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Transformative adjudication in administrative law: The revolutionary jurisprudence of Edwin Cameron

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1 Introduction

As a scholar and human rights activist, Edwin Cameron has done and continues to do a tremendous amount for the development of South African law. That includes administrative law to the extent that his engagement with topics such as criminal justice, prisons, employment, equality, sexual orientation and AIDS touch administrative-law issues. As a judge, however, there is nothing oblique about what Edwin Cameron has done for this discipline. His judicial contribution to administrative law has been direct, sustained, rich and remarkable.[1] Indeed, it is unparalleled.

1 His many noteworthy judgments in this area include: *Van Niekerk v Pretoria City Council* 1997 (3) SA 839 (T); *Industrial Manpower Projects (Pty) Ltd v Receiver of Revenue, Vereeniging* 2001 (2) SA 1026 (W); *Olitzki Property Holdings v State Tender Board* [2001] ZASCA 51; *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* [2001] ZASCA 85; *Logbro Properties CC v Bedderson NO* [2002] ZASCA 135; *South African Veterinary Council v Szymanski* [2003] ZASCA 11; *Unitas Hospital v Van Wyk* [2006] ZASCA 34 (dissenting); *Transnet Ltd v Chirwa* [2006] ZASCA 177; *Minister of Finance v Gore NO* [2006] ZASCA 98 (with Brand JA); *Rustenburg Platinum Mines v Commission for Conciliation, Mediation and Arbitration* [2006] ZASCA 175; *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* [2007] ZASCA 70; *President of the Republic of South Africa v M&G Media Ltd* [2011] ZACC 32 (dissenting); *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6; *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* [2015] ZACC 29 (with Froneman J); *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31 (dissenting); *Steenkamp v Edcon* [2016] ZACC 1 (dissenting); *Merafong City v AngloGold Ashanti Ltd* [2016] ZACC 35; *AMCU v Chamber of Mines of South Africa* [2017] ZACC 3; *Electronic Media Network v e.tv* [2017] ZACC 17 (dissenting with Froneman J);

A critical factor in this regard is that Edwin Cameron's judicial legacy is to a great extent one of transformation or, in the now famous words of Klare, a matter of 'achieving dramatic social change through law-grounded processes'.[2] Precisely because it is grounded in law, legal transformation is situated somewhere between the tamer notion of law reform and the more political and violent connotations of revolution.[3] So, while the change involved may indeed be revolutionary in its scope or effects, the idea of legal transformation has much in common with the contradictory concept 'constitutional revolution'.[4]

As a judge, Edwin Cameron responded boldly, bravely and often brilliantly to the challenge of transformative adjudication. That proposition is amply borne out by other essays in this collection. While some of these contributions offer insight into the moral or legal philosophy informing Cameron's transformative jurisprudence,[5] my aim in this essay is simply to substantiate the proposition in the context of administrative law. I do this by exploring three Constitutional Court judgments of Cameron J and the revolutionary jurisprudence advanced in them. In essence, then, this chapter can be regarded as the continuation of an article published more than 15 years ago, in which I used the jurisprudence of Cameron JA of the Supreme Court of Appeal

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Aquila Steel (Pty) Ltd v Minister of Mineral Resources [2019] ZACC 5; *Buffalo City Metropolitan Municipality v Asla Construction* (Pty) Ltd [2019] ZACC 15 (dissenting with Froneman J).

2 K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146 at 150.

3 Klare (n 2) 150; C Hoexter 'The transformation of South African administrative Law since 1994 with particular reference to the Promotion of Administrative Justice Act 3 of 2000' PhD thesis, University of the Witwatersrand, 2009 at 17-18.

4 See eg R Hirschl *Towards juristocracy: The origins and consequences of the new constitutionalism* (2004) ch 1 and LWH Ackermann 'The legal nature of South Africa's constitutional revolution' [2004] *New Zealand Law Review* 633. As to the latter, see further J Klaaren 'The constitutionalist concept of Justice L Ackermann: Evolution by revolution' in N Bohler-Muller, M Cosser & G Pienaar (eds) *Making the road by walking: The evolution of the South African Constitution* (2018) 27 at 35ff.

5 For instance, Johan Froneman & Helen Taylor identify two principles – protection of the weak and suspicion of power – that informed Cameron's judgments, and they go on to show how suspicion or scrutiny of power featured in his dissents: J Froneman & H Taylor 'Judicial dissent and the sceptical scrutiny of power', this volume, at 366. Other contributors, including Frank Michelman and David Dyzenhaus, highlight Dworkinian influences on Cameron's jurisprudence.

to illustrate the practice of transformative adjudication in administrative law.[6]

In that piece transformative adjudication was described as an adjunct to transformative constitutionalism in its interpretive sense, or more simply 'what judges must do in order to achieve the aims of transformative constitutionalism'.[7] Those aims were identified as the attainment of substantive equality, the realisation of social justice, the infusion of the private sphere with human-rights standards, and the promotion of a culture of justification in public-law interactions.[8] Accordingly, it was suggested that judges engaging in transformative adjudication could be expected to interpret the law so as to advance these four projects in particular.[9]

The article went on to characterise this transformative style of adjudication as a countermeasure against the conservative legal culture inherited from the pre-constitutional era. While the fetters of parliamentary sovereignty and a repressive state had fallen away in 1994, almost 15 years later it seemed that the courts were still constrained by something far more insidious and thus more difficult to pin down and ultimately to eradicate: a parsimonious and formalistic legal culture. This was especially evident in administrative law, a discipline that had always been pervaded by legal reasoning of a miserly and mechanistic nature – as shown, for instance, by the courts' attraction to the classification of administrative functions, the restrictive nature of the judge-made rules of standing, the courts' all-or-nothing treatment of public contracts and their clinging, for the most part, to an outdated conception of the distinction between review and appeal.[10]

Transformative adjudication was, the piece proposed, a device capable of freeing the courts from the constraints of that pre-democratic culture and allowing them to realise their own power under a supreme and consciously transformative constitution. An essential element of this

6 C Hoexter 'Judicial policy revisited: Transformative adjudication in administrative law' (2008) 24 *South African Journal on Human Rights* 281.
7 Hoexter 'Judicial policy revisited' (n 6) 286.
8 Hoexter 'Judicial policy revisited' (n 6) 286, relying on M Pieterse 'What do we mean when we talk about transformative constitutionalism?' (2005) 20 *SA Public Law* 155 and E Mureinik 'A bridge to where? Introducing the interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31.
9 Hoexter 'Judicial policy revisited' (n 6) 286-287.
10 Hoexter 'Judicial policy revisited' (n 6) 287-288.

style of adjudication was a judicial preference for substance over form, a hallmark of the judicial policy or strategy of 'anti-formalism'.[11] Such reasoning was then illustrated with reference to three administrative-law judgments of Cameron JA.[12]

More than 15 years on, this chapter reprises the theme of transformative adjudication. This time the theme is pursued with reference to three especially noteworthy administrative-law judgments from Justice Cameron's years at the Constitutional Court: *Giant Concerts CC v Rinaldo Investments (Pty) Ltd,*[13] *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal*[14] and *Genesis Medical Scheme v Registrar, Medical Schemes.*[15] In their various ways, these three judgments all had a revolutionary effect on the substance of South African administrative law while boldly advancing some of the transformative aspirations associated with the discipline. Those aspirations are briefly identified and explained in the next part of this chapter. The three judgments and their significance are then discussed in detail in parts 3, 4 and 5 of the chapter, and a brief conclusion follows in part 6.

