

# Administrative Law



# Good Reviews, Bad Actors: The Constitutional Court's Procedural Drama

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The law must rule, and prevent government officials from acting self-interestedly or arbitrarily. When officials act unlawfully, therefore, their decisions ought to be undone. Indeed, the officials themselves have a duty to set things right in court. But sometimes an official acts self-interestedly or arbitrarily in the very act of undoing her own unlawful decision. What should the court do then? That is the puzzle this article is about.

This puzzle has arisen in two recent Constitutional Court cases.<sup>1</sup> A related puzzle has arisen in a third.<sup>2</sup> The thrust of the Court's judgments has been to constrain the government's power to have its prior decisions undone by a court. I discuss the puzzle in more detail in Part I, and the Court's solution in Part II. Since the solution has been to erect procedural bars to the official's attempts to undo her own decision, this raises the broader question of the relationship in the Court's jurisprudence between procedure and substance, which is the subject of Part III.

## I THE PROBLEM

When and why would we want to tie the government's hands? That is the puzzle I am interested in here. Why, in other words, would we want to say that an official who has gone to court to undo a prior decision that is clearly unlawful should be prevented from doing so? The question may be surprising, since it seems axiomatic that unlawful conduct must be undone. That is the point of

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<sup>1</sup> *Khumalo and Another v MEC for Education, KwaZulu-Natal* [2013] ZACC 49, 2014 (5) SA 579 (CC), 2014 (3) BCLR 333 (CC) ('*Khumalo*'); *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* [2014] ZACC 6, 2014 (3) SA 481 (CC), 2014 (5) BCLR 547 (CC) ('*Kirland*').

<sup>2</sup> *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal and Others* [2013] ZACC 10, 2013 (4) SA 262 (CC), 2013 (6) BCLR 615 (CC) ('*KZN Joint Liaison Committee*').

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the venerated principle of legality.<sup>3</sup> In fact, government officials have a duty, as custodians of the public interest, to undo illegalities.<sup>4</sup> Why would a court want to stand in their way?

One obvious answer is that undoing a decision upon which people have relied creates uncertainty. That is true, but not my interest here – not least because, as we shall see, it cannot explain the cases. My interest here is a fact more rarely appreciated, which is that officials are capable of acting irrationally, arbitrarily or opportunistically even when they are undoing unlawful decisions. There is no magic to stop the reappearance of the same vices that produced the unlawful decision in the first place. And sometimes even a good review must be stopped if the actor bringing it is behaving badly; or so I shall argue.

The tension this creates can be understood as a tension within the rule of law. The cases I discuss in this article bear this out. Both the majority and dissenting judgments strenuously invoke the rule of law, using it to support verdicts that are diametrically opposed. Some judges say the rule of law gives them reason to allow officials to undo unlawful acts; some say it gives them reason to prevent their undoing. After all, the rule of law paradigmatically includes the principle of legality, which says that unlawful conduct must be undone. And yet officials could flout the rule of law by acting improperly or arbitrarily in the very attempt to undo unlawful conduct. As Alistair Price has recently said, conceptualising the rule of law is a task that South African scholars ‘cannot afford to ignore’.<sup>5</sup> These tensions within the rule of law, and the Court’s deployment of it, confirm that further academic treatment is needed. No full conceptualisation will be forthcoming in this article, though the polyvalence of the rule of law is an important theme. What I shall discuss is the dilemma for judges that this generates, and the doctrinal tools they have used to manage it.

The dilemma arises against the background of a debate about the status of unlawful administrative acts,<sup>6</sup> which has important terminological (if not other) relevance and therefore requires brief discussion. The fundamental starting point is that all unlawful administrative acts are void. But this has always been a theoretical rather than a practical proposition. Without the authoritative judgment of a court, one cannot know that an extant administrative decision is, in truth, unlawful and invalid. And it makes little practical difference whether, as a matter of theory, the court’s judgment declares the act void or makes it so. If judicial review is foreclosed for procedural reasons, even an invalid act is ‘as effective ...

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<sup>3</sup> See, eg, *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others (No 2)* [2014] ZACC 12, 2014 (4) SA 179 (CC), 2014 (6) BCLR 641 (CC) (*Allpay*) at para 30 (‘Logic, general legal principle, the Constitution and the binding authority of this court all point to a default position that requires the consequences of invalidity to be corrected or reversed where they can no longer be prevented. It is an approach that accords with the rule of law and principle of legality.’)

<sup>4</sup> See text to note 12 below.

<sup>5</sup> A Price ‘The Evolution of the Rule of Law’ (2013) 130 *South African Law Journal* 649, 661.

<sup>6</sup> See generally, L Baxter *Administrative Law* (1984) 355–358; C Forsyth ‘The Theory of the Second Actor Revisited’ (2006) *Acta Juridica* 209, 209–210; C Hoexter *Administrative Law in South Africa* (2nd Edition, 2012) 546–550.

as the most impeccable of orders'.<sup>7</sup> Moreover, it will often be unjust for a court to undo the effects of an administrative act upon which people have relied. Thus, even as it declares the act invalid, the court has discretion to decide whether it will be left intact.<sup>8</sup> The upshot is that, on one hand, unlawful administrative acts are axiomatically invalid. On the other, their factual existence must sometimes be sustained. This means that, on top of the notions of lawfulness and validity, a third-level criterion had to be introduced into the ontology of administrative acts, namely whether the act has been 'set aside' by a court. And this third level is, in many ways, the most important. A court may authoritatively declare an administrative action unlawful and invalid, but if it does not set aside the act it is as robustly existent as any other.

In current South African law, it is possible for the official who made the decision to approach a court to set it aside. It was not always so. In the nineteenth century our courts recognised the doctrine of *functus officio*, which prevents officials from reversing their decisions willy-nilly.<sup>9</sup> Initially, our courts said it followed from this that an official may not even approach a court to have his or her decision set aside;<sup>10</sup> some interested private party had to bring the application. But in the constitutional era, our courts, impelled by the principle of legality, decided otherwise.<sup>11</sup> The Supreme Court of Appeal held, in a series of cases starting with *Pepcor*, that officials may apply to court to have their own unlawful decisions set aside.<sup>12</sup> Indeed, officials were held to have a duty to do so, since the state has a special responsibility, as custodian of the public interest, to undo illegalities.

This was an appealing conclusion to reach. But it has given rise to the problems that motivate this article. The basic difficulty is one already mentioned: officials sometimes behave badly even as they try to undo illegalities. The courts need a way to stop those machinations, or at least to avoid becoming an instrument of them. And that need becomes more pressing in times of venality.

Let us start with an extreme case. Imagine some hypothetical country where the President, widely suspected of trying to subjugate the prosecuting authorities, plucks a new head of prosecutions from obscurity. Now suppose that the head turns out to be far more effective and independent than the President anticipated. Fortunately for the President, he finds out that the head had an undisclosed brush with the law

<sup>7</sup> *Smith v East Elloe Rural District Council* [1956] AC 736, 769–780 (Lord Radcliffe). See also *Harnaker v Minister of the Interior* 1965 (1) SA 372 (C) at 381A–F; *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48, 2004 (6) SA 222 (SCA) ('*Oudekraal*') at para 26.

<sup>8</sup> *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others* [2007] ZASCA 165, 2008 (2) SA 481 (SCA) at para 23; *Seale v Van Rooyen NO and Others* [2008] ZASCA 28, 2008 (4) SA 43 (SCA) ('*Seale*') at para 13; *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* [2010] ZACC 26, 2011 (4) SA 113 (CC), 2011 (3) BCLR 229 (CC) ('*Bengwenyama*') at paras 81–85.

<sup>9</sup> See generally, DM Pretorius 'The Origins of the *Functus Officio* Doctrine, with Specific Reference to its Application in Administrative Law' (2005) 122 *South African Law Journal* 832.

<sup>10</sup> *Ibid* 844–845 and 856, citing *Osterloh v Civil Commissioner of Caledon* (1856) 2 Searle 240; *Mining Commissioner of Johannesburg v Getz* 1915 TPD 323.

<sup>11</sup> Baxter (note 6 above) at 379–380 (Criticised the earlier decisions for 'lean[ing] too far on the side of the individual and away from the principle of legality').

<sup>12</sup> *Pepcor Retirement Fund and Another v Financial Services Board and Another* [2003] ZASCA 56, 2003 (6) SA 38 (SCA) ('*Pepcor*'); *Municipal Manager: Qaukeni Local Municipality and Another v FV General Trading CC* [2009] ZASCA 66, 2010 (1) SA 356 (SCA); *Ntshangase v MEC for Finance, KwaZulu-Natal and Another* [2009] ZASCA 123, 2010 (3) SA 201 (SCA).

thirty years ago. As it happens, this hypothetical country, like South Africa, treats it as a reviewable irregularity if the President appoints a prosecution head who is not ‘fit and proper’,<sup>13</sup> and allows government officials, including the President himself, to bring the review application.<sup>14</sup> What would a court do if presented with this application? Would it be bound to do the President’s bidding and undo the clearly illegal decision? And would it make a difference if the President had chosen to appoint this new prosecution head precisely because he knew about the undisclosed misdemeanours, which would hang over him like a Damoclean sword?

Indeed, we do not need such outlandish hypotheticals to make the problem vivid. It is a strategy actually used by government actors in countless recent cases. These are not the heady days of *Pepcor*, when the government was optimistically enlisted to assert the power of the Constitution through judicial review. The government’s litigation strategies have become flagrantly opportunistic and self-interested, using judicial review to evade, rather than to assert, its obligations. It has sought to nullify those obligations by pointing to its own illegal behaviour in incurring them. Once the government allows itself the use of this strategy, it is hard to stop. Under political pressure because you chose a bad building contractor? No problem; just undo the contract by claiming you failed to vet the builder’s tax certificate.<sup>15</sup> Contracted for services you no longer want? Not to worry; have the contract nullified by claiming you concluded it in contravention of your own procurement rules.<sup>16</sup> Made a settlement agreement whose terms now prove inconvenient? Ditto.<sup>17</sup> The possibilities are endless if such arguments are allowed to succeed.

To be sure, they almost never do. The courts have managed to squash them every time. The point is merely that there is an epidemic of these cases which the courts need to salve. Sometimes the cases are bound to fail on the merits, but we want better safeguards than that. Even if the state can contrive a good legal point – even if the President had happened to appoint someone genuinely unfit and improper – arbitrary and self-seeking governance cannot be given free rein. The Court has, fortunately, perceived this fact and has sought to apply the brakes.

This is merely one instance of a more general trend. In the face of growing governmental dysfunction, the Court has newly asserted itself in a range of areas to gird and to goad government and even, where possible, simply to replace

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<sup>13</sup> Section 9(1)(b) of the National Prosecuting Authority Act 32 of 1998, applied in *Democratic Alliance v President of the Republic of South Africa and Others* [2012] ZACC 24, 2013 (1) SA 248 (CC).

