In other words, in *Gijima,* the court treated the application for review as if it was already before it whilst in *Khumalo* the court dealt with the question whether it should hear the review at all though it also took the merits into account in that inquiry. In essence, *Gijima* has heavily watered down the delay rule as it was endorsed in *Khumalo* and has created uncertainty about its application.

In *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd,*[316] the Constitutional Court encountered facts that were similar to those in *Gijima.* The applicability of the principle laid down in *Gijima* divided the court. In *Asla Construction*, the municipality had a contract with Asla to construct houses in a particular township within its jurisdiction. The municipality extended this contract to cover an additional township. This extension did not comply with the mandatory public procurement requirements set out in s 217 of the Constitution. Asla performed its obligations in accordance with the extended contract and claimed payment for the rendered service. In response, the municipality refused to pay and challenged the validity of the relevant contract on review. It did so after a delay of 14 months. The High Court upheld

[312] Ibid paras 45 and 49.
[313] Ibid para 52.
[314] Ibid para 54.
[315] *Khumalo* (note 300 above).
[316] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) ('*Asla Construction*').

this application.[317] Asla successfully challenged this decision on appeal.[318] The municipality then approached the Constitutional Court.

The Constitutional Court unanimously held that the municipality's delay in bringing the review application was unreasonable and that there was no basis for it to overlook the unreasonable delay.[319] Whether despite this, *Gjima* obliged the court to consider the review application divided the apex court.[320] The majority explained that the *Gijima* principle means that 'even where there is no basis for a court to overlook an unreasonable delay, the court may nevertheless be constitutionally compelled to declare the state's conduct unlawful'.[321] The unlawfulness of the impugned act must be clear and not disputed.[322] The majority characterized the *Gijima* principle as an additional consideration when deciding whether to overlook an unreasonable delay.[323] The majority refers to *Gijima* as the 'fourth principle' and this suggests it is a consideration in the inquiry like the other three considerations. Yet Theron J immediately goes on almost to contradict this by saying 'even when there is no basis to overlook the delay, the court may be constitutionally compelled to declare the state's conduct unlawful'.[324] This suggests that *Gijima* operates as a trump rather than as a mere consideration.

According to the majority, the application of the *Gijima* principle turns on whether there is clear and undisputed evidence of unlawfulness.[325] The majority agreed with the minority that, by doing so, the *Gijima* principle creates tension between procedural requirements that govern applications for review and s 172(1)(a) of the Constitution. The former requires state parties to bring review applications timeously, backed up by a threat of being non-suited, whilst the latter implies that sometimes s 172(1)(a) may trump these procedural requirements.[326] However, the majority considered itself bound by *Gijima* and applied it on the basis that the correctness or otherwise of *Gijima* was not before it.[327]

In view of the tension in the jurisprudence, the majority held that '[t]the *Gijima* principle should be interpreted narrowly and restrictively so that the valuable rationale behind the rules of delay

[317] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2016] 4 All SA 60 (ECG).
[318] *Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality* 2017 (6) SA 360 (SCA).
[319] *Asla Construction* (note 316 above) paras 100 & 144.
[320] Ibid paras 65 and 122.
[321] Ibid para 63.
[322] Ibid para 66.
[323] Ibid para 63.
[324] Ibid.
[325] Ibid paras 63 and 66.
[326] Ibid para 67.
[327] Ibid paras 64–5.

are not undermined'.[328] Even on this restrictive interpretation, however, the majority found that it had an obligation to declare the patently unlawful contract invalid even though there was no basis for condoning the unreasonable delay.[329] As in *Gijima,* the majority looked to s 172(1)(b) to address any prejudice to the respondent. In this instance, the court declined to set aside the invalid contract so as to preserve Asla's rights under it.[330]

The minority in *Asla Construction* highlighted the ambivalence in the jurisprudence emanating from the apex court on impact of delay in review application. The minority pointed to Constitutional Court authority for entertaining an application for review without having condoned an unreasonable delay[331] and, on the other hand, insisting on an explanation for the delay and declining to hear a matter where there was no basis to overlook an unreasonable delay.[332] Although the majority acknowledged this tension, it considered *Gijima* to be binding on it.

By contrast, the minority viewed this tension as an opportunity to suggest an alternative approach.[333] This is that 'in the absence of adequate explanation for unreasonable delay, courts should not intervene to inquire into a final and determinative holding into unlawfulness, unless the seriousness of the unlawfulness at issue warrants overlooking the manifest deficiencies in the state actor's case'.[334] At the core of this approach is whether it is in the interest of justice to overlook unreasonable delay. This entails weighing two competing aspects of the rule of law: the principle of legality, which requires the impugned act to be corrected, as well as certainty and finality which emphasize expeditious performance of public duties.[335] It calls for the assessment of the seriousness of the illegality and the reasonableness of the delay.[336] In the view of the minority, the seriousness of the illegality must be judged against the objective of legality review to 'promote open, responsive and accountable government'.[337] The court cautioned against overlooking unreasonable delay in applications that do not promote open, responsive and accountable government but rather enable unscrupulous officials to evade the consequences of their earlier decisions.[338]

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[328] Ibid para 71.
[329] Ibid para 101.
[330] Ibid para 105.
[331] Ibid para 126.
[332] Ibid.
[333] Ibid para 127.
[334] Ibid para 128.
[335] Ibid para 132.
[336] Ibid para 139.
[337] Ibid paras 115 and 139.
[338] Ibid para 139.

The minority concluded that the absence of an explanation of the delay and the circumstances surrounding the unlawfulness of the extension of the contract in issue were sufficient for it not to overlook the unreasonable delay. Furthermore, the public interest in open and accountable government would not be served by the court's overlooking the delay.[339]

The minority approach is consistent with the application of the delay rule in *Khumalo,* in that its assessment of the merits is focused on whether the court should overlook the unreasonable delay and not necessarily the final determination of the lawfulness of the impugned act. The only addition to *Khumalo* proposed by the minority is the need to curb the abuse of the review process to serve the personal interests of implicated officials. The emphasis on the public interest in open and accountable government provides the context within which the assessment of the nature of the impugned act may be made. In light of the ambivalence highlighted by the minority, its resolve not to follow *Gijima* slavishly is sound. On the other hand, by following *Gijima,* the majority exacerbates the uncertainty created by that judgment on the role and relevance of the delay rule. Its apparent compromise – interpreting the *Gijima* principle narrowly – fails to resolve this uncertainty.

Although the court unanimously held that *Asla Construction* was not the ideal occasion for reconsidering the *Gijima* principle, the minority's acknowledgement of the scathing academic criticism that the *Gijima* principle has attracted are instructive. Boonzaier has described the ruling on delay in *Gijima* as the most alarming error in this controversial judgment.[340] He questions the court's logic as well as its legal authority to jump into the determination of unlawfulness in terms of s 172(1)(a) of the Constitution after finding no reason to overlook the SITA's unreasonable delay in bringing its review application.[341] In his view, a finding that there was no reason to overlook the delay is tantamount to a decision that the 'application could *not* be adjudicated'.[342]

In light of the observed tension in the jurisprudence of the Constitutional Court on the impact of delay in review applications[343] and the academic criticism of *Gijima,*[344] there is merit in the

[339] Ibid para 145.
[340] Leo Boonzaier 'A decision to undo' (2018) 135 *SALJ* 642 at 677.
[341] Ibid.
[342] Ibid.
[343] *Asla Construction* (note 316 above) paras 67 and 126.
[344] Boonzaier (note 340 above).

proposal by the minority that '[i]t may in due course become necessary to reconsider whether the legality review pathway chosen in *Gijima* withstands the test of time'.[345]

In respect of a review application based on PAJA, s 7(1) requires that it be brought within a reasonable time and not later than 180 days from the date on which the applicant has concluded any internal remedial processes; or, where none is prescribed, from the date upon on which he or she became aware of the administrative action and the reasons for it. Where an application is brought outside the 180-day period, the applicant must apply for an extension, which will be granted only 'where the interests of justice so require'.[346]

In *Camps Bay Ratepayers and Residents Association v Harrison,* the SCA ruled that, in the context of PAJA, 'the question whether the interests of justice require the grant of such extension depends on the facts and circumstances of each case'.[347] A person seeking the indulgence of the court must explain the delay fully covering 'the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue to be raised in the intended proceedings and the prospects of success'.[348] The question is whether, on the strength of the *Gijima* principle, a court hearing a late application for review in terms of PAJA may proceed to determine it even if it is not satisfied with the explanation provided by applicant in respect of the factors identified in *Harrison.* The court's reasoning in *Asla Construction* provides guidance on how *Gijima* might be applied in the PAJA context. In *Asla Construction,* the majority applied rigour similar to that in *Harrison* in its enquiry on whether it should overlook the unreasonable delay and decided that there was no reason to do so.[349] However, despite this, the majority held that s 172(1)(a) of the Constitution obliged it to declare the impugned act unlawful. [350] By parity of reasoning, it is open to a court hearing an application for an extension in terms of s 9 of PAJA to hold that it is bound by s 172(1)(a) to determine the merits of an application for review even it is not satisfied with the explanation for the delay, provided there is compelling evidence that the impugned act is unlawful. In the context of PAJA, the *Gijima* principle could easily be be an additional basis for the court to find that the interests of justice favour the granting of the extension.

[345] *Asla Construction* (note 316 above) para 112.
[346] Section 9(2) of PAJA.
[347] *Camps Bay Ratepayers and Residents Association v Harrison* [2010] 2 All SA 519 (SCA) ('*Harrison*') para 54.
[348] Ibid.
[349] *Asla Construction* (note 316 above) paras 78-80.
[350] Ibid paras 63 and 66.

The *Gijima* principle (and its potential application in the PAJA context) elevates the merits of the application over any considerations relating to delay and its reasonableness. In this way, the *Gijima* principle negates the protections afforded to respondents by the delay rule or reduces them to 'leaky cover'.[351] It is worth recalling, as the minority aptly explained, that 'the delay bar serves an important rule of law function: it promotes the public interest in the certainty and finality of decision-making. This is an imperative focus whenever a court undertakes a case-specific enquiry as to the reasonableness of the delay'.[352]

5.3.8 Failure to invoke alternative remedies

Freund and Price contend that where alternative remedies such as 'interdicts, costs orders, declaration of rights, even . . . damages or compensation' are available, setting aside an unlawful act may be unnecessary'.[353] The submission by Freund and Price promotes the consideration and use by the courts of other remedies provided for in the long list in s 8 of PAJA.

All of the above factors assume that the court has discretion and that it can be accommodated within s 172(1) of the Constitution. In any event, the courts in *Millennium Waste*[354] and *Allpay II*[355] showed that they are able to fashion a just and equitable remedy without negating the full impact of s 172(1)(a), ie declaring an unlawful act invalid from the outset.

5.4 SUMMARY

The fourth Oudekraal principle is that a court has discretion not to set aside an invalid act.[356] This discretion is narrower in scope than the power afforded by s 8 of PAJA to grant a just and equitable remedy. The discretion envisaged in *Oudekraal* is a common-law construct.

In later cases, the courts have interpreted *Oudekraal* as part of s 8 of PAJA and s 172 of the Constitution. This has expanded the scope of the discretion. It now goes beyond discretion not to set aside an invalid act,[357] it is a wide and principled discretion to grant a just and equitable remedy.[358] This discretion allows the court to take into account all the relevant facts, including the public interest and the impact of the declaration of invalidity on affected persons. In its

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[351] Ibid.
[352] Ibid para 120.
[353] Freund & Price (note 82 above) 206.
[354] *Millennium Waste* (note 16 above) 35.
[355] *Allpay II* (note 6 above) para 78.
[356] *Oudekraal* (note 1 above) para 36.
[357] *Bengwenyama* (note 33 above) para 83 with reference to *Steenkamp* (note 154 above) para 29; *Corruption Watch* (note 73 above) para 68.
[358] Ibid.

expanded form, the discretion not to set aside is now exercised within the context of s 172(1) of the Constitution.