2 Transformative constitutionalism in administrative law

While transformative constitutionalism has no fixed or agreed meaning,[16] in South African public law it is associated primarily and ineluctably with the move from a culture of authority, the culture of the pre-1994 era, to a culture of justification.[17] Achieving a culture of justification is

11 Hoexter 'Judicial policy revisited' (n 6) 287ff.
12 *Ngxuza* (n 1), *Logbro* (n 1) and *Rustenburg Platinum* (n 1).
13 [2012] ZACC 28.
14 [2013] ZACC 10.
15 [2017] ZACC 16.
16 See especially P Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 351 and J Brickhill & Y van Leeve 'Transformative constitutionalism – Guiding light or empty slogan?' (2015) *Acta Juridica* 141. These last two authors remind us (at 169) that the lack of a settled meaning 'is, at least in part, because the transformation envisaged by the Constitution is an ongoing process, not a once-off event, and its objectives depend on the shifting circumstances facing society over time'. For a more recent conception with a socio-economic focus, see H Klug 'Transformative constitutionalism as a model for Africa?' in P Dann, M Riegner & M Bönneman (eds) *The Global South and comparative constitutional law* (2021) 141, and see also on this theme DM Davis 'Transformative constitutionalism: What does it mean in 2021' (2021) 4 *South African Judicial Education Journal* 19.
17 See especially Mureinik (n 8); Pieterse (n 8); Langa (n 16).

a 'central promise or vision of the 1996 Constitution',[18] and arguably its most important contribution to the nascent democratic society.[19] But what does this mean in the context of administrative law?

I have argued previously that in this discipline the promise of a culture of justification can be translated into four more specific (though still fairly broad) aspirations or transformative ideals.[20] My identification of these aspirations was informed partly[21] by relevant provisions of the Constitution,[22] most obviously section 33,[23] section 1[24] and section 195.[25] The identification exercise was also guided by what is surely South Africa's most significant manifesto for administrative-law reform: the Breakwater Declaration.[26] This brief but highly influential document was the product of an eponymous workshop held in February 1993, on the eve of democracy, and attended by representatives of the judiciary, the legal profession, the academy, the public administration and political parties.[27] A measure of its influence is that, as Corder has observed, the Breakwater Declaration came to resemble an agenda for the reform that actually took place in administrative law after 1994.[28]

18 Hoexter 'The transformation of South African administrative Law' (n 3) 23.
19 D Davis *Democracy and deliberation: Transformation and the South African legal order* (1999) 21.
20 Hoexter 'The transformation of South African administrative Law' (n 3) 30-41.
21 Hoexter 'The transformation of South African administrative Law' (n 3) 26-29.
22 Constitution of the Republic of South Africa, 1996.
23 Section 33, titled 'just administrative action', provides: '(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. (3) National legislation must be enacted to give effect to these rights and must – (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal; (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and (c) promote an efficient administration.'
24 Section 1 lists the values on which the Republic of South Africa is founded, including supremacy of the Constitution and the rule of law (s 1(c)).
25 Section 195 lists the basic values and principles governing the public administration.
26 The Breakwater Declaration was initially published, together with papers from the workshop, in (1993) *Acta Juridica* 18-20. That volume of the journal was subsequently republished with unchanged pagination as TW Bennett & H Corder (eds) *Administrative law reform* (1993).
27 Like the declaration, the workshop on 'Administrative Law for a Future South Africa' acquired its colloquial name from the venue, the Breakwater Lodge in Cape Town.
28 H Corder 'Reviewing review: Much achieved, much more to do' in H Corder & L van der Vijver (eds) *Realising administrative justice* (2002) 1 at 4.

Three of the four administrative-law aspirations concern the scope of judicial review and are thus directly relevant to the subject matter of this chapter. The first aspiration is to have meaningful and well-developed grounds for judicial review of administrative action, especially where those grounds were deficient in the pre-democratic era. This hardly needs stating, for narrow and impoverished grounds of review obviously imply minimal accountability and give increased scope for violations of rights and abuses of power. The second aspiration is improved access to judicial remedies, described in the Breakwater Declaration as the need for 'maximum feasible access to administrative justice, including class actions [and] a broad definition of legal standing'.[29] The third aspiration, which relates most obviously to the strategy of anti-formalism, is the adoption of a more substantive style of judicial reasoning to counteract the stultifying formalism that was so characteristic of administrative law before 1994. Finally, the fourth aspiration – not relevant to this chapter – is the completion of administrative law by enhancing the range and effectiveness of non-curial safeguards against maladministration, thus reducing the discipline's heavy reliance on judicial review as a way of securing accountability.

The judgments of Cameron J highlighted in this essay find resonance with the first three transformative aims outlined above. In different ways, these three exhilarating judgments all served to enhance access to judicial remedies by means of anti-formalistic judicial reasoning. In the first case, *Giant Concerts*,[30] Cameron J counteracted the literalism that had after 1994 perversely continued to feature in the South African law relating to standing, and reaffirmed the progress made in *Ferreira v Levin NO*[31] away from the stifling constraints of the common law. He went on to change the law radically by blurring what had previously been a strict divide between standing and the merits. In *KZN Joint Liaison Committee*,[32] Cameron J conducted a rescue operation on behalf of a majority of the court, obliterating procedural obstacles in the way of a deserving applicant who had unwisely framed its case in contract rather than public law. In the process he boldly identified and deployed a new

29 Item vi under heading II, 'Areas of agreement'.
30 n 13.
31 [1995] ZACC 13.
32 n 14.

constitutional principle, alongside the principle of legality, as a further route to administrative-law review outside the main statutory pathway. In *Genesis*,[33] Cameron J again rescued a hapless applicant, this time by expanding a well-known ground of review, error of law, well beyond its traditional scope. His judgment in this case is comparable to the revolution accomplished in respect of the same ground of review by Corbett CJ a quarter of a century earlier;[34] only more breathtaking.

I now turn to the judgments themselves, which are dealt with in chronological order.

3 *Giant Concerts*

In *Giant Concerts* the applicant, Giant Concerts CC, sought to challenge the lawfulness of the sale of about 21 hectares of beachfront land by a municipality to the first respondent, Rinaldo Investments (Pty) Ltd. Whereas the High Court had set aside the sale[35] on several grounds under the Promotion of Administrative Justice Act (PAJA),[36] the Supreme Court of Appeal found that the applicant had lacked standing to bring the review.[37] The case went on to the Constitutional Court, which ultimately dismissed the appeal, but not without contributing richly to the jurisprudence on standing in general and own-interest standing in particular.

