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# Invalid Court Orders

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ABSTRACT: Over the past fifteen years, the Constitutional Court and Supreme Court of Appeal have held that objectively invalid administrative and executive decisions remain legally effective unless they are set aside in review proceedings. The rule has emerged from balancing two competing principles of the rule of law: on the one hand, legality in that government action must be lawful; on the other, certainty in that if government decisions could be ignored without recourse to the courts that could undermine the orderly functioning of government and the administration of justice. The courts have applied a similar rule in respect of court orders: all court orders are binding unless they are overturned on appeal or through rescission proceedings, save for one exception – where a judge issues an order outside of his or her authority or competence, it is invalid and not binding. In this article I trace the emergence and development of this exception in the jurisprudence and offer some preliminary justifications for why the courts treat invalid, authority-related court orders differently from invalid government decisions, thereby striking a different balance between legality and certainty. I then provide guidance as to how courts ought to determine whether a court order was issued with or without authority and explore the limits of the exception, particularly in respect of its application to orders issued by South Africa's apex Court.

KEYWORDS: principle of legality, legal certainty, invalid decisions, judicial authority

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An important founding value of South Africa's constitutional democracy is the rule of law.[1] Derived from this founding value is the principle of legality, which requires that public functionaries may only exercise public power lawfully.[2] Put another way, 'people in positions of authority [must] exercise their power within a constraining framework of public norms'.[3] Unlawful government decisions are invalid and void, not voidable, and as an objective legal matter do not exist.[4] Simple enough. But the rule of law requires much more. Certainty in the administration of justice is another principle of the rule of law.[5] Citizens place reliance on extant government decisions and arrange their affairs around them, with the expectation that they were made lawfully and will be carried out. If government conduct, that might be unlawful, could simply be disregarded – without the need for a process to pronounce on its validity – that could lead to chaos and prejudice the rights and interests of many innocent people. The rule of law would suffer a blow if that were the case.

The tension between these two competing principles of legality and certainty has vexed our courts over the past two decades. Judges have had to figure out how to treat government decisions made in error by public functionaries but which have not been challenged in the usual way – judicial review proceedings. Should the court be entitled to ignore decisions made in error and not challenged properly? Or should such decisions be taken as valid or effective until so challenged?

The tension has bubbled to the surface most prominently in administrative law type cases. A long line of judgments – starting with the Supreme Court of Appeal's decision in *Oudekraal* and most recently confirmed by the Constitutional Court in *Magnificent Mile* – have held that seemingly irregular administrative and executive decisions not challenged in review proceedings should be treated as legally effective unless and until set aside in the

[1] Constitution of the Republic of South Africa, 1996 s 1(c)('The Republic of South Africa is one, sovereign, democratic state founded on … [s]upremacy of the constitution and the rule of law.')

[2] *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* [1998] ZACC 17, 1999 (1) SA 374 (CC) at paras 56–58. See also F Michelman 'Rule of Law, Legality and the Supremacy of the Constitution' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd ed, 2005) Chapter 11 s 11.1.

[3] J Waldron 'The Concept and the Rule of Law' (2008) 43 *Georgia Law Review* 1, 6.

[4] *Ferreira v Levin NO & Others; Vryenhoek & Others v Powell NO & Others* [1995] ZACC 13, 1996 (1) SA 984 (CC)('*Ferreira*') at para 27. C Forsyth 'The Theory of the Second Actor Revisited' 2006 *Acta Juridica* 209, 211–213 ('Forsyth Revisited') explains why unlawful administrative acts should be taken as void and not voidable; similar considerations apply in respect of any unlawful government conduct.

[5] Ibid at para 26. For academic commentary see D Freund & A Price 'On the Legal Effects of Unlawful Administrative Action' (2017) 134 *South African Law Journal* 184, 185 and earlier B Beinart 'The Rule of Law' 1962 *Acta Juridica* 99, 106.

correct proceedings.[6] This does not mean that an invalid decision somehow becomes valid, for objectively invalid conduct cannot be anything other than that. Rather as a rule[7] the decision continues to have 'effect in law' until set aside.[8] That is no matter the nature of the irregularity. The Court has emphasised that invalid administrative and executive acts while not existing in law, exist in fact and have consequences in the real world. If anyone could simply ignore a decision seemingly made in error (particularly its decision-maker) without the need for an independent judicial pronouncement on its validity that would be a licence to self-help. Legal certainty would be severely undermined. Cameron J explicitly refers to these as the 'rule of law reasons' which put a 'provisional halt' on the determination of a decision's validity.[9]

*Oudekraal* and its application by the Constitutional Court have been controversial, and the rule it propounds has come under harsh criticism from a minority of the Court, which stresses the legality aspect of the rule of law.[10] Nonetheless, a majority of the Court has consistently upheld and applied the rule, which has also been celebrated by many academics and court watchers.[11] No doubt *Oudekraal* provides for an important rule in our public law.

Finding the right balance between legality and certainty has also recently become controversial in respect of decisions made by other public functionaries – judges. Similar rule

[6] *Oudekraal Estates (Pty) Ltd v City of Cape Town & Others* [2004] ZASCA 48, 2004 (6) SA 222 (SCA) ('*Oudekraal*'); *Camps Bay Ratepayers' & Residents Association v Harrison* [2010] ZACC 19, 2011 (4) SA 42 (CC); *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* [2010] ZACC 26, 2011 (4) SA 113 (CC) ('*Bengwenyama*'); *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6, 2014 (3) SA 481 (CC)('*Kirland*'); *Merafong City v AngloGold Ashanti Limited* [2016] ZACC 35, 2017 (2) SA 211 (CC)('*Merafong*'); *Department of Transport v Tasima (Pty) Ltd* [2016] ZACC 39, 2017 (2) SA 622 (CC)('*Tasima*'); *Swart v Starbuck & Others* [2017] ZACC 23, 2017 (5) SA 370 (CC); *Corruption Watch NPC & Others v President of the Republic of South Africa & Others; Nxasana v Corruption Watch NPC & Others* [2018] ZACC 23, 2018 (10) BCLR 1179 (CC)('*Corruption Watch*'); *Aquila Steel (S Africa) (Pty) Limited v Minister of Mineral Resources & Others* [2019] ZACC 5, 2019 (3) SA 621 (CC)('*Aquila Steel*'); and *Magnificent Mile Trading 30 (Pty) Limited v Charmaine Celliers NO & Others* [2019] ZACC 36 ('*Magnificent Mile*')

[7] I specifically use the term 'rule' instead of 'principle' because *Oudekraal* requires courts to treat unchallenged administrative and executive decisions conclusively as legally effective, which is subject to certain exceptions (eg, collateral challenges and perhaps instances of patent unlawfulness discussed in parts III and IV below). It is not a principle because its application does not lead to inconclusive outcomes in a given case. On the distinction between rules and principles, see R Dworkin *Taking Rights Seriously* (1977) 17 and R Alexy *A Theory of Constitutional Rights* (2002) Ch 3.

[8] *Merafong* (note 6 above) at para 41 and fn 63.

[9] *Aquila Steel* (note 6 above) at para 95.

[10] Jafta J leads the charge with his allies Mogoeng CJ and Zondo DCJ together, on occasion, with the late Bosielo AJ. His reasoning, simply stated, is that Constitution s 172(1)(*a*) provides that a court 'must' declare conduct inconsistent with the Constitution to be invalid, ie he places the legality aspect of the rule of law above all else. Madlanga J formed part of the minority in *Kirland* (note 6 above), but since then has supported the majority position in *Merafong* (note 6 above), *Tasima* (note 6 above) and even wrote the majority judgment in *Corruption Watch* (note 6 above). For general discussions about this controversy, see J Brickhill, H Corder, D Davis & G Marcus 'Administration of Justice' in N Botha (ed) *Annual Survey of South African Law* (2016) 3–12 and L Boonzaier 'A Decision to Undo' (2018) 135 *South African Law Journal* 642, 659, 671–672.

[11] C Hoexter *Administrative Law in South Africa* (2nd Ed, 2012) 546–550 ('Hoexter'); C Hoexter 'The Enforcement of an Official Promise' (2015) 132 *South African Law Journal* 207, 217–218; L Boonzaier 'Good Reviews, Bad Actors' (2017) VII *Constitutional Court Review* 1; Freund & Price (note 5 above); and Boonzaier (note 10 above). For an earlier discussion about *Oudekraal*, before the Constitutional Court set about developing the rule it sets out, see also D Pretorius 'The Status and Force of Defective Administrative Decisions Pending Judicial Pronouncement' (2009) 126 *South African Law Journal* 537.

of law issues arise in this context: 'in exercising the judicial function judges are themselves constrained by the law'[12] and for good reason since judges make decisions which have far-reaching impacts on the rights and interests of ordinary people. A conundrum arises: while unlimited judicial authority is a constitutional oxymoron, it is for the judiciary to decide on the validity of *all* exercises of public power – including its own. The judiciary is both player and referee when it comes to this issue.[13] The problem is that judges err sometimes.[14] And if they err and their orders not challenged on appeal can simply be ignored, that could be a near-fatal blow to the rule of law; respecting court orders is a core foundation of our legal system. Not only will the law lose its ability to regulate affairs between private parties, but this might also undermine its important function in controlling the exercise of public power by the State.

Despite the majority of the Constitutional Court defending the *Oudekraal* rule at length in respect of administrative and executive decisions, the Court in *Tasima* and other cases[15] seems to have accepted *obiter* that some court orders are not necessarily binding, even where they have not been challenged. Without needing to decide the issue, the Court has favourably referred to the Supreme Court of Appeal's decision in *Motala*, which has developed a rule that if a court issues an order without 'jurisdiction' it is *not* binding, even if it is not challenged in the proper way – usually on appeal or in a rescission application.[16] Call it the *Motala* exception.

In this article, I trace the emergence of the exception crafted in *Motala* and in so doing, try to make sense of and explain why our courts recognise this narrow exception by sometimes disregarding extant court orders that are made without authority, thus striking a different balance between legality and certainty. I then provide a blueprint for how exceptions of this kind should be determined and thereafter consider the limits of this exception, particularly in light of the difficulty of applying *Motala* to hard cases and to the decisions and orders of the Constitutional Court.

## I AN OVERVIEW – THE *MOTALA* EXCEPTION

It is necessary upfront to provide a specific definition of a word used throughout the article and outline the basic structure of the exception. As for the definition, the decisions of the Supreme

[12] *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1, 2009 (2) SA 277 (SCA) at para 15.

[13] L Kohn 'The Test for 'Exceptional Circumstances' Where an Order of Substitution is Sought: An Analysis of *Trencon* Against the Backdrop of the Separation of Powers' (2017) 7 *Constitutional Court Review* 91, 93.

[14] *Jacobs & Others v S* [2019] ZACC 4, 2019 (5) BCLR 526 (CC) at para 97 (Froneman J made this point quite candidly: 'The italicised portion of that quotation [from an earlier judgment of the Constitutional Court] wrongly describes the law. Even Homer nodded. And courts sometimes make decisions *per incuriam*, or in a more brutal translation, "through lack of care". The Latin phrase sounds more impressive than its English translation, but, embarrassing as it may turn out to be, one must examine whether the decision suffers from a lack of care.')

[15] *Kirland* (note 6 above) at fn 78; *Provincial Government North West & Another v Tsoga Developers CC & Others* [2016] ZACC 9, 2016 (5) BCLR 687 (CC)('*Tsoga Developers*') at paras 47–50; *Nkata v Firstrand Bank Limited & Others* [2016] ZACC 12, 2016 (4) SA 257 (CC) at para 161(Nugent AJ concurring).

[16] *Master of the High Court Northern Gauteng High Court, Pretoria v Motala NO & Others* [2011] ZASCA 238, 2012 (3) SA 325 (SCA)('*Motala*') at paras 11–13 citing *G W Willis v L B Cauvin* 4 NLR 97 at 98–99('*G W Willis*') and *Lewis & Marks v Middel* 1904 TS 291 at 303. See also *City of Johannesburg v Changing Tides 74 (Pty) Ltd & Others* [2012] ZASCA 116, 2012 (6) SA 294 (SCA)('*Changing Tides*'); *Moraitis Investments (Pty) Ltd & Others v Montic Diary (Pty) Ltd & Others* [2017] ZASCA 54, 2017 (5) SA 508 (SCA)('*Moraitis Investments*') at fn 4; and *Minister of Rural Development and Land Reform v Normandien Farms (Pty) Ltd & Others, Mathibane & Others v Normandien Farms (Pty) Ltd & Others* [2017] ZASCA 163, 2019 (1) SA 154 (SCA) at para 53.

Court of Appeal recognising the *Motala* exception refer to instances where a judge lacks 'jurisdiction' and that orders issued without 'jurisdiction' are considered to be invalid on their face. From a close reading of the jurisprudence, the term 'jurisdiction' is being used in a very specific sense – as a synonym for 'power', 'competence' or 'authority'.[17] To avoid confusion, since 'jurisdiction' may a have wider meaning in other contexts,[18] the word 'authority' is used in this article.

