

The indirect review of administrative action in South African law

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December 2018

SUMMARY

Section 33 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”) gives everyone the right to just administrative action. Administrative law gives content to, and protects, this right. Administrative law’s primary corrective mechanism is judicial review. This is a procedure through which administrative action may be scrutinised and invalidated by a court.

A court can review administrative action directly or indirectly. In direct-review proceedings the validity of administrative action is the court’s main subject of adjudication. In indirect-review proceedings, by contrast, the validity of administrative action is incidental to the court’s main subject of adjudication. While the law on direct review is well developed, the law on indirect review is comparatively obscure and unexplored.

The thesis attempts to provide a critical analysis of the South African law on indirect review. After reviewing this body of law, I will argue that it is in need of doctrinal reform. I will propose, in conclusion, that section 36 of the Constitution should be the point of departure for such reform.

OPSOMMING

Artikel 33 van die Grondwet van die Republiek van Suid Afrika, 1996 (“die Grondwet”) gee elkeen die reg op regverdige administratiewe optrede. Die administratiefreg gee inhoud aan, en beskerm, dié reg. Geregtelike hersiening is die administratiefreg se primêre korrektiewe meganisme. Howe gebruik geregtelike hersiening om onregmatige administratiewe optrede te identifiseer en ongeldig te verklaar.

Geregtelike hersiening kan op beide direkte en indirekte wyse geskied. By direkte geregtelike hersiening is die geldigheid van administratiewe optrede die fokus van die geding. By indirekte geregtelike hersiening is die hof se fokus elders gerig, en die geldigheid van administratiewe optrede is insidenteel tot die hoofpunt in geskil. Direkte geregtelike hersiening is bekend en goed ontwikkel. Indirekte geregtelike hersiening, aan die ander hand, is relatief obskuur.

Hierdie tesis poog om ‘n kritiese analise van die reg op indirekte geregtelike hersiening te verskaf. Ek betoog dat dié corpus reg hervorming benodig. Ten slotte doen ek aan die hand dat artikel 36 van die Grondwet die vertrekpunt vir sulke hervorming moet wees.

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CHAPTER 1: INTRODUCTION

1 1 Introduction

Section 33 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”) grants everyone the right to just administrative action.¹ This right is protected by administrative law and is given effect by the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”).² Administrative law’s primary diagnostic and corrective mechanism is judicial review,³ a procedure through which administrative action may be scrutinised and invalidated by a court.⁴

A court can review administrative action directly or indirectly.⁵ In direct-review proceedings the validity of administrative action is the court’s main subject of adjudication. Such proceedings are initiated by a litigant whose purpose in approaching a court is to impugn the administrative action in question. In indirect-review proceedings, by contrast, the validity of administrative action is incidental to the court’s main subject of adjudication. As this thesis will demonstrate, indirect review may arise in a variety of legal proceedings. It is most often initiated by a respondent or a defendant in the form of a defence. While direct review is ubiquitous, clearly regulated and well-known, indirect review is comparatively obscure and unexplored.

Indirect review is best illustrated by way of an example.⁶ Assume that one Mr Smit drives his car on a national road (the N4) between Nelspruit and Komatipoort. He

¹ The Constitutional Court has recently held that, while the state is obliged to respect everyone’s right to just administrative action, it cannot rely on that right to invalidate its own prior administrative action. See *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 2 SA 23 (CC); chapter 7 part 7 7 6 3 below.

² S 33(3) of the Constitution read with PAJA’s long title.

³ Although judicial review is the primary mechanism for detecting and correcting invalid administrative action, there are a number of other ways in which administrative action is controlled. These include internal appeals and investigations by independent institutions such as the Public Protector. See C Hoexter *Administrative Law* 2 ed (2012) 58-102.

⁴ C Hoexter *Administrative Law* 2 ed (2012) 113.

⁵ 518-519.

⁶ This example is based on the facts of *S v Smit* 2007 2 SACR 335 (T). This judgment is analysed in chapter 3 part 3 2 below.

reaches the Nkomazi toll plaza on the N4. But instead of stopping to pay the prescribed tollgate fee, he drives through the toll plaza and continues his journey.

Mr Smit is later charged with the offence of refusing or failing to pay tollgate fees.⁷ In his trial Mr Smit admits that he intentionally passed through the toll plaza without paying the fees. Curiously, he nonetheless pleads not-guilty to the charge against him.

The crux of Mr Smit's defence is that the N4 was not validly declared a toll road. Therefore, argues Mr Smit, the state was not entitled to require him to pay a tollgate fee to use the road, and he was accordingly entitled to refuse to pay the fee. Hence Mr Smit mounts what has come to be known as a "collateral challenge"⁸ to the declaration of the toll road.

Assume further that the court entertains Mr Smit's collateral challenge. The court will then have to consider whether the N4 was validly declared a toll road. It will, in other words, indirectly review the declaration. The review is *indirect* because it is incidental to the determination of the main question in Mr Smit's case: whether he is guilty of the offence or not.

When should a court allow a litigant to challenge administrative action indirectly by way of a collateral challenge? These questions are not only relevant to Mr Smit's case, but often arise before our courts. Yet the question has no consistent answer, provoking uncertainty among the public, litigants, and the judiciary. The central aim of the thesis is to address these questions in a critical and systematic way.

⁷ This is a criminal offence under the South African National Roads Agency Limited and National Roads Act 7 of 1998.

⁸ See, for example, *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) para 32 n 22; *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) para 23.

1 2 The rationale for this thesis

South Africa is founded on the rule of law.⁹ Though the concept “the rule of law” is multi-faceted and escapes conclusive definition,¹⁰ it entails at least two ideals.

The first ideal is that public power must be exercised within the ambit of the law and should, in principle, be invalid to the extent that it is *ultra vires*. This ideal, which is arguably the cornerstone of administrative law,¹¹ finds expression in the principle of legality.¹²

The second ideal, which may be called the principle of certainty,¹³ is that the law should indicate with reasonable certainty what those bound by the law should do or not do.¹⁴ The delay rule is one manifestation of this principle. It provides that judicial review proceedings must be instituted without unreasonable delay.¹⁵ One rationale for the rule is that the state and the public organise their activities on the assumption that administrative acts are legally binding, and that they will suffer prejudice if this assumption is suddenly upset.¹⁶

Like the rule of law, the law on indirect review entails a confluence of twin ideals.

⁹ S 1(c) of the Constitution.

¹⁰ See, for instance, F Michaelman “The Rule of Law” in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* 2 ed (OS 2008) 11-24.

¹¹ See C Hoexter *Administrative Law* 2 ed (2012) 255.

¹² *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1991 1 SA 374 (CC) paras 56-58.

¹³ A Price & D Freund “On the Legal Effects of Unlawful Administrative Action” (2017) 134 SALJ 184 184.

¹⁴ *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) para 108 (emphasis added).

¹⁵ The delay rule is of common-law origin (*Wolgroeiers Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 1 SA 13 (A) at 41E-F). It is now codified in s 7(1) of the PAJA, which provides that any proceedings for judicial review in terms of s 6(1) of the PAJA must be instituted without unreasonable delay and no later than 180 days after internal remedies have been concluded; or, where no internal remedies exist, 180 days after the date on which the applicant was informed of the administrative action, became aware of the action and the reasons for it, or might reasonably have been expected to have become aware of the action and its reasons. In terms of s 9 of the PAJA, the 180-day period may be extend by agreement between the litigants; or, failing such agreement, by a court “where the interests of justice so requires”.

¹⁶ *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 3 SA 481 (CC) para 104.

The first ideal is that administrative action should be treated as valid until a court determines otherwise.¹⁷ For reasons that are explained in the next chapter, this ideal has come to be known as “the *Oudekraal* principle”.

The second ideal is that a subject may be entitled to disregard apparently invalid administrative action, should the action form the basis of coercion by the state. In these circumstances the delay rule finds no application and the law permits a litigant to challenge the administrative action indirectly once the state seeks to enforce it upon him, whenever that may be.¹⁸ This ideal may be called “the collateral-challenge exception”.

The *Oudekraal* principle advances the rule of law’s principle of certainty. By clothing administrative action with legal effectiveness, the *Oudekraal* principle fixes the legal position, which in turn facilitates societal harmony and promotes efficient administration.¹⁹ When the *Oudekraal* principle is elided, “it invites a vortex of uncertainty, unpredictability and irrationality”.²⁰ This is because we rely on “[t]he clarity and certainty of governmental conduct” to organise our lives.²¹

The collateral-challenge exception, on the other hand, promotes the principle of legality.²² It demands that public power be exercised within the boundaries of the law and that *ultra vires* conduct be denuded from legal force.²³

¹⁷ *Comair Ltd v Minister of Public Enterprises* 2016 1 SA 1 (GP) para 15; *Hanekom v Voight* 2016 1 SA 416 (WCC) para 15; *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre* 2016 3 SA 317 (SCA) para 43; *Minister of Mineral Resources v Sishen Iron Ore* 2014 2 SA 603 (CC) para 38; *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) para 43; *Department of Transport v Tasima* 2017 2 SA 622 (CC) paras 87-93.

¹⁸ *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) paras 32, 36; A Price & D Freund “On the legal effects of unlawful administrative action” (2017) 134 SALJ 184 190. But see chapter 4 part 4 6 2 below.

¹⁹ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) para 26; Forsyth (2006) *Acta Juridica* 220; A Price & D Freund “On the Legal Effects of Unlawful Administrative Action” (2017) 134 SALJ 184 185.

²⁰ *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 3 SA 481 (CC) para 103.

²¹ Para 104.

²² *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) para 31; *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) para 26; A Price & D Freund “On the Legal Effects of Unlawful Administrative Action” (2017) 134 SALJ 184 185.

²³ See, for instance, *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) para 58.

The *Oudekraal* principle and the collateral-challenge exception therefore hold competing aspects of the rule of law in fragile equipoise.²⁴ When judges apply the *Oudekraal* principle, the principle of legality is subordinated to the principle of certainty. And when judges apply the collateral challenge exception, the principle of certainty is subordinated to the principle legality.²⁵

Because the rule of law is “a complex political ideal”,²⁶ it is unavoidable that these trade-offs should happen on occasion.²⁷ But given that the Constitution does not, on the face of it, prioritise one aspect of the rule of law above another,²⁸ there should be coherent justifications for upsetting the parity that theoretically exists between the rule

²⁴ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) paras 31-32, 37; A Price & D Freund “On the Legal Effects of Unlawful Administrative Action” (2017) 134 SALJ 184 184-186, 189-191; L Boonzaier “Good Reviews, Bad Actors: The Constitutional Court’s Procedural Drama” (2015) 7 CCR 1 2.

²⁵ Jafta J appears to favour this hierarchy as a matter of course, as demonstrated by his minority judgment in *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 3 SA 481 (CC) paras 1-63. Boonzaier criticises this judgment for favouring the principle of legality without due regard for the implications this has for the principle of certainty. See L Boonzaier “Good Reviews, Bad Actors: The Constitutional Court’s Procedural Drama” (2015) 7 CCR 1 11.

Jafta J reiterated his preference for the principle of legality in his minority judgments in both *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) paras 95-96, 107-108 and *Department of Transport v Tasima* 2017 2 SA 622 (CC). In the latter case, both Khampepe J, for a majority of the Constitutional Court, and Froneman J, in a separate concurring judgment, held Jafta J’s views to be misguided. In a separate minority judgment, Zondo J concurred with Jafta J’s views and criticised Froneman J’s treatment of a range of cases. See *Department of Transport v Tasima* 2017 2 SA 622 (CC) paras 143-149, 209-223, 225.

Commentators have noted that this disagreement between the judges of the Constitutional Court was, at times, clearly belligerent. See D Brand, M Murcott & W van der Westhuizen “Administrative Law” (2016) 4 JQR 2.4.1. Although this antagonism may disturb the Constitutional Court’s *esprit de corps*, it serves, at least, to underscore the importance of the issue in debate, and to show that the debate is far from resolved. On the unresolved nature of the debate, see G Quinot “Public Procurement” (2017) 2 JQR 2.5.

²⁶ A Price & D Freund “On the Legal Effects of Unlawful Administrative Action” (2017) 134 SALJ 184 184; L Boonzaier “Good Reviews, Bad Actors: The Constitutional Court’s Procedural Drama” (2015) 7 CCR 1 2.

²⁷ 184.

²⁸ S 1(c) of the Constitution, the only section of the Constitution that explicitly refers to the rule of law, states that South Africa is founded on, among other things, the “[s]upremacy of the constitution and the rule of law”. See further, *Van der Walt v Metacash Trading Ltd* 2002 4 SA 317 (CC) paras 65-67.

of law's different components.²⁹

This thesis seeks to make a modest contribution to that task. It seeks to do so by articulating a coherent methodology for determining the competence of a collateral challenge.

1 3 Hypothesis and research aims

The main hypothesis of this thesis is that, unlike the law on the direct review of administrative action, the law on indirect review lacks coherent organising principles. As such, the law on indirect review is unclear, unpredictable and in need of doctrinal reform.

The thesis's two research aims flow from this hypothesis. The first aim is to demonstrate that the law on indirect review is indeed incoherent. The second aim is to propose a way in which this area of the law may be organised congruently with the Constitution.

1 4 Delineation

This thesis is concerned with the way in which a court should determine the competence of a collateral challenge. In other words, the thesis attempts to prescribe how a court should decide whether a litigant may challenge administrative action indirectly. But this thesis is not concerned with how a court should decide whether a competent collateral challenge should succeed.

The difference between these two topics is best illustrated with reference to the example of Mr Smit's case. The first question the court in that case would have to answer is whether Mr Smit should be allowed to raise a collateral challenge at all. To answer that question, the court will have to grapple with the tension between the *Oudekraal* principle and the collateral challenge exception: on the one hand it seems dangerous to condone Mr Smit's rebellious insouciance; on the other hand it seems unfair to deprive him of a seemingly cogent defence to a criminal conviction. How

²⁹ A Price & D Freund "On the Legal Effects of Unlawful Administrative Action" (2017) 134 SALJ 184 186.

should a court resolve this tension? That is the question this thesis attempts to answer.

But assume that the court decides Mr Smit may indeed raise the collateral challenge. It will then have to decide whether the collateral challenge should prevail, ie whether it is a complete defence to the charge against Mr Smit. Which branch of the law should the court apply to resolve this question?

Given that the proceedings centre on Mr Smit's guilt or innocence, the court may clearly apply criminal law. In that case the state must prove all the elements of the offence beyond reasonable doubt³⁰ and Mr Smit need only create a reasonable doubt to avoid conviction. In considering the validity of Mr Smit's defence (ie that the toll-road declaration was invalid), the Court will accordingly consider whether that defence creates a reasonable doubt that the state has discharged its burden of proof.

But Mr Smit's defence apparently compels the court to consider whether a ground of review in administrative law, such as unlawfulness, unreasonableness or fairness,³¹ has been established. The court may therefore require Mr Smit to prove his defence on the much stricter standard of a balance of probabilities, as that is the standard a litigant must ordinarily discharge to prove that administrative action is reviewable.³²

The latter question is as perplexing and important as the first. But it is sufficiently complex that it demands treatment in a separate thesis. As such, it will not be considered in any detail here.

1 5 Methodology

The central methodology of this thesis is a critical analysis of the South African jurisprudence on the indirect review of administrative action. While this jurisprudence consists mainly of judgments, the academic treatment of indirect review is also considered. In analysing the law on indirect review, the theoretical framework of transformative adjudication is explained and applied.

While this thesis includes comparisons between the law of South Africa and the law of the United Kingdom, it does not intend to be a comparative study. This is not

³⁰ *S v Ndhllovu* 1945 AD 369.

³¹ See s 6 of the PAJA.

³² C Hoexter *Administrative Law* 2 ed (2012) 543-545.

because comparative legal analysis cannot contribute to the development of the law on indirect review, but simply because such comparative analysis falls beyond this thesis's focus and scope. The reason the thesis considers the law of the United Kingdom is because "the theory of the second actor", which underlies much of the early South African law on indirect review (and which is analysed in detail in chapter 2), originated from that jurisdiction.

1 6 Overview of chapters

The *locus classicus* on the indirect review of administrative action in South African law is the judgment of *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* ("Oudekraal").³³ The aim of the chapter 2 is to analyse this judgment closely, to assess the theory underlying the court's reasoning, and to consider the judgment's legacy in broad terms.

While judges have invoked *Oudekraal* in almost every reported judgment that has subsequently dealt with indirect review, they have generally not applied *Oudekraal*'s reasoning. The aim of chapter 3 is to explain the disparate modes of reasoning that judges have used instead. It will be suggested that our courts have mainly used two other distinct modes of reasoning, or judicial methods, which I call "the categorical method" and the "flexible method" respectively for ease of reference. Each of these methods will be critically considered.

In chapter 4 the focus shifts from *Oudekraal* to arguably the most authoritative contemporary judgment on indirect review, *Merafong City v AngloGold Ashanti Ltd* ("Merafong City").³⁴ It will be argued that this judgment has notionally given the flexible method primacy, but has still failed to harmonise the law on indirect review and has, instead, underscored the need for doctrinal reform.

Chapter 5 attempts to lay the foundation for such doctrinal reform. It does this by proposing transformative adjudication as the ideal judicial method, and explaining, in detail, what this method entails.

³³ 2004 6 SA 222 (SCA).

³⁴ 2017 2 SA 211 (CC).

Chapter 6 then considers how the current law on indirect review compares with the ideal of transformative adjudication. It will be concluded that our courts have not yet adjudicated indirect-review cases congruently with this ideal.

Chapter 7 proposes a new method for the adjudication of indirect-review cases. It will be argued that a judicial method grounded on section 36 of the Constitution would be most congruent with the ideal of transformative adjudication. Briefly put, the argument in Chapter 7 is that:

- (i) The doctrine of precedent obliges courts to use the flexible method as the point of departure.
- (ii) Whenever a court uses the flexible method to adjudicate an indirect-review case, it will develop the common law of indirect review.
- (iii) When a court develops the common law of indirect review, it must, in terms of section 39 of the Constitution, promote “the spirit, purport and objects of the Bill of Rights”.³⁵
- (iv) A litigant that seeks to raise a collateral challenge seeks to exercise the right of access to courts.
- (v) Should a court preclude a litigant from raising a collateral challenge, the court will limit the litigant’s right of access to courts.
- (vi) In order to promote the “spirit, purport and objects of the Bill of Rights”, a court should only preclude a litigant from raising a collateral challenge if it would, in terms of section 36 of the Constitution, be reasonable and justifiable to limit that litigant’s right of access to courts.
- (vii) Courts should accordingly use a limitations analysis under section 36 of the Constitution to determine the competence of a collateral challenge.
- (viii) A judicial method based on section 36 of the Constitution is potentially congruent with the ideal of transformative adjudication.

17 Qualifications

Before commencing the substantive portion of this thesis, two qualifications are necessary. The first is that the thesis considers the law as at 30 June 2018. The

³⁵ S 39(2) of the Constitution.

second is that, where I critique judgments and academic contributions, I do so with respect and with the sole aim of attempting to contribute to the development of the law.

CHAPTER 2: OUDEKRAAL AND ITS LEGACY

2 1 Introduction

In South African law, the *locus classicus* on the indirect review of administrative action is the judgment of *Oudekraal*.³⁶ Although this is not the first judgment in our law to deal with indirect review, it has certainly been the most influential judgment on the topic.³⁷

The purpose of this chapter is to analyse *Oudekraal* closely. After explaining the background to the dispute, the theoretical basis of the court's *ratio* – Forsyth's theory of the second actor – is critically examined. The chapter then considers *Oudekraal's* legacy. It is demonstrated that the judgment has been misunderstood in two main ways, notwithstanding its venerated status in our law.

2 2 The background to *Oudekraal*

Oudekraal was a dispute about a valuable property on Cape Town's Atlantic Seaboard. This property was located on the slopes of the iconic Twelve Apostles mountain range, between the affluent suburbs of Llandudno and Camps Bay.³⁸

In 1957, the Administrator of the Cape Province, acting in terms of the Townships Ordinance 1933 of 1934 ("the Ordinance"),³⁹ gave the owner of the property permission to develop what came to be known as "Oudekraal Township" on the site.⁴⁰

Oudekraal Estates (Pty) Ltd ("Estates") acquired the site in 1965.⁴¹ For decades it took no steps to develop it. Eventually, in 1996, it asked the local authority, the Cape Metropolitan Council, to approve the proposed township's engineering services plan – an important step in the township-development process.

³⁶ 2004 6 SA 222 (SCA).

³⁷ *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* 2014 3 SA 219 (CC) para 102.

³⁸ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) para 2.

³⁹ Para 2.

⁴⁰ Para 2.

⁴¹ Para 3.

The Council refused. It pointed out that the Ordinance imposed certain obligations on all township developers: they had to ask the Surveyor-General to approve their townships' general plans; and, if the Surveyor-General did so, they had to submit the plans to the Registrar of Deeds. According to the Council, Estates' predecessor-in-title had failed to meet these obligations timeously, the Administrator should therefore never have permitted the development of Oudekraal Township, and Estates did not inherit any rights to develop the site.⁴²

Estates instituted an application in the High Court to challenge the Council's decision. It asked the court to declare that it was entitled to develop Oudekraal Township.⁴³ When the High Court declined to grant this order Estates appealed to the Supreme Court of Appeal.⁴⁴

The Supreme Court of Appeal agreed with the High Court that Estates did not have the right to develop Oudekraal Township.⁴⁵ But the two courts reached this conclusion through different lines of reasoning. Unlike the High Court, the Supreme Court of Appeal focussed on the fact that there were several graves on the site that had religious and cultural significance to Muslims.⁴⁶ It found that when the Administrator approved the development of Oudekraal Township, he was either unaware of the graves or he disregarded their existence.⁴⁷ It held that the Administrator's decision was invalid in either event: he either failed to consider material information or he considered the information but treated it as immaterial.⁴⁸ The court therefore upheld the High Court's order dismissing Estates' application.⁴⁹

⁴² Paras 3-5.

⁴³ Para 7.

⁴⁴ Para 12.

⁴⁵ Paras 13, 25-26.

⁴⁶ Para 14.

⁴⁷ Para 19.

⁴⁸ Para 25.

⁴⁹ Para 51.

2 3 *Oudekraal* and the theory of the second actor

2 3 1 Introduction

Those are *Oudekraal's* background facts. I now consider why the judgment is important to the law on indirect review. A convenient starting point is to look at the Council's legal position more closely.

The Council refused to register Oudekraal Township's engineering services plan because it believed that the Administrator's earlier decision – the decision to approve the development of the township – was invalid.⁵⁰ The Supreme Court of Appeal later held that the decision had indeed been invalid. But did this mean that the Council was entitled to treat the decision as if it did not exist? "No", said the Supreme Court of Appeal.⁵¹ It explained:

"Until the Administrator's approval (and thus also the consequence of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."⁵²

As this passage makes clear, the reason the Council could not simply ignore the Administrator's decision was because the decision produced legal consequences, notwithstanding its invalidity.⁵³ This might strike one as odd: one might assume that an invalid administrative is void and that, because it is void, it cannot produce *any* consequences. One might assume, in other words, that "[n]othing will come of nothing".⁵⁴

⁵⁰ Para 1.

⁵¹ Para 26.

⁵² Para 26.

⁵³ Paras 27, 29.

⁵⁴ *City of Tshwane Metropolitan Municipality and Others v Nambiti Technologies (Pty) Ltd* 2016 2 SA 494 (SCA) para 33, quoting W Shakespeare *King Lear* Act 1, scene I, line 92.

Although this assumption may be logically sound, it is legally misguided. *Oudekraal* confirmed that, unless it is set aside⁵⁵ by a court, invalid administrative action is not strictly void or strictly voidable.⁵⁶ Rather, it occupies a middle way⁵⁷ between these two extremes – it is “theoretically void, yet functionally voidable”.⁵⁸ So, although the act may be invalid in theory, in reality it is valid until a court sets it aside.⁵⁹

To complicate matters further, an invalid act can produce legal consequences even if it not only seems invalid, but has also been *declared* invalid by a court.⁶⁰ This might seem inexplicably odd. But it is explained by the fact that courts have a discretion: they may choose not to set aside administrative action they have found to be invalid.⁶¹

⁵⁵As explained by Hoexter, to “set aside” administrative action is “simply a way of saying that the decision no longer stands, or that it is void”. See C Hoexter *Administrative Law in South Africa* (2012) 546.

⁵⁶ C Hoexter *Administrative Law in South Africa* (2012) 546-7; D Freund & A Price “On the legal effects of unlawful administrative action” (2017) 134 SALJ 184 187; *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) para 36.

⁵⁷ D Freund & A Price “On the legal effects of unlawful administrative action” (2017) 134 SALJ 184 187.

⁵⁸ C Forsyth “The theory of the second actor revisited” (2006) *Acta Juridica* 209 210.

⁵⁹ *South African Reserve Bank v Shuttleworth* 2015 5 SA 146 (CC) para 38; *Department of Transport v Tasima (Pty) Ltd* 2017 1 BCLR 1 (CC) para 148; C Hoexter *Administrative Law in South Africa* (2012) 546-7; D Freund & A Price “On the legal effects of unlawful administrative action” (2017) 134 SALJ 184 184-185; L Boonzaier “Good Reviews, Bad Actors: The Constitutional Court’s Procedural Drama” (2015) 7 CCR 1 2-3.

⁶⁰ See, for instance, *Judicial Service Commission v Cape Bar Council* 2013 1 SA 170 (SCA) para 13.

⁶¹ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) para 36; *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC) para 81-85. As illustrated by *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 115, the discretionary nature of setting aside was recognised under common law. It is codified by s 8 of the PAJA, as confirmed in *Eskom Holdings Ltd v New Reclamation Group (Pty) Ltd* 2009 4 SA 628 (SCA) para 9. The discretion has proved particularly significant in the public procurement context, as demonstrated by *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 2 SA 638 (SCA); *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province* 2008 2 SA 481 (SCA) para 23; *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 4 SA 179 (CC).

Courts tend to exercise this discretion when the consequences of setting aside the act would be impractical or harmful.⁶² In *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency*,⁶³ for example, the Constitutional Court considered the South African Social Security Agency's decision to award a tender for the payment of social grants. The court declared the decision invalid.⁶⁴ But, in a separate judgment dedicated to the remedy that should follow the declaration of invalidity,⁶⁵ the court declined to set the tender award aside. It took into account that millions of vulnerable people depend for their livelihood on the social grants and that the setting aside of the tender could harm these people profoundly and injure our society in general.⁶⁶

So simply because a court declares an administrative act invalid does not mean that the act is void.⁶⁷ As Quinot and Maree point out, this is particularly puzzling under the constitutional dispensation: section 172(1) of the Constitution seems to imply that

⁶² *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province* 2008 2 SA 481 (SCA) para 23, citing *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) para 46.

⁶³ 2014 1 SA 604 (CC).

⁶⁴ Paras 72, 91, 93, 98.

⁶⁵ *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 4 SA 179 (CC).

⁶⁶ Paras 32-33. See further *Black Sash Trust v Minister of Social Development* 2017 3 SA 335 (CC).

⁶⁷ In a recent contribution on the topic at hand, Sonnekus seems to argue that a finding of invalidity *must* lead to an order setting aside the administrative action. See, for instance, JC Sonnekus "Procurement contracts and underlying principles of the law – no special dispensation for organs of state (part 1 – the principles)" (2014) *TSAR* 320-321:

"Any administrative conduct that is *ultra vires* is *void in law* and *deprived of legal effect*...If the conduct is not authorised by law it has no leg to stand on. It is void *ab initio*." (emphasis added).

It is doubtful whether this proposition is true, as it conflicts with most of the settled law on courts' remedial discretion. It does seem, however, to be supported by *Esorfranki Pipelines (Pty) Ltd v Mopani District Municipality* 2014 2 All SA 493 (SCA) para 20.

a declaration of invalidity vitiates the impugned act,⁶⁸ and the doctrine of objective constitutional invalidity⁶⁹ implies that invalid administrative acts are void.⁷⁰

In *Bengwenyama Mineral (Pty) Ltd v Genorah Resources (Pty) Ltd* (“Bengwenyama”),⁷¹ the Constitutional Court confirmed that section 172 of the Constitution empowers courts to withhold the setting aside of invalid administrative action.⁷² But the court did not provide the missing pieces that would explain this puzzling fact in a doctrinally satisfactory way.⁷³ Instead it held that courts have this discretion for reasons of pragmatism and equity.⁷⁴ As the court did “not provide much conceptual clarity on the issue”,⁷⁵ the puzzle remains incomplete.

⁶⁸ As Quinot and Maree point out, once a court has made a declaration of invalidity under s 172(1)(a) of the Constitution, it is empowered by s 172(b)(i) to make an order “limiting the retrospective effect of the declaration of invalidity”. This suggest that a declaration of invalidity has automatic retrospective effect, or, to put it differently, that it declares the law or conduct to be invalid at the outset – void *ab initio* (G Quinot & P J H Maree “The Puzzle of Pronouncing on the Validity of Administrative Action on Review” (2015) 7 CCR 27 32).

⁶⁹ According to the doctrine of objection constitutional invalidity, when a court declares law or conduct constitutionally invalid, it identifies a pre-existing invalidity. In other words, the law or conduct is invalid from the moment it is inconsistent the Constitution, not from the subsequent moment when the court identifies the inconsistency. It follows that a declaration of invalidity operates retrospectively, unless the court determines otherwise. See *Ferreira v Levin NO and Others; Vryenhoek v Powell NO and Others* 1996 1 SA 984 (CC) paras 26-27; *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) para 94.

⁷⁰ G Quinot & P J H Maree “The Puzzle of Pronouncing on the Validity of Administrative Action on Review” (2015) 7 CCR 27 32.

⁷¹ 2011 4 SA 113 (CC)

⁷² Para 85.

⁷³ One of the applicants presented the court with a constitutional justification for courts’ discretion to withhold the setting aside of invalid administrative action. The applicant argued that when courts decline to set aside invalid administrative action, they effectively suspend the declaration of invalidity, as they are entitled to do by section 172(1)(b) of the Constitution. Instead of engaging with this argument on its own terms, the court rejected it on the basis that it put courts’ remedial powers into a “conceptual straightjacket” (*Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC) para 81-82).

⁷⁴ Paras 84-85.

⁷⁵ G Quinot & P J H Maree “The Puzzle of Pronouncing on the Validity of Administrative Action on Review” (2015) 7 CCR 27 33. The court revised the issue in *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) paras 34-37, but again failed to provide a solution to the puzzle.

Clearly, the apparent anomaly that an invalid act can produce legally effective consequences does not invite “easy and consistently logical solutions”,⁷⁶ and has created “terminological and conceptual problems of excruciating complexity”.⁷⁷ Scholars have proposed several different solutions to the apparent anomaly.⁷⁸ In *Oudekraal*, the Supreme Court of Appeal embraced the solution proposed by Forsyth, namely “the theory of the second actor”.⁷⁹

2 3 2 The theory of the second actor

The theory of the second actor is based on a rather metaphysical idea: there is a distinction between the realm of tangible things (“the Is”), and the realm of norms (“the Ought”). Empirically ascertainable facts about the world belong to the first realm; moral codes, laws, and others norms belong to the second.⁸⁰

According to this distinction, a valid administrative act exists in both realms while an invalid administrative act exists in the factual realm only.⁸¹ Consider, for example,

⁷⁶ *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC) para 85.

⁷⁷ De Smith, Woolf & Jowell *Judicial Review of Administrative Action* 5 ed (1995) 5-44; quoted in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) para 29.

⁷⁸ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) paras 27-29. For academic treatment of the apparent anomaly, see L Baxter *Administrative Law* (1984) 355-358; C Hoexter *Administrative Law in South Africa* (2012) 546-550; JC Sonnekus “Procurement contracts and underlying principles of the law – no special dispensation for organs of state (part 1 – the principles)” (2014) *TSAR* 320-336; JC Sonnekus “Procurement contracts and underlying principles of the law – no special dispensation for organs of state (part 2 – developing the common law, consequences, and remedies) (2014) *TSAR* 536-559; D Freund & A Price “On the legal effects of unlawful administrative action” (2017) 134 *SALJ* 184-208; G Quinot & P Maree “The Puzzle of Pronouncing on the Validity of Administrative Action on Review” (2015) 7 *CCR* 27-42; L Boonzaier “Good Reviews, Bad Actors: The Constitutional Court’s Procedural Drama” (2015) 7 *CCR* 1 2-3.

⁷⁹ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) para 29; C Forsyth “‘The metaphysics of nullity’: Invalidity, conceptual reasoning and the rule of law’ in C Forsyth & I Hare (eds) *Essays on Public Law in Honour of Sir William Wade QC* (1998) 141 141.

⁸⁰ Forsyth “‘The metaphysics of nullity’” *Essays on Public Law* 147, citing Hans Kelsen *Reine Rechtslehre* 2ed (1960).

⁸¹ Forsyth “‘The metaphysics of nullity’” *Essays on Public Law* 147.

the administrative action of an organ of state that decides to award a public tender. Assume that the organ of state awards the tender for nefarious purposes and flagrantly contravenes the Constitution and the Preferential Procurement Policy Framework Act 5 of 2000 in the process. The decision is clearly invalid and does not exist in law. But its factual existence is undeniable: it will be evidenced by the correspondence between the organ of state and its preferred bidder, the contract they concluded, and so forth.

The distinction is philosophically interesting, but what is the point? According to the theory of the second actor, the point is that there are some cases where the legal force of an act depends only on the factual existence – and not the legal existence – of a preceding administrative act.⁸² In such cases an invalid administrative act can produce legal consequences: the consequences flow from the act's mere factual existence.⁸³

The crucial issue, then, is not whether the initial administrative act is valid, voidable, void or something else entirely.⁸⁴ Rather, it is whether the second act depends on the first act's factual or legal existence.⁸⁵ As such, the theory of the second actor prompts a subtle but ingenious shift in focus – from the status of the first act to the powers of the second actor. Forsyth puts it as follows:

“[U]nlawful administrative acts are void in law. But they clearly exist in fact and they often appear to be valid; and those unaware of their invalidity may take decisions and act on the assumption that these acts are valid. When this happens the validity of these later acts depends upon the legal powers of the second actor. The crucial issue to be determined is whether the second actor has legal power to act validly notwithstanding the invalidity of the first act.”⁸⁶

In prompting this shift in focus, the theory of the second actor does not unknot the void/voidable conundrum.⁸⁷ That is to say, it does not give the final word on whether invalid administrative acts are strictly void or strictly voidable. But by focussing on the

⁸² *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) para 29.

⁸³ Forsyth “The metaphysics of nullity” *Essays on Public Law* 146-148.

⁸⁴ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) paras 27-30.

⁸⁵ Forsyth “The metaphysics of nullity” *Essays on Public Law* 148.

⁸⁶ Forsyth (2006) *Acta Juridica* 210.

⁸⁷ 210.

powers of the second actor, the theory avoids being entangled in the void/voidable conundrum altogether.⁸⁸

The theory of the second actor was designed to explain how an invalid administrative act can produce legally effective consequences.⁸⁹ But, as recognised by the Supreme Court of Appeal in *Oudekraal*, the theory can explain when a court should allow a collateral challenge.⁹⁰

This works as follows. According to the theory, the validity of the second act will sometimes depend not only on the factual existence of the first act, but also on its legal existence, ie its validity. In these circumstances, an invalid administrative act cannot produce legally effective consequences and may therefore be ignored. As such, a subject needn't take the initiative to have the act set aside: should the state enforce the act against the subject, he will be allowed to raise the invalidity of the administrative action as a defence in the enforcement proceedings. He will, in other words, be allowed to raise a collateral challenge.⁹¹

When will the validity of the second act depend on the legal existence of the first act? According to the Forsyth, this is ultimately a matter of interpretation of the empowering instrument concerned.⁹² In interpreting the empowering instrument, the focus is on the powers of the second actor, the key question being whether those powers depend on the first act's factual or legal existence.⁹³

In *Oudekraal*, the Supreme Court of Appeal acknowledged that the validity of the second act will often depend on the validity of the first act "where the subject is sought to be coerced by a public authority into compliance with an unlawful administrative act".⁹⁴ According to the court, this is because "the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question".⁹⁵

⁸⁸ 221.

⁸⁹ Forsyth "The metaphysics of nullity" *Essays on Public Law* 146-147.

⁹⁰ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) paras 32-34; Forsyth "The metaphysics of nullity" *Essays on Public Law* 155-156.

⁹¹ 155-156.

⁹² *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) para 35; C Hoexter *Administrative Law in South Africa* (2012) 549.

⁹³ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) para 31.

⁹⁴ Para 32.

⁹⁵ Para 35.

The court noted that it would be a violation of the principle of legality to turn down a collateral challenge in such cases. It referred to the English case of *Boddington v British Transport Police*⁹⁶ ("Boddington") to illustrate the point. In this case, Mr Boddington had been fined for smoking on a railway carriage, which was an offence under a bylaw. In his criminal trial, he raised a collateral challenge by arguing that the bylaw was invalid, which collateral challenge the House of Lords allowed.⁹⁷ In a passage quoted with approval by the court in *Oudekraal*,⁹⁸ Lord Irvine explained:

"It would be a fundamental departure from the rule of law if an individual were liable for conviction for contravention of some rule which is itself liable to be set aside by a court as unlawful. Suppose an individual is charged before one court with a breach of a byelaw and the next day another court quashes that byelaw...Any system under which the individual was convicted and made subject to a criminal penalty for breach of an unlawful byelaw would be inconsistent with the rule of law."⁹⁹

In *Oudekraal*, the Supreme Court of Appeal drew two implications from the fact the rule of law obliges a court to allow a litigant to raise a competent collateral challenge.