The common-law rules of standing, developed in the context of private law, are inimical to litigation of a public nature,[38] and before 1994 these rules tended to operate as a significant impediment to access to administrative justice. This is hardly surprising, since the common-law rules were part and parcel of the courts' attraction to formalism in that era: a convenient way of avoiding uncomfortably political issues and thus of reinforcing, in a covert manner, prevailing notions of the legitimate function of the judiciary.[39] As Edwin Cameron himself had pointed out during the politically fraught years of the mid-1980s, the

33 n 15.
34 *Hira v Booysen* 1992 (4) SA 69 (A).
35 *Giant Concerts CC v Minister for Local Government, Housing and Traditional Affairs for the Province of KwaZulu-Natal* [2010] ZAKZPHC 64.
36 Act 3 of 2000.
37 *Rinaldo Investments (Pty) Ltd v Giant Concerts CC* [2012] ZASCA 34.
38 See the separate judgment of O'Regan J in *Ferreira* (n 31) para 229.
39 Hoexter 'The transformation of South African administrative Law' (n 3) 168-169.

rules lent themselves to manipulation by judges 'who [felt] disinclined to hear certain cases ... for reasons which [were] not openly expressed'.[40]

By the early 1990s the need for drastic change was hardly doubted. Indeed, as we have seen, the desirability of 'a broad definition of legal standing' was one of eight unequivocal 'Areas of Agreement' recorded in the Breakwater Declaration.[41] Unfortunately, however, the common-law rules were only partly displaced by the constitutional revolution that followed. Those rules continued to exist and, in cases not clearly implicating rights in the Bill of Rights, to be applied alongside the far-reaching provisions of section 7(4)(b) of the Interim Constitution[42] and their successor, section 38 of the 1996 Constitution.[43] This made for an awkwardly dualistic system, often progressive but sometimes yielding retrogressive results that were obviously incongruent with their constitutional setting.

As to the application of the constitutional provisions, administrative-law review was a grey area. This was mainly because the legislature had rejected the Law Commission's proposal[44] to include the provisions of section 38 in the draft PAJA, so that all reference to that section was dropped from PAJA shortly before its enactment in February 2000.[45] Like several other academic commentators,[46] I argued that section 38 ought

40 E Cameron 'Legal standing and the emergency' in N Haysom & L Mangan (eds) *Emergency law papers presented at a workshop, Johannesburg, April 1987* (1987) 61 at 64.

41 Item vi.

42 Act 200 of 1993.

43 Section 38 provides: 'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are – (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members.'

44 See the definition of 'qualified litigant' in the Bill appended to the South African Law Reform Commission's *Report on administrative justice* (August 1999) 15 at 19-20 (clause 1(m)).

45 The legislature had opted to include s 38 in comparable legislation, including the National Environmental Management Act 107 of 1998, and its reasons for non-inclusion in PAJA remain obscure: see JR de Ville *Judicial review of administrative action in South Africa* rev ed (2005) 401.

46 For example, De Ville (n 45) 401; I Currie *The Promotion of Administrative Justice Act: A commentary* 2 ed (2007) 179; J Klaaren & G Penfold 'Just administrative action' in Woolman & others (eds) *Constitutional law of South Africa* 2 ed (2008) ch 63 at 63-119.

to be read into PAJA.[47] The courts were considerably more doubtful, however, as suggested by a judgment handed down a decade after the enactment of the statute. *Democratic Alliance v Acting National Director of Public Prosecutions*[48] held that review under PAJA did not directly implicate section 33 of the Constitution, and nor had PAJA itself altered the common-law requirements for standing to review administrative action. Ranchod J failed to see any link between a PAJA review and the rights in section 33 – even though he evidently appreciated that the applicant was obliged by constitutional subsidiarity to proceed by way of PAJA and thus that direct reliance on section 33 was not available to it.[49]

Though the respondents wisely made no attempt to peddle such blatant formalism in *Giant Concerts*, the unanimous judgment of Cameron J effectively put paid to it. He began by confirming that the applicant was seeking to vindicate a constitutional right to just administrative action via the statute mandated and enacted to realise the right, and that the correct approach was indeed to read the provisions of section 38 into PAJA.[50] As the highest court stated in a more recent judgment, the broad standing requirements in section 38 apply to the review of administrative action under PAJA precisely because such review amounts to the enforcement of the section 33 rights.[51]

Cameron J did not stop there, however, but proceeded magisterially to clarify the law governing own-interest standing, both under PAJA and more generally. First he pointed out that, in accordance with the seminal interpretation of PAJA's definition of administrative action in *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works*,[52] an own-interest litigant merely has to 'show that the decisions it seeks to attack had the

47 C Hoexter *Administrative law in South Africa* (2007) 440-441 and 2 ed (2012) 493-494.

48 [2011] ZAGPPHC 57 paras 32, 35-36.

49 *Democratic Alliance* (n 48) para 35. The conclusion that the applicant lacked standing to challenge the dropping of corruption charges against President Jacob Zuma was overturned on appeal in *Democratic Alliance v Acting National Director of Public Prosecutions* [2012] ZASCA 15 para 45, though with reliance on the principle of legality rather than PAJA. As to constitutional subsidiarity, see the exposition of Cameron J in *My Vote Counts* (n 1) paras 44-66.

50 *Giant Concerts* (n 13) paras 28-29.

51 *Mkhize NO v Premier of the Province of KwaZulu-Natal* [2018] ZACC 50 para 70.

52 [2005] ZASCA 43 para 23, where the court proposed that PAJA's requirement that rights be adversely affected would be satisfied by action having merely the capacity to affect legal rights.

capacity to affect its own legal rights or its interests'.[53] Notably, too, he reminded his audience that, in line with the ground-breaking judgment in *Ferreira*,[54] under section 38(a) it is enough if the applicant is affected *directly* by the law or conduct complained of, and that the effect need not be personal as well as direct. In other words, the own-interest litigant need not be the person whose constitutional right has been infringed or threatened. Ultimately,

> a litigant need not show the same 'sufficient, personal and direct interest' that the common law requires, but must still show that a contested law or decision directly affects his or her rights or interests, or potential rights or interests.[55]

Cameron J also clarified the position as regards municipalities and their ratepayers, the subject of a well-established exception at common law to the need for 'personal' interest.[56] In *Giant Concerts* the applicable legislation permitted the sale of property by private bargain (rather than public auction or tender) if it would be in the 'interests of the borough'.[57] In this context a stumbling block for the Supreme Court of Appeal was that, like a ratepayer from another city, the applicant clearly had no stake in the interests of the borough.[58] However, congruent with the broad approach to standing established in *Ferreira*, Cameron J pointed out that a litigant seeking to challenge the conduct of a municipality need not be a ratepayer at all. Since *anyone* who establishes a sufficient interest in the lawfulness of a transaction will have own-interest standing to challenge it,[59] the ratepayer-municipality relationship was beside the point.