The Constitutional Court has interpreted s 172(1) to provide for a two-staged enquiry.[359] The first stage is to enquire into whether the impugned act is inconsistent with the Constitution; and if so, to declare it invalid to the extent of its inconsistency.[360] Secondly, once the court has declared an act invalid, it determines the just and equitable remedy that must follow.[361] A court will depart from the logical consequences of invalidity only if justice and equity so demand.[362] The Constitutional Court termed this approach to remedy the 'corrective principle'.[363] It has explained that the corrective principle is not restricted to setting aside invalid acts or leaving them to stand, but that it operates at multiple levels and in various dimensions.[364] In appropriate cases, a just and equitable remedy may lie somewhere in between setting aside an invalid act or leaving it to continue to have legal effect.[365] However, the Constitutional Court has stressed that first and foremost the consequences of invalidity ought to be 'corrected or reversed where they can no longer be prevented'.[366]

In their convincing analysis, Quinot and Maree contend that the conceptualization of the discretion by the Constitutional Court is not satisfactory.[367] In their view, a declaration of invalidity cannot mean anything other than setting aside of the invalid act.[368] This is because the language of s 172(1)(a) of the Constitution, in its current formulation, does not allow for any discretion.[369] It obliges the court to declare invalid any act that is inconsistent with the Constitution, ie an unlawful act. According to the doctrine of objective invalidity, when the court makes a declaration of invalidity, it merely confirms an already existing status quo.[370]

Freund and Price defend the distinction between a declaration of invalidity and the remedy that follows. They contend that the alternative is to interpret s 172(1)(a) in a manner that preserves the court's discretion. In their view, 'the requirement of a "declaration of invalidity" referred to in s 172 of the Constitution, at least in the context of administrative law and s 33, is satisfied

[359] *Bengwenyama* (note 33 above) para 84.
[360] Ibid.
[361] Ibid.
[362] Ibid.
[363] *Allpay II* (note 6 above) paras 30–32.
[364] Ibid para 32.
[365] Ibid para 39.
[366] Ibid para 30.
[367] Quinot and Maree (note 43 above) 32.
[368] Ibid.
[369] Ibid.
[370] *Ferreira* (note 48 above) paras 27–9; *Fose* (note 50 above) para 94.

by declaring that a ground of review has been established and therefore that the impugned administrative act is unlawful'.[371] In essence, Freund and Price propose equating invalidity to unlawfulness. This interpretation is, however, inconsistent with the clear language of s 172(1)(a) regarding what a court must declare invalid.

The objection by Quinot and Maree thus remains unanswered. Instead, in *Corruption Watch,* the Constitutional Court simply restated its view that the language of s 172(b) is permissive enough to allow for discretion.[372] This stance by the apex court perpetuates the uncertainty over the meaning of unlawfulness and invalidity in s 172(1)(a) of the Constitution. For instance, in the latest offering from the Constitutional Court, *Asla Construction,* the court found the impugned contract 'unlawful' and 'invalid'.[373] It went on to hold that, on the authority of *Gijima* and in terms of s 172(1)(a)*,* it had to declare the contract invalid and set it aside. Ultimately, the court declared the contract invalid but declined to set it aside. This judgment raises a fundamental question about what it means for a court to declare an act invalid. The answer to this question posed by Quinot and Maree, ie that a declaration of invalidity cannot mean anything else other than setting aside the impugned act, is supported by the established authority of the Constitutional Court.[374]

There is no dispute that discretion has an important role to play in judicial review.[375] Discretion is used by the courts to avoid or minimize any prejudice or injustice that may result from a declaration of invalidity. A declaration of invalidity means that the impugned act is retrospectively invalid and anything done pursuant to it is a nullity.[376] This may have catastrophic consequences for affected parties and the public.[377]

Although the Constitutional Court has declined to prescribe a list of factors that should persuade a court to exercise its discretion against setting aside an unlawful act,[378] it is possible to identify some of these factors.[379] The prominent factors that emerge are: (1) pragmatism and practical considerations;[380] (2) disruption of an important public service;[381] (3) adverse impact

[371] Freund & Price (note 82 above) 201.
[372] *Corruption Watch* (note 73 above) para 68.
[373] *Asla Construction* (note 316 above) para 92
[374] *Ferreira* (note 48 above) paras 27–9; *Fose* (note 50 above) para 94.
[375] Quinot and Maree (note 43 above) 41.
[376] *Seale* (note 140 above) para 13.
[377] *Millennium Waste* (note 16 above) para 23.
[378] *Bengwenyama* (note 33 above) para 85; see also *Allpay II* (note 6 above) 34.
[379] Freund and Price (note 82 above) above 193–6.
[380] *Sapela* (note 21 above) para 27.
[381] *Millennium Waste* (note 16 above) paras 28 and 31.

on the public purse;[382] (4) the interests of all affected parties;[383] (5) whether the aggrieved party was complicit in the unlawfulness of the administrative act;[384] (6) the seriousness of the impact of the unlawful act;[385] (7) whether the aggrieved person delayed unreasonably in bringing the review application;[386] and (8) whether there are alternative remedies.[387]

[382] Ibid para 29.
[383] Ibid paras 22–3.
[384] *Eskom Holdings* (note 23 above) para 14.
[385] Freund and Price (note 82 above) 203.
[386] Ibid 205.
[387] Ibid 206.

CHAPTER 6

CONCLUSION

This thesis has canvassed how the courts since *Oudekraal*[1] have interpreted, applied and modified the Oudekraal principles. This thesis has identified four Oudekraal principles. Pretorius concurs that the SCA established several principles in its judgment, notwithstanding a tendency to refer to 'the Oudekraal principle' as if there were only one.[2] He observes that in South Africa, '[i]n the field of administrative law, *Oudekraal* is probably the most annotated SCA judgment of recent times'.[3]

The SCA developed the Oudekraal principles in an attempt to explain the conundrum that an unlawful act may, under certain circumstances, have legal effect.[4] The court had found earlier explanations of the conundrum unsatisfactory.[5] These include the presumption of legality;[6] Wade's theory of relativity, which holds that the invalidity of an administrative act is not absolute;[7] and the pragmatic explanation arising out of the court's refusal to set aside an unlawful act for reasons that are not related to its unlawfulness.[8] The SCA found Forsyth's theory of the second actor to be the most convincing explanation of the conundrum.[9] This theory recognizes that although an act may not exist in law, it may exist in fact, and thus form the basis for a later legally competent act. [10] This happens because third parties who may not be aware of the legal deficiencies of an administrative act may rely on it to take further acts, or fashion their lives according to it.[11]

Although *Oudekraal* dealt with what it termed an 'administrative act' rather than 'administrative action', the Oudekraal principles seem to apply to all official exercises of public power whether they are administrative or executive. This is underscored by the decision in

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[1] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) ('*Oudekraal*').
[2] DM Pretorius '*Oudekraal* after fifteen years: The second act (or, a reassessment of the status and force of defective administrative decisions pending judicial review)' (2020) 31 *Stellenbosch Law Review* 3.
[3] Ibid.
[4] *Oudekraal* (note 1 above) para 29.
[5] Ibid.
[6] Ibid para 27 with reference to Lawrence Baxter *Administrative Law* (1984) 355.
[7] *Oudekraal* (note 1 above) para 28 with reference to HWR Wade & Christopher Forsyth *Administrative Law* 7 ed (1994) 342–4
[8] *Oudekraal* (note 1 above) with reference to *Harnaker v Minister of Interior* 1965 (1) SA 372 (C) 381C.
[9] *Oudekraal* (note 1 above) para 29 with reference to Christopher Forsyth ' "The Metaphysic of Nullity": Invalidity, Conceptual Reasoning and the Rule of Law' in Christopher Forsyth & Ivan Hare (eds) *Essays in Public Law in Honour of Sir William Wade QC* (2005) 141 at 146–7.
[10] Forsyth (note 9 above) 147.
[11] Ibid 159

Economic Freedom Fighters v Speaker, National Assembly where the Constitutional Court held that '[n]o decision grounded in the Constitution or law may be disregarded without recourse to a court of law'.[12] In *Corruption Watch v President of the Republic of South Africa,* the Constitutional Court made it clear that *Oudekraal* applies to administrative action. The court also found no reason in principle why the Oudekraal principles should not apply to conduct of the executive such as the conduct of the President's in that case, where he secured the vacation of office of the incumbent NDPP.[13]

The reference to an administrative act instead of administrative action in *Oudekraal* is perhaps understandable on the basis that the facts that gave rise to *Oudekraal* predate the concept of administrative action. In any event, *EFF* and *Corruption Watch* suggest that there is no legal significance in the difference between an administrative action and the broader notion of an administrative act. This thesis has adopted the terminology preferred in *Oudekraal* to cover all acts of an official nature whether they occurred before or after the introduction of the concept of administrative action in the interim Constitution.

Forsyth acknowledges that the flaw in the theory of the second actor is that 'whatever its analytical strengths, it provides little guidance to the actual determination of the legal powers of the second actor'.[14] In other words, the weakness of this theory is the difficulty of determining whether the validity of the first act is a precondition for the validity of the second act. Forsyth considers this flaw not to be fatal because appropriate principles can be developed to guide the determination of this issue.[15] Forsyth also cautions against using these principles mechanically to determine the powers of the second actor.[16] He stresses that the primary object of the theory of the second actor is to move away from rigid rules in favour of an approach based on principles.

The application of the Oudekraal principles exhibits a similar weakness to the theory of the second actor on how the legal effect of an unlawful act may be determined. Despite the plethora of cases that have considered *Oudekraal,* it does not seem that these judgments have contributed much clarity as to the legal consequences of an unlawful act.[17] Instead, the cases

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[12] *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 (3) SA 580 (CC) *('EFF')* para 74.
[13] *Corruption Watch NPC v President of the Republic of South Africa* 2018 (2) SACR 442 (CC) ('*Corruption Watch*') para 31 n 31.
[14] Christopher Forsyth 'The theory of the second actor revisited' 2006 *Acta Juridica* 209 at 219.
[15] Ibid 219.
[16] Ibid 221.
[17] Henri-Willem van Eetveldt *The indirect review of administrative action in South African law* (unpublished LLM Thesis, Stellenbosch University, 2018) 26.

after *Oudekraal* have shown the prescience of Saller's earlier observation that although *Oudekraal* sought to introduce a principled approach to the determination of the legal consequences of an unlawful act, it 'does not necessarily provide us with a more predictable, or indeed simpler, solution than previous appeals to void and voidable administrative acts'.[18]

Like Saller, however, this thesis concludes that the cases since *Oudekraal* have achieved the exact opposite of what *Oudekraal* and Forsyth's theory of the second actor intended.

The key findings and observations of this thesis are summarised in what follows.

6.1. FIRST OUDEKRAAL PRINCIPLE

The first Oudekraal principle states that an unlawful act has legal effect for so long as it has not been set aside.[19] Such an act ought not to be simply disregarded.

6.1.1 The meaning of legal effect

In *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute,* Cameron J, on behalf of the majority, caused confusion by equating the legal effect of an unlawful act with the act's being valid until it is set aside.[20] In *Merafong City Local Municipality v AngloGold Ashanti Limited,*[21] Cameron J corrected the confusion that he caused in *Kirland* and explained that the 'legal effect' of an unlawful act means that it is legally effective, and not that it is valid. It means that an unlawful act must be *treated* as if it were valid.[22] It has all the intended effects of a valid act.

6.1.2 The objects and purport of the first Oudekraal principle

The first Oudekraal principle provides temporary protection to an unlawful administrative act until it is brought to court.[23] It does not preserve the legal effect of an administrative act indefinitely.