The first is that a court may not choose to disallow a competent collateral challenge.¹⁰⁰ This is an exception to the rule that a court has a discretion on whether it will hear an application for judicial review.¹⁰¹ A court may, for instance, dismiss the application because it was instituted after an undue delay.¹⁰² It may thus, in the words

⁹⁶ 1999 2 AC 143 (HL).

⁹⁷ Lord Steyn, with whom Lord Hoffman and Lord Browne-Wilkinson concurred, expressly used Forsyth's theory of the second actor to decide whether Mr Boddington should be allowed to raise a collateral challenge.

⁹⁸ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) para 32.

⁹⁹ *Boddington v British Transport Police* 1999 2 AC 143 (HL) 153H-154A.

¹⁰⁰ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) para 36.

¹⁰¹ Para 36; *Metal and Allied Workers Union of SA v National Panasonic* 1991 2 SA 527 (C) 250F-254D.

¹⁰² For the common-law position on delay, see *Wolgroeiers Afslaers (Edms) Bpk v Municipaliteit van Kaapstad* 1978 1 SA 13 (A) at 41E-F. The delay rule is now codified in the Promotion of Administrative Justice Act 3 of 2000.

of Gregorowski J, refuse to hear an applicant who “now wishes to drag a cow long dead out of the ditch”.¹⁰³

The second implication flows from the first. It is that direct review and indirect review are not “interchangeable manifestations of a single remedy that arises whenever an administrative act is invalid”.¹⁰⁴ Rather, they are materially different ways of challenging the validity of administrative action.

2 3 3 The Council’s collateral challenge

In *Oudekraal* the Council sought to collaterally challenge the Administrator’s decision to permit the development of the township. The Supreme Court of Appeal rejected this challenge¹⁰⁵ and used the theory of the second actor to do so.¹⁰⁶

It reasoned as follows. Under the Ordinance, the Surveyor-General and the Registrar of Deeds could approve a township’s general plan if the Administrator in fact approved the township’s development. They did not have to verify that, as a matter of law, the Administrator’s decision was valid.¹⁰⁷ The Council was in the same position. Its duty to consider Estates’ engineering services plan did not depend on whether the Administrator’s decision was valid. It depended on whether the Administrator in fact decided to approve the Oudekraal Township.¹⁰⁸ This meant that the Council could not simply ignore the Administrator’s decision.¹⁰⁹ It also meant that the Council could not

¹⁰³ *Louw v Mining Commission, Johannesburg* 1986 3 OR 190 200, cited in L Baxter *Administrative Law* (1984) 715.

¹⁰⁴ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) para 36.

¹⁰⁵ Para 39.

¹⁰⁶ Para 39; Forsyth (2006) *Acta Juridica* 219; *Van Der Westhuizen v Butler* 2009 6 SA 174 (C) 183C-F; JC Sonnekus “Procurement contracts and underlying principles of the law – no special dispensation for organs of state (part 2 – developing the common law, consequences, and remedies) (2014) *TSAR* 536 537.

¹⁰⁷ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) para 39; *Van Der Westhuizen v Butler* 2009 6 SA 174 (C) 183C-F.

¹⁰⁸ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) para 40.

¹⁰⁹ Paras 26,31,39.

collaterally challenge the decision once Estates sought to enforce it.¹¹⁰ Although the decision was conspicuously misguided, it existed in fact, and the Council should not have pretended that it did not.

2 3 4 Estates' right to develop Oudekraal Township

The Council's collateral challenge thus failed. This did not mean, however, that Estates could obtain the relief it sought: a declaratory order that its "development rights...[were] of full force and effect".¹¹¹

The court refused to grant this relief for two reasons. First, the relief was overbroad and the court was not prepared to grant such "all-embracing and undifferentiated form".¹¹² Second, if Oudekraal Township were to be developed according to its general plan, it would fail to preserve the burial places on site. This was not something the court could condone, as the development would violate the Bill of Rights, among other things.¹¹³

This left the dispute between Estates and the Council in a bind. The Administrator's decision to approve the development of Oudekraal Township was clearly flawed and susceptible to review. But no one had directly asked the court to review the decision and set it aside.¹¹⁴ So although the Administrator's decision was clearly reviewable, it remained extant.

The Supreme Court of Appeal intimated that the solution to the stalemate was to have the Administrator's decision properly set aside in direct judicial-review proceedings.¹¹⁵ Together with two other applicants, the City of Cape Town took the initiative to do.¹¹⁶

¹¹⁰ Para 39. The court also pointed out that the Council was not being coerced on the strength of the Administrator's decision. It was therefore not apparent that the principle of legality obliged the court to consider the collateral challenge.

¹¹¹ Para 43.

¹¹² Para 44.

¹¹³ Para 42.

¹¹⁴ Paras 42-43.

¹¹⁵ Paras 46-49.

¹¹⁶ Para 31.

Estates opposed the application on the basis that it contravened the delay rule.¹¹⁷ That was a good point, as the application lagged its target – the Administrator’s initial decision – by decades. But *Oudekraal* was a “thoroughly exceptional”¹¹⁸ case: both the High Court¹¹⁹ and the Supreme Court of Appeal¹²⁰ condoned the applicants’ delay.¹²¹ In the event, the application succeeded and the Administrator’s decision was reviewed and set aside.¹²²

2 4 *Oudekraal’s legacy*

2 4 1 A venerated judgment

Oudekraal is a venerated judgment.¹²³ It has been affirmed on numerous occasions

¹¹⁷ Para 31.

¹¹⁸ C Hoexter *Administrative Law in South Africa* (2012) 534; *Cape Town City v South African National Roads Agency Ltd* 2015 6 SA 535 (WCC) para 32.

¹¹⁹ *The City of Cape Town v Oudekraal Estates (Pty) Ltd* 2007 JDR 0982 (C); *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2010 1 SA 333 (SCA) paras 38-49.

¹²⁰ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2010 1 SA 333 (SCA) paras 80-82.

¹²¹ Paras 38-49, 82.

¹²² Para 49.

¹²³ *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 3 SA 481 (CC) para 102.

by the Supreme Court of Appeal¹²⁴ and the Constitutional Court.¹²⁵ Judges have used *Oudekraal* to decide cases in a variety of contexts, including criminal trials,¹²⁶ interdicts,¹²⁷ public-procurement disputes,¹²⁸ land-use-planning disputes,¹²⁹

¹²⁴ See, for instance, *V & A Waterfront Properties (Pty) Ltd v Helicopter & Marine Services (Pty) Ltd* 2006 1 SA 252 (SCA) para 10; *Jacquesson v Minister of Finance* 2006 3 SA 334 (SCA) para 11; *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 2 SA 481 (SCA) para 23; *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 2 SA 638 (SCA) para 28; *Seale v Van Rooyen NO; Provincial Government, North West Province v Van Rooyen NO* 2008 4 SA 43 (SCA) para 13; *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2008 6 SA 12 (SCA) para 45; *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2010 1 SA 333 (SCA); *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 3 SA 589 (SCA) para 15; *Moseme Road Construction CC v King Civil Engineering Contractors (Pty) Ltd* 2010 4 SA 359 (SCA) para 11; *Chief Executive Officer, South African Social Security Agency v Cash Paymaster Services (Pty) Ltd* 2012 1 SA 216 (SCA) para 29; *Kouga Municipality v Bellingan* 2012 2 SA 95 (SCA) paras 12, 14; *City of Johannesburg v Ad Outpost (Pty) Ltd* 2012 4 SA 325 (SCA) para 19; *Head, Department of Education, Free State Province v Welkom High School* 2012 6 SA 525 (SCA); *MEC for Health, Eastern Cape, and Another v Kirland Investments (Pty) Ltd t/a Eye and Laser Institute* 2014 3 SA 219 (SCA) paras 20-21; *Merafong City v AngloGold Ashanti Ltd* 2016 2 SA 176 (SCA) para 15; *South African Broadcasting Corporation SOC Ltd v Democratic Alliance* 2016 2 SA 522 (SCA) para 45.

¹²⁵ *Gundwana v Steko Development* 2011 3 SA 608 (CC) para 58; *Camps Bay Ratepayers' and Residents' Association v Harrison* 2011 4 SA 42 (CC) para 62; *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC) para 85; *Head of Department, Department of Education, Free State Province v Welkom High School* 2014 2 SA 228 (CC) para 258 (minority judgment of Zondo J); *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 3 SA 481 (CC) paras 100-103; *South African Reserve Bank v Shuttleworth* 2015 5 SA 146 (CC) para 32; *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) paras 36, 39, 41, 43-44.

¹²⁶ For instance, *S v Smit* 2007 2 SACR (T) 375E.

¹²⁷ For instance, *V & A Waterfront Properties (Pty) Ltd v Helicopter & Marine Services (Pty) Ltd* 2006 1 SA 252 (SCA) para 10.

¹²⁸ For instance, *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 2 SA 481 (SCA) para 23; *Chairperson, Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* 2008 2 SA 638 (SCA) para 28.

¹²⁹ For instance, *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2008 6 SA 12 (SCA) para 45; *Camps Bay Ratepayers' and Residents' Association v Harrison* 2011 4 SA 42 (CC) para 62.

environmental-law matters,¹³⁰ and intellectual-property-law cases.¹³¹ The High Court has even relied on *Oudekraal* in an apparently esoteric case concerning “the exchange trade of ‘derivatives’ and ‘futures’ securities in the form of corporate shares on the ALT-X exchange”.¹³²

Despite *Oudekraal*’s illustrious status, its correctness was recently at issue in *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute*.¹³³ In this case Kirland Investments (Pty) Ltd (“Kirland”) asked the Department of Health of the Eastern Cape (“the Department”) for a licence to operate private hospitals in that province.¹³⁴ The Department’s Superintendent-General, Mr Boya, turned down Kirland’s request.¹³⁵ But he became incapacitated and went on sick leave before he could communicate his decision to Kirland.¹³⁶ In his absence, an acting Superintendent-General, Dr Diliza, gave Kirland what it sought.¹³⁷

However, Dr Diliza had taken this decision under the dictates of an MEC. The MEC, in turn, had been under “political pressure” to ensure that Kirland’s request was granted.¹³⁸ When Mr Boya returned to work, he discovered these “political shenanigans”.¹³⁹ After seven months of “dilly-dallying”,¹⁴⁰ he eventually told Kirland that the Department had withdrawn Dr Diliza’s decision.¹⁴¹

Kirland went to court to uphold Dr Diliza’s decision.¹⁴² In response, the Department argued that there was nothing to uphold: according to it, the decision was so defective that it did not exist.¹⁴³

¹³⁰ For instance, *Khabisi v Aquarella Investment 83 (Pty) Ltd* 2008 4 SA 195 (T) para 21.

¹³¹ For instance, *Roodezandt Ko-Operatiewe Wynmakery Ltd v Robertson Winery (Pty) Ltd* 2014 BIP 294 (SCA) para 14.

¹³² *Absa Bank Ltd v Ukwanda Leisure Holdings (Pty) Ltd* 2014 1 SA 550 (GSJ) para 1.

¹³³ 2014 3 SA 481 (CC).

¹³⁴ *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 3 SA 481 (CC) para 69.

¹³⁵ Para 7.

¹³⁶ Para 69.

¹³⁷ Para 69.

¹³⁸ Para 10.

¹³⁹ Para 79.

¹⁴⁰ Para 71.

¹⁴¹ Para 16.

¹⁴² Para 66.

¹⁴³ Paras 66, 87.

The Department argued, in other words, that it was entitled to ignore Dr Diliza's decision. But this put it at odds with the precedent *Oudekraal* had set.¹⁴⁴ As we have seen, in *Oudekraal* the Supreme Court of Appeal held that apparently invalid administrative action produces legal consequences and may not simply be ignored.¹⁴⁵ The only exception to this rule is where administrative action may be challenged collaterally.¹⁴⁶ Given that the Department was stymied by *Oudekraal*, it asked the Constitutional Court to reconsider the correctness of the decision.¹⁴⁷

The majority of the Constitutional Court endorsed *Oudekraal* unconditionally. In a judgment authored by Cameron J,¹⁴⁸ it held that the "essential basis of *Oudekraal*"¹⁴⁹ – the idea that invalid administrative action may have legal consequences and may therefore not be ignored – articulates aspects of the rule of law. It articulates the idea that courts are the exclusive arbiters of legality, and that organs of state may not circumvent legal processes to achieve what they consider to be fair or just outcomes.¹⁵⁰ *Oudekraal* thus received a constitutional stamp of approval and the Department was held to be bound by its precedent.¹⁵¹

2 4 2 A palimpsest

Although judges frequently cite *Oudekraal* as an authority, and although they do so in a variety of contexts, a careful reading of their judgments reveals that they often represent *Oudekraal* in a light that obscures many of its subtler distinctions. Like a palimpsest, *Oudekraal*'s original meaning seems to fade with every reiteration. I will

¹⁴⁴ Para 20.

¹⁴⁵ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) para 26.

¹⁴⁶ Para 32.

¹⁴⁷ Para 87.

¹⁴⁸ Moseneke ACJ, Skweyiya ADCJ, Dambuza AJ, Froneman J, Mhlantla AJ and Nkabinde J concurring.

¹⁴⁹ *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 3 SA 481 (CC) para 101.

¹⁵⁰ Para 103, citing *Head of Department, Department of Education, Free State Province v Welkom High School* 2014 2 SA 228 (CC); *The Master of the High Court (North Gauteng High Court, Pretoria) v Motala NO and Others* 2012 3 SA 325 (SCA).

¹⁵¹ *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 3 SA 481 (CC) paras 102-103.

now discuss two ways in which this has occurred.

2 4 2 1 *The Oudekraal principle*

The first way judges truncate *Oudekraal* relates to the “*Oudekraal* principle”. This is the principle that administrative action must be treated as valid until a court determines otherwise.¹⁵²

While the Supreme Court of Appeal clearly asserted this principle in *Oudekraal*,¹⁵³ it also asserted an exception to the principle.¹⁵⁴ As we have seen, the exception to the principle is that, in those cases where administrative action may be challenged collaterally, the subject *is* entitled to ignore the administrative act.¹⁵⁵ The first way in which judges truncate *Oudekraal*, then, is to invoke the *Oudekraal* principle without adding that the principle is subject to the collateral-challenge exception.¹⁵⁶

This arguably occurred in *Kirland*. Here the majority of the Constitutional Court held that the *Oudekraal* principle barred the Department from ignoring Dr Diliza’s decision.

¹⁵² *Comair Ltd v Minister of Public Enterprises* 2016 1 SA 1 (GP) para 15; *Hanekom v Voight* 2016 1 SA 416 (WCC) para 15; *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre* 2016 3 SA 317 (SCA) para 43; *Minister of Mineral Resources v Sishen Iron Ore* 2014 2 SA 603 (CC) para 38; *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) para 43; *Department of Transport v Tasima* 2017 2 SA 622 (CC) paras 87-93.

¹⁵³ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) para 26.

¹⁵⁴ J Bleazard & S Budlender “Remedies in Judicial Review Proceedings” in G Quinot (ed) *Administrative Justice in South Africa: An Introduction* (2015) 246-247; A Price & D Freund “On the Legal Effects of Unlawful Administrative Action” (2017) 134 SALJ 184 189.

¹⁵⁵ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) para 32. As I will explain in chapter 4 below, *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) calls this proposition into question, as the Constitutional Court held that there are certain collateral challenges – or “reactive challenges”, as the Court called them – that must be instituted without unreasonable delay.

¹⁵⁶ There are also cases where judges clearly recognise that the *Oudekraal* principle *is* subject to the collateral challenge exception. See, for instance, *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2008 6 SA 12 (SCA) paras 49-50; *Van Der Westhuizen v Butler* 2009 6 SA 174 (C) 183C-184D; *Nature’s Choice Properties (Alrode) (Pty) Ltd v Ekurhuleni Municipality* 2010 3 SA 581 (SCA) para 13; *Cape Town City v South African National Roads Agency Ltd* 2015 6 SA 535 (WCC) para 12; *Tasima (Pty) Ltd v Department of Transport* 2016 1 ALL SA 465 (SCA) 476C-D; *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) paras 43-44.

But the majority did not consider whether the collateral-challenge exception applied to the case at hand, even though the Department apparently tried to frame its case as a collateral challenge to Dr Diliza's decision.¹⁵⁷

In *Merafong City*, a judgment I analyse in detail below,¹⁵⁸ the majority of the Constitutional Court affirmed both *Oudekraal* and *Kirland*.¹⁵⁹ Cameron J, who again authored the majority's judgment,¹⁶⁰ held that *Kirland* had recognised that the *Oudekraal* principle was subject to the collateral-challenge exception.¹⁶¹ *Kirland* "recognised that there may be occasions where an administrative decision or ruling should be treated as invalid even though no action has been taken to strike it down",¹⁶² Cameron J remarked.

But Cameron J's remarks in *Merafong City* beg the question: if the majority in *Kirland* had indeed recognised that the *Oudekraal* principle is subject to the collateral-challenge exception, why did it only apply the *Oudekraal* principle and not consider the Department's putative collateral challenge?

One hypothesis is that the Department's status as an organ of state prevented it, in principle, from making a collateral challenge. That is how the Supreme Court of Appeal subsequently understood *Kirland*'s implied message.¹⁶³

This seems like a reasonable explanation. But it is disproven by *Merafong City*. Here Cameron J determined that there is no principled reason why an organ of state may not make a collateral challenge,¹⁶⁴ and that there is nothing in *Kirland* that would suggest otherwise.¹⁶⁵

¹⁵⁷ L Boonzaier "Good Reviews, Bad Actors: The Constitutional Court's Procedural Drama" (2015) 7 CCR 1 15, n 93.

¹⁵⁸ Chapter 4 below.

¹⁵⁹ *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) paras 40-42

¹⁶⁰ Moseneke DCJ, Froneman J, Khampepe J, Madlanga J, Mhlantla J, and Nkabinde J concurring.

¹⁶¹ *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) paras 43-44.

¹⁶² Para 44.

¹⁶³ *Kwa Sani Municipality v Underberg/Himeville Community Watch Association* 2015 2 ALL SA 657 (SCA) paras 16; *Merafong City v AngloGold Ashanti Ltd* 2016 2 SA 176 (SCA) paras 15-17; *Tasima v Department of Transport* 2016 1 ALL SA 465 (SCA) 476I-477C. But compare *South African Local Authorities Pension Fund v Msunduzi Municipality* 2016 (4) SA 403 (SCA) paras 35-40.

¹⁶⁴ *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) para 25.

¹⁶⁵ Para 44.

Boonzaier offers a further hypothesis.¹⁶⁶ He points out that when government seeks to undo its own irregularities, its remedial efforts may be motivated by the same vices that engendered the irregularity in the first place. On his view, the majority in *Kirland* was primarily trying to prevent this from occurring: allowing the Department's collateral challenge would have excused it from explaining its motives, as it would not have to disclose a record of its decision, nor would it have to explain why it delayed before approaching the court. In a direct challenge, by contrast, those requirements would be mandatory, and the Department would be forced to prove that it was litigating in good faith.¹⁶⁷

Boonzaier's hypothesis is perceptive¹⁶⁸ and has been endorsed by the Supreme Court of Appeal.¹⁶⁹ Moreover, it was arguably borne out by *Merafong City*. Here the majority allowed an organ of state to raise a collateral challenge, but only if the organ of state could adequately explain its motives for not initiating direct judicial-review proceedings.¹⁷⁰ This approach affirmed the proposition that government may only take procedural shortcuts where its motives are beyond reproach.

However, Boonzaier's hypothesis is called into question by the Constitutional Court's subsequent judgment in *Department of Transport v Tasima (Pty) Ltd* ("Tasima").¹⁷¹ This case dealt with "[t]he Department of Transport's highly suspect attempt to evade the consequences of its flagrant violation of due process".¹⁷² The Supreme Court of Appeal had rejected the Department of Transport's collateral

¹⁶⁶ L Boonzaier "Good Reviews, Bad Actors: The Constitutional Court's Procedural Drama" (2015) 7 CCR 1 1-5.

¹⁶⁷ 10-11.

¹⁶⁸ This does not mean that Boonzaier's views are uncontroversial: he defends a position that is opposed to that enunciated by the Constitutional Court in, for instance, *National Treasury v Opposition to Urban Tolling Alliance* 2012 6 SA 223 (CC) paras 45-46. Here the Constitutional Court said that a court "should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power" (my emphasis).

¹⁶⁹ *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2017 2 SA 63 (SCA) para 39 n 35.

¹⁷⁰ *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) paras 54,75-76. As explained at chapter 4, part 4 6 2 below, this holding was doctrinally problematic, as it blurs the distinction between direct and indirect review.

¹⁷¹ 2017 2 SA 622 (CC).

¹⁷² L Boonzaier "Good Reviews, Bad Actors: The Constitutional Court's Procedural Drama" (2015) 7 CCR 1 15.

challenge precisely because the Department's motives were suspect.¹⁷³ It pointed out, for instance, that the Department only sought to raise a collateral challenge because this would give it an escape route from the PAJA's time bar. But the Constitutional Court permitted the Department to raise the collateral challenge, notwithstanding its murky motives.¹⁷⁴

Although the Constitutional Court insisted that the Department explain its delay, the delay bar was really no bar at all: the court condoned the delay even though it found the Department's explanation "both porous and lacking the markings of good constitutional citizenship".¹⁷⁵

Tasima thus suggests, contrary to Boonzaier's hypothesis, that the Constitutional Court is *not* consistently inclined to use procedural requirements to prevent "bad actors" from seeking "good reviews". It suggests, rather, that the Constitutional Court may occasionally *relax* procedural requirements to hear "good reviews" – even if those reviews are sought by "bad actors".¹⁷⁶

Finally, there is a simple hypothesis to explain what occurred in *Kirland*: perhaps the majority of the Constitutional Court did not consider the Department's putative collateral challenge because that would have been unfair to Kirland.

The reasoning for this hypothesis is as follows. When Mr Boya purported to withdraw Dr Diliza's decision, he told Kirland that the decision was "contrary to [the Department's] view that the area is over supplied".¹⁷⁷ Mr Boya said nothing about the political machinations behind the scenes,¹⁷⁸ and Kirland only found out about them when it received the Department's answering affidavit.¹⁷⁹ Kirland therefore had to

¹⁷³ *Tasima (Pty) Ltd v Department of Transport* 2016 1 ALL SA 465 (SCA)

¹⁷⁴ *Department of Transport v Tasima* 2017 2 SA 622 (CC) para 171.

¹⁷⁵ Para 159.

¹⁷⁶ This sentiment is neatly illustrated by the recent unreported judgment of the High Court in *Joburg Market SOC Ltd v Aurecon South Africa (Pty) Ltd* GJ 30-5-2017 Case no 36801/2015. In this case an organ of state brought an application for the judicial review of its own decision to award a public tender. Its application was delayed. But the High Court condoned the delay because the application seemed meritorious. So, even though an organ of state impugned its own prior misdeeds, the strength of its review overshadowed the fact that it presented the review to the court in a way that was procedurally defective. See further G Quinot "Public Procurement" (2017) 2 JQR 2.4.

¹⁷⁷ *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) paras 16, 74.

¹⁷⁸ Para 76.

¹⁷⁹ Para 76.

address the alleged malfeasance in its replying affidavit, which put it at a distinct disadvantage in the litigation: it was not in a position to properly defend Dr Diliza's decision;¹⁸⁰ it could not use the delay bar to its advantage;¹⁸¹ and the *Plascon-Evans* rule¹⁸² operated to its detriment.¹⁸³ As Kirland was unaware of the actual reason for the Department's about-turn, it would, in the words of the Constitutional Court, "be very unfair indeed to hold [its] feet to the fire of a dispute it did not then even realise existed".¹⁸⁴

The final hypothesis is validated by both *Merafong City* and *Tasima*. Unlike the Department in *Kirland*, the organs of state that sought indirect review in those cases embodied their challenges in counter-applications. In both instances, this was a fact the Constitutional Court took into account in allowing the collateral challenges to proceed.¹⁸⁵

2422 *The theory of the second actor*

As we have seen, the theory of the second actor was an integral part of the Supreme Court of Appeal's reasoning in *Oudekraal*. The court used the theory to grapple with

¹⁸⁰ Para 78.

¹⁸¹ Para 83.

¹⁸² The Appellate Division established the *Plascon-Evans* rule in *Plascon-Evans Paints Ltd v Van Riebeek Paints (Pty) Ltd* 1984 3 SA 623 (A) 634H-635B. According to the rule, where the affidavits in motion proceedings disclose a factual dispute, the court will only grant a final order if that would be justified by the facts the parties agree on, together with the facts that have only been averred by the respondent. In other words, the respondent's version of events is decisive (*Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions* 2009 1 SA 1 (CC) para 8). This rule also operates in favour of the respondent in a counter-application (*MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 3 SA 481 (CC) para 85).

¹⁸³ *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 3 SA 481 (CC) paras 77-82. It should also be noted that our courts do generally not allow litigants to make out a new case in their replying papers. See, for instance, *Director of Hospital Services v Mistry* 1979 1 SA 626 (A) at 635H-636B; *Tao Ying Metal Industry (Pty) Ltd v Pooe NO and others* 2007 3 All SA 329 (SCA) para 98. However, compare *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd* 2013 2 SA 204 (SCA) para 26.

¹⁸⁴ Para 80.

¹⁸⁵ *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) paras 57, 66; *Department of Transport v Tasima* 2017 2 SA 622 (CC) para 171.

two related topics: the apparent anomaly that an invalid act can produce legally effective consequences, and the circumstances in which a court should permit indirect review. It explained:

“[T]he proper enquiry in each case – at least at first – is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court.”¹⁸⁶

As the theory of the second actor was an integral part of the reasoning in *Oudekraal*, one would expect it to have featured prominently in those cases where *Oudekraal* has been applied. With single exceptions,¹⁸⁷ however, this has not occurred. Although judges frequently rely on *Oudekraal*, they have generally not performed what the Supreme Court of Appeal called “the proper enquiry in each case”.¹⁸⁸ In other words, judges have generally applied *Oudekraal* without also applying the theory of the second actor.

Kirland is again a case in point. Here the Constitutional Court invoked *Oudekraal* to determine whether Dr Diliza’s decision – an apparently invalid act – produced legally effective consequences. But the court did not use “the proper enquiry” to answer this question: it did not interpret the empowering instrument¹⁸⁹ to see whether the substantive validity of Dr Diliza’s decision was a necessary precondition for the validity of Kirland’s private-hospital license. Instead, it considered a range of pragmatic and policy-reasons for deciding that Dr Diliza’s decision was legally effective and could not simply be ignored. It took into account, for instance, that “it would spawn confusion

¹⁸⁶ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) para 31 (emphasis added).

¹⁸⁷ For example, *Department of Transport v Tasima* 2017 2 SA 622 (CC) paras 87-93 (minority judgment of Jafta J); *S v Smit* 2007 2 SACR 335 (T).

¹⁸⁸ Interestingly, Forsyth questions whether the Supreme Court of Appeal *itself* performed “the proper enquiry” in *Oudekraal*. He doubts whether the court engaged in a sufficiently rigorous analysis of the Council’s powers under the relevant empowering instruments. See Forsyth (2006) *Acta Juridica* 224-225.

¹⁸⁹ Namely, the Health Act 63 of 1977 and its associated regulatory framework.

and conflict” if administrators ignored their peers’ decisions,¹⁹⁰ and that government should not be allowed to take the law into its own hands, as this undermines the institutional role, and constitutional status, of the judiciary.¹⁹¹

If judges have not been partial to the theory of the second actor, which methods have they used to adjudicate indirect-review cases? That is the question I consider in chapter 3.

¹⁹⁰ *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) para 66.

¹⁹¹ Para 103.

CHAPTER 3: DIFFERENT JUDICIAL METHODS

3 1 Introduction

Judges have invoked *Oudekraal* in almost every reported judgment that has subsequently dealt with indirect review.¹⁹² Yet they have generally not used the theory of the second actor to adjudicate these cases. The purpose of this chapter is to discuss the judicial methods judges have used instead.

By way of introduction, I briefly consider a case where the theory of the second actor was used to decide whether a litigant could raise a collateral challenge, as this provides a point of contrast for the ensuing discussion.

3 2 *S v Smit*

Mr Nicolaas Michiel Smit, the defendant in *S v Smit*,¹⁹³ was charged with committing two offences on twelve occasions. The first offence was the refusal or failure to pay tollgate fees, a crime under the South African National Roads Agency Limited and National Roads Act 7 of 1998 (“Roads Act”). The second offence was failing to comply with a traffic sign (a red traffic light), a crime under the National Road Traffic Act 93 of 1996.¹⁹⁴ This came about when, in a gesture of vehicular rebellion, he drove through a toll plaza on a national road (the N4) without paying and without stopping when instructed to do so.

Mr Smit’s defence was simple: government had not validly declared the N4 a “toll road” in terms of the Roads Act, he therefore had no obligation to pay a toll to use the road, and he had thus not acted unlawfully when he refused to pay the so-called toll.¹⁹⁵

¹⁹² The Constitutional Court’s judgment in *Head of Department, Department of Education, Free State Province v Welkom High School and Others* 2014 2 SA 228 (CC), which I discuss below, is a notable exception. Although the case dealt with indirect review the judgment did not cite *Oudekraal* as authority.

¹⁹³ 2007 2 SACR 335 (T).

¹⁹⁴ *S v Smit* 2007 2 SACR 335 (T) 341A-C.

¹⁹⁵ 342I-J.

The state countered by relying on the *Oudekraal* principle.¹⁹⁶ It said, in other words, that Mr Smit could not simply take the law into his own hands: if he disputed the validity of the toll road, his recourse was to ask a court to set the toll-road declaration aside. Mr Smit sought to evade the *Oudekraal* principle by framing his defence as a collateral challenge.¹⁹⁷

In considering whether Mr Smit could raise the collateral challenge, the court referred to *Oudekraal* and the theory of the second actor.¹⁹⁸ It held that Mr Smit's prosecution for failing to pay the toll fees depended on the substantive validity, and not the mere factual existence, of the toll-road declaration.¹⁹⁹ The state, being the second actor, could therefore only validly prosecute Mr Smit if the first act, the declaration of the toll road, was valid.

The court held that Mr Smit was thus entitled to have ignored the toll plaza with impunity. He was equally entitled to collaterally challenge the validity of the toll-road declaration in his criminal trial.²⁰⁰ This he did successfully, persuading the court that the toll-road declaration had indeed been irregular. The court accordingly exonerated him of the offence of failing to pay toll fees.²⁰¹

In contrast, the court found Mr Smit guilty of the offence of failing to comply with a traffic signal.²⁰² It reasoned that the imposition of the traffic light did not depend for its effectiveness on the legal validity of the toll-road declaration. All it depended on was the fact that N4 had been declared a toll road. As the toll road had, in fact, been declared, Mr Smit could not simply ignore the traffic signal, and could not later collaterally challenge the signal's validity.²⁰³

3 3 The categorical method

S v Smit is an outlier: in the post-*Oudekraal* era, judges have generally not used the

¹⁹⁶ 374F-H.

¹⁹⁷ 375E-G.

¹⁹⁸ 376E-I.

¹⁹⁹ 378I-J.

²⁰⁰ 380E-F.

²⁰¹ 391B-C.

²⁰² 381B-F, 391B-C.

²⁰³ 381B-F.

theory of the second actor to adjudicate indirect-review cases,²⁰⁴ but have used two other judicial methods instead.²⁰⁵ The first is what I will call “the categorical method”.

This method is based on the idea that a collateral challenge may only be raised by a fixed category of persons, in a fixed category of situations. An often-repeated idea is that “[a] collateral challenge to the validity [an] administrative act will be available...only ‘if the right remedy is sought by the right person in the right proceedings’.”²⁰⁶

Who is the “right person”, what is “the right remedy”, and what are “the right proceedings”? According to the categorical method, the Supreme Court of Appeal answered these questions in *Oudekraal*:

*“It is in those cases – where the subject is sought to be coerced by a public authority into compliance with an unlawful administrative act – that the subject may be entitled to ignore the unlawful act with impunity and justify his conduct by raising what has come to be known as a ‘defensive’ or a ‘collateral’ challenge to the validity of the administrative act”.*²⁰⁷

The archetypal collateral challenge, then, will be made by “a subject” who is subject to “coercion by a public authority”, where coercion is premised on “an unlawful administrative act”. The categorical method requires a court to assess whether a prospective collateral challenge adheres to this ideal type. Unlike the theory of the second actor, it does not require the court to analyse the powers of the second actor under the relevant empowering instrument.

The cases that have been decided by way of the categorical method fall into two

²⁰⁴ *City of Tswane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 1 All SA 1 (SCA) could also be an outlier, as the Supreme Court of Appeal’s reasoning closely resembles the theory of the second actor.

²⁰⁵ To be clear, I am not implying that these are the *only* types of judicial methods that have been used or will be used in the future. I am merely proposing a typology of judicial methods in an effort to make the law on indirect-review more coherent and systematic.

²⁰⁶ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) para 35, quoting Wade *Administrative Law* 6 ed 331, as cited in *Metal and Electrical Workers Union of South Africa v National Panasonic Co (Parow Factory)* 1991 2 SA 527 (C) 530C-D & *National Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry v Photocircuit SA (Pty) Ltd* 1993 2 SA 245 (C) 253E-F.

²⁰⁷ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) para 35 (emphasis added).

groups. Some turned on whether the challenger was “coerced by a public authority”. In others, the central question was whether the challenger was “a subject”. I will now discuss the most influential judgments in each group.

3.3.1 Is the challenger “coerced by a public authority”?

3.3.1.1 *V & A Waterfront Properties (Pty) Ltd v Helicopter & Marine Services (Pty) Ltd*

The categorical method was established in *V & A Waterfront Properties (Pty) Ltd v Helicopter & Marine Services (Pty) Ltd*²⁰⁸ (“V & A”), the second reported Supreme Court of Appeal judgment to cite *Oudekraal*.²⁰⁹

V & A was a dispute about a helicopter landing site.²¹⁰ The appellant was a company that let commercial property. It had let the site to the respondent, Marine Services (Pty) Ltd (“Marine Services”), a company that operated helicopters.²¹¹ After the lease commenced, the South African Civil Aviation Authority issued a grounding order against Marine Services.²¹² The order prohibited it from operating one of its helicopters until its airworthiness had been assessed.²¹³

Marine Services intimated that it would ignore the grounding order and that it would continue operating the controversial helicopter at the landing site.²¹⁴ But this amounted to a threatened infringement of the lease, as Marine Services had agreed in the lease that it would comply with the rules of the Civil Aviation Authority.²¹⁵ The

²⁰⁸ 2006 1 SA 252 (SCA).

²⁰⁹ *Associated Institutions Pension Fund v Van Zyl* 2005 2 SA 302 (SCA) was the first reported Supreme Court of Appeal judgment to cite *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA). As the judgment did not pertain to indirect review, I do not consider it in this thesis.

²¹⁰ *V & A Waterfront Properties (Pty) Ltd v Helicopter & Marine Services (Pty) Ltd* 2006 1 SA 252 (SCA) para 1.

²¹¹ Para 1.

²¹² Para 3. The grounding order was issued in terms of the Civil Aviation Regulations promulgated under the Aviation Act 74 of 1962.

²¹³ Para 3.

²¹⁴ Para 4.

²¹⁵ Paras 6-9; *Helicopter & Marine Services (Pty) Ltd v V & A Waterfront Properties (Pty) Ltd* 2006 3 BCLR 351 (CC) para 2.

appellant thus asked the High Court for an order interdicting Marine Services from using the landing site until the grounding order had been lifted.²¹⁶ In the interdict proceedings, Marine Services sought to raise a collateral challenge to the validity of the grounding order.²¹⁷

Although the Supreme Court of Appeal cited *Oudekraal* as authority, it did not use the theory of the second actor to adjudicate the collateral-challenge issue, but used the categorical method instead. It did not try to establish what the empowering instrument said about the second actor's powers. It held, rather, that a collateral challenge will only be available "where a public authority seeks to coerce a subject into compliance with an unlawful act".²¹⁸

According to the court, Marine Services did not fit this mould.²¹⁹ Its direct adversary was a private company, not a public authority. And this private company was trying to coerce Marine Services into complying with a consensual undertaking, not an administrative act.²²⁰

V & A was therefore not a case where the litigant seeking to raise a collateral challenge was being coerced by a public authority. It was a case where a landlord sought to enforce its lease.²²¹ In the event, the Supreme Court of Appeal rejected Marine Service's attempted collateral challenge.²²² It held, in effect, that the challenge

²¹⁶ *V & A Waterfront Properties (Pty) Ltd v Helicopter & Marine Services (Pty) Ltd* 2006 1 SA 252 (SCA) para 4.

²¹⁷ Paras 9-10.

²¹⁸ Para 10.