To those who suspect that antipathy to formalism essentially means being generous to applicants irrespective of the merits, or that it is synonymous with sloppy reasoning and 'anything-goes' outcomes, the result in *Giant Concerts* may come as a shock: for the court ultimately found that the applicant had failed to demonstrate a direct or substantial

53 *Giant Concerts* (n 13) para 30.
54 n 31, para 168.
55 *Giant Concerts* (n 13) para 41(a), and see also eg *Areva Incorporated in France v Eskom Holdings SOC Ltd* [2016] ZACC 51, para 32.
56 In *Director of Education, Transvaal v McCagie* 1919 AD 616 at 628 the Appellate Division explained that the relationship of trust between ratepayers and their local authority founds a presumption that ratepayers have an interest in the legality of municipal decisions.
57 Section 233(8) of the Local Authorities Ordinance 25 of 1974.
58 *Giant Concerts* SCA (n 37) paras 29, 31.
59 *Giant Concerts* (n 13) paras 46-47.

interest in the sale, i.e. something beyond a purely hypothetical or academic interest. In this regard, it was not enough for the applicant to have participated and objected in an earlier notice-and-comment process concerning the sale.[60] The fundamental problem was that in the review proceedings themselves, the applicant had not given substance to that objection, nor had it offered any indication of its own intentions in relation to the land, most obviously the price it was willing to pay for it. That being so, the court was entitled to infer that it 'was merely toying with process, or seeking to thwart a propitious public development because it had been made available to someone else'.[61]

But the most remarkable feature of *Giant Concerts* is its challenge to the traditionally liminal nature of the standing inquiry and its insulation from the merits of the case. As Cameron J explained, own-interest standing concerns the entitlement of a particular litigant to claim the court's time by bringing the challenge. It is not rooted in the legality or otherwise of the challenged decision or law, but in its effect on the applicant's interests or potential interests.[62] This means that when determining standing, the court must assume that the challenge sought to be brought is justified, and also that standing may be denied in the face of an illegality.[63] Having stated these time-honoured principles, Cameron J proceeded immediately to disturb them by asserting that

> the interests of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if the applicant's standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest.[64]

Later in the judgment he added the qualification that when a party has *no* standing, 'it is not necessary to consider the merits, unless there is at least a strong indication of fraud or other gross irregularity in the conduct of a public body'.[65]

60 *Giant Concerts* (n 13) paras 56-57.
61 *Giant Concerts* (n 13) para 55.
62 *Giant Concerts* (n 13) para 33.
63 *Giant Concerts* (n 13) paras 32, 34.
64 *Giant Concerts* (n 13) para 34.
65 *Giant Concerts* (n 13) para 58.

To the extent that the *Giant Concerts* exception blurs the formerly strict divide between standing and merits, it must count as a revolutionary development. However, the exception remains a work in progress, and at the time of writing there was still considerable doubt about its scope and the manner of its application. In *Tulip Diamonds FZE v Minister for Justice and Constitutional Development*,[66] the court seemed to regard the exception as something to be triggered only by fraud or gross irregularity – and yet Van der Westhuizen J was evidently willing to scrutinise the merits closely in arriving at the conclusion that the case was not worthy of exceptional treatment. In *Areva*,[67] the majority reached the same conclusion *without* investigating the merits: these, Zondo J held, should be entered only in exceptional cases or where the public interest cries out for it. The minority, by contrast, regarded it as obviously in the public interest to determine the lawfulness of state conduct entailed in the award of so massive a tender.[68] So, as one commentator lamented a few years ago, it is still 'unclear when exactly a court should consider the merits of a case made by an own-interest litigant with questionable standing'.[69]

But then the *Giant Concerts* exception is no doubt a product of its time, the painful era of state capture, when in the highest court's calculations legality must often have weighed more heavily than certainty and other values associated with the rule of law. That was not only a period of endemic maladministration and public corruption, but one most alarmingly characterised by the government's abdication of its governance responsibilities.[70] The resulting accountability vacuum was inevitably filled by the courts – and in the midst of the lawfare[71] that resulted, it is hardly surprising that the highest court should have added to its arsenal for the vindication of legality. Indeed, the *Giant Concerts* exception is not the only example of this. The exception was more than

66 [2013] ZACC 19 para 70.
67 n 55.
68 *Areva* (n 55) para 61.
69 HW van Eetveldt 'Standing on unsteady ground: *Areva NP Incorporated in France v Eskom SOC Ltd*' (2019) 22 *Potchefstroom Electronic Law Journal* 1 at 23.
70 This abdication was frankly admitted by the National Executive Committee of the ANC in March 2017: see G Mantashe, Secretary-General 'Statement of the African National Congress following the National Executive Committee meeting held 24-26 March 2017'.
71 See H Corder & C Hoexter '"Lawfare" in South Africa and its effects on the judiciary' (2017) 10 *African Journal of Legal Studies* 105.

matched a few years later by the court's '*Gijima* principle', laid down in the context of self-review under the legality principle, which obliges a court to declare conduct invalid even where it is wholly unable to condone or overlook unreasonable delay in bringing a review application.[72] Cameron J concurred in that controversial judgment but, characteristically, in a subsequent case he was one of a minority of judges willing to admit the unpopularity of the court's reasoning in *Gijima* and to confront the ambivalence of the court's various pronouncements on delay.[73]

4 *KZN Joint Liaison Committee*

The majority judgment of Cameron J in *KZN Joint Liaison Committee*[74] was effectively a rescue operation that saved a deserving applicant from being non-suited – and simultaneously brought into existence a public-law claim of unconscionable state conduct. The judgment exemplifies transformative adjudication mainly by facilitating access to something closely resembling administrative justice, thus increasing the prospects of public accountability. In this way it advances the culture of justification that is the central aspiration of post-1994 administrative law and of the democratic Constitution more generally.[75]

The applicant was an association of independent schools in the province of KwaZulu-Natal. In September 2008, the provincial department of education had notified such schools, in approximate terms, of the levels of government subsidy they could expect in three tranches the following year under section 48 of the South African Schools Act.[76] But the first tranche, due on 1 April 2009, was not in fact

72 *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* [2017] ZACC 40 paras 52-54. In essence, the court regarded the injunction in s 172(1)(a) of the Constitution as overriding the requirement that review proceedings be brought promptly, notwithstanding the equally constitutional provenance of the latter requirement. Accordingly, a court may be under a duty to declare conduct invalid even where it finds itself unable to condone or overlook unreasonable delay in bringing the review application. For criticism, see especially L Boonzaier 'A decision to undo' (2018) 135 *South African Law Journal* 642 at 666ff.

73 *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15 paras 108-153 (Cameron J and Froneman J; Khampepe J concurring).

74 n 14.

75 For more detailed discussion and analysis, see C Hoexter 'The enforcement of an official promise: Form, substance and the Constitutional Court' (2015) 132 *South African Law Journa*l 207.

76 Act 84 of 1996.

paid, and a month later a further notice warned schools to expect a 30% reduction in subsidy owing to budget cuts. When the first two tranches were eventually paid in July 2009, they proved to be 30% lower than the amounts originally specified.

The KwaZulu-Natal High Court dismissed the applicant's attempt to enforce the terms of the original notice as a contract or promise.[77] Even on the assumption that the original notice had created contractual obligations, Koen J found that the terms of the contract and its 'approximate' amounts were too uncertain to be enforced.[78] Leave to appeal was refused by that court and by the Supreme Court of Appeal. Ultimately, however, and against all the odds, the applicant achieved some success in the Constitutional Court, for there a majority held that the applicant was entitled on public-law grounds to be paid the approximate amounts of subsidy that had fallen due by 1 April 2009.