Three distinct objects of the first principle emerge from the cases since *Oudekraal*. First, to preserve the legal certainty of an unlawful administrative act pending judicial review.[24]

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[18] Karla Saller 'When worlds collide: Implications of the Constitutional Court's decision in *Jaftha v Schoeman* when viewed through the lens of the second actor theory accepted in *Oudekraal Estates (Pty) Ltd v City of Cape Town'* (2005) 122 *South African Law Journal* 725 at 725–6.
[19] *Oudekraal* (note 1 above) para 26.
[20] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* 2014 (3) SA 481 (CC) para 101.
[21] *Merafong City Local Municipality v AngloGold Ashanti Limited* 2017 (2) SA 211 (CC) ('*Merafong*') para 41 n 63.
[22] *Road Accident Fund v Duma and three similar cases* 2013 (6) SA 9 (SCA) ('*Duma*') para 24.
[23] *Merafong* (note 21 above) para 43.
[24] *Camps Bay Ratepayers' and Residents Association v Harrison* 2011 (4) SA 42 (CC) ('*Harrison*') para 62–3.

Certainty is vital to maintain the integrity, reliability and efficiency of public administration. The converse has been described as 'a vortex of uncertainty, unpredictability and irrationality that is detrimental to efficient public administration as well as the public'.[25] According to Brickhill et al, the first Oudekraal principle provides a practical response to daily encounters with objectively invalid acts.[26]

The second object that emerges from the cases since Oudekraal is to promote the maintenance of the rule of law and the principle of legality.[27] Officials should not resort to self-help but should follow due process in addressing their disquiet about flawed administrative acts.

Lastly, the first Oudekraal principle ensures the pre-eminence of the courts as the final arbiters of what constitutes an unlawful administrative act.[28]

6.1.3 The extent and limits of the first Oudekraal principle

Originally, the first Oudekraal principle dealt with the legal effect of the first act in a series of successive administrative acts.[29] It did not deal with the legal effect of a standalone administrative act.[30] However, nothing in logic or law prevented the courts from extending the principle to a standalone act.[31] In *Kirland,* the Constitutional Court dealt with the legal effect of a standalone act, ie an unlawful approval that the acting head of department had granted to Kirland to establish a private hospital. The court held that this approval had legal effect until it was set aside.[32] In *Merafong,* despite the protest by the minority,[33] the majority endorsed the ruling in *Kirland* that the first *Oudekraal* principle also applies to a standalone act.[34] This settled the law on the extent of the first principle.

Furthermore, *Kirland* draws no distinction between an unlawful act that is latently defective or flagrantly flawed.[35] They all have legal effect for so long as they have not been set aside by a

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[25] *Kirland* (note 20 above) paras 101–3.
[26] Jason Brickhill, Hugh Corder, Dennis Davis & Gilbert Marcus 2016 'Administration of justice' *Annual Survey of South African Law* 1 ('Brickhill et al') at 9.
[27] *Head of Department, Department of Education, Free State Province v Welkom High School and Others* 2014 (2) SA 228 (CC) ('*Welkom High* School') paras 89 and 103; see also *Kirland* (note 20 above) paras 102–3; *Merafong* (note 21 above) paras 39–43.
[28] *Kirland* (note 22 above) para 88; see also *Department of Transport and Others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) ('*Tasima*') para 148.
[29] *Oudekraal* (note 1 above) para 2.
[30] Daniel Malan Pretorius 'The status and force of defective administrative decisions pending judicial pronouncement' (2009) 125 *SALJ* 537 at 545.
[31] Ibid.
[32] *Kirland* (note 20 above) paras 106.
[33] Ibid paras 116 and 119
[34] Ibid para 41.
[35] Ibid para 66.

court. In his early commentary on *Oudekraal,* Pretorius[36] convincingly argued that the first Oudekraal principles cannot be absolute. He pointed to instances under common law and the Constitution where the courts have allowed an author of an unlawful act to disregard it. In *Merafong,*[37] the Constitutional Court's endorsement of the flexible approach to collateral challenge attests to the correctness of Pretorius's assertion that the first Oudekraal principle is not absolute.

A corollary to the first Oudekraal principle is that '[w]here a consequential act would be *invalid* only as a result of the factual existence – not legal validity – of an earlier act, the consequential act would be *invalid* only for as long as the earlier act is not set aside'.[38]

6.1.4 Determining the legal effect of an unlawful act before it is set aside

The legal effect of an unlawful act may be expressly provided for in an enabling statute such as tax legislation. According to the 'pay now, argue later' principle in taxation, assessed tax is payable despite any objections that a taxpayer may have.[39] Thus, a tax assessment is legally effective and may not be disregarded for so long as it has not been set aside. In this regard, a court does nothing more than give effect to the express intention of the legislature.[40]

Where a statute is silent, the legal effect of an unlawful act may be established through proper interpretation of the relevant legislation.[41] Section 39 of the Constitution requires the courts to interpret legislation in a manner that promotes the bill of rights. No clear guide emerges from the jurisprudence on how this may be done.

Initially, in *V&A Waterfront Properties (Pty) Ltd v Helicopter & Marine Services (Pty) Ltd,* the SCA relied almost exclusively on the absence or presence of state coercion as a key test.[42] The High Court followed the approach adopted by the SCA.[43] The analysis of *V&A Waterfront* and the cases that followed highlights that the courts since *Oudekraal,* the SCA and the High

[36] Pretorius (note 30 above) 547–56; see also a sequel to this article, Pretorius (note 2 above).
[37] *Merafong* (note 21 above) para 44.
[38] *Aquila (South Africa) (Pty) v Minister of Mineral Resources* 2019 (3) SA 621 (CC) para 102.
[39] Section 36 of the Value Added Tax Act 89 of 1991 and s 88 of the Income Tax Act 58 of 1962.
[40] *Capstone 556 (Pty) Ltd v Commissioner, South African Revenue Services* 2011 (6) SA 65 (WCC) ('*Capstone*') paras 48–9.
[41] *Nzimande v Nzimande* 2005 (1) SA 83 (W) ('*Nzimande')* para 60.
[42] *V&A Waterfront Properties (Pty) Ltd v Helicopter & Marine Services (Pty) Ltd* 2006 (1) SA 252 (SCA) ('*V&A Waterfront*') para 10.
[43] *Club Myokonos Langebaan Ltd v Langebaan Country Estate Joint Venture and Others* 2009 (3) SA 546 (C) ('*Club Myokonos')* para 38; *Absa Bank Ltd v Ukwanda Leisure Holdings (Pty) Ltd* 2014 (1) SA 550 (GSJ) ('*Ukwanda Leisure'*) para 62; *Coal of Africa Limited v Akkerland Boedery (Pty) Ltd* [2014] ZAGPPHC 195 (5 March 2014) para 75 ('*Coal of Africa'*) para 76.

Court have applied a rigid rule about state coercion rather than an approach informed by principles. The rejection of this rigid approach by the Constitutional Court in favour of a flexible approach allows space for the development of much-needed guiding principles.[44] According to *Merafong,* it now all depends on the interests of justice whether collateral challenge is available in any given circumstances.[45] Conversely, this also means that it is the interests of justice that determine whether the validity of a prior act or its factual existence is the precondition for the validity of a subsequent act. Because the interests of justice depend on the facts of each case and thus are undefined, it would be beneficial if the courts were to develop principles to promote certainty and transparency. In this way, one can avoid the undesirable situation that Forsyth cautions against, where 'law is an arcane mystery which the omniscient judges alone understand'.[46]

Four guiding principles have so far emerged from the cases since *Oudekraal.* First, the courts since *Oudekraal* have upheld the legal effect of an unlawful act where it vindicates constitutional rights or values or promotes the objects and underlying policy of the enabling Act. For instance, the High Court enforced a compliance notice which sought to protect the environment and the vindicate environmental rights.[47] The Constitutional Court upheld the legal effect of binding remedial action of the Public Protector which sought to correct breaches of the Constitution.[48] Secondly, the courts have declined to uphold the legal effect of allegedly unlawful administrative acts where doing so undermined constitutional values or negated the underlying policy and purposes of the enabling Act.[49] Thirdly, where the administrative act is directed at a person and not the general public, and that person has had an opportunity to challenge the act, a court is likely accord the impugned act legal effect until it is set aside.[50] Lastly, where a subject is not coerced by a public authority, a court is likely to uphold the legal effect of an unlawful act prior to its being set aside.[51]

These principles provide a measure of objectivity in the application of the Oudekraal principles. In line with the principled approach advocated by *Oudekraal,* the application of these principles to guide intepretation should not be mechanical.[52]

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[44] *Merafong* (note 21 above) para 25.
[45] Ibid para 55.
[46] Forsyth (note 9 above) 145.
[47] *Khabisi NO v Aquarella Investment 83 (Pty) Ltd* 2008 (4) SA 195 (T) ('*Khabisi*') para 30.
[48] *EFF* (note 19 above) paras 1 and 51–6.
[49] *Nzimande* (note 41 above) paras 60–62.
[50] *Khabisi* (note 47 above) paras 18 and 24.
[51] See for instance *V&A Waterfront* (note 42 above) para 10
[52] Forsyth (note 14 above) 221.

6.1.5 Judicial disagreement about the legal effect of an administrative act

The question whether, prior to its being set aside on review, an unlawful administrative act can have any legal effect has divided the Constitutional Court. In *Merafong,* judicial disagreement about the legal effect of an unlawful act reached its crescendo. At the centre of the dispute is the question whether the legal effect of an unlawful act is constitutional. The argument by minorities in *Merafong* and *Tasima* is more convincing than the ruling by the majority judgments.

The minorities offer four reasons why an unlawful act can never have legal effect. The first ground is that *Oudekraal* is not authority for the proposition that an unlawful act has legal effect.[53] In the view of the minority, *Oudekraal* established a narrow principle that allows a second or subsequent act in a series of consecutive acts to have legal effect if its legal existence is dependent solely on the factual existence of the originating act.[54]

Secondly and chiefly, the minority contend that an unlawful act is void ab initio and of no legal force or effect.[55] This is because section 2 of Constitution provides that the Constitution is the supreme law, any law inconsistent with it is invalid. In terms of s 172(1)(a) of the Constitution, when deciding a constitutional matter within its power, a court must declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. A declaration of invalidity does not invalidate an act. It merely confirms it to have been a nullity from the outset.[56]

Thirdly, at a practical level, the contention that an unlawful act may have legal effect promotes uncertainty on the legal consequences of an unlawful act.[57] The minority rightly question how the lapse of time could accord an invalid act legal force. How much time must pass?

Fourth and lastly, the proposition that an unlawful act is legally effective until it is set aside promotes a licence to subvert the Constitution and the rule of law.[58]

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[53] *Merafong* (note 21 above) paras 116 and 119.
[54] Ibid.
[55] Ibid paras 107–10 and 130; see also *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) paras 48–9; *Tasima* (note 28 above) paras 77–81.
[56] *Ferreira v Levin NO* 1996 (1) SA 984 (CC) ('*Ferreira*') paras 27–9; *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 94.
[57] *Merafong* (note 21 above) paras 132–3.
[58] Ibid para 139.

Three reasons are offered by the majority as to why an unlawful act has legal effect. First, in *Merafong,* the majority held that the first Oudekraal principle is 'constitutionally sustainable and necessary because unless challenged by the right challenger in the right proceedings, an unlawful act is not void or non-existent, but exists as a fact. It may thus provide the basis for lawful acts pursuant to it'.[59] The weakness of this assertion by the majority is that it does not explain the principle of legality and the doctrine of objective invalidity does not make an unlawful act void.

Secondly, the majority in *Merafong* held that 'the sole power to pronounce that a decision is defective, and therefore invalid, lies with the courts'.[60] No one should usurp this power from the courts; not even government. If the mandate of the court in terms of s 172(1)(a) of the Constitution is to confirm that an act is indeed invalid and if a subject is entitled to a collateral challenge against an unlawful act, this assertion by the majority does not answer to the charge by the minority that the legal effect of an unlawful act is unconstitutional.