²¹⁹ Paras 10-14.

²²⁰ Paras 10-14.

²²¹ *Airports Company South Africa Ltd v Airport Bookshops (Pty) Ltd t/a Exclusive Books* 2016 1 SA 473 (GJ) para 90.

²²² Para 15. The respondent instituted an application for leave to appeal to the Constitutional Court. That court's judgment was reported as *Helicopter & Marine Services (Pty) Ltd v V & A Waterfront Properties (Pty) Ltd* 2006 3 BCLR 351 (CC). Before the Constitutional Court, the respondent argued that the Supreme Court of Appeal had unduly limited the circumstances in which a collateral challenge should be permitted (para 4). The Constitutional Court did not engage with this argument, and left the question open whether the Supreme Court of Appeal had circumscribed collateral challenges too narrowly (para 5). It held, however, that even on a more relaxed approach to allowing collateral challenges, the respondent's challenge would not pass muster (para 7). The court mentioned two reasons for this conclusion. First, the respondent had been taken to court by its contractual counterparty, and not by the Civil Aviation Authority. Second, there was nothing that prevented the respondent from instituting

had not been made “in the right proceedings” as Marine Services was not being “coerced” by a “public authority”.²²³

3 3 1 2 *Airports Company South Africa Ltd v Airport Bookshops (Pty) Ltd t/a Exclusive Books*

It is instructive to compare *V & A* with *Airports Company South Africa Ltd v Airport Bookshops (Pty) Ltd t/a Exclusive Books*²²⁴ (“*Airport Bookshops*”). In this case the Airports Company of South Africa (“ACSA”), a public authority,²²⁵ sought to evict Exclusive Books, a book merchant, from the shop it hired from ACSA.²²⁶

The dispute arose when ACSA invited companies to submit bids for the tenancy of a group of shops, including the shop Exclusive Books occupied. Exclusive Books submitted a bid in the hope of retaining its lease, but its bid was unsuccessful.²²⁷ ACSA informed Exclusive Books that it had to leave the shop when the lease terminated.²²⁸ But Exclusive Books did not leave. It instituted an application for the judicial review of ACSA’s tender for the tenancy of the shops.²²⁹

The central question in the eviction proceedings was whether ACSA had lawfully cancelled the lease. If it had, Exclusive Books was occupying the shop unlawfully, and ACSA was entitled to the eviction order. But if the lease was extant, Exclusive

an application for the judicial review of the Civil Aviation Authority’s decision to issue the grounding order (paras 7-8). In the event, the Constitutional Court dismissed the respondent’s application for leave to appeal (para 9).

²²³ In *Absa Bank Ltd v Ukwanda Leisure Holdings (Pty) Ltd* 2014 1 SA 550 (GSJ), a case in which a bank sued a company to recover the final harm the company had allegedly caused it, the company sought to raise a collateral challenge against the validity of an earlier decision by the Johannesburg Stock Exchange. The High Court held that the case was “in principle identical” to *V & A Waterfront Properties (Pty) Ltd v Helicopter & Marine Services (Pty) Ltd* 2006 1 SA 252 (SCA) (para 65). On the authority of the latter judgment, it held that the company could not raise a collateral challenge, as it was not seeking to defend against coercion by the Johannesburg Stock Exchange, but against the claim by the bank (para 66).

²²⁴ 2016 1 SA 473 (GJ).

²²⁵ *Airports Company South Africa Ltd v Airport Bookshops (Pty) Ltd t/a Exclusive Books* 2016 1 SA 473 (GJ) para 89.

²²⁶ Para 3.

²²⁷ Paras 5-7.

²²⁸ Paras 8, 11.

²²⁹ Para 10.

Books was in lawful occupation of the shop and ACSA could not get the order it sought.²³⁰

ACSA said that the lease was terminable on a month's notice and that it had given such notice to Exclusive Books.²³¹ However, on Exclusive Books' prompting, the High Court found that the lease contained a tacit term that precluded ACSA from terminating the lease "until completion of a lawful tender process".²³² Exclusive Books argued that ACSA had breached this term because its tender process had not been lawful.²³³ The effect of Exclusive Books' argument was to collaterally challenge the validity of the tender.²³⁴

The High Court held that Exclusive Books was entitled to raise this collateral challenge.²³⁵ It thus considered Exclusive Books' arguments on why ACSA's public-procurement process had been valid.²³⁶ It found these arguments convincing, and held that the tender had been invalid in terms of several of the PAJA's grounds of review.²³⁷

²³⁰ Paras 15, 86.

²³¹ Paras 15, 25; *Airports Company South Africa Ltd v Airport Bookshops (Pty) Ltd t/a Exclusive Books* 2017 3 SA 128 (SCA) para 16.

²³² *Airports Company South Africa Ltd v Airport Bookshops (Pty) Ltd t/a Exclusive Books* 2016 1 SA 473 (GJ) para 80.

²³³ Para 78.

²³⁴ Para 87.

²³⁵ Paras 87-101.

²³⁶ Paras 102-136.

²³⁷ Para 136. ACSA appealed to the Supreme Court of Appeal against the High Court's order (*Airports Company South Africa Ltd v Airport Bookshops (Pty) Ltd t/a Exclusive Books* 2017 3 SA 128 (SCA)). A majority of the Supreme Court of Appeal upheld the High Court's order. It apparently confirmed the High Court's finding on the competency of Exclusive Books' collateral challenge (paras 8-13, 22, 26). But it did not deal with this issue in any detail. It held that ACSA had not put up any evidence that contested Exclusive Books' interpretation of the lease (para 23) or its averment that the public-procurement process had been invalid (paras 12, 26).

Willis JA wrote a dissenting judgment. He determined that, on the plain meaning of the lease, the validity of the public-procurement process had no bearing on when the lease could be terminated (paras 34, 36, 39). As such, he considered Exclusive Books' collateral challenge to be irrelevant to the eviction proceedings (paras 40, 41, 57). He intimated, *obiter*, that Exclusive Books sought to use the collateral challenge, not as an instrument to expose malfeasance, but rather as a weapon in "commercial 'blood sports'" (para 60). He also remarked, again *obiter*, that the High Court should not have considered the collateral

The High Court did not use the theory of the second actor to adjudicate the competency of Exclusive Books' collateral challenge. Instead, in a clear illustration of the reasoning underlying the categorical method, it held:

"In the present matter Acsa is a public authority...The tender process amounts to administrative action. Acsa seeks coercive action against Exclusive Books in the form of ejectment from the premises it occupies...[I]ts entitlement to act coercively through a court order is dependent upon the legal validity of its administrative action in the conduct of the tender process. In those instances, on the basis of *Oudekraal*, it is the 'right remedy...sought by the right person in the right proceedings'."²³⁸

The facts in *V & A* and *Airport Booksellers* are similar. In both cases, a lessee resisted enforcement of the lease it had concluded with its lessor. In both cases the lessee attacked the validity of the administrative action on which the enforcement was based. Why, then, did the cases have opposite outcomes?

The answer, as pointed out by the court in *Airport Booksellers*, lay in the important factual dissimilarities between *V & A* and *Airport Booksellers*.²³⁹ The antagonist in *V & A* was a private party. It forced Marine Services to comply with the administrative action of a third-party public authority, ie the Civil Aviation Authority. By contrast, ACSA, the antagonist in *Airport Booksellers*, was *itself* a public authority. What's more, it sought to coerce Exclusive Books based on its *own* underlying administrative action, namely its decision to award a tender for the tenancy of the shops. So, although Marine Services and Exclusive Books both resisted enforcement of a lease, and although they both did so by attacking the validity of underlying administrative action, only Exclusive Books resisted enforcement *by a public authority*. From the perspective of the categorical method, that made all the difference.

challenge. His reasons were, firstly, that Exclusive Books' averments on the validity of the tender were "altogether too terse to be taken seriously"; and secondly, that ACSA's answering affidavit in the review application was not before the court.

²³⁸ Paras 89.

²³⁹ Paras 90-93.

3 3 1 3 *Club Mykonos Langebaan Ltd v Langebaan Country Estate Joint Venture*

*Club Mykonos Langebaan Ltd v Langebaan Country Estate Joint Venture*²⁴⁰ (“Club Mykonos”) was another case in which indirect review was at issue in a private-party dispute. In this case, two property developers were at loggerheads.²⁴¹

A municipal council, acting in terms of the Land Use Planning Ordinance 15 of 1985 (“the LUPO”), gave the respondent permission to rezone and subdivide a tract of land.²⁴² The permission was subject to conditions the council had imposed to accommodate the appellant’s objections to the development.²⁴³

The dispute between the property developers turned on whether the respondent had complied with these conditions.²⁴⁴ Besides arguing that it had indeed complied,²⁴⁵ the respondent mounted a collateral challenge to their validity.²⁴⁶ In assessing the competence of the collateral challenge, the High Court did not undertake a second-actor analysis of the LUPO, but instead considered whether the case before it corresponded to the categorical-challenge archetype.²⁴⁷

It held that, as was the case in *V & A*, the respondent was not being coerced by the public authority that engendered the contentious administrative action, ie the local municipal council.²⁴⁸ Rather, its opponent was a private party which, acting in its commercial self-interest, asked the court to ensure that the respondent complied with the impugned administrative act.²⁴⁹ This meant that “issues which may be relevant to the validity of the conditions” were not properly before the court.²⁵⁰ Accordingly, the

²⁴⁰ 2009 3 SA 546 (C)

²⁴¹ *Club Mykonos Langebaan Ltd v Langebaan Country Estate Joint Venture* 2009 3 SA 546 (C) paras 1-2.

²⁴² Para 6.

²⁴³ Para 6. Essentially, the conditions determined that the respondent had to execute the development in a way that respected the road network that was planned for the area (paras 8-9).

²⁴⁴ Para 6.

²⁴⁵ Para 28.

²⁴⁶ Para 29.

²⁴⁷ Para 40.

²⁴⁸ Para 40.

²⁴⁹ Para 40.

²⁵⁰ Para 40.

court held the respondent's collateral challenge to be misguided.²⁵¹

3 3 1 4 *Kouga Municipality v Bellingan*

In *V & A and Club Mykonos*, the parties seeking to raise a collateral challenge failed, not because the second-actor analysis went against them, but because they made their challenges in what the courts considered to be the wrong type of case. In *Kouga Municipality v Bellingan*²⁵² ("Kouga"), the Supreme Court of Appeal held that the applicants *did* have the right type of case for a collateral challenge. The complication, however, was that they used the wrong procedure to present their case.²⁵³

The applicants in *Kouga* were liquor traders.²⁵⁴ They asked the High Court to review the Kouga Municipality's decision to pass a bylaw which made it a criminal offence to trade in liquor outside certain hours.²⁵⁵ The liquor traders' interest in the validity of the bylaw was obvious – they had been charged with committing the offence it prohibited.²⁵⁶

Although there was little doubt that the bylaw was indeed invalid,²⁵⁷ the liquor traders faced a serious problem: having waited some three years to institute their judicial-review application, it seemed that they had broken the rule against delay.²⁵⁸ But the Supreme Court of Appeal held that the liquor traders had, in substance, made a collateral challenge to the validity of the bylaw,²⁵⁹ even though they had clothed this collateral challenge in the form of a judicial-review application. Because the liquor traders had, in substance, made a collateral challenge and not a direct challenge, the delay rule had no bearing on their case.²⁶⁰

As was the case in *Airport Booksellers*, the court did not use second-actor reasoning to decide that a collateral challenge was appropriate in the case before it.

²⁵¹ Para 40.

²⁵² 2012 2 SA 95 (SCA).

²⁵³ *Kouga Municipality v Bellingan* 2012 2 SA 95 (SCA) para 15.

²⁵⁴ Para 1.

²⁵⁵ Para 2.

²⁵⁶ Para 13.

²⁵⁷ Paras 9-11.

²⁵⁸ Para 13.

²⁵⁹ Para 12.

²⁶⁰ Para 16.

Instead, it focussed on the fact that the liquor traders had essentially sought “the right remedy”: because they sought to resist criminal prosecution for contravening an invalid bylaw, they were, in effect, defending themselves against a public authority that sought to coerce them into compliance with an unlawful administrative act.²⁶¹ As such, the court held that the liquor traders’ case neatly resembled the collateral-challenge archetype, even though this had been obscured by their misguided judicial-review application.²⁶²

3315 *Head, Department of Education, Free State Province v Welkom High School*

*Head, Department of Education, Free State Province v Welkom High School*²⁶³

²⁶¹ Para 14.

²⁶² *Kouga Municipality v Bellingan* 2012 2 SA 95 (SCA) can be usefully compared with *Gongqose v S; Gongqose v Minister of Agriculture Forestry and Fisheries* 2016 2 ALL SA 130 (ECM). In this case the appellants had been charged with contravening provisions of the Marine Living Resources Act 18 of 1998 (“the MLRA”). They were accused, among other things, of having attempted to fish in a Marine Protected Area (“MPA”). They were found guilty in the court below.

The appellants launched a multi-pronged attack on their criminal conviction. One of these prongs was an application for the judicial review of two ministerial decisions: first, the decision to declare the relevant area a MPA in which there could be no fishing; second, the decision not to exempt the appellants – and the communities they belonged to – from the provisions of the MLRA that prohibited fishing in the MPA (para 52). The respondents countered by arguing that the judicial-review application contravened the delay rule, as the appellants had made the application more than 180 days after the impugned decisions were made (para 56).

The appellants argued that their application was a collateral challenge and was therefore not barred by the delay rule (para 59). They relied on *Kouga Municipality v Bellingan* 2012 2 SA 95 (SCA) as authority for this argument (para 62). But the High Court held that the cases were “distinguishable in a vast manner” (para 63): in *Kouga Municipality* the collateral challenge had been instituted during a postponement of the criminal trial; in the instant case the appellants made their judicial-review application after their criminal trial had concluded. The High Court thus rejected the appellants argument that their judicial-review application was a collateral challenge (para 64). The appeal was ultimately dismissed (para 79).

²⁶³ 2012 6 SA 525 (SCA); *Head of Department, Department of Education, Free State Province v Welkom High School and Others* 2014 2 SA 228 (CC). It should be noted that *Welkom* is important for several areas of the law. It is, for example, an important judgment for the law on socio-economic rights. In this regard, see S Liebenberg “Remedial Principles and Meaningful

(“*Welkom*”) was the mirror image of *Kouga*. While the applicants in *Kouga* raised a collateral challenge in substance and a direct challenge in form, the appellant in *Welkom* did the opposite: he framed his case as a collateral challenge while his challenge was, in substance, direct.²⁶⁴

The appellant in *Welkom*, to whom I will refer as the “HOD”, was the head of a provincial department of education.²⁶⁵ He instructed two public schools to rescind decisions they had taken under their respective policies on pregnant learners.²⁶⁶ He did this because he believed that the policies were unconstitutional,²⁶⁷ given that they forced pregnant learners to temporarily leave school.²⁶⁸

The schools refused to rescind their decisions and turned to the High Court for relief,²⁶⁹ which relief the court granted. Among other things, it interdicted the HOD from interfering with the schools’ implementation of their policies.²⁷⁰

The HOD appealed to the Supreme Court of Appeal. Here he argued that he was entitled to attack the validity of the schools’ policies collaterally in the case the schools had made against him.²⁷¹ The Supreme Court of Appeal disagreed.²⁷² It reasoned that the HOD was not subject to any coercion,²⁷³ and further, that while the HOD said that he was challenging the policies indirectly, in substance his challenge was direct.²⁷⁴

In dismissing the HOD’s putative collateral challenge, the Supreme Court of Appeal displayed the hallmark of the categorical method: it rejected the challenge, not because second-actor logic yielded this outcome, but because the HOD was not the “right person in the right proceedings”. The court contrasted the HOD’s position with

Engagement in Education Rights Disputes” (2016) 19 *PER* 2 20-29. Given the focus of this thesis, I will, however, focus exclusively on *Welkom*’s impact on the law on indirect review.

²⁶⁴ *Head, Department of Education, Free State Province v Welkom High School* 2012 6 SA 525 (SCA) para 15.

²⁶⁵ Para 1.

²⁶⁶ Paras 4-5.

²⁶⁷ *Head of Department, Department of Education, Free State Province v Welkom High School and Others* 2014 2 SA 228 (CC) para 1.

²⁶⁸ Para 6.

²⁶⁹ Para 6.

²⁷⁰ Para 6.

²⁷¹ Para 12.

²⁷² Para 14.

²⁷³ Para 14.

²⁷⁴ Para 16.

that of the pregnant learners affected by the policies: unlike the HOD, these learners were being coerced under the policies, since the policies temporarily barred the learners from school.²⁷⁵ Had the schools sought to interdict the learners from returning to school, they would have been entitled to challenge the policies collaterally in those proceedings.²⁷⁶

Welkom went on further appeal to the Constitutional Court.²⁷⁷ The majority of the court, in a judgment written by Khampepe J,²⁷⁸ agreed with the Supreme Court of Appeal that the HOD could not simply instruct the schools to treat their policies as if they did not exist.²⁷⁹ As Khampepe J explained, if the HOD considered the policies to be invalid, he still had to respect their legal force and challenge them in the legally prescribed way.²⁸⁰

Khampepe J reached this conclusion without citing *Oudekraal* and without using the normal indirect-review nomenclature. She did not, for instance, use the term “collateral challenge” in her judgment.²⁸¹ But she still engaged with the same legal question that was before the Supreme Court of Appeal.²⁸² This was whether the HOD could collaterally challenge the schools’ policies, or whether he should have taken the initiative to have them set aside.²⁸³

Interestingly, Khampepe J dealt with this question by using a method more akin to

²⁷⁵ Para 14.

²⁷⁶ Para 14.

²⁷⁷ Para 1.

²⁷⁸ Moseneke DCJ and van der Westhuizen J concurred with Khampepe J’s judgment. Froneman J and Skweyiya J jointly authored a separate concurring judgment.

²⁷⁹ *Head of Department, Department of Education, Free State Province v Welkom High School and Others* 2014 2 SA 228 (CC) paras 76, 79, 86, 88, 90, 105.

²⁸⁰ Paras 1, 72, 76, 79, 86, 88, 90, 105.

²⁸¹ This contrasts with the minority judgment of Zondo J, who used indirect-review nomenclature, and cited *Oudekraal*, to adjudicate the HOD’s case. See *Head of Department, Department of Education, Free State Province v Welkom High School* 2014 2 SA 228 (CC) para 255.

²⁸² This is arguably illustrated by Khampepe J’s subsequent judgment in *Department of Transport v Tasima* 2017 2 SA 622 (CC) para 147, n 90. Here she held that *Head of Department, Department of Education, Free State Province v Welkom High School* 2014 2 SA 228 (CC) was part of “a long string of [the Constitutional Court’s] judgments” to deal with the interaction between the *Oudekraal* principle and the collateral-challenge exception.

²⁸³ *Head of Department, Department of Education, Free State Province v Welkom High School* 2014 2 SA 228 (CC) paras 1, 28.

the theory of the second actor than to the categorical method. Consistent with second-actor methodology, Khampepe J sought the answer to the legal question in the relevant empowering instruments,²⁸⁴ which in *Welkom* included the Constitution and the South African Schools Act 84 of 1996.²⁸⁵ As such, the key question in her judgment was whether these instruments empowered the HOD to treat the schools' policies as if they were legally inconsequential.²⁸⁶

Based on an astute, wide-ranging analysis of these empowering instruments,²⁸⁷ and based further on the Constitutional Court's earlier judgment in *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo*,²⁸⁸ Khampepe J concluded that the HOD's executive authority over the schools "[did] not entitle him to superimpose his own policies and countermand those of the school by fiat, simply because he [was] of the opinion that the latter [were] unconstitutional".²⁸⁹

So, unlike the Supreme Court of Appeal in *Welkom*, Khampepe J did not use the categorical method to decide whether the HOD should be allowed to raise a collateral challenge to the validity of the schools' policies. That is, she did not reject the HOD's attempted collateral challenge simply because the HOD was not subjected to coercion by a public authority. Instead, by using a judicial method that was similar – if not identical – to the theory of the second actor, she resolved the legal question by determining what the empowering instrument said about the HOD's powers vis-à-vis the policies.

Zondo J, writing for a dissenting minority of the Constitutional Court,²⁹⁰ disagreed

²⁸⁴ See, for instance, paras 3, 28, 72.

²⁸⁵ Para 7.

²⁸⁶ See, for instance, paras 1, 28, 72, 90, 94, 105.

²⁸⁷ Paras 34-71, 77-88, 98.

²⁸⁸ 2010 2 SA 415 (CC). This was also a case involving the head of a provincial department of education. This HOD had formed the view that a high school's governing body had irregularly adopted a language policy. He therefore purported to rescind the governing body's power to adopt language policies, and further purported to confer this power on a committee of his choosing. The Constitutional Court held that, although the HOD could exercise supervisory powers over the school's language policy, these supervisory powers were delineated by the Schools Act, and the HOD had failed to stay within the Act's boundaries when he appointed the committee. See *Head of Department, Department of Education, Free State Province v Welkom High School* 2014 2 SA 228 (CC) paras 73-75.

²⁸⁹ Para 79.

²⁹⁰ Mogoeng CJ, Jafta J, and Nkabinde J concurring.

with the reasoning of both Khampepe J and the Supreme Court of Appeal. Unlike Khampepe J, Zondo J held that the HOD was both entitled and obliged – by the Constitution, the Schools Act, and the Employment of Educators Act 76 of 1998 – to direct the schools to undo the decisions they had taken under their policies.²⁹¹

According to Zondo J, the HOD could also raise a collateral challenge because – contrary to the view of the Supreme Court of Appeal – he was being coerced to acquiesce with the schools' policies.²⁹² Although it is not entirely clear on what grounds Zondo J made this finding,²⁹³ he clearly considered the presence of coercion to be determinative of the collateral-challenge issue. Zondo J's judgment therefore implies that collateral challenges avail a certain category of litigants, namely those that are being coerced into compliance with an unlawful administrative act.

3 3 1 6 *Maxime Hotel (Pty) Ltd v Chairperson: National Gambling Board NO and Others*

In his minority judgment in *Welkom*, Zondo J held coercion to be the touchstone of a collateral challenge. In *Maxime Hotel (Pty) Ltd v Chairperson: National Gambling Board NO and Others* ("Maxime Hotel"),²⁹⁴ the High Court applied the same criterion.

The underlying dispute in *Maxime Hotel* centred on gambling instruments called "limited pay-out machines".²⁹⁵ Maxime Hotel (Pty) Ltd held a licence to operate five of these machines, but it wanted to operate more. It therefore asked the Gauteng Gambling Board ("the GGB") for an additional licence that would allow it to operate forty gambling machines.²⁹⁶

The GGB decided to give Maxime Hotel the licence. But its decision was subject to the concurrence of the National Gambling Board ("the NGB").²⁹⁷ Months passed

²⁹¹ *Head of Department, Department of Education, Free State Province v Welkom High School* 2014 2 SA 228 (CC) paras 192, 199, 201, 202-207, 211, 237, 249, 251.

²⁹² Para 258.

²⁹³ Zondo J apparently reasoned that, since the schools' principals were the HOD's employees, they were being coerced into complying with the invalid policies; and the HOD – in his capacity as the principals' employer – experienced this coercion vicariously (para 258).

²⁹⁴ *Maxime Hotel (Pty) Ltd v Chairperson: National Gambling Board* 2014 JDR 0657 (GNP).

²⁹⁵ Para 24.

²⁹⁶ Paras 3-4.

²⁹⁷ Para 5.

without the NGB indicating whether it concurred or not. Maxime Hotel then instituted an application in which it impugned the NGB's authority to decide whether limited-pay-out-machine licences should be granted.²⁹⁸

The GGB and the NGB opposed the application. In addition to opposing the application on the merits, they raised several preliminary points. One was that, if Maxime Hotel sought to challenge the NGB's failure to take a decision, it should have done this by instituting a judicial-review application under the PAJA.²⁹⁹ Relying on *Kouga* as authority,³⁰⁰ Maxime Hotel countered by arguing that it had not been obliged to institute judicial-review proceedings, as it was entitled to challenge the NGB's authority collaterally.³⁰¹

The High Court disagreed. It held that a collateral challenge can only be raised by someone at risk of being coerced by the state, which Maxime Hotel was not: it was simply waiting to see whether its application for an additional license would succeed.³⁰² In deciding that Maxime Hotel could not raise a collateral challenge, the High Court did thus not engage in a second-actor analysis of the empowering instrument. Instead, it considered “[t]he proximity of the risk of facing coercive action by a public authority” to be the key criterion,³⁰³ which criterion Maxime Hotel failed to meet.

3.3.2 Is the challenger a subject?

Besides the fact that they were all decided by way of the categorical method, the common feature of the preceding six cases is that they turned on whether the

²⁹⁸ Paras 1, 8, 12-15.

²⁹⁹ Para 16.

³⁰⁰ Para 26.

³⁰¹ Para 24.

³⁰² Para 29.

³⁰³ Para 31. The High Court also used a coercion-based approach to disallow a collateral challenge in *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* 2009 5 SA 661 (SE) 673C-E and *Gillyfrost 54 v Nelson Mandela Bay Metropolitan Municipality* 2015 4 All SA 58 (ECP) paras 54-57. Heher JA also seems to have favoured the approach in his minority judgment in *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2008 6 SA 12 (SCA) para 50.

challenger was “coerced by a public authority”. In these cases the courts focussed on the status of the entity seeking to enforce the contentious administrative action.

Courts have also used the categorical method in cases that turned on whether the challenger was a “subject”, as this term was used in *Oudekraal*. Here, courts focussed on the status of the challenger, not the enforcer.

*Kwa Sani Municipality v Underberg/Himeville Community Watch Association*³⁰⁴ (“Kwa Sani”) is a good example of such a case. Here the Supreme Court of Appeal used the categorical method to decide that, because a municipality was not a “subject”, it could not collaterally challenge the validity of an agreement it had concluded with a voluntary association.

The parties had agreed that the association would provide the municipality with disaster-management and security services, for which the municipality would pay the association a fee.³⁰⁵ They further decided that the agreement would endure for a fixed term. Before the term expired, the municipality purported to cancel the agreement, which cancellation the association rejected.³⁰⁶ Thereafter, for a two-year period, the association continued providing the services to the municipality while the municipality stopped paying the association.³⁰⁷

Acting in terms of the agreement, the association instituted arbitration proceedings in which it claimed payment from the municipality. The municipality took the view that the agreement was invalid, and that the arbitration, which flowed from the agreement, was stillborn. It instituted a judicial-review application to have the agreement declared invalid and set aside.³⁰⁸

The municipality’s application contravened the delay rule. But it argued that it could not be time-barred, as it was raising a collateral challenge. Relying on *Kouga*, it argued that it could collaterally challenge the agreement because the association sought to use the agreement to coerce the municipality into payment.³⁰⁹ The Supreme Court of Appeal disagreed. It explained:

³⁰⁴ 2015 2 All SA 657 (SCA).

³⁰⁵ *Kwa Sani Municipality v Underberg/Himeville Community Watch Association* 2015 2 ALL SA 657 (SCA) paras 1, 5-6, 8.

³⁰⁶ Paras 7-8.

³⁰⁷ Para 8.

³⁰⁸ Para 11.

³⁰⁹ Para 13.

“In the present matter, it is the municipality which is the public authority, and not the association. The municipality is also not in the position of a subject being coerced by a public authority whose underlying administrative action is invalid. No collateral challenge is raised by way of the application. The application concerned a public authority claiming that its own administrative action was invalid. This submission of the municipality thus falls wide of the mark.”³¹⁰

The court thus rejected the municipality’s collateral challenge on a principled basis, not because the second-actor analysis yielded this outcome. It held that, as a rule, an organ of state cannot avail itself of a collateral challenge, particularly not where it seeks to impugn its own prior decision.³¹¹ It relied on *Kirland* for this proposition.³¹²

The Supreme Court of Appeal subsequently reiterated this proposition – that an organ of state cannot raise a collateral challenge – on two occasions.³¹³ This may be quite surprising if one considers the court’s earlier judgment in *Municipal Manager: Qaukeni Local Municipality v FV General Trading (“Quakeni”)*.³¹⁴

Here a company had also sought to enforce its contract with a municipality. The Supreme Court of Appeal decided that, because the contract flowed from an invalid public-procurement process, the municipality was not only entitled – but obliged – to challenge the validity of the contract indirectly, which is what the municipality had done.³¹⁵ Although the court did not expressly say that a municipality may raise a collateral challenge, that is what it seemed to imply: it held that it would be unduly formalistic to force the municipality to challenge its earlier decision in direct-review proceedings, as the municipality had “raised the question of the legality of the contract fairly and squarely, just as it would have done in a formal review”.³¹⁶

³¹⁰ Para 14.

³¹¹ Para 15.

³¹² Para 16.

³¹³ *Merafong City v AngloGold Ashanti Ltd* 2016 2 SA 176 (SCA) paras 15-17; *Tasima v Department of Transport* 2016 1 All SA 465 (SCA) 476I-477C.

³¹⁴ 2010 1 SA 356 (SCA)

³¹⁵ *Municipal Manager: Qaukeni Local Municipality v FV General Trading CC* 2010 1 SA 356 (SCA) para 26.

³¹⁶ Para 23, relying on *Rajah & Rajah (Pty) Ltd v Ventersdorp Municipality* 1996 4 SA 402 (A) at 407D-E; *Transair (Pty) Ltd v National Transport Commission* 1977 3 SA 784 (A) at 792H-793G; and *Premier, Free State v Firechem Free State (Pty) Ltd* 2000 4 SA 413 (SCA) para 23. On the ambit of the precedent set by *Municipal Manager: Qaukeni Local Municipality v*

However, although *Quakeni* supports the idea that an organ of state may challenge its own decisions collaterally on occasion, it does not support the idea that an organ of state may ignore its own decisions with impunity. On the contrary, the court held that an organ of state is obliged to actively resist the enforcement of its decision, should the decision be invalid.³¹⁷ An important factual difference between *Kwa Sani* and *Quakeni* relates to way in which the respective municipalities resisted enforcement of their decisions. While the municipality in *Kwa Sani* took a lackadaisical, reactionary approach,³¹⁸ the municipality in *Quakeni* had no choice but to act swiftly, as it was the respondent in an urgent application.³¹⁹ This factual difference could perhaps explain why the court allowed a collateral challenge in *Quakeni* but not in *Kwa Sani*.

In *South African Local Authorities Pension Fund v Msunduzi Municipality*³²⁰ (“Msunduzi”), a judgment the Supreme Court delivered after *Kwa Sani*, the court again intimated that an organ of state may, in appropriate circumstances, raise a collateral challenge.

The dispute in this case started when a pension fund tried to change its rules. Under the amended rules, the Msunduzi Municipality, in its capacity as employer of members of the fund, had to pay the fund increased annual contributions. When it refused to do so, the fund instituted an action against it, claiming contributions that were allegedly unpaid.³²¹

The Pension Funds Act 24 of 1956 prescribed the process the fund had to follow to change its rules.³²² Its board of trustees had to adopt a resolution to change the rules,

FV General Trading CC 2010 1 SA 356 (SCA), see *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2017 2 SA 63 (SCA) paras 27-31.

³¹⁷ *Municipal Manager: Quakeni Local Municipality v FV General Trading CC 2010 1 SA 356* (SCA) para 26; *Kwa Sani Municipality v Underberg/Himeville Community Watch Association* 2015 2 All SA 657 (SCA) para 16.

³¹⁸ *Kwa Sani Municipality v Underberg/Himeville Community Watch Association* 2015 2 All SA 657 (SCA) paras 8, 10-11.

³¹⁹ *Municipal Manager: Quakeni Local Municipality v FV General Trading CC 2010 1 SA 356* (SCA) paras 1-2, 9.

³²⁰ 2016 4 SA 403 (SCA).

³²¹ *South African Local Authorities Pension Fund v Msunduzi Municipality* 2016 4 SA 403 (SCA) paras 1-2.

³²² Paras 4-5.

it had to send the resolution to the Registrar of Pension Funds, and the Registrar had to approve the resolution.³²³

The municipality argued that the fund had not followed this process when it tried to change the rules.³²⁴ The fund's answer was that the Registrar had in fact endorsed the rule change, and – because of the *Oudekraal* principle – that the Registrar's decision had to be treated as valid until set aside by a court in judicial-review proceedings.³²⁵

The Supreme Court of Appeal held that the fund was mistaken: because it sought to enforce the decision to change its rules, it had to prove to the court that the decision was valid.³²⁶ According to the court, the fund had failed woefully to do so.³²⁷ As the fund had failed to prove one of the essentials of its claim, the Supreme Court upheld the ruling of the court below – absolution from the instance in favour of the municipality.

In reaching this conclusion, the Supreme Court of Appeal endorsed the High Court's judgment in *South African Local Authorities Pension Fund v George Municipality*,³²⁸ where Dolama J held that a municipality could collaterally challenge the fund's decision to change its rules.³²⁹ However, Lewis JA, who authored the Supreme Court of Appeal's judgment, doubted whether the case before her was "one where a collateral challenge even arises".³³⁰ In making this remark, Lewis JA presumably meant that, because the fund had failed to make even a *prima facie* case, it was unnecessary for the municipality to raise any challenge, collateral or otherwise. So, although the Supreme Court of Appeal clearly intimated in *Msunduzi* that an organ of state could raise a collateral challenge in appropriate circumstance, its remarks in that regard were probably *obiter dicta*.

As I will discuss in detail later,³³¹ in *Merafong City* the Constitutional Court subsequently made it clear than an organ of state may indeed raise a collateral

³²³ S 12 of the Pension Funds Act 24 of 1956.

³²⁴ *South African Local Authorities Pension Fund v Msunduzi Municipality* 2016 4 SA 403 (SCA) paras 30.

³²⁵ Paras 28, 35.

³²⁶ Para 37.

³²⁷ Para 37.

³²⁸ WCC 11-9-2015 case no 2064/08.

³²⁹ Para 38.

³³⁰ Para 39.

³³¹ See chapter 4 below.

challenge.³³² In *Tasima* the Constitutional Court decided that an organ of state may even collaterally challenge its own prior decision.³³³ The court suggested, however, that an organ of state's collateral challenge will be of a special kind: it will be subject to the rule against delay.³³⁴ But, as we will see below, there are reasons for doubting whether this development was jurisprudentially successful.

3 4 The flexible method

3 4 1 Introduction

As part 3 3 demonstrates, the defining feature of the categorical method is that it is premised on a rule: a collateral challenge will only be allowed where a "subject is sought to be coerced by a public authority into compliance with an unlawful administrative act".³³⁵

The categorical method requires a judge in an indirect-review case to decide whether this rule applies to the facts of the case at hand. As we have seen, this has resulted in several indirect-review judgments that have explored this rule's "penumbra of uncertainty",³³⁶ to use Hart's famous phraseology. Judges have, for instance, considered whether an organ of state is a "subject",³³⁷ whether a commercial-property company is "a public authority",³³⁸ and whether a school governing body "coerces" a minister when it disregards his instructions.³³⁹

This can be contrasted with another way in which judges have adjudicated indirect-

³³² *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC).

³³³ *Department of Transport v Tasima* 2017 2 SA 622 (CC). *Tasima* has not, however, settled the legal position, as lower courts continue to issue conflicting judgments on whether organs of state may collaterally challenge their own prior decisions. In this regard, see G Quinot "Public Procurement" (2017) 2 JQR 2.5.

³³⁴ This proposition was subsequently reiterated in *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC).

³³⁵ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) para 35.

³³⁶ HLA Hart *The Concept of Law* 3rd ed (2012) 12.

³³⁷ See chapter 3 part 3 2 2 above.

³³⁸ See chapter 3 part 3 3 1 above.

³³⁹ *Head of Department, Department of Education, Free State Province v Welkom High School* 2014 2 SA 228 (CC) para 258.

review cases, which I will call “the flexible method” for ease of reference. This method shuns the very idea that there can be a rule that covers all possible indirect-review cases.³⁴⁰ Instead, it determines that a collateral challenge should be allowed where, in the circumstances of the case before the court, that would be in the interests of justice.³⁴¹ Unlike the categorical method, the flexible method asks judges to exercise a broad discretion, to assess a wide array of factors, and to consider the pragmatic dimensions of the dispute they are called upon to adjudicate.³⁴²

The flexible method predates *Oudekraal*.³⁴³ In *Metal and Allied Workers Union of SA v National Panasonic*,³⁴⁴ for instance, the erstwhile Cape Provincial Division of the High Court held that it was impossible to lay down a “fixed rule” to determine when a collateral challenge should be allowed.³⁴⁵ It held that courts should rather assess the competence of collateral challenges on a case-by-case basis, and by considering the nature of impugned act, the reason it had not been impugned earlier, the relationship between the parties implicated in the challenge, and “whatever other factors may be relevant”.³⁴⁶

In the post-*Oudekraal* era, the flexible method has not been as prominent as the categorical method. But of late it has achieved notional ascendancy, having received the endorsement of the Constitutional Court in *Merafong City*. Yet, as I will explain below, *Merafong City* itself creates confusion about the flexible method, and it is therefore unlikely that the judgment has halted the diffusion of judicial methods in indirect-review cases.