The basic rationale for the exception is stated as follows. A judge's authority is found in the rules of law which stipulate the types of cases a court may hear and decide ('subject-matter authority') as well as the rules which specify the kinds of orders that the particular court is empowered to make ('court-order authority'). The enquiry into whether a judge has 'authority' for these purposes, concerns not whether she exercises her adjudicative powers appropriately. Rather, it implicates the antecedent question whether the relevant powers are possessed in the first place – a narrower legal question. Whether a court has authority, so defined, to issue an order can be determined simply with reference to the order itself and the law (nothing further need be looked at in this regard). In this article, orders issued without authority are referred to as 'invalid court orders'.[19]

To illustrate by way of example, whether a court exercised its authority appropriately by ordering the arrest of a debtor who was about to leave the country[20] is not the type of issue to which the exception is directed. Rather, the sort of issue is whether the court has the power to arrest such a debtor in the first place. This is a useful example because under the common law the courts had such authority, but it was declared unconstitutional.[21] Furthermore, the enquiry into a court's 'authority' does not concern whether all the necessary facts were proved to sustain a cause of action, but whether, objectively speaking, the relevant court possesses the power to adjudicate on a claim of this kind. HLA Hart would have categorised these as a species of secondary rules – those which define and delimit the courts' powers of adjudication as distinct from primary rules, which are intended to guide judges in the course of determining the lawfulness of the conduct in dispute.[22]

Based on the *Motala* exception, where a judge has decided a case or issued an order that falls outside of their adjudicative powers (ie, has made an authority-related error), the courts are entitled to treat it as invalid and not binding on its face – even if the order has not been taken on appeal.[23] Importantly, the courts have not, following *Motala*, extended this narrow exception to where a court makes other kinds of errors and issues an order. In fact, both the

[17] On how the word 'jurisdiction' is commonly used to refer to a decision-maker's power or authority, see L Baxter *Administrative Law* (1984) 302–303.

[18] H Wade & C Forsyth *Administrative Law* (11th Ed, 2014) 29–30 for a discussion about the wider use of the word.

[19] The Supreme Court of Appeal tends to call them 'nullities', but in *Tasima* the Constitutional Court rejected that terminology. See part II.C below.

[20] Referred to as an arrest *tanquam suspectus de fuga*.

[21] *Malachi v Cape Dance Academy International (Pty) Ltd & Others* [2010] ZAWCHC 1, 2010 (7) BCLR 678 (WCC) and *Malachi v Cape Dance Academy International (Pty) Ltd & Others* [2010] ZACC 13, 2010 (6) SA 1 (CC).

[22] See generally, HLA Hart *The Concept of Law* (3rd Ed, 2012) ch V. Hart's most famous secondary rule is his rule of recognition, by which decision-makers identify and ascertain primary rules. Since I borrow Hart's characterisation, it is important to point out that he would not have supported the *Motala* exception (at 30).

[23] Of course one could also say that a judge acts outside of their authority or jurisdiction by issuing orders while making other kinds of errors. That is the essence of the wide *ultra vires* doctrine – see the discussion in Wade & Forsyth (note 19 above) at 29–30. For the purposes this article, however, 'authority' concerns only the narrow issue described above.

Constitutional Court and Supreme Court of Appeal have stressed the opposite: where a court has authority to decide an issue or make an order and errs, such an order must be treated as binding and effective unless overturned in the correct process. Admittedly, this is a subtle distinction that is not always easy to draw in practice.

A useful way of considering whether the *Motala* exception applies is to ask whether the court *can* ever issue the order, and not whether it *may* have been entitled to. The former is purely a legal question. If the answer is 'Yes' then the order is binding. If the answer is 'No' then the courts have held that it is not binding and can be disregarded.

## II WHERE THE *MOTALA* EXCEPTION AROSE[24]

The Supreme Court of Appeal, as mentioned in my introductory remarks, has had to confront the issue head on in cases before it, while the Constitutional Court has only considered it tangentially.

### A The Supreme Court of Appeal's approach

*Motala* concerned an order issued by Kruger AJ sitting in the High Court, purporting to appoint a judicial manager under the old Companies Act 61 of 1973. The Master of the High Court, who oversees these matters, refused to issue a certificate of appointment pursuant to the order, and appointed other insolvency practitioners as the provisional judicial managers.[25] In subsequent proceedings in the matter, Legodi J of his own accord found the Master to be in contempt for refusing to follow the appointment order.[26]

On appeal against the Legodi J order, Ponnan JA[27] enquired into the validity of the earlier Kruger AJ order, even though it was not the subject of the appeal. Ponnan JA held that the latter order should not have been issued for want of authority. In coming to this conclusion, he surveyed jurisprudence developed by the Supreme Court of Appeal and its predecessor over the course of the previous century.[28] He held that the High Court had no authority in law to make an order appointing a judicial manager in the first place.[29] That power exclusively vested in the Master under South Africa's statutorily-created insolvency processes, which Kruger AJ had impermissibly attempted to usurp.[30] What's more, another

[24] I bracket that there is a second uncontroversial exception recognised in the jurisprudence to a court order being binding. Where an order has been issued against a party who has not been cited before the court, it will be a nullity (unless the order was taken in very special urgent circumstances). That was the position at common law (*Lewis & Marks* (note 16 above) at 303). Constitution ss 34 and 35 entrench fair hearing and fair trial rights, which require that a party be given an opportunity to be heard before an adverse order is made against them (*South African Riding for the Disabled Association v Regional Land Claims Commissioner & Others* [2017] ZACC 4, 2017 (5) SA 1 (CC) at para 10).

[25] *Motala NO & Others v ITT Financial Corporation (Pty) & Others* [2010] ZAGPPHC 162 at paras 14–15

[26] Ibid at para 61.31.

[27] *Motala* (note 16 above) (Malan JA and Wallis JA concurring).

[28] *GW Willis* (note 16 above); *Lewis & Marks* (note 16 above); *Sliom v Wallach's Printing & Publishing Company Ltd* 1925 TPD 650; *Schierhout v Minister of Justice* 1926 AD 99; *State v Mkize* 1962 (2) SA 457 (N); *Suid-Afrikaanse Sentrale Ko-operatiewe Graanmaatskappy Bpk v Shifren & the Taxing Master* 1964 (1) SA 162 (O); *Trade Fairs & Promotions (Pty) Ltd v Thomson* 1984 (4) SA 177 (W); *S v Absalom* [1989] ZASCA 46, 1989 (3) SA 154 (A); and *Government of the Republic of South Africa v Von Abo* [2011] ZASCA 65, 2011 (5) SA 262 (SCA).

[29] *Motala* (note 16 above) at paras 5–6 citing old Companies Act s 429.

[30] Ibid at para 14.

judge, Bertelsmann J in the same division had already handed down a judgment making this exact finding in law: only the Master has the power to make such appointments.[31] Ponnan JA held that the Kruger AJ order was therefore a 'nullity'. As a result, no finding of contempt could be made. Ponnan JA held so even though no proceedings to rescind or appeal against the Kruger AJ order had been brought: 'Being a nullity a pronouncement to that effect was unnecessary. Nor did it first have to be set aside by a court of equal standing.'[32]

Another case is *Changing Tides* where a High Court judge hearing eviction proceedings issued an order compelling the Sheriff of the court to compile a list of occupants in the building concerned.[33] Wallis JA[34] declared those paragraphs of the order to be a 'nullity', as the Sheriffs Act did not confer such a power on the Sheriff – a creature of statute.[35] He explained that '[t]hat part of the order was accordingly improvidently sought and erroneously granted' and was 'therefore a nullity.'[36] The case has an important difference from *Motala*: the High Court did not take a power assigned to another actor by the law, but was effectively legislating from the bench by purporting to grant powers to the Sheriff that went beyond those provided for in the empowering statute.

In both matters the issue was not whether the court had authority to hear the dispute or whether the court was satisfied that facts were proved to justify the granting of the order. Rather it fell squarely within the realm of the antecedent question as to whether the court had the authority in law to grant the order in the first place.

### B The Constitutional Court judgments

As for the Constitutional Court, a few recent cases touch on the issue. The first, *Eke*[37] dealt with the following questions: whether the terms of a settlement agreement made an order of court are enforceable as a court order and what terms may legitimately be contained in such agreements.[38] Madlanga J answered the first question in the affirmative: 'Once a settlement agreement has been made an order of court, it is an order like any other.'[39] As to the second question, the Court held that not every settlement agreement, or every term of one, should automatically be made an order by a court, primarily for three reasons.[40] First, the settlement agreement must relate to the issue between the parties that is before the court. Secondly, it must have some kind of 'practical and legitimate advantage' for the parties.[41] And thirdly, most important for this discussion—

[31] *Ex parte The Master of the High Court South Africa (North Gauteng)* [2011] ZAGPPHC 105, 2011 (5) SA 311 (GNP).

[32] *Motala* (note 16 above) at para 14. Ponnan JA also proferred a sweeping claim that 'it is a fundamental principle of our law that a thing done contrary to a direct prohibition of the law is void and of no force and effect' (citing *Schierhout v Minister of Justice* 1926 AD 99, 109). This proposition is overbroad for focusing solely on the legality aspect of the rule of law. It overlooks that, for the sake of certainty, some unlawful acts might have to be taken as effective.

[33] *Changing Tides* (note 16 above) at para 8.

[34] Ibid (Mthiyane DP, Lewis JA, Tshiqi JA and Petse JA concurring).

[35] Sheriffs Act 90 of 1986, s 3(1) sets out the functions of the office.

[36] *Changing Tides* (note 16 above) para 9, citing *Motala* (note 16 above).

[37] *Eke v Parsons* [2015] ZACC 30, 2016 (3) SA 37 (CC)('*Eke*').

[38] Ibid at para 1.

[39] Ibid at paras 29 and 36.

[40] Ibid at para 29.

[41] Ibid at para 26.

> the agreement must not be objectionable, that is, its terms must be capable, both from a legal and a practical point of view, of being included in a court order. *That means, its terms must accord with both the Constitution and the law.* Also, they must not be at odds with public policy.[42]

The Court did not explain whether the italicised part of the paragraph means that any error (whether authority-related or otherwise) by a court in deciding to make a settlement agreement an order will be binding.

A settlement agreement also played a central role in the second case, *Tsoga Developers*. The applicants, officials from the North West Province, sought the stay of a writ of execution before the Constitutional Court pending the outcome of proceedings attacking the validity of the settlement. The agreement was alleged to have been made pursuant to an unlawful administrative decision, for want of compliance with s 217 of the Constitution.[43] This notwithstanding, the High Court had refused to stay the writ. In considering whether the prospects of success in the pending review supported the granting of interim relief, the Constitutional Court discussed *Motala* and *Changing Tides*. Madlanga J wrote the judgment in this matter as well:

> I read both judgments to say that, if on the face of the order, one is able to conclude that what the court has ordered cannot be done under the enabling legislation, the order is a nullity and can be disregarded. These cases are distinguishable from the instant scenario… On its face, [the settlement agreement] order is perfectly valid and competent. If there be a need to explain this, the so-called nullity of the settlement order does not – so to speak – *jump out of the page*, as was the case with the nullity of the orders in *Changing Tides* and *Motala*. There has to be an antecedent step: proof of the grounds of review.[44]

The applicants argued that because the settlement agreement had been made without complying with s 217, it did not 'accord with both the Constitution and the law' as required by *Eke*.[45] Madlanga J explained that *Eke* was dealing with the requirements a court must be satisfied with *before* making a settlement agreement an order of court, and that once it had done so 'it is an order like any other'.[46] In a footnote,[47] he mentioned the Supreme Court of Appeal's recognition of the possibility of an order being a 'nullity' in *Motala* and *Changing Tides*, but in any event made no ruling on the correctness of these judgments.[48]

Note that in none of these cases did either of the courts extend the exception to invalidating orders arising out of other, non-authority related, errors. Interestingly, the old Roman Dutch authorities drew the same distinction. Voet for instance said:

> By the customs of to-day such over stressful and pettifogging discussion of fine points of law as to whether a decision is *ipso jure* void, or holds good by strict law and must be set aside through the remedy of an appeal, has been as far as possible abolished. The ruling has rather prevailed that decisions are never annulled under cover of nullity without appealing … *There are exceptions when*

[42] Ibid (emphasis added.)

[43] Constitution s 217(1)('When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.')

[44] *Tsoga Developers* (note 15 above) at para 50 (emphasis added.)

[45] Ibid at para 52.

[46] Ibid.

[47] Ibid at fn 64.

[48] Ibid.

> *the nullity arises from a lack of jurisdiction*, or of summons, or of an attorney's mandate as is noticed by the authors cited below following others.[49]

Again the reader will notice that the exception is narrowly confined to the three instances listed; the important one for my argument being 'lack of jurisdiction', which properly understood refers to a court's authority. The first paragraph clearly states that all other orders are binding unless challenged properly.