This unlikely outcome depended on a remarkable willingness on the part of Cameron J and some of his more adventurous colleagues to surmount procedural, and largely self-imposed, obstacles in the way of the applicant. While the approximate nature of the amounts stipulated in the first notice hardly augured well for a contractual claim, the applicant had apparently placed no reliance on public law[79] until, after the oral hearing, the Constitutional Court called for written representations on the public-law dimensions of the case.[80] This was a far more propitious approach, particularly since the constitutional and legislative framework included regulations and a set of National Norms and Standards for School Funding 2006 that laid down deadlines for subsidy payments. Grasping the public-law lifeline extended by the court, the applicant argued that its expectation of payment solidified into a right when the due date arrived for payment of the first tranche of subsidy. The court, in turn, accepted that a sufficient basis had been laid in the applicant's papers for such an argument. The deadline-setting provision, item 195 of the Norms and Standards, had actually been referred to in the

77 *KwaZulu-Natal Joint Liaison Committee v Member of the Executive Council, Department of Education, KwaZulu-Natal* (KZP) unreported case no 9594/2010 of 26 September 2011.
78 *KZN Joint Liaison Committee* HC (n 77) paras 9-11.
79 On this point, see especially para 156 (per Zondo J).
80 *KZN Joint Liaison Committee* (n 14) para 59.

applicant's founding affidavit, and 'reliance on statutory obligations was foreshadowed in its papers'.[81]

Another promising argument based on the legitimate expectation doctrine was raised by the amicus, the Centre for Child Law at the University of Pretoria. However, the applicant's original failure to pursue the route of administrative-law review meant that the rule 53 record was not available, and that lacuna made it very difficult for the court to enforce the claim as a matter of administrative justice.[82] Accordingly, in the rest of his judgment Cameron J was careful to deny any association with the legitimate expectation doctrine.[83] Yet, as commentators pointed out at the time, the reasoning of his majority judgment not only showed connections with the South African case law on legitimate expectations but also resonated in several respects with the English case law dealing with substantive enforcement of such expectations.[84]

Cameron J reasoned that the original notice amounted to a publicly promulgated promise to pay that had created an enforceable legal obligation.[85] By virtue of a 'sound principle of our constitutional law'[86] – a principle drawn from case law concerned with legitimate expectations – that promise could not unilaterally be diminished after the date of payment had arrived and the expectation had solidified into an accrued right.[87] This conclusion was informed by considerations of reliance, accountability and rationality. The schools had banked on the original promise made in the 2008 notice, and after the due date it was impossible for them to adjust themselves to the reduced first tranche; accountability demanded that government announce budget cuts promptly; and it was clearly irrational to revoke a promise made in relation to a period that had already passed.[88] Only an 'overriding public interest' (another

81 *KZN Joint Liaison Committee* (n 14) para 67.
82 *KZN Joint Liaison Committee* (n 14) paras 31-33.
83 See *KZN Joint Liaison Committee* (n 14) paras 52, 69.
84 See M Murcott 'A future for the doctrine of substantive legitimate expectation? The implications of *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal*' (2015) 18 *Potchefstroom Electronic Law Journal* 3133 at 3146-3149; Hoexter 'Enforcement of an official promise' (n 75) 224-228.
85 *KZN Joint Liaison Committee* (n 14) para 48.
86 *KZN Joint Liaison Committee* (n 14) para 52.
87 *KZN Joint Liaison Committee* (n 14) paras 52-62, with reference to an obiter dictum in *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* [1998] ZACC 20 para 41 and to two judgments of the European Court of Justice.
88 *KZN Joint Liaison Committee* (n 14) paras 63-65.

concept ineluctably associated with legitimate expectations)[89] could justify such a revocation, and no such interest had been demonstrated by the province.[90]

As for the word 'approximate', it presented no real difficulty. While it was usual for court orders to specify precise amounts of money, Cameron J saw no reason why his order should be totally precise:

> The 2008 notice specified exact sums, and undertook to pay them approximately. That is an obligation that is coherent and legally enforceable. And the department is obliged to engage with the schools to find finality in complying. The department will tender performance in terms of the court's order. If the recipient schools consider its tender inadequately 'approximate' to the rand amounts specified, they can apply to the high court for appropriate relief.[91]

Cameron J and the majority thus secured a remedy for a deserving applicant whose claim would otherwise have been dismissed, for the rescue operation did not commend itself to all the judges of the court.

Nkabinde J would have granted leave to appeal but would have dismissed the appeal on the basis that 'neither the alleged promise nor the Norms and Standards created an enforceable obligation'.[92] Mogoeng CJ and Jafta J (Zondo J concurring) agreed with her judgment save for the granting of leave to appeal. Pointing to the insufficiency of evidence on questions such as the number of learners qualifying for subsidy, these judges concluded that the applicant had failed to establish that the department owed the schools any amount for the first term.[93] The opinion of Zondo J (Mogoeng CJ and Jafta J concurring) was the most strident of the dissenting judgments. For Zondo J, the only case the court was entitled to decide was the case the applicant had brought the respondents to court to answer, and that was 'no case whatsoever'.[94] Zondo J seemed to be especially infuriated by the majority's insouciant approach to the payment of approximate amounts, an issue to which he devoted a large proportion of his judgment. Over the course of 20 closely reasoned paragraphs he objected to the uncertainty of the order and

89 The South African source is again *Premier, Mpumalanga* (n 87) para 41, but the phrase also features prominently in the English case law on substantive enforcement: see Hoexter 'The enforcement of an official promise' (n 75) 227.
90 *KZN Joint Liaison Committee* (n 14) para 66.
91 *KZN Joint Liaison Committee* (n 14) para 75.
92 *KZN Joint Liaison Committee* (n 14) para 148.
93 *KZN Joint Liaison Committee* (n 14) para 189.
94 *KZN Joint Liaison Committee* (n 14) para 150.

the casual imposition of an 'inexplicable' obligation on the department to engage with the schools, an obligation that revealed the majority's 'implied acceptance that difficulties may arise with the implementation or execution of the order'.[95]

If the court's order was undeniably adventurous, it has been argued that the rescue operation itself was not as extreme as Zondo J made it sound; for by the time the case was heard in November 2012 the highest court had already recognised several exceptions to the general principle that a court is confined to the questions of law explicitly raised by the parties.[96] Indeed, the court had been known to grant relief on the basis of claims not raised by the parties 'directly, fully or at all', as Khampepe J pithily observed in a judgment handed down a few months later, in July 2013.[97] Still, like his outraged response to the court order, the indignant tone of the Zondo judgment on the 'deviation by the main judgment from the applicant's case'[98] serves as a contemporaneous measure of the revolutionary nature of the majority judgment.