<sup>14</sup> One could also imagine that the country allows the President to institute a commission of inquiry on the basis of the possible irregularity, and to suspend the unwanted NDPP while this takes place.

<sup>15</sup> *Country Cloud Trading CC v MEC, Department of Infrastructure Development* [2013] ZASCA 161, 2014 (2) SA 214 (SCA). An appeal on a different point was heard, but dismissed, by the Constitutional Court in *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* [2014] ZACC 28, 2015 (1) SA 1 (CC), 2014 (12) BCLR 1397 (CC).

<sup>16</sup> *Gauteng MEC for Health v 3P Consulting (Pty) Ltd* [2010] ZASCA 156, 2012 (2) SA 542 (SCA) (‘3P Consulting’); *Kwa Sani Municipality v Underberg/Himeville Community Watch Association and Another* [2015] ZASCA 24 (‘Kwa Sani’); *Tasima (Pty) Ltd v Department of Transport* [2015] ZASCA 200, [2016] 1 All SA 465 (SCA) (‘Tasima’). The state’s go-to provision here is s 217 of the Constitution, which requires government contracts to be concluded ‘in accordance with a system which is fair, equitable, transparent, competitive and cost-effective’.

<sup>17</sup> *Provincial Government: North West and Another v Tsoga Developers CC and Others* [2015] ZANWHC 36. The Constitutional Court heard an appeal, but refused leave, in *Provincial Government North West and Another v Tsoga Developers CC and Others* [2016] ZACC 9, 2016 (5) BCLR 687 (CC).

it. Most plainly, the Court has developed more robust remedies to hold errant officials to account. Its recent judgment in *Pheko* exhibits a clear determination to put individual officials on the hook in contempt proceedings; they will no longer be allowed to deflect meaningful judicial enforcement by cowering behind the nebulous legal personhood of the state, or by endlessly passing the buck.<sup>18</sup> The Supreme Court of Appeal recently took the dramatic step of imposing a custodial sentence (albeit suspended) on officials who pigheadedly ignored the requirements of administrative law.<sup>19</sup> These moves to craft sharper-edged enforcement powers have been coupled with a greater willingness to make supervisory orders.<sup>20</sup> Also notable is the Court's unprecedented willingness to substitute its own decision for that of a government agency in the recent case of *Trencon*.<sup>21</sup> The message is clear: the government is no longer to be trusted.

## II THE SOLUTION

My concern here is how this has played out when the government has tried to have its own decisions reviewed. The synopsis is that the delay bar has come to the fore as a means to scrutinise, and where necessary to thwart, the government's conduct in bringing the review. At common law a judicial review application must be brought within a 'reasonable' time.<sup>22</sup> The Promotion of Administrative Justice Act 3 of 2000 (PAJA) rigidifies that requirement significantly by providing that the application 'must be instituted ... not later than 180 days' after the person became aware, or should have become aware, of the decision and the reasons for it.<sup>23</sup> Two rationales are conventionally given for these delay bars: to ensure the finality of administrative decisions, and to curtail prejudice to the other party.<sup>24</sup> These certainly have application where the review is sought by a private party, but the delay bars are used for an additional purpose where the government seeks to review its own decision.

<sup>18</sup> *Pheko and Others v Ekurhuleni City (No 2)* [2015] ZACC 10, 2015 (5) SA 600 (CC) ('*Pheko*'). The Court joined the Executive Mayor, Municipal Manager and departmental head of the Ekurhuleni Municipality, as well as the MEC for Human Settlements in the province, so that the Court's earlier supervisory order – and any concomitant contempt proceedings – would be more effective.

<sup>19</sup> *Tasima* (note 16 above) at para 3 of the order.

<sup>20</sup> See, eg, *AllPay* (note 3 above); *Pheko* (note 18 above); *Economic Freedom Fighters v Speaker, National Assembly and Others* [2016] ZACC 11, 2016 (3) SA 580 (CC) ('*EFF v Speaker*'). These contrast strikingly with *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* [2002] ZACC 15, 2002 (5) SA 721 (CC) at para 129, where the Court famously declined to issue a structural interdict on the basis that '[t]he government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present case.' It is hard to imagine the Court's saying that now.

<sup>21</sup> *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* [2015] ZACC 22, 2015 (5) SA 245 (CC), discussed elsewhere in this volume by Raisa Cachalia and Lauren Kohn respectively.

<sup>22</sup> *Wolgroeiens Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A).

<sup>23</sup> Section 7(1). I ignore the complexities introduced by s 7(1)(a). Section 9(1)(b), it should be noted, allows a court to condone a delay of more than 180 days on application by the person concerned. For recent discussion see *Aurecon South Africa (Pty) Ltd v Cape Town City* [2015] ZASCA 209, 2016 (2) SA 199 (SCA) ('*Aurecon*') at paras 13–17.

<sup>24</sup> See, eg, *Associated Institutions Pension Fund and Others v Van Zyl and Others* [2004] ZASCA 78, 2005 (2) SA 302 (SCA) ('*Van Zyl*') at para 46. But see note 35 below.

*Khumalo*, decided in December 2013, is the first Constitutional Court judgment to deal with that scenario.<sup>25</sup> Mr Khumalo was appointed to a position in the KwaZulu-Natal Department of Education in April 2004. Other disappointed applicants lodged a grievance shortly thereafter, complaining that he did not meet the requirements stated in the advertisement for the post. The MEC set up a task team, which reported in January 2007 that Mr Khumalo had not met the requirements and should not have been considered. In October 2008, the MEC applied to the Labour Court to have the appointment set aside. Both that court<sup>26</sup> and the Labour Appeal Court<sup>27</sup> held that, although the MEC had inexplicably delayed in bringing the application, the principle of legality had to be vindicated.<sup>28</sup> They allowed the MEC's challenge and set aside the appointment.

But the Constitutional Court unanimously upheld Mr Khumalo's appeal, holding that the MEC should have been non-suited because of her unexplained delay. The majority judgment of Skweyiya J brings out very clearly the fundamental dilemma. The judgment emphasises, from its first paragraph, the importance of the rule of law.<sup>29</sup> Yet this foundational principle points in different directions. On one hand, the Court held, the rule of law not only confers standing on the MEC to correct her own department's unlawful decisions, but imposes a duty to do so.<sup>30</sup> On the other, 'expeditious and diligent compliance with constitutional duties' is itself 'a requirement of legality'.<sup>31</sup> Unlawful administrative conduct must be remedied – but remedied according to law:

Because of these fundamental commitments [to the rule of law], 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. But that does not mean that the Constitution has dispensed with the basic procedural requirement that review proceedings are to be brought without undue delay.<sup>32</sup>

In this instance there seemed to be a very strong *prima facie* case that Mr Khumalo's appointment was unlawful: even on his own version, 'he ha[d] not gone far enough to show that he met the post's requirements', with the effect that, in terms of the controlling statute, he was 'not entitled to be considered'.<sup>33</sup> Yet the Court nevertheless held that the delay bar trumped the imperative to undo this decision.

The majority judgment considered three reasons for its conclusion. The first was that Mr Khumalo would suffer prejudice if his appointment were to be undone now, nine years after it was made.<sup>34</sup> But the Court discountenanced this

<sup>25</sup> *Khumalo* (note 1 above). The Court notes the novelty of the situation before it at para 32.

<sup>26</sup> MEC, *Department of Education, KwaZulu-Natal v Khumalo and Another* [2010] ZALC 79, 2011 (1) BCLR 94 (LC).

<sup>27</sup> *Khumalo and Another v MEC for Education: KwaZulu-Natal* [2012] ZALAC 26, (2013) 34 *ILJ* 296 (LAC).

<sup>28</sup> I gloss over the fate of the several other parties in the case, and consider only that of Mr Khumalo, one of two first-instance respondents who went all the way to the Constitutional Court.

<sup>29</sup> *Khumalo* (note 1 above) at para 1.

<sup>30</sup> *Ibid* at paras 35–36.

<sup>31</sup> *Ibid* at para 46.

<sup>32</sup> *Ibid* at para 45.

<sup>33</sup> *Ibid* at paras 60–61.

<sup>34</sup> *Ibid* at para 52.

reason on the basis of the distinction between invalidity and setting aside.<sup>35</sup> Any potential prejudice to Mr Khumalo would be accommodated in determining, on the merits, whether his appointment ought to be set aside. It could not, therefore, justify the Court's refusal to hear the merits of the MEC's application at all. The second reason the Court considered was that the MEC's delay meant the lawfulness of the appointment could not be properly determined. Memories inevitably decline, and documentary evidence disappears, over time;<sup>36</sup> and in this case the evidence was particularly patchy, the task team's report having noted an 'almost total collapse' of memory even by early 2007.<sup>37</sup> The Court did not discountenance this reason, but should have: if the MEC could not discharge the burden of proving the decision was unlawful, then her application would fail on the merits. The paucity of evidence is rarely, therefore, a sufficient reason to non-suit an applicant altogether.

So the third reason is, it seems to me, the real driver of the Court's decision. The reason is that '[t]he MEC ha[d] not sought in any way to explain her delay'.<sup>38</sup> Crucially, the lack of an explanation was not conclusive in itself. What mattered was the inevitable inference to which it led:

The fact that the MEC has elected not to account for the delay, despite having had the opportunity to do so at multiple stages in the litigation, can only lead one to infer that she either had no reason at all or that she was not able to be honest as to her real reasons.<sup>39</sup>

Suspicions about the MEC's motives seem, then, to have been decisive. Was she really trying to vindicate the rule of law, or was she using the illegality opportunistically to remove an opponent? If the former, why not act sooner? Did the supposed collapse of memory within the department seem like a suspicious cover-up? Was it suggestive that, shortly after Mr Khumalo's appointment and before moves were made to oust him, the African National Congress had wrested control of the KwaZulu-Natal government from the Inkatha Freedom Party? Maybe. Or maybe this is all too conspiratorial. But the Court could not know, because the MEC did not tell it. In the absence of an explanation, the uncomfortable inference arose that the MEC was acting either arbitrarily or dishonestly.

What is more, the MEC's motives mattered only because she was a state functionary. 'Had the matter been brought by a private litigant', the Court held, 'this aspect of the test might weigh less heavily'.<sup>40</sup> Whereas private litigants may invoke their legal rights for whatever purpose they wish, the rule of law requires

<sup>35</sup> Ibid at paras 53, 56. This approach differs from that taken in *Van Zyl* (note 24 above) at para 53 and *Gqwetha v Transkei Development Corporation Ltd and Others* [2005] ZASCA 51, 2006 (2) SA 603 (SCA) at paras 21–23, where the potential prejudice of undoing the decision is treated as a reason to refuse to adjudicate the review at all. Importantly, the Constitutional Court held in *Bengwenyama* (note 8 above) that a court must declare any unlawful decision invalid – which requires it to adjudicate the review – and ameliorate any prejudice in deciding whether or not to set the decision aside. This seems effectively to eliminate the prejudice-avoiding function of the delay bar (except, as we shall soon see, where the prejudice relates to the conduct of the litigation itself).