## C *Tasima*

The next case decided by the Constitutional Court, *Tasima* complicates things and could be understood as putting the *Motala* exception in doubt. The case had convoluted facts and so it is necessary to set out its narrative at length properly to discuss the issues it dealt with.

The central issue in dispute was the legality and constitutionality of an agreement between the Department of Transport and a private company to create and operate a centralised, modern electronic road traffic management system.[50] The company was paid generously by the State to provide these services. An acrimonious dispute regarding the validity of an extension of the agreement was referred to arbitration. Pending its outcome the company was granted an interim High Court order by Mabuse J in October 2012 (Interim Order), which kept the contractual obligations of each party alive and prohibited a breach of the agreement by the Department.[51] The order was granted without enquiring into the validity of the extension.[52]

Despite the existence of the Interim Order and ongoing arbitration proceedings, the Department repeatedly attempted to take over the system. The company resisted and contended that this could only happen in terms of a convoluted takeover schedule to the agreement. Any premature succession, the company argued, would amount to a breach of the agreement and, by extension, the Interim Order as well. If the Department breached the agreement in any way, contempt of court proceedings were used as 'the stick with which [the company] whipped the Department's officials to submission.'[53] A total of five contempt orders were granted between March 2013 and January 2014,[54] entrenching the company's position. Each order ruled that there had been contempt of the Interim Order and of the other contempt orders that had preceded it.

During the last iteration of contempt proceedings brought by the company in March 2015, seeking the committal to prison of the Department's officials and those of the Road Traffic Management Corporation that had been joined along the way, the Department raised a new defence by impugning the validity of the agreement.[55] According to the Department, the extension, on which the Interim Order was premised, came about in an unconstitutional manner for non-compliance with s 217 of the Constitution.[56] The Interim Order was therefore invalid.

[49] Voet 49.8.3 (trans Gane, vol 7) citing A. Matthaeus II *De Auctionibus* 1.16.59; Groenewegen *De legibus abrogatis* ad c 7.64; and *Hollandsche Consultatien* 5 c. 104 (emphasis added.)

[50] *Tasima* (note 6 above) at para 6.

[51] Ibid at para 32.

[52] Ibid at para 33.

[53] Ibid at para 43.

[54] Ibid at paras 174–175. The orders were issued by Strijdom J, Ebersohn AJ, Fabricius J, Nkosi J & Rabie J respectively.

[55] Ibid at para 48.

[56] Ibid at para 49.

In raising the defence the Department did two things. First, it introduced a collateral challenge like a shield against the enforcement of the agreement through the order; and secondly, it launched a formal counter-application seeking that the extension be set aside, attacking it like a sword. Hughes J hearing this chapter of the story in the High Court upheld the Department's counter-attack,[57] thereby dismissing the contempt application.

The Supreme Court of Appeal was unconvinced.[58] Brand JA held that the Department's application to set aside the extension was unreasonably late by many years and, in exercising the court's discretion, refused to entertain the review. The extension stood. It followed that the state actors were in contempt of the Interim Order, and of the contempt orders that followed it.[59]

On appeal, the Constitutional Court unanimously held it could decide the merits of the Department's case despite the delay, concluding that the extension was unconstitutional and ought to be set aside.[60] That left the question of contempt. On the one hand, Mabuse J had made the Interim Order to preserve the agreement, and judges following that had made findings of contempt for breaches of the Order. On the other, the very agreement underpinning the Interim Order had now been declared unconstitutional – and was therefore void from the outset. Should the Department be found to be in contempt of the orders? Jafta J for the minority held that on the facts of the case, the details of which are not pertinent for this article, the Department and its officials had not acted with contempt.[61]

For the majority, Khampepe J held that such an inference could not be drawn.[62] In her view, the attempts by the Department and its officials to take over the system and transfer it to the Road Traffic Management Corporation was contemptuous of the Interim Order.[63] She reasoned that up until Hughes J set aside the extension, the order was effectual, and that 'the legal consequence that flows from non-compliance with a court order is contempt.'[64] Khampepe J held that not complying with the Interim Order from the time it was made until the time the High Court set aside the extension of the agreement was contemptuous, but that committal was not appropriate on the facts.

In support of these conclusions Khampepe J relied on three bases. First, she drew on s 165(5) of the Constitution and reasoned that although the Constitution entrenches its

[57] *Tasima (Pty) Ltd v Department of Transport* [2015] ZAGPPHC 421.

[58] *Tasima (Pty) Ltd v Department of Transport* [2015] ZASCA 200, [2016] 1 All SA 465 (SCA).

[59] Ibid at para 20.

[60] Although unanimous in this conclusion, the Court was bitterly divided in its reasoning, with a primary disagreement about the *Oudekraal* rule. Khampepe J for the majority (Froneman J, Madlanga J, Mhlantla J and Nkabinde J concurring) confirmed the rule again. She held that even though the counter-application was brought unreasonably late by the Department, it should nevertheless be entertained in the circumstances. The extension was found to be invalid and set aside. Jafta J for the minority (Mogoeng CJ, Bosielo AJ and Zondo J concurring) held that a court is *always* obliged to set aside unconstitutional government decisions, no matter if they were formally challenged on review or raised collaterally in enforcement proceedings. He also criticised the *Oudekraal* rule and the majority decision in *Kirland*. Froneman J in a concurring majority judgment criticised Jafta J for ignoring precedent in his reasoning. Zondo J in turn wrote a concurring minority judgment which criticised Froneman J for doing the same thing in previous cases. The Court also included a single paragraph judgment relating to a concern raised by one of the parties in the case, that Jafta J had prejudged the matter for having referred to the factual situation in *Tasima* as an example in his minority judgment in *Merafong* (note 6 above), which had been handed down a few weeks before.

[61] *Tasima* (note 6 above) at paras 114–115.

[62] Ibid at para 184.

[63] Ibid at para 185.

[64] Ibid at para 186.

supremacy in s 2,[65] it expressly provides for *one* exception to a court order's immediate binding force – confirmation of an order of constitutional invalidity by the Constitutional Court.[66] This 'tipped' the balance in favour of holding that an 'order is binding, irrespective of whether or not it is valid, until set aside.'[67] Secondly, she buttressed this proposition by referring to pre-constitutional jurisprudence.[68] Thirdly, Khampepe J applied the *Oudekraal* rule by analogy to invalid orders:

> This reading of section 165(5) accepts the Judiciary's fallibilities. As explained in the context of administrative decisions, "administrators may err, and even … err grossly." Surely the authors of the Constitution viewed Judges as equally human. The creation of a judicial hierarchy that provides for appeals attests to this understanding. Like administrators, Judges are capable of serious error. Nevertheless, judicial orders wrongly issued are not nullities. They exist in fact and may have legal consequences.[69]

This conclusion 'vindicates the constitutionally-prescribed authority of the courts'. Khampepe J cautioned further that '[a]llowing parties to ignore court orders would shake the foundations of the law'[70] and continued that '[t]he duty to obey court orders is the stanchion around which a state founded on the supremacy of the Constitution and the rule of law is built.'[71] Failure to comply with a court order thus results in contempt.[72]

It is in this context that the majority took issue with some of Ponnan JA's reasoning in *Motala*.[73] Khampepe J analysed and placed in doubt the Supreme Court of Appeal's reliance on its century of jurisprudence[74] and criticised it for failing to mention s 165(5) in its judgment.

One reading of the decision might be that the exception is put in doubt.[75] The reasoning of the Court seems to imply that court orders should *always*, as a rule, be considered binding and capable of founding contempt, until set aside.[76] Nonetheless, it is important to emphasise that the Court was not being called upon to consider the status of an order made without authority as defined in this article. The question in the matter was whether Mabuse J – who issued the Interim Order – 'had the authority to make the decision that he did at the moment that he

[65] Constitution s 2 ('This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.')

[66] Constitution s 172(2)(*a*) ('The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.')

[67] *Tasima* (note 6 above) at para 180. (Khampepe J contends as follows at fn 118: 'Even though courts do not have the purse or sword to enforce their orders, the effect of their decision is binding in law.')

[68] *In re Honeyborne* (1876) 7 Buch 145; *S v Zungo* 1966 (1) SA 268 (N).

[69] *Tasima* (note 6 above) at para 182 citing *Kirland* (note 6 above) at para 90.

[70] *Tasima* (note 6 above) at para 183.

[71] Ibid.

[72] Ibid at paras 184–187.

[73] Ibid at para 190.

[74] Ibid at paras 188–196.

[75] For example, the editors of the *South African Law Reports* state that *Motala* was 'criticised' by the Constitutional Court in *Tasima*. See also D van Loggerenberg *Erasmus Superior Court Practice* (Revision Service 6, 2018) A2-94B–95 (Notes that *Tasima* takes a different approach from *Motala*.)

[76] In an earlier draft of the article I adopted the view that the exception carefully drawn in *Motala* was seriously put in doubt by the reasoning in *Tasima*: any order binds, but judges have a *discretion* not to enforce one made without authority. I am indebted to both of the CCR's anonymous reviewers as well as my editors for suggesting that I reconsider that view, as I have done.

made it.'[77] Undoubtedly, he had the power to issue an interim order to maintain the status quo pending the determination of the agreement's validity in the arbitration proceedings.[78] Khampepe J explicitly stated that *Motala* was 'dealing with a different issue'[79] from *Tasima*.[80] Again, buried in a footnote, one finds the Court recognising the exception: '*Motala* correctly holds that where an order is made without jurisdiction … another court may refuse to enforce it'.[81] In doing so, the Constitutional Court adds a wrinkle. Khampepe J explicitly stated that invalid orders are not 'nullities', but emphasised that a court can still disregard an earlier order made without authority, albeit in a footnote.[82]

Notably, the Supreme Court of Appeal in *Moraitis Investments* subsequently interpreted *Tasima* as having confirmed the *Motala* exception. After stressing that *Tasima* underscored the general proposition that court orders shouldn't be ignored, Wallis JA cited the footnote mentioned above for the proposition that '[t]here is a narrow exception where a court makes an order that is on its face beyond its powers'.[83] This too was contained in a footnote.

## III WHY TREAT COURT ORDERS DIFFERENTLY FROM ADMINISTRATIVE AND EXECUTIVE DECISIONS?

I have already outlined some of the 'rule of law reasons' why South Africa's apex courts have insisted on treating unlawful government decisions as effective until set aside. Surely some of the same reasons apply to court orders as well. Regarding those reasons, the courts have held that just because something is invalid in law, it should not necessarily be treated as a nullity in reality because it exists in fact and may have legal consequences. This distinction between the normative legal validity of an act on the one hand, and the same act's factual existence and effect on the other, was drawn by Christopher Forsyth.[84] In *Oudekraal*, the Supreme Court of Appeal approvingly cited Forsyth's work in developing the rule.[85] Additionally, the courts are anxious to diminish the risk of public functionaries resorting to self-help in deciding which of their decisions are lawful or not – something that is the province of the courts.[86]

[77] *Tasima* (note 6 above) at para 198.

[78] Arbitration Act 42 of 1965 s 21(*f*) empowers the court to make interim orders of this nature.

[79] *Tasima* (note 6 above) at para 197.

[80] Perhaps the majority was responding to sentiments expressed by Jafta J in his lone judgment of *Nkata* (note 15 above) that other non-authority related errors may also make court orders nullities, which is not consonant with the *Motala* exception.

[81] *Tasima* (note 6 above) at fn 156.

[82] If we understand *Tasima* in this way, what then do we make of Constitution s 165(5)? It provides that an 'order or decision issued by a court binds'? Perhaps *Motala* and *Tasima* mean that a 'court order' issued without authority ought not even be referred to as a 'court order' at all, for it does not meet the desiderata for an order. On this approach, an 'order or decision' for the purposes of Constitution s 165(5) only refers to those made with authority.

[83] *Moraitis Investments* (note 16 above) at fn 4.

[84] C Forsyth '"The Metaphysic of Nullity" Invalidity, Conceptual Reasoning and the Rule of Law' in C Forsyth and I Hare (eds) *The Golden Metwand and the Crooked Cord: Essays in Honour of Sir William Wade QC* (1998) 147. Forsyth draws on Hans Kelsen's pure theory of law for the theoretical foundation of the distinction explaining that the theory 'is built on the distinction between the *Sein* (the Is) and the *Sollen* (the Ought), between the realm of things that are – facts or natural phenomena – and the realms of norms, included therein the law.'

[85] *Oudekraal* (note 6 above) at para 29.

[86] *Kirland* (note 6 above) at para 103.

There are further considerations as well. It has always been the case that the judicial review of an unlawful decision must be brought within a reasonable time[87] and by a party with sufficient interest in the decision to challenge it.[88] The courts have always had a discretion in deciding whether or not to set aside an unlawful decision in review proceedings.[89] For these reasons it has been said that 'the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances.'[90] Legal certainty has always been an overarching factor in deciding these sorts of issues.