A criticism not voiced by the dissenting judges is the potential of the public-law claim to exacerbate avoidance, subversion or sidelining of PAJA, thus (at best) detracting from a constitutionally mandated statute or (at worst) encouraging its redundancy. In recent years the trend has been for litigants and courts to avoid the statute in favour of the more abstract and more general principle of legality, and it has perturbed commentators who care about subsidiarity and the integrity of South African public law.[99] But the Constitutional Court seems far less troubled by this sort of subversion, or perhaps it is tolerated as unavoidable collateral damage in the fight for legality and accountability. The court's

95 *KZN Joint Liaison Committee* (n 14) paras 173, 175.
96 Hoexter 'The enforcement of an official promise' (n 75) 212-214, with reference *inter alia* to an unpublished paper by Stuart Scott.
97 *Head, Department of Education, Free State Province v Welkom High School* [2013] ZACC 25 para 108.
98 *KZN Joint Liaison Committee* (n 14), heading to paras 155-160.
99 For example, M Murcott & W van der Westhuizen 'The ebb and flow of the principle of subsidiarity – Critical reflections on *Motau* and *My Vote Counts*' (2015) 7 *Constitutional Court Review* 43; R Henrico 'Subverting the Promotion of Administrative Justice Act in judicial review: The cause of much uncertainty in South African administrative law' [2018] *Journal of South African Law* 288; C Hoexter & G Penfold *Administrative law in South Africa* 3 ed (2021) 168-177; C Hoexter & G Penfold 'The remaking of South African administrative law' (2024) 68 *Journal of African Law* 215 at 220-222.

calculated choice of the legality principle as the main pathway to 'self-review'[100] does not seem inconsistent with such an attitude.

In *Pretorius v Transport Pension Fund*,[101] in which the public-law claim of unconscionable state conduct was elaborated, Froneman J acknowledged for a unanimous court that the criticisms inspired by PAJA-avoidance in favour of the legality principle 'also need to be considered carefully' in relation to the public-law claim.[102] However, this did not prevent the court from confirming the legitimacy of claims outside PAJA even where the relevant conduct qualifies as administrative action.[103] And, while the court emphasised that the public-law claim engages rights other than those in section 33 of the Constitution,[104] that is not particularly reassuring. A characteristic of administrative-justice cases is that other rights almost inevitably feature alongside the rights in section 33(1) and (2) of the Constitution – so it would be easy enough in most cases to typify an administrative-justice claim as a claim sourced in another right.[105] Nor are critics likely to be placated by the Constitutional Court's answer to the charge that it departed from the principle of subsidiarity in *KZN Joint Liaison Committee*: 'this court did not ignore PAJA, but rather chose to dispose of the matter without having to answer the question whether PAJA applied'.[106] The answer is unsatisfactory, for if the court had indeed done that it would surely

100 In its controversial judgment in *Gijima* (n 72) the court held unanimously that PAJA is available only exceptionally to an organ of state seeking to challenge its own decision on review. For criticism, see Boonzaier (n 72); MN de Beer 'A new role for the principle of legality in administrative law' (2018) 135 *South African Law Journal* 593; G Quinot & E van der Sijde 'Opening at the close: Clarity from the Constitutional Court on the legal cause of action and regulatory framework for an organ of state seeking to review its own decisions?' [2019] *Journal of South African Law* 324.

101 [2018] ZACC 10.

102 *Pretorius* (n 101) para 37. For comment, see C Hoexter 'Courageous creativity and anti-formalism in administrative law: Notable contributions from the jurisprudence of Johan Froneman' (2022) 12 *Constitutional Court Review* 121.

103 *Pretorius* (n 101) paras 37-41. See also the dissenting judgment of Froneman J in *Hunter v Financial Sector Conduct Authority* [2018] ZACC 31 para 100.

104 *Pretorius* (n 101) paras 38-39.

105 See C Hoexter 'From *Chirwa* to *Gcaba*: An administrative lawyer's view' in M Kidd & S Hoctor (eds) *Stella iuris: Celebrating 100 years of teaching law in Pietermaritzburg* (2010) 47 at 52-53; Hoexter 'Courageous creativity' (n 102) 128-129.

106 *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku* [2022] ZACC 5 para 115 (per Khampepe J for a unanimous court).

count as avoidance. The answer is also misleading,[107] for the public-law claim was really invented as a solution to the applicant's failure to invoke PAJA in the first place. The message the court sent in *KZN Joint Liaison Committee* was that *applicants* might safely ignore the statute in future and still receive administrative justice; or something very like it.[108]

5 *Genesis*

In his majority judgment in *Genesis,* Cameron J again came to the rescue of the applicant: this time by expanding the review ground of error of law well beyond the confines of its traditional application. This feat meant overcoming an obstacle described by one of the dissenting judges, and not unreasonably, as 'insurmountable'.[109]

This is not the first time in the history of South African law that error of law has been revolutionised. The ground of review was recognised almost a century ago as a failure to appreciate a discretion conferred by statute 'through misreading of the Act which confers it'.[110] In practice, however, it was very difficult to predict when the review ground would operate. This was because the South African courts had adopted a distinction drawn in English law, in the context of decisions of inferior courts, between 'jurisdictional' and 'non-jurisdictional' errors.[111] The first category encompassed an error made in determining an administrator's jurisdiction. This type of error was reviewable because it necessarily entailed either the abdication or usurpation of power, both of which were obviously unlawful. A non-jurisdictional error, on the other hand, was unreviewable because it did not go to jurisdiction. Rather, it was made in the course of deciding a matter that the administrator had jurisdiction to decide, and so it could be regarded as an error 'within jurisdiction'

107 So is the claim in *Masuku* (n 106) para 115 that the court 'ultimately decided the question on the basis of the rationality requirement of the principle of legality'.

108 See Hoexter 'The enforcement of an official promise' (n 75) 223.

109 *Genesis* (n 15) para 109 (per Jafta J; Mojapelo AJ concurring).

110 Stratford JA in *Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Ltd* 1928 AD 220 at 234.

111 In English law the distinction remains relevant in relation to the decisions of inferior courts. In the context of administrative tribunals, however, it was eroded by judgments including *Anisminic Ltd v Foreign Compensation Commissioner* [1969] 1 All ER 208 (HL).

or 'on the merits'.[112] As an English judge explained it, an administrator was not bound to get its discretionary decision right but also enjoyed 'jurisdiction to go wrong'.[113]

The point of this artifice was, of course, to avoid the conclusion that *every* error of law necessarily amounted to a failure to appreciate the nature of the discretion, and thus to preserve and safeguard the more fundamental distinction between the remedies of review and appeal. The idea was to ensure that in South Africa, as in English law, a 'mere mistake of law' did not count as a reviewable irregularity.[114] There were, however, several cases in which mere mistakes of law had apparently been subjected to review,[115] and they were not readily explicable in terms of the distinction between jurisdictional and non-jurisdictional errors.

This uncomfortable truth was admitted by Corbett CJ in 1992 in the watershed case of *Hira v Booysen*.[116] Here, drawing on English cases including *Anisminic*,[117] the Appellate Division found a new basis for the operation of error of law. Corbett CJ held for a unanimous court that the key to the reviewability of such an error was whether the legislature intended the tribunal to have exclusive jurisdiction to decide the question of law. In this regard, a court would be unlikely to impute exclusive jurisdiction to the tribunal in relation to 'purely judicial' questions, such as whether a person's conduct falls within an objectively ascertainable category.[118] The question in the case before the court, whether teachers were guilty of criticising their department of education 'publicly', was indeed of a purely judicial nature, and the tribunal's error

112 Or an error 'in jurisdiction' as opposed to 'of jurisdiction': see MN de Beer 'Reviewable mistakes of law and fact' (2021) 4 *South African Judicial Education Journal* 65 at 69.