<sup>36</sup> *Khumalo* (note 1 above) at para 66.

<sup>37</sup> Ibid at para 7.

<sup>38</sup> Ibid at para 39.

<sup>39</sup> Ibid at para 51.

<sup>40</sup> Ibid.

government officials to act without arbitrariness or opportunism at all times – even when trying to undo their own unlawful decisions.

*Khumalo* embodies the dilemma faced by a court that has to decide whether to allow an official to undo her own unlawful decisions. On one hand, undoing an illegality is required by the rule of law. On the other, in undoing an illegality an official may flout the rule of law. This, I have suggested, drew the Court in *Khumalo* into examining the functionary's motives. Was the MEC nobly cleaning up her department, or was she opportunistically using the illegality to get rid of an employee who had fallen out of political favour? Fortunately, the rule against delay – or, more accurately, the test to determine whether the delay ought to be overlooked – gave a ready doctrinal home for these sorts of considerations. Things are not always so easy.

In *Kirland*, the Eastern Cape Department of Health had granted an approval to Kirland in 2007 to build a private hospital.<sup>41</sup> The following year the Superintendent-General (SG) 'withdrew' the approval. Kirland went to court seeking to set aside the withdrawal on the basis that the SG was *functus officio* and bound by the earlier approval. But then the department revealed what had gone on behind the scenes. In 2006, an internal decision had been made by the SG to refuse Kirland's application on the basis that the region was oversupplied. This was never acted upon or communicated to Kirland. Instead, when the SG was away on sick leave, his acting replacement yielded to political pressure (applied, apparently, by the Eastern Cape MEC and the ANC's then provincial chairperson, Stone Sizani) and granted the approval to Kirland. As the Acting SG explained in her affidavit, the department was seen to be 'withholding licences from BEE companies to establish private hospitals', and so refusing Kirland would 'put her in a bad light in the political arena'.<sup>42</sup>

The MEC argued that the initial 2006 refusal was the extant decision, and so the *functus officio* rule in fact meant the Acting SG had had no power to grant the 2007 approval. But, if not, the 2007 approval was unlawful because it had been given as result of unauthorised dictation, as the Acting SG's affidavit admitted.

Of course, Kirland had not asked for the 2007 approval to be set aside. It did not know about the dubious circumstances underlying the approval until the MEC revealed them in her opposing affidavit; and, in any event, Kirland would have had no interest in undoing the decision that was in its favour – its litigation was aimed precisely at reviving that decision. Crucially, the department, despite arguing that the approval was unlawful, did not counter-apply for it to be declared invalid or set aside – though Kirland had made the point, in its replying affidavit, that in the absence of a counter-application the government's protestations about the approval were futile. Nevertheless, in addition to affirming all of Kirland's arguments and setting aside the withdrawal, the High Court also set aside the approval, agreeing with the department that the Acting SG had unlawfully

<sup>41</sup> *Kirland* (note 1 above).

<sup>42</sup> Acting SG's affidavit, quoted in *MEC for Health, Province of Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* [2013] ZASCA 58, 2014 (3) SA 219 (SCA) ('*Kirland* (SCA)') at paras 8–9.

buckled under political pressure.<sup>43</sup> But the court gave no reasons why it was open to it to set aside the approval in the absence of any application for its judicial review. It simply stated, incorrectly, that Kirland had sought its review.<sup>44</sup>

This was the crucial issue on appeal. The Supreme Court of Appeal held (per Plasket AJA) that the High Court had correctly set aside the withdrawal, but had clearly 'erred' in saying Kirland had also sought the setting aside of the approval.<sup>45</sup> In truth, the court had had 'no jurisdiction to set aside the approvals granted by [the Acting SG] in the absence of either an application or a counter-application in which that relief was sought'.<sup>46</sup> And, as long as the approval was not set aside, it 'existed in fact and had legal consequences' and had to be treated as valid.<sup>47</sup> The Supreme Court of Appeal therefore dismissed the government's appeal but upheld a cross-appeal by Kirland against the setting aside of the approval.

A further appeal by the government was decided by the Constitutional Court in March 2014.<sup>48</sup> The Court split 7:3. The majority (per Cameron J, with Froneman J adding a separate concurrence) agreed with the Supreme Court of Appeal in all relevant respects. The minority (per Jafta J, with Zondo J adding a separate concurrence) held that the propriety of the approval had been adequately ventilated in the High Court papers and that it should be set aside. To do otherwise would allow a clearly unlawful decision to remain in existence on the 'technical basis' that there was no application to have it reviewed,<sup>49</sup> thus 'plac[ing] form way above substance'.<sup>50</sup>

In response, the majority judgment of Cameron J gave three '[i]nter-related reasons' why the validity of the approval could not fairly be decided in the absence of a formal counter-application.<sup>51</sup> First, only if there were a counter-application – in which Kirland would be the respondent, rather than, as here, the applicant – would Kirland have the procedural right to have its version of the facts preferred,<sup>52</sup> and be on notice that it needed to dispute seriously the version given in the Acting SG's affidavit, and if necessary refer the matter to trial, to get the order it sought.<sup>53</sup> Secondly, Kirland said it had spent R15 000 000 to acquire property in reliance on the approval.<sup>54</sup> This and other potential prejudice 'should,

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<sup>43</sup> *Kirland Investment (Pty) Ltd t/a Eye & Laser Institute v MEC for Health, Province of Eastern Cape NO and Others* [2011] ZAECGHC 78 (Makaula J).

<sup>44</sup> *Ibid* at para 8.

<sup>45</sup> *Kirland (SCA)* (note 42 above) at para 26.

<sup>46</sup> *Ibid* at para 27.

<sup>47</sup> *Ibid* at paras 22 and 32.

<sup>48</sup> *Kirland* (note 1 above).

<sup>49</sup> *Ibid* at para 43.

<sup>50</sup> *Ibid* at para 50.

<sup>51</sup> *Ibid* at para 70. I organise these issues in a way different from Cameron J.

<sup>52</sup> This is a consequence of the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51, 1984 (3) SA 623 (A).

<sup>53</sup> *Kirland* (note 1 above) at para 85. Notably, Jafta J's minority judgment (at para 33) turned both these points against Kirland. He held that the Acting SG's version must be regarded as correct – and therefore the approval as clearly unlawful – because the department was the respondent. And he held that Kirland 'must now live with the consequences of its choice' not to raise a serious dispute of fact or refer the matter to the hearing of oral evidence.

<sup>54</sup> *Ibid* at paras 75, 86.

at least, be properly explored and considered before a decision on which the entity in good faith relied is set aside.<sup>55</sup>

Thirdly, and most interestingly for my purposes, Cameron J pointed to the fact that the department's officials had not explained the seven-month delay between the return of the SG and their first attempts to undo the decision.<sup>56</sup> 'The Court and Kirland', he said, 'are entitled to know what happened in that time'.<sup>57</sup> In part, Cameron J's point is that if the MEC had brought a formal counter-application, it would have been hit by the rule against delay, and that the MEC could not be allowed to bypass a clear legislative requirement using 'procedural tricks'.<sup>58</sup> Here the Court cited *Khumalo*.<sup>59</sup>

As in *Khumalo*, the point has a further dimension. Cameron J is not merely asserting procedural propriety for its own sake. The delay bar and concomitant explanation help the Court by allowing it to assess the department's motives in seeking the setting aside of the decision. Cameron J notes that the department's conduct during the seven-month delay 'suggests that at least it was resigned to the approval', and perhaps that it thought the approval was valid, which 'may count against it' when a court adjudicates its application.<sup>60</sup> There were also suggestions that the department was still under the MEC's thumb and could not do anything about the approval.<sup>61</sup> Perhaps 'political shenanigans' underlay not only the approval but also the MEC's attempt to undo it? Or were the supposed shenanigans invented by the department to try to undo a decision that had become inconvenient? Unlikely – but impossible to rule out, at least in these impaired proceedings.

What is beyond doubt is that the department claimed that the approval was invalid only after it had become embroiled in adversarial proceedings – and once its earlier decision to grant the approval must have become very inconvenient. Prior to that, the department exhibited not the faintest interest in asserting the decision's unlawfulness, and indeed seemed to presuppose that it was valid.<sup>62</sup> In these circumstances the Court may well have doubted that the department's sole aim, in asking for the approval to be set aside, was nobly to vindicate the rule of law.

So it is easy to understand why the majority was not willing to undo the approval. Even when a decision is unlawful there are, I have been suggesting, deep-rooted reasons not to allow the government to undo it. This is both because

<sup>55</sup> Ibid at para 86. As Jafta J suggests (at paras 59–61), the potential prejudice is assessed in determining whether an invalid decision should be set aside, and is not a reason to withhold a declaration of invalidity or refuse to adjudicate the matter at all. Compare the discussion of *Khumalo* (note 1 above). But Cameron J's point is that, absent a counter-application, there was insufficient evidence and argument to assess prejudice, since Kirland had not been on notice to address the matter. This distinguishes the case from *Khumalo*, where there was a formal judicial review application and the potential prejudice had been fully ventilated in both lower courts.

<sup>56</sup> *Kirland* (note 1 above) at paras 70–74.

<sup>57</sup> Ibid at para 70.

<sup>58</sup> Ibid at 83.

<sup>59</sup> Ibid. Froneman J's concurring judgment (at paras 112–114) quotes from *Khumalo* at length.

<sup>60</sup> Ibid at paras 72–74.

<sup>61</sup> Ibid at para 71.

<sup>62</sup> Ibid at paras 71–76.

undoing the decision may set back the interests of those who have relied on it, and because government actors can, in seeking to have the decision undone, exhibit the very same self-interest, partisanship, arbitrariness and other vices that made the decision reviewable in the first place.

For this reason, the minority judgments in *Kirland* are disappointing. They fail to spot the dilemma that this article takes as its starting point, and sail benightedly past the reasons that this article has identified against undoing even an unlawful decision. Jafta J's central argumentative strategy is to stress the impropriety of the approval: it was, he says, not only 'unacceptable and disgraceful' but also 'opportunist[ic]...', 'exploit[ative]', 'illegitimate',<sup>63</sup> 'fraudulent'<sup>64</sup> and 'corrupt'.<sup>65</sup> But this is unhelpful. No one sought to defend the decision; the central issue was how to weigh up the importance of correcting illegalities against the difficulties that correction inevitably entails. Rather than resolving that dilemma, Jafta J denies that there is one.

Cameron J gives the lie to Jafta J's reasoning, and notes the importance of the official's motive in undoing the decision, when he says:

It does not assist the debate to point out that what happened in this case seems to have been highly unscrupulous and deplorable. This is because, in the next case, the official who seeks to ignore departmental action may not be acting with pure motives. Though the official here seems to have been on the side of the angels, the risk of vindicating the Department's approach lies in other cases where the revoker may not be acting nobly.<sup>66</sup>

Jafta J also says that a decision so flagrantly unlawful is 'antithetical to the founding values of our constitutional order' and 'inconsistent with the rule of law'.<sup>67</sup> But this, again, treats the rule of law as nothing more than the principle that unlawfulness must not be allowed, and must be undone when it occurs. That is to say, Jafta J makes the error, cautioned against by Allan, of adopting an analysis of the rule of law that is no more sophisticated 'than the jejune idea of legality'.<sup>68</sup> He ignores the fact, to which these cases attest, that the government can act antithetically to the rule of law even as it purports to assert legality.