Even so, there have been instances where despite a failure to challenge a decision in the correct way, the courts have pronounced on its validity. The most prominent exception to the *Oudekraal* rule is the collateral challenge, where a party raises the invalidity of a decision as a defence in proceedings where it is sought to be enforced. Such a challenge is 'collateral' because it is raised in proceedings not designed to impugn the decision in question.[91] In a sense a collateral challenge can be considered a shield against the enforcement of invalid decision.[92] Daniel Freund and Alistair Price, who provide useful commentary on *Oudekraal* and its application by the Constitutional Court, explain instances where collateral challenges of these sorts have been allowed:

> Where an administrative act is advanced as the legal justification for coercing a subject, [that is, requiring certain conduct by threatening a sanction, such as criminal punishment or civil liability, for non-compliance] and that subject believes the act to be unlawful, he or she may choose to ignore it and if he or she is then criminally prosecuted or sued in civil proceedings, the subject is entitled to defend herself by reactively challenging the administrative act in defence.[93]

As an example, they refer to *S v Smit* where an accused who had been charged for failing to pay tolls successfully raised the unlawful declaration of the toll road as his defence.[94] If Smit was not allowed to challenge the decision collaterally, he could have been coerced on the basis of an unlawful decision. Another famous case is the decision of the UK House of Lords in *Boddington* where an accused charged with smoking on a train in breach of a by-law, was allowed to raise its alleged invalidity collaterally, even though the House of Lords ultimately found against the accused on the question of the by-law's validity.[95] In both instances the

[87] See *Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A); Promotion of Administrative Justice Act 3 of 2000 ('PAJA') s 7(1); and *City of Cape Town v Aurecon South Africa (Pty) Ltd* [2017] ZACC 5, 2017 (4) SA 223 (CC) at fn 30.

[88] *Giant Concerts CC v Rinaldo Investments (Pty) Ltd & Others* [2012] ZACC 28, 2013 (3) BCLR 251 (CC).

[89] For a discussion regarding the discretionary nature of the courts' power to set order aside, see G Quinot & P Maree 'The Puzzle of Pronouncing on the Validity of Administrative Action on Review' (2015) 7 *Constitutional Court Review* 27.

[90] Wade & Forsyth (note 18 above) at 251, the same sentence from the 7th edition of the work (at 342–344) was cited with approval in *Oudekraal* (note 6 above) at para 28.

[91] *Merafong* (note 6 above) at para 23.

[92] *Tasima* (note 6 above) at fn 60–62 (Court seems to have recognised that a collateral challenge is a species of a broader category of 'reactive challenges' which could include a formal counter-application which is more akin to a sword attacking the validity of the decision head-on. Any challenge to a decision raised in *response* to an application for enforcement is reactive on this definition.)

[93] Freund & Price (note 5 above) at 189.

[94] *S v Smit* 2007 (2) SACR 335 (T).

[95] *Boddington v British Transport Police* [1999] 2 AC 143.

accused faced the potential risk of imprisonment for failing to comply with a requirement that may not have existed in law.[96]

Not all administrative decisions are coercive in nature, and presumably a court might be less inclined to allow a collateral challenge where that is the case (although the jurisprudence indicates that collateral challenges of administrative decisions shouldn't only be available against certain categories of errors or be available only to certain categories of litigants).[97]

This all has quite big implications for invalid court orders, because they are always coercive in nature. A party who has a court order in hand can utilise the powers of the state to enforce it. An order *ad factum praestandum* – to do or refrain from doing something – is capable of being enforced through contempt proceedings and the threat of imprisonment. In contrast, an order *ad solvendam pecuniam* – one which sounds in money – is enforceable through execution against property.[98]

In *Matjhabeng*, Nkabinde ADCJ emphasised that being committed to prison for contempt violates the rights not to be deprived of freedom arbitrarily or without just cause and not to be detained without trial, and impacts upon fair trial rights.[99] The *Motala* exception recognises that just cause begins with authority in law, and that a person should not lose their freedom without that foundation. The Constitutional Court on numerous occasions has also held that executing an order which sounds in money has the potential to affect property, housing and fair trial rights.[100]

While the *Motala* exception would frustrate a judgment creditor from exercising her rights accruing under an invalid order, a judgment debtor too has a right not to be 'deprived of property except in terms of law of general application',[101] which must include the courts' powers of adjudication. After all, even if a judgment creditor were to have a valid cause of action in law, if they bring their case in a court that doesn't have authority over their dispute, their right to enforce their cause of action should not be permitted to trump the rights of the debtor to have their case adjudicated by the correct judicial offer. The machinery of the State is still involved in ensuring compliance with money judgments: through execution by the Sheriff. The state would still be coercing compliance with something illegal.

[96] That result would be in breach of the *nulla poena sine lege* principle.

[97] *Merafong* (note 6 above) at para 81, where Cameron J discusses how the approach must be flexible and less categorical, overturning the Supreme Court of Appeal's ruling in the case to the effect that public functionaries may not raise collateral challenges (*Merafong City Local Municipality v AngloGold Ashanti Limited* [2015] ZASCA 85, 2016 (2) SA 176 (SCA) at para 17). See also Wade & Forsyth (note 18 above) at 235–238 (Describe instances where collateral challenges are permitted in the United Kingdom.)

[98] *Matjhabeng Local Municipality v Eskom Holdings Limited & Others; Mkhonto & Others v Compensation Solutions (Pty)* [2017] ZACC 35, 2018 (1) SA 1 (CC) at paras 56–57. There appears to be one blend between them: the refusal to pay maintenance pursuant to a court order can result in contempt and committal to prison *Bannatyne v Bannatyne* [2002] ZACC 31, 2003 (2) SA 363 (CC).

[99] *Matjhabeng* (note 98 above) at para 1, citing Constitution ss 12(1) and 35(3).

[100] Constitution ss 25(1) and 34. See *University of Stellenbosch Legal Aid Clinic & Others v Minister of Justice & Correctional Services & Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic & Others; Mavava Trading 279 (Pty) Ltd & Others v University of Stellenbosch Legal Aid Clinic & Others* [2016] ZACC 32, 2016 (6) SA 596 (CC) at para 129.

[101] Constitution s 25(1).

In short, if the courts are willing to allow collateral challenges to coercive administrative decisions – and in effect treat them as nullities – then it is reasonable for courts to treat orders made without authority on a similar basis.[102]

There may be other reasons for the differentiation in treatment. First, judges occupy a different position from administrators and other decision-makers in our democracy. They are required to be 'appropriately qualified'[103] and part of that means being well versed in the law, a requirement that is not applicable to administrators. (I mean this as a general proposition; many people in the public administration are well qualified in the law, but that is not always a requirement for a position.)

Secondly, challenging a court order is a far stricter process than taking an administrative or executive decision on review. In civil matters, leave to appeal against a High Court order must be applied for within fifteen court days[104] and, while condonation is possible for late applications, it is not readily given.[105] An application for rescission of judgment must be brought within twenty days[106] and the courts have held that a similar period would be considered reasonable for the purposes of rescission applications brought in terms of the common law.[107] In contrast, in respect of administrative action, the time frames are more lenient. PAJA specifies that applications for review must be brought within a reasonable time and not more than 180 days of the aggrieved party having become, or ought reasonably to have become, aware of the impugned decision, or after internal remedies are exhausted.[108] The time period can be extended by agreement or by the court if the interests of justice require.[109] There has been at least one case where a fifty year delay was condoned – the second instalment of the *Oudekraal* matter.[110] Under the principle of legality, review challenges must also be brought within a reasonable time, although with no set period,[111] and unreasonable lateness can be condoned by

[102] One of the anonymous reviewers made the point that some of the concerns raised in the article about coercion possibly could be dealt with in other ways: committal to prison for contempt requires proof beyond a reasonable doubt that a party willfully and in bad faith ignored an order (*Matjhabeng* (note 98 above) at para 103), therefore a party confronted with allegations of not complying with an invalid order might defend itself by raising its belief that it was not bound by the order due to its invalidity. The main problem with this is that for civil debts there is no enquiry as to why the judgment debtor ignored a court's order; a warrant of execution is simply issued and executed and so those safeguards are not present.

[103] Constitution s 174(1)('Any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer. Any person to be appointed to the Constitutional Court must also be a South African citizen.')

[104] Rules regulating the conduct of the proceedings of the several provincial and local divisions of the Supreme Court of South Africa *Government Notice* R 48 (12 January 1965) rule 49(1)(b). That is within 15 days of the order or the court's reasons being handed down.

[105] See the discussion in van Loggerenberg (note 75 above) at D1-663 and D1-669. See also *Van Wyk v Unitas Hospital & Another* [2007] ZACC 24, 2008 (2) SA 472 (CC).

[106] Rule 31(2)(*b*).

[107] *Nkata v Firstrand Bank Limited & Others* [2014] ZAWCHC 1, 2014 (2) SA 412 (WCC) at para 27.

[108] PAJA s 7(1).

[109] PAJA s 9(1).

[110] *Oudekraal Estates (Pty) Ltd v the City of Cape Town & Others* [2009] ZASCA 85, 2010 (1) SA 333 (SCA).

[111] *Aurecon* (note 87 above) at fn 30.

a court, as it was in *Tasima*.[112] Just recently, the Constitutional Court has held that in legality self-review cases of 'clearly and indisputably unlawful' conduct, it might still be required to look into the merits of the case even where it finds that delay should not be overlooked.[113] Moreover, collateral challenges of administrative decisions are not usually time-barred.[114]

Thirdly, as has been remarked by many over the centuries,[115] the judiciary is the weakest branch of state and having no army or sword of its own to enforce its orders, it must rely on moral authority in society to fulfil its mandate as the interpreter of the Constitution and upholder of the law.[116] If the judiciary – as the ultimate interpreter of the law – makes mistakes as to its adjudicative powers, and the same branch then enforces those mistakes through contempt or execution, that might undermine the vital moral authority the judiciary requires to play its part in society. Because judges decide on the legality of all public conduct, society needs to trust that judges will not abuse their authority when they do so.

## IV WHY TREAT AUTHORITY-ERRORS DIFFERENTLY FROM OTHER ERRORS IN RESPECT OF COURT ORDERS?

That may be so, but it still doesn't answer the question why the courts draw a distinction between court orders made without authority and those issued where another error was committed. All irregular orders are coercive, no matter the nature of the irregularity.

Notably, the Constitutional Court has refused to make the same distinction in respect of administrative and executive decisions, despite some uncertainty in the jurisprudence. In a 2009 article commenting on *Oudekraal*, Daniel Pretorius took the view that the law continued to draw such a distinction, by explaining: 'An act which is ultra vires (in the sense that the decision-maker had no jurisdiction to perform that act) may be ignored by its author, without any need for revocation or judicial review.'[117] In *Kirland*, Cameron J seemed to imply the same by holding: 'despite its vulnerability to challenge, [it was] a decision taken by the incumbent of the office *empowered to take it*, and remained effectual until properly set aside'.[118] In *Merafong* the same Justice firmly rejected this approach. Counsel for one of the parties, relying on the quoted sentence from *Kirland*, argued that where a decision 'lacks the facial imprimatur of lawfulness' it is a nullity and can be ignored.[119] Cameron J disagreed, pointing out that administrative decisions made without authority – or 'not authorised by an empowering provision' – are subject to review under PAJA,[120] and that '[a] decision taken within statutory

[112] *Tasima* (note 6 above) at paras 151–152. Notably the Court avoided specifying which regime, PAJA or under the principle of legality, it was utilising to review the extension of the agreement. In light of the decision in *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd* [2017] ZACC 40, 2018 (2) SA 23 (CC) it was probably legality review.

[113] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Limited* [2019] ZACC 15, 2019 (4) SA 331 (CC) at para 66.

[114] Freund & Price (note 5 above) at 190.

[115] Montesquieu *The Spirit of the Laws* Vol I (1777) 204; Hamilton *The Federalist No. 78* (1788); and A Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962).

[116] *S v Mamabolo* [2001] ZACC 17, 2001 (3) SA 409 (CC) at para 16.

[117] Pretorius (note 11 above) at 548.

[118] *Kirland* (note 6 above) at para 105 (emphasis added.)

[119] *Merafong* (note 6 above) at para 50 and fn 69.