Lastly, in *Tasima,* the majority held that because a declaration of invalidity must be made by a court, 'until a court is appropriately approached and an allegedly unlawful exercise of public power is adjudicated upon, it has binding effect merely because of its factual existence'.[61] The first Oudekraal principle and collateral challenge are mutually exclusive. Like the first and second reasons advanced by the majority, this reason by the majority does not provide constitutional authority for the legal effect of an unlawful act.

Despite the flaws in its reasons, the decision of the majority in *Merafong* should have settled the debate on whether an unlawful act may have legal effect prior to it being set aside on review. The continuation of the disagreement in *Tasima* has evoked disapproval from legal commentators. As is aptly pointed out by Brickhill et al, '[t]his saga invites two comments: first, the fragility of precedent and its susceptibility to manipulation; and second, the precedents in *Oudekraal* and *Kirland* presented an important practical problem of how to deal with the many objectively unlawful administrative acts that occur every day'.[62] The disagreement in *Merafong* should not have happened because before that*,* in *President of the Republic of South Africa v South African Dental Association,*[63] the Constitutional Court had unanimously

[59] Ibid para 36.
[60] Ibid para 41.
[61] *Tasima* (note 28 above) para 147.
[62] Brickhill et al (note 26 above) 10.
[63] *President of the Republic of South Africa v South African Dental Association* 2015 (4) BCLR 388 (CC) ('*SA Dental Association*') para 12; see also Brickhill et al (note 26 above) 10–11 on the effect of this judgment on *Merafong* (note 21 above).

accepted the authority of *Oudekraal.* Notably, Jafta J, as the leader of the minority judgments in *Kirland, Merafong* and *Tasima,* was not part of the bench in this case.

In their convincing analysis, Brickhill et al show that the robust view of the minority that an unlawful act can never have legal effect fails to account for the daily occurrence of objectively invalid acts that are relied on and may go unchallenged.[64] If the minority view were to be followed, that would inevitably lead to chaos in public administration with each official being at liberty to choose which official act to regard as valid.[65] This criticism points to the necessity of the first Oudekraal principle but it does not go to whether the Constitution allows for an unlawful act to have legal effect.

In line with the doctrine of precedent, the view of the majority constitutes the prevailing statement of the law on the legal consequences of an unlawful act. However, despite being impolite, the persistence by the minority in *Tasima* should not be dismissed. It highlights the fact that view of the majority may be unconstitutional and raises the question whether it should not be revisited. A future court is entitled to depart from precedent if it is of the view that the decision of the earlier court is clearly wrong.[66] A reconsideration of the first Oudekraal principle will provide clarity as to whether the South African constitutional context with its strong emphasis on the supremacy of the Constitution and the principle of legality accommodates an unlawful act having legal effect.

6.1.6 The consequences of setting aside an unlawful act

Initially, the High Court allowed a second or subsequent act to remain legally effective despite the originating act's having been set aside.[67] In *Seale v Van Rooyen NO; Provincial Government, North-West Province v Van Rooyen NO,* the SCA ruled that once the originating act has been set aside, all acts performed pursuant to it (on which their validity depends) before or after the order cease to have any legal effect.[68]

Although Saller opines on the unintended consequences of the retrospective effect of a declaration of invalidity, her caution about the resultant uncertainty applies equally to an order setting aside an unlawful administrative act.[69] It may result in the reopening of finalized cases.[70]

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[64] Brickhill et al (note 26 above) 11–12.
[65] Ibid 12.
[66] *Turnbull-Jackson v Hibiscus Coast Municipality* 2014 (6) SA 592 (CC) para 57.
[67] *Darson Construction (Pty) Ltd v City of Cape Town* 2007 (4) SA 488 (C) ('*Darson*') 502H–I.
[68] *Seale v Van Rooyen NO and Others; Provincial Government, North-West Province v Van Rooyen NO and Others* 2008 (4) SA 45 (SCA) ('*Seale*') para 13.
[69] Saller (note 18 above).
[70] Ibid 735–8.

For example, an order declaring invalid a rule of court that enabled the sale of a debtor's property in execution without the involvement of the court may nullify a sale that took place before the order was handed down.

In *Gundwana v Steko Development,* without reference to Saller, the Constitutional Court addressed the uncertainty that she highlighted.[71] The Constitutional Court ruled that those who seek to rely on the order declaring invalid the High Court equivalent of the rule discussed by Saller, are required to apply for the rescission of the specific orders that pertain to them. They must explain the reason for their delay and satisfy the court that they are not in wilful default and that they have a bona fide defence.[72]

6.1.7 The effect of the first Oudekraal principle has become uncertain

Oudekraal provided a reasonably clear framework for the application of the first principle, ie the principle applied except where a subject was coerced by the state to comply with an unlawful act.[73] When *Merafong* revived the notion of an extended collateral challenge,[74] it allowed the lawfulness of an act to be challenged collaterally even where a subject was not so coerced. A person invoking an extended collateral challenge is merely required to show that it is in the interests of justice that collateral challenge be availed to him or her.[75] If so, a court is bound to uphold collateral challenge if the impugned act is unlawful– meaning that the legal effect of the impugned act is no longer preserved until a review application is brought.[76] In *Merafong*[77] the majority refrained from providing any guidance on how extended collateral challenge will be applied by the courts. It left this to future courts. Van Eetveldt correctly decries this judicial minimalism in light of the uncertainty introduced by the extended collateral challenge.[78] Other than glaring instances of unlawfulness highlighted in *Tasima*, no other principles have yet emerged on the application of the extended collateral challenge.[79] This leaves the efficacy of the first Oudekraal principle uncertain.

In any event, it is now established practice that when a public authority invokes an extended collateral challenge, it will also bring a review application that places the lawfulness of the

[71] *Gundwana v Steko Development* 2011 (3) SA 608 (CC) ('*Gundwana*') paras 58–9.
[72] Ibid.
[73] *Oudekraal* (note 1 above) paras 31–2.
[74] *Merafong* (note 21 above) para 55.
[75] Ibid.
[76] *Tasima* (note 28 above) para 166.
[77] *Merafong* (note 21 above) para 59.
[78] Van Eetveldt (note 17 above) 75–6.
[79] *Tasima* (note 28 above) para 166.

impugned act in issue.[80] In this context, the fact that an order setting aside an unlawful act operates retrospectively leaves the application and scope of the first Oudekraal principle uncertain.[81] This is exacerbated by the court's ability to declare an unlawful act invalid in terms of s 172(1)(a) Constitution even if the review application is unreasonably late and no reason exists for the delay to be condoned.[82] The only requirement is that the unlawfulness must be clear and undisputed.[83]

Furthermore, extended collateral challenge revives and reinforces the contentions of the minorities in *Merafong* and *Tasima* that a collateral challenge is always available against an unlawful act because the court has a duty to declare it invalid. In the view of these minorities, it is against the principle of legality for an unlawful act to have legal effect at all.[84]

In *Aquila,*[85] Cameron J's interpretation of the effect of the order declaring invalid Nxasana's vacation of office in *Corruption Watch* compounds the confusion as to the legal effect of an unlawful act prior to its being reviewed. Cameron J held that the unlawful vacation of the office of National Director of Public Prosecution by Nxasana vitiated the appointment of his successor, Abrahams, even before it had been declared invalid.[86] This suggests that it is the mere fact that Nxasana's vacation of office was invalid, and not the declaration of invalidity by the court, that rendered the appointment of Abrahams invalid. In this regard, the remarks by Cameron J may be said to be consistent with reading of s 172(1)(a) of the Constitution by Quinot and Maree, ie a declaration of invalidity confirms the existing nullity of the impugned act.[87] However, this is contradicted by Madlanga J, who held in *Corruption Watch* that there is no preordained consequence that follows upon the declaration of invalidity.[88] The remedy that follows is at the discretion of the court. If not clarified, the comments by Cameron J in *Aquila* exacerbate the uncertainty as to the legal effect of an unlawful act before it is set aside.

The first Oudekraal principle serves an important role in supporting the efficacy of public administration. In order to give it practical meaning, legitimate benefits enjoyed as a result of

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[80] *Merafong* (note 21 above) paras 13 and 57; see also *Tasima* (note 28 above) para 48.
[81] *Seale* (note 68 above) para 13.
[82] *State Information Technology Agency v Gijima Holding* 2018 (2) SA 23 (CC) ('*Gijima*') para 52; see also *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) ('*Asla Construction*') paras 65 and 122.
[83] *Asla Construction* (note 82 above) para 66.
[84] *Merafong* (note 21 above) paras 107–8; *Tasima* (note 28 above) paras 87–8.
[85] *Aquila* (note 38 above) paras 99–100.
[86] Ibid.
[87] Geo Quinot & PJH Maree 'The puzzle of pronouncing on the validity of administrative action on review' (2015) 7 *CCR* 27 at 32.
[88] *Corruption Watch* (note 13 above) para 68.

an unlawful act's having temporary legal effect should be protected when the act is eventually reviewed. The efficacy of the first Oudekraal principle requires that its relationship with extended collateral challenge be clarified.

6.2 SECOND OUDEKRAAL PRINCIPLE

According to the second Oudekraal principle, an enquiry into whether an unlawful administrative act has legal effect is not directed at whether an act is valid but whether its validity is a necessary precondition for the validity of consequent acts.[89] This principle provides a nexus between the first and the third principles, ie if the validity of the first act is not a necessary condition for the validity of the second act, the first Oudekraal principle applies. [90] If the validity of the prior act is a precondition for the validity of the subsequent act then the third principle applies and the affected person is entitled to raise a collateral challenge.[91] The thesis has focused on how the courts since *Oudekraal* have determined whether the validity of the first act is a precondition for the validity of the second act.

Partly, *Oudekraal* relied on the presence or absence of state coercion to determine whether the validity of the administrator's permission was a precondition for the validity of the consideration of the engineering service plan.[92] At first, the cases after *Oudekraal* consistently followed this approach. In cases where a subject was coerced to comply with an administrative act, the courts held that the earlier act had to be valid.[93] In line with this approach, where state coercion was absent, the courts ruled that the validity of the originating act was not a precondition for the validity of later acts.[94]

Forsyth's theory of the second actor[95] is the root of *Oudekraal's*[96] reliance on the presence of coercion as a measure of whether the validity of a prior act was a precondition for the validity of the next act. Forsyth identifies four types of administrative acts, namely permissions, authorizations to public officials, instructions to public officials and instructions or orders to

[89] *Oudekraal* (note 1 above) para 31.
[90] Ibid.
[91] Ibid para 32.
[92] Ibid para 39.
[93] *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 (3) SA 589 (SCA) ('*City of Tshwane*') para 15; *South African Heritage Resources Agency v Arniston Hotel Property (Pty) Ltd* 2007 (2) SA 461 (SCA) ('*Arniston*') para 22.
[94] *Reader and Another v Ikin and Another* 2008 (2) SA 582 (C) ("*Reader'*) para 36; *V&A Waterfront* (note 43 above) para 10; *Harrison* (note 26 above) para 62.
[95] Forsyth (note 9 above).
[96] *Oudekraal* (note 1 above) para 39.

private persons.[97] According to him, it is only in respect of the latter that the validity of an earlier act is necessary because the implicated administrative act involves coercion.