What the cases also show is just how stacked the deck can be in favour of the government. It has all the information about what went on behind the scenes, while the citizen often cannot know that an illegality has occurred. This means that, as in *Kirland*, the government can triumphantly play its joker whenever – and only if – it is convenient. Worse, the pressure is strong to contrive false information that casts doubt on the decision. If the official does this, the private party, as an outsider to the state's inner workings, is poorly placed to refute the allegations. Sometimes, in fact, government officials can serve these ends not by disclosing or inventing information, but by withholding it. Whereas in ordinary judicial

<sup>63</sup> Ibid at para 41.

<sup>64</sup> Ibid at para 44.

<sup>65</sup> Ibid at para 46.

<sup>66</sup> Ibid at para 104.

<sup>67</sup> Ibid at para 47, quoting from *S v Shaik and Others* [2008] ZACC 7, 2008 (5) SA 354 (CC), 2008 (8) BCLR 834 (CC) at para 72 and *South African Association of Personal Injury Lawyers v Heath and Others* [2000] ZACC 22, 2001 (1) SA 883 (CC), 2001 (1) BCLR 77 (CC) at para 4 respectively.

<sup>68</sup> TRS Allan 'The Rule of Law as the Rule of Reason: Consent and Constitutionalism' (1999) 115 *Law Quarterly Review* 221.

review cases it is the government's aim to show that the decision had the weight of information and deliberation behind it, its precise purpose in these cases is to show the decision to be unlawful. If, as in *Khumalo*, the full background to the decision would be needed to show that the decision was justified, the government can simply withhold it.

True, these points should not be overstated. The information is not entirely within the state's control; it is legally bound to provide the record of the decision when a judicial review application is brought. But there are certainly cases in which there is no realistic prospect that anyone but the decision-makers themselves will have evidence of the alleged unlawfulness. *Kirland* is one such case; *Tasima*, which I discuss below, is another.<sup>69</sup> Public procurement cases such as these raise particular worries.<sup>70</sup> The applicable legal regulations are especially detailed and technical; one can find missteps in almost any tender process, and confect a plausible-sounding review ground almost whenever one has an interest in doing so. Where the government is known to be corrupt, suspicions that it has such an interest are ever-present: the procurement process is its primary means of distributing largesse, and having previous procurement decisions undone is an effective way to free up some more.

Indeed, all this might bear on how the government conducts itself when the decision is made in the first place. Why bother to comply with procurement law if that is only going to make your contract harder to undo if it proves inconvenient? And why not wilfully appoint an NDPP with skeletons in his closet so that you can undo his appointment if he shows too much independence? The point should, again, not be overstated; there remain obvious reasons, both legal and prudential, for officials not to flout the law. But their incentives are plainly messier than one would like. Certainly it is true that where the government has the power to create, to reveal, and to undo irregularities, there are difficulties that do not arise where judicial review is brought by a private party, and which must be specially addressed.

Fortunately, *Khumalo* and *Kirland* have already made important moves to do so. First, the majority judgment in *Kirland* rejected the government's invitation to the Court to revisit *Oudekraal*.<sup>71</sup> Instead, the Court resoundingly endorsed that judgment, making clear that the principle at its core – that the government may not simply ignore its own decisions – extends well beyond second-actor cases and admits of no exception, even in cases involving clear illegalities.<sup>72</sup> Although the Court was deeply divided in *Kirland* itself, the majority judgment's pivotal

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<sup>69</sup> *Tasima* (note 16 above).

<sup>70</sup> See also the cases cited in notes 15 and 16 above.

<sup>71</sup> Note 7 above.

<sup>72</sup> This was despite arguments to the contrary in DM Pretorius 'The Status and Force of Defective Administrative Decisions Pending Judicial Pronouncement' (2009) 126 *South African Law Journal* 537, which cites *Seale* (note 8 above) and was approved in *Gardner and Others v Central University of Technology, Free State* [2010] ZALC 75 at para 57.

passage has since been endorsed by a unanimous Court that included *Kirland's* three dissentients.<sup>73</sup>

Secondly, both *Khumalo* and *Kirland* assert the importance of the delay bars, both at common law and under PAJA. PAJA's exacting 180-day deadline for the institution of proceedings has been criticised for limiting private citizens' access to court.<sup>74</sup> But, in the case of officials trying to undo their own decisions, its utility is clear. Here the delay bar's stringency is its strength.<sup>75</sup> It allowed the Court in *Khumalo* to apply the brakes to the MEC's attempt to undo Mr Khumalo's appointment.<sup>76</sup> Moreover, the enquiry into the MEC's delay afforded an opportunity to scrutinise her motive. In *Kirland*, the delay bar served a similar function, though at one remove. It was not directly applicable, because the MEC had not brought a proper review application; but it was for that very reason that the majority held that she must bring one, so that she would confront the delay bar rather than evade it.<sup>77</sup> If our fictional President were to apply to court to undo the appointment of his prosecution head, the delay bar would be the only obvious way to stop him.

Could other solutions be devised? One would be to reverse *Pepcor*,<sup>78</sup> and hold that public authorities simply have no standing to challenge their own decisions. That would be drastic, but, in light of the many problems that *Pepcor* creates, not without merit. Nevertheless, the Court expressly approved *Pepcor* in *Khumalo*, holding that the MEC has standing under the principle of legality to challenge her own decision.<sup>79</sup> So this drastic solution seems to have been foreclosed.

On the other hand, *Kirland* intriguingly alludes to, and leaves open, the possibility that public authorities lack standing under PAJA.<sup>80</sup> Yet if the Court believes that to be a viable interpretation, it is wrong. Nothing in the legislation supports that interpretation: to the contrary, PAJA never says or suggests that the applicant for judicial review must have had its own rights or interests affected.<sup>81</sup> Officials are therefore free to bring PAJA applications in the public interest,

<sup>73</sup> *EFF v Speaker* (note 20 above) at para 74. On the other hand, Jafta J's lone concurrence a month later in *Nkata v FirstRand Bank Ltd* [2016] ZACC 12, 2016 (4) SA 257 (CC), 2016 (6) BCLR 794 (CC) at paras 186–187 exploits the wiggle room left open by para 103 fn 78 of *Kirland* to hold that a default judgment granted incorrectly 'was a nullity and had no force in law' and can be ignored by a court even without a declaration of invalidity. The breadth of these passages is irreconcilable with *Kirland* (which is nowhere mentioned) and suggests a continued willingness to curtail its precedential effect where possible. The separate judgment of Nugent AJ, in which Cameron J concurs, criticises Jafta J's approach at paras 158–161.

<sup>74</sup> C Plasket *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* (PhD thesis, Rhodes University, 2002) 276–285.

<sup>75</sup> It is true that government can ask for the delay to be condoned: see note 23 above. But the court retains a wide discretion to grant or refuse condonation, considering much the same factors as under the common-law delay bar.

<sup>76</sup> The majority (per Skweyiya J) used the common-law delay bar, since in its view the claim was one based on the principle of legality, not PAJA. Zondo J used PAJA's delay bar, having disagreed on this point.

<sup>77</sup> *Kirland* (note 1 above) at para 83.

<sup>78</sup> Note 12 above.

<sup>79</sup> *Khumalo* (note 1 above) at para 32.

<sup>80</sup> *Kirland* (note 1 above) at para 82 fn 43.

<sup>81</sup> For example, s 6(1) says unqualifiedly that '[a]ny person' may institute judicial review proceedings. It contrasts tellingly with the right in s 5(1) to ask for reasons, which is limited to any person 'whose rights have been materially and adversely affected'.

consonantly with their duties recognised in both *Pepcor* and *Khumalo*. Indeed, to hold otherwise would fall foul of the Constitution's generous standing provisions, with which PAJA must be consistently interpreted.<sup>82</sup> Finally, granting standing to public authorities under the principle of legality, but denying it under PAJA, would aggravate the notorious bifurcation of South African administrative law.<sup>83</sup> *Khumalo* must, in short, be taken to have established that administrators have standing under both the common law and PAJA.

A more narrowly tailored solution would be a purpose-built doctrine, analogous to the 'clean hands' doctrine in private law, that requires the state to prove its bona fides to the court before it is entitled to the relief it seeks. This would be an express doctrinal articulation of the imperatives I have discussed in this article, and would allow courts to consider transparently the factors I have claimed they are considering anyway. And – unlike PAJA's delay bar, of course – it would allow the courts to control mischievous reviews brought by government officials even within 180 days. It is, in short, the ideal solution.

The courts may nevertheless prove reluctant to adopt it. This is, in part, for the very reason that it requires them to acknowledge openly, but on incomplete evidence, that they doubt the government's bona fides – so much so that they are willing for that reason to deny relief. In any event, the common law is famously slow to bring forth grand new doctrines. Sometimes courts really must 'forge new tools' to achieve what is needed.<sup>84</sup> More commonly, however, they use (or misuse) whatever existing tools suffice to solve the instant case. And in this context, as we have seen, the courts usually have to hand a tool of that kind, namely the delay bar. We await a major case where the government responds with anywhere near the promptness required to make the delay bar inapplicable. And if it does so, it may well be a case where no check on its power is appropriate; for it is usually the very fact of the delay, and the poor explanation for it, that makes an inference of bad faith possible. So in most cases – or until someone brings a constitutional challenge to the delay bar<sup>85</sup> – it is likely to prove an adequate, if makeshift, tool. Or so it proved, at any rate, in *Khumalo* and *Kirland*.

<sup>82</sup> Section 38. See also s 33 (in fulfilment of which PAJA was enacted) read with s 39(2).

<sup>83</sup> See, eg, C Hoexter 'The Principle of Legality in South African Administrative Law' (2004) 4 *Macquarie Law Journal* 165; I Currie 'What Difference Does the Promotion of Administrative Justice Act Make to Administrative Law?' (2006) *Acta Juridica* 330; L Kohn 'Our Curious Administrative Law Love Triangle: The Complex Interplay between the PAJA, the Constitution and the Common Law' (2013) 28 *Southern African Public Law* 22.

<sup>84</sup> This phrase, now regularly used by the Court, originates from *Fose v Minister of Safety and Security* [1997] ZACC 6, 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC) at para 69.