[120] Ibid at paras 50–52.

authority may be equally plainly vitiated – for instance by palpable fraud, or error of law, or mistake of fact.'[121]

The line of argument the Court rejected is very similar to a distinction drawn between jurisdictional errors of law and non-jurisdictional errors of law in pre-1994 South African administrative law.[122] Under earlier authority, like *Chesterfield House*,[123] the courts would not interfere with errors of law committed by administrators when they were acting within their jurisdiction and where that caused no consequential irregularity. These were errors made on the merits; they were 'non-jurisdictional errors', which were 'regrettable but not reviewable'.[124] Only those errors which caused an administrator to fail to appreciate its powers or to misconstrue them were reviewable – 'jurisdictional errors'.[125] In *Hira*, Corbett CJ made the artificiality of this distinction clear, explaining that any error of law, even one made within a functionary's jurisdiction, has the potential to cause an administrator to misconstrue its powers.[126] Under the constitutional era, where the judiciary has the ultimate authority to decide questions of law, the Constitutional Court has rendered this distinction obsolete.[127]

Even so, treating all unlawful government decisions as binding and effective, irrespective of whether they are made with or without authority, does produce some bizarre results. There may, for instance, be a situation where a functionary purports to make a decision it so obviously has no authority in law to take.[128] Picture an ombudsperson who, exercising her powers to take appropriate remedial action, instructs Parliament to amend the Constitution because she believes that the founding law is standing in the way of resolving a matter she has investigated. Parliament, undoubtedly, is the only functionary empowered to make amendments to the Constitution,[129] and the ombudsperson's authority cannot extend that far. For the sake of

[121] Ibid at para 53.

[122] Hoexter (note 11 above) at 282–290 and Baxter (note 17 above) 468–472.

[123] *Johannesburg City Council v Chesterfield House (Pty) Ltd* 1952 (3) SA 809 (A)('*Chesterfield House*').

[124] *Hira & Another v Booysen & Another* [1992] ZASCA 112, 1992 (4) SA 69 (A)('*Hira*') at 84A.

[125] *Local Road Transportation Board & Another v Durban City Council & Another* 1965 (1) SA 586 (A)(Administrator refused to renew certain certificates on the ground that they didn't exist and that there were thus no certificates before it. Holmes JA held that the decision was erroneous in law and that this precluded the administrator from considering the applications for renewal. It was thus a reviewable error.)

[126] *Hira* (note 124 above) at 90F. The Appellate Division did not completely obliterate the distinction, but held that jurisdictional errors of law will be reviewable, unless it was the intention of the legislature, gleaned from the administrator's founding statute, that the administrator would exercise the exclusive authority to decide the question of law concerned. Ibid at 93C. The UK House of Lords also (mostly) abandoned this distinction in a number of judgments in the latter half of the twentieth century. *Anisminic Ltd. v Foreign Compensation Commission* [1969] 2 AC 147; *O'Reilly v Mackman* [1983] 2 AC 237; *Reg v Hull University Visitor, Ex parte Page* [1993] AC 682; and *Boddington* (note 95 above).

[127] *Genesis Medical Scheme v Registrar of Medical Schemes* [2017] ZACC 16, 2017 (6) SA 1 (CC) at para 21 and Hoexter (note 11 above) at 288). The courts have the final say on what the law means (*Marshall & Others v Commission for the South Africa Revenue Service* [2018] ZACC 11, 2018 (7) BCLR 830 (CC) at para 10). This result might mean that the much-contested administrative law rule from the United States – *Chevron U.S.A. Inc. v Natural Resources Defense Council Inc.* 467 US 837 which specifies that courts ought to defer to reasonable interpretations of administrative agencies implementing their legislation – might not find much application in South African law. M Wallis 'Do We Need Deference?' (2018) 1 *South African Judicial Education Journal* 97, 99–101. For a different view, see C Hoexter 'The Future of Judicial Review in South African Administrative Law' (2000) 117 *South African Law Journal* 484, 501–502.

[128] Freund & Price (note 5 above) at 188 ('An attempt by the National Heritage Council to dismiss the National Director of Public Prosecutions, to take an improbable example, is surely null and void.')

[129] Constitution s 44(1)(a)(i) and (b)(i).

argument, let's imagine that the decision is never taken on review and the ombudsperson brings judicial proceedings to force Parliament to comply with the instruction. It is very unlikely that a court would enforce the instruction even though it hadn't been challenged. The likely scenario is that the court would regard the instruction as a nullity for having no basis in law: it would be wary of ordering an amendment to the Constitution in this manner. This is only partly a hypothetical situation, because a similar order made by the Public Protector was indeed taken on review and set aside.[130] But it is an example of a more obvious case of a decision of a State institution that probably should not be treated as effective (ie, another exception to the *Oudekraal* rule).

Returning to invalid court orders, curiously it was Cameron J who reaffirmed the *Motala* exception in *Kirland.* Buried in a footnote, he made the following remark in passing:

> [*Motala* provides] that judicial decisions issued without jurisdiction … are nullities that a later court may refuse to enforce (without the need for a formal setting aside by a court of equal standing). This seems paradoxical but is not. The court, as the fount of legality, has the means itself to assert the dividing line between what is lawful and not lawful. For the court itself to disclaim a preceding court order that is a nullity therefore does not risk disorder or self-help.[131]

Other than that, the courts have not given further reasons as to why they draw a distinction between authority-related errors and other types in respect of court orders. After all, if a party were seeking to enforce an order which was made unlawfully due to another error and not challenged, the court enquiring into its invalidity would still be asserting the 'dividing line' between what is and what is not lawful. And a person may still be deprived of their freedom or property through coercion by unlawful government conduct.

Admittedly, this is the weakest part of the reasoning in the jurisprudence recognising the *Motala* exception. It is also difficult to reconcile with the remarks made by Khampepe J in *Tasima* that *all* court orders exist in fact and have consequences in the real world (much the same as administrative decisions), that judges also err sometimes, and that a culture of disobeying court orders could have negative effects for the rule of law. A court hearing an appeal also has the power to overturn an order made without authority. In short, the same 'rule of law reasons' regarding certainty are present no matter the nature of the error.

Perhaps the courts have been making the following distinction. Some irregular court orders are void where they are made without authority in the sense described in this article. Other irregular court orders are simply voidable since they are vitiated for non-authority related reasons.[132] The courts treat the former as nullities and invalid, and the latter as binding, unless they are properly challenged and set aside, ie, made void. But this is unlikely, as drawing the distinction contradicts the general proposition of legality in our public law that all unlawful acts are invalid and void, and are not made void by judicial pronouncement. Lawrence Baxter once noted that the law does not treat undetected crimes as lawful – why then should an undetected

[130] *South African Reserve Bank v Public Protector & Others* [2017] ZAGPPHC 443, 2017 (6) SA 198 (GP) at paras 42–44. Murphy J didn't exactly take the same line as I have here. He found that the type of order made was not within the scope of the investigation concerned and was thus invalid. He also took issue with the order breaching the separation of powers.

[131] *Kirland* (note 6 above) at fn 78.

[132] This distinction between void and voidable acts once featured in English administrative law, but was rejected by the House of Lords in *Anisminic Ltd* (note 126 above). It also sometimes featured in our law right up until the new constitutional dispensation. L Rose Innes *Judicial Review of Administrative Tribunals in South Africa* (1963) 92; *Coalcor (Cape) (Pty) Ltd v Boiler Efficiency Services CC* 1990 (4) SA 349 (C)).

unlawful government act be treated as lawful because it has not been challenged?[133] In short there are some conceptual and justification-related difficulties with the *Motala* exception.

It seems to me that the courts treat authority-related errors differently from others in respect of invalid court orders, simply because they can. What I mean is that first, a court deciding whether to enforce an extant order can in many instances determine the question of authority as an objective legal question. To do so the court need not have access to the entire record of the proceedings. It doesn't even need to look any further than the paper the order itself is printed on. *Motala* is an example where the order concerned quite clearly contradicted an earlier decision on the point; all Ponnan JA had to do was hold it up to the law.[134] Other kinds of non-authority related errors are more difficult to ascertain: they cannot be considered simply with reference to the law alone and thus often require a fuller consideration of the facts and merits of the case. An appeals process is ideally suited to making those sorts of determinations. Secondly, the common law has always provided a rule which allowed the courts to do so, and so the courts do it because they can.[135] This may seem unsatisfactory to some, but as Froneman J remarked in *Bengwenyama* 'the law often is a pragmatic blend of logic and experience.'[136]

What *Kirland* and *Merafong* do not explain is why the same exception should not be recognised in respect of administrative decisions. An organ of state can equally ignore both its own decision or an order of a court, and as I pointed out above, there may be instances of a patently invalid administrative decision for lack of authority. The reason seems to be that the invalid government conduct comes from the judiciary *itself* and the judges are not comfortable with enforcing authority-related mistakes of their own. Legality here outweighs certainty on the spectrum of the rule of law.

This problem came up in another recent decision of the Constitutional Court, *ACSA*.[137] In the case a tender had been set aside by the High Court in review proceedings. One of the tenderers lodged an appeal against the High Court order, but the decision-maker didn't participate in its hearing and abided by the appeal court's decision. After the appeal hearing but before judgment was handed down, the two tenderers found common ground and in a settlement agreed to set aside the High Court order with the intention of reviving the tender as it had been originally awarded. The settlement agreement was made an order of court by the full court.[138] When faced with this order, the decision-maker refused to take steps to give effect to the tender award. The successful tenderer thus approached the High Court to enforce the court order.

Hughes J in the High Court dismissed the enforcement application.[139] She reasoned that the original High Court order was an order *in rem* that affects not only the parties to the dispute but the world at large – a 'public remedy'. As such, an agreement between private parties could not set it aside. The full court order in the settlement agreement therefore did not bind her.

[133] Baxter (note 17 above) at 360.

[134] This highlights the importance of *stare decisis*, which I discuss below in part VI.C.

[135] See discussion about Voet's views above in part II.B.

[136] *Bengwenyama Minerals (Pty) Ltd* (note 6 above) at para 85.

[137] *Airports Company South Africa v Big Five Duty Free (Pty) Limited & Others* [2018] ZACC 33, 2019 (2) BCLR 165 (CC)('*ACSA*').

[138] Ibid at para 7.

[139] *Big Five Duty Free (Pty) Limited v Airports Company South Africa Limited & Others* [2016] ZAGPPHC 688.

The Supreme Court of Appeal rejected this reasoning. While assuming that an order setting aside an administrative decision is a 'public remedy',[140] Lewis JA focused on interpreting the settlement agreement in light of its purpose and the parties' intentions. The decisive paragraph in her judgment reads:

> What was the purpose of the withdrawal and abandonment, coupled with the agreement of settlement, if not to set aside the [original high court order]? It could be none other than to agree that the award … was to stand. There is no other purpose that the parties could have intended to achieve.[141]

The Constitutional Court, on appeal, produced three judgments with very different reasoning. Froneman J for the majority[142] began his decision by stating two propositions:

> The first is that a judgment *in rem* may not be set aside by only a settlement agreement between the litigating parties in an appeal against that judgment. For a judgment *in rem* to be set aside by a settlement agreement, the court hearing the appeal must give its sanction to the agreement being made an order of court on the basis that the setting aside is justified by the merits of the appeal. *The second is that the court sanctioning the settlement agreement should give its reasons for doing so*.[143]

On this approach, the courts indeed have authority to set aside orders *in rem* but must do so in a certain way. Froneman J held that the original High Court order was an order *in rem* and 'withdraw' could not mean that it was set aside in the absence of an indication from the full court to that effect.[144] Froneman J further criticised the reasoning of the Supreme Court of Appeal, that no matter the parties' true intentions, the settlement agreement could not have had the effect of setting aside the High Court order.

Jafta J concurred with the majority but for very different reasons. He held that the settlement agreement should never have been made as its terms were 'inconsistent with the Constitution and this rendered the order of the full court invalid.'[145] He placed emphasis on the tender's invalidity for its inconsistency with s 217 of the Constitution. Citing *Eke,* Jafta J held that the settlement agreement did not meet the requirements for it to be made an order of court.[146]

Cachalia AJ dissented. Placing direct reliance on *Eke*, *Tsoga Developers* and *Tasima* he held:

> Once a settlement agreement is made an order of court, it has the same standing and qualities as any other court order. Its effect is to finally determine the status of the rights and obligations between the parties and the issues covered by the dispute. It is enforceable like 'any other' court order. This means that it may only be impugned through a 'legally cognisable' process such as rescission or appeal.[147]

He held that the full court order, like that of the High Court, was also an order *in rem* as it finally determined the latter's status and the administrative decision underlying it, for all the parties to the case – including the decision-maker. Cachalia AJ cited *Tasima* for the proposition that the decision-maker could not ignore the full court order.[148] Importantly, the

[140] *Big Five Duty Free (Pty) Limited v Airports Company South Africa Limited & Others* [2017] ZASCA 110, [2017] 4 All SA 295 (SCA) at para 14.
[141] Ibid at para 26.
[142] *ACSA* (note 137 above)(Dlodlo AJ, Goliath AJ, Khampepe J, Madlanga J, Petse AJ and Theron J concurring).
[143] *ACSA* (note 137 above) at para 1 (emphasis added.)
[144] Ibid at para 45.
[145] Ibid at para 82.
[146] Ibid at para 81.
[147] Ibid at para 93, citing *Eke* (note 37 above) at paras 29 and 31, and *Tsoga Developers* (note 15 above) at para 52.
[148] *ACSA* (note 137 above) at para 96.

full court indeed had the authority in law to issue the order it did incorporating the settlement agreement. Cachalia AJ also stressed that the full court made the settlement agreement an order of court *after* hearing the case, which 'necessarily implies that the full court considered the merits of the dispute' as required by the first of Froneman J's two propositions.[149] Turning to interpret the agreement, Cachalia AJ disagreed with the majority and held that what the parties sought to do was set aside the High Court order, and since the full court had the authority to do so in the circumstances, that should be the meaning ascribed to the agreement.[150]

Analysing the case using the *Motala* exception, we might ask whether the full court had the authority to overturn an order *in rem*? According to Froneman J's judgment the answer is 'Yes', if it decided the merits and gave reasons for doing so. If that is so, then the *Motala* exception cannot apply in these circumstances, ie, the Full Bench had authority to do what it did, the issue was whether it exercised its authority appropriately. In determining whether it made a valid decision, a later court would have to look further than the full court order itself, in that it would need to see whether that order was backed up by reasons and whether the court looked into the merits. Therefore, in the absence of an appeal against the settlement agreement made an order by the full court, it is binding.