Consistent with Forsyth's theory, in the post-*Oudekraal* cases where the courts found that the validity of the originating act was not a precondition for the validity of the second act, the administrative acts involved were in the form of permissions or official authorizations.[98]

In respect of an administrative act that obliges an administrator to do something, in *Duma,* the SCA also took a position that is consistent with Forsyth and *Oudekraal*. Notably, there was no coercion in this case. The Road Accident Fund Act obliges the fund to compensate victims of road accidents who qualify. Applicants for benefits are required to submit medical reports. In *Duma,* the fund rejected the medical reports. Consistent with Forsyth's theory, in the absence of a review application, the SCA declined to enquire into the validity of the decision to reject the medical reports.[99]

In essence, except for *Nzimande,* [100] the courts since *Oudekraal* have relied on the categorization approach to determine whether the validity of the originating act was a necessary precondition for the validity of later acts. According to the categorization approach, it is acts falling within a particular category (coercion of a subject by a public authority) that determine whether validity of a prior act is a necessary condition for the validity of a later act.[101] In *Nzimande,* the High Court deviated from the categorization approach. It relied on the objects of the enabling Act to conclude that the validity of the certificate of occupation was a necessary requirement for the valid conversion of permission to occupy into ownership.[102]

In *Merafong,* a majority of the Constitutional Court rejected the categorization approach[103] and revived the flexible approach that prevailed at common law.[104] This marked a departure from the purity of *Oudekraal* that had been preserved by the SCA until then.[105] According to the

[97] Forsyth (note 9 above) 154–6.
[98] *Reader* (note 94 above) para 31 (approval of building plans); *Loghdey v Advanced Parking Solutions* 2009 (5) SA 595 (C) ('*Loghdey*') para 34 (tender to provide services); *Harrison* (note 25 above) para 62 (approval of buildings plans); *V&A Waterfront* (note 43 above) para 10 (suspension of helicopter licence); *Kirland* (note 22 above) (permission to establish private hospitals).
[99] *Duma* (note 24 above) para 24.
[100] *Nzimande* (note 41 above) para 58.
[101] *Merafong* (note 23 above) para 25.
[102] *Nzimande* (note 41 above) para 58.
[103] *Merafong* (note 23 above) para 25.
[104] *Metal and Electrical Workers Union of South Africa v National Panasonic Co (Parow factory)* 1991 (2) SA 527 (C) ('*Panasonic*') 530G–H; *National Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry v Photocircuit SA (Pty) Ltd* 1993 (2) SA 245 (C) ('*Photocircuit*') 253E–F.
[105] *Oudekraal* (note 1 above) para 32.

flexible approach, the overriding consideration is the interests of justice. In *Tasima,*[106] the majority endorsed *Merafong.* The approach in *Merafong* revived the relevance and importance of *Nzimande* – the earliest case to have relied on the interests of justice.[107]

State coercion remains an important consideration, however. It is trite that where a subject is coerced to comply with an unlawful act, that act must be valid.[108]

6.3 THIRD OUDEKRAAL PRINCIPLE

According to the third Oudekraal principle, where a public authority seeks to coerce a subject to do or not to do something, the legal force of the coercive act depends on the validity of the originating administrative act.[109] This means that a person who is sought to be coerced is entitled to question the validity of the administrative act in any enforcement proceedings. This is known as collateral challenge. In *Oudekraal,* the SCA defined collateral challenge as 'a challenge to the validity of the administrative act that is raised in proceedings that are not designed directly to impeach the validity of the administrative act'.[110]

6.3.1 Collateral versus reactive challenge

A collateral challenge may be defensive or proactive. In its defensive form, the validity of an administrative act is challenged in proceedings that are meant to enforce it.[111] A proactive collateral challenge takes place when, in reaction to an unlawful act, a person initiates proceedings to question the validity of that act, such as an application for an order declaring the unlawful act invalid.[112]

The Constitutional Court prefers to term collateral challenge 'reactive challenge' because it aptly expresses the fact that a challenge of this nature may be proactive rather than defensive.[113] This thesis has found that the definition of collateral challenge used by the Constitutional Court[114] is consistent with the one that is used by the SCA in *Oudekraal*.[115] Thus, there is no substantive legal difference between collateral and reactive challenge as such.

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[106] *Tasima* (note 28 above) para 138.
[107] *Nzimande* (note 41 above) para 58.
[108] *Merafong* (note 21 above) para 69.
[109] *Oudekraal* (note 1 above) para 32.
[110] Ibid n 22.
[111] *City of Tshwane* (note 93 above) where ratepayer resisted the extraction of a levy; see also *Arniston* (note 93 above) where a property owner resisted the enforcement of a provisional protection notice issued in terms of the National Heritage Act.
[112] *Kouga Municipality v Bellingan* 2012 (2) SA 95 (SCA) ('*Kouga Municipality*') paras 18–19.
[113] *Merafong* (note 21 above) para 26 n 27.
[114] Ibid para 26; see also *Tasima* (note 28 above) para 135 n 60.
[115] *Oudekraal* (note 1 above) para 32 n 22.

6.3.2 The difference between collateral challenge and judicial review

Oudekraal explained that at the heart of the difference between collateral challenge and judicial review is that in a judicial review the court has discretion to refuse a remedy even if a ground of review has been established, whilst in a collateral challenge it does not enjoy such discretion.[116] When the requirements for collateral challenge have been established, the court has to uphold it. The cases since *Oudekraal* have loyally embraced this difference.[117]

6.3.3 Types of collateral challenge

At common law, there were two types of collateral challenge, the classical[118] and extended collateral challenge. [119] Based on English law authority on classical challenge,[120] *Oudekraal* held that collateral challenge was available to a subject that was being coerced by a public authority to comply with an unlawful act.[121] This had the effect of fusing the two types of collateral challenge. In *Merafong,* the Constitutional Court revived the common-law view that there are two types of collateral challenge.[122]

6.3.4 The requirements of classical collateral challenge

A classical collateral challenge originates from criminal law.[123] In his or her defence, an accused in a criminal trial is entitled to challenge the validity of the law or regulations under which he or she is charged. In the administrative-law context, the subject of an administrative act is entitled to challenge the validity of the originating administrative act if he or she is coerced by a public authority to comply with it.[124] For instance, since *Oudekraal,* the SCA has allowed a classical collateral challenge where a subject was prevented from improving its property by a heritage provisional protection notice[125] or coerced to pay a levy to a local authority.[126]

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[116] Ibid para 36.
[117] *Seale* (note 68 above) para 13; *Kouga Municipality* (note 112 above) para 12.
[118] *Photocircuit* (note 104 above) 252J–253E.
[119] *Panasonic* (note 104 above) 530C–D.
[120] *Boddington v British Transport Police* [1999] 2 AC 143 (HL) ('*Boddington*') 153H–154A.
[121] *Oudekraal* (note 1 above) para 32.
[122] *Merafong* (note 21 above) paras 55.
[123] *Attorney-General of Natal v Johnstone and Co Ltd* 1946 AD 256 ('*Johnstone*') 262.
[124] See for example *Arniston* (note 93 above) para 22.
[125] Ibid.
[126] *City of Tshwane* (note 93 above) para 15.

Two requirements must be fulfilled before a classical collateral challenge can be successfully invoked, namely, the subject must be coerced by a public authority to do or not to do something[127] and the underlying administrative act must be invalid.[128]

6.3.5 Confusion as to the meaning of coercion

In *V&A Waterfront,* the SCA held that that the respondent could not raise a collateral challenge because it had not been coerced by a public authority to comply with an unlawful act.[129] Although this latter principle is well established, the correctness of its application in *V&A Waterfront* is doubtful. In this case, the South African Civil Aviation Authority had issued a grounding order preventing the respondent from operating a helicopter until its airworthiness could be assured. The respondent defied this order. Relying on the terms of the lease which required the respondent to comply strictly with the directives and regulations from the civil aviation authority, the lessor sought an interdict to compel the respondent to comply with the grounding order. In response, the respondent questioned the validity of the grounding order in a collateral challenge.

The SCA held that the respondent was not entitled to a collateral challenge because the civil aviation authority had not taken any steps to enforce the grounding order against it.[130] This approach is unduly narrow. In this case, the grounding order, by definition, coerced the respondent to comply with its terms, ie the order required the respondent temporarily to cease operating its business.[131] The fact that it was the lessor who brought the application for an interdict does not change the fact that, in essence, the respondent was being compelled to comply with the grounding order. The interpretation of 'coercion' preferred by the SCA is unduly restrictive and allows for a loophole in terms of which an unlawful act may be enforced through private-law means.

S v Smit is another instance where a court has caused confusion as to the meaning of 'coercion'.[132] In this case the accused was charged with two sets of offences. One related to a refusal to pay toll fees and the other related to a refusal to obey a red traffic light that was

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[127] *V&A Waterfront* (note 42 above) para 10; *Club Myokonos* (note 43 above) para 38; *Ukwanda Leisure* (note 43 above) para 62; *Coal of Africa* (note 43 above) para 75–6.
[128] *City of Tshwane* (note 93 above) para 16; see also *Nature's Choice Properties (Alrode) (Pty) Ltd v Ekurhuleni Municipality* 2010 (3) SA 581 (SCA) ('*Nature's Choice*') paras 12–13.
[129] *V&A Waterfront* (note 43 above) para 10.
[130] Ibid paras 11–13.
[131] Ibid para 7.
[132] *S v Smit* 2008 (1) SA 135 (T) ('*Smit*').

erected on the toll road.[133] The court found that the establishment of the toll road was unlawful. Based on this finding, it acquitted the accused of a charge relating to the refusal to pay the toll fees.[134] In other words, the accused could not be coerced to pay an unlawful fee. However, the court convicted the accused in respect of his refusal to obey the traffic light that was erected on the toll road.[135] A failure to comply with a traffic light on public road attracts a criminal sanction. The conviction is inexplicable considering that the relevant traffic light coerced its subjects to comply with it by means of a threat of criminal prosecution, and that it was erected on an unlawfully established toll road.

6.3.6 The availability of classical collateral challenge to a public authority

In *Merafong,* the Constitutional Court held that a public authority can conceivably be coerced by another to comply with an unlawful act.[136] In such an instance, the public authority is entitled to raise a collateral challenge. In *Tasima,* however, the Constitutional Court cautioned that a classical collateral challenge may be available to a public authority only in exceptional circumstances.[137] This may be partly due to the requirement that public authorities should deal proactively and expeditiously with any unlawful acts that they encounter.[138]

6.3.7 Delay and classical collateral challenge

A classical collateral challenge is not time-barred in the sense that the subject may wait indefinitely and raise the invalidity of the relevant administrative act only once the public authority attempts to enforce it.[139] The subject also has an election proactively to approach a court for an order declaring that the administrative act in issue is invalid.[140] By so doing, the aggrieved person may have the benefit of a court that is more familiar with administrative-law principles than a criminal court to rule on the validity or otherwise of the administrative act in issue.[141]

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[133] Ibid 140B–D
[134] Ibid 174F–H.
[135] Ibid 182A–D.
[136] *Merafong* (note 21 above) para 55.
[137] *Tasima* (note 28 above) para 143.
[138] Ibid with reference to *Khumalo v Member of the Executive Council for Education: Kwa Zulu Natal* 2014 (5) SA 579 (CC) (‘*Khumalo’*) paras 46–8.
[139] *Oudekraal* (note 1 above) para 32; *Merafong* (note 21 above) para 69; *Tasima* (note 28 above) para 135.
[140] *Kouga Municipality* (note 112 above) para 19.
[141] Ibid para 20.

6.3.8 Exclusion of classical collateral challenge

A classical collateral challenge is a limited defence in the sense that it ought to be invoked by the right person, at the right time, in the right proceedings.[142] Its availability may be expressly excluded by statute[143] or by the scheme, purpose and object of the underlying statute.[144]

Tax legislation provides an example of the express exclusion of classical collateral challenge by statute. For instance, the provisions giving effect to the 'pay now, argue later principle' have been held to exclude a classical collateral challenge.[145] Where a statute is silent, a court takes into account its scheme, object, purpose and underlying policy to ascertain whether it excludes a classical collateral challenge.[146] Since *Oudekraal,* the courts have developed a number of principles to assist them in determining whether a statute excludes a classical collateral challenge. In summary, the courts have interpreted statutes as doing so in the following instances: (1) based on the availability of internal remedies before an administrative act is enforced;[147] (2) where an administrative act is directed at a specific person and that person has had an opportunity to challenge it;[148] and (3) where constitutional rights such as the right to a safe environment militate against the availability of a classical collateral challenge.[149] In addition to these principles, the High Court has excluded a classical collateral challenge relying on the judges or officials de facto doctrine.[150] This doctrine preserves the legal effect of unlawful administrative acts where the only defect relates to the appointment of a decision-maker.