Before considering *Merafong City* in detail, I first discuss *Khabisi v Aquarella Investment 83*³⁴⁷ (“*Khabisi*”), a case which clearly demonstrates the operation of the flexible method.

3.4.2 *Khabisi v Aquarella Investment 83*

³⁴⁰ *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) para 25.

³⁴¹ Para 56.

³⁴² Para 56.

³⁴³ Para 55.

³⁴⁴ 1991 2 SA 527 (C)

³⁴⁵ *Metal and Allied Workers Union of SA v National Panasonic* 1991 2 SA 527 (C)

³⁴⁶ 530G-H, cited in *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) para 28.

³⁴⁷ 2008 4 SA 195 (T).

Khabisi was a dispute about the construction of a residential complex in an ecologically sensitive area in Pretoria.³⁴⁸ The dispute started in 2007, when one Dr Cornelius, the head of the Gauteng provincial Department of Agriculture, Conservation and Environment (“DACE”), ordered the respondents to cease all construction on the site. These orders took the form of compliance notices in terms of the National Environment Management Act 107 of 1998 (“NEMA”), and directives in terms of the Environmental Conservation Act 73 of 1989.³⁴⁹

The respondents told Dr Cornelius that they would ignore his orders, as they considered them to be invalid and void.³⁵⁰ True to their word, they continued the construction of the complex.³⁵¹ When a letter of demand failed to deter them, Dr Cornelius and the MEC for DACE initiated proceedings in the High Court, asking for an order that would interdict the respondents from continuing the development.³⁵²

Could the respondents just ignore Dr Cornelius’ orders? That was the legal question before the court.³⁵³ The respondents said that they could, and justified their insouciance by raising a collateral challenge to the validity of Dr Cornelius’ orders.³⁵⁴

The High Court roundly dismissed this argument, calling it “seriously misconceived”.³⁵⁵ Although the court analysed the empowering instruments,³⁵⁶ it did not engage in a second-actor analysis. In a clear expression of the flexible method, it held, instead, that whether a litigant may raise a collateral challenge will depend on various factors.³⁵⁷

³⁴⁸ *Khabisi v Aquarella* 2008 4 SA 195 (T) paras 4, 16.

³⁴⁹ Para 6.

³⁵⁰ Para 7.

³⁵¹ Para 7.

³⁵² Paras 3, 7.

³⁵³ Paras 9-10, 20-21.

³⁵⁴ Paras 12,14,23.

³⁵⁵ Para 22. The court ultimately granted the interdict. See *Khabisi v Aquarella* 2008 4 SA 195 (T) para 30.

³⁵⁶ The court focussed on the provisions of the NEMA, as it considered it unnecessary to consider the Environmental Conservation Act 73 of 1989. See *Khabisi v Aquarella* 2008 4 SA 195 (T) paras 12.

³⁵⁷ Para 24.

Using this flexible, multi-factor approach, the court considered, first, that a collateral challenge would frustrate NEMA's aims, as the Act was clearly set against a collateral challenge: NEMA said, in peremptory terms, that compliance notices had to be obeyed; made non-compliance a criminal offence; provided the respondents with the opportunity to lodge an objection against the compliance notices; and further provided the respondents with an avenue of appealing against the compliance notices to the MEC or the responsible minister.³⁵⁸

The court considered, second, that the respondents' reactive attitude was "both inimical to and seriously subversive of a sound and efficient system of public administration".³⁵⁹ This was because the respondents' nonchalance hampered the DACE and its functionaries from performing the crucial environmental-conservation functions entrusted to them by the Constitution, the NEMA, and its associated regulatory framework.³⁶⁰ The court stressed:

"One shudders to imagine the amount of damage to the environment and ecology which would result if all people who owned properties were to develop them as they wished, against any objections raised by a competent environmental authority."³⁶¹

In making these remarks, the court drew from the authority of the Constitutional Court judgment in *Pretoria City Council v Walker*³⁶² ("Walker"), where similar policy-considerations were articulated. This is interesting, as *Walker* is not ordinarily invoked in the indirect-review context.³⁶³

In this case the City Council of Pretoria had sued Mr Walker for outstanding municipal-service levies.³⁶⁴ Mr Walker admitted that he had received utilities without paying for them. But he argued that he was entitled to withhold payment, because the

³⁵⁸ Paras 18, 24-25.

³⁵⁹ Para 25.

³⁶⁰ Para 27.

³⁶¹ Para 27.

³⁶² 1998 2 SA 363 (CC).

³⁶³ There are two exceptions: J de Ville *Judicial Review of Administrative Action in South Africa* (2005) 393, 395; JA D'Oliveira "Administrative Justice" in WA Joubert & JA Faris *LAWSA* 3 3 ed (2015) para 12.

³⁶⁴ *City Council of Pretoria v Walker* 1998 2 SA 363 (CC) para 1.

Council's practice of levying and enforcing rates on a differential basis³⁶⁵ violated his constitutional right to equality.³⁶⁶ In effect, Mr Walker sought the indirect review the way the Council exercised its powers. So, although it is debatable whether *Walker* was concerned with the indirect review of administrative action,³⁶⁷ the case clearly concerned the indirect review of the exercise of public power.³⁶⁸

The Constitutional Court held that the Council had unjustifiably limited Mr Walker's right to equality.³⁶⁹ But that was not the end of the matter. It next considered whether, like the High Court, it should order absolution from the instance,³⁷⁰ the effect of which would be to dismiss the Council's claim against Mr Walker.³⁷¹

The court's answer was an emphatic "no".³⁷² It sharply criticised the reactionary way in which Mr Walker had conducted his litigation, and articulated the policy-considerations that the High Court reiterated in *Khabisi*. It held that Mr Walker's purported collateral challenge amounted to unlawful self-help, that it was antithetical to good governance, and that it carried "the potential for chaos and anarchy".³⁷³ The court asserted:

³⁶⁵ Residents of previously advantaged communities paid for water and electricity at a higher rate than residents of previously repressed communities. Furthermore, only the residents of previously advantaged communities faced the threat of legal action if they failed to pay for the services they received from the municipality. See *City Council of Pretoria v Walker* 1998 2 SA 363 (CC) paras 23.

³⁶⁶ *City Council of Pretoria v Walker* 1998 2 SA 363 (CC) paras 1,6,27,47.

³⁶⁷ See *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) paras 43-46; *City of Tshwane v Marius Blom & G C Germishuizen* 2014 1 SA 341 (SCA) paras 18-19. But compare, *Gillyfrost 54 (Pty) Ltd v Nelson Mandela Bay Metropolitan Municipality* 2015 4 All SA 58 (ECP) paras 13-14, 32, 43, 47-48.

³⁶⁸ *City Council of Pretoria v Walker* 1998 2 SA 363 (CC) para 89.

³⁶⁹ Paras 81-82. The court held that it was unfairly discriminatory, within the meaning of s 8(2) of the Interim Constitution, for the Council to enforce payment of service charges from the residents of previously advantaged areas, while not enforcing such payment from the residents of previously repressed communities.

³⁷⁰ On absolution from the instance generally, see rules 39(3) & 39(6) of the Uniform Rules of Court; *Claude Neon Lights (SA) Ltd v Daniel* 1976 4 SA 403 (A) at 409G-H; *Gordon Lloyd Page & Associates v Riviera* 2001 (1) SA 88 (SCA) para 2.

³⁷¹ Paras 93-95.

³⁷² Paras 93-95.

³⁷³ Para 93.

"It is not for the disgruntled individual to decide what the appropriate relief should be and to combine with others or take it upon himself or herself to punish the government structure by withholding payment which is due."³⁷⁴

What Mr Walker should have done, the court explained, was to take the initiative of approaching a court for appropriate relief, such as a declaration of rights or an interdict.³⁷⁵ In the result, Mr Walker's constitutional attack was not a defence to the council's claim for payment, and the Constitutional Court overruled the High Court's order of absolution from the instance.³⁷⁶

These considerations were absent from the Supreme Court of Appeal's reasoning in *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd*,³⁷⁷ another indirect-review case that turned on the validity of municipal rates and levies.³⁷⁸ In this case the respondent, a company, refused to pay service levies to the plaintiff, a municipality. The company refused to pay because, in its view, the levies were based on an invalid ministerial notice. When the municipality sued the company for payment of the levies, the company collaterally challenged the ministerial notice.³⁷⁹

In deciding whether the company could raise this collateral challenge, the Supreme Court of Appeal did not engage with the line of reasoning espoused in

³⁷⁴ Para 93.

³⁷⁵ Para 96.

³⁷⁶ Para 97. In *Liebenberg v Bergrivier Municipality* 2013 5 SA 246 (CC) the Constitutional Court heard the case of 85 farmers who refused, for 8 years, to pay municipal rates to the Bergrivier Municipality had imposed on them (paras 1-4).

When the municipality sued the landowners for the outstanding rates, they countered by disputing the lawfulness of the municipality's imposts. As these actions were instituted in magistrates' courts, and as these courts did not have jurisdiction to adjudicate the lawfulness of the rates, the municipality abandoned the enforcement proceedings and instead sought declaratory orders, from the High Court, that would confirm the lawfulness of the rates (paras 5-7). The Constitutional Court had to decide whether to grant this declaratory order. As such, the court pointed out, it did not have to determine "whether the applicants have brought a so-called collateral challenge and their entitlement to do so" (para 16).

In dismissing the farmers' appeal, the court invoked *City Council of Pretoria v Walker* 1998 2 SA 363 (CC) and reiterated that "a culture of non-payment for municipal services" has no place in the constitutional dispensation (paras 79-80).

³⁷⁷ 2010 1 ALL SA 1 (SCA).

³⁷⁸ *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 1 ALL SA 1 (SCA) paras 1,7.

³⁷⁹ Para 16.

Khabisi and *Walker*. Unlike the court in *Walker*, for instance, the Supreme Court of Appeal expressed no concern that – should ratepayers be entitled to ignore municipal rates and services because they consider them invalid – this may obstruct municipal governance, enervate the rule of law, and spawn anarchy. It held, instead, that because the validity of the ministerial notice was a prerequisite for the validity of the municipal levy, the court had no choice but to hear the company's collateral challenge.³⁸⁰ In coming to this conclusion, the court appears to have used a modified form of the theory of the second actor.³⁸¹

Khabisi can also usefully be compared with *Nature's Choice Properties (Alrode) (Pty) Ltd v Ekurhuleni Metropolitan Municipality ("Nature's Choice")*.³⁸² Like *Khabisi*, *Nature's Choice* dealt with a collateral challenge to the enforcement of environmental law. Unlike the High Court in *Khabisi*, the Supreme Court of Appeal in *Nature's Choice* used the categorical method to assess the competence of the collateral challenge.

Nature's Choice was a dispute between a municipality and a company operating a food-processing factory in the municipality's jurisdiction. The municipality had made regulations under the Atmospheric Pollution Prevention Act 45 of 1965. They made it mandatory to get the municipality's permission if one wanted to install a "fuel-burning appliance" on any premises in the municipality. The company breached this regulation by installing a coal-fired boiler on its property without the municipality's consent.³⁸³

The regulations empowered the municipality to force the company to remove the boiler. The municipality did not do this. Instead, it asked the company to submit a proper application for the installation of the boiler. The company acquiesced, but the municipality turned down its application.³⁸⁴ When the company continued to use the

³⁸⁰ Para 16.

³⁸¹ In an earlier judgment, *Weenen Transitional Local Council v Van Dyk* 2002 4 SA 653 (SCA), the Supreme Court of Appeal also allowed a ratepayer to challenge the validity of municipal rates collaterally. It held that the municipality had failed to comply with the Ordinance that empowered it to levy rates, and that the rates were not due and payable when the municipality instituted the action.

³⁸² 2010 1 All SA 12 (SCA).

³⁸³ *Nature's Choice Properties (Alrode) (Pty) Ltd v Ekurhuleni Metropolitan Municipality* 2010 1 All SA 12 (SCA) para 1-3.

³⁸⁴ Paras 11-12.

boiler, the municipality turned to the High Court, which ordered the company to stop using the boiler and to have it removed within 30 days.³⁸⁵

Before the Supreme Court of Appeal, the company collaterally attacked the municipality's decision to turn down its boiler application. It said that the municipality exceeded its authority when it made this decision, and that the decision was therefore unlawful. The Supreme Court of Appeal seems to have considered it self-evident that the company was entitled to raise this collateral challenge. It appears to have reasoned that the company sought to defend itself against the administrative coercion of a public authority, and was thus seeking the "right remedy" in the "right proceedings". The court held that, because the "municipality [was] seeking to enforce an illegal decision", the company could ignore the decision and later challenge it collaterally.³⁸⁶ So, as was the case in *Cable City*, the Supreme Court of Appeal did not consider the political and practical reasons for disallowing a collateral challenge that the courts expressed in *Walker* and *Khabisi* respectively.

3 5 Conclusion

If one only considers the indirect-review cases that were decided by way of the categorical method, it may seem that the law on indirect review developed relatively harmoniously after *Oudekraal*. Most of these judgments follow a similar logic and deal with cognate themes. They are all structured around a set of core assumptions, adhere to the same central rule, and reach reasonably predictable outcomes.

But this chapter has shown that the categorical method is but one of the methods judges have used to decide indirect review cases and that the law on indirect review fractures when the different judicial methods interact.

This is clearly illustrated by *Khabisi* and *Walker* on the one hand, and *Cable City*, on the other. Though the courts dealt with equivalent issues in these cases, they reached opposite outcomes, which outcomes flowed from the different methods the courts used to adjudicate the respective cases.

Because the courts in *Khabisi* and *Walker* used the flexible method, they were attuned to the broader socio-political, institutional, and pragmatic consequences that

³⁸⁵ Para 2.

³⁸⁶ Para 13.

a collateral challenge may engender. This led them to reject the putative collateral challenges before them, and to do so harshly. In *Cable City* the Supreme Court of Appeal adjudicated the competence of the collateral challenge on a narrow, legalistic basis. It was only concerned with whether the municipal levy depended on the factual or legal existence of the ministerial notice. Again, this made the outcome of the case ostensibly self-evident: because the legal existence of the ministerial notice was a prerequisite for the validity of the municipal levy, the court had no choice but to hear the company's collateral challenge.

CHAPTER 4: AN EVALUATION OF *MERAFONG CITY*

4 1 Introduction

The previous chapter demonstrated that our courts have used disparate judicial methods to adjudicate indirect-review cases and that these methods are mutually exclusive in material respects.

Merafong City, which is arguably the most authoritative current case on indirect review, takes the jurisprudential zero-sum game a step further. Here the High Court, Supreme Court of Appeal, and Constitutional Court used different methods to adjudicate the same dispute.³⁸⁷ The purpose of this chapter is to assess the way in which the Constitutional Court deal with this methodological diffusion. It will be argued that the court failed to harmonise the law on indirect review and that this area of the law is accordingly in need of doctrinal reform.

4 2 Background to *Merafong City*

Merafong City was essentially a dispute about water. The applicant in the court of first instance, AngloGold Ashanti Ltd (“AngloGold”), mined within the Merafong City local municipality (“Merafong”)³⁸⁸ and it used water to do so.³⁸⁹ It had its own water-reticulation system but this system did not satisfy all its needs. So, since 1958, it acquired additional water from Rand Water, an organ of state with water-provision duties.³⁹⁰

In 1997, Parliament promulgated the Water Services Act 108 of 1997. This Act empowered Merafong to administer water services in its area of jurisdiction.³⁹¹ Exercising those powers in 2004, Merafong notified all the mining houses in its jurisdiction that it would assume the responsibility of providing them with water. Merafong also set new tariffs which were much higher than those previously set by

³⁸⁷ On the idea of a jurisprudential zero-sum game, see *Khumalo v Holomisa* 2002 5 SA 401 (CC) para 42.

³⁸⁸ *Merafong City v AngloGold Ashanti Ltd* 2016 2 SA 176 (SCA) para 2.

³⁸⁹ Para 2.

³⁹⁰ Para 3.

³⁹¹ *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) para 4.

Rand Water.³⁹² It added a surcharge to the tariff to “find new sources of income to ensure [its] financial stability”.³⁹³

AngloGold felt aggrieved by the new tariff and appealed to the Minister of Water Affairs and Forestry (“the Minister”), as the Act entitled it to do.³⁹⁴ The Minister upheld the appeal. She overturned Merafong’s decision to add a surcharge to the price of water AngloGold used for industrial purposes. But she held that Merafong could add a surcharge to the price of water AngloGold used for domestic purposes.³⁹⁵

Merafong was not satisfied with this result. It obtained legal advice that the Minister’s decision was void.³⁹⁶ On the strength of this advice it ignored the decision and continued to add a surcharge to the price of water it supplied to AngloGold.³⁹⁷ AngloGold continued paying the surcharge but did so “under protest”.³⁹⁸

4 3 High Court and Supreme Court of Appeal

The parties failed to find an amicable solution to their disagreement.³⁹⁹ AngloGold then instituted an application in the High Court, asking for an order compelling Merafong to comply with the Minister’s ruling. Merafong reacted with a counter-application in which it sought an order invalidating the Minister’s ruling.⁴⁰⁰

The High Court granted AngloGold’s application and dismissed Merafong’s counter-application.⁴⁰¹ It found that the Minister’s ruling was valid.⁴⁰² But it also found that – due to the *Oudekraal* principle – whether the Minister’s ruling was valid or not, it was legally effective until set aside by a court.⁴⁰³ Merafong should thus have adhered to the Minister’s ruling instead of ignoring it, the court ruled.

³⁹² Paras 6-7.

³⁹³ Para 7.

³⁹⁴ Para 8.

³⁹⁵ Para 9.

³⁹⁶ Para 10.

³⁹⁷ Para 10.

³⁹⁸ Para 10.

³⁹⁹ Para 11.

⁴⁰⁰ Para 13.

⁴⁰¹ *Anglogold Ashanti Ltd v Merafong City Local Municipality* 2014 JDR 0321 (GNP) para 83.

⁴⁰² Paras 41-68.

⁴⁰³ *Anglogold Ashanti Ltd v Merafong City Local Municipality* 2014 JDR 0321 (GNP) para 70.

Merafong sought to evade this ruling by framing its counter-application as a collateral challenge to the Minister's ruling. But the court swiftly dismissed this argument, holding that:

“A collateral challenge is not available to a public authority. The defence is meant to prevent the power of a state to bear on a citizen and as such a public authority like a municipality cannot use this defence.”⁴⁰⁴

The High Court clearly used the categorical method to determine the competence of Merafong's collateral challenge, as did the Supreme Court of Appeal. It held that it was “simply untenable” that one organ of state could use a collateral challenge against another organ of state, given that the state could not be a “subject” in way this term was understood in *Oudekraal*.⁴⁰⁵

4 4 Constitutional Court

Merafong appealed to the Constitutional Court. It persisted with its argument that its challenge to the Minister's ruling was collateral in nature, and that the *Oudekraal* principle did therefore not apply to its challenge.⁴⁰⁶

In a judgment authored by Cameron J,⁴⁰⁷ the majority of the Constitutional Court plainly disapproved of the categorical method used by the High Court and the Supreme Court of Appeal. According to Cameron J, this method “squeeze[d] collateral challenge into a rigid format – one that neither doctrine nor practical reason appears to warrant”.⁴⁰⁸

In contrast to the High Court and the Supreme Court of Appeal, the majority of the Constitutional Court used the flexible method to decide whether Merafong could raise a collateral challenge. Cameron J held that a collateral challenge “should be available

⁴⁰⁴ Para 72.

⁴⁰⁵ *Merafong City v AngloGold Ashanti Ltd* 2016 2 SA 176 (SCA) para 17.

⁴⁰⁶ *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) para 23.

⁴⁰⁷ Moseneke DCJ, Froneman J, Khampepe J, Madlanga J, Mhlantla J, and Nkabinde J concurring.

⁴⁰⁸ Para 25.

where justice requires it to be”, that this will depend on the facts of the case before the court, and that the inquiry will depend “on a variety of factors”.⁴⁰⁹

Ultimately the majority allowed Merafong to raise a collateral challenge on pragmatic grounds.⁴¹⁰ It considered that Merafong would probably reinstitute proceedings if its collateral challenge failed, thereby prolonging the stalemate and increasing the costs of the litigation. Thus one reason for allowing Merafong’s collateral challenge was to avoid delaying an already protracted dispute.⁴¹¹

The minority of the Constitutional Court agreed with the majority that Merafong should be allowed to raise a collateral challenge.⁴¹² Jafta J, who authored the minority judgment,⁴¹³ described the Supreme Court of Appeal’s categorical method as a “narrow technical approach”,⁴¹⁴ and agreed with Cameron J that this approach was misguided. Although it is not entirely clear which judicial method Jafta J preferred, he seems to have endorsed the theory of the second actor.⁴¹⁵

A striking feature of Jafta J’s judgment is his rather idiosyncratic reading of *Oudekraal*. According to Jafta J, *Oudekraal* held that administrative action will only be enforceable if it is “valid”, and will only be valid if it is lawful.⁴¹⁶ Or as Jafta J put it:

“If it is illegal, an administrative act cannot be enforced because it would be inconsistent not only with the rule of law but also with section 33 of the Constitution which guarantees ‘an administrative action that is lawful, reasonable and procedurally fair’.”⁴¹⁷

With respect, this is incorrect. First, *Oudekraal* did not determine that administrative action will only be enforceable if valid. It determined the opposite. The court held that,

⁴⁰⁹ Para 56.

⁴¹⁰ Para 65.

⁴¹¹ Para 67.

⁴¹² Paras 97-106.

⁴¹³ Bosielo AJ and Zondo J concurring.

⁴¹⁴ *Merafong City v AngloGold Ashanti* 2017 2 SA 211 (CC) para 104.

⁴¹⁵ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) paras 31-32.

⁴¹⁶ *Merafong City v AngloGold Ashanti* 2017 2 SA 211 (CC) para 95.

⁴¹⁷ Para 95.

subject to the collateral-challenge exception, administrative action is enforceable until set aside by a court.⁴¹⁸

Second, it is meaningless to label administrative action as “unlawful” or “illegal” before a court reviews it. This is because courts are the sole “arbiters of legality”.⁴¹⁹ Accordingly, only courts have the authority to decide whether such labels are warranted.

Finally, while it is true that the rule of law may be harmed if invalid administrative action is enforced, it is equally true that the rule of law may be harmed if extant administrative action is ignored because it seems to be invalid.⁴²⁰ Jaftha J’s judgment fails to recognise this foundational conundrum at the heart of the rule of law.⁴²¹ It also fails to recognise that *Oudekraal* was concerned with this conundrum. And it fails to recognise that the court in *Oudekraal* tried to solve the conundrum by using the theory of the second actor.⁴²²

In the premises, while Jaftha J may have purported to use a judicial method based on the theory of the second actor, his judgment did not indicate an appreciation for that theory’s rationale and aims.

4 5 What *Merafong City* demonstrates

Merafong City acutely demonstrates that judges use different judicial methods to adjudicate indirect-review cases. The three courts that considered the matter used three different methods to adjudicate whether Merafong could raise a collateral challenge. The High Court (per Kubushi J) and the Supreme Court of Appeal (per Maya JA) said “no” and used the categorical method to reach that conclusion. In the Constitutional Court, Cameron J said “yes” after using a flexible and open-ended method. Jafta J also said “yes”, but apparently endorsed the theory of the second actor.

⁴¹⁸ See chapter 2 part 2 3 above.

⁴¹⁹ *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 3 SA 481 (CC) para 103.

⁴²⁰ See chapter 1 part 1 2 above.

⁴²¹ L Boonzaier “Good Reviews, Bad Actors: The Constitutional Court’s Procedural Drama” (2015) 7 CCR 1 11.

⁴²² See chapter 2 part 2 3 above.

It is instructive to consider the way Maya JA and Cameron J arrived at “no” and “yes” respectively, as this clearly illustrates the differences between the categorical method and the flexible method.

Maya JA packed her reasoning on the collateral-challenge issue into three paragraphs.⁴²³ In these paragraphs her reasoning was terse,⁴²⁴ deductive, and syllogistic. She did not cite the Constitution or foreign jurisprudence.

Cameron J, by contrast, devoted many pages to the collateral-challenge issue.⁴²⁵ His reasoning was wide-ranging: he considered the pre-constitutional law on indirect-review,⁴²⁶ the impact of the Constitution on this body of law,⁴²⁷ the ambit of key indirect-review cases,⁴²⁸ foreign law on indirect review,⁴²⁹ and the practical consequences that his ruling may engender.⁴³⁰

While Maya JA expressed herself dispassionately, Cameron J used more colourful language: he held that Maya JA’s judicial method “squeeze[d]”⁴³¹ collateral challenges into only applying to private citizens, that this dealt a “knockout blow”⁴³² to Merafong’s case, and that there was no justification for “straight-jacketing”⁴³³ collateral challenges in this way.

The premise of Maya JA’s reasoning was a classic expression of the categorical method:

“It is established in our law that a collateral challenge to the validity of an administrative action is a remedy available to a person threatened by a public authority with coercive action precisely because the legal force of the coercive

⁴²³ *Merafong City v AngloGold Ashanti Ltd* 2016 2 SA 176 (SCA) paras 16-18.

⁴²⁴ See, for instance, para 17: “The notion that an organ of State can use this shield against another organ of State is simply untenable. These findings dispense with the need to deal with the substantive issues raised in this matter. The appeal must fail.”

⁴²⁵ *Merafong City v AngloGold Ashanti* 2017 2 SA 211 (CC) paras 23-58.

⁴²⁶ Paras 26-30.

⁴²⁷ Paras 31-38.

⁴²⁸ Paras 39-44.

⁴²⁹ Para 30 n 38.

⁴³⁰ Paras 65-68.

⁴³¹ Para 25.

⁴³² Para 25

⁴³³ Para 55.

action will most often depend upon the legal validity of the administrative action in question.”⁴³⁴

Maya JA seemed to treat this proposition as a definitive statement of the law, consisting of discrete elements, each of which had its own settled legal definition. Only one element of the definition was relevant in *Merafong*, namely that of “a person threatened by a public authority”. Maya JA treated this element as if it denoted a fixed category of persons and considered it self-evident that an organ of state fell outside the category.⁴³⁵

Cameron J, by contrast, did not start his reasoning by asking whether *Merafong*’s attempted collateral challenge satisfied a fixed rule. Instead he asked whether it would be just to allow *Merafong* to raise a collateral challenge in the circumstances of the case.⁴³⁶ According to him, the answer to this question depended on a variety of factors, “invoked with a ‘pragmatic blend of logic and experience’”.⁴³⁷ Although Cameron J recognised that collateral challenges “in the first instance, and perhaps in origin, protect private citizens from state power”,⁴³⁸ he did not treat this fact as a definitive statement of the law. Rather, he held that “practical sense and the call for justice” demand that collateral challenges be applied in a wider range of circumstances.⁴³⁹

Maya JA and Cameron J’s respective judicial methods correspond to different adjudicative tasks. Using the categorical method, Maya JA’s adjudicative task was to determine whether *Merafong* fell within the category of persons the law allows to use collateral challenge. The task was simple: her point of departure was that a collateral challenge can only be used by a private citizen, so the only remaining step was to decide whether *Merafong* was indeed a private citizen, and it was self-evidently not. Cameron J’s adjudicative task was more complex. As he did not use the categorical method, he could not rely on ostensibly settled concepts to provide him with an answer to the legal question. Using a flexible, open-ended method, he had to decide – with

⁴³⁴ *Merafong City v AngloGold Ashanti Ltd* 2016 2 SA 176 (SCA) para 17.

⁴³⁵ Para 17.

⁴³⁶ *Merafong City v AngloGold Ashanti* 2017 2 SA 211 (CC) para 55.

⁴³⁷ *Merafong City v AngloGold Ashanti* 2017 2 SA 211 (CC) para 56, citing *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC) para 85.

⁴³⁸ *Merafong City v AngloGold Ashanti* 2017 2 SA 211 (CC) para 55.

⁴³⁹ Para 55.

reference to law, logic, and the facts of the case – what would be just in the case before him.

Does Cameron J’s expression of the flexible method amount to “gold-plait doctrine”?⁴⁴⁰ In other words, has *Merafong City* put an end to the law on indirect review’s methodological ambiguity? That is the question I consider in the next part of this chapter.

4 6 *Merafong City*’s legacy

4 6 1 Introduction

The Supreme Court of Appeal’s judgement in *Oudekraal* was a coherent, thoughtful treatment of indirect review. By basing its decision on Forsyth’s theory of the second actor, the court endowed the law on indirect review with a judicial method based on rigorous theory.⁴⁴¹ Whatever its faults,⁴⁴² the theory seemed, at least, to provide a sound point of departure for the adjudication of subsequent indirect-review cases.

However, we have now seen that judges in subsequent indirect-review cases rarely used the theory of the second actor to guide their decision making. They mostly relied on the categorical method and the flexible method instead. These judicial methods differ materially from the theory of the second actor and from each other, leading to methodological discord.

It is doubtful whether *Merafong City* halted this entropy. There are at least two aspects of the majority judgment that may provoke further uncertainty about the law on indirect review. The first is the majority’s finding that there are certain collateral challenges that must be instituted without undue delay. The second is the majority’s treatment of the flexible judicial method. I will now discuss each of these aspects in turn.

⁴⁴⁰ *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services* 2016 6 SA 596 (CC) para 135; *Jordaan v Tswane Metropolitan Municipality* 2017 6 SA 287 (CC) para 44.

⁴⁴¹ K Saller “When Worlds Collide: Implications of the Constitutional Court’s Decision in *Jaftha v Schoeman* when Viewed Through the Lens of the Second Actor Theory Accepted in *Oudekraal Estates (Pty) Ltd v City of Cape Town* (2005) 122 SALJ 725 725.

⁴⁴² See chapter 6 part 6 2 below.

4.6.2 Time-bound collateral challenges

Merafong City was not a classic⁴⁴³ indirect-review case where a citizen sought to raise a collateral challenge against an organ of state. It dealt with the peculiar situation of an organ of state seeking to raise a collateral challenge.

Both the minority⁴⁴⁴ and the majority⁴⁴⁵ held that Merafong's status as an organ of state did not preclude it from collaterally challenging the Minister's decision. This finding appears to be justifiable: it is conceivable that one organ of state may try, through unjust legal proceedings, to coerce another organ of state into compliance with an invalid administrative act.⁴⁴⁶ It seems reasonable to treat the coerced organ of state like a subject in this scenario and to allow it to repel the coercive action through a collateral challenge.⁴⁴⁷

But there are cogent, widely-recognised reasons why an organ of state should not be treated like a private-party litigant, but should be held accountable to more onerous procedural standards.⁴⁴⁸ These reasons all stem from the fact that the state exercises public power when it engages in litigation,⁴⁴⁹ and must therefore litigate within powers conferred upon it by law.⁴⁵⁰

⁴⁴³ On the use of the word “classic” as an adjective in this context, see *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) paras 69-72; *Department of Transport v Tasima (Pty) Ltd* 2017 2 SA 622 (CC) para 135 n 62.

⁴⁴⁴ *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) paras 97-106.

⁴⁴⁵ Para 55.

⁴⁴⁶ Para 55.

⁴⁴⁷ Para 55.

⁴⁴⁸ M du Plessis, G Penfold & J Brickhill *Constitutional Litigation* (2013) 3; A Klaasen “The Duty of the State To Act Fairly in Litigation” (2017) 3 SALJ 616 616. See, generally, *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC).

⁴⁴⁹ *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 4 SA 1184 (SCA) paras 14-15; M du Plessis, G Penfold & J Brickhill *Constitutional Litigation* (2013) 3.

⁴⁵⁰ *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 2 SA 415 (CC) paras 73, 93; *Head of Department, Department of Education, Free State Province v Welkom High School* 2014 2 SA 228 (CC) paras 1, 76, 79, 105; *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 3 SA 481 (CC) paras 65, 103. For the general principle that the exercise of public power must be authorised by law, see *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) para 58.

The state must, for instance, respect, promote, and fulfil the rights in the Bill of Rights.⁴⁵¹ When it litigates, it should be particularly sensitive to its opponents' right of access to courts;⁴⁵² the rights of arrested, detained and accused persons;⁴⁵³ the right to have legal standing;⁴⁵⁴ and the right of access to information.⁴⁵⁵

It must also "assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts".⁴⁵⁶ It must, for instance, freely disclose all material to the court that may have a bearing on the case before it,⁴⁵⁷ honour any assurances it gives to the court,⁴⁵⁸ and – where it anticipates that it will break its promises – immediately inform the court that this may happen.⁴⁵⁹ It may not

⁴⁵¹ S 7(2) of the Constitution.

⁴⁵² S 34 of the Constitution gives everyone the right "to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".

⁴⁵³ S 35 of the Constitution.

⁴⁵⁴ S 38 of the Constitution gives specific persons the right "to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened". The section further provides that "the court may grant appropriate relief, including a declaration of rights". See further *Ferreira v Levin NO and Others v Vryenhoek v Powell NO and Others* 1996 1 SA 984 (CC).

⁴⁵⁵ S 32(1)(a) of the Constitution gives everyone the right of access to any information held by the state. On the implications of this right for the state's participation in litigation, see G Penfold & J Brickhill *Constitutional Litigation* (2013) 3-4; *Van Niekerk v Pretoria City Council* 1997 3 SA 839 (T) 850.

⁴⁵⁶ S 165(4) of the Constitution.

⁴⁵⁷ *Matatiele Municipality v President of the Republic of South Africa* 2006 5 SA 47 (CC) paras 84, 107, 109, 110; M du Plessis, G Penfold & J Brickhill *Constitutional Litigation* (2013) 3-4; *Democratic Alliance v President of the Republic of South Africa* 2017 3 ALL SA 124 (GP) paras 35-36.

⁴⁵⁸ *Black Sash Trust v Minister of Social Development* 2017 5 BCLR 543 (CC) paras 10-11, 42.

⁴⁵⁹ Paras 10-14, 61, 72-75.

abuse court proceedings by using “procedural tricks”,⁴⁶⁰ obstructionist stratagems,⁴⁶¹ “non-arguments”,⁴⁶² and other self-serving ploys.⁴⁶³

There is tension between the fact that established collateral-challenge doctrine allows the state to raise a collateral challenge, while the law obliges the state to be a model litigant.⁴⁶⁴ The doctrine, as canonically expressed in *Oudekraal*, would permit the state to “ignore [an] unlawful act with impunity and justify [its] conduct by raising...a ‘collateral’ challenge”.⁴⁶⁵ But the Constitution places “a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights”.⁴⁶⁶

This tension is evident in *Merafong City*. The majority recognised that one organ of state may use a collateral challenge to ward off the unjust coercion of another. Yet it also recognised that, precisely because Merafong was an organ of state, it should “either have accepted the Minister’s ruling as valid, or gone to court to challenge it head-on”.⁴⁶⁷

The majority apparently tried to resolve this tension by creating a new type of collateral challenge, one that requires “scrutiny in regard to delay”.⁴⁶⁸ It explained:

⁴⁶⁰ *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 3 SA 481 (CC) paras 83.

⁴⁶¹ *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 4 SA 179 (CC) para 75.

⁴⁶² *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 4 SA 1184 (SCA) para 14.

⁴⁶³ *State Information Technology Agency v Gijima Holdings* 2016 4 All SA 842 (SCA) paras 30, 32, 35.

⁴⁶⁴ Klaasen proposes that the rules of civil procedure and professional ethics be supplemented by a “model-litigant obligation”, which obligation the state will bear. The purpose of this obligation is to prevent the state litigant from failing to meet its constitutional obligations (A Klaasen “The Duty of the State To Act Fairly in Litigation” (2017) 3 SALJ 616 635-637).

⁴⁶⁵ *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) para 69.

⁴⁶⁶ *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 3 SA 481 (CC) para 82.

⁴⁶⁷ *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) para 59.

⁴⁶⁸ Paras 69-72. It thus remitted the matter to the High Court, and made Merafong’s collateral challenge conditional on whether it could explain to that court why it had delayed in seeking legal recourse. See also *Department of Transport v Tasima (Pty) Ltd* 2017 2 SA 622 (CC) paras 142-144.

"First, we must note that Merafong's reactive challenge has distinctive attributes. These render it different from those a subject raises when the state threatens imprisonment or coerces payment. In those cases, which we may call "classical" collateral challenges, delay plays no role. The subject is entitled, as of right, to scrutinise the lawfulness of coercive action because the rule of law requires that official power not be exercised against the liberty or property of a subject unless it is lawfully sourced."⁴⁶⁹

The majority made it clear that this type of collateral challenge – one that requires "scrutiny in regard to delay" – was not simply a tailor-made solution for the dispute in Merafong.⁴⁷⁰ Although it did not explain in which circumstances a collateral challenge will be subject to the delay rule, it suggested that this will "be developed in the case law".⁴⁷¹ This implies that the time-bound collateral challenge is not something peculiar to *Merafong City*, but is now a part of the positive law at the disposal of litigants and judges in indirect-review cases.⁴⁷² Indeed, the Constitutional Court again allowed a time-bound collateral challenge in *Tasima*,⁴⁷³ and it has subsequently been appreciated as a distinct legal mechanism by the High Court.⁴⁷⁴

On the surface, this may seem like a welcome development, as the time-bound collateral challenge apparently dissolves the tension that arises when an organ of state seeks to raise a collateral challenge: it both enables an organ of state to use a collateral challenge *and* it obliges an organ of state to act proactively, in accordance with its stringent constitutional obligations.