113 *R v Governor of Brixton Prison, ex parte Armah* [1968] AC 192 at 234 (Lord Reid).

114 *Doyle v Shenker & Co Ltd* 1915 AD 233 at 236 (Innes CJ), and see also eg *Johannesburg City Council v Chesterfield House (Pty) Ltd* 1952 (3) SA 809 (A) 825A. In both cases the decision was that of an inferior court.

115 These included *Goldfields Investment Ltd v City Council of Johannesburg* 1938 TPD 551; *Local Road Transportation Board v Durban City Council* 1965 (1) SA 586 (A); *Reynolds Brothers Ltd v Chairman, Local Road Transportation Board, Johannesburg* 1985 (2) SA 790 (A).

116 n 34, 90D-G.

117 n 111.

118 *Hira* (n 34) 93E-F.

as to the meaning of public criticism was, the Chief Justice concluded, reviewable.[119]

Over the next 25 years the legal system changed fundamentally as legislative sovereignty gave way to constitutional supremacy, broadly conceived constitutional rights to just administrative action were created and given statutory effect in PAJA, and the principle of legality was identified and developed by the courts into a major source of administrative law. In the process, error of law became well established as a ground of review both in section 6(2)(d) of PAJA and under the legality principle.[120] Notably, too, the drafters of PAJA made no mention of jurisdiction and simply envisaged judicial review where 'the action was materially influenced by an error of law'. Indeed, any need for the courts to resort to the language of jurisdiction also fell away for, as Cameron J aptly pointed out in *Kirland*, whether an error was jurisdictional had become irrelevant to its reviewability.[121] The PAJA ground came to be very well used, and it featured in several judgments of the Constitutional Court concerning the misconstruction or misinterpretation of legislative power by an administrator.

In one of these, *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*,[122] the court laid stress on the requirement of materiality and confirmed that a material error of law is one that affects the outcome of the case: 'An error of law is not material ... if, on the facts, the decision-maker would have reached the same decision, despite the error of law.'[123] On the application of this test in the *Lagoonbay* case, an error of law was found not to be material where it was probable that

119 *Hira* (n 34) 95C-F.

120 As the Constitutional Court indicated in *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 11 para 148, public powers are not to be misconstrued. Prominent diagnoses of error of law under the legality principle include *Scalabrini Centre, Cape Town v Minister of Home Affairs* [2017] ZASCA 126 para 59 and *President of the Republic of South Africa v Public Protector* [2020] ZAGPPHC 9 para 47ff.

121 *Kirland* (n 1) para 98. However, despite this and the example set by PAJA in relation to fact as well as law, jurisdictional terminology continues to be used by all the courts. Notable illustrations from the Constitutional Court in respect of jurisdictional facts, requirements or factors are *Competition Commission of South Africa v Standard Bank of South Africa Ltd* [2020] ZACC 2 paras 62, 65; *Maswanganyi v Minister of Defence and Military Veterans* [2020] ZACC 4 paras 26, 29, 39-41, 45-49.

122 [2010] ZACC 11.

123 *Gauteng Development Tribunal* (n 122) para 91 (Jafta J).

the administrator would have refused the rezoning application in any event.[124] In *Business Zone*, by contrast, the error of law was judged to be material.[125] Here a petrol supplier had cancelled its lease agreement with a service station, and the latter had asked the Controller of Petroleum Products to refer the cancellation to arbitration as an unfair contractual practice under section 12B of the Petroleum Products Act.[126] The Controller refused, however, owing to an erroneous belief that the statutory power to consent depended on an existing contract between the parties, and furthermore that it was not permissible to exercise the power while litigation about the cancellation was pending. In truth, as the court pointed out, the only prerequisite for the exercise of the power to consent was an allegation by a retailer that a wholesaler had engaged in an unfair or unreasonable contractual practice.[127]

This, then, was the legal context in which *Genesis* fell to be decided. The facts were that in 2013 Genesis Medical Scheme had submitted to the Registrar of Medical Schemes financial statements in which Personal Medical Savings Accounts (PMSAs) were reflected as assets of the scheme. In terms of section 38 of the Medical Schemes Act,[128] the Registrar rejected these financial statements for non-compliance with the Act. As the Registrar explained when giving written reasons for the decision, a High Court judgment from 2007, known generally as *Omnihealth*,[129] had classified PMSAs as trust property. In accordance with that judgment, the Registrar had issued binding circulars in 2011 and 2012 that required PMSAs to be treated as trust property for purposes of financial reporting.

Genesis challenged the rejection in the Western Cape High Court by way of review for error of law.[130] There it appeared to Davis J (another intrepid and anti-formalistic judge) that the Registrar's decision was essentially based on *Omnihealth,* a judgment that the court regarded as

124 *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* [2013] ZACC 39 paras 67-68.
125 *Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Ltd* [2017] ZACC 2.
126 Act 120 of 1977.
127 *Business Zone* (n 125) para 83.
128 Act 131 of 1998.
129 *Registrar of Medical Schemes v Ledwaba NO* [2007] JOL 19202.
130 *Genesis Medical Scheme v Registrar of Medical Schemes* [2014] ZAWCHC 206.

wrong in law.[131] It followed, then, that the Registrar's decision, 'predicated directly and exclusively on that holding', had to be set aside as based on an error of law.[132]

An appeal by the Registrar turned purely on the correctness of the classification of PMSAs: a majority of the Supreme Court of Appeal held that they constitute trust property, while a minority agreed with Davis J that they are assets of the medical scheme.[133] Davis J was ultimately vindicated on further appeal to the Constitutional Court. Here, however, interpretation of the relevant statutes[134] was not the only issue, for serious difficulties were raised in connection with the ground of error of law.

These difficulties were thoroughly canvassed in the dissenting judgment of Jafta J, in which Mojapelo AJ concurred. Jafta J pointed out that the ground of error of law – the only ground pleaded – was ordinarily confined to misinterpretation or misapplication of a legislative provision by an administrative functionary. Neither of those features was present here: the error, if any, did not relate to legislation and had been made not by the Registrar but by the court in *Omnihealth*. The Registrar had done no more than follow a precedent that he had been bound to follow.[135]

Jafta J also took issue with the materiality of the error. The Registrar, he pointed out, was empowered by section 37(2) of the Act to stipulate the form in which financial statements had to be submitted. He had done so by means of two circulars that, while inspired by *Omnihealth*, remained binding because they had an independent existence as administrative decisions that had never been set aside and were not being challenged now.[136] In support of this argument, Jafta J quoted several dicta of Cameron J from his judgments in *Kirland*[137] and *Merafong*:[138] statements emphasising that for rule-of-law reasons, an apparently binding decision remains legally effective unless and until it is duly set aside by a court

131 *Genesis* HC (n 130) paras 39-42.
132 *Genesis* HC (n 130) para 42.
133 *Registrar of Medical Schemes v Genesis Medical Scheme* [2016] ZASCA 75.
134 These were the Medical Schemes Act and the Financial Institutions (Protection of Funds) Act 28 of 2001.
135 *Genesis* (n 15) paras 92-95.
136 *Genesis* (n 15) para 105ff.
137 n 1.
138 n 1.