<sup>85</sup> Plasket (note 74 above) argued in 2002 that the 180-day rule was probably unconstitutional and raised the possibility of a court challenge. In *Moblomi v Minister of Defence* [1996] ZACC 20, 1997 (1) SA 124 (CC), 1996 (12) BCLR 1559 (CC) and *Brümmer v Minister for Social Development and Others* [2009] ZACC 21, 2009 (6) SA 323 (CC), 2009 (11) BCLR 1075 (CC) the Constitutional Court declared similar time-bar provisions unconstitutional on the basis that they violated the constitutional right of access to court. But those provisions were significantly more restrictive than PAJA's, since neither afforded an opportunity for a court to condone a delay, and the one in *Brümmer* gave a window of just 30 days – far more restrictive than PAJA, whose limit of 180 days the Court used as a 'yardstick' (para 67) and indeed saw fit to emulate in its reading in (at para 89). A period of 180 days is also used in s 3(2) of the Institution of Legal Proceedings Against Certain Organs of State Act 40 of 2002 and is considerably more generous than England and Wales's 90-day cut-off for the institution of a judicial review: see CPR 54.5(1). These considerations may help to explain why no one has yet been willing

And so it proved in *Tasima*, an important recent judgment of the Supreme Court of Appeal.<sup>86</sup> The Department of Transport's highly suspect attempt to evade the consequences of its flagrant violation of due process, and of the contract it had concluded with the applicant, was thwarted in large part by Brand JA's appropriately strict application of PAJA's delay bar. Having quoted from *Kirland* at length, he expressed grave doubts about why the department had waited five years to seek the review of its decision.<sup>87</sup> The department, in its own, less pleasing echo of *Kirland*, insisted its delay should be overlooked because of the serious 'fraud and corruption' tainting the decisions it sought now to undo.<sup>88</sup> But Brand JA was sceptical. First, why was the department raising the allegations of corruption only now?<sup>89</sup> Worse, the allegations seemed contrived: the department's conduct of the litigation showed it 'ha[d] little, if any, confidence in its ability to establish these allegations if they were to be properly challenged in a court of law'.<sup>90</sup> So it was, once again, the delay bar – and the opportunity to interrogate the state's motives that it affords – that allowed the court to deflect an illegitimate review attempt.

But closing the door to belated judicial review applications by public authorities has caused them to push at another. In several recent cases, including *Tasima*, public authorities have tried to skirt the strict procedural requirements attaching to judicial review applications by bringing 'collateral challenges', which were recognised in South African law in *Oudekraal*.<sup>91</sup> The Supreme Court of Appeal has moved decisively to shut this door, ruling in *Merafong* that collateral challenges are not available to organs of state.<sup>92</sup> The municipality's reliance on a collateral challenge there appeared to be a nakedly opportunistic attempt to avoid PAJA's delay bar, and was rightly rejected. In *Kirland* itself, in fact, one of the MEC's main arguments had been that, supposing she had failed to meet the procedural requirements of a judicial review application, she was entitled to bring a collateral challenge – an argument that the Court did not entertain.<sup>93</sup> And, of course, it was the main message of *Kirland* (and indeed of *Khumalo*) that when the government

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to bring a constitutional challenge to PAJA's delay bar even though it has been a decisive obstacle to numerous litigants.

Even if a challenge were successful, it would matter what the 180-day rule is replaced with. If a longer period were specified, courts would have little power to stop judicial review applications brought within it. But if the more flexible common-law position were restored, in terms of which judicial review proceedings must be brought within a 'reasonable' time, courts would be given greater scope to clamp down on the state in appropriate cases.

<sup>86</sup> *Tasima* (note 16 above). In both *3P Consulting* and *Kwa Sani* (note 16 above) the SCA noted the alternative argument that the government's challenge to its own decision was time-barred, but did not have to decide this; the government's inept application failed on the merits: *3P Consulting* (note 16 above) at paras 13–14; *Kwa Sani* (note 16 above) at paras 31–33.

<sup>87</sup> *Tasima* (note 16 above) at paras 27 and 31.

<sup>88</sup> *Ibid* at para 32.

<sup>89</sup> *Ibid* at para 37.

<sup>90</sup> *Ibid* at para 36.

<sup>91</sup> *Oudekraal* (note 7 above), applying *Boddington v British Transport Police* [1999] 2 AC 143.

<sup>92</sup> *Merafong City v AngloGold Ashanti Ltd* [2015] ZASCA 85, 2016 (2) SA 176 (SCA) (*'Merafong'*) at para 17. Strictly speaking, the judgment says only that an organ of state cannot raise a collateral challenge *against another organ of state*. But it was confirmed, and applied in a dispute between an organ of state and a private party, in *Tasima* (note 16 above) at paras 26–27. See also *Kwa Sani* (note 16 above) at para 14.

<sup>93</sup> See the applicant's heads of argument at paras 43–45. The Court's judgment does not mention this even though, if it thought a collateral challenge were permissible, that would have had clear decisional relevance.

tries to plot an easier procedural route it must, ipso facto, be stopped. The twice-stated view of the Supreme Court of Appeal is that the prohibition on the state's bringing collateral challenges is entailed by *Kirland*.<sup>94</sup> One expects the Constitutional Court to keep this door shut too.<sup>95</sup>

### III PROCEDURE AND SUBSTANCE

The theme of the previous sections has been that government officials must sometimes be held to their prior decisions even when they are unlawful, and that procedural exactitude from judges is needed to achieve this. Cameron and Froneman JJ were our protagonists, insisting on scrupulous adherence to legal process. By contrast, Jafta and Zondo JJ took what I argued was an unreasonably lax approach. But what, then, are we to say about the case of *KZN Joint Liaison Committee*,<sup>96</sup> decided shortly before *Khumalo*, and the subject of an excellent note by Cora Hoexter?<sup>97</sup>

In 2008 the KwaZulu-Natal MEC for Education (of *Khumalo* fame) issued a notice to independent schools in the province setting out the value of their state subsidy (their 'approximate funding levels') for the 2009–10 financial year. In May 2009, when the first tranche had already fallen due, the department sent a letter advising the schools to expect a 30% cut in their subsidies. When the first two tranches were paid, in mid-July, they were indeed 30% short. The applicant, an association of independent schools in the province, entered into negotiations with the department, but in the end the subsidies for the year remained, on average, 30% less than those in the 2008 notice. The association applied to the High Court for an order enforcing the 'promises' in that notice.<sup>98</sup> The High Court dismissed the application on the basis that, even assuming the notice was intended to create contractual obligations, an obligation to pay an 'approximate' amount of money is too vague to be enforced. Both the High Court and the Supreme Court of Appeal denied leave to appeal.

The Constitutional Court heard the appeal, however, and the conduct of the association's case generated controversy. Importantly, the association had not brought a judicial review application. This, it became clear, was a major obstacle to its now relying on administrative-law grounds. The association had not complied with PAJA's formalities, so no record of the department's decision was before the Court; and, even if it had complied, the association would (at least absent a good

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<sup>94</sup> *Kwa Sani* (note 16 above) at paras 14–17; *Merajong* (note 92 above) at paras 15–17. Admittedly the breadth of these precedents is questionable. *Pace* the Supreme Court of Appeal, the fact that the applicant is an organ of state should not necessarily disqualify it from a collateral challenge: if one organ of state tries to coerce another into compliance with a clearly reviewable decision, it may, at least in some circumstances, be reasonable to allow the latter to await enforcement, safe in the knowledge that it will be able to raise a collateral challenge. Nevertheless, the result in *Merajong* was surely correct.

<sup>95</sup> Editor's note: The Constitutional Court has, since the article was finalised, decided the appeals in both *Merajong* and *Tasima*. See *Merajong City Local Municipality v AngloGold Ashanti Ltd* [2016] ZACC 35, 2017 (2) 211 (CC), 2017 (2) BCLR 182 (CC); *Department of Transport and Others v Tasima (Pty) Ltd* [2016] ZACC 39, 2017 (2) 622 (CC), 2017 (1) BCLR 1 (CC).

<sup>96</sup> Note 2 above.

<sup>97</sup> C Hoexter 'The Enforcement of an Official Promise: Form, Substance and the Constitutional Court' (2015) 132 *South African Law Journal* 207.

<sup>98</sup> *KwaZulu-Natal Joint Liaison Committee v Member of the Executive Council, Department of Education, KwaZulu-Natal* (KZP) unreported case no 9594/2010 (26 September 2011).

explanation) have been non-suited by the delay bar.<sup>99</sup> To fix these mistakes would require the association to reinstate in the High Court, which would drag out the litigation considerably. Counsel for the association said it had no time or money to do this and thus emphatically disavowed reliance on administrative law, saying the case must be decided, 'do or die', by the question whether the 2008 notice created an enforceable promise.<sup>100</sup>

In the first place, then, the association's case was that the department's undertaking amounted in law to a contract. But, in the view of almost all members of the Court, there were insurmountable problems with that argument. The case therefore became about a rather different question, namely whether the association was entitled to succeed on some other basis – even though, as the association had acknowledged, it had failed woefully to comply with the procedural requirements of its obvious alternative cause of action, judicial review. As in *Kirland*, therefore, the basic legal difficulty was the same: in the absence of a formal review application, and in the face of PAJA's delay bar, could the Court get to the merits? In the end, the Court split 6:4. As in *Kirland*, Cameron and Froneman JJ respectively wrote the two judgments for the majority, and Jafta and Zondo JJ were in the minority.

But then comes the twist. Quite unlike in *Kirland*, Cameron and Froneman JJ were on the side saying procedural strictures could be bypassed, and the merits of the decision adjudicated; and Jafta and Zondo JJ found themselves insisting that the Court may adjudicate only the case that had been brought with full procedural propriety. This raises an intriguing puzzle, as Hoexter points out.<sup>101</sup> What explains the about-face between *Kirland* and *KZN*? Why do Cameron and Froneman JJ insist on procedural niceties in *Kirland*, but happily overlook them in *KZN*? After all, the applicant in *KZN*, on its own version, was deliberately trying to evade PAJA's delay bar and the legislation's other procedural requirements – trying, in other words, to do exactly what Cameron and Froneman JJ prohibited, and Jafta and Zondo JJ countenanced, in *Kirland*. So why do the pairs now swap roles?

The start of the explanation is, of course, that in *Kirland* the party seeking judicial review was a public authority, and in *KZN* it was a private party. Hoexter elaborates:

Most members of the court [including Cameron and Froneman JJ] would hold public authorities to a higher procedural standard than other litigants – an attitude that does not seem inappropriate in view of the state's greater resources and the special duties on it, such as constitutional duties to 'respect, protect, promote and fulfil' rights (s 7(2)) and to perform all constitutional obligations 'diligently and without delay' (s 237).<sup>102</sup>

There is undoubtedly something to this explanation, which derives, after all, from Cameron J's own statement, in a crucial passage in *Kirland*, that '[g]overnment is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline'.<sup>103</sup>

<sup>99</sup> *KZN Joint Liaison Committee* (note 2 above) at para 31.

<sup>100</sup> *Ibid* at para 34.

<sup>101</sup> Hoexter (note 97 above) at 216.

<sup>102</sup> *Ibid* at 217.