But the time-bound collateral challenge achieves this result at a cost: it disturbs the way collateral challenges have been conceived in our law. A collateral challenge is usually thought to be different from a direct challenge precisely because it is *not* subject to the rule against delay.⁴⁷⁵ Stated differently, if a collateral challenge were

⁴⁶⁹ Para 69.

⁴⁷⁰ Compare *Black Sash Trust v Minister of Social Development* 2017 3 SA 335 (CC) para 51.

⁴⁷¹ *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) para 81.

⁴⁷² Freund and Price appear to share this view. See D Freund & A Price "On the legal effects of unlawful administrative action" (2017) 134 SALJ 184 191.

⁴⁷³ *Department of Transport v Tasima (Pty) Ltd* 2017 2 SA 622 (CC).

⁴⁷⁴ *Lornavision (Pty) Ltd v South African Broadcasting Corporation SOC Ltd* 2017 JDR 1325 (GJ).

⁴⁷⁵ See, for instance, *National Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry v Photocircuit SA (Pty) Ltd* 1993 2 SA 245 (C) 251J-254D; *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) paras 32, 36; *3M South Africa (Pty)*

subject to the delay rule, it could not possibly be an exception to the *Oudekraal* principle: if the subject had to challenge the impugned decision within a reasonable time, he would obviously not be able to “ignore the unlawful act with impunity and justify his conduct by raising...a ‘collateral’ challenge to the validity of the administrative act”.⁴⁷⁶

The reason our courts have held collateral challenges to be exempt from the delay rule is because “they attack the legal basis of the coercion in question whenever it is later brought to bear”.⁴⁷⁷ The rationale, in other words, is that when the state seeks to rely on the validity of an administrative act to coerce a subject, the subject may not be time-barred from arguing that the administrative act is, in fact, invalid.⁴⁷⁸ If the subject were time-barred in these circumstances, “it would be akin to a defence to a claim becoming prescribed before the claim itself, which would be untenable”.⁴⁷⁹

So it flows from the very idea of a collateral challenge that it is not bound by the rule against delay. Its immunity from the time bar is one of its defining traits.⁴⁸⁰ It is therefore difficult to see how the time-barred collateral challenge – which *is* bound by the rule against delay – can be a collateral challenge.

The majority in *Merafong City* did not attempt to answer these questions but left them to “be developed in the case law”.⁴⁸¹ While such judicial minimalism may have its virtues on occasion,⁴⁸² its pitfalls are, in my view, illustrated by *Merafong City*: the

Ltd v CSARS 2010 3 All SA 361 (SCA) paras 31-33; *Kouga Municipality v Bellingan* 2012 2 SA 95 (SCA) paras 15-18; C Hoexter *Administrative Law* (2012) 549.

⁴⁷⁶ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) para 32.

⁴⁷⁷ D Freund & A Price “On the legal effects of unlawful administrative action” (2017) 134 SALJ 184 190.

⁴⁷⁸ *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) para 69.

⁴⁷⁹ *National Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry v Photocircuit SA (Pty) Ltd* 1993 2 SA 245 (C) 253C (references excluded).

⁴⁸⁰ *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* 2013 4 ALL SA 639 (SCA) para 40.

⁴⁸¹ *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) paras 59.

⁴⁸² See, for example, I Currie “Judicious Avoidance” (1999) 15 SAJHR 138-165. But compare, *Areva NP Incorporated in France v Eskom Holdings SOC Ltd* 2017 6 BCLR 675 (CC) para 41; C Roederer “Judicious Engagement: Theory, Attitude and Community” (1999) 15 SAJHR 486-512; R Cachalia “Botching Procedure, Avoiding Substance: a Critique of the Majority Judgment in *My Vote Counts*” (2017) 33 SAJHR 138-153.

majority introduced a judge-made rule – that some collateral challenges must be made without undue delay – without convincingly explaining to whom, and when, this rule applies.

4 6 3 The majority's preferred judicial method

As explained above, in *Merafong City* the majority of the Constitutional Court favoured the flexible judicial method. It said, for instance, that a collateral challenge should be allowed “where justice requires it to be” available; that this “will depend, in each case, on the facts”,⁴⁸³ and that “it would be imprudent to pronounce any inflexible rule” on the availability of collateral challenge.⁴⁸⁴ This flexible approach enabled the majority to produce a bespoke solution to the dispute in *Merafong City*. But the majority did not provide coherent guidance on how courts should use the flexible method to decide future indirect-review cases.

As we have seen, the majority held that courts should assess the competence of collateral challenges by considering justice and the facts of the cases before them.⁴⁸⁵ This is self-evidently not instructive, as courts presumably engage in these activities whenever they adjudicate disputes.

The majority further suggested that the approach in *Bengwenyama* “offers practical guidance” on assessing the competence of a collateral challenge.⁴⁸⁶ This seems like concrete instruction. But there are two reasons why it is not.

First, as explained above, *Bengwenyama* has been criticised for its lack of conceptual clarity. It is therefore not an attractive source of practical guidance. Indeed, on the topic with which it was concerned – the apparent anomaly that an invalid administrative act can produce legally effective consequences – it did not provide much direction: it said that the issue should be resolved by examining “the circumstances of each case”, as it would not be “wise to attempt to lay down inflexible rules” to resolve the topic.⁴⁸⁷

⁴⁸³ *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) para 55.

⁴⁸⁴ Para 56.

⁴⁸⁵ *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) para 55.

⁴⁸⁶ Para 56.

⁴⁸⁷ *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC) para 85.

Second, the passage in *Bengwenyama* from which the majority in *Merafong City* sought to take “practical guidance” was concerned with a materially different issue: the remedy that should follow upon a declaration of invalidity.⁴⁸⁸ In the immediately preceding paragraph, the court in *Bengwenyama* said:

“It would be conducive to clarity, when making the choice of a just and equitable remedy in terms of PAJA, to emphasise the fundamental constitutional importance of the principle of legality, which requires invalid administrative action to be declared unlawful. This would make it clear that the discretionary choice of a further just and equitable remedy follows upon that fundamental finding. *The discretionary choice may not precede the finding of invalidity.* The discipline of this approach will enable courts to consider whether relief which does not give full effect to the finding of invalidity, is justified in the particular circumstances of the case before it.”⁴⁸⁹

In this paragraph, the Constitutional Court established a two-stage sequence for administrative-law adjudication.⁴⁹⁰ In the first stage, the court considers whether the impugned decision is invalid. If it finds the decision invalid, it *must* make a declaration of invalidity. A declaration of invalidity triggers the second stage. Here the court considers what would be a just and equitable remedy. It is only at the latter stage that a court has a discretion to decide what would be equitable in the case before it. After *Bengwenyama*, the Constitutional Court reiterated and entrenched this basic adjudicative sequence.⁴⁹¹ This was expressly recognised by the majority in *Merafong City*.⁴⁹²

Given that the passage in *Bengwenyama* dealt with the remedy that should follow a declaration of invalidity, it was clearly concerned with the second, discretionary stage of the adjudicative sequence. But when a court considers whether a litigant may raise a collateral challenge, it has not yet reached that juncture. It is still engaged in a

⁴⁸⁸ Para 85.

⁴⁸⁹ Para 84 (emphasis added).

⁴⁹⁰ J Bleazard & S Budlender “Remedies in Judicial Review Proceedings” in G Quinot (ed) *Administrative Justice in South Africa: An Introduction* (2015) 240.

⁴⁹¹ *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 1 SA 604 (CC) paras 25-26, 56; *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 4 SA 179 (CC) paras 29-32; *Black Sash Trust v Minister of Social Development* 2017 3 SA 335 (CC) paras 42-51.

⁴⁹² *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) para 35.

preliminary question: whether the litigant may contest the validity of administrative action in the proceedings before the court.⁴⁹³

The collateral-challenge enquiry is twice removed from the remedy stage of the adjudicative sequence. It is therefore doubtful whether the approach discussed in the relevant passage of *Bengwenyama* is well-suited to provide guidance on the collateral-challenge enquiry. In the premises, *Bengwenyama* does not instruct a judge how to use the flexible method to adjudicate an indirect case.

This is not problematic *per se*. Discretion plays an essential role in any legal system⁴⁹⁴ and many important questions in our law are adjudicated by pure judicial discretion. For example, a superior court decides whether it should regulate its own process if that would be “in the interests of justice”;⁴⁹⁵ the Constitutional Court decides whether it should grant an application for leave to appeal by considering “the interests of justice”;⁴⁹⁶ and, most pertinently for present purposes, a court decides whether it should condone a contravention of the PAJA’s delay rule by considering whether “the interests of justice so require”.⁴⁹⁷ The advantage of such broad standards is that, unlike narrower rules, they enable courts to achieve just outcomes in anomalous cases.⁴⁹⁸

But the majority in *Merafong City* made remarks which, on the face of it, displace the idea that the flexible method is a broad standard. These remarks are contained in two successive paragraphs, which I quote in full for ease of reference:

“The virtue of “classical” reactive challenges lies precisely in the fact that they provide a defence to parties who face the enforcement of the law but who never previously confronted it. And it is for this reason that they may sometimes be disallowed. Where a statue provides for an appeal or other remedy, and the

⁴⁹³ *Gillyfrost 54 v Nelson Mandela Bay Metropolitan Municipality* 2015 4 All SA 58 (ECP) paras 73-77.

⁴⁹⁴ *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC) para 53; *Shuttleworth v South African Reserve Bank* 2013 All SA 625 (GNP) para 79.

⁴⁹⁵ S 173 of the Constitution.

⁴⁹⁶ S 167(6)(b) of the Constitution.

⁴⁹⁷ S 9(2) of the PAJA.

⁴⁹⁸ See, for instance, K Sullivan “Foreword: The Justices of Rules and Standards” (1992) 106 *Harvard Law Review* 22 67.

disputed decision was specifically directed to the challenging party, our courts have forbidden a collateral challenge.

The point of these cases is that the ruling or decision was not directed to the world at large. It was specific. It was known to the subject. They stand in contrast to instances where the law is of general application, and is possibly unknown to the person against whom it is sought to be enforced. There, delay cannot be a disqualifying consideration.”⁴⁹⁹

Here the majority seems, finally, to express guidelines for assessing the competence of a collateral challenge. The challenge should be allowed where it would provide a defence to someone who faces the enforcement of an administrative act he has not yet had the opportunity of challenging. Correlatively, it should not be allowed where the challenger already had an opportunity to impugn the administrative act.

But it is difficult to determine how these guidelines – if that is indeed what they are – integrate with the majority’s stated preference for the flexible judicial method. As discussed above, the majority initially said that “[c]ategorical exclusions” should be avoided.⁵⁰⁰ Yet here it implies that there are two categories of litigants that *should* be excluded from using collateral challenges: first, litigants that failed to use available internal remedies; and, second, litigants that challenge administrative action that was directed at them specifically. Moreover, the majority initially said that the competence of collateral challenges should be assessed through a flexible, fact-sensitive, and pragmatic method.⁵⁰¹ Yet here it implies that courts should use the categorical method – which is characterised by its *lack* of flexibility – to adjudicate the competence of collateral challenges.

The problem, then, is that although the majority eventually provided concrete guidance on the adjudication of indirect-review cases, this guidance contradicted what it had said previously. In the result, it is not clear exactly what the flexible method is, whether courts are obliged to use it to adjudicate indirect-review cases, and – if they are obliged to use the method – what this obligation means in practical terms.

4 7 A concluding conundrum

⁴⁹⁹ *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) paras 70-71.

⁵⁰⁰ Para 55.

⁵⁰¹ Paras 30, 37, 44,

4 7 1 Introduction

We have now seen that there are at least three different methods our courts use to adjudicate the competence of collateral challenges. We have also seen that the law on indirect review does not indicate, clearly, which method courts should use. This creates two legal problems.

The first problem is that it is unclear when, and on what grounds, a court will upset the notional parity between the principle of legality and the principle of restraint. As explained in chapter 1, it is unavoidable that the principles will occasionally conflict. But because the rule of law is a founding value of our constitutional dispensation,⁵⁰² the justification for this compromise should be overt and well-founded. The law on indirect review permits the compromise: by allowing a collateral challenge, it allows the principle of certainty to be subordinated to the principle of legality. But it fails to explain, in a coherent way, on what grounds this compromise should be permitted.

The second problem is that the current law on indirect review is incapable of indicating, with reasonable certainty, when a litigant may ignore administrative action and justify his inaction by raising a collateral challenge. Because the law on indirect review is not reasonably clear and accessible, it fails to achieve one of the core purposes of law: to regulate and guide the behaviour of those bound by it.⁵⁰³ The rule of law demands that law achieve this purpose: “[L]aw cannot ‘rule’ unless it is reasonably predictable”,⁵⁰⁴ as the Constitutional Court has put it.

Both problems indicate that, as far as the indirect review of administrative action is concerned, courts have not yet fulfilled their obligation to develop coherent principles

⁵⁰² S 1(c) of the Constitution.

⁵⁰³ *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA) para 14; *Gcaba v Minister for Safety and Security* 2010 1 SA 238 (CC) para 1. The idea that the law should be reasonably clear and certain is manifested by, among other things, the doctrine of precedent and the doctrine of vagueness. On the former, see *Gcaba v Minister for Safety and Security* 2010 1 SA 238 (CC). On the latter, see *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 102; *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) para 108; *South African Liquor Traders' Association and Others v Chairperson, Gauteng Liquor Board, and Others* 2009 (1) SA 565 (CC) paras 25 – 28.

⁵⁰⁴ *Gcaba v Minister for Safety and Security* 2010 1 SA 238 (CC) para 62.

under which cases should be adjudicated. The Constitutional Court forcefully articulated this duty in *Misty v Interim Medical and Dental Council of South Africa*.⁵⁰⁵

“Cases fall to be decided on a principled basis. Each case that is decided adds to the body of South African constitutional law and establishes principles relevant to the decision of cases which may arise in the future...It is...the duty of the Courts of this country to develop a constitutional jurisprudence based on principle and to decide cases in the light of principles that have been established”.⁵⁰⁶

The two problems are problems of a theoretical nature. They show that the law on indirect review does not have a unified theoretical basis. But they are not merely theoretical problems.⁵⁰⁷ They also have consequences for “warm-bodied human beings”.⁵⁰⁸ To illustrate, I conclude by considering the legal position of a motorist that drives through electronic toll plazas (“e-tolls”) on one of the seven main roads in Gauteng.⁵⁰⁹

First, some background. After receiving the approval of the Minister of Transport (“the Minister”), the South African National Roads Agency Ltd (“SANRAL”) declared these toll roads in 2008.⁵¹⁰ It made the declarations under the Roads Act.⁵¹¹ They provoked “unprecedented public and political debate”.⁵¹²

⁵⁰⁵ 1998 4 SA 1127 (CC).

⁵⁰⁶ *Mistry v Interim Medical and Dental Council of South Africa* 1998 4 SA 1127 (CC) para 3. See also *Minister of Safety and Security v Sekhoto* 2011 (5) SA 367 (SCA) para 14.

⁵⁰⁷ On the distinction between theoretical and practical relevance in law, see for instance, *Weenen Transitional Local Council v van Dyk* 2002 4 SA 653 (SCA) para 13; *KwaZulu-Natal Joint Liaison Committee v Member of the Executive Council, Department of Education, KwaZulu-Natal* 2013 4 SA 262 (CC) para 79.

⁵⁰⁸ *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) para 18.

⁵⁰⁹ *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* 2013 4 ALL SA 639 (SCA) para 1.

⁵¹⁰ Para 1.

⁵¹¹ Para 1. S 27(1)(a)(i) of the Roads Act empowers SANRAL – with the Minister’s approval – to declare any road, or part thereof, to be a toll road.

⁵¹² Para 1.

They also provoked litigation. Opposition to Urban Tolling Alliance⁵¹³ (“OUTA”), a voluntary association, instituted a two-part challenge against the e-tolls.⁵¹⁴ The first part was an application for an order interdicting SANRAL from levying and collecting tolls, pending the outcome of the second part. The latter was an application for the judicial review of SANRAL’s decision and the Minister’s decision on which it was predicated.⁵¹⁵

OUTA’s application failed. The interdict was ultimately dismissed by the Constitutional Court.⁵¹⁶ The judicial review was dismissed by the Supreme Court of Appeal.⁵¹⁷

The Supreme Court of Appeal dismissed OUTA’s review-application because it contravened the delay rule: OUTA instituted the application well outside PAJA’s 180-day deadline and failed to show that it would be in the interests of justice to condone its delay.⁵¹⁸ The court held, however, that a collateral challenge to the validity of the toll-road declaration would not be similarly time-barred.⁵¹⁹

This brings us back to indirect review. Is a motorist obliged to pay the e-tolls? Or may he ignore them and justify his impunity by collaterally challenging their validity? The answer to this question depends on whether the competence of a collateral challenge is determined by the theory of the second actor, the categorical method, or the flexible method.

4.7.2 Theory of the second actor

If one applies the theory of the second actor, it seems plain that the motorist may ignore the toll and later raise a collateral challenge. If he is charged under section

⁵¹³ Now known as “Organisation Undoing Tax Abuse”. See *Organisation Undoing Tax Abuse v National Energy Regulator of South Africa* 2016 JDR 0682 (GP) para 51.

⁵¹⁴ *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* 2012 JOL 29370 (GNP).

⁵¹⁵ *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* 2013 4 ALL SA 639 (SCA) paras 2, 16.

⁵¹⁶ *National Treasury v Opposition to Urban Tolling Alliance* 2012 6 SA 224 (CC).

⁵¹⁷ *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* 2013 4 All SA 639 (SCA).

⁵¹⁸ Para 41.

⁵¹⁹ Para 40.

27(5) of the Roads Act with the offence of failing or refusing to pay toll fees,⁵²⁰ the prosecution will depend on the substantive validity, and not the mere factual existence, of the toll-road declaration. That is what the High Court asserted in *S v Smit*.⁵²¹ This means that, like Mr Smit, the motorist in our hypothetical case will be allowed to raise the invalidity of the toll-road declaration as a defence in his criminal trial, should the state seek to enforce the toll upon him.

4 7 3 Categorical method

The categorical method yields the same outcome. The motorist neatly fits the collateral-challenge archetype. He is a “subject”; the prosecution is “a public authority”; the criminal charge amounts to “coercion”; and that this coercion is ultimately based on the toll-road declaration, which is administrative action.

There is also substantial common-law authority that an accused may raise the invalidity of administrative action as a defence to the charge against him.⁵²² In many of these cases, the accused repelled the enforcement of repugnant apartheid by-laws and regulations.⁵²³ Although these cases were decided in a different context, they are, arguably, still authority for the general idea that an accused in a criminal trial is

⁵²⁰ S 27(5) of the Roads Act provides that, should a person be liable to pay a toll, and should that person fail to pay the toll when instructed to do so, he will, firstly, be guilty of an offence, and, secondly, be liable to pay SANRAL a fine.

⁵²¹ *S v Smit* 2007 (2) SACR 335 (T) 378I-379A.

⁵²² See, for instance, *R v Padsha* 1923 AD 281 at 304 (dissenting minority judgment of Innes CJ); *R v Carelse* 1943 CPD 242; *R v Abdurahman* 1950 3 SA 136 (A); *S v Gwala* 1966 4 SA 523 (N); *S v De Wet* 1978 2 SA 515 (T); *S v Botha* 1999 2 SACR 261 (C). Compare *S v Brand* 1973 2 SA 469 (RA); *S v Adams, S v Werner* 1981 1 SA 187 (A). See further, M Wiechers *Administratiefreg* 2nd ed (1984) 303-304; J Taitz *The Inherent Review Jurisdiction of the Supreme Court LLD thesis* Cape Town (1983) 319-321; L Baxter *Administrative Law* (1984) 705-706; G Devenish, K Govender, D Hulme *Administrative Law and Justice in South Africa* (2001) 438-439; JR de Ville *Judicial Review of Administrative Action in South Africa* (2005) 389-393; C Hoexter *Administrative Law in South Africa* (2012) 525.

⁵²³ On the relationship between administrative law and apartheid, see generally, C Hoexter *The Transformation of South African Administrative Law Since 1994 with Particular Reference to the Promotion of Administrative Justice Act 3 of 2000 LLD thesis* University of the Witwatersrand (2009) 10-13; K O'Regan “Breaking Ground: Some Thoughts on the Seismic Shift in our Administrative Law” (2004) 121 SALJ 424-429.

entitled to challenge the administrative action on which the charge against him is founded.⁵²⁴

4 7 4 The flexible method

But the flexible method invites the opposite conclusion. There are several practical and institutional reasons why motorists should not be given latitude to challenge the e-tolls collaterally.

The primary reason is that the state may suffer irreparable harm if it cannot recoup what it expended on the e-tolls. SANRAL paid 20 billion rand to have the e-tolls installed. It did not have this money in reserve, but loaned it.⁵²⁵ It planned to repay the loan through the toll it would collect from motorists. But it may find it impossible to do so if the motorists are entitled to indirectly challenge the e-tolls. In that scenario, SANRAL will not even be able to repay the *interest* on the loan, let alone the capital. Then the fiscus will then be burdened with yet further obligations, given that the South African government guaranteed repayment of SANRAL's loan.⁵²⁶

SANRAL needs revenue from the e-tolls not only to repay its 20-billion-rand loan, but also simply to do its job. This includes maintaining the national road network. SANRAL needs at least 15 billion rand a year for 10 years to do so. Without adequate revenue from the e-tolls, it will not obtain this funding, maintenance costs will increase, the maintenance backlog will grow, and the road network will deteriorate.⁵²⁷

So it may be economically damaging – not only to SANRAL but to the country generally – if motorists may ignore the tolls because they consider them to be invalid. Moreover, given the amount of money that is at risk, and given that government shares that risk, the economic damage could send adverse consequences rippling throughout the public administration.⁵²⁸

⁵²⁴ Y Burns *Administrative Law* 4th ed (2013) 570.

⁵²⁵ Technically, SANRAL did not conclude a loan agreement; it sold sovereign bonds to investors. But these bonds were, in the words of the Supreme Court of Appeal, "effectively repayable loans, repayment of which was guaranteed by the South African Government through Treasury." See *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* 2013 4 All SA 639 (SCA) para 13.

⁵²⁶ Paras 13, 31-33.

⁵²⁷ Para 32.

⁵²⁸ Paras 31-33, 44.

4 7 5 Summation

This practical example illustrates that our courts could coherently reach different conclusions to important indirect-review cases, depending on the judicial method that they use. This creates legal uncertainty for litigants, legal advisors, the judiciary, the state and the public generally. Hence the necessity of imposing a uniform judicial method upon the law of indirect review.

CHAPTER 5: TRANSFORMATIVE ADJUDICATION

5 1 Introduction

In the preceding chapters I argued that courts have used different methods to adjudicate indirect-review cases. I further argued that this methodological diffusion has been harmful to the rule of law and that the law on indirect review is accordingly in need of doctrinal reform.

Such reform requires clarity on the judicial method judges should use to adjudicate the competence of collateral challenges. This calls for the existing judicial methods to be evaluated against an ideal type of judicial method. The purpose of this chapter is to propose transformative adjudication as that ideal.

5 2 The idea of transformative adjudication

5 2 1 Introduction

In *S v Makwanyane*,⁵²⁹ Mahomed J held:

“In some countries the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.”⁵³⁰

Here Mahomed J poignantly expressed the idea that, unlike some constitutions that are preservative in nature,⁵³¹ our Constitution is transformative. The transformative

⁵²⁹ *S v Makwanyane* 1995 3 SA 391 (CC).

⁵³⁰ Para 262.

⁵³¹ F Michaelman “The Rule of Law” in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* 2 ed (OS 2008) 11-24. Michaelman mentions the Constitution of the

nature of our constitutional dispensation has been recognised by our courts on numerous occasions,⁵³² has been a fertile topic for academic discussion,⁵³³ and is evident from the text of the Constitution itself.⁵³⁴ The preamble to the Constitution, for instance, declares that the Constitution is adopted to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental

United States of America, particularly as interpreted by Scalia J in *Michael H v Gerald D* 491 US 110 141 (1989), as an example of a preservative constitution.

⁵³² See, for instance, *Du Plessis v De Klerk* 1996 3 SA 850 (CC) para 157; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) paras 73-74; *Minister of Finance v van Heerden* 2004 6 SA 121 (CC) para 142; *Mkontwana v Nelson Mandela Metropolitan Municipality & Another* 2005 1 SA 530 (CC) para 81; *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC) para 8; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd; In re: Hyandai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) para 21; *Tshwane City v Afriforum* 2016 6 SA 279 (CC) para 14.

⁵³³ The academic literature on this topic is vast. Some of the most influential contributions are: E Mureinik “A Bridge to Where? Introducing the Interim Bill of Rights” (1994) 10 SAJHR 31-48; K Klare “Legal Culture and Transformative Constitutionalism” (1998) 14 SAJHR 146-188; H Botha “Metaphoric Reasoning and Transformative Constitutionalism (part 1)” (2002) TSAR 612-627; H Botha “Metaphoric reasoning and transformative constitutionalism (part 2) TSAR 20-36; D Mosenke “The fourth Bram Fisher memorial lecture: Transformative adjudication” (2002) 18 SAJHR 309-319; AJ van der Walt “Transformative constitutionalism and the development of the South African property law (part 1)” (2005) TSAR 655-689; AJ van der Walt “Transformative constitutionalism and the development of the South African property law (part 2)” (2006) TSAR 1-31; M Pieterse “What do we mean when we talk about transformative constitutionalism?” (2005) 20 SA Public Law 155-166; P Langa “Transformative constitutionalism” (2006) 17 Stell LR 351-360; D Davis & K Klare “Transformative constitutionalism and the common and customary law” (2010) 26 SAJHR 403-509; D Davis “Transformation: the constitutional promise and reality” (2010) 26 SAJHR 85-101.

⁵³⁴ The Interim Constitution expressed its transformative aim through a vivid metaphor. The first paragraph of its epilogue stated: “This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex”. Mureinik was one of the first to engage with the bridge metaphor. In what has become a very influential article, he argued that the Interim Constitution was a bridge from a culture of authority to a culture of justification. See, E Mureinik “A bridge to where? Introducing the Interim Bill of Rights” (1994) 10 SAJHR 31 32.

human rights”,⁵³⁵ while the application section⁵³⁶ obliges every court, when applying a provision of the Bill of Rights to a person, to “apply, or if necessary develop, the common law to the extant that legislation does not give effect to that right”.⁵³⁷

Klare was one of the first to consider how judges should adjudicate under our transformative Constitution.⁵³⁸ He framed this topic as follows:

“The Constitution invites a new imagination and self-reflection about legal method, analysis and reasoning consistent with its transformative goals. By implication, new conceptions of judicial role and responsibility are contemplated. Judicial mindset and methodology are *part of the law*, and therefore they must be examined and revised so as to promote equality, a culture of democracy and transparent governance...[T]he drafters cannot have intended dramatically to alter substantive constitutional foundations and assumptions, yet to have left these new rights and duties to be interpreted through the lens of classical legalist methods.”⁵³⁹

Klare made these remarks in a famous article that considered whether “transformative constitutionalism” is a viable project for South-African lawyers.⁵⁴⁰ In this article he argued that the viability of this project would depend largely on whether South-African lawyers could develop “transformative adjudication”,⁵⁴¹ ie a mode of adjudication congruent with the Constitution’s transformative goals.⁵⁴² Klare’s idea of transformative constitutionalism has “inspired a cottage industry in constitutional

⁵³⁵ On the transformative nature of the preamble, see particularly, *Tshwane City v Afriforum* 2016 6 SA 279 (CC).

⁵³⁶ S 8 of the Constitution, headed “Application”.

⁵³⁷ S 8(3)(a) of the Constitution.

⁵³⁸ K Klare “Legal Culture and Transformative Constitutionalism” (1998) 14 SAJHR 146-188.

⁵³⁹ 149 (original emphasis). See also, A Cockrell “Rainbow Jurisprudence” (1996) 12 SAJHR 1 3; H Botha “Freedom and constraint in constitutional adjudication” (2004) 20 SAJHR 249 249-252.

⁵⁴⁰ K Klare “Legal Culture and Transformative Constitutionalism” (1998) 14 SAJHR 146 150. He described transformative constitutionalism as “a long-term project of constitutional enactment, interpretation, and enforcement committed...to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.”

⁵⁴¹ 157.

⁵⁴² 149-151.

theory".⁵⁴³ Although his related idea of transformative adjudication has not been met with an equally voluminous response, it has also engendered a burgeoning literature.⁵⁴⁴

5.2.2 Formal and substantive reasoning

A central proposition of the abovementioned literature is that there is a distinction between formal and substantive reasoning.⁵⁴⁵ This distinction is sourced from Atiyah

⁵⁴³ AJ van der Walt "Normative pluralism and anarchy: Reflections on the 2007 term" (2008) 1 CCR 77 91 n 56.

⁵⁴⁴ D Moseneke "The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication" (2002) 18 SAJHR 309 309-319; C Hoexter "Contracts in administrative law: life after formalism?" (2004) 121 SALJ 595 598-599; JC Froneman "Legal reasoning and legal culture: our "vision" of law" (2005) 16 *Stell LR* 3 3-20; C Hoexter "Judicial policy revisited: transformative adjudication in administrative law" (2008) 24 SAJHR 281 281-299; G Quinot "Substantive reasoning in administrative-law adjudication" (2010) 3 CCR 111 111-139; C Hoexter "The enforcement of an official promise: form, substance, and the Constitutional Court" (2015) 132 SALJ 207-229.

⁵⁴⁵ Cockrell was one of the first to make this point in the South-African context. See, A Cockrell "Rainbow Jurisprudence" (1996) 12 SAJHR 1-38. Cockrell assessed the performance of the Constitutional Court's jurisprudence during 1995, the first year of its existence. He noted that the Constitutional Court appeared to be pre-occupied with "values", and argued that "the explicit intrusion of constitutional values into the new adjudicative process signals a transition from a 'formal vision of law' to a 'substantive vision of law' in South Africa." (3) According to Cockrell, this transition forced judges accustomed to formal reasoning to engage with substantive reasons in the form of moral and political values. Cockrell's main point was that this transition had been "traumatic" (4), as the Constitutional Court had struggled to engage in coherent substantive reasoning. Cockrell's article appeared before the term "transformative adjudication" had been coined, but his article undoubtedly engages with the idea underlying the term, and has been influential in the transformative-adjudication literature. See, for instance, JC Froneman "Legal reasoning and legal culture: our "vision" of law" (2005) 16 *Stell LR* 3 4; C Hoexter "Judicial policy revisited: transformative adjudication in administrative law" (2008) 24 SAJHR 281 285; G Quinot "Substantive reasoning in administrative-law adjudication" (2010) 3 CCR 111 111. To be clear, I am not saying that Cockrell and Klare made the same argument (cf T Roux "Transformative constitutionalism and the best interpretation of the South African Constitution: Distinction without a difference" (2009) 20 *Stell LR* 258 n 4). I am saying that both authors, in their own way, considered how substantive considerations should inform adjudication under the Constitution.

and Summers' comparative study of English and American legal systems.⁵⁴⁶ In this study the authors describe a substantive reason as a "moral, economic, political, institutional, or other social consideration",⁵⁴⁷ and a formal reason as a "legally authoritative reason on which judges and others are empowered or required to base a decision or action...which overrides...any countervailing substantive reason".⁵⁴⁸

These definitions can be explained by way of two examples. A substantive reason for the delay rule is that it promotes legal certainty, while a formal reason for the rule is that section 7 of the PAJA says that judicial-review proceedings must be instituted without unreasonable delay and within 180 days. A substantive reason for enforcing a speeding ticket is that it discourages reckless driving and promotes safe road transport, while a formal reason is that the motorist in question failed to adhere to a sign that obliged him to drive at a speed of less than 120 kilometres per hour.

A formal reason removes a decision-maker's discretion to impose substantive considerations on the situation. For example, the 180-day rule removes the discretion to decide that a delay of 181 days is reasonable in the circumstances of the case,⁵⁴⁹ while the 120-kilometres-per-hour rule removes the discretion to decide that it was safe and orderly to drive 121 kilometres per hour in the circumstances of the case.⁵⁵⁰

Formal and substantive reasons are justified by "second-level substantive reasons".⁵⁵¹ The justification for substantive reasons is self-evident: they articulate moral, political, economic, and institutional convictions.⁵⁵² The justification for formal reasons is less obvious but no less compelling: they make for cost-effective decision-

⁵⁴⁶ PS Atiyah & RS Summers *Form and substance in Anglo-American Law: A comparative study of legal reasoning, legal theory, and legal institutions* (1987) 5-11; cited in, A Cockrell "Rainbow Jurisprudence" (1996) 12 SAJHR 1 5; JC Froneman "Legal reasoning and legal culture: our "vision" of law" (2005) 16 Stell LR 3 4; C Hoexter "Judicial policy revisited: transformative adjudication in administrative law" (2008) 24 SAJHR 281 285; G Quinot "Substantive reasoning in administrative-law adjudication" (2010) 3 CCR 111 111.

⁵⁴⁷ PS Atiyah & RS Summers *Form and substance in Anglo-American Law* (1987) 1.

⁵⁴⁸ 2.

⁵⁴⁹ Unless the judge condones the delay in terms of s 9 of the PAJA.

⁵⁵⁰ 2.

⁵⁵¹ PS Atiyah & RS Summers *Form and substance in Anglo-American Law* (1987) 1 21.

⁵⁵² 21.

making, promote legal certainty, and curb capricious and irrational interpretations of the law.⁵⁵³

Based on the distinction between formal and substantive reasoning, Atiyah and Summers propose two “visions” of law: a formal vision and a substantive vision.⁵⁵⁴ Under a formal vision, formal reasoning is privileged over substantive reasoning; conflicts of laws are resolved by recourse to rules of hierarchical priority; law is seen as mainly as a collection of hard and fast rules; and the adjudicative task is to apply the rules without much recourse to substantive considerations.⁵⁵⁵ Under a substantive vision, substantive reasoning is privileged over formal reasoning; conflicts of laws are resolved mainly with recourse to moral and political reasons; law is seen as mainly consisting of flexible standards, the exact content of which is derived from interpretation; and the adjudicative task is to “examine and improve upon the substantive quality of the law.”⁵⁵⁶

Drawing from Atiyah and Summers’ analysis, Cockrell,⁵⁵⁷ Mosenke DCJ,⁵⁵⁸ Froneman J,⁵⁵⁹ Hoexter,⁵⁶⁰ and Quinot,⁵⁶¹ have argued that the start of the constitutional era – and the advent of a transformative Constitution in particular – marked a shift from a formal to a substantive vision of the law. This new vision of our

⁵⁵³ 21-28. See also A Cockrell “Rainbow Jurisprudence” (1996) 12 SAJHR 1 5-6; F Schauer *Playing by the rules: A philosophical examination of rule-based decision-making in law and in life* (1991) 135-162.

⁵⁵⁴ PS Atiyah & RS Summers *Form and substance in Anglo-American Law* (1987) 411-415. They define a “vision of law” as “a set of inarticulate and perhaps even unconscious beliefs held by the general public at large and, to some extent, also by politicians, judges, and legal practitioners, as to the nature and functions of law – how and by whom it should be made, interpreted, applied and enforced.”

⁵⁵⁵ 413-414.

⁵⁵⁶ 413-414.

⁵⁵⁷ A Cockrell “Rainbow Jurisprudence” (1996) 12 SAJHR 1 7-9.

⁵⁵⁸ D Mosenke “The fourth Bram Fisher memorial lecture: transformative adjudication” (2002) 18 SAJHR 309 316.

⁵⁵⁹ JC Froneman “Legal reasoning and legal culture: our “vision” of law” (2005) 16 Stell LR 3 3-5.

⁵⁶⁰ C Hoexter “Judicial policy revisited: transformative adjudication in administrative law” (2008) 24 SAJHR 281 285-286.

⁵⁶¹ G Quinot “Substantive reasoning in administrative-law adjudication” (2010) 3 CCR 111 111-112.

law sees adjudication differently: it is no longer mainly concerned with the application of formal reasons; it is now mainly concerned with substantive reasoning.

5 3 Transformative adjudication in practice

5 3 1 Introduction

The law's "vision" is an arresting metaphor. But for what is it a metaphor, exactly? Adjudication is ultimately a practical matter,⁵⁶² and cannot function on the basis of metaphor alone. Fortunately, there are several principles of substantive reasoning that resonate throughout the transformative-adjudication literature and explain what substantive reasoning means in practice. I will now briefly discuss three of these principles I consider to be primary.

5 3 2 Variability

The first principle is that of variability.⁵⁶³ Variability essentially entails that the rules of administrative justice should not be applied in an all-or-nothing manner, but that their manner of application may vary according to the context in which they are applied.⁵⁶⁴

The principle of variability has influenced our administrative law in several ways. Our courts have long recognised, for instance, that the rules of procedural fairness are

⁵⁶² See, for instance, JC Froneman "Legal reasoning and legal culture: our "vision" of law" (2005) 16 *Stell LR* 3 15: "The study and practice of law is a *practical* discipline. We do law in order to arrive at solutions of practical issues. We do not have the luxury of postponing conclusions. The practice of law demands the making of decisions, sometimes quickly and urgently."