This means that the approach of the majority is open to some doubt since it sought out to determine whether the full court had given reasons for making the settlement agreement an order when the original order was not on appeal before the Constitutional Court. The irregularity did not simply jump from the page. Jafta J's judgment is problematic because he too would have to look at more than just the order itself to determine whether it was made unlawfully; his judgment would extend the *Motala* exception beyond its narrow application. His reliance on *Eke* is misplaced, for as I pointed out above, *Tsoga Developers* clarified that *Eke* dealt with the requirements a court should be satisfied of *before* making a settlement agreement an order, and reiterated that once made it is binding like any other.[151] On both of these approaches, this appears to be a case in which the Constitutional Court was looking to justify a perceived better outcome (ie, the tender being set aside) and relaxed the rules pertaining to the binding nature of the order which did not support that outcome.[152] That leaves Cachalia AJ, whose judgment best applies the general rule that unchallenged court orders bind, other than the narrow exception carved out in *Motala*. The exception was not applicable in the case because the full court had authority to sanction the settlement agreement.

## V WHY THE COURTS MIGHT STILL ENFORCE INVALID ORDERS

At this point the reader may be concerned that the *Motala* exception goes too far and could encourage bad behaviour, particularly by the state. In unclear cases, public officials might ignore court orders instead of challenging them on appeal, wait for a private party to haul them before court in contempt proceedings and only then raise the order's invalidity as their defence. That could open the floodgates of recalcitrant behaviour, undermine the administration of justice and jeopardise certainty.

[149] Ibid at para 98.

[150] Ibid at paras 109–110.

[151] *Tsoga* (note 15 above) at para 52.

[152] For a critique of the Court's longstanding penchant for using outcomes-based reasoning see S Woolman 'The Amazing, Vanishing. Bill of Rights' (2007) 124 *South African Law Journal* 762.

According to the Constitutional Court, a court may still elect *not* to disregard an invalid order using the *Motala* exception and proceed to determine whether there was contempt of it. In *Tasima*, Khampepe J held that contemptuous conduct does not only concern the order itself but also 'violat[es] the dignity, repute or authority of the court.'[153] She explained:

> [W]hile a court may, in the correct circumstances, find an underlying court order null and void and set it aside, this finding does not undermine the principle that damage is done to courts and the rule of law when an order is disobeyed. A conclusion that an order is invalid does not prevent a court from redressing the injury wrought by disobeying that order, and deterring future litigants from doing the same, by holding the disobedient party in contempt.[154]

The objective of contempt is to maintain the rule of law, rather than to punish a party who breaches an order.[155] There may be instances where a court order is disregarded with such malice, instead of being challenged on appeal or in a rescission application, that a court finds the conduct to be contemptuous.

But this should be seen as the exception to the *Motala* exception. There is a stronger case where it is a public functionary or organ of state that ignores an order. Section 165(4) of the Constitution specifies that '[o]rgans of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the court.' Khampepe J pointed out in *Tasima* that there is a higher duty for organs of state to take orders they disagree with on appeal.[156] That is what is required of organs of State as 'good constitutional citizens'.[157] The state has the resources to do so after all.[158]

In any event, the state may not be able to comply with every court order or challenge it. The facts in *Motala* are again instructive in this regard. The Master's Office had previously approached the High Court for a declaratory order that it alone is vested with the competence in law to appoint judicial managers. This was done in response to an emerging trend of court ordered appointments of judicial managers, which was said to undermine the Master's ability to carry out its legislative duties properly.[159] Despite the declaratory order, and a detailed judgment setting out the basis for such conclusions by Bertelsmann J, judges in the same Division of the High Court continued to issue such orders, presumably *ex tempore* and in busy motion court after receiving draft orders from counsel, and with no reasons given. While the Master's Office is cited in every insolvency proceeding instituted in court, can we realistically expect it to instruct lawyers and appear in every matter to ensure that court orders of this kind are not granted, or to appeal the orders that have been issued? Does the Master have the time and resources to do so?[160]

For private parties an even stronger case of contempt and bad faith would have to be made out because they have no additional obligation to assist the courts in enforcing orders.

[153] Ibid at para 186 citing *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 52, 2006 (4) SA 326 (SCA) at para 6.

[154] *Tasima* (note 6 above) at para 186.

[155] *Matjhabeng* (note 98 above) at para 57 citing *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (Tk) at 456B–C.

[156] *Tasima* (note 6 above) at para 187.

[157] *Merafong* (note 6 above) at paras 59–61.

[158] *Tasima* (note 6 above) at para 187 and *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality* [2014] ZASCA 209, 2015 (2) SA 413 (SCA) at para 8.

[159] *Ex Parte Master of the High Court* (note 31 above) at para 39.

[160] *Motala v The Master of the North Gauteng High Court, Pretoria* [2019] ZASCA 60 at para 2 (Supreme Court of Appeal noted that the Pretoria Master's Office deals with approximately 7000 insolvent estates every year and receives around 750 liquidated companies to administer per year.)

## VI HOW TO DETERMINE JUDGES' ADJUDICATIVE POWERS

Having explained why it is necessary to recognise the *Motala* exception, why authority-errors should be treated differently from others and why there may be an exception to the *Motala* exception, I now turn to the issue of 'how' the courts are to determine whether an order was issued without authority.

The courts' adjudicative powers delimit their functions in two ways, first in respect of what cases they can hear and decide (subject-matter authority) and secondly in respect of the kinds of orders they can make (court-order authority). To determine whether an order is invalid, one must ask objectively whether the court possessed the authority to make the order. Another court will be competent to make that determination since it only concerns an objective legal question divorced from the particular facts in the matter. This also means that whether a court correctly asserted jurisdiction over a matter on a more general basis – for example the appropriateness of an order allowing the attachment of property to found jurisdiction or whether a party is domiciled in a court's area of jurisdiction – must be determined in the normal way, namely by appeal or rescission.[161]

### A Subject-matter authority

The types of matters that may be decided by all courts within the judicial hierarchy are delineated either in the Constitution, legislation,[162] the common law or customary law. The Constitutional Court may only decide constitutional matters and arguable points of law of general public importance and has exclusive jurisdiction over certain issues;[163] the Supreme Court of Appeal may only decide appeals from the High Court, and no competition or labour matters;[164] and the High Court may decide constitutional matters unless the Constitutional Court has elected to hear the matter directly or where the matter has been assigned to another court of similar status by legislation,[165] and any other matter not assigned in an Act to another court.[166] The superior courts are also granted inherent jurisdiction.[167]

Section 21 of the Superior Courts Act 10 of 2013 specifies that the High Court 'has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance.' The commentary in *Erasmus* suggests that 'jurisdiction' used here refers to its power to 'hear, adjudicate upon, determine and dispose of disputes between parties in a matter brought before it.'[168] That accords with the definition of 'authority' used in this article.

Section 170 of the Constitution empowers Parliament to determine matters to be decided by other courts. The District and Regional Magistrates Courts – those famous creatures of

[161] Compare *Tralex Limited v Maloney & Another* [2016] ZASCA 128 at para 16. The Supreme Court of Appeal seemed to indicate that 'lack of jurisdiction' for the purposes of the *Motala* exception can be understood more widely than relating merely to the court's authority, such as whether a court should have ordered an attachment to found or confirm jurisdiction. This ruling appears to be inconsistent with the rest of the jurisprudence.

[162] Constitution s 170 ('All courts other than those referred to in s 167, 168 and 169 may decide any matter determined by an Act of Parliament.')

[163] Constitution s 167(3) and (4).

[164] Constitution s 168(3).

[165] Constitution s 169(1)*(a)*.

[166] Constitution s 169(1)(*b*).

[167] Constitution s 173.

[168] Van Loggerenberg (note 75 above) at A2-89.

statute in our administration of justice – can only decide matters they are empowered to in legislation, primarily the Magistrates Courts Act 32 of 1944. Magistrates may also 'not enquire into or rule on the constitutionality of any legislation or any conduct of the President.'[169] Even within their ranks, the Regional Courts are empowered to hear a broader range of both criminal and civil matters. For example, only a Regional Court may hear cases pertaining to the dissolution of marriages.[170]

Parliament has created many specialised judicial tribunals to decide specific matters, including the Labour Court,[171] Labour Appeal Court,[172] Competition Appeal Court,[173] and Land Claims Court.[174] The authority of the High Court in these matters has in turn been denuded. And the Supreme Court of Appeal was also divested of some authority. If one of these specialist legal tribunals decides a matter outside of its authority, an order it issues would be invalid, and a High Court or the Supreme Court of Appeal deciding an issue reserved for a specialist tribunal would suffer the same deficiency. For example, the Land Claims Court has no power to decide matters under the PIE Act.[175] Therefore, an order declaring occupants of land which is the subject of a land claim dispute to be 'illegal occupiers' for the purpose of PIE would be invalid.[176]

### B Court-order authority

There are other limits to the adjudicative powers of judges: the law at times does not grant a court the power to make an order, even in a matter in which it has subject-matter authority. In effect, while superior courts all have 'inherent jurisdiction', their powers to issue orders are, to varying degrees, circumscribed by law.[177]

In the criminal realm for example, a judge cannot utilise their inherent jurisdiction to create new offences and sentences – that would be in breach of the right not to be convicted of a crime that was not an offence at the time.[178] In *S v Mhlakaza*,[179] after explaining that sentencing powers are derived primarily from statute, Harms JA held that the courts must 'limit themselves to performing their duties within the scope of that jurisdiction.'[180] An order fixing a non-parole period for a time greater than two thirds of the sentence – the maximum

[169] Constitution s 170.
[170] Magistrates Courts Act s 29(1B).
[171] Labour Relations Act 66 of 1995 ss 151, 157 and 158 ('LRA').
[172] LRA ss 167, 173–175 and 182–183.
[173] Competition Act 89 of 1998 ss 36 and 37.
[174] Restitution of Land Rights Act 22 of 1994 s 22, Extension of Security of Tenure Act 62 of 1997 s 20.
[175] Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('PIE Act').
[176] *Mamahule Communal Property Association v Minister of Rural Development and Land Reform* [2017] ZACC 12, 2017 (7) BCLR 830 (CC).
[177] *South African Broadcasting Corporation Limited v National Director of Public Prosecutions & Others* [2006] ZACC 15, 2007 (1) SA 523 (CC) at para 90.
[178] Constitution s 35(3)(*l*). The *nulla poena sine lege* legality principle requires this conclusion. *S v Dodo* [2001] ZACC 16, 2001 (3) SA 382 (CC) at para 13.
[179] *S v Mhlakaza* [1997] ZASCA 7, [1997] 2 All SA 185 (A).
[180] Ibid at 521D–I.

non-parole period allowed under the relevant statute[181] – would therefore be invalid since it would be made beyond the authority of the court. This is an example of how an invalid order could have a deleterious effect on a person's life if it were to be enforced.

*Motala* and *Changing Tides* are also good examples of instances where a court made an order without authority. No one had argued that the High Court does not have jurisdiction to hear insolvency proceedings or eviction matters. Rather the concern was that the court order issued in each case was not competent under the relevant statute. Another example comes from a judgment reported in the same volume of the *South African Law Reports* as *Tasima*, where a High Court made a declaratory order that Magistrates have no power under s 87(1) of the National Credit Act 34 of 2005 to vary the agreed interest rate in a credit agreement and that any order to such effect is invalid.[182] Many of these examples pertain not to organs of state ignoring orders, but to ordinary people who may be affected by something that should not have been ordered in the first place.