<sup>103</sup> *Kirland* (note 1 above) at para 82.

But there is surely more to it. The fundamental point is not about the competence the respective judges expect of different legal teams. The fundamental point derives from what I have been suggesting throughout this article about state power, and the courts' responsibility to constrain it. The point is simply this: in *Kirland*, insisting on procedural rectitude resulted in the department's being held to its prior decision; in *KZN*, by contrast, doing so would have allowed the department to escape.

As we have seen, in both *Kirland* and *KZN* the key issue was whether the government should be held, against its will, to its own prior decision. The government's position in both was that it should be allowed to wriggle out. The difference is that in *Kirland* procedural strictures were helpful in restraining the government's attempt to undo its decision, but in *KZN* they threatened to do the opposite. In *Kirland* the MEC sought the judicial review of her department's extant decision; success in the review would have allowed the MEC to evade that decision; and therefore insisting that the review be conducted with full procedural propriety ensured that she was bound by her prior decision. In *KZN*, the schools applied to hold the MEC to her undertaking; here, success in the application would have *prevented* the MEC from evading that decision; and therefore the way to hold her to it was to overlook the application's procedural shortcomings.

Seen in this light, *KZN* and *Kirland* are easily reconciled. The two pairs of judges have not reversed roles at all. Their judgments seem inconstant if one focusses upon their attitude to procedural rules, but exactly what one would expect if one focusses upon the object to which those procedural rules were directed: holding (or releasing) the government from its prior decisions. On that issue, both pairs of judges have been unyielding. Cameron J's majority judgment in *Kirland* raised serious doubts about the MEC's attempt to review her decision, and made clear that these must significantly counterweigh the imperative to undo illegalities; and that same concern about the government's motives in withdrawing its undertaking would explain his stance in *KZN*. Jafta and Zondo JJ had no similar worries in *Kirland*; they thought the rule of law was the 'jejune' principle of legality, and nothing more. That same sanguinity about the government's revising its prior decisions would explain why they were unmoved to see the association's application scuppered in *KZN*.

So it is not the case that the only, or primary, contrast here is between the principle of legality and scrupulous adherence to procedure for the sake of certainty and finality in litigation.<sup>104</sup> The richer contrast is between the principle of legality and the fact that the rule of law requires the government always to act

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<sup>104</sup> See Hoexter (note 97 above) at 218: ('The rule of law is a multi-faceted concept, and one must surely accept that any relaxation of procedural requirements is bound to erode it in one way or another – irrespective of the immediate beneficiary of the relaxation, and even if there is no discernible prejudice to the other party. The real challenge ... is to decide when and in what circumstances the erosion of one aspect of the rule of law, such as legal certainty, may be justifiable in order to uphold some other aspect of the rule of law, such as legality. But there will always be some sacrifice.') Also see Froneman J's own statement in *Kirland* (note 1 above) at para 114 ('The law does not allow us to uphold the rule of law while at the same time circumvent and undermine it [by circumventing PAJA's delay bar]. In the long run, shortcuts of this kind will erode the rule of law as one of the foundational values of our Constitution.' In light of the position he took in *KZN Joint Liaison Committee*, which plainly circumvents and undermines PAJA's delay bar, one would hope a deeper-going explanation is available.)

for legitimate reasons, both when it makes decisions and when it tries to undo them. Procedural rules are a way of ensuring the latter – sometimes. If the real end is holding the government to its prior decisions, we should not be surprised that the procedural rules are modulated according to their usefulness as a means.<sup>105</sup> Another way of putting the point is this: Yes, indubitably the government's special status matters when procedural rules are applied to it. But that is not because of its special status *qua* litigant; it's not about its extra 'resources' or whether its legal team is 'bewildered'. Its special status is that the rule of law requires it to be held to its prior decisions in ways that private parties are not. If exacting procedural rules are helping to achieve this, expect judges to deploy them strictly. If they aren't, don't. That is what *Kirland* and *KZN* show. Cameron and Froneman JJ's treatment of the procedural rules varies dramatically between the two cases, but only because of the underlying continuity between them, namely the need to keep the government honest.<sup>106</sup>

As we have seen, Jafta and Zondo JJ's treatment of the procedural rules also varied dramatically between the two cases, but in the opposite direction. Where Cameron and Froneman JJ saw pressing reasons not to allow even an unlawful decision to be set aside, Jafta and Zondo JJ saw none. But we want to know why. An answer is of course latent in what I already said. The crucial reason against allowing the government to undo its unlawful decisions is its questionable motive in doing so. The compulsion that judges feel to apply the brakes depends, then, on how wary they are of state abuse of power. So, the thought continues, Jafta and Zondo JJ do not apply the brakes as firmly because they are slower to doubt the government's motives in undoing its prior decisions. Whereas Cameron and Froneman JJ view the power of the state with suspicion, and disrupt it in favour of the citizenry, Jafta and Zondo JJ are enablers, willing to empower the state and to prevent litigants from throwing spanners in its works.

How far does this attitude extend? Is it a general truth that Jafta and Zondo JJ are unconcerned about abuse of power by the state? That would certainly resonate with the popular view of Jafta and Zondo JJ (and arguably of their frequent ally

<sup>105</sup> This means-end point should not be overstated. In *Khumalo* (note 1 above) and *Kirland* (note 1 above), at least, the Court squarely addressed what procedures the government should be made to follow before it could be allowed to undo its own decision. That was the main issue. Deciding it required no legal gymnastics, and could be accommodated in the delay enquiry. *KZN Joint Liaison Committee* (note 2 above), on the other hand, was a singular, and badly litigated, case in which the clear doctrinal tool for controlling the government's liability, substantive legitimate expectations, was foreclosed for procedural reasons: see Hoexter (note 97 above) at 224–229 and M Murcott 'A Future for the Doctrine of Substantive Legitimate Expectations? The Implications of *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal*' (2015) 18 *Potchefstroom Electronic Law Journal* 3133. A more creative – and controversial – solution was therefore called for, which clearly did take procedural liberties for the sake of the merits.

<sup>106</sup> There are, to be sure, significant differences between the approaches of Cameron J and of Froneman J in *KZN Joint Liaison Committee*: see Hoexter (note 97 above) at 210–211. Here and in what follows, my analysis contrasts one pair of judges, Cameron and Froneman JJ, with another pair, Jafta and Zondo JJ. Quite obviously, this risks suppressing the disagreements between the members of each of those pairs, and a more complete analysis would bring those out. My incipient suggestions in that direction are relegated to footnotes.

Mogoeng CJ) as the Court's conservative, pro-government members.<sup>107</sup> But is it true? The number of cases in which Jafta J has found in favour of the government for procedural reasons that a majority of the Court found unpersuasive is certainly striking.<sup>108</sup> In addition to *Kirland* and *KZN*, one can point to *Oriani-Ambrosini v Sisulu*<sup>109</sup> and *Mazibuko v Sisulu*,<sup>110</sup> two politically charged cases in which Jafta J's procedural objections meant he would have left Parliament's rules, which the majority found unconstitutional because they disadvantaged minority parties, untouched. And in the last two 'school cases', *Welkom* and *Rivonia*, Jafta and Zondo JJ held that officials from the provincial Department of Education had the power to intervene in the decisions of school governing bodies in circumstances where the majority of the Court held it impermissible.<sup>111</sup> In *Rivonia*, the decisive reason for Jafta J's dissent was procedural: the majority's finding against the department was, he believed, not open to the Court because it had not been properly pleaded.<sup>112</sup> Finally, one might cite *SAPS v Barnard*, in which Jafta J adopted a very restrictive attitude to procedure, the effect of which was to defeat Ms Barnard's attempt to challenge the SAPS's affirmative action decision.<sup>113</sup>

These well-known judgments have earned Jafta and Zondo JJ their reputation as the Court's 'stickler[s] for process' and the stalwarts of its 'procedurally conservative camp'.<sup>114</sup> Certainly they adopt formalist<sup>115</sup> techniques – including, notably, the minute parsing of the first-instance pleadings – which their colleagues would find embarrassing.<sup>116</sup> I have not yet mentioned *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd*, another judgment of Cameron J (supplemented by a concurrence

<sup>107</sup> See, eg, R Calland *The Zuma Years* (2013) ch 11; E McKaiser 'Shame on those two ConCourt judges' *The Star* (7 October 2013); N Tolsi 'Applause for Mogoeng's judicial cadenza' *Mail & Guardian* (18 October 2013). As is well known, Mogoeng's public reputation has shifted: he is now regarded as an important counterweight to the power of the government, especially as a result of his judgment in *EFF v Speaker* (note 20 above).

<sup>108</sup> Some of these are discussed in Hoexter (note 97 above) at 214.

<sup>109</sup> *Oriani-Ambrosini v Sisulu, Speaker of the National Assembly* [2012] ZACC 27, 2012 (6) SA 588 (CC), 2013 (1) BCLR 14 (CC). Zondo J was not yet on the Court.

<sup>110</sup> *Mazibuko NO v Sisulu and Others NNO* [2013] ZACC 28, 2013 (6) SA 249 (CC), 2013 (11) BCLR 1297 (CC). Here Zondo J concurred in Jafta J's dissent.

<sup>111</sup> *Head of Department, Department of Education, Free State Province v Welkom High School and Others* [2013] ZACC 25, 2014 (2) SA 228 (CC), 2013 (9) BCLR 989 (CC); *MEC for Education, Gauteng Province, and Others v Governing Body, Rivonia Primary School and Others* [2013] ZACC 34, 2013 (6) SA 582 (CC), 2013 (12) BCLR 1365 (CC) ('*Rivonia*').

<sup>112</sup> *Rivonia* (note 111 above) at para 105.

<sup>113</sup> *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23, 2014 (6) SA 123 (CC), 2014 (10) BCLR 1195 (CC) ('*Barnard*'). The joint judgment written by Cameron and Froneman JJ and Majiedt AJ agreed that Ms Barnard's application had to fail, though not for procedural reasons. It decided the case on its merits, which it thought were finely poised.

<sup>114</sup> Hoexter (note 97 above) at 214.

<sup>115</sup> This term is hardly ideal, for reasons classically expressed in F Schauer 'Formalism' (1988) 97 *Yale Law Journal* 509. Yet its use in the contemporary South African debate that I am about to enter is too entrenched to avoid. Its meaning in this context is, I think, tolerably clear. It is more precise, at least in one respect, than the usages Schauer lamented: it refers to rigidity in the application of legal rules of a specific kind, namely rules of procedure.

<sup>116</sup> See, eg, *KZN Joint Liaison Committee* (note 2 above) at paras 151–154; *Rivonia* (note 111 above) at paras 92–99 and 108; *Khumalo* (note 1 above) at paras 78 and 81–90. Even in *Kirland* (note 1 above), where Jafta and Zondo JJ adopted the more permissive approach to procedure, a fixation upon the wording of the parties' first-instance affidavits was a hallmark of their dissents: see paras 37, 48, 124–127, 139 and 143–147.

by Froneman J) from which Zondo J (with Mogoeng CJ and Jafta J concurring) vigorously dissented on the basis that the remedy ordered by the majority had not been pleaded<sup>117</sup> – the Mogoeng Court's first significant procedure-based split, and one that has already spawned a burgeoning literature.<sup>118</sup> These formalist techniques, as we have seen, often manifest in ways that benefit state litigants.