⁵⁶³ G Quinot "Substantive reasoning in administrative-law adjudication" (2010) 3 *CCR* 111 115-116.

⁵⁶⁴ C Hoexter "The future of judicial review in South African administrative law" (2000) 117 *SALJ* 484 502; C Hoexter *Administrative law in South Africa* (2012) 151, 404-405.

context-sensitive.⁵⁶⁵ More recently our courts have recognised that the rules of reasonableness vary from context to context.⁵⁶⁶

Yet in order to advance the substantive vision of the law it is not enough to simply frame legal rules in open-ended terms, or in terms of a list of factors that guide their application. It is also crucial that “these sorts of distinctions should not be made in a formalistic, heavy-handed or mechanical way”.⁵⁶⁷ Otherwise something like the classification-of-functions approach,⁵⁶⁸ which was itself a “perverse” kind of variability,⁵⁶⁹ will be the result.

5 3 3 Anti-formalism

This leads to the second principle of substantive reasoning: anti-formalism. In considering anti-formalism it is necessary first look at *formalism* specifically, as this is a troublesome word.⁵⁷⁰ It is troublesome because it escapes precise definition, as any

⁵⁶⁵ H Corder “The content of the *audi alteram partem* in South African administrative law (1980) 43 *THRHR* 156; L Baxter *Administrative Law* (1984) 541; C Hoexter *Administrative law in South Africa* (2012) 151, 404-405. The variability of the rules of procedural fairness is also encoded in the PAJA. S 3(2)(a) of the PAJA says that “[a] fair administrative procedure depends on the circumstances of each case”. See further, *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) para 29.

⁵⁶⁶ The *locus classicus* is *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 45. Here O'Regan J enumerated a list of “factors” to guide the variable application of reasonableness. O'Regan J seemingly drew these factors from: C Hoexter “The future of judicial review in South African administrative law” (2000) 117 *SALJ* 484 503. Hoexter's article was not only concerned with the variable application of reasonableness, but more generally with a theory of “defence” to navigate a court's involvement in polycentric issues. This is an intricate topic that cannot be explored in detail here. For a critical overview of the topic see, PJ Maree & G Quinot “A decade and a half of deference (part 1)” (2016) *TSAR* 268-280; PJ Maree & G Quinot “A decade and a half of deference (part 2)” (2016) *TSAR* 447-466.

⁵⁶⁷ C Hoexter “The future of judicial review in South African administrative law” (2000) 117 *SALJ* 484 503.

⁵⁶⁸ See part 5 3 3 below.

⁵⁶⁹ C Hoexter “The future of judicial review in South African administrative law” (2000) 117 *SALJ* 484 504.

⁵⁷⁰ F Schauer “Formalism” (1988) 97 *Yale Law Journal* 509 509-511; C Hoexter “Contracts in administrative law: life after formalism?” (2004) 121 *SALJ* 595 597; C Forsyth “Showing the

effort to neatly circumscribe the word's meaning leads to a performative contradiction.⁵⁷¹ I therefore propose the following description of formalism not because it is *the* definite statement on the matter, but because it has been judicially endorsed.⁵⁷² According to Hoexter, formalism is:

“[A] judicial tendency to attach undue importance to the pigeonholing of a legal problem and to its superficial or outward characteristics; and a concomitant judicial tendency to rely on technicality rather than substantive principle or policy, and on conceptualism instead of common sense...In cases displaying formalistic legal reasoning the merits often seem strangely divorced from the outcome of the case, so that it is difficult and perhaps even embarrassing to explain the case to a layperson. There is often a reliance on what one might call *code*: legalistic shorthand that lawyers may understand, however dimly, but that others will find impenetrable and altogether mystifying”.⁵⁷³

Anti-formalism, then, is a commitment to steer away from this type of reasoning, and above all to subordinate *code* to substantive reasoning.⁵⁷⁴ But although the proponents of transformative adjudication clearly seek to subordinate formal reasoning to substantive reasoning, they are not critical of formal reasoning as such. What they categorically reject is *formalistic* reasoning. There is only a five-letter difference between “formal reasoning” and “formalistic reasoning”. Yet the semantic difference is large.

Formal reasoning is an indispensable part of judicial decision-making. It is the logical scaffolding on which reasoned outcomes are built. Transformative adjudication

way out of the flybottle: the value of formalism and conceptual reasoning in administrative law” (2007) 66 *Cambridge Law Journal* 325 326-327.

⁵⁷¹ Robert Alexy explains that a performative contradiction is “provoked by someone who, while carrying out a speech act, presupposes, claims or implies something which contradicts the contents of the same speech act.” See, R Alexy “Discourse theory and human rights” in R Martin & G Sprenger (eds) *Challenges to the law at the end of the 20th century: Rights* (1997) 81 86. The performative contradiction I wish to avoid is to advocate for anti-formalism in a formalistic way.

⁵⁷² See *KwaZulu-Natal Joint Liaison Committee v MEC, Department of Education, KwaZulu-Natal* 2013 6 BCLR 615 (CC) para 80.

⁵⁷³ C Hoexter “Contracts in administrative law: life after formalism?” (2004) 121 SALJ 595 597.

⁵⁷⁴ D Davis & K Klare “Transformative constitutionalism and the common and customary law” (2010) 26 SAJHR 403 407-408.

therefore does not call for the abandonment of this mode of thinking.⁵⁷⁵ Instead, it asks judges to bear in mind that formal rules are ultimately justified by second-level substantive reasons,⁵⁷⁶ and that instead of mechanically applying the rules as if they are their own justification, they should openly acknowledge the substantive reasons that informs their decision-making.⁵⁷⁷

Formalistic reasoning is perhaps best illustrated by “conceptualism”,⁵⁷⁸ which has been described as “the fallacious belief that it is possible to solve problems syllogistically by the mere application of concepts to them”.⁵⁷⁹ The most notorious example of conceptualism is the “classification-of-functions” approach used by courts in pre-Constitutional administrative law.⁵⁸⁰

According to this approach, the courts grouped all administrative acts into simple categories.⁵⁸¹ Once an administrative act was classified according to one of these categories, the law regulating the act was thought to be clear.⁵⁸² For instance, if an act was classified as a “legislative” administrative act, it was considered non-delegable.⁵⁸³ If the act was classified as “purely administrative”, it was considered to

⁵⁷⁵ G Quinot “Substantive reasoning in administrative-law adjudication” (2010) 3 CCR 111 116.

⁵⁷⁶ 5-7.

⁵⁷⁷ 5-7.

⁵⁷⁸ C Hoexter “Judicial policy revisited: transformative adjudication in administrative law” (2008) 24 SAJHR 281 287.

⁵⁷⁹ 287. In giving this description Hoexter draws particularly on the work of Roscoe Pound and Rudolf von Jhering. She further cites HLA Hart *Essays in Jurisprudence and Philosophy* (1983) 267 269. See also, J Froneman “Legal reasoning and legal culture: Our ‘vision’ of law” (2005) 16 Stell LR 3 16. Davis and Klare call this type of reasoning a “formalist error”. According to them it “occurs when a lawyer believes...that a particular authoritative legal norm (or concept or rule or principle) *entails* a specific legal result or conclusion, when, in fact, a qualified legal practitioner using accepted tool and canons of legal reasoning can generate one or more alternative results or conclusions that are *also* compatible with the norm”. See, D Davis & K Klare “Transformative constitutionalism and the common and customary law” (2010) 26 SAJHR 403 407.

⁵⁸⁰ C Hoexter “The future of judicial review in South African administrative law” (2000) 117 SALJ 484 502; G Quinot “Substantive reasoning in administrative-law adjudication” (2010) 3 CCR 111 115.

⁵⁸¹ L Baxter *Administrative Law* (1984) 344.

⁵⁸² 344.

⁵⁸³ 346, 440.

be immune from natural justice.⁵⁸⁴ In this way, difficult questions of administrative law were answered in an automatic fashion, as if by a “jurisprudential slot-machine”.⁵⁸⁵

One finds similar conceptualism⁵⁸⁶ in the way some courts treat PAJA’s definition of “administrative action”.⁵⁸⁷ They are prone to parse each element of the administrative-action definition narrowly, instead of reasoning substantively about what administrative justice means in the context of the case at hand.⁵⁸⁸

5 3 4 The back-to-front approach

But if we are to steer away from formalism, in which direction should we be going? The third principle of substantive reasoning provides a destination. Froneman J has called this principle the “back-to-front” approach.⁵⁸⁹ Froneman J borrows this term from Madala J’s judgement in *Du Plessis v De Klerk*,⁵⁹⁰ where Madala J starts his reasoning by stating that his analysis of the matter would be “back-to-front” by first considering the Constitution’s underlying values.⁵⁹¹

⁵⁸⁴ 347.

⁵⁸⁵ D Davis “To Defer and When? Administrative Law and Constitutional Democracy” (2006) *Acta Juridica* 13 34.

⁵⁸⁶ C Hoexter “‘Administrative Action’ in the Courts” (2006) *Acta Juridica* 303 306; G Quinot “Substantive reasoning in administrative-law adjudication” (2010) 3 *CCR* 111 111 117.

⁵⁸⁷ The PAJA defines “administrative action” in s 1(i). This definition is widely criticised for being – among other things – cumbersome, contradictory, imprecise, narrow, and convoluted (see, for instance: *Grey’s Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 6 SA 313 (SCA) para 21; *Minister of Defence and Military Veterans v Motau* 2014 5 SA 69 (CC) para 33; C Hoexter “‘Administrative Action’ in the Courts” (2006) *Acta Juridica* 303 306). Our courts have attempted to impose some order by splitting the definition into several elements. See, for instance, *Minister of Defence and Military Veterans v Motau* 2014 5 SA 69 (CC) para 33.

⁵⁸⁸ C Hoexter “‘Administrative Action’ in the Courts” (2006) *Acta Juridica* 303 312.

⁵⁸⁹ JC Froneman “Legal reasoning and legal culture: our “vision” of law” (2005) *Stell LR* 3 3. It is revealing that the approach is described as “back-to-front” rather than “front-to-back”. It shows, as all the authors on transformative adjudication point out, that South African legal culture has traditionally embraced a very formal vision of the law. This formal legal culture is so entrenched that it inhibits the development of a substantive vision of the law. See further, D Davis & K Klare “Transformative constitutionalism and the common and customary law” (2010) 26 *SAJHR* 403 405-408.

⁵⁹⁰ *Du Plessis v De Klerk* 1996 3 SA 850 (CC).

⁵⁹¹ Para 156.

The back-to-front approach requires jurists to take the Constitution as the point of departure to the solution of a legal problem, even if the problem is not, on the face of it, a constitutional issue. Hence in solving legal questions judges should ultimately be reasoning congruently with the values underlying the Constitution, regardless of the question's apparent degree of specificity. This does not mean that judges should simply abandon the crystallised rules of specific fields of law. It means that they should view those rules in the light of the second-order substantive reasons underlying them, and candidly acknowledge which reasons they relied on to reach their conclusions.⁵⁹²

5 4 The blind spot

If the back-to-front provides a destination to reason towards, the next question is simply: how does one get there? This question has been asked since the start of the constitutional era,⁵⁹³ it has been asked repeatedly,⁵⁹⁴ and it has been asked in a seemingly “increasing order of indignation”.⁵⁹⁵ If substantive reasoning gives the law a vision, we may think of this question as the blind spot in that vision.

The basic problem underlying this question is that the open-ended, variable nature of substantive reasoning – if left unchecked – may vitiate legal coherence, established doctrine, and the rule of law. In Cockrell’s memorable words, if substantive reasoning lacks rigour it produces “rainbow jurisprudence” – propositions that “flit before our eyes like rainbows, beguiling us with their lack of substance”.⁵⁹⁶ A key feature of such rainbow jurisprudence is that it treats constitutional values as incommensurable and assumes “competing values can, mysteriously, be accommodated within the embrace of a warm, fuzzy consensus”.⁵⁹⁷

⁵⁹² G Quinot “Substantive reasoning in administrative-law adjudication” (2010) 3 CCR 111 116.

⁵⁹³ See, for instance, A Cockrell “Rainbow Jurisprudence” (1996) 12 SAJHR 1-38.

⁵⁹⁴ See, for instance, S Woolman “The Amazing, Vanishing Bill of Rights” (2007) 124 SALJ 762-794; J Lewis “The Constitutional Court of South Africa” (2009) 125 *Law Quarterly Review* 440; JJ Gauntlett “The sounds of silence?” (2011) 2 TSAR 226-233; L T C Harms “The Puisne Judge, the Chaos Theory and the Common Law (2014) 131 SALJ 3-10.

⁵⁹⁵ L Boonzaier “Good Reviews, Bad Actors: The Constitutional Court’s Procedural Drama” (2015) 7 CCR 1 24 n 134.

⁵⁹⁶ See, for instance, A Cockrell “Rainbow Jurisprudence” (1996) 12 SAJHR 1 1-38.

⁵⁹⁷ 12.

It is perilous to ignore this blind spot. When the law's vision is unclear the rule of law suffers.⁵⁹⁸ This is because the rule of law includes the doctrine of vagueness,⁵⁹⁹ which expresses the idea that, for the law to fairly regulate the conduct of those bound by it, it must be clear and accessible.⁶⁰⁰ This does not mean that the law must be unequivocal. It means that the law must indicate with reasonable certainty what those bound by the law should do or not do.⁶⁰¹ This obligation of clarity rests on the judiciary as much as it rests on the legislature, as the courts play a crucial role in determining the content of the law.⁶⁰² As Quinot puts it:

“As much as it is the Constitutional Court’s role to act as final interpreter of what the Constitution means in substance and how legal rules are to comply with those substantive standards, the Court must also provide guidance to other courts on the appropriate adjudicate method under the Constitution. Such guidance should not only flow from the Court’s express instructions on adjudicative method, but also (and perhaps most importantly) from its own example.”⁶⁰³

Although the back-to-front approach shows us where substantive reasoning should go, we need directions to get there. If courts reason without direction they imperil the rule of law. In this regard, the single-system-of-law principle may provide direction. I briefly introduce the principle in the next section.

⁵⁹⁸ JJ Gauntlett “The sounds of silence?” (2011) 2 *TSAR* 226 227.

⁵⁹⁹ *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) para 108.

⁶⁰⁰ *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) para; *Kruger v President of the Republic of South African and Others* 2009 (1) SA 417 (CC) para 65; *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2007 (5) SA 438 (SCA) para 9; *South African Liquor Traders’ Association and Others v Chairperson, Gauteng Liquor Board, and Others* 2009 (1) SA 565 (CC) paras 25 – 28.

⁶⁰¹ *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) para 108 (emphasis added).

⁶⁰² G Quinot “Substantive reasoning in administrative-law adjudication” (2010) 3 *CCR* 111 118.

⁶⁰³ 118.

5 5 A single system of law

5 5 1 Introduction

Under the Interim Constitution there was a cleft between the jurisdiction of the Constitutional Court and the Appellate Division. The Constitutional Court was the court of final instance in constitutional matters while the Appellate Division was the court of final instance in non-constitutional matters.⁶⁰⁴ Due to this jurisdictional division, the appellate courts had equal status: a litigant could not appeal to the Constitutional Court against a decision of the Appellate division, and *vice versa*.⁶⁰⁵

The Supreme Court of Appeal initially held that administrative law would reflect this bifurcated system of jurisdiction. In *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd* ("Container Logistics"),⁶⁰⁶ a case decided under the Interim Constitution,⁶⁰⁷ the Supreme Court of Appeal held that it could review administrative action in terms of the common law and without recourse to the Constitution.⁶⁰⁸ The court reasoned that judicial review under the Constitution and under the common law are "different concepts": constitutional judicial review is concerned with whether administrative action coheres with the Constitution; common-law judicial review, on the other hand, is concerned with whether administrative action coheres with the empowering statute and with the requirements of natural justice.⁶⁰⁹

The Constitutional Court considered this proposition in *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* ("Pharmaceutical Manufacturers").⁶¹⁰ The legal question in *Pharmaceutical Manufacturers* was whether the court had the power to review and set aside a decision of the President to bring an Act into force.⁶¹¹ Relying on *Container Logistics*, counsel for the applicants argued that this question did not raise a constitutional issue because

⁶⁰⁴ Ss 101(5) and 168(3) of the Interim Constitution.

⁶⁰⁵ I Currie & J de Waal *The Bill of Rights Handbook* 5 ed (2005) 111.

⁶⁰⁶ *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd* 1999 3 SA 771 (SCA).

⁶⁰⁷ Para 7.

⁶⁰⁸ Para 20.

⁶⁰⁹ Para 20.

⁶¹⁰ 2000 2 SA 674 (CC).

⁶¹¹ *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 2 SA 674 (CC) para 1.

it could be decided under the common law, without recourse to the Constitution.⁶¹² The Constitutional Court rejected this argument. Chaskalson P, for a unanimous court, held:

“I cannot accept this contention, which treats the common law as a body of law separate and distinct from the Constitution. There are not two systems of law, each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest Court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.”⁶¹³

According to Hoexter, “[t]he importance of this dictum can hardly be overestimated, and the idea of ‘one system of law’ continues to have significant implications for South African administrative law”.⁶¹⁴ The most significant implications of the dictum for this thesis is that it forms the basis of an adjudicative approach⁶¹⁵ that could give substantive reasoning the rigour it deserves.

The single-system-of-law idea can be used as a point of departure to determine which source of law – the Constitution, legislation, or the common law – should apply to a dispute when two or all three of the sources seem to apply at the same time.⁶¹⁶

⁶¹² Para 21.

⁶¹³ Para 44.

⁶¹⁴ C Hoexter *Administrative Law* 2 ed (2012) 28.

⁶¹⁵ What I mean by “adjudicative approach” is more fully described by van der Walt as follows:

“In addition to the identification of the applicable source of law, research on the single-system-of-law principle (together with the subsidiary principles) has also produced results that might have a significant impact on the methodology of adjudication, in the sense of guidelines that could provide an ‘angle of approach’, a possible sequence of questions to be asked, to guide the adjudication of property disputes in a single but complex constitutional system.”

See, AJ van der Walt “Property law in the Constitutional Democracy” (2017) 28 *Stell LR* 8 12 (footnotes omitted).

⁶¹⁶ See, in particular, AJ van der Walt “Normative pluralism and anarchy: Reflections on the 2007 term” (2008) 1 *CCR* 77-128; AJ van der Walt *Property and Constitution* (2012); AJ van der Walt “Property law in the Constitutional Democracy” (2017) 28 *Stell LR* 8 9-13. Van der Walt drew particularly from, F Michelman “The rule of law legality and supremacy of the Constitution” in S Woolman et al (eds) *Constitutional law of South Africa* (2nd ed, OS, 2005) 34-44.

The idea therefore has a unifying, organising goal.⁶¹⁷ But it does not indicate, on its own terms, precisely how the Constitution, legislation, common law, and customary law should interact in the single system of law in a case before a court. These directions are provided by the principles of subsidiarity, which have been developed by our courts in a series of judgments.⁶¹⁸

5 5 2 Subsidiarity

Subsidiarity entails a hierarchical configuration of institutions, norms, principles, or remedies. It denotes the idea that a higher, more general norm should only be invoked where a lower, more specific norm is not applicable.⁶¹⁹ Simply put, subsidiarity encourages a “bottom-to-top” approach.⁶²⁰

The idea of subsidiarity manifests in several different ways in our law.⁶²¹ One of its manifestations is a pair of rules that determine the source of law a litigant should invoke to protect his constitutional rights where more than one of source of law could

⁶¹⁷ AJ van der Walt “Normative pluralism and anarchy: Reflections on the 2007 term” (2008) 1 CCR 100-128; AJ van der Walt “Property law in the Constitutional Democracy” (2017) 28 *Stell LR* 8 10.

⁶¹⁸ AJ van der Walt “Normative pluralism and anarchy: Reflections on the 2007 term” (2008) 1 CCR 77 105-128; AJ van der Walt *Property and Constitution* (2012) 35; M Murcott & W van der Westhuizen “The Ebb and Flow of the Application of the Principle of Subsidiarity – Critical Reflections on *Motau* and *My Vote Counts*” (2015) 7 CCR 43-53.

⁶¹⁹ *My Vote Counts NPC v Speaker of the National Assembly* 2016 1 SA 132 (CC) paras 46, 121; L du Plessis “‘Subsidiarity’: What’s in the Name for Constitutional Interpretation and Adjudication” (2006) 17 *Stell LR* 207 209-211.

⁶²⁰ M Murcott & W van der Westhuizen “The Ebb and Flow of the Application of the Principle of Subsidiarity – Critical Reflections on *Motau* and *My Vote Counts*” (2015) 7 CCR 43 46.

⁶²¹ See, for example, *S v Mhlungu* 1995 7 BCLR 793 (CC) para 59 (subsidiarity dictates that, where possible, a court should decide a case without reaching a constitutional issue), but compare *Jordaan v Tswane Metropolitan Municipality* 2017 6 SA 287 (CC) para 8 (“constitutional approaches to rights determination must generally enjoy primacy”). See also *Ex parte Minister of Safety & Security: In re: S v Walters* 2002 4 SA 613 (CC) para 22 (subsidiarity dictates that force should only be used to effect an arrest where there are no lesser means of doing so); *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 4 BCLR (CC) para 50 (subsidiarity dictates that, where the Constitution contains both a specific right and a more general right, it is appropriate first to invoke the specific right).

potentially apply.⁶²² The first rule regulates the relationship between the Constitution and legislation that has been enacted to give effect to a constitutional right. The second rule regulates the relationship between such legislation and the common law. For ease of reference, I will refer to the former as the “Constitution/legislation rule” and to the latter as the “Constitution/legislation/common-law rule”.

5 5 2 1 *The Constitution/legislation rule*

Several Acts give effect to rights in the Bill of Rights. The Promotion of Access to Information Act 2 of 2000, for instance, gives effect to the right of access to information.⁶²³ The Labour Relations Act 66 of 1995 gives effect to constitutional labour-law rights.⁶²⁴ And the PAJA similarly gives effect to the right to just administrative action.⁶²⁵

Where legislation has been enacted to give effect to a constitutional right, subsidiarity determines that a litigant should rely on the legislation to protect the right. The litigant may not bypass the legislation and rely directly on the constitutional right itself.⁶²⁶ This is because the legislation is the specific, local norm, while the constitutional right is the general, abstract norm. In terms of subsidiarity’s “bottom-up” approach, the specific norm must be exhausted before the general norm may be used.⁶²⁷

⁶²² AJ van der Walt “Normative pluralism and anarchy: Reflections on the 2007 term” (2008) 1 CCR 77 105-128; AJ van der Walt *Property and Constitution* (2012) 35; M Murcott & W van der Westhuizen “The Ebb and Flow of the Application of the Principle of Subsidiarity – Critical Reflections on *Motau* and *My Vote Counts*” (2015) 7 CCR 43-53; *My Vote Counts NPC v Speaker of the National Assembly* 2016 1 SA 132 (CC) paras 50, 121.

⁶²³ S 32 of the Constitution; *My Vote Counts NPC v Speaker of the National Assembly* 2016 1 SA 132 (CC) paras 50, 121.

⁶²⁴ S 23 of the Constitution.

⁶²⁵ Long title of the PAJA; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 25.

⁶²⁶ See, for instance, *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) para 51; *MEC for Education, KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) para 40; *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) para 73.

⁶²⁷ *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC) para 51; AJ van der Walt “Normative pluralism and anarchy: Reflections on the 2007 term” (2008) 1 CCR 77 100-103.

The Constitutional Court proposed⁶²⁸ this rule of subsidiarity in *Minister of Health v New Clicks South Africa (Pty) Ltd.*⁶²⁹ Here a pharmaceutical company challenged the validity of medicine-pricing regulations the Minister of Health had made under the Medicines and Related Substances Act 101 of 1965. The High Court held that both the Minister's decision to make the regulations, and the recommendations on which that decision was based, were not administrative acts and could therefore not be reviewed under the PAJA.⁶³⁰ The court held that the regulations could be reviewed under the principle of legality and under section 33 of the Constitution.⁶³¹ But the court apparently held that it was immaterial which source of law it used to scrutinise the validity of the regulations.⁶³² In the event, it elected to follow the section-33 pathway to review.⁶³³

The Supreme Court of Appeal took a similar approach.⁶³⁴ It held that it was immaterial whether the decision should be reviewed under PAJA, as the decision was reviewable under the principle of legality.⁶³⁵

The Constitutional Court rejected this "free alternative"⁶³⁶ approach. In a concurring minority judgment, Chaskalson CJ held that the PAJA gives effect to the rights contained in section 33 of the Constitution, and that it "was clearly intended to be, and

⁶²⁸ According to van der Walt ((2008) CCR 100 fn 104), the Constitution/legislation rule was formulated by the High Court in *NAPTO SA v Minister of Education, Western Cape* 2001 1 SA 112 (C) 123I-J, mooted by the Constitutional Court in *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC), and finally confirmed by that court in *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) paras 51-52. See further *My Vote Counts NPC v Speaker of the National Assembly* 2016 1 SA 132 (CC) paras 55-56.

⁶²⁹ 2006 2 SA 311 (CC).

⁶³⁰ *New Clicks South Africa (Pty) Ltd v Tsabalala-Msimang NO* 2005 2 SA 530 (C) paras 43, 49.

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⁶³² C Hoexter *Administrative Law in South Africa* (2012) 132.

⁶³³ *New Clicks South Africa (Pty) Ltd v Tsabalala-Msimang NO* 2005 2 SA 530 (C).

⁶³⁴ *Pharmaceutical Society of South Africa v Tshabalala-Msimang NO* 2005 3 SA 238 (SCA); C Hoexter *Administrative Law in South Africa* (2012) 132.

⁶³⁵ *Pharmaceutical Society of South Africa v Tshabalala-Msimang NO* 2005 3 SA 238 (SCA) para 94.

⁶³⁶ C Hoexter *Administrative Law in South Africa* (2012) 132.

in substance is, a codification of these rights".⁶³⁷ This means, Chaskalson CJ explained, that a litigant may not circumvent the PAJA by seeking to rely directly on section 33 of the Constitution where the PAJA regulates the impugned decision.

This does not mean that a litigant may not rely directly on section 33 of the Constitution under any circumstances. A litigant may directly invoke the right to argue that the PAJA,⁶³⁸ other legislation,⁶³⁹ or the common law⁶⁴⁰ unjustifiably limits his right to administrative justice.

5 5 2 2 *The relationship between the principle of legality and the PAJA*

Litigants often ask courts to review the exercise of public power against the principle of legality.⁶⁴¹ The principle of legality is an even more abstract, general norm than the right to administrative justice enshrined in section 33 of the Constitution,⁶⁴² and is thus a more abstract norm than the PAJA. Accordingly, in terms of the Constitution/legislation rule, if the exercise of public power amounts to "administrative action" under the PAJA, it should be reviewed by way of that Act and not by way of the principle of legality.⁶⁴³

The principle of legality should, in other words, function as a "safety net".⁶⁴⁴ It should provide a means of reviewing the exercise of public power that does not amount to "administrative action" under the PAJA.⁶⁴⁵

⁶³⁷ *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC) para 95, citing *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) para 25.

⁶³⁸ I Currie & J de Waal *The Bill of Rights Handbook* (2005) 648-649.

⁶³⁹ *Zondi v MEC for Traditional and Local Government Affairs* 2005 3 SA 589 (CC) paras 99-103.

⁶⁴⁰ See, for example, *Trustees, Bellocchio Trust v Engelbrecht NO & Another* 2002 JOL 9365 (C).

⁶⁴¹ C Hoexter *Administrative Law in South Africa* (2012) 133-137.

⁶⁴² Murcott & van der Westhuizen (2015) CCR 50.

⁶⁴³ C Hoexter *Administrative Law in South Africa* (2012) 132; Murcott & van der Westhuizen (2015) CCR 50-52.

⁶⁴⁴ C Hoexter "The Enforcement of an Official Promise: Form, Substance and the Constitutional Court" (2015) 132 SALJ 207 219; *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2017 2 SA 63 (SCA) para 38.

⁶⁴⁵ C Hoexter *Administrative Law in South Africa* (2012) 137.

This safety net is vital. Because the PAJA's definition of "administrative action" is limiting and confusing,⁶⁴⁶ the Act often fails to apply to governmental conduct that should be subject to some form of judicial oversight. The principle of legality ensures that these public actions are susceptible to judicial scrutiny, even if they are not regulated by the PAJA.⁶⁴⁷ When it works as a safety net, the principle of legality does "at least some of the work that administrative law would ordinarily do".⁶⁴⁸

The relationship between the principle of legality and the PAJA is clear in theory. But it is unsettled in practice.⁶⁴⁹ Our courts have, for instance, occasionally ignored the hierarchy between the principle of legality and the PAJA by using a "free alternative" approach.⁶⁵⁰ They have also occasionally inverted the hierarchy by preferring the principle of legality to the PAJA in cases where the impugned decision possibly amounted to administrative action.⁶⁵¹

The relationship between the principle of legality and the PAJA was recently at issue in *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* ("Gijima").⁶⁵² In this matter the State Information Technology Agency ("SITA"), an organ of state, impugned its own decision to conclude a contract with Gijima Holdings, a private company.⁶⁵³ The litigants agreed that SITA's decision contravened section 217 of the Constitution.⁶⁵⁴

⁶⁴⁶ *Greys Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 6 SA 313 (SCA) para 21.

⁶⁴⁷ C Hoexter *Administrative Law in South Africa* (2012) 137.

⁶⁴⁸ 137.

⁶⁴⁹ L Kohn "Our curious administrative law love triangle: The complex interplay between the PAJA, the Constitution and the common law" (2013) 28 SA *Public Law* 22 23, 30.

⁶⁵⁰ See, for example, *Valuline CC v Minister of Labour* 2013 4 SA 326 (KZP); *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Tourism and Environmental Affairs; KwaZulu-Natal; Democratic Alliance v South African Broadcasting Corporation SOC Ltd* 2017 2 BLLR 153 (WCC) paras 165-166. See further, D Brand & M Murcott "Administrative Law" (2014) *Annual Survey of South African Law*; D Brand, M Murcott & W van der Westhuizen "Administrative Law" (2016) 4 JQR 2.1.1.

⁶⁵¹ See, for instance, *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) para 80. For commentary, see C Hoexter *Administrative Law in South Africa* (2012) 137; Murcott & van der Westhuizen (2015) CCR 50-52.

⁶⁵² 2017 ZACC 40.

⁶⁵³ Para 3.

⁶⁵⁴ *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2016 4 All SA 842 (SCA) para 1.

SITA asked the court to review its decision under the principle of legality. Both the High Court and the Supreme Court of Appeal refused to do so.⁶⁵⁵ They found that SITA's decision to contract with Gijima amounted to administrative action,⁶⁵⁶ and that SITA should therefore have sought review under the PAJA, not the principle of legality. The High Court and the Supreme Court of Appeal thus adhered to the doctrine of subsidiarity and, more specifically, to the Constitution/legislation rule.⁶⁵⁷

But the Constitutional Court held that an organ of state must invoke the principle of legality, and not the PAJA, when it seeks the judicial review of its own decisions.⁶⁵⁸ The court reasoned that the rights in PAJA accrue to natural and juristic persons; that these rights are enforceable against the state; that the state cannot enforce rights against itself; and that the rights in the PAJA do not vest in the state when it challenges its own decisions.⁶⁵⁹

The Constitutional Court and the Supreme Court of Appeal thus reached opposite conclusions. This may create the impression that the Constitutional Court disregarded the Constitution/legislation rule. But that impression would, in my view, be incorrect.

The Constitutional Court based its reasoning on whether the PAJA applied or not. The court implied that SITA would have been obliged to rely on the PAJA, had that Act been applicable. So, unlike the minority of the Supreme Court of Appeal *Gijima*, the Constitutional Court did not support a free-alternative approach to the principle of legality and the PAJA.⁶⁶⁰ And unlike in its judgment in *Albutt v Centre for the Study of Violence and Reconciliation*,⁶⁶¹ the court did not hold that the PAJA should be subordinated to the principle of legality.⁶⁶² The Constitutional Court thus seems to have upheld the doctrine of subsidiarity in *Gijima*.

5 5 2 3 *The Constitution/legislation/common-law rule*

⁶⁵⁵ Para 1.

⁶⁵⁶ Paras 16-21.

⁶⁵⁷ Paras 38, 44.

⁶⁵⁸ *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 2 SA 23 (CC) paras 18-37.

⁶⁵⁹ Paras 18-37.

⁶⁶⁰ *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2016 4 All SA 842 (SCA) paras 47, 55-65.

⁶⁶¹ 2010 3 SA 293 (CC).

⁶⁶² *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC) para 80.

The second rule flowing from the doctrine of subsidiarity regulates the relationship between the Constitution, legislation, and the common law. According to this rule, if a litigant seeks to protect a right in the Bill of Rights, and if Parliament has made legislation to give effect to the right, the litigant must have recourse to that legislation, and not the common law, to protect the right.⁶⁶³ This rule recognises that the common law is a more abstract and indirect norm than legislation giving effect to a constitutional right.⁶⁶⁴

The Constitutional Court formulated this rule in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*.⁶⁶⁵ Bato Star Fishing (Pty) Ltd, the applicant in this case, held a commercial fishing license that entitled it to catch a fixed annual quota of hake. It asked government for a larger quota. Government obliged but was not nearly as generous as Bato Star thought it should have been. So Bato Star went to court, seeking the judicial review of government's quota-allocation decision.⁶⁶⁶

The parties agreed that the quota-allocation decision was "administrative action" in terms of the PAJA.⁶⁶⁷ But it was unclear what Bato Star's cause of action was, as it did not mention the PAJA in its notice of motion or founding affidavit.⁶⁶⁸

The Constitutional Court held that Bato Star's cause of action derived from the PAJA and that the courts below had erred in not recognising this.⁶⁶⁹ O'Regan J, who wrote the majority judgment, reasoned as follows: *Pharmaceutical Manufacturers* established that administrative action is regulated by a single system of law; the core of this system is section 33 of the Constitution, not the common-law doctrine of *ultra vires*; the PAJA gives effect to section 33 of the Constitution; section 6 of the PAJA states the grounds upon which a court may review administrative action; and section

⁶⁶³ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 25; *Chirwa v Transnet Ltd* 2008 2 SA 24 (CC) para 23; van der Walt (2008) CCR 103.

⁶⁶⁴ Muncott & van der Westhuizen (2015) CCR 44, 48-49.

⁶⁶⁵ 2004 4 SA 490 (CC) para 25; confirmed in *Chirwa v Transnet Ltd* 2008 2 SA 24 (CC) para 23.

⁶⁶⁶ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) paras 1, 11, 16.

⁶⁶⁷ Para 24.

⁶⁶⁸ Paras 20-21.

⁶⁶⁹ Para 26.

6 of the PAJA thus provides the ordinary cause of action for the judicial review of administrative action.⁶⁷⁰

O'Regan J thus held that, where an impugned act or decision amounts to "administrative action" under the PAJA, the act or decision should be challenged by way of the PAJA and not by way of the common law. This does not mean that the common law is irrelevant, however. It provides guidance on the meaning of the PAJA's provisions.⁶⁷¹ It also performs a "gap-filling" function by governing areas of administrative law that the PAJA fails to govern, such as the regulatory decisions of private bodies.⁶⁷²

5 6 Conclusion

This chapter has proposed transformative adjudication as the ideal judicial method. It has been explained that this method adheres to a substantive vision of the law. It takes the back-to-front approach as its point of departure; establishes rules and principles of a variable nature; avoids conceptualism and other forms of formalistic reasoning; and is organised around the single-system-of-law principle.

This ideal method provides a basic structure for cogently and systematically comparing the different methods our courts have used to adjudicated indirect-review cases. The aim of the next chapter is to undertake this comparison.

⁶⁷⁰ Paras 22-26.

⁶⁷¹ *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 2 SA 674 (CC) para 45.

⁶⁷² *National Horseracing Authority of Southern Africa v Naidoo* 2010 3 SA 182 (N) para 4 (judgment of Levinsohn DJP); I Currie & J de Waal *The Bill of Rights Handbook* (2005) 650; C Hoexter *Administrative Law* (2012) 127-128. Compare A Breitenbach "The Place of the Common Law in 'Constitutional' Administrative Law" in H Corder & L van der Vijver (eds) *Realising Administrative Justice* (2002) 37 44. The regulatory decisions of private bodies have long been subject to common-law administrative law. See, for example, *Turner v Jockey Club of South Africa* 1974 3 SA 633 (A); *Theron v Ring van Wellington van die NG Sendingkerk in Suid Afrika* 1976 2 SA 1 (A).

CHAPTER 6: ASSESSMENT

6 1 Introduction

The previous chapter proposed transformative adjudication as the ideal judicial method. We have seen that this method consists of three essential elements that are buttressed by the single-system-of-law principle. The first element is variability, being the practise of applying legal rules in a way that is sensitive to the context in which they are applied.⁶⁷³ The second element is anti-formalism, which is a policy of avoiding the mechanical, unreflective application of the law.⁶⁷⁴ The third element is the “back-to-front” approach, which is a commitment to taking the Constitution as the point of departure to the adjudication of a dispute.⁶⁷⁵

The aim of this chapter is to measure the second-actor method, the categorical method, and the flexible method against the ideal of transformative adjudication. I will do this by considering, in respect of each method, whether it is variable, encourages anti-formalism, and embraces the back-to-front approach. The purpose of this exercise is to ultimately recommend a judicial method that courts should use to adjudicate indirect-review cases, which is the aim of chapter 7.