The superior courts also have powers to grant 'appropriate relief'[183] and any order which is 'just and equitable'[184] in constitutional matters – particularly those where rights are infringed or threatened.[185] Following declarations of invalidity of legislation, the Constitutional Court has ordered a range of different remedies to regulate their impact[186] including: limiting the retrospective effect of an order to avoid the consequences flowing from its objective invalidity;[187] suspending the declaration in order to give Parliament time to rectify the defect[188] and extending suspensions where Parliament hasn't acted timeously;[189] severing words from provisions which offend the Constitution if possible;[190] and reading-in words to remedy an omission that makes a provision unconstitutional.[191] The Court has also ordered declaratory relief[192] and issued structural interdicts – particularly in socio-economic rights cases.[193] And

[181] Criminal Procedure Act 51 of 1977 s 276B(1):
'(a) If a court sentences a person convicted of an offence to imprisonment for a period of two years or longer, the court may as part of the sentence, fix a period during which the person shall not be placed on parole.
(b) Such period shall be referred to as the non-parole-period, and may not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter.'

[182] *Nedbank Ltd v Jones* [2016] ZAWCHC 139, 2017 (2) SA 473 (WCC).

[183] Constitution s 38.

[184] Constitution s 172(1)(b).

[185] M Bishop 'Remedies' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Ed, 2008) Chapter 9. See also I Currie & J de Waal *The Bill of Rights Handbook* (6th Ed, 2013) Chapter 8.

[186] *Executive Council of the Western Cape Legislature & Others v President of the Republic of South Africa & Others* [1995] ZACC 8, 1995 (4) SA 877 (CC) at para 107.

[187] Constitution s 172(1)(b)(i). *Masiya v Director of Public Prosecutions, Pretoria* [2007] ZACC 9, 2007 (5) SA 30 (CC) at para 50.

[188] Constitution s 172(1)(b)(ii). *Minister of Home Affairs & Another v Fourie & Another* [2005] ZACC 9, 2006 (1) SA 524 (CC).

[189] *Acting Speaker of the National Assembly v Teddy Bear Clinic for Abused Children & Another* [2015] ZACC 16, 2015 (10) BCLR 1129 (CC).

[190] *Oriani-Ambrosini, MP v Sisulu, MP Speaker of the National Assembly* [2012] ZACC 27, 2012 (6) SA 588 (CC).

[191] For a recent example see *University of Stellenbosch Legal Aid Clinic* (note 100 above).

[192] *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19, 2001 (1) SA 46 (CC).

[193] *Minister of Health & Others v Treatment Action Campaign & Others (No 2)* [2002] ZACC 15, 2002 (5) SA 721 (CC), and *Pheko & Others v Ekurhuleni Metropolitan Municipality* [2011] ZACC 34, 2012 (2) SA 598 (CC).

there is a fledgling jurisprudence relating to constitutional damages.[194] These types of remedial orders have been carefully developed and justified by the Constitutional Court over the past two decades.

### C Precedent as a tool

A useful tool in our law to determine whether a judge has authority is precedent or the *stare decisis* doctrine. It requires a judge to follow the decisions of courts higher up in the judicial hierarchy, whether it be an appellate court or a full court (three judges) or full bench (two judges) of their division, and also a single judge on the same level in their division.[195] This stems from the need for certainty, stability and predictability in our legal system: 'without [it,] deciding legal issues would be directionless and hazardous.'[196] Precedent is an important aspect of the rule of law in South Africa.

Only the *ratio decidendi* of a decision is binding – ie, the '[r]ationale or basis of deciding'.[197] *Obiter dicta*, 'things said by the way or in passing by a court … are not pivotal to the determination of the issue or issues at hand and are not binding precedent.'[198] Even so, the latter are persuasive, especially those which emanate from courts higher up in the hierarchy.[199] Precedent may only be departed from where a court considers a judgment on the same level to be not simply wrong, but clearly wrong.[200] A High Court for example, could not depart from a precedent set by the Supreme Court of Appeal even if the High Court regards it as clearly wrong. In a similar manner, the Supreme Court of Appeal cannot depart from a precedent set by the Constitutional Court.

For court order authority it works both ways. The jurisprudence may have held that a court has authority to hear a dispute and issue an order, and if so such orders will not be invalid due to an authority-related error. Or a precedent may have established that the court does not have the authority, with the concomitant result. Either way, a court is bound by precedent and if a judge issues an order, that an earlier judgment held the court has no authority to make, then one can easily ascertain that the order was invalid.

[194] *Families of Mental Health Care Users Affected by the Gauteng Mental Marathon Project v National Minister of Health of the Republic of South Africa & Others* (Arbitration Award, 19 March 2018); *Komape & Others v Minister of Basic Education* [2018] ZALMPPHC 18; *Ngomane & Others v City of Johannesburg Metropolitan Municipality & Another* [2019] ZASCA 57 at paras 25–27.

[195] *Turnbull-Jackson v Hibiscus Court Municipality & Others* [2014] ZACC 24, 2014 (6) SA 592 (CC) at paras 53–56; and *True Motives 84 (Pty) Ltd v Mahdi & Another* [2009], ZASCA 4, 2009 (4) SA 153 (SCA) at para 100. But see M Wallis 'Whose Decisis Must We Stare?' (2018) 135 *South African Law Journal* 1, 3 (Offers interesting remarks about how the Superior Courts Act may have altered the 'traditional view' concerning whether a judge is bound by decisions from judges in other divisions. Under the traditional approach, a decision from another division would only be persuasive, but now that may have changed and will be binding). For a discussion of the Constitutional Court's relationship with precedent, see Brickhill, Corder, Dvaid & Marcus (note 10 above) at 2–12; J Brickhill 'Precedent and the Constitutional Court' (2010) 3 *Constitutional Court Review* 79.

[196] *Turnbull-Jackson* (note 198 above) at para 53.

[197] *Camps Bay Ratepayers' & Residents' Association* (note 6 above) at para 30.

[198] *Turnbull-Jackson* (note 195 above) at para 61.

[199] Ibid at para 57.

[200] Ibid.

## VII HARD CASES?

The focus of this article has been on the authority of High Court judges and Magistrates to hear cases and issues orders. The discussion has had regard mostly to cases of clear illegality, but there may be many instances where it is *less clear* that an order was issued without authority. There may very well be a penumbra of uncertainty as to whether a court has subject-matter or court-order authority in a case before it. For example, the question may never have been asked in a case before. And the discussion has not thus far taken account of how orders from the apex Court are to be treated.

### A A spectrum of certainty

There are many obvious examples of instances where a court doesn't have authority or competence to decide a case: the Supreme Court of Appeal could be hoodwinked into hearing a case as a court of first instance, any order it makes in those circumstances would be invalid and not binding; and a decree of divorce granted by a Magistrate sitting in the district court would too be invalid. These rules of adjudication are clearly laid down. But there may be many cases falling at the fringes still requiring judicial pronouncement.

A very recent example is *Greef*.[201] The matter concerned whether Magistrates have the authority to interdict compliance with a subpoena issued during debt collection proceedings. There are two competing considerations. On the one hand, s 30 of the Magistrates' Courts Act expressly provides that Magistrates have the authority to grant interdicts, subject to the 'limits of jurisdiction prescribed by the Act'. On the other, Magistrates have no general authority to set aside subpoenas (they can only cancel them in limited instances and set aside improper *service*).[202] Davis AJ held that an interdict against compliance with a subpoena would in substance amount to setting it aside, and concluded that such relief is 'not legally competent' in the Magistrates Court.[203]

Another good example of uncertainty is the authority of the High Court to hear certain labour matters.[204] Up until 2007, there was debate about whether an employee of the state could bring a labour dispute (such as a claim for unfair dismissal) before the High Court instead of the Labour Court, by framing their claim on the ground that their administrative rights had been breached.[205] In *Chirwa*,[206] a majority of the Constitutional Court held that such an applicant's case, while being framed in administrative law was essentially a labour dispute under the LRA.[207] Such cases should be brought in the Labour Court, which has exclusive jurisdiction, and not in the High Court. Cora Hoexter in her decisive analysis of the case, points out that the conclusion was more likely based on a policy reason – avoiding having

[201] *Greef v Cooper & Others* [2018] ZAWCHC 170, 2019 (3) SA 203 (WCC).

[202] Ibid at para 26, citing *S v Matisonn* 1981 (3) SA 302 (A) at 313E–F and *Marais v Smith* 2000 (2) SA 924 (W) at 933F–G.

[203] *Greef* (note 201 above) at para 37.

[204] I am indebted to one of the anonymous reviewers for referring this situation to me. For a very thorough discussion see Hoexter (note 11 above) at 210–218.

[205] Section 157(2) of the LRA recognises concurrent jurisdiction between the High Court and the Labour Court in certain labour matters. *Fredericks & Others v MEC for Education and Training Eastern Cape & Others* [2001] ZACC 6, 2002 (2) SA 693 (CC) at para 41.

[206] *Chirwa v Transnet Limited & Others* [2007] ZACC 23, 2008 (4) SA 367 (CC)('*Chirwa*').

[207] Ibid at para 65.

parallel systems of dispute resolution – rather than a legal one.[208] Later in *Gcaba*,[209] the Court attenuated this finding and seemed to recognise that where a decision has a wider impact than on the employee concerned, the High Court may have jurisdiction to decide the dispute based on the right to just administrative action.[210]

An unpalatable consequence of the judgment in *Chriwa* in light of the *Motala* exception is that any labour matter, which was decided by the High Court during the decade between the LRA coming into effect and 2007, would be invalid and any order issued by the court would not be binding. That would have some very deleterious effects for legal certainty in South Africa.

Had this been raised by the parties, the Constitutional Court could have limited the retrospective effect of its new interpretation of LRA.[211] For example in *Stratford*,[212] the Court interpreted a provision of the Insolvency Act 24 of 1936 which requires service of an application for sequestration to be made on a person's 'employees' as to include domestic employees.[213] In doing so it overturned an earlier judgment of the Supreme Court of Appeal which held that the section did not require such service.[214] The Court held that the declaration as to the correct interpretation of the provision should not be retrospective as many parties would have acted on the earlier decision of the Supreme Court of Appeal before that time, and that would unscrambled too many eggs.[215] It ought to have done the same in *Chirwa*.

The question that needs to be answered however is this: should the existence of uncertainty surrounding whether courts have authority in a case count against the *Motala* exception to such an extent that the courts ought to abandon it in future? I would argue 'no'. First, while law to many looks indeterminate, in truth on a day-to-day basis hard cases in the courts are unusual.[216] Even lawyers closely associated with the American Legal Realism movement accepted this reality. Max Radin explained:

> 'The law' as a generalization of legal judgments is always incomplete since it is always concerned with a specific question not yet decided, as well as thousands already decided. The prognosis of that decision involves an estimate in advance of the factors that will determine the future judgment. In spite of the possible variety and number of these factors, the advance estimate is so highly probable in a number of cases that the statement of the law can be made with a fair degree of certainty and precision, and no decision will be required to test its accuracy since most men will regard the

[208] Hoexter (note 11 above) at 213.

[209] *Gcaba v Minister for Safety & Security* [2009] ZACC 26, 2010 (1) SA 238 (CC)('*Gcaba*').

[210] Ibid at para 66. Hoexter (note 11 above) at 213.

[211] An issue that has also arisen in the UK. In the past, the courts held that they had no power to order that new understandings of legislative provisions (or their development of the common law) were to be prospective only. *Launchbury v Morgans* [1973] AC 127 (HL). But see *National Westminster Bank plc v Spectrum Plus Limited* [2005] 2 AC 680 (HL) at para 40 (House of Lords recognised that there may be some extraordinary instances where legal certainty requires that the court make its ruling prospective.)

[212] *Stratford & Others v Investec Bank Limited & Others* [2014] ZACC 38, 2015 (3) SA 1 (CC)('*Stratford*').

[213] Ibid at para 37.

[214] *Gungudoo & Another v Hannover Reinsurance Group Africa (Pty) Ltd & Another* [2012] ZASCA 83, 2012 (6) SA 537 (SCA).

[215] *Stratford* (note 212 above) at para 47.

[216] This is not to say that the substantive justifications for various settled legal rules concerning adjudicative authority should not be questioned and tested, but rather that where a rule has been laid by the Constitutional Court or Supreme Court of Appeal in the past, those courts will be the appropriate forum to determine whether the rule is justified. See J Froneman 'Legal Reasoning and Legal Culture: Our "Vision" of Law' (2005) 16 *Stellenbosch Law Review* 3, 5–7 (Formal and substantive types of legal reasoning are explained and discussed).

> decision as a foregone conclusion. *Decisions will consequently be called for chiefly in what may be called marginal cases, in which prognosis is difficult and uncertain. It is this fact that makes the entire body of legal judgments seem less stable than it really is*.[217]

Secondly, there are tools in the law that the courts can use to ameliorate the sometimes-harsh consequences of the exception, such as limiting any finding that certain courts don't have authority to apply prospective only. Thirdly, as I have stressed throughout this article, *Motala* constrains the exercise of public power by requiring judges to decide cases only when they have authority to do so.