6.3.9 The requirements of an extended collateral challenge

Prior to *Oudekraal,* in *Panasonic,*[151] the High Court recognized the principle that collateral challenge is available even where coercion is absent. The focus of the enquiry in this instance would be on the lawfulness of the impugned act. In *Panasonic,* a labour union whose members had been locked out by their employer approached the court to have the industrial council which underpinned the lawfulness of the lockout declared unlawful. Although in this case the

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[142] *Oudekraal* (note 1 above) para 35.
[143] *Capstone* (note 40 above) para 49.
[144] *Khabisi* (note 47 above) paras 24–6.
[145] Ibid.
[146] Ibid.
[147] Ibid para 25.
[148] *Merafong* (note 21 above) para 70–71; see also generally *V&A Waterfront* (note 42 above); *Khabisi* (note 47 above); and *Mgoqi v City of Cape Town* 2006 (4) SA 355 (C) ('*Mgoqi*'), where the administrative acts in question were directed specifically to the relevant subjects.
[149] *Khabisi* (note 47 above) paras 27–30.
[150] *Mgoqi* (note 148 above) 124–5.
[151] *Panasonic* (note 104 above) 530G–H.

court disallowed the collateral challenge, it did so because it was raised long after the lockout had been instituted.[152] The court reasoned that if it were to rule on the validity of the lockout, it was likely to interfere with the power balance between the employer and the employees who were engaged in an industrial action which was essentially an endurance test. A lockout is a mechanism available to an employer in collective bargaining. It does not amount to coercion of the employees by the employer.

Notably, other than *Panasonic,* there are no other reported cases before *Oudekraal* which deal with an extended collateral challenge. The paucity of jurisprudence in this area partly explains why the law relating to extended collateral challenge remained indistinct.

After *Oudekraal,* it was in *Merafong* that the Constitutional Court first recognized the existence of an extended collateral challenge.[153] In *Merafong,* the majority emphasized that it is the interests of justice that determine whether collateral challenge is available in any given case. The interests of justice depend on the specific circumstances of each case. According to the majority in *Merafong, Oudekraal* and *Kirland* did not circumscribe the circumstances in which collateral challenge may be raised. In *Merafong,* the court provided no guidance with regard to the availability of collateral challenge where state coercion is absent.

In *Tasima,*[154] the Constitutional Court followed *Merafong.* It upheld a collateral challenge raised by the Department of Transport against the enforcement by Tasima of an unlawfully extended contract. This extension of the contract contravened s 217 of the Constitution and s 38 of the PFMA, which govern public procurement processes.[155] The court upheld the collateral challenge because of the unlawfulness of the extension of the contract.[156] What may be extrapolated from *Tasima* is that patent or glaring unlawfulness and the contravention of the mandatory constitutional requirements that apply to public procurement emerge as factors that are likely to sway the court to uphold an extended collateral challenge.[157]

Strictly speaking, *Merafong* and *Tasima* did not involve coercion of a subject by a public authority. However, it may be argued that in *Merafong,* AngloGold brought proceedings to compel the municipality to comply with an unlawful act of another public authority, ie the unconstitutional determination of the appeal against the municipality's water tariff by the

[152] Ibid 530E–F.
[153] *Merafong* (note 21 above) para 55.
[154] *Tasima* (note 28 above) paras 138 and 150.
[155] Ibid paras 131 and 151 (for the minority judgment); para 171 (for the majority judgment).
[156] Ibid paras 164 and 166.
[157] Ibid.

Minister of Water Affairs.[158] Similarly, in *Tasima,* the applicant sought to hold the Department of Transport to its own unlawful act, the unlawfully extended eNaTis contract.[159] In light of the facts in *Merafong* and *Tasima*, it is concluded that the cases that came after *Oudekraal* have not provided ideal examples of facts that exclude coercion completely.

Since *Oudekraal,* an extended collateral challenge has been invoked by public authorities against their own acts or those of other organs of state.[160] An extended collateral challenge by a private person is yet to be tested by the Constitutional Court.

Van Eetveldt proposes that the *Oudekraal* approach to collateral challenge needs to be discarded in favour of a transformative adjudication approach based on s 36 of the Constitution, ie the limitation clause.[161] However, this proposal negates the fact that a court has no discretion on whether collateral challenge should be upheld.[162] It is available as of right. Section 36 would subject it to judicial discretion. On this aspect, it is submitted, Van Eeveldt's proposal is not convincing. However, his criticism that the courts have misapplied *Oudekraal* and disregarded the theory of the second actor as it was adopted in *Oudekraal* cannot be gainsaid.[163]

A better solution to the uncertainty surrounding the application of extended collateral challenge may be found in Forsyth's suggestion that the courts should develop principles to assist them in interpreting enabling legislation to determine whether collateral challenge is permissible in any given circumstances.[164] Although Forsyth referred to the determination of the powers of the second actor, his guidance applies equally to a standalone act. *Merafong* grants the courts the space to develop the law on extended collateral challenge. Future courts should add to the principles that emerge from *Tasima.*

6.3.10 Delay and extended collateral challenge

Apart from the absence of a requirement of state coercion, an extended collateral challenge that is raised by a public authority differs from a classical collateral challenge in that delay is a factor.[165] In *Merafong,* the majority held that delay on the part of Merafong deserved to be scrutinized because the local authority had long been aware of the unlawful act.[166] The majority

[158] *Merafong* (note 21 above) para 13
[159] *Tasima* (note 28 above) para 45.
[160] Ibid; see also *Merafong* (note 21 above) para 13.
[161] Van Eetveldt (note 17 above) 123.
[162] *Oudekraal* (note 1 above) 36.
[163] Van Eetveldt (note 17 above) 27–33.
[164] Forsyth (note 14 above) 220–22.
[165] *Merafong* (note 21 above) para 72.
[166] Ibid.

adopted the delay rule as it was adapted in *Khumalo* as a test to determine the consequences of a delayed collateral challenge.[167] According to the *Khumalo* test, a court must determine whether the delay is unreasonable and if so, whether it should overlook the unreasonable delay.[168] On whether a court should overlook the delay, the Constitutional Court endorsed the SCA decision in *Gqwetha v Transkei Development Corporation Ltd* that a court must have regard to the possibility of prejudice[169] but added the nature of the impugned decision as a further consideration.[170] According to the *Khumalo* test*,* it is relevant to the assessment of prejudice that the court has discretion in terms of s 172(1)(b) of the Constitution to grant a just and equitable remedy.[171] Insofar as the consideration of the impugned decision is concerned, it held that this enquiry entails the analysis of the decision in relation to the merits of the challenge against it.[172] *Khumalo* cautioned that a court must be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power but that it is equally a feature of the rule of law that undue delay should not be tolerated.[173]

Other than clarifying the principles applicable to delay in raising collateral challenge, the majority in *Merafong* did not determine the implications of the delay in that case but deferred it to a rehearing by the High Court.[174] On the other hand, the minority insisted that collateral challenge has no time-bar.[175] In the view of the minority, a court faced with an unlawful act has a constitutional duty to declare it invalid.[176]

In *Tasima,* the judicial disagreement continued regarding the consequences of delay in an extended collateral challenge. In this case, the minority persisted that once unlawfulness is established, the court is obliged by s 172(1)(a) of the Constitution to declare the impugned act invalid.[177] According to the minority, this obligation trumps any time limit in PAJA. The minority also interpreted *Khumalo* to mean that a court should not be deterred by procedural requirements from declaring an unlawful act invalid.[178]

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[167] Ibid para 74.
[168] *Khumalo* (note 138 above) para 49 where the Constitutional Court endorsed the delay rule the SCA applied *Gqwetha v Transkei Development Corporation Ltd* 2006 (2) SA 603 (SCA) ('*Gqwetha*').
[169] *Khumalo* (note 138 above) para 52.
[170] Ibid para 57.
[171] Ibid para 57.
[172] Ibid.
[173] Ibid para 45.
[174] *Merafong* (note 21 above) para 76.
[175] Ibid para 176.
[176] Ibid para 177.
[177] *Tasima* (note 28 above) paras 77–9.
[178] Ibid paras 129–30 with reference to *Khumalo* (note 138 above) para 45.

In a convincing analysis, however, the majority held that '*Khumalo* made it perspicuous that timely performance of constitutional obligations is itself a constitutional concern'.[179] In line with this analysis, the majority concluded that s 172(1)(a) could not subordinate s 237 of the Constitution.[180] The majority also endorsed and applied the test for delay that it had earlier adopted in *Khumalo*.[181] In *Tasima,* Constitutional Court urged courts to be vigilant against delay because the latter could prejudice the other party to the proceedings and hamper the court's ability to adjudicate the merits.[182] Although in *Khumalo,* the Constitutional Court applied the modified delay rule to a review application based on legality, in *Merafong,*[183] it acknowledged the application of this rule to an extended collateral challenge. In *Tasima*[184] the Constitutional Court applied the *Khumalo* test to deal with delay in application that combined a request for judicial review and an invocation of collateral challenge. The acceptance of the *Khumalo* test in these cases suggests that the test applies to both collateral challenge and review applications. After *Tasima,* the test for the consequences of delay in bringing collateral challenge appeared to be settled.

However, in *State Information Technology Agency v Gijima Holdings,*[185] the Constitutional Court upset the apple cart when it departed from the accepted *Khumalo* test. The court heard a review application despite the fact that it was unreasonably late and there was no basis for overlooking the unreasonable delay. Contrary to *Tasima,*[186] the majority held itself bound by s 172(1)(a) of the Constitution to declare invalid any unlawful act.[187] The essence of *Gijima* is that whether a matter will be heard hinges on the strength of the challenge on the merits. The stronger the merits, the more likely that the court will intervene. *Gijima* dealt with a review; but because the *Khumalo* test evidently applied to both judicial review and collateral challenge, there appears to be no reason in logic or law why the *Gijima* principle may not be extended to collateral challenge. *Gijima's* departure from the established precedent of the Constitutional Court is unexplained but has far-reaching implications.In *Buffalo City Metropolitan Municipality v Asla Construction,*[188] the majority followed *Gijima*. Although the majority

[179] *Tasima* (note 28 above) para 144 *Khumalo* (note 138 above) para 46–8.
[180] *Tasima* (note 28 above) para 144.
[181] Ibid paras 152–3 with reference to *Khumalo* (note 138 above) para 49.
[182] *Tasima* (note 28 above) 160.
[183] *Merafong* (note 21 above) paras 13, 74–5.
[184] *Tasima* (note 28 above) paras 48 (application for review), 50 (collateral challenge), and 143 (application of the *Khumalo* test).
[185] *Gijima* (note 82 above).
[186] *Tasima* (note 28 above) para 144.
[187] *Gijima* (note 82 above) para 52.
[188] *Asla Construction* (note 82 above) para 65.

acknowledged the tension between the principle laid down in *Gijima* and the legal principles governing delay,[189] it held that it was bound by the former.[190] In the view of the majority, where the unlawfulness of the act is clear and not disputed, the court must declare the impugned act invalid.[191] Because of the inroads that the *Gijima* principle makes on the delay rule, however, the court held that it should be construed narrowly.[192]

The minority, on the other hand, attached weight to the emerging criticism of the *Gijima* principle and held that in the future it may be worth interrogating it.[193] Boonzaier, in particular, had criticized *Gijima* for its inexplicable logic: the court's engaging in review when the merits of the case were not properly before it.[194] However, the minority concurred with the majority that *Alsa Construction* was not the ideal case for reconsideration of the principle.[195] The issue had not been properly canvassed by the parties or ventilated at the hearing.[196]

In light of conflicting legal authority emerging from the Constitutional Court, the minority proposed an alternative approach in terms of which the court must balance the seriousness of the illegality with need to maintain finality in official decisions. Where the delay is unreasonable, the court must decline to determine the lawfulness of the impugned act unless the seriousness of the unlawfulness warrants overlooking the delay.[197] This approach enriches *Khumalo* but maintains the judgment's overall frame.