6 2 Second-actor method

6 2 1 Introduction

The main advantage of the second actor method is that it is based on Forsyth’s theory of the second actor, which, as we have seen, is nuanced and coherent.⁶⁷⁶ However, I will argue below that this theory is less variable than it appears to be, lends itself to be used in a formalistic way, and originates from a jurisdiction that does not encourage the back-to-front approach. As a result, the second actor method fails to meet the ideal of transformative adjudication.

⁶⁷³ See chapter 5 part 5 3 2 above.

⁶⁷⁴ See chapter 5 part 5 3 3 above.

⁶⁷⁵ See chapter 5 part 5 3 4 above.

⁶⁷⁶ See chapter 2 part 2 3 above.

6 2 2 Variability

A judge that uses the second-actor method must determine whether the second actor's powers depend on the factual existence or the legal validity of the initial administrative act.⁶⁷⁷ According to the theory of the second actor, the judge must make this determination by interpreting the empowering provision that is the source of the second actor's powers.⁶⁷⁸

A defining trait of administrative action is that it is based on an empowering instrument.⁶⁷⁹ As the second-actor method is directed at the meaning of such instruments, it seems that all administrative action could be analysed through the second-actor method. It would seem, then, that the second-actor method is highly variable.

But, in my submission, it is not. Although administrative action is axiomatically based on some empowering instrument, very few of these instruments express what the second actor's powers are.⁶⁸⁰ The second-actor method will accordingly find little traction in most empowering instruments.

Forsyth would certainly disagree. He acknowledges that most empowering instruments do not expressly articulate second actors' powers. But he argues that these powers are discernible even where the empowering instrument does not say, expressly, what they are.⁶⁸¹ He argues that they can be discerned by the following principles of interpretation:

⁶⁷⁷ See chapter 2 part 2 3 2 above.

⁶⁷⁸ See chapter 2 part 2 3 2 above.

⁶⁷⁹ G Quinot & P Maree "Administrative Action" in G Quinot (ed) *Administrative Justice in South Africa: An Introduction* (2015) 86. This defining trait of administrative law is captured by the definition of "administrative action" in s 1 of the PAJA. According to this definition, a decision will only be "administrative action" if it was made in terms of the Constitution, legislation or another empowering provision. This is underscored by the fact that, in terms of s 1 of the PAJA, "administrative action" entails a "decision", and a "decision" means "any decision of an administrative nature made...under an empowering provision" (emphasis added). See further, C Hoexter *Administrative Law* (2012) 205-206.

⁶⁸⁰ Forsyth (2006) *Acta Juridica* 219.

⁶⁸¹ 220-221.

- (i) If the impugned administrative act was directed at a specific person, and not to the world at large, then the person at whom the act was directed should have less scope for challenging the act collaterally.⁶⁸²
- (ii) If the empowering instrument provides for internal remedies against the impugned administrative action, then it would be contrary to the scheme of the instrument to allow a collateral challenge to the impugned act or decision.⁶⁸³
- (iii) The more the empowering instrument seeks to promote the principle of certainty, the less scope there should be for raising a collateral challenge to an act or decision based on the empowering instrument.⁶⁸⁴
- (iv) The powers of the second actor should be interpreted congruently with human rights: allowing a collateral challenge may violate the human rights of persons who have acted on the assumption that the impugned act or decision is valid; and disallowing a collateral challenge may violate the human rights of the person seeking to make the challenge.⁶⁸⁵

Forsyth stresses that these principles are tools of statutory interpretation, not free-standing criteria for assessing the competence of a collateral challenge. In his view, this is because judges should decide indirect-review cases by interpreting the relevant empowering instruments, and not by simply using their discretion.⁶⁸⁶

In my view, there are two problems with this claim. First, it is doubtful whether courts have, in fact, used the principles as interpretative tools and not as free-standing criteria. As Daly argues, many of the cases that produced these principles were

⁶⁸² Forsyth (2006) *Acta Juridica* 220, citing *Boddington v British Transport Police* 1999 2 AC 143 (HL) at 653D.

⁶⁸³ HWR Wade & C Forsyth *Administrative Law* 11ed (2014) 237, 252, citing *R v Wicks* 1998 AC 92.

⁶⁸⁴ Forsyth (2006) *Acta Juridica* 220-221, citing *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) paras 32-34.

⁶⁸⁵ Forsyth (2006) *Acta Juridica* 220-221, citing the United Kingdom's Human Rights Act 1998.

⁶⁸⁶ Forsyth (2006) *Acta Juridica* 221-222; HWR Wade & C Forsyth *Administrative Law* 11 ed (2014) 237.

decided by way of policy and pragmatism, and not, as Forsyth contends, by way of statutory interpretation and conceptual analysis.⁶⁸⁷

Second, it is doubtful whether courts in South Africa will use the principles simply as tools of statutory interpretation. As we have seen, in its majority judgment in *Merafong City*, the Constitutional Court determined that courts should use the flexible method to decide indirect-review cases.⁶⁸⁸ Under this fact-sensitive and discretionary method, the proper role of the principles would be to assist a judge in deciding whether it would be just to allow a collateral challenge in the circumstances of the case, not simply to aid in the interpretation of the relevant empowering instrument.

The second actor method therefore has a low degree of variability. Although it purports to apply to all administrative action, it can only be usefully applied in limited cases where the empowering instrument is clear on the second actor's powers. This might explain why our courts have only infrequently used the second actor method to adjudicate indirect-review cases, notwithstanding *Oudekraal*'s venerated status in our law.⁶⁸⁹

6 2 3 Formalism

It seems obvious that the theory of the second actor is formalistic, as Forsyth himself says that it is.⁶⁹⁰ But the theory's true nature, which is obscured by the polyvalence of the word "formalism", is more nuanced.

Unlike the authors of the transformative adjudication literature, Forsyth considers "formalism" to be a virtue, not a vice.⁶⁹¹ Notably, Forsyth uses the word "formalism" to refer to that which Atiyah and Summers call "formal reasoning", which is something transformative adjudication encourages.⁶⁹² So, while Forsyth and the authors of the transformative adjudication literature may use the word "formalism" in different ways,

⁶⁸⁷ P Daly "Voidness and voidability" (03-03-2017) *Administrative Law in the Common Law World* < <https://adminlawblog.org/2017/03/03/2> > (accessed 1-10-2017).

⁶⁸⁸ See chapter 4 above.

⁶⁸⁹ See chapter 3 above.

⁶⁹⁰ Forsyth (2007) *Cambridge Law Journal* 326-327.

⁶⁹¹ 327.

⁶⁹² See chapter 5 part 5 5 3 above.

they seem to agree that formal reasoning is indispensable to just administrative law adjudication.⁶⁹³

It would therefore be incautious to assume that the theory of the second actor is formalistic *per se*. However, given that the theory focuses exclusively on statutory interpretation, avoids pragmatic considerations, and seeks to limit the range of judicial discretion as much as possible, it is clear the theory could easily be used in a formalistic manner.⁶⁹⁴

6 2 4 The back-to-front approach

The theory of the second actor originated in the United Kingdom. While our administrative law has been greatly influenced by the administrative law of that jurisdiction,⁶⁹⁵ the two legal systems differ in material respects. I will now briefly discuss one such difference and explain how it prevents the second actor theory from encouraging a back-to-front approach.

In the United Kingdom, the traditional justification for judicial review is the *ultra vires* doctrine. According to this doctrine, the purpose of judicial review is to ensure that administrators do not exceed the powers given to them by Parliament. Judicial review aims to ensure that administrators do not act *ultra their vires*, in other words.⁶⁹⁶

The *ultra vires* doctrine, as classically formulated by Dicey, is an incident of the doctrine of parliamentary sovereignty,⁶⁹⁷ a central feature of public law in the United Kingdom. At its simplest, this doctrine expresses the idea that Parliament has

⁶⁹³ See, for instance, C Hoexter *The Transformation of South African Administrative Law Since 1994 with Particular Reference to The Promotion of Administrative Justice Act 3 of 2000* DPhil thesis Witwatersrand (2009) 37-39.

⁶⁹⁴ K Saller "When Worlds Collide: Implications of the Constitutional Court's Decision in *Jaftha v Schoeman* when Viewed Through the Lens of the Second Actor Theory Accepted in *Oudekraal Estates (Pty) Ltd v City of Cape Town*" (2005) 122 SALJ 725 740.

⁶⁹⁵ C Hoexter *Administrative Law in South Africa* (2012) 14-15.

⁶⁹⁶ *Boddington v British Transport Police* 1999 2 AC 143 at 164; HWR Wade & C Forsyth *Administrative Law* 11ed (2014) 237; C Forsyth & L Whittle "Judicial Creativity and Judicial Legitimacy in Administrative Law" (2002) 8 *Canterbury Law Review* 453 453.

⁶⁹⁷ L Ringhand "Fig Leaves, Fairy Tales, and Constitutional Foundations: Debating Judicial Review in Britain" (2005) 43 *Columbia Journal of Transnational Law* 865-904; C Hoexter *Administrative Law in South Africa* (2012) 115.

unlimited law-making power and that no person or institution other than Parliament may undo its laws.⁶⁹⁸ Because Parliament is the supreme authority, the function of the judiciary is to ensure that the intention of Parliament is obeyed. The judiciary performs this function by invalidating actions and decisions that are *ultra vires*.⁶⁹⁹

Under the Diceyan view of the *ultra vires* doctrine, judicial review is empowered by, and serves to protect, the doctrine of parliamentary sovereignty.⁷⁰⁰ Wade and Forsyth put it as follows:

“Parliamentary sovereignty...profoundly affects the position of the judges. They are not guardians of constitutional rights, with power to declare statutes unconstitutional...Subject only to the overriding law of the European Union, they can only obey the latest expression of the will of Parliament. Nor is their own jurisdiction sacrosanct. If they fly too high, Parliament may clip their wings.”⁷⁰¹

The validity of the *ultra vires* doctrine is the subject of a protracted debate.⁷⁰² Forsyth, an important voice in this debate, is a firm defender of the doctrine against its critics.⁷⁰³ One argument he makes in support of the doctrine relates to collateral challenge.

Forsyth argues that collateral challenges are only possible because of the doctrine of *ultra vires*.⁷⁰⁴ He illustrates this proposition by referring to the situation where a defendant in a criminal trial, adjudicated by a Magistrates' court, raises a collateral

⁶⁹⁸ AV Dicey *An Introduction to the Study of the Law of the Constitution* 10 ed (1959) xxxiv.

⁶⁹⁹ P Joseph “The Demise of *Ultra Vires* – a Reply to Christopher Forsyth and Linda Whittle” (2002) 8 *Canterbury Law Review* 463 463; C Hoexter *Administrative Law in South Africa* (2012) 115.

⁷⁰⁰ L Ringhand “Fig Leaves, Fairy Tales, and Constitutional Foundations: Debating Judicial Review in Britain” (2005) 43 *Columbia Journal of Transnational Law* 865 874-875.

⁷⁰¹ HRW Wade & C Forsyth *Administrative Law* 11 ed (2014) 23.

⁷⁰² The intricacies of this debate are beyond the realm of this thesis. For overviews of the copious literature the debate has produced, see C Forsyth (ed) *Judicial Review and the Constitution* (2000); L Ringhand “Fig Leaves, Fairy Tales, and Constitutional Foundations: Debating Judicial Review in Britain” (2005) 43 *Columbia Journal of Transnational Law* 865-904.

⁷⁰³ See, for instance, C Forsyth “Of Fig Leaves and Fairy Tales: the *Ultra Vires* Doctrine, the Sovereignty of Parliament and Judicial Review” (1996) 55 *Cambridge Law Journal* 122-140.

⁷⁰⁴ C Forsyth “Collateral Challenge and the Rule of Law” (1999) 4 *Judicial Review* 165 167; C Forsyth & L Whittle “Judicial Creativity and Judicial Legitimacy in Administrative Law” (2002) 8 *Canterbury Law Review* 453 458.

challenge to the validity of a bylaw. The court has no jurisdiction to declare the bylaw invalid. But according to the doctrine of *ultra vires*, if the author of the bylaw contravened his empowering instrument when he made the bylaw, the bylaw will be void, “[f]or acts are non-existent when the decision-maker has no power to make the decision in question”.⁷⁰⁵ If the bylaw is void, the magistrate will be entitled to disregard it, as there will be nothing in law to enforce or to invalidate. If the bylaw were merely voidable, by contrast, it would necessarily found a conviction, since the Magistrate would have no jurisdiction to set it aside.⁷⁰⁶

According to Forsyth, the doctrine of *ultra vires* enables the magistrate to consider the collateral challenge to the bylaw’s validity. Conversely, “if *ultra vires* disappears, then so too would collateral challenge”.⁷⁰⁷ One reason for not abandoning the *ultra vires* doctrine, then, is that this would deprive certain accused persons of a defence to the charges against them. This, in turn, would undermine the principle of legality.⁷⁰⁸

But the *ultra vires* doctrine faces the problem we considered in the beginning of chapter 2: although invalid acts may be theoretically void, they often have legally effective consequences before being declared invalid by a court.⁷⁰⁹ As we have seen, Forsyth proposes the theory of the second actor as the solution to this problem. In his view, the theory explains how a void act could have legally effective consequences.⁷¹⁰

Forsyth argues that the theory of the second actor emanates from, and supports, the *ultra vires* doctrine: while the *ultra vires* doctrine makes collateral challenges possible in principle, it is the theory of the second actor that determines whether a collateral challenge is permissible in a particular case.⁷¹¹ The theory does this by illuminating whether a collateral challenge accords with the relevant empowering instrument; in other words, whether it would accord with the will of Parliament to allow a collateral challenge to be made. Under the theory of the second actor, then, a judge does not use his own discretion to decide whether it would be just to permit a collateral

⁷⁰⁵ C Forsyth “Collateral Challenge and the Rule of Law” (1999) 4 *Judicial Review* 165 167.

⁷⁰⁶ 167.

⁷⁰⁷ C Forsyth & L Whittle “Judicial Creativity and Judicial Legitimacy in Administrative Law” (2002) 8 *Canterbury Law Review* 453 458.

⁷⁰⁸ C Forsyth “Collateral Challenge and the Rule of Law” (1999) 4 *Judicial Review* 165 165.

⁷⁰⁹ 168.

⁷¹⁰ See chapter 2 part 2 3 2 above.

⁷¹¹ C Forsyth “Collateral Challenge and the Rule of Law” (1999) 4 *Judicial Review* 165 165 168.

challenge. He rather determines whether, in terms of the will of Parliament, the collateral challenge should be countenanced.⁷¹²

The theory of the second actor therefore serves the twin doctrines of *ultra vires* and parliamentary sovereignty. It falls beyond the scope of this thesis to consider whether it does so successfully, as that would require a detailed discussion of the English law on point.⁷¹³ For the purposes of this thesis it suffices to note that the theory of the second actor serves two doctrines that have been supplanted by the Constitution in the South African context.

The Constitution determines that South Africa's legal order is founded on constitutional supremacy⁷¹⁴ and not on parliamentary supremacy as in the past.⁷¹⁵ Accordingly, our courts do not derive their judicial-review powers from the doctrine of *ultra vires*⁷¹⁶ or only from their inherent jurisdiction,⁷¹⁷ but from the Constitution itself.⁷¹⁸

This transition from parliamentary sovereignty to constitutional supremacy was profound.⁷¹⁹ The doctrine of parliamentary sovereignty limited our court's power to review administrative action and to protect fundamental rights. It enabled Parliament

⁷¹² 168.

⁷¹³ For a critique of Forsyth's argument from the perspective of English law, see T Adams "The Standard Theory of Administrative Unlawfulness" (2017) 76 *Cambridge Law Journal* 289 303-304.

⁷¹⁴ Ss 1(c) and 2 of the Constitution. For an analysis of the doctrine of constitutional supremacy in general, see F Michaelman "The Rule of Law" in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* 2 ed (OS 2008) 11-34 – 11-42.

⁷¹⁵ See L Baxter *Administrative Law* (1984) 30; M Wiechers *Administratiefreg* 2 ed (1984) 17; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) paras 28-32; *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 2 SA 674 (CC) paras 37-38.

⁷¹⁶ Compare L Baxter *Administrative Law* (1984) 307-312.

⁷¹⁷ Compare *Johannesburg Consolidated Investment Co Ltd v Johannesburg Town Council* 1903 TS 111 at 115; *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) paras 23, 28.

⁷¹⁸ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) para 22; K O'Regan "Breaking Ground: Some Thoughts on the Seismic Shift in Our Administrative Law" (2004) 121 SALJ 424 431; C Hoexter *Administrative Law in South Africa* (2012) 114-118.

⁷¹⁹ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) para 32; *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 2 SA 674 (CC) para 40.

to make laws as it deemed fit⁷²⁰ and to instruct administrators to enforce iniquitous policies.⁷²¹ The Constitution, on the other hand, contains a justiciable Bill of Rights⁷²² which is binding on all persons, entities, and branches of government.⁷²³

Under a dispensation of constitutional supremacy, the role of the judiciary is not to apply the will of the Parliament. It is to apply the Constitution and other law independently, impartially, and without “fear, favour, or prejudice”.⁷²⁴ Within the boundaries of the doctrine of separation of powers,⁷²⁵ the judiciary is thus obliged to ensure that all arms of government, including the legislature, act consistently with the Constitution.⁷²⁶

Given that the theory of the second actor serves the twin doctrines of *ultra vires* and parliamentary sovereignty, and given that these doctrines are at odds with our constitutional dispensation, it is doubtful whether the theory could accommodate a back-to-front approach. That is the fundamental reason why the second-actor method falls short of the ideal of transformative adjudication.

6 3 The categorical method

6 3 1 Introduction

The categorical method has two attractive features. The first is that the content of the method is clear and readily ascertainable. The second is that the method provides

⁷²⁰ Under the erstwhile dispensation of parliamentary sovereignty, Acts of Parliament were substantially immune from judicial review. A court could only review an Act if it had not been passed in conformity with the prescribed procedure. See *Harris v Minister of the Interior* 1952 2 SA 428 (A); I Currie & J de Waal *The Bill of Rights Handbook* 5 ed (2005) 3-4.

⁷²¹ C Hoexter *Administrative Law* (2012) 14-15.

⁷²² Ss 7 and 8 of the Constitution.

⁷²³ Ss 2 and 8 of the Constitution.

⁷²⁴ S 165(2) of the Constitution.

⁷²⁵ See *Minister of Health v Treatment Action Campaign* 2002 5 SA 721 (CC) para 98. For an overview of the doctrine of separation of powers in general, see S Seedorf & S Sibanda “Separation of Powers” in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* 2 ed (OS 2008) 12-1 – 12-94.

⁷²⁶ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 1 SA 374 (CC) paras 28, 32.

robust protection to the principle of legality and thus protects at least one aspect of the rule of law.⁷²⁷

However, as I will explain below, the categorical method obtains these attractive features at a cost. Because it is premised on a fixed rule, the method fails to achieve variability and anti-formalism. And because it seeks to protect only one aspect of the rule of law, it fails to adopt a balanced back-to-front approach.

6.3.2 Variability and anti-formalism

The categorical method is premised on the rule that a collateral challenge will only be allowed where a “subject is sought to be coerced by a public authority into compliance with an unlawful administrative act”.⁷²⁸ The method entails determining whether this rule is satisfied by the facts of the case at hand. This determination usually takes the form of one of two questions. The first is whether the challenger is “coerced by a public authority”. The second is whether the challenger is “a subject”.⁷²⁹

Rules are, by their very nature, over-inclusive or under-inclusive.⁷³⁰ A rule is over-inclusive when it applies to more states of affairs than it was intended to regulate, and it is under-inclusive if it fails to apply to states of affairs it was intended to regulate.⁷³¹

Consider the example of a legislature that intends to reduce noise in public spaces, and, to achieve that purpose, makes a rule prohibiting pets from public parks. While this rule reduces noise by prohibiting boisterous pets from parks, it is over-inclusive to the extent that it also bars pets that are unlikely to cause a disturbance. And while the rule removes the noise created by pets, it is under-inclusive to the extent that it does not remove the noise created by other things that may be found in parks, such as portable music players or electric toys.⁷³²

The categorical method is similarly over-inclusive and under-inclusive. It is over-inclusive because it allows *all* “subjects” to raise collateral challenges, even though

⁷²⁷ See chapter 3 part 3.3 above.

⁷²⁸ *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) para 35.

⁷²⁹ See chapter 3 part 3.3 above.

⁷³⁰ F Schauer *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (1991) 31-34.

⁷³¹ 31-34.

⁷³² Compare HLA Hart *The Concept of Law* 3rd ed (2012).

there are some subjects who should arguably not be given this opportunity. And it is under-inclusive because it *only* permits “subjects” to collaterally challenge administrative action, even though the rule of law may require a public authority to use a collateral challenge on occasion.

The method’s over-inclusiveness is demonstrated by the Supreme Court of Appeal’s judgment in *Nature’s Choice*. As discussed in chapter 3, in this case a municipality declined a company’s request for permission to install a boiler. The court ruled that the company could collaterally challenge the municipality’s decision even though the company had, on two prior occasions, flouted the municipality’s measures to protect the environment.

This was arguably an over-inclusive ruling. If the Supreme Court of Appeal adopted the High Court’s reasoning in *Khabisi*,⁷³³ it would not have tolerated the company’s collateral challenge at all. The fact that the company was being coerced by a public authority would have been outweighed by the fact that the company had previously flouted that authority’s instructions. In other words, although the company was a “subject”, it would not have been given an opportunity to make a collateral challenge.

The method’s under-inclusiveness is demonstrated by the Supreme Court of Appeal’s judgments in *Kwa Sani*, *Merafong City*, and *Tasima*.⁷³⁴ Here the court used the categorical method to hold that, because organs of state are not “subjects”, they may not challenge administrative action collaterally.⁷³⁵ By contrast, in its judgment in *Merafong City*, the Constitutional Court explained that organs of state might justifiably require the protection given by collateral challenges even though they are not “subjects” in the concept’s conventional sense.⁷³⁶

Two implications can be drawn from the categorical method’s under-inclusiveness and over-inclusiveness. The first is that the method has a low degree of variability: it only permits a collateral challenge in a limited range of fixed circumstances. The second implication is that courts have mainly used the method in a formalistic way: they have generally assumed that the competence of a collateral challenge can be

⁷³³ See chapter 3 part 3 4 2 above.

⁷³⁴ See chapter 3 part 3 3 2 above.

⁷³⁵ *Kwa Sani Municipality v Underberg/Himeville Community Watch Association* 2015 2 All SA 657 (SCA) para 14; *Merafong City v AngloGold Ashanti Ltd* 2016 2 SA 176 (SCA) paras 15-17; *Tasima v Department of Transport* 2016 1 All SA 465 (SCA) 476I-477C.

⁷³⁶ *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) paras 55-56.

determined by mechanically applying a rule, ie that a collateral challenge is permissible where a “subject is sought to be coerced by a public authority into compliance with an unlawful administrative act”.⁷³⁷

6 3 3 The back-to-front approach

The categorical method determines that a subject may use a collateral challenge to resist being coerced into compliance with unlawful administrative action. This is because “[i]t would be a fundamental departure from the rule of law if an individual were liable for contravention of some rule which is itself liable to be set aside by a court as unlawful”.⁷³⁸ The categorical method thus gives effect to the principle of legality,⁷³⁹ which expresses the idea that the exercise of public power must be authorised by law.⁷⁴⁰

Because the categorical method gives effect to the principle of legality, it embraces the back-to-front approach to a limited extent. This is because the principle of legality is an incident of the rule of law, a foundational value of our constitutional dispensation.⁷⁴¹

But the categorical method’s alignment with the Constitution is incomplete and oversimplified. The method does not adequately account for the fact that the rule of law also consists of the principle of certainty and that this principle is often at cross-purposes with the principle of legality.⁷⁴² Moreover, the method fails to provide grounds on which a judge can subordinate one of these principles to the other, should they be in conflict in a case before the court. The categorical method therefore only partially encourages a back-to-front approach.

⁷³⁷ *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) para 35.

⁷³⁸ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) para 26, quoting *Boddington v British Transport Police* 1999 2 AC 143 (HL) 153H-154A.

⁷³⁹ J Bleazard & S Budlender “Remedies in Judicial Review Proceedings” in G Quinot (ed) *Administrative Justice in South Africa: An Introduction* (2015) 246-247

⁷⁴⁰ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 58.

⁷⁴¹ See chapter 1 above.

⁷⁴² See chapter 1 above.

6 4 The flexible method

6 4 1 Introduction

As I will explain below, while the categorical method promotes legal certainty at the cost of variability and non-formalism, the flexible method promotes variability and non-formalism at the cost of legal certainty. What both methods have in common is that they fail to present a coherent and balanced back-to-front approach. The flexible method therefore also falls short of the ideal of transformative adjudication.

6 4 2 Variability

The flexible method is highly variable. Unlike the theory of the second actor and the categorical method, it does not prescribe any typical or ideal cases in which a collateral challenge should be allowed. On the contrary, it can be applied in any conceivable case in which “justice requires”⁷⁴³ a collateral challenge to be permitted, which “will depend, in each case, on the facts”.⁷⁴⁴

6 4 3 Formalism

It is also doubtful whether the flexible method could be used in a formalistic way. This is because the method does not prescribe a fixed set of criteria that courts must take into account when considering the competence of a collateral challenge. Courts using the method are accordingly left with little option but to engage in substantive reasoning.

But although the method’s lack of prescriptive criteria engenders substantive reasoning, it also produces uncertainty about the legal position. This is illustrated by Cameron J’s judgment in *Merafong City*. As discussed in chapter 4, while the judgment may have produced a bespoke solution to the dispute before the court, it failed to provide guiding principles which courts could use in the adjudication of future

⁷⁴³ *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) paras 55.

⁷⁴⁴ Para 55.

indirect-review cases.⁷⁴⁵ In the result, even though the judgment may have given the litigants in *Merafong City* more certainty about their dispute, it has failed to provide clarity about the law on indirect review.

The flexible method's lack of prescriptive criteria also exposes the method to the risk of being used in an entirely *ad hoc* and unorganised way, at odds with the prescripts of formal reasoning. The flexible method could therefore engender "rainbow jurisprudence".⁷⁴⁶ Such jurisprudence is not only antithetical to the ideal of transformative adjudication, but harmful to the rule of law.⁷⁴⁷

6 4 4 The back-to-front approach

Perhaps the greatest failing of the flexible method is that it does not entail a coherent back-to-front approach. The method does not explain which aspects of the Constitution should be taken into account when considering the competence of a collateral challenge. Nor does it explain how the principle of legality and the principle of certainty should interact in the law on indirect review.

In my view, the Constitutional Court's majority judgment in *Merafong City* exemplifies this failing. As explained in chapter 5, our courts have developed the principles of subsidiarity to determine how the Constitution, the common law, and legislation should interact in a single system of law.⁷⁴⁸ Yet the judgment failed to use these principles to explain how the Constitution interfaces with the common law on indirect review, on the one hand, and with the PAJA, on the other.⁷⁴⁹ As a result, although the judgment was ostensibly "grounded in the Constitution",⁷⁵⁰ it failed to provide coherent guidance on how a court should use the Constitution to decide whether a litigant should be permitted to raise a collateral challenge.

⁷⁴⁵ See chapter 4 part 4 6 3 above.

⁷⁴⁶ See chapter 5 part 5 4 above.

⁷⁴⁷ *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 2 SA 150 (SCA) para 14; *Gcaba v Minister for Safety and Security* 2010 1 SA 238 (CC) para 1.

⁷⁴⁸ See chapter 5 part 5 5 2 above.

⁷⁴⁹ Although the judgment was ostensibly based on section 172(1) of the Constitution, it is not clear that this section of the Constitution should be used to decide the competence of a collateral challenge. See chapter 4 above.

⁷⁵⁰ *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) paras 55.

6 5 Conclusion

The main conclusion of this chapter is that courts should not use the theory of the second actor, the categorical method, or the flexible method to adjudicate the competence of a collateral challenge. This is because, notwithstanding their meritorious features, all these methods fall short of the ideal of transformative adjudication in significant respects. A common problem of all the methods is that they fail to provide a coherent back-to-front approach.

This conclusion implies that courts should use a new method to adjudicate the competence of a collateral challenge. The purpose of the next chapter is to provide a basic framework through which such a new method could be developed.

CHAPTER 7: PROPOSAL

7 1 Introduction

The previous chapter concluded that the second-actor method, the categorical method, and the flexible method all fall short of the ideal of transformative adjudication, and that courts should therefore not use these methods to adjudicate indirect-review cases. The purpose of this final chapter is to propose a new method that courts might use instead.

This chapter does not aim to provide the definitive method for the adjudication of indirect-review cases. This is because the task of crafting such a method is large, complex, and warrants sustained and dedicated attention exceeding the scope of this thesis. However, should the proposed method prove to have potential, it could be refined and developed in further academic contributions.

The purpose of this chapter is rather to suggest an “angle of approach”,⁷⁵¹ ie a possible series of questions that can be asked to guide the adjudication of indirect-review cases in a “single but complex constitutional system”.⁷⁵² Should this angle of approach prove to be meritorious, it could serve as a paradigm upon which the law on indirect review could be structured.

The argument in this chapter has the following seven premises:

- (i) The doctrine of precedent obliges courts to use the flexible method as the point of departure.
- (ii) Whenever a court uses the flexible method to adjudicate an indirect-review case, it will develop the common law of indirect review.

⁷⁵¹ I use the phrase “angle of approach” in the sense it is used by van der Walt in, among places, AJ van der Walt “Normative pluralism and anarchy: Reflections on the 2007 term” (2008) 1 CCR 77 99; AJ van der Walt “Property law in the constitutional democracy” (2017) 28 *Stell LR* 8 12. The phrase was conceived by Njabulo Ndebele (see N Ndebele *The Cry of Winnie Mandela: A Novel* (2003) 82) and imported into legal scholarship by Henk Botha (see H Botha “Refusal, Postapartheid Constitutionalism, and The Cry of Winnie Mandela” in K van Marle (ed) *Refusals, Transitions, and Postapartheid Law* (2009) 37).

⁷⁵² AJ van der Walt “Property law in the constitutional democracy” (2017) 28 *Stell LR* 8 12.

- (iii) When a court develops the common law of indirect review, it must, in terms of section 39 of the Constitution, promote “the spirit, purport and objects of the Bill of Rights”.⁷⁵³
- (iv) A litigant that seeks to raise a collateral challenge seeks to exercise the right of access to courts.
- (v) Should a court preclude a litigant from raising a collateral challenge, the court will limit the litigant’s right of access to courts.
- (vi) In order to promote the “spirit, purport and objects of the Bill of Rights”, a court should only preclude a litigant from raising a collateral challenge if it would, in terms of section 36 of the Constitution, be reasonable and justifiable to limit that litigant’s right of access to courts.
- (vii) Courts should accordingly use a limitations analysis under section 36 of the Constitution to determine the competence of a collateral challenge.

I will now defend each of these premises in turn. I start by explaining why the doctrine of precedent obliges courts to use the flexible method as the point of departure.

7 2 The doctrine of precedent obliges courts to use the flexible method

The doctrine of precedent⁷⁵⁴ is an incident of the rule of law⁷⁵⁵ and an essential part of our legal system.⁷⁵⁶ It promotes “certainty, predictability, reliability, equality, uniformity, convenience”⁷⁵⁷ and the idea that like cases should be treated alike.⁷⁵⁸

⁷⁵³ S 39(2) of the Constitution.

⁷⁵⁴ The doctrine is often expressed by the Latin maxim *stare decisis*, meaning “to stand by decisions previously taken” (*Camps Bay Ratepayers and Residents’ Association v Harrison* 2011 4 SA 42 (CC) para 28).

⁷⁵⁵ *Daniels v Campbell NO an Others* 2004 5 SA 331 (CC) para 94.

⁷⁵⁶ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 2 SA 97 (CC) para 8; *Gcaba v Minister for Safety and Security* 2010 1 SA 238 (CC) paras 58-62. See also M Wallis “Whose *decisis* must we *stare*” (2018) 135 SALJ 1 2-5.

⁷⁵⁷ HR Hahlo & E Kahn *The South African Legal System and its Background* (1968) 215.

⁷⁵⁸ *Van der Walt v Metcash Trading Ltd* 2002 4 SA 317 (CC) para 39; F du Bois “Sources of law: Common law and precedent” in F du Bois (ed) *Wille’s Principles of South African Law* 9 ed (2007) 78.

The doctrine obliges a court to follow the rationales, or *ratio decidendi*,⁷⁵⁹ underlying the judgments of courts that are superior to it in the hierarchy of courts.⁷⁶⁰ It also binds courts to follow their own prior decisions unless those decisions are clearly wrong.⁷⁶¹

Because the Constitutional Court is our apex court,⁷⁶² its decisions bind all other courts.⁷⁶³ The Constitutional Court should be circumspect to deviate from its own prior decisions, as “a single source of consistent, authoritative and binding decisions is essential for the development of a stable constitutional jurisprudence”.⁷⁶⁴

In its majority judgment in *Merafong City*, the Constitutional Court held that the competence of a collateral challenge should be determined by way of the flexible method.⁷⁶⁵ In my submission, this ruling was part of the court’s *ratio* and was not a mere *obiter dictum*.⁷⁶⁶ This is because the ruling satisfies what has become the classic test for distinguishing between *ratio* and *obiter dicta*,⁷⁶⁷ established by Schreiner JA in *Pretoria City Council v Levinson*.⁷⁶⁸

According to this test, a holding is part of the court’s *ratio* if it was necessary for the court’s decision, in the sense that the decision would have been different but for the ruling.⁷⁶⁹ The Constitutional Court’s ruling on the flexible method meets this test: had

⁷⁵⁹ On the exact meaning of “*ratio decidendi*”, see *Pretoria City Council v Levinson* 1949 3 SA 305 (A) 317; *Turnbull-Jackson v Hibiscus Coast Municipality* 2014 6 SA 592 (CC) paras 61-62.

⁷⁶⁰ *Camps Bay Ratepayers and Residents’ Association v Harrison* 2011 4 SA 42 (CC) para 28.

⁷⁶¹ Para 28.

⁷⁶² S 3 of the Constitution Seventeenth Amendment Act 2012; *Paulsen v Slip Knot Investments 777 (Pty) Ltd* 2015 3 SA 479 (CC) para 90.

⁷⁶³ *Ex Parte President of the RSA: In Re Constitutionality of the Liquor Bill* 2000 1 SA 732 (CC) para 8.

⁷⁶⁴ *Gcaba v Minister for Safety and Security* 2010 1 SA 238 (CC) para 62.

⁷⁶⁵ *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) paras 55-56.

⁷⁶⁶ For a discussion of this difficulty, see P Olivier “Deriving the *ratio* of an over-determined judgment: the law after *Turnbull-Jackson v Hibiscus Coast Municipality*” (2016) 133 SALJ 522-544. An *obiter dictum* is a statement made “by the way”. Such statements may be persuasive but they are not binding (*Camps Bay Ratepayers’ and Residents’ Association v Harrison* 2011 4 SA 42 (CC) para 30).

⁷⁶⁷ F du Bois “Sources of law: Common law and precedent” in F du Bois (ed) *Wille’s Principles of South African Law* 9 ed (2007) 78.

⁷⁶⁸ 1949 3 SA 305 (AD) at 317.

⁷⁶⁹ *Pretoria City Council v Levinson* 1949 3 SA 305 (AD) at 317.

the court adopted the categorical method, it would likely have found, like the court below, that Merafong's status as an organ of state precluded it from raising a collateral challenge.

The doctrine of precedent now obliges courts to use the flexible method to adjudicate indirect-review cases. But because the flexible method does not prescribe any guiding rules or criteria for deciding cases, it is not clear exactly what this obligation means in practical terms. In the remainder of this chapter I will argue that the Constitution contains principles which could fill this gap and guide courts to use the flexible method in a practical, useful way. The first such principle is contained in section 39(2) of the Constitution.

7 3 The common law of indirect review will be developed whenever a court uses the flexible method

Section 39(2) of the Constitution obliges a court to "promote the spirit, purport and objects of the Bill of Rights" when "developing" the common law.⁷⁷⁰ While this section makes it clear that a court must align the common law with the Constitution's "objective, normative value system",⁷⁷¹ it is not yet settled how courts should do so.⁷⁷²

In *Carmichele v Minister of Safety and Security*,⁷⁷³ the Constitutional Court held that courts must develop the common law if it fails to promote the spirit, purport and objects

⁷⁷⁰ S 39(2) of the Constitution states that, "[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights".

⁷⁷¹ *Carmichele v Minister of Safety and Security* 2001 4 SA 983 (CC) para 54.