### B *Motala* and the Constitutional Court

Where *Motala* finds little to no application is in respect of orders issued by the Constitutional Court, even if it is constrained by the law. As for its subject-matter authority, it is worth repeating that the Court may only hear two categories of cases: those which raise constitutional issues; and those which raise arguable points of law.[218] That means that, strictly speaking, the Constitution does not grant the Court authority to decide cases that only raise factual disputes.[219] This is not an unusual approach. Recently in *Vedanta Resources*, the UK Supreme Court explained the point of limiting an apex court's authority in this manner:

> The essential business of this court is to deal with issues of law, rather than fact-finding or the re-exercise of discretion. The pursuit of detailed matters of factual (or evaluative) analysis in this court is therefore inappropriate, both because it is likely to involve a needless and useless misapplication of the parties' time and resources, and because it distracts this court from its proper focus upon real issues of law.[220]

That said, the Constitution expressly grants the Constitutional Court the authority to make 'the final decision whether a matter is within its jurisdiction'[221] and, for this reason, it will be difficult if not impossible to argue that the Court ought not to have heard a case for want of authority.

Sometimes even the Justices of the Constitutional Court cannot find common ground on this issue: *Jacobs*[222] is one such case. It concerned the application of the common purpose doctrine in criminal law. The Constitutional Court split spectacularly about whether it had authority to hear the case. On one side, five Justices[223] held that the court could not hear the matter because in essence it dealt with a factual dispute.[224] On the other side, the remaining five Justices[225] (the court sat as ten, an even number[226]) held that the application of the common purpose doctrine was a constitutional issue and the Court had jurisdiction to decide the case.[227]

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[217] Max Radin 'In Defense of an Unsystematic Science of Law' (1942) 51 *Yale Law Journal* 1269, 1271 (emphasis added.)

[218] Constitution s 167(3)(a) and (b).

[219] *Paulsen & Another v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5, 2015 (3) SA 479 (CC) at para 20.

[220] *Vedanta Resources PLC & Another v Lungowe & Others* [2019] UKSC 20 at para 12.

[221] Constitution s 167(3)(c).

[222] *Jacobs* (note 14 above).

[223] Ibid (Goliath AJ; Cachalia AJ, Froneman J, Khampepe J and Madlanga J concurring).

[224] *Jacobs* (note 14 above) at paras 46–51.

[225] Ibid (Theron J; Zondo DCJ, Dlodlo AJ, Jafta J and Petse AJ concurring).

[226] The Chief Justice was absent.

[227] *Jacobs* (note 14 above) at paras 56 and 127.

In reaching this conclusion, the second group relied on *Makhubela v S*,[228] a 2017 decision of the Court which seems to have held that the doctrine's application raises a constitutional issue. In a concurring judgment aligned with the first five Justices, Froneman J[229] held that the *Makhubela* decision had been made in error and should not be relied on.[230]

This was the first case in the Court's history where it split evenly as to the outcome of a case and the order to be granted.[231] Interestingly, while the Constitution explicitly allows the Court to sit in even numbers – since it specifies that at least eight Justices must sit to hear a case[232] – it is silent as to what is to happen if the Court deadlocks. So, in keeping with the general thesis about the Constitutional Court's authority discussed here, it was the Court that had to decide how to go forward. It concluded that in such instances the case should be dismissed, by holding: 'There is thus no majority decision of this Court. The result is that the judgment and order of the full court stands.'[233]

The Court also has wide discretionary court-order authority when it decides constitutional matters. In *Corruption Watch*,[234] Madlanga J contemplated just how wide this authority is, holding:

> In terms of section 172(1)(b) of the Constitution we may make any order that is just and equitable. The operative word 'any' is as wide as it sounds. Wide though this jurisdiction may be, it is not unbridled. It is bounded by the very two factors stipulated in the section – justice and equity. This Court has laid down certain principles in charting the path on the exercise of discretion to determine a just and equitable remedy.[235]

Even though it is wide (and justice and equity are often malleable) the Court has on occasion ruled that it cannot grant certain orders. In *Minister of Social Development*, the Court held that once an order suspending a declaration of invalidity of legislation has expired, it has no authority to grant an order reviving the suspension.[236] In the case the suspension order concerned had expired on 5 March 2006 and the Minister's application was only heard by the Court the next day. Van der Westhuizen J explained that while the Court has the power to extend a suspension *before* it expires, once the period has expired so too has the Court's suspension power under s 172(1)(b)(ii). He further held that the Court has no authority to revive a law that is invalid, because that would in effect be legislating from the bench in breach of the separation of powers.[237]

So, arguably if the Court were to revive a suspension after its expiry, that would be an invalid court order. But that is not the end of the story. While the highest judicial organ is constrained by the law, it will ultimately be for the Court to decide whether it has authority to issue an order. It may in future come to the conclusion that in certain exceptional cases it indeed has authority to revive a suspension and hold that *Minister of Social Development* was

[228] *Makhubela v S; Matjeke v S* [2017] ZACC 36, 2017 (12) BCLR 1510 (CC).

[229] Ibid (Cachalia AJ and Madlanga J concurring.)

[230] *Jacobs* (note 14 above) at para 97.

[231] It has on occasion split evenly regarding the way in which the order was reached. *Myathaza v Johannesburg Metropolitan Bus Services (SOC) Limited t/a Metrobus & Others* [2016] ZACC 49, 2018 (1) SA 38 (CC); *Mogaila v Coca Cola Fortune (Pty) Limited* [2017] ZACC 6, 2018 (1) SA 82 (CC).

[232] Constitution s 167(2).

[233] Ibid at para 3.

[234] Note 6 above.

[235] Ibid para 68.

[236] *Ex Parte Minister of Social Development & Others* [2006] ZACC 3, 2006 (4) SA 309 (CC) at para 38.

[237] Ibid at para 39.

wrongly decided. It will be for the Court to decide. In short, given that the Constitutional Court is the sole arbiter of its own authority to hear cases and issue orders on grounds of justice and equity, it seems that the *Motala* exception can never really apply to South Africa's apex Court.[238]

## VIII WHY *MOTALA* MATTERS

A judge's decision can be of great consequence, often of more consequence than any Act of Parliament or administrative decision. It can be the difference between imprisonment and freedom, financial ruin and salvation, even between losing and winning an election. For these reasons, Ronald Dworkin once quipped that '[i]t matters how judges decide cases'.[239] *Motala* matters because it reminds us that when judges exercise their great powers, they too are constrained by the law.

In this article I have traced where the *Motala* exception came from, tried to explain its application, and provided a justification for it based on principles emanating from the rule of law. I have also offered some guidance as to how our courts can determine whether an order is made with or without authority and considered the limits of the exception, particularly that it cannot apply to orders issued by our apex Court.

On a spectrum of the rule of law with the principles of legality and certainty occupying its poles, the *Motala* exception may seem to lean more towards the former and, some might argue, at the expense of the latter. But this is not necessarily the case. It promotes judges only acting when they are competent to do so, as well as more predictable and certain decision-making from the courts. Understanding the *Motala* exception as requiring judges to act both lawfully and predictably by following the rules and not deciding cases without authority, can ultimately be a good thing for the rule of law.

## IX POSTSCRIPT

After the finalisation of the manuscript, the Constitutional Court handed down three important judgments that deal with various issues raised in this article.

1. Court-order authority: In *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another*,[240] the Court confirmed the existence of a new special remedy for systemic rights violations. Cameron J held that in exceptional cases the courts have the authority to appoint a Special Master to oversee and monitor the implementation of the executive's constitutional and legal obligations. Pointing out that the form of relief is novel in South African law,[241] he grappled with whether it would be competent for the courts to have such power. He concluded that it wouldn't breach the separation of powers[242] or amount to judicial overreach, as the Supreme Court of Appeal had held, and stressed that the courts 'intervene only when the evidence and arguments compel them to

[238] This conclusion doesn't mean that we should not question and debate the Court's exercise of its authority in the future. We should accept that, ultimately, all orders of the Constitutional Court are essentially binding and cannot be ignored based on the *Motala* exception.

[239] R Dworkin *Law's Empire* (1986) 1.

[240] *Mwelase & Others v Director-General for the Department of Rural Development and Land Reform & Another* [2019] ZACC 30.

[241] Ibid at para 38.

[242] Ibid at paras 46–49.

conclude that the Executive or the Legislature has done wrong, or has not done enough. And when the courts intervene, they do so with necessary trepidation.'[243] This is an important case, because it highlights that new remedies – and a development of court-order authority – may be established by the apex Court to deal with novel issues and with sufficient justification, especially in constitutional cases.

2. *Oudekraal* rule: In *Magnificent Mile Trading 30 (Pty) Limited v Charmaine Celliers NO*,[244] the Court reexplored the justification for *Oudekraal*. Madlanga J for the majority[245] adopted the terminology – similar to this article – that *Oudekraal* and *Kirland* set forth a 'rule' that 'says an unlawful administrative act exists in fact and may give rise to legal consequences for as long as it has not been set aside.'[246] Jafta J[247] again disagreed and held that the principle of legality does not allow the recognition or enforcement of invalid administrative acts and stated that the *Oudekraal* rule is not a true reflection of our law.[248] '[T]o say an invalid action remains valid' Jafta J held 'defies logic'.[249] In response, Madlanga J pointed out that the *Oudekraal* rule is all about the rule of law and its requirement of legal certainty:

> Imagine the spectre of organs of state and private persons ignoring or giving heed to administrative action based on their view of its validity. The administrative and legal chaos that would ensue from that state of affairs is unthinkable. Indeed, chaos and not law would rule.[250]

He held that because unlawful decisions exist in fact they may have legal consequences.[251] After careful analysis of the Court's earlier jurisprudence, Madlanga J rejected that the rule defies 'logic', and reaffirmed that an unlawful decision is to be treated as valid and that '*[t]reating* the invalid act as valid does not invest it with legal validity.'[252]

3. *Motala* exception: Finally, in *Moodley v Kenmont School*[253] the applicant had obtained a costs order against the respondent school. The school did not appeal the order nor pay it. When the applicant tried to levy execution against assets of the school, he was met with s 58A(4) of South African Schools Act 84 of 1996 which precludes a public school's assets being attached. In response he sought and was granted an order declaring the provision unconstitutional in the High Court. Madlanga J for a unanimous Constitutional Court declined to confirm the order.[254] The problem for the school was that the costs order remained extant. In rejecting an argument that the order should not be enforced, Madlanga J reiterated that court orders must be binding for the sake of the rule of law.[255] Even though the *Motala* exception would not apply, as a competent court had issued the costs order and no steps had been taken to set

[243] Ibid at para 53.
[244] *Magnificent Mile Trading* (note 6 above).
[245] Ibid (Cameron J, Froneman J, Khampepe J, Ledwaba AJ, Mhlantla J, Nicholls AJ, Theron J concurring).
[246] Ibid at para 1.
[247] Jafta J wrote a judgment concurring with the outcome, but disagreed about the reach of the *Oudekraal* rule.
[248] Ibid at para 85.
[249] Ibid at para 89
[250] Ibid at para 50.
[251] Ibid at para 51.
[252] Ibid at para 60. Emphasis in the original.
[253] *Moodley v Kenmont School & Others* [2019] ZACC 37.
[254] While accepting the provision limits the rights to equality and dignity, the Court held that it seeks to protect the right to basic education and that any limitation is reasonable and justifiable under s 36(1) in light of its purpose of avoiding adverse effects that could be caused by the attachment of school assets.
[255] *Moodley* (note 253 above) at para 36.

it aside, Madlanga J again briefly discussed the exception (without pronouncing either way) and said the following:

> Not even cases like *Changing Tides* and *Motala* which were referred to in this Court's judgment in *Tsoga* suggest that persons – natural or juristic – or organs of state have an entitlement to ignore court orders based on their understanding of their lawfulness. According to *Changing Tides* and *Motala*, it is a court that declares an order previously granted and against which there is no appeal a nullity. In terms of s 165(5) persons and organs of state just must obey court orders whatever their view of them might be, subject, of course, to their exercise of the right of appeal.[256]

The upshot is that in more direct *obiter* remarks the Court has raised some doubt whether the *Motala* exception will withstand scrutiny before it, as on the approach set out a party must follow an order subject to the right to appeal it and a court finding it invalid. The only way the issue ever will arise is if a party does not appeal against an objectively invalid order (for whatever reason) and also does not comply with it (also for whatever reason). Then only will the party in whose favour an invalid order was granted seek its enforcement before a court. And only when that happens will the court need to decide whether to enforce it or not – as happened in *Motala*. Whether the Constitutional Court affirms *Motala* will have to wait for an appropriate case.

What *Moodley*, *Magnificent Mile* and *Mwelase* all show, is that the Justices of our Constitutional Court take the issues discussed in this article seriously, are alive to the legitimate extent and outer limits of judicial authority, and are committed to ensuring respect for the rule law, and its requirements of legality and certainty, by all State actors.

[256] Ibid at para 38.