On the other hand, there is a series of judgments – generally less well-known – in which Jafta J has displayed a pliability in the face of procedural rules that is unmatched by even his avowedly 'anti-formalist' colleagues.<sup>119</sup> There is *Kirland*, of course, as well as his lofty remarks elsewhere that courts should show 'flexibility' in the application of procedural rules where their 'mechanical application' would 'lead to an injustice',<sup>120</sup> and not waste time on 'mere formalities which are not dispositive of a real dispute'.<sup>121</sup> But I am thinking of those cases where his procedural flexibility leads him to find, more surprisingly, *against* the state. Witness, for example, his remarkable willingness to chart a lone course, circumventing what seemed unanswerable procedural irregularities to reach the merits, and strike down a state policy, in *Sali v National Commissioner of the SAPS*.<sup>122</sup> And note his radical interventionism in setting aside the report of a state commission that a majority of his colleagues thought unimpeachable in *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims*, doing so on the basis of a novel argument raised by none of the parties – a move Khampepe J's majority judgment thought most unfair.<sup>123</sup> In the earlier case of *Tulip Diamonds*, Jafta J took a strikingly permissive approach to the rules of standing, accordingly reached the

<sup>117</sup> [2012] ZACC 2, 2012 (3) SA 531 (CC), 2012 (5) BCLR 449 (CC). See in particular paras 103–104, 109–110 and 113.

<sup>118</sup> J Fowkes 'Managerial Adjudication, Constitutional Civil Procedure and *Maphango v Aengus Lifestyle Properties*' (2013) 5 *Constitutional Court Review* 309; M Dafel 'On the Flexible Procedure of Housing Eviction Applications' (2013) 5 *Constitutional Court Review* 331.

<sup>119</sup> The phrase is again Hoexter's. Hoexter (note 97 above) at 210 and 215. She uses it to describe Cameron and Froneman JJ, and cites the latter's comments in *KZN Joint Liaison Committee* at para 79 and his 'Legal Reasoning and Legal Culture: Our "Vision" of Law' (2005) 16 *Stellenbosch Law Review* 3.

<sup>120</sup> *PFE International and Others v Industrial Development Corporation of South Africa Ltd* [2012] ZACC 21, 2013 (1) SA 1 (CC), 2013 (1) BCLR 55 (CC) at para 31.

<sup>121</sup> *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd and Others* [2013] ZACC 48, 2014 (5) SA 138 (CC), 2014 (3) BCLR 265 (CC) at para 136.

<sup>122</sup> [2014] ZACC 19, 2014 (9) BCLR 997 (CC). Cameron J wrote the majority judgment which was adamant that the merits could not be fairly decided. Unusually, even Zondo J could not agree with Jafta J.

<sup>123</sup> [2014] ZACC 36, 2015 (3) BCLR 268 (CC) ('*Mamone*'). Here, too, Zondo J disagreed with Jafta J. Both judges have been willing elsewhere to decide cases on the basis of issues entirely unheralded by any of the parties or the lower courts. For example, in *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16, 2014 (4) SA 474 (CC) Jafta J's dissent, concurred in by Zondo J, would have decided the matter on the basis that the parties' contract was invalid because it contravened legislation, even though the parties had formally agreed that the litigation was to be decided on the contrary assumption. And in *Horn and Others v LA Health Medical Scheme and Another* [2015] ZACC 13, 2015 (7) BCLR 780 (CC) Zondo J would have decided the matter on the basis that the respondent's alleged obligation to pay pension benefits to the appellants, its former employees, had been transferred to their new employer by automatic operation of s 197 of the Labour Relations Act 66 of 1995, even though the respondent itself had disavowed that possibility as a 'non-issue' in its founding papers and both parties repeated that stance before the Constitutional Court. Here, at least, unlike in *Cool Ideas*, the Court asked after the hearing for written submissions on this novel point. But that would have offered little comfort to the third party, not involved in the litigation at all, to whom Zondo J's judgment said these liabilities had been transferred. Fortunately, a majority of the Court held that to impose obligations on a third party *mero motu* and without its joinder 'should not be done' (para 35).

merits of the applicant's judicial review – where a majority of his colleagues, and both of the lower courts, would not – and decided it nonchalantly against the government.<sup>124</sup>

So describing Jafta and Zondo JJ as the Court's procedural sticklers tells only half the story. Something more complex is going on. We need to explain why they veer from sticklers to libertines. As I have suggested, a full explanation is not going to be the judges' attitudes to procedure itself – for why, then, would their attitudes seem so inconstant? – but in the causes that procedure can be made to serve; and the operative cause, to which the Court's judges have divergent loyalties, is constraining the powers of the state. But there, too, we have already encountered several wrinkles, in the form of cases in which Jafta and Zondo JJ relaxed procedural rules to the state's detriment. A further wrinkle, and an intriguing counterpoint to *Kirland*, is *S v Nabolisa*, where the procedural rectitude of the majority judgment of Jafta J, now back in stickler mode and insisting on a full, formal application to cross-appeal by the state, gave individuals important protections from the power of the prosecution authorities.<sup>125</sup> Indeed, even in *Kirland* itself, Jafta J's willingness to castigate the former MEC shows the need for a suitably fine-grained appraisal.<sup>126</sup> One must also account, finally, for Jafta J's concurrences in a range of highly politically charged judgments of the Court that found unflinchingly against the national government.<sup>127</sup>

To be sure, one would not expect a single criterion to determine a judge's entire judicial philosophy. And thus far I have spoken, simplistically, as though the state

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In any event, Jafta J and Zondo J's approach in *Mamone*, *Cool Ideas* and *Horn* sits most uncomfortably with their fierce dissents in *KZN Joint Liaison Committee* (note 2 above), where, although the majority undoubtedly decided the case on a basis of the Court's, not the applicant's, making, the novelty was largely nominal, not substantive; and where the applicant's only reason for disavowing the basis on which the Court ultimately decided the matter was that it did not want to have to reinstitute in the High Court – a wish the Court respected. Their approach also sits uncomfortably with *Kirland* (note 1 above) at para 147, where Zondo J holds that the Court can and must ignore applicable legislative provisions if they have not been raised by the parties.

<sup>124</sup> *Tulip Diamonds FZE v Minister for Justice and Constitutional Development and Others* [2013] ZACC 19, 2013 (10) BCLR 1180 (CC). This time he was joined by his regular allies, Nkabinde and Zondo JJ.

<sup>125</sup> *S v Nabolisa* [2013] ZACC 17, 2013 (8) BCLR 964 (CC). Or perhaps the real kicker is that, in the earlier case of *S v Bogaards* [2012] ZACC 23, 2012 (12) BCLR 1261 (CC), Jafta J's dissent would (partly on the basis of misgivings about the way the case was pleaded) have *denied* an almost identical protection to an applicant who had been convicted of harbouring the so-called Boeremag terrorists. In both cases, Zondo J agreed with Jafta J.

<sup>126</sup> See text to note 65 above.

<sup>127</sup> *Democratic Alliance v President of the Republic of South Africa and Others* [2012] ZACC 24, 2013 (1) SA 248 (CC), 2012 (12) BCLR 1297 (CC); *Minister of Police and Others v Premier of the Western Cape and Others* [2013] ZACC 33, 2014 (1) SA 1 (CC); *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30, 2015 (1) SA 315 (CC), 2014 (12) BCLR 1428 (CC); *Helen Suzman Foundation v President of the Republic of South Africa and Others* [2014] ZACC 32, 2015 (2) SA 1 (CC), 2015 (1) BCLR 1 (CC); *EFF v Speaker* (note 20 above). If we are engaging in this crude totting up, then it is worth mentioning Cameron J's concurrences in pro-executive decisions like *South African Reserve Bank and Another v Shuttleworth and Another* [2015] ZACC 17, 2015 (5) SA 146 (CC) (where his frequent ally, Froneman J, wrote a powerful dissent) and his unwillingness to overlook procedural propriety in *Zulu and Others v eThekweni Municipality and Others* [2014] ZACC 17, 2014 (4) SA 590 (CC), 2014 (8) BCLR 971 (CC) (again, Froneman J could not agree). Of course, even in *KZN Joint Liaison Committee* itself Froneman J's 'anti-formalism' was notably more far-reaching than Cameron J's: see note 105 above.

is a monolith. In truth it has diverse parts, and it would be quite appropriate for the judges to take different attitudes to each. For example, does Jafta J, in accordance with traditional separation of powers doctrine, apply a light touch to the political branches, but readily hold the criminal justice system and the bureaucracy to account? That would go some way to explaining his deference to MECs in *Rivonia* and *Kirland*, and to Parliament in *Oriani-Ambrosini* and *Mazibuko*; and his relative willingness to intervene against the police in *Sali*, the prosecutors in *Nabolisa* and the commissioned lawyers in *Mamone*. Or is it that Jafta J is keen to free the government of legal fetters only where he thinks the goal it is pursuing is particularly important, or particularly liable to derailment by interest groups: affirmative action in *Barnard*, liberalising access to privileged schools in *Rivonia*? I shall not take these questions further here. I am content to say only that in *Kirland* and *KZN Cameron and Froneman JJ* clearly perceived a need to restrain public power in a way that Jafta and Zondo JJ did not.

What also cannot be disputed is the sheer number of recent cases that have been dividing the Court on procedural lines. The latest, and one of the most striking, is *My Vote Counts*.<sup>128</sup> Here Jafta and Zondo JJ did not sit. Nevertheless, a 7:4 majority ducked a question of considerable public interest – whether Parliament has an obligation to enact legislation requiring political parties to disclose their private funding – on the singularly unpersuasive basis that the applicant NGO, My Vote Counts, had opted for the wrong procedural route.<sup>129</sup> The dissenting judgment of Cameron J (with Froneman J and two others concurring) cut through these proceduralist contrivances and found comprehensively in favour of My Vote Counts. He would therefore have issued an order that Parliament was in breach of its constitutional obligations. On that momentous issue the majority, of course, had nothing to say; its sole concern was that the applicant had not jumped through what it described as certain ‘procedural hoops’.<sup>130</sup>

That procedure so regularly obscures the merits, even at super-appellate level, is worrying. Still worse is the suspicion that the merits are the true source of the rift in the Court, which the endless procedural contestations merely mask. And the

<sup>128</sup> *My Vote Counts NPC v Speaker of the National Assembly and Others* [2015] ZACC 31, 2016 (1) SA 132 (CC) (*My Vote Counts*).