Gijima and *Asla Construction* have introduced unnecessary confusion as to the role and relevance of the delay rule in review applications and (possibly) collateral challenges. There is merit in the suggestion by the minority that there is a need for the *Gijima* principle to be revisited.

6.4 FOURTH OUDEKRAAL PRINCIPLE

According to the fourth Oudekraal principle, a court seized with judicial review of an unlawful act has discretion not to set it aside even though a ground of review may have been

[189] Ibid para 67.
[190] Ibid para 65.
[191] Ibid para 66.
[192] Ibid para 71.
[193] Ibid para 112 with reference to Leo Boonzaier 'A decision to undo' (2018) 135 *SALJ* 642 at 672.
[194] Boonzaier (note 193 above) 672.
[195] *Asla Construction* (note 82 above) para 112.
[196] Ibid para 64.
[197] Ibid para 127.

established.[198] It is a 'moderating tool for avoiding or minimizing injustice where legality and certainty collide'.[199]

6.4.1 The source and nature of the discretion not to set aside

Quinot and Maree convincingly question whether s 172(1) of the Constitution allows a court discretion not to set aside the impugned act once it has declared it invalid.[200] The logic of their proposition remains unanswered by the courts. Quinot and Maree proceed from the premise that in *Oudekraal* the SCA had in mind the common-law discretion.[201] This is supported by the fact that the approval in issue in that case was granted under the old constitutional dispensation[202] and that the dispute between the parties about its legality arose prior to the commencement of PAJA.[203] At common law, granting a remedy on judicial review is a right inherent in the court.[204] Common law regards the enquiry into the reviewability of an act and the remedy that must follow as separate.[205] This means that despite an applicant's having established a ground of review, the court has discretion to grant or withhold a remedy.[206] Quinot and Maree explain that at common law, the fact that an act is reviewable is not decisive.[207]

However, Quinot and Maree contend that in light of the doctrine of objective invalidity, a declaration in terms s172(1)(a) of the Constitution cannot mean anything else other than setting aside the impugned act. In line with the doctrine of objective invalidity, the effect of the declaration of invalidity is that the impugned act is a nullity ab initio.[208] Thus, the declaration leaves no room for the court to withhold the remedy of setting aside.

Implicitly, Quinot and Maree also question the constitutional validity of s 8 of PAJA. According to these authors a finding that a ground of review in terms of s 6(2) of PAJA has been established equates to a finding that an act is inconsistent with s 33 of the Constitution and thus triggers the declaration of invalidity.[209] The logic of their proposition is that this

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[198] *Oudekraal* (note 1 above) para 36.
[199] Ibid.
[200] Quinot & Maree (note 87 above) 41
[201] Ibid 29.
[202] *Oudekraal* (note 1 above) paras 2–3.
[203] Ibid para 3 and 7.
[204] *Johannesburg Consolidated Investment Co Ltd v Johannesburg Town Council* 1093 TS 111 ('*Johannesburg Consolidated* Investment') 115; see also Jérold Leonard Taitz *The inherent review jurisdiction of the Supreme Court Vol 1* (unpublished PhD thesis, University of Cape Town, 1983) 20.
[205] *Johannesburg Consolidated Investment* (note 207 above) 115.
[206] Baxter (note 6 above) 712–13.
[207] Quinot & Maree (note 87 above) 28.
[208] *Ferreira* (note 56 above) paras 27–9; *Fose* (note 56 above) para 94.
[209] Ibid 31–2.

declaration sets aside the invalid act and leaves no further room for the court to exercise discretion in terms of s 8 of PAJA.

Since *Oudekraal*, the SCA[210] and the Constitutional Court have interpreted the *Oudekraal* discretion as part of s 8 of PAJA and s 172 of the Constitution.[211] By so doing, the highest courts have imported the common-law discretion into s 172(1)(b) in a manner that negates the effect of s 172(1)(a).[212] The courts since *Oudekraal* have described this discretion as wide yet principled.[213] It said to allow the court to consider all the relevant facts including the impact of the declaration of invalidity on affected persons and the public interest.

In *Corruption Watch,* the Constitutional Court held that '[t]here is no preordained consequence that must flow from our declarations of constitutional invalidity. In terms of section 172(1)(b) of the Constitution we may make *any* order that is just and equitable'.[214] In the view of the court, the word 'any' implies a wide discretion. The weakness of the reasoning in *Corruption Watch* is that the court did not canvass the meaning and effect of s 172(1)(a) to determine whether it accommodates discretion not to set aside an act that has been declared invalid. There is no dispute that discretion has an important role to play in judicial review.[215] The question is whether the Constitution allows for it, and this question has not been dealt with satisfactorily by the Constitutional Court.

Furthermore, the difference between *Gijima*[216] and *Alsa Construction*[217] in how the court exercised its discretion with regard to just and equitable remedy requires further judicial attention. In *Gijima,* the court declared the relevant contract invalid but prevented SITA from escaping its liability towards Gijima arising out of that contract. In line with the doctrine of objective invalidity and the interpretation of its effect on s 172(1)(a) of the Constitution by Quinot and Maree, what the court did was enough to confirm that the contract was a nullity from the outset.[218] However, in *Asla Construction* the court declared the relevant contract

[210] *Eskom Holdings Ltd v New Reclamation Group (Pty) Ltd* 2009 (4) SA 628 (SCA) ('*Eskom Holdings*') para 9.
[211] *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) ('*Bengwenyama'*) paras 81–4.
[212] Quinot & Maree (note 87 above) 32.
[213] *Bengwenyama* (note 211 above) para 83 with reference to *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) ('*Steenkamp*') para 29; *Corruption Watch* (note 13 above) para 68.
[214] *Corruption Watch* (note 13 above) para 68.
[215] Quinot and Maree (note 87 above) 41.
[216] *Gijima* (note 82 above) paras 53–4.
[217] *Asla Construction* (note 82 above) para 105.
[218] Quinot & Maree (note 87 above) 32.

invalid but declined to set it aside. This assumes that over and above the declaration of invalidity, the court still needed to set the contract aside in order for it to be a nullity.

Freund and Price defend the distinction between a declaration of invalidity and the remedy of setting aside.[219] They contend that s 172(1)(a) can be interpreted in a manner that preserves the court's discretion. On this view, 'the requirement of a "declaration of invalidity" referred to in s 172 of the Constitution, at least in the context of administrative law and s 33, is satisfied by declaring that a ground of review has been established and therefore that the impugned administrative act is unlawful'.[220] In essence, Freund and Price propose equating invalidity with unlawfulness. This interpretation is, however, inconsistent with the clear language of s 172(1)(a) regarding what a court must declare invalid.

6.4.2 The corrective principle

The court exercises its remedial discretion in accordance with the corrective principle.[221] According to this principle, a just and equitable remedy in a judicial review is not restricted to setting aside an invalid act or leaving it legally effective.[222] Sometimes, the solution lies somewhere in between.[223] The application of corrective principle follows a two-staged enquiry that the Constitutional Court adopted in *Bengwenyama.*[224] First, the court enquires into whether the impugned act is inconsistent with the Constitution; and if so, it declares it invalid to the extent of its inconsistency.[225] Secondly, once the court has declared an act invalid, it determines a just and equitable remedy.[226] According to the Constitutional Court, '[t]he discipline of this approach will enable courts to consider whether relief which does not give full effect to the finding of invalidity, is justified in the particular circumstances of the case before it'.[227] The Constitutional Court has stressed that first and foremost the consequences of an invalidity ought to be 'corrected or reversed where they can no longer be prevented'.[228] In *Bengwenyama,* the court declined to lay down rules to determine the remedy of setting aside may be withheld.[229] The Constitutional Court echoed the same sentiment in *Allpay II.* It

[219] Daniel Freund & Alistair Price 'On the legal effects of unlawful administrative action' (2017) 134 *SALJ* 184 at 200–202.
[220] Ibid 201.
[221] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* 2014 (4) SA 179 (CC) ('*Allpay* II') paras 30–32.
[222] Ibid para 32.
[223] Ibid para 39.
[224] *Bengwenyama* (note 211 above) para 84.
[225] Ibid.
[226] Ibid.
[227] Ibid.
[228] Ibid para 85; see also *Allpay II* (note 221 above) para 30.
[229] *Bengwenyama* (note 211 above) para 85.

reasoned that because the application of the corrective principle was not uniform, it was unwise to prescribe a formula to determine when a court will deviate from the remedy of setting aside. In the view of the court, '[t]he corrective principle may be capable of implementation at certain levels, but not others'.[230]

6.4.3 Ambiguity in the meaning of 'unlawful' and 'invalid'

The debate in the Constitutional Court about the court's powers in terms of s 172(1)(a) of the Constitution has resulted in uncertainty as to what the court is mandated to do in terms of this provision. Section 172(1)(a) provides that when deciding a constitutional matter within its power, a court must declare that any law or conduct that is inconsistent with the Constitution is *invalid* to the extent of its inconsistency. The Constitutional Court has used 'unlawful' and 'invalid' interchangeably to describe the declaration it must make in terms of s 172(1)(a).[231]

At face value, in *Merafong,* the minority appears to discern the difference between invalidity and unlawfulness in s 172(1)(a) of the Constitution. In its analysis of *Bengwenyama,* the minority observes that in *Merafong* the Constitutional Court dispelled 'the common law notion that a court in review proceedings has a discretion to withhold the remedy and declared that once it is proved that an administrative act is inconsistent with the Constitution and PAJA; a court must declare it invalid'.[232] However, this emerging clarity on the meaning and effects of s 172(1)(a) dissipates because the minority also held that the drastic impact of this section can be ameliorated by an appropriate just and equitable remedy in terms of s 172(1)(b).[233] The remarks by the minority on the court's discretion to grant a just and equitable remedy stand in stark contrast with its understanding that a declaration of invalidity renders the impugned act invalid ab initio.[234] Although the majority did not interrogate the meaning of invalidity to any degree, it employed the direct language of s 172(1)(a) which requires a court to declare invalid an act that is inconsistent with the Constitution.[235]

The above Constitutional Court cases suggest that the confusion about the mandate of the court in terms of s 172(1)(a) stems from the court's choice of terminology, particularly the

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[230] *Allpay II* (note 221 above) para 34.
[231] *Bengwenyama* (note 211 above) 82 and 84; see also *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* (2014 (1) SA 604 (CC) ('*Allpay I*') para 25–6; *Merafong* (note 21 above) para 35.
[232] *Merafong* (note 21 above) para 117.
[233] Ibid.
[234] Ibid paras 135–7.
[235] Ibid paras 32 and 37.

interchangeable use of 'invalid' and 'unlawful'. This in turn may be attributed to the fact the courts have not paid adequate attention to the exact mandate and effect of s 172(1)(a).