– and that in the meantime, no official is entitled to disregard such a decision on the basis of perceived unlawfulness.[139]

In the judgment of Jafta J, then, the correctness of *Omnihealth* was neither here nor there. On the first principle established in *Oudekraal Estates (Pty) Ltd v City of Cape Town*[140] and later extended by the Constitutional Court in *Kirland, Merafong* and other cases,[141] the Registrar would in any event have been bound to reject the financial statements for non-compliance with his circulars. This, Jafta J concluded, created an 'insurmountable obstacle in the way of setting aside the impugned decision'.[142] But Cameron J negotiated that obstacle so nimbly that he took a large majority with him and attracted a separate concurring judgment written by Zondo J.

Cameron J dealt with the traditional scope of error of law very swiftly. He simply pointed out that section 33 of the Constitution and section 6(2)(d) of PAJA render *every* error of law reviewable as long as it is material.[143] While he admitted that the ground of review had traditionally been applied to the misconstruction or misinterpretation of legislative provisions, there was nothing in PAJA to justify such a rigid definition of the ground.

Next, Cameron J reasoned that *Omnihealth* had not merely influenced the Registrar's decision but had caused it:

> *Omnihealth* was effectively the be-all and end-all of the Registrar's decision. Without *Omnihealth*, the Registrar would not have taken it. The parties would never have been at odds. In lawyers' language, *Omnihealth* was 'material' to the disputed decision. And if *Omnihealth* was wrong, that means the Registrar's decision was wrong then – and that it is wrong now.[144]

After demonstrating in a compelling fashion that *Omnihealth* had indeed been wrong on the merits,[145] Cameron J turned to the more difficult issue: the argument about the independent existence of the Registrar's

139 *Genesis* (n 15) paras 107, 112.
140 [2004] ZASCA 48.
141 *Department of Transport v Tasima (Pty) Ltd* [2016] ZACC 39 paras 123-126; *Swart v Starbuck* [2017] ZACC 23 para 37; *Magnificent Mile Trading 30 (Pty) Ltd v Celliers NO* [2019] ZACC 36 para 45. On this principle and its development, see further Hoexter & Penfold *Administrative law* (n 99) 760ff.
142 *Genesis* (n 15) para 109.
143 *Genesis* (n 15) para 21.
144 *Genesis* (n 15) para 22.
145 *Genesis* (n 15) paras 23-56.

circulars, an argument bolstered moreover by his own landmark dicta in *Kirland* and *Merafong*. Cameron J addressed it by means of an holistic, integrated reading of sections 37 and 38 of the Medical Schemes Act, thus linking the power to issue the circulars ineluctably with the power to enforce them by rejecting the financial statements of a medical scheme.[146] Cameron J contrasted this integrated reading with one that 'cleave[d] the Registrar's powers in two when the statute offer[ed] no warrant for this', producing 'lopsided, limping and illogical' results.[147] In this way the Registrar's rejection of the financial statements was characterised as a decision to *enforce the circulars* – and any expectation that the medical scheme ought to have sought separately to have the circulars themselves set aside was made to sound captious and nit-picking. Ultimately, Cameron J reasoned, '[w]hen *Omnihealth* tumbles, the Registrar's decision tumbles, and with it the circulars, all in one'.[148] An adroit addition was that there was no question of *ignoring* the circulars (or disregarding the court's previous judgments), particularly since the Registrar himself had 'linked non-compliance with the circulars directly to the *Omnihealth* judgment'.[149]

All this must have been gall and wormwood to Jafta J, who would not have forgotten that he and Cameron J were on opposite sides of a similar debate in *Kirland*.[150] But the cases were different, not least because *Kirland* concerned the failure of a government department to challenge its own unlawful action. As Cameron J made clear in that case, the state is or ought to be under a higher duty than other actors to fulfil procedural requirements.[151]

One of the most breathtaking features of *Genesis* is that the majority's application of error of law as a ground of review effectively operated as an appeal against the judgment in *Omnihealth*.[152] That alone suggests the revolutionary nature of what Cameron J managed in the *Genesis* case. But his judgment has caused consternation for other reasons too,

146 *Genesis* (n 15) paras 57-62.
147 *Genesis* (n 15) paras 57-58.
148 *Genesis* (n 15) para 62.
149 *Genesis* (n 15) paras 63-64, and on precedent see para 60.
150 For discussion see S Mahlangu 'Balancing legality and certainty: The *Oudekraal* principles and their development' PhD thesis, University of the Witwatersrand, 2020 at 44ff.
151 *Kirland* (n 1) para 82.
152 Hoexter & Penfold *Administrative law* (n 99) 398.

particularly since it might encourage officials to second-guess the case law: a 'recipe for chaos' according to Jafta J.[153] On the same theme, Volmink has described *Genesis* as a 'double-edged sword' in that administrators commit an error by failing to follow the prevailing case law or, since *Genesis*, by following it too faithfully.[154] His objection is that this creates intolerable uncertainty for administrators without doing anything to promote good administration, given that the actual error is not that of the administrator.[155] In that regard, one might add, the injustice of seeming to attribute the error to the administrator may cause further unease.

These concerns are not unfounded – and yet it is difficult to resist the bracing logic of applying the ground of review to *all* material errors of law. Furthermore, there has never been a necessary connection between error of law and blameworthiness. As Hoexter and Penfold suggest:

> [A]ll honestly made errors of law are errors only with the benefit of the court's hindsight. If one can accept the idea of 'objective' irrationality in cases such as *Pharmaceutical Manufacturers*, perhaps one ought not to cavil at 'no-fault' error of law. In the end, the objectionable feature of an error of law is not the blameworthiness of the administrator but rather the fact that the decision is, for whatever reason, based on a flawed understanding of the legal position.[156]

Those who remain unpersuaded by this reflection may perhaps take comfort in the fact that *Genesis*-type scenarios are unlikely to occur very often, and that several years have already passed without another such case presenting itself.

6 Conclusion

The aim of this essay has been to substantiate the assertion with which it began: that as a judge, Edwin Cameron responded boldly, bravely and often brilliantly to the challenge of transformative adjudication.

153 *Genesis* (n 15) para 122.

154 P Volmink 'Jurisdiction' guest seminar in Advanced Administrative Law at the School of Law, University of the Witwatersrand, 7 September 2022.

155 Volmink (n 154).

156 Hoexter & Penfold *Administrative law* (n 99) 398. The reference is to *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* [2000] ZACC 1 para 89, where the court observed that the President was not to blame for his irrational act of bringing a statute into force prematurely.

In the context of South African administrative law, the proposition has been illustrated by three of his most noteworthy Constitutional Court judgments and the always exhilarating, and sometimes breathtaking, jurisprudence advanced in them. The cases of *Giant Concerts, KZN Joint Liaison Committee* and *Genesis,* it has been argued, all had a revolutionary effect on the substance of South African administrative law while advancing some of the transformative aspirations associated with the discipline. The result in each instance, while not beyond criticism, effectively promoted public accountability and furthered a culture 'in which every exercise of public power is expected to be justified'.[157] The discussion of these cases has also, I hope, given my readers some sense of Justice Cameron's extraordinary impact on this branch of the law.

157 Mureinik (n 8) 32.