⁷⁷² Commentators have given may conflicting interpretations of the section, leading to a protracted (and sometimes heated) debate. A useful compendium of the standpoints in the debate is S Woolman "Application" in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* 2 ed (OS 2008) 31-136 – 31-158. A vivid example of the (sometimes heated) debate is that between Davis and Fagan: A Fagan "The secondary role of the spirit, purport and objects of the Bill of Rights in the common law's development" (2010) 127 SALJ 611-627; D Davis "How many positivist legal philosophers can be made to dance on the head of a pin: A reply to Professor Fagan" (2012) 129 SALJ 59-72; A Fagan "A straw man, three red herrings, and a closet rule-worshipper: A rejoinder to Davis JP" (2012) 129 SALJ 788-798; D Davis "The importance of reading – A rebutter to the jurisprudence of Anton Fagan" (2013) 130 SALJ 52-59.

⁷⁷³ *Carmichele v Minister of Safety and Security* 2001 4 SA 983 (CC) para 39.

of the Bill of Rights. A court must therefore first ask whether the common law requires development. Only if the answer is in the affirmative, the court must develop the common law to accord with the spirit, purport and objects of the Bill of Rights.⁷⁷⁴ The court held, in effect, that “if the common law is bad, use the Bill of Rights to make it better”.⁷⁷⁵

I agree with Friedman that this is an erroneous interpretation of section 39(2) of the Constitution.⁷⁷⁶ In truth, as recognised by the Constitutional Court on at least two other occasions,⁷⁷⁷ section 39(2) of the Constitution does not say *when* the common law should be developed. It says that *whenever* the common law *is* being developed, that development should promote the spirit, purport and objects of the Bill of Rights.⁷⁷⁸

When do courts develop the common law? The Constitutional Court answered this question in *K v Minister of Safety and Security*.⁷⁷⁹ Here O'Regan J explained that courts develop the common law in three different scenarios. The first is where a court completely changes or replaces a common law rule.⁷⁸⁰ The second is where a court introduces a new rule.⁷⁸¹ The third is where a court applies an extant common law rule to a novel set of facts “not on all fours with any set of facts previously adjudicated”,⁷⁸² and thereby develops the common law by clarifying the “precise ambit” of an extant rule.⁷⁸³

The third type of common-law development is ubiquitous⁷⁸⁴ and will in my view occur whenever courts use the flexible method to adjudicate the competence of a

⁷⁷⁴ Para 40.

⁷⁷⁵ N Friedman “The South African Common Law and the Constitution: Revisiting Horizontality” (2014) 30 SAJHR 75.

⁷⁷⁶ 75.

⁷⁷⁷ *K v Minister of Safety and Security* 2005 6 SA 419 (CC) para 16; *Masiya v Director of Public Prosecutions, Pretoria* 2007 5 SA 30 (CC) para 31.

⁷⁷⁸ N Friedman “The South African Common Law and the Constitution: Revisiting Horizontality” (2014) 30 SAJHR 75.

⁷⁷⁹ 2005 6 SA 419 (CC).

⁷⁸⁰ *K v Minister of Safety and Security* 2005 6 SA 419 (CC) para 16.

⁷⁸¹ Para 16.

⁷⁸² Para 16.

⁷⁸³ Para 16.

⁷⁸⁴ Para 16. See also L Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2012) 259-260. For a contrasting view, see A Fagan “The Secondary Role of the Spirit, Purport and Objects of the Bill of Rights in the Common Law’s Development (2010) 127 SALJ

collateral challenge. This is because there are *no* facts that will be “on all fours with any set of facts previously adjudicated” when courts use the flexible method. As determined by the Constitutional Court in *Merafong City*, the permissibility of a collateral challenge will “depend, *in each case, on the facts*”.⁷⁸⁵

The common law will thus be developed whenever the flexible method is applied. And the doctrine of precedent determines that the method must be applied whenever a court considers the competence of a collateral challenge. It follows, in my view, that courts must develop the common law in terms of section 39(2) of the Constitution whenever they adjudicate the competence of a collateral challenge.

7 4 A court must develop the common law of indirect review in a way that promotes the spirit, purport, and objects of the Bill of Rights

The fact that the common law will be developed whenever the flexible method is applied does not mean that courts should make sweeping changes to the law in every case. On the contrary, courts should develop the common law cautiously⁷⁸⁶ and incrementally.⁷⁸⁷ They should be mindful that, according to the doctrine of separation of powers, it is the legislature and not the judiciary that should be the main “engine for law reform”.⁷⁸⁸

Courts should also not take the task of common-law development lightly. Before it develops the common law, a court is obliged to determine exactly what the common-law position is and the reasons underlying that position. It must also determine exactly how the common law should be amended.⁷⁸⁹

613. For rejoinders to Fagan’s view, see D Davis “How many positivist legal philosophers can be made to dance on the head of a pin: A reply to Professor Fagan” (2012) 129 SALJ 59-72; AJ van der Walt *Property and Constitution* (2012) 26-27, 33, 92-97.

⁷⁸⁵ *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) paras 55 (emphasis added). Also see *Metal and Allied Workers Union of SA v National Panasonic* 1991 2 SA 527 (C) 530G-H.

⁷⁸⁶ *Paulsen v Slip Knot Investments 777 (Pty) Ltd* 2015 3 SA 479 (CC) para 57.

⁷⁸⁷ *Masiya v Director of Public Prosecutions, Pretoria* 2007 5 SA 30 (CC) para 31.

⁷⁸⁸ *Carmichele v Minister of Safety and Security* 2001 4 SA 983 (CC) para 36.

⁷⁸⁹ *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd* 2016 1 SA 621 (CC) para 39; *Minister of Justice v Estate Stransham-Ford* 2017 3 SA 152 (SCA) para 5.

Once a court has ascertained precisely what the common-law rule is, it must enquire whether the rule “offend[s] the normative structure of the Constitution”.⁷⁹⁰ I agree with Van der Walt that the common law will only promote the Constitution’s “normative structure” if it reflects the “framework of systematic qualities” that the Constitution sets out in respect of a field of law.⁷⁹¹ This does not mean that the common law should be avoided and that the Constitution should be applied directly. It means, rather, that the common law should be developed in the image of the Constitution, thereby promoting a single, unified system of law.⁷⁹²

The question, then, is how courts should develop the common law of indirect review so that it reflects the Constitution’s “framework of systematic qualities”. In the next 3 parts, I will outline the basic systemic qualities of the Constitution that should, in my view, regulate the development of the common law of indirect review.

7 5 The right of access to courts

Section 34 of the Constitution guarantees the right of access to courts. The section states:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”.

The right of access to courts is central to our constitutional democracy. It gives effect to a principle underlying the rule of law, namely “that any constraint upon a person or property shall be exercised by another only after recourse to a court recognised in terms of the law of the land”.⁷⁹³ Given that the right of access to courts is central to our constitutional democracy, it is crucial that courts consider this right when developing the common law under section 39(2) of the Constitution.⁷⁹⁴

⁷⁹⁰ *MEC for Health and Social Development, Gauteng v DZ obo WZ* 2018 1 SA 335 (CC) para 36.

⁷⁹¹ AJ van der Walt *Property and Constitution* (2012) 26-27.

⁷⁹² AJ van der Walt “Normative pluralism and anarchy: Reflections on the 2007 term” (2008) 1 CCR 77 91 n 56.

⁷⁹³ *Chief Lesapo v North West Agricultural Bank* 2000 1 SA 409 (CC) para 16.

⁷⁹⁴ *Government of the Republic of Zimbabwe v Fick* 2013 5 SA 325 (CC) para 63.

The Constitutional Court has held that section 34 of the Constitution does not apply to criminal proceedings.⁷⁹⁵ This is because section 34 only applies to a “dispute that can be resolved by the application of law” and criminal proceedings are not “disputes” within the meaning of that section.⁷⁹⁶

But this does not mean that accused persons do not have the right of access to courts. Their right of access to courts is guaranteed by section 35 of the Constitution, which entitles accused persons *inter alia* to be clearly informed of the charges against them,⁷⁹⁷ the right to adequately prepare a defence,⁷⁹⁸ the right to challenge and adduce evidence,⁷⁹⁹ the right to be presumed innocent,⁸⁰⁰ and the right “to a public trial before an ordinary court”.⁸⁰¹

In accordance with the Constitutional Court’s jurisprudence on the interpretation of constitutional rights, the right of access to courts should be interpreted in the way that is most favourable to beneficiaries of the right.⁸⁰² Litigants are therefore, in the words of the Supreme Court of Appeal, “entitled to the benefits of a constitutional dispensation that promotes rather than inhibits access to courts of law”.⁸⁰³

The right of access to courts has been interpreted as giving everyone at least three component rights: the right to challenge the legality of law or conduct; the right to be heard by a court or forum that is impartial and independent; and finally, the right to a hearing that is procedurally fair.⁸⁰⁴

A litigant that seeks to raise a collateral challenge relies principally on the right to challenge the legality of law or conduct. This is because a collateral challenge to administrative action is a means of challenging the legal validity of the administrative

⁷⁹⁵ *S v Pennington* 1997 4 SA 1076 (CC) para 46.

⁷⁹⁶ Paras 46-47.

⁷⁹⁷ S 35(3)(a) of the Constitution.

⁷⁹⁸ S 35(3)(b) of the Constitution.

⁷⁹⁹ S 35(3)(i) of the Constitution.

⁸⁰⁰ S 35(3)(h) of the Constitution.

⁸⁰¹ S 35(3)(c) of the Constitution. See further *S v Zuma* 1995 2 SA 642 (CC) para 12.

⁸⁰² *S v Zuma* 1995 2 SA 642 (CC) para 14, referring to *Minister of Home Affairs (Bermuda) v Fisher* 1979 3 All ER 21; *S v Mhlungu* 1995 3 SA 391 (CC) para 9.

⁸⁰³ *Van Zijl v Hoogenhout* 2005 2 SA 93 (SCA) para 7, quoted with approval in *Paulsen v Slip Knot Investments 777 (Pty) Ltd* 2015 3 SA 479 (CC) para 64. See also, *Helen Suzman Foundation v Judicial Service Commission* (CC) 2018 4 SA 1 (CC) para 27.

⁸⁰⁴ I Currie & J de Waal *The Bill of Rights Handbook* 5 ed (2005) 704.

action in question.⁸⁰⁵ As such, a litigant that seeks to raise a collateral challenge seeks, in effect, to enforce the right of access to courts.⁸⁰⁶

7 6 Limiting the right of access to courts

If the right to raise a collateral challenge is a manifestation of the right of access to courts, it follows as a matter of logic that a litigant's right of access to courts will be limited where a court deprives the litigant of the opportunity to raise a collateral challenge. This is not, however, the end of the enquiry, as the rights in the Bill of Rights are not absolute.

7 7 The limitation analysis

Section 36 of the Constitution permits the limitation of these right by law of general application, to the extent that the "limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".⁸⁰⁷ The right of access to courts may therefore be limited insofar as section 36 of the Constitution allows that limitation.

The common law of indirect review permits the limitation of the right of access to courts. It does this by disabling litigants from challenging administrative action collaterally unless the challenge is made "by the right person in the right proceedings".⁸⁰⁸ Section 36 of the Constitution determines that the law may only permit such a limitation where it would be reasonable and justifiable in an open and democratic society based on human dignity, equality, and freedom.⁸⁰⁹ This means

⁸⁰⁵ C Hoexter *Administrative Law in South Africa* (2012) 518 – 519; *Merafong City v AngloGold Ashanti* 2017 2 SA 211 (CC) para 92.

⁸⁰⁶ I Currie & J de Waal *The Bill of Rights Handbook* (2005) 705.

⁸⁰⁷ S 36 of the Constitution.

⁸⁰⁸ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) para 35, quoting Wade *Administrative Law* 6ed 331, as cited in *Metal and Electrical Workers Union of South Africa v National Panasonic Co (Parow Factory)* 1991 2 SA 527 (C) 530C-D & *National Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry v Photocircuit SA (Pty) Ltd* 1993 2 SA 245 (C) 253E-F.

⁸⁰⁹ Section 36 of the Constitution also provides that the rights in the Bill of Rights may only be limited "in terms of law of general application". While the ambit of the phrase "law of general

that a litigant *should* be allowed to raise a collateral challenge where it would *not* be constitutionally permissible to limit that litigant's right of access to court.

When a court determines whether a limitation of the litigant's right of access to court would be constitutionally permissible, it must balance the harm that the limitation causes against the benefits it is designed to achieve.⁸¹⁰ The court must ultimately weigh up competing constitutional values to perform this assessment.⁸¹¹ Where a litigant seeks to raise a collateral challenge, the primary competing constitutional values will be the principle of legality and the principle of restraint.⁸¹²

The court should weigh up these competing values by taking into account the "relevant factors" listed in section 36(1)(a) – (e) of the Constitution, namely the nature of the right being limited; the importance and purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and whether there are less restrictive means to achieve that purpose.⁸¹³

771 The nature of the right

Some rights in the Bill of Rights carry more weight than others. These rights are more important in an open and democratic society that the Constitution envisages.⁸¹⁴ Courts are less inclined to permit a limitation of such rights than rights carrying less

application" is not entirely settled, it is clear that it includes the common law. See *S v Thebus* 2003 6 SA 505 (CC) paras 64-65; cited in H Botha & S Woolman "Limitations" in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* 2 ed (OS 2008) 34-52.

⁸¹⁰ *S v Makwanyane* 1995 3 SA 391 (CC) para 104; *Ex parte Minister of Safety and Security: in re S v Walters* 2002 4 SA 613 (CC) para 27.

⁸¹¹ *S v Makwanyane* 1995 3 SA 391 (CC) para 104.

⁸¹² See chapter 1 above.

⁸¹³ Section 36 of the Constitution; *Ex parte Minister of Safety and Security: in re S v Walters* 2002 4 SA 613 (CC) para 27. The factors listed in section 36 of the Constitution are not exhaustive. They are rather "key considerations" that should be used in conjunction with any other factors that may be relevant to the overall determination of whether or not the limitation is justifiable (*S v Manamela* 2000 3 SA 1 (CC) para 33).

⁸¹⁴ I Currie & J de Waal *The Bill of Rights Handbook* (2005) 178.

weight. In deciding whether a limitation of a right is reasonable and justifiable, a court will therefore have to consider the weight of the right that is subject to the limitation.⁸¹⁵

The Constitutional Court has held that the right to life and the right to dignity are the fundamental rights with the most gravity.⁸¹⁶ Because the rights in the Bill of Rights are interconnected,⁸¹⁷ the rights to life and dignity will (in addition to the right of access to courts) occasionally be implicated in indirect review cases. Where a litigant seeks to raise a collateral challenge as a defence to criminal prosecution, for instance, the litigant will necessarily seek to protect his dignity, as “[d]ignity is inevitably impaired by imprisonment or any other punishment”.⁸¹⁸

Accordingly, should a litigant seek to use a collateral challenge to protect his rights to life and/or dignity (or other comparably important rights), the court should be more inclined to allow the collateral challenge than in other circumstances. This is because disallowing the collateral challenge would limit the most substantial fundamental rights. Such a limitation would only be reasonable and justifiable in extraordinary circumstances.⁸¹⁹

7.7.2 The importance of the purpose of the limitation

A limitation of a fundamental right will only be reasonable and justifiable if serves a purpose that is legitimate and important in the society that the Constitution envisages.⁸²⁰ This factor is unproblematic in indirect review cases. It is well recognised that the availability of collateral challenge is limited in order to advance the

⁸¹⁵ 178.

⁸¹⁶ *S v Makwanyane* 1995 3 SA 391 (CC) para 144; *Ex parte Minister of Safety and Security: in re S v Walters* 2002 4 SA 613 (CC) paras 5-6, 28.

⁸¹⁷ See, for instance, *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 2 SA 168 (CC) para 64.

⁸¹⁸ Para 142.

⁸¹⁹ *Ex parte Minister of Safety and Security: in re S v Walters* 2002 4 SA 613 (CC) para 28.

⁸²⁰ I Currie & J de Waal *The Bill of Rights Handbook* (2005) 178.

principle of certainty.⁸²¹ This principle is an incident of the rule of law and is important in the society that the Constitution envisages.⁸²²

The Constitutional Court has also intimated that there may “be a substantive and valid reason underlying the purported exclusion of other remedies in a matter with public law overtones”,⁸²³ notwithstanding that our law recognises that the same facts may give rise to different causes of action.⁸²⁴ This might provide authority for the view that the judicial review of administrative action should be limited to direct review proceedings under the PAJA, and that collateral challenges to administrative action should generally be avoided. In the United Kingdom, by way of comparison, the general rule is that it would be contrary to public policy and an abuse of court to challenge public power in any proceeding other than an application for judicial review.⁸²⁵

A collateral challenge to administrative action is, however, a recognised exception to this rule: it is an accepted means of challenging public power outside the ordinary procedure for judicial review.⁸²⁶ It would thus appear that the principle of certainty provides the most cogent justification for limiting a litigant’s right of access to courts by disallowing a collateral challenge.

7 7 3 The nature and extent of the limitation

A limitation of a fundamental right will only be reasonable and justifiable if the benefits the limitation seeks to achieve outweigh the harm the limitation causes. Section 36 of the Constitution, in other words, “does not permit a sledgehammer to be used to crack

⁸²¹ *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) para 36; *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) para 32.

⁸²² *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 (SCA) para 26; Forsyth (2006) *Acta Juridica* 220; A Price & D Freund “On the Legal Effects of Unlawful Administrative Action” (2017) 134 SALJ 184 185.

⁸²³ *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal* 2013 4 SA 262 (CC) para 104 (concurring minority judgment of Froneman J).

⁸²⁴ *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 1 SA 475 (A) 496.

⁸²⁵ *O'Reilly v Mackman* 1983 3 All ER 1124 at 285, cited in *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal* 2013 4 SA 262 (CC) para 104.

⁸²⁶ *Wandsworth London Borough Council v Winder* 1984 3 All ER 83 at 105.

a nut".⁸²⁷ A court must therefore assess the degree to which a fundamental right is limited by the law or conduct in question.⁸²⁸

This means that a court should be hesitant to disallow a collateral challenge if the challenge is the litigant's only way of enforcing his right of access to courts.⁸²⁹ On the other hand, a court should more readily decline a collateral challenge where the litigant could use an internal remedy or a direct judicial review application to impugn the administrative action in question. In the first scenario, the court will completely limit the litigant's right of access to courts if it disallows the collateral challenge. In the second scenario, the litigant retains a right of access to courts even if the court disallows his collateral challenge.

774 The relation between the limitation and its purpose

It will not be reasonable and justifiable to limit a fundamental right if the limitation does not achieve its intended purpose.⁸³⁰ Section 36(1)(d) of the Constitution thus obliges a court to consider whether there is a rational connection between the purpose of the impugned law or conduct and the limitation that it produces.

*Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development*⁸³¹ provides an instructive example of how section 36(1)(d) of the Constitution may inform a court's reasoning. This case concerned the constitutionality of provisions in an Act that criminalised consensual sexual conduct between children aged 12 to 16.⁸³² The respondents argued that the purpose of the contentious provisions was to protect adolescents from the risks attendant upon sexual behaviour.⁸³³ But the court held that there was no evidence to indicate that the provisions would achieve that purpose. On the contrary, the evidence showed that

⁸²⁷ *S v Manamela* 2000 3 SA 1 (CC) para 34.

⁸²⁸ I Currie & J de Waal *The Bill of Rights Handbook* (2005) 182.

⁸²⁹ The Constitutional Court appears to have endorsed this proposition in *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) paras 70-71.

⁸³⁰ I Currie & J de Waal *The Bill of Rights Handbook* (2005) 182-183.

⁸³¹ 2014 2 SA 168 (CC).

⁸³² Part 1 of Chapter 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

⁸³³ *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 2 SA 168 (CC) para 85.

the provisions *increased* the probability that adolescents would engage in risky sexual behaviour. According to the court, this meant that the impugned provisions did not achieve their purpose and that they could accordingly not limit fundamental rights in reasonable and justifiable way.⁸³⁴

When a court disallows a collateral challenge it limits the challenger's right of access to court. The purpose of such a limitation is to protect the principle of certainty. Section 36(1)(d) of the Constitution determines that it would be unjustifiable to limit the right of access to courts if a purported collateral challenge does *not* threaten the principle of certainty: in such a case there would be a diminished connection between the limitation (disallowing a collateral challenge) and its purpose (protecting the principle of certainty).

In my view, there are at least two factors a court could consider to decide whether a collateral challenge threatens the principle of certainty. The first is the extent to which members of the public have acted on the assumption that the impugned administrative action is valid. The second is the amount of time that has passed since the impugned administrative act came into being.

If the act is recent and few people have acted on the assumption that it is valid, there is a small likelihood that a successful collateral challenge would upset vested interests and settled relations, and the principle of certainty is accordingly not imperilled. By contrast, where the administrative action has matured and many have acted on the assumption that it is valid, vested interests and settled relations would likely be upset if the action is set aside.⁸³⁵

775 Less restrictive means to achieve the purpose of the limitation

A limitation of a fundamental right will not be reasonable or justifiable if the costs of the limitation outweigh its benefits.⁸³⁶ When considering whether law or conduct

⁸³⁴ Para 87.

⁸³⁵ *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) para 46; *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province* 2008 2 SA 481 (SCA) para 23; *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* 2014 3 SA 481 (CC) para 103.

⁸³⁶ I Currie & J de Waal *The Bill of Rights Handbook* (2005) 183-184.

unjustifiably limits a fundamental right, a court must therefore consider whether the law or conduct could achieve its purpose in a less restrictive way.⁸³⁷

It is not clear what this factor means in the context of the indirect review of administrative action. It could perhaps be understood as obliging a court to consider whether, instead of denying a collateral challenge altogether, it should rather permit the challenge and use its remedial discretion to ameliorate any harm this may cause to the principle of certainty.⁸³⁸ In this way the court will thus use “less restrictive means” to protect the principle of certainty, as the principle will be protected while the challenger’s right of access to court will be left intact.

Even though the Constitutional Court appears to have endorsed such an approach in *Merafong City*,⁸³⁹ it is questionable whether the approach is sound. This is because the approach tends to collapse the distinction between two stages in the judicial decision-making process: the initial stage where the court considers whether the litigant may present the case to the court, and the final stage where the court considers what relief would be just and equitable. As each stage deals with a distinct question and attracts different policy considerations, it is not jurisprudentially sound, in my view, to collapse both stages into one.⁸⁴⁰

7 7 6 Other factors

The factors in section 36(1)(a) – (e) of the Constitution do not form a closed list. A court is free to consider any other factor that is “relevant”.⁸⁴¹ There are several factors a court may consider relevant to determining the competence of a collateral challenge. These factors must now be seen in the context of the general limitation analysis. Accordingly, while each factor may inform the court’s assessment, no individual factor should be determinative of that assessment. I will now briefly discuss the four factors that are most likely to be considered relevant by our courts.

⁸³⁷ S 36(1)(e) of the Constitution.

⁸³⁸ On our superior courts’ wide remedial discretion, see chapter 2 part 2 3 2 above.

⁸³⁹ *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) paras 55-56.

⁸⁴⁰ See chapter 4 part 4 6 3 above.

⁸⁴¹ S 36(1) of the Constitution.

7 7 6 1 *The empowering instrument*

All administrative action is founded on an empowering instrument.⁸⁴² A court should naturally consider whether the instrument permits or prohibits a collateral challenge to the administrative act in question. In *Khabisi*, for example, the court held that “the clear and peremptory letter” of the NEMA precluded the respondents from raising a collateral challenge.⁸⁴³ In *S v Smit*, by contrast, the court held that the Roads Act did not prohibit Mr Smit from collaterally challenging the validity of a contentious toll-road declaration.⁸⁴⁴

Most empowering instruments do not expressly determine the permissibility of collateral challenges.⁸⁴⁵ However, in the unlikely event that an instrument unequivocally prohibits a collateral challenge, the court will be bound by the doctrine of separation of powers to give effect to the intention of the legislature. It is only then that the content of the empowering instrument should be a determinative factor in the court’s assessment of the permissibility of a collateral challenge.

7 7 6 2 *The nature of the impugned administrative action*

A collateral challenge is traditionally seen as a mechanism that protects persons from coercive public power.⁸⁴⁶ A court may therefore be minded to disallow a collateral challenge where the challenger faces no threat of coercion. In *Maxime Hotel*,⁸⁴⁷ for example, the High Court disallowed a collateral challenge because the challenger did not face any threat of coercion, but merely sought to ensure – by way of a collateral challenge – that it was awarded a commercially valuable gambling licence.⁸⁴⁸

⁸⁴² See chapter 6 part 6 2 2 above.

⁸⁴³ *Khabisis v Aquarella Investment 83 (Pty) Ltd* 2008 4 SA 195 (T) para 18.

⁸⁴⁴ *S v Smit* 2007 2 SACR 335 (T) 378I-J.

⁸⁴⁵ See chapter 6 part 6 2 2 above.

⁸⁴⁶ *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) para 32

⁸⁴⁷ See chapter 2 part 2 3 above.

⁸⁴⁸ *Maxime Hotel (Pty) Ltd v Chairperson: National Gambling Board* 2014 JDR 0657 (GNP) paras 29-31.

7 7 6 3 The person attempting to raise the collateral challenge

As discussed in chapter 3, our courts previously held that a collateral challenge is only available to a “subject” threatened with coercive public power and that an organ of state cannot be such a subject.⁸⁴⁹ The Constitutional Court overruled this line of authority in *Merafong City*, holding that an organ of state may also avail itself of a collateral challenge.⁸⁵⁰

A court should therefore not disallow a collateral challenge merely because the challenger is an organ of state. But a court should bear in mind that a challenger’s status as an organ of state has two important consequences.

The first consequence is that the organ of state’s collateral challenge may be subject to the rule against delay.⁸⁵¹ This is because an organ of state has an enhanced duty to proactively seek the judicial review of administrative action, particularly where it impugns its own prior administrative action.⁸⁵²

The second consequence is that, should an organ of state’s collateral challenge be directed at its own prior decision, and should the challenge be allowed to proceed, the challenge must be made under the principle of legality and not the PAJA. According to the Constitutional Court, the PAJA was intended to protect “warm-bodied human beings primarily against the state”⁸⁵³ and does therefore not protect the state against its own prior decisions. This is because the fundamental right to just administrative action, enshrined in section 33 of the Constitution, does not accrue to the state.⁸⁵⁴

⁸⁴⁹ *Kwa Sani Municipality v Underberg/Himeville Community Watch Association* 2015 2 All SA 657 (SCA) paras 5-8; *Merafong City v AngloGold Ashanti Ltd* 2016 2 SA 176 (SCA) paras 15-17; *Tasima v Department of Transport* 2016 1 All SA 465 (SCA) 476I-477C.

⁸⁵⁰ See chapter 4 above.

⁸⁵¹ *Merafong City v AngloGold Ashanti Ltd* 2017 2 SA 211 (CC) paras 59;

⁸⁵² *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 3 SA 481 (CC) para 82.

⁸⁵³ *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 2 SA 23 (CC) para 18.

⁸⁵⁴ Para 27.

7 7 6 4 The person whose decision is being challenged

The purpose of a collateral challenge is to avoid the enforcement of unjust public power. A court may therefore be minded to disallow a collateral challenge where the challenger seeks to avoid the enforcement of private-law rights. In *V & A*,⁸⁵⁵ for instance, the Supreme Court of Appeal disallowed a collateral challenge because it was not aimed at preventing the enforcement of administrative action by a public authority, but was rather aimed at preventing the enforcement of a lease by a private party.⁸⁵⁶

7 8 Conclusion

7 8 1 Conspectus

When should a court allow a litigant to challenge administrative action indirectly by means of a collateral challenge? The central aim of this thesis has been to address this question in a systematic and critical way. It is submitted that the thesis has made five novel findings in pursuit of that aim.

The first finding is that, notwithstanding *Oudekraal*'s venerated status in our law, courts have not consistently appreciated the full import of the reasoning underlying the judgment. In *Oudekraal*, the Supreme Court of Appeal used the theory of the second actor to mediate the tension between the *Oudekraal* principle and the collateral-challenge exception.⁸⁵⁷ However, in *Oudekraal*'s wake, some courts have invoked the *Oudekraal* principle without recognising that the principle is subject to the collateral-challenge exception, while other courts have ignored or misapplied the theory of the second actor.⁸⁵⁸

The second finding flows from the first: instead of using the theory of the second actor to assess the competence of a collateral challenge, courts have been inclined to

⁸⁵⁵ See chapter 3 part 3 3 1 1 above.

⁸⁵⁶ *V & A Waterfront Properties (Pty) Ltd v Helicopter & Marine Services (Pty) Ltd* 2006 1 SA 252 (SCA) paras 10-14.

⁸⁵⁷ See chapter 2 part 2 3 above.

⁸⁵⁸ See chapter 2 part 2 4 above.

use two other judicial methods instead.⁸⁵⁹ Some courts have preferred what this thesis has termed the categorical method. This method is premised on the view that a collateral challenge may only be made by a subject that is coerced by a public authority.⁸⁶⁰ Other courts have preferred what this thesis has termed the flexible method. This method assumes that a collateral challenge should be permitted where it would be in the interest of justice, taking into account the exigencies of the case before the court.⁸⁶¹

The third finding is that the proliferation of judicial methods has not resulted in harmony, but in discord. The same dispute could be resolved in materially different ways, depending on which method the court employs. And there is an absence of guidelines indicating which method a court will use in any given case. This undermines legal certainty and harms the rule of law.⁸⁶²

The fourth finding is that *Merafong City*, arguably the most authoritative current judgment on indirect review, has failed to harmonise this branch of the law and has instead underscored the need for doctrinal reform.⁸⁶³ While the judgment apparently endorsed the flexible method, its reasoning was questionable and failed to provide guidance on how this method should be used to decide other cases.⁸⁶⁴

The fifth finding is that such doctrinal reform should not be based on the theory of the second actor, the categorical method, or the flexible method. This is because all three methods fall short of the ideal of transformative adjudication in significant respects.⁸⁶⁵

7 8 2 Proposal

In the light of the abovementioned findings, the central proposal of this thesis is that the competence of a collateral challenge should be determined by way of a judicial method that is grounded on section 36 of the Constitution. As explained at the start

⁸⁵⁹ See chapter 3 above.

⁸⁶⁰ See chapter 3 part 3 3 above.

⁸⁶¹ See chapter 3 part 3 4 above.

⁸⁶² See chapter 4 part 4 7 above.

⁸⁶³ See chapter 4 above.

⁸⁶⁴ See chapter 4 above.

⁸⁶⁵ See chapter 5 above.

of this chapter, the proposed method is still in nascent form, and is presented in this thesis merely as an “angle of approach”. It is submitted that, should the proposed method be developed to maturity, it would be more congruent with the ideal of transformative adjudication than the theory of the second actor, the categorical method and the flexible method respectively. This is so for three reasons.

Firstly, the proposed method attains a high degree of potential variability. This is because it is established law that the section-36 analysis invariably entails a fact-bound inquiry, which cannot be performed in an abstract way that is insensitive to the exigencies of the case before the court.⁸⁶⁶ The variability of a section-36 analysis is compounded by the fact that the scope of the analysis itself, and not only the application of the analysis, theoretically varies from case to case.⁸⁶⁷ This is perhaps most clearly illustrated by considering that the factors in section 36(1)(a) – (e) of the Constitution do not form a closed list, and that a court is free to use any other factor that is relevant to the determination of the case before it.

Secondly, the proposed method, properly applied, also encourages substantive, as opposed to formalistic, reasoning. From the outset, the Constitutional Court has emphasised that the section-36 analysis does not call for the rote application of ossified rules, but instead calls for “the weighing up of competing values, and ultimately an assessment based on proportionality”.⁸⁶⁸ According to Botha and Woolman, because section 36 obliges courts to weigh up competing values:

“Courts cannot, and do not, simply apply the requirements of the text of the limitation clause mechanically. Courts need to explain how they understand the demands of the text and why those demands have certain consequences for the disposition of a case. As a result, judges themselves are subject to the demand for justification. They must be able to explain why they have given the standards the content that they have, and why they have applied them in a given fashion”.⁸⁶⁹

⁸⁶⁶ See, for instance, *S v Makwanyane* 1995 3 SA 391 (CC) para 104; *De Lange v Smuts* 1998 3 SA 785 (CC) paras 86-87, 163.

⁸⁶⁷ I Currie & J de Waal *The Bill of Rights Handbook* 5 ed (2005) 177.

⁸⁶⁸ *S v Makwanyane* 1995 3 SA 391 (CC) para 104.

⁸⁶⁹ H Botha & S Woolman “Limitations” in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* 2 ed (OS 2008) 34-7.

Finally, the proposed method embraces a workable back-to-front approach. Unlike the theory of the second actor and the categorical method,⁸⁷⁰ the proposed method centres on the provisions of the Constitution. And unlike the flexible method,⁸⁷¹ the proposed method provides guidance on how a court should use the provisions of the Constitution to determine the competence of a collateral challenge. While the limitation analysis may itself call for further jurisprudential development and clarification,⁸⁷² it is nonetheless a well-known and constitutionally mandated mechanism for resolving the conflict between competing constitutional ideals. In my view, the limitation analysis therefore offers a promising basis upon which the conflict between the *Oudekraal* principle and the collateral-challenge exception may be mediated. As explained in chapter 1, the seemingly irreconcilable conflict between these two ideals lies at the heart of the law on indirect review, and forms the rationale of this thesis.⁸⁷³

A potential problem with the proposed method is that it may appear, on the face of it, to contravene the principles of subsidiarity outlined in chapter 5.⁸⁷⁴ This is because the Constitution/legislation/common-law rule determines that, where a litigant seeks to protect the right to just administrative action, he may not circumvent the PAJA by relying directly on the common law.⁸⁷⁵ The proposed method does not involve the PAJA at all, and is instead based squarely on the development of the common law through the Bill of Rights.

However, the Constitution/legislation/common-law rule is only effective where the PAJA is applicable.⁸⁷⁶ And, according to the Supreme Court of Appeal, the PAJA does not apply when a court must determine the competence of a collateral challenge.⁸⁷⁷

⁸⁷⁰ See chapter 6 above.

⁸⁷¹ Id.

⁸⁷² See, for instance, H Botha & S Woolman “Limitations” in S Woolman, M Bishop & J Brickhill (eds) *Constitutional Law of South Africa* 2 ed (OS 2008) 34-93 – 34-127.

⁸⁷³ See chapter 1 part 1 2 above.

⁸⁷⁴ See chapter 5 part 5 5 2 above.

⁸⁷⁵ See chapter 5 part 5 5 2 3 above.

⁸⁷⁶ C Hoexter *Administrative Law* (2012) 134. Compare M Murcott & W van der Westhuizen “The Ebb and Flow of the Application of the Principle of Subsidiarity – Critical Reflections on *Motau and My Vote Counts*” (2015) 7 CCR 43 49.

⁸⁷⁷ *Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd* 2013 4 All SA 639 (SCA) paras 39-40. The court did not express any view on whether the PAJA

Accordingly, the proposed method does not unjustifiably displace the PAJA with the common law, but rather uses the common law to govern an area of administrative law that the PAJA fails to regulate. And, as explained in chapter 5, the principles of subsidiarity allow the common law to perform such a “gap-filling” function.⁸⁷⁸ It is accordingly submitted that the proposed method coheres with the principles of subsidiarity and is congruent with the ideal of a single-system-of-law.⁸⁷⁹

A further problem with the proposed method is its rather idiosyncratic use of section 36 of the Constitution. Ordinarily, this section is only triggered once a litigant asks a court to find that law or conduct limits a right in the Bill of Rights and the court indeed makes that finding.

The proposed method does not rely on this trigger being present. Instead it invites a court to use section 36 much earlier, and more generally, in its decision-making process. Section 36 has so far been used to decide whether apparently invalid law or conduct is constitutionally justifiable. But the proposed method uses the section to ensure that judicial reasoning conforms with the Bill of Rights.

In my view, there are two reasons why this idiosyncratic use of section 36 is warranted. First, there is nothing in the text of section 36 of the Constitution or in the rest of the Bill of Rights that precludes courts from employing that text in new, previously unimagined ways. Of course, such developments must be consistent with the Constitution and the positive law generally. And it is submitted that the proposed method meets that test. But a legal development can surely not be criticised simply for being novel.

Second, there is textual support for the proposed method in the Constitution itself. Section 8 of the Constitution reads:

- “(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
- (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

regulates the *merits* of a collateral challenge to administrative action, once a court determines that the collateral challenge may indeed be raised.

⁸⁷⁸ See chapter 5 part 5 5 2 3 above.

⁸⁷⁹ See chapter 5 part 5 5 above.

- (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –
 - (a) in order to give effect to a right in the Bill, must apply, if necessary develop, the common law to the extent that legislation does not give effect to that right; and
 - (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)" (my emphasis).

It falls beyond the scope of this thesis to engage in a discussion of how our courts have interpreted section 8 of the Constitution. It suffices to point out that, on the face of it, section 8(3)(b) contemplates section 36 being used in the way the proposed method asks courts to use the section. Clearly, section 8(3)(b) does not contemplate section 36(1) being used to do its normal job as a justificatory mechanism. Instead, like the proposed method, it contemplates section 36(1) being used as a lodestar in the judicial development of the common law.

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Uniform Rules of Court GN R48 of 12 January 1965