<sup>129</sup> This is not the place for a full engagement with the disappointing majority judgment; the following synopsis, which largely repeats criticisms made by the minority judgment, must suffice. The nub of the majority’s reasoning was that the applicant, My Vote Counts, ought to have brought its case by means of a constitutional challenge to the pertinent legislation that already exists, namely the Promotion of Access to Information Act 2 of 2000 (PAIA). But My Vote Counts had made clear that, in its view, PAIA was constitutionally valid and indeed essential to realising the constitutional right of access to information. It was therefore very odd to insist that My Vote Counts attack that legislation’s constitutional validity. The principle of subsidiarity, on which the majority heavily relied (paras 160–183), did not in truth assist it: My Vote Counts, far from subverting or bypassing PAIA, had explained why PAIA was inapplicable and inapposite to the issue of political party funding; Parliament had duly responded to this charge in detail. For the same reason, what was to be gained by forcing My Vote Counts to reinstate in the High Court? That application would raise precisely the same issues about PAIA’s sufficiency that had already been argued at length before the Constitutional Court – and which, indeed, the High Court had already decided, consonantly with My Vote Counts’ argument, in *Institute for Democracy in South Africa and Others v African National Congress and Others* [2005] ZAWCHC 30, 2005 (5) SA 39 (C).

<sup>130</sup> *My Vote Counts* (note 128 above) at para 175.

vener is wearing very thin. As in *Barnard*, so in *My Vote Counts*: ‘the overwhelming impression created by the majority judgment is a Court seizing on an easy way out of a difficult task’.<sup>131</sup> Or is it that the majority seized on an easy way of *doing* a difficult task? Did it believe that the applications of Ms Barnard and My Vote Counts deserved to be dismissed, and that slamming the procedural door was a decisive way to achieve this? Whatever the correct impression, it is not a pleasing one. Elsewhere, the Court seems to have retreated to rather dubious points of procedure precisely so that it can obtain unanimity rather than a nasty merits-based split: Michael Mbikiwa and I have written that the Court’s unconvincing remittal of an important but highly controversial substantive question in *H v Fetal Assessment Centre*<sup>132</sup> raises this worry.<sup>133</sup>

The point I have been labouring is that procedure is being subordinated, in various ways, to the judges’ views of the merits. Is it too discomfiting to say that procedural rules are being used as a mere means to a concealed end? Has the argument of this paper been too realist, too deflating, in treating doctrine as a smokescreen for what is really driving judicial decisions? Maybe for some;<sup>134</sup> but I think this conclusion would be too quick. Partly, this is because it is unwise to deny that judges are doing something because we think they ought not to be doing it. The ostrich-in-the-sand approach is especially dangerous given what is clearly a profound cleavage in the Court that manifests along procedural lines. This cleavage is, shortly put, *the* story of the Court’s last few years. If the Court’s approach to procedural rules has become a key battleground, we need to understand the opposing factions.

Some might say, voicing a cognate complaint, ‘Well, what did you expect?’ They will say the damaging inconsistencies in a riven Court’s application of procedural rules are the foreseeable consequence of its deliberate retreat from formal reasoning into reasoning that is substantive, discretionary and value-

<sup>131</sup> C McConachie ‘Affirmative Action and Intensity of Review: *South African Police Service v Solidarity obo Barnard* (2015) 7 *Constitutional Court Review* 163. He also quotes C Albertyn ‘Adjudicating Affirmative Action within a Normative Framework of Substantive Equality and the Employment Equity Act – An Opportunity Missed? *South African Police Service v Solidarity obo Barnard*’ (2015) 132 *South African Law Journal* 711, 716 (the majority performs an ‘oddly formalistic side-step’ to avoid the main issues).

<sup>132</sup> [2014] ZACC 34, 2015 (2) SA 193 (CC), 2015 (2) BCLR 127 (CC).

<sup>133</sup> L Boonzaier & M Mbikiwa ‘The Constitutional Court in Harms’ Way: A Response’ (2015) 4 *South African Law Journal* 769, 777–778. Pierre de Vos has made a similar suggestion in response to the Court’s dismissal of *De Lange v Methodist Church and Another* [2015] ZACC 35, 2016 (2) SA 1 (CC): see P de Vos ‘Constitutional Court avoids decision on sexual orientation discrimination by Methodist Church’ *Constitutionally Speaking* (24 November 2015), available at <http://constitutionallyspeaking.co.za/constitutional-court-avoids-decision-on-sexual-orientation-discrimination-by-methodist-church>. This seems to me uncharitable; to overcome that application’s very serious procedural irregularities would have been a bridge too far. Nevertheless, De Vos’s perception that the Court is using procedural reasons in a way that is not ‘honest’ is itself telling.

<sup>134</sup> South African legal scholarship rarely analyses court behaviour from anything approaching a ‘political science’ perspective. The major exception is T Roux *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (2013). The mixed reception to Roux’s methodology is well illustrated by the two reviews of the book in (2014) 131 *South African Law Journal* 704 and 707: Jeremy Gauntlett is scathing; Stephen Ellmann is reverential.

based. Cautions have been sounded against this trend for decades now.<sup>135</sup> 'We told the Court not to get onto the slippery slope towards arbitrary, ad-hoc, even disingenuous applications of rules that should be adhered to strictly', they might say. 'When courts try too hard to do justice in a particular case, we only end up worse off.'

The critique should, I think, be taken seriously.<sup>136</sup> But two responses are apt – in addition to the obvious one that refraining from doing justice in particular cases has its own patent cost. First, it is far from clear that the uncertainties and divisions in the Court's approach are the result of a lack of fidelity to existing procedural rules. To the contrary, we have already noted several cases, such as *Maphango* and *Rivonia*, where it was a minority's obsessive and unaccountable fealty to the words used in the pleadings that made things fraught and divisive. The uncertainty and division in these cases is not a consequence of the flexible approach, in other words, but of a recalcitrant minority's preference for formalism.

True, I have stressed that this tells only half the story. When that minority has yawed to the opposite, procedurally unchained extreme this has equally been the cause of deep rifts. Yet the point remains that those rifts cut across the distinction between procedural conservatism and procedural creativity. Neither is a solvent of bad judgement. Minute parsing of the pleadings can be just as productive of senseless and surprising outcomes as the application of flexible tests. Although the Court as a whole is often criticised for its willingness to engage in substantive reasoning at the expense of lawyerly fidelity to formal rules, most of its judges manage to reach a fairly comfortable consensus on procedural questions even as they do so. The point can be stated bluntly: subtract Jafta and Zondo JJ from the Court, and a coherent, predictable and more or less unanimous approach to procedural questions starts to emerge.<sup>137</sup>

The challenge, then, is to understand why those two judges do what they do. Unfortunately, they offer us little help, rarely articulating the purposes they take to underlie the rules and principles they deploy (or choose not to deploy), or the reason why they parse the parties' pleaded case like a statute in one case and shrug it off happily in another, why they insist on full procedural rectitude in one case and disavow it in the next. To be fair, it would be quite wrong to say that Jafta and Zondo JJ are the only offenders here: though they are most frequently in dissent, many of these charges can be levelled at the Court's other judges, who also adopt apparently inconsistent attitudes to procedure that are poorly substantiated. Their

<sup>135</sup> See, in increasing order of indignation, A Cockrell 'Rainbow Jurisprudence' (1996) 12 *South African Journal on Human Rights* 1; S Woolman 'The Amazing, Vanishing Bill of Rights' (2007) 124 *South African Law Journal* 762; J Lewis 'The Constitutional Court of South Africa' (2009) 125 *Law Quarterly Review* 440; LTC Harms 'The Puisne Judge, the Chaos Theory and the Common Law' (2014) 131 *South African Law Journal* 3.

<sup>136</sup> See, in addition to Cockrell and Woolman – (note 134 above), H Scott 'The Death of Doctrine? Private Law Scholarship in South Africa Today' in J Basedow, H Fleischer & R Zimmermann (eds) *Legislators, Judges and Professors* (2016) 223.

<sup>137</sup> This is a further reason to worry particularly about the recent judgments in *Barnard* (note 113 above) and *My Vote Counts* (note 128 above), where procedure divided the Court even apart from the contribution of Jafta and Zondo JJ.

prior decisions are rarely mentioned, let alone distinguished.<sup>138</sup> Undoubtedly the solution lies, in part, in more astute debate within and without the Court about its adjudicatory role.<sup>139</sup> But it also lies, I have suggested, in understanding the judges' convictions about the merits, to which procedure is frequently subordinate. That is a large task, to which I have contributed only modestly, if at all, in this article.

But the outlook is not entirely dreary. Sometimes the Court has spoken with one voice even while striking out in entirely novel procedural directions. The most justly celebrated case is *Informal Traders*, where the unanimous Court heard, and granted, an urgent interim application that had leap-frogged the High Court to restrain draconian conduct by the Johannesburg Metro Police.<sup>140</sup> Another example is *Sarrabwitz v Maritz NO and Another*, a very poorly litigated application that all judges agreed merited an unusually flexible approach (though they differed on the detail).<sup>141</sup>

Here, then, is a more optimistic view about the Court's approach to procedure, and a second response to those who would despair when we notice some space appearing between a court's behaviour and its doctrine. When a judge departs from a common-law rule, it is not anarchy. It is legal development. Doctrines can be revised to better capture the reasons on which they are based. I have explained why I think there is strong pressure on judges to regulate, and sometimes to hinder, the government's attempts to undo even unlawful decisions. The reason, to repeat, is that the government can behave badly even as it undoes a bad decision. Recognising that this is a new challenge, not comfortably accommodated within existing doctrine, was the lesson of Part I. That it is not easily accommodated is not, of course, a reason for judges to ignore it. The truth that judicial decisions should comport with doctrine need not mean that judges should never depart from the existing law. Often they should. It is only that, when they do, their reasons for doing so must be made clear, and that doctrine must be made to catch up. That this can be done was the lesson of Part II. And that academics' recognising the space between doctrine and outcomes is a help, not a hindrance, to improving both – well that, I hope, was the lesson of the whole article.

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<sup>138</sup> For discussion of the Court's general reticence about its own precedents, see J Brickhill 'Precedent and the Constitutional Court' (2010) 3 *Constitutional Court Review* 79; T Ngcukaitobi 'Precedent, Separation of Powers and the Constitutional Court' (2012) *Acta Juridica* 148.

<sup>139</sup> By far the best body of work on this that I know is J Fowkes 'How to Open the Doors of the Court – Lessons on Access to Justice from Indian PIL' (2011) 27 *South African Journal on Human Rights* 434; J Fowkes 'Civil Procedure in Public Interest Litigation: Tradition, Collaboration and the Managerial Judge' (2012) 1 *Cambridge Journal of International and Comparative Law* 235; Fowkes (note 117 above).

<sup>140</sup> *South African Informal Traders Forum and Others v City of Johannesburg and Others* [2014] ZACC 8, 2014 (4) SA 371 (CC), 2014 (6) BCLR 726 (CC).

<sup>141</sup> [2015] ZACC 14, 2015 (4) SA 491 (CC), 2015 (8) BCLR 925 (CC).