6.4.4 Factors that have persuaded the courts not to set aside unlawful acts

Although the Constitutional Court has declined to prescribe a list of factors that could persuade a court to exercise its discretion against setting aside an invalid act,[236] it is possible to identify some of these factors.[237] The most prominent factors that emerge are: (1) pragmatism and practical considerations;[238] (2) disruption of an important public service;[239] (3) adverse impact on the public purse;[240] (4) the interests of all affected parties;[241] (5) whether the aggrieved party is complicit in the unlawfulness of the administrative act;[242] (6) the seriousness of the impact of the unlawful act;[243] (7) whether the aggrieved person delayed unreasonably in bringing the review application;[244] and (8) whether alternative remedies exist.[245]

6.5 RECOMMENDATIONS

There is currently considerable uncertainty as to the content and application of the Oudekraal principles. This uncertainty, brought about mainly by the Constitutional Court's introduction of the flexible approach to collateral challenge in *Merafong,*[246] has been exacerbated by the judgment of the same court in *Gijima.*[247] It is recommended that the highest court use its earliest opportunity to resolve or minimise this uncertainty. First, the court ought to provide guiding principles or factors that it considers relevant in the determination of the interests of justice for the purposes of the flexible approach to collateral challenge. Secondly, the court ought to clarify the impact of evidence of egregious unlawfulness on the first three Oudekraal principles. Lastly, the uncertainty resulting from the tension between s 172(1)(a) of the Constitution and the relevance of delay in both collateral and direct challenge needs to be resolved.

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[236] *Bengwenyama* (note 211 above) para 85; see also *Allpay II* (note 221 above) 34.
[237] Freund and Price (note 219 above) above 193–6.
[238] *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 (2) SA 638 (SCA) ('*Sapela')* para 27.
[239] *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA) ('*Millennium Waste*') paras 28 and 31.
[240] Ibid para 29.
[241] Ibid paras 22–3.
[242] *Eskom Holdings Ltd* (note 210 above) para 14.
[243] Freund & Price (note 219 above) 203.
[244] Ibid 205.
[245] Ibid 206.
[246] *Merafong* (note 21 above) para 55.
[247] *Gijima* (note 82 above) para 52.

Clarity and guidance on the above issues will promote legal certainty, an indispensable part of the rule of law. As Forsyth correctly observes, 'it goes to the heart of the rule of law that the judges, like everyone else, should be ruled by the *law*, i.e. rules fixed and announced beforehand'.[248] In what follows, this thesis justifies these recommendations and reflects on the specific areas that require the court's attention.

The effects of the flexible approach to collateral challenge

The various Oudekraal principles are interrelated and their application is intertwined. The first and third principles are inversely proportional, while the second principle provides a link between the first and third principles by setting the test for whether the first or the third principle applies.

Given this interrelationship, the introduction of the flexible approach to collateral challenge has caused uncertainty in the scope and application of the first three Oudekraal principles. It has extended collateral challenge to any unlawful act even where a subject is not being coerced by a public authority to comply with that act. It has also introduced the interests of justice as a test for the availability of collateral challenge. The result is that an unlawful act is forever vulnerable to attack, and its legal effect is concomitantly uncertain.

Because of the inversely proportional relationship between the first and third principles, the widening of the ambit of the third principle by the flexible approach necessarily entails the constriction of the scope of the first principle. However, uncertainty as to what constitutes the interests of justice means that it is uncertain to what extent the flexible approach has widened the scope of the third principle and limited the scope of the first principle.

One implication for the second Oudekraal principle is that the test for the legal effect of the second act in a series of acts has also become uncertain. Will it now depend on the interests of justice whether the validity of the originating act is a precondition for the legal effect of a subsequent act? If so, what will guide the determination of the interests of justice?

Finally, the relationship between the interests of justice and the second Oudekraal principle is also uncertain. The second Oudekraal principle states that the enquiry into whether an unlawful administrative act has legal effect should not focus on whether it is valid but whether its validity

[248] Forsyth (note 9 above) 145-6.

is a necessary precondition for the validity of consequent acts.[249] The introduction of the flexible approach, and concomitantly the interests of justice, has one of two possible implications for the second Oudekraal principle. First, the interests of justice may have become the test for whether the validly of the first act is a precondition for the validity of the second act. Alternatively, it may be that the flexible approach has done away with the second Oudekraal principle in the sense that the inquiry is now directed solely at whether it is in the interests of justice to allow collateral challenge. In either case, it is unclear what will guide the determination of the interests of justice.

The need for guiding principles to determine the interests of justice

This thesis has shown that, after *Oudekraal* but prior to *Merafong,* jurisprudence had emerged from the courts limiting collateral challenge to instances where a subject was coerced by a public authority to comply with an unlawful act.[250] Although this may have been at odds with the common law,[251] it was entirely consistent with *Oudekraal*.[252] The courts had also delineated certain exceptions to collateral challenge, such as the promotion of the objects of an enabling statute and the advancement of the constitutional rights or values;[253] the protection of the environment;[254] and where the administrative act is directed at a specific person and that person has a right to an internal appeal.[255] From the cases, it is possible to extrapolate guiding principles as to how the courts prior to *Merafong* approached collateral challenge and its obverse, the first Oudekraal principle. These may be described as the original guiding principles.

In *Merafong,* the majority changed course from the direction signalled by the cases before it.[256] *Merafong* introduced a flexible approach in terms of which the interests of justice determine whether collateral challenge is available in any given case.[257] However, the court did not provide guidance regarding the factors that are relevant to the determination of the interests of justice.

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[249] *Oudekraal* (note 1 above) para 31.
[250] *V&A Waterfront* (note 42 above) para 10; *Club Myokonos* (note 43 above) para 38; *Ukwanda Leisure* (note 43 above) para 62; *Coal of Africa* (note 43 above) para 76; *City of Tshwane* (note 93 above) para 15.
[251] *Panasonic* (note 104 above) 530G-H; *Photocircuit* (note 104 above) 253E–F.
[252] *Oudekraal* (note 1 above) para 39.
[253] *Khabisi* (note 47 above) para 27; *EFF* (note 12 above) para 51–6.
[254] *Khabisi* (note 47 above) para 30.
[255] Ibid para 24.
[256] *Merafong* (note 21 above) para 55.
[257] Ibid.

Essentially, the flexible approach to collateral challenge means that the relevance of the original guiding principles is now uncertain. Clarity is required as to whether and how these principles relate to the interests of justice. It seems that other than the absence of coercion of a subject by a public authority, these guiding principles may be relevant considerations in the determination of the interests of justice. For instance, it is obviously in the interests of justice to advance constitutional values and protect the environment for future generations. However, the interests of justice are likely to be far wider than the original guiding principles. The result is that it is now uncertain just how wide the scope of collateral challenge has become.

Furthermore, the potentially wide ambit of the interests of justice raises the question whether factors such as prejudice will play any role in determining the availability of collateral challenge. Prejudice is a relevant consideration in the determination of a just and equitable remedy after the court has declared an unlawful act invalid.[258] Future courts could conceivably draw guidance from the jurisprudence that has been developed in respect of the role of prejudice in this regard.

Another source of uncertainty is whether the interests of justice test introduces discretion as to whether collateral challenge may be invoked in a particular case. When assessing the interests of justice in other contexts, such as whether to condone a late PAJA review application, the court exercises discretion after considering all relevant facts and circumstances.[259] If indeed the flexible approach introduces discretion as to the availability of collateral challenge, that would contradict the express remarks of the SCA in *Oudekraal*.[260]

Section 172(1)(a) and the effect of egregious unlawfulness of an official act

In *Kirland,* the majority of the Constitutional Court upheld the first Oudekraal principle despite evidence before it that the impugned permission was tainted by illegality.[261] This is also how Hoexter understood the essence of the first Oudekraal principle.[262] However, by virtue of the adoption of the flexible approach to collateral challenge in *Merafong*,[263] the unlawfulness of

[258] *Millennium Waste* (note 239 above) paras 22–3.
[259] *Harrison* (note 24 above) para 54.
[260] *Oudekraal* (note 1 above) para 36.
[261] *Kirland* (note 20 above) paras 88, 90–92.
[262] Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) 547, endorsed in *Coal of Africa* (note 43 above) para 64.
[263] *Merafong* (note 21 above) para 55.

an act apparently renders it perpetually vulnerable to challenge. The circumstances under which an unlawful act may have legal effect have thus become unclear.

The uncertainty as to the legal effect of an unlawful act prior to its being set aside is compounded by the Constitutional Court's interpretation of s 172(1)(a) of the Constitution in *Gijima.*[264] In this case, the highest court ruled that the court's obligation under s 172(1)(a) to declare an unlawful act invalid trumps the applicant's delay in challenging that act. Although *Gijima* did not concern collateral challenge, there appears to be no reason in logic or law why the court would adopt a different interpretation of s 172(1)(a) in the context of collateral challenge.

The construction *Gijima* accords to s 172(1)(a) appears to expand the scope of the latter and concomitantly limit, if not totally negate, the first Oudekraal principle. Essentially, in all instances where there is evidence of egregious unlawfulness, collateral challenge would be available and the first Oudekraal principle would not apply. For instance, a court seized with the facts akin to those in *Khabisi* would declare the environmental compliance notices invalid if there were evidence of egregious unlawfulness.[265]

Clarification by the Constitutional Court whether and to what extent an egregiously unlawful act has legal effect will obviously assist in determining the scope and ambit of the first Oudekraal principle.

The relevance of delay in both direct and collateral challenge

In *Merafong,* the majority held that delay may be a relevant consideration in an extended collateral challenge.[266] However, the majority left it to future courts to work out the details and provide guidance on this issue. In *Tasima,* the majority responded to the need for guidance by applying the delay rule as it was modified in *Khumalo.*[267] According to this rule, the court first determines whether the delay is unreasonable. If so, the court decides whether it should be condoned. If the court does not condone the unreasonable delay, the applicant is non-suited and the unlawful act is insulated from the reach of the court.[268] In this way, the delay rule curbs

[264] *Gijima* (note 82 above) para 52.
[265] *Khabisi* (note 47 above).
[266] *Merafong* (note 21 above) para 81.
[267] Ibid para 152 with reference to *Khumalo* (note 138 above) para 49.
[268] *Kirland* (note 20 above) para 97; *Cape Town City v Aurecon SA (Pty) Ltd* 2017 (4) SA 223 (CC) para 51.

'the potential prejudice that would ensue if the lawfulness of the decision remains uncertain'.[269] In addition to promoting legal certainty, the *Khumalo* test provides a principled way in which a court may determine the impact of delay on the availability of collateral challenge.

The majority in *Tasima* affirmed that in an extended collateral challenge invoked by a public authority, delay is indeed relevant.[270] The court emphasized that undue delay should not be tolerated.[271] As Khampepe J cautioned, '[d]elay can prejudice the respondent, weaken the ability of a court to consider the merits of a review, and undermine the public interest in bringing certainty and finality to administrative action'.[272]

Importantly, in *Tasima*[273] the court envisaged the application of the *Khumalo* test both to extended collateral challenge and to review applications based on legality. This brought about consistency in the legal principles used to determine the consequences of delay in both direct and collateral challenge.

However, in *Gijima*[274] the Constitutional Court introduced uncertainty as to the relevance of delay in review applications based on legality. In this case the court, having applied the *Khumalo* test to the facts before it, concluded that the applicant's delay was unreasonable and that there was no basis for condoning it. In spite of this, the court went ahead and declared the impugned act invalid. It held itself bound by s 172(1)(a) of the Constitution to declare the offending act invalid even though it had not condoned the undue delay. In *Asla Construction,*[275] a majority of the Constitutional Court followed *Gijima.*

In this way *Gijima* has questioned the relevance of delay in challenging an unlawful act, whether directly or indirectly. Secondly, because the court did not expressly discard or depart from the *Khumalo* test, it has rendered the application of that test uncertain.

Gijima thus illuminates considerable tension between the established jurisprudence of the Constitutional Court on delay and the court's latest interpretation of s 172(1)(a) of the Constitution. This tension cries out for resolution at the earliest opportunity.

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[269] *Merafong* (note 21 above) para 73.
[270] *Tasima* 150–51.
[271] Ibid para 160.
[272] *Tasima* (note 28 above) para 160.
[273] *Tasima* (note 28 above) paras 143, 163–6.
[274] *Gijima* (note 82 above) para 52.
[275] *Asla Construction* (note 82 above) para 65–6.

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