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Curbing the abuse of power: *Kirland* and the struggle for its acceptance

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https://doi.org/10.29053/978-1-0672372-0-2_8

1 Introduction

South Africa has been beset by the abuse of official power for decades. Under apartheid, the state was the chief architect of abuse. With rare exceptions, the courts were passive onlookers to this abuse and frequently paved the way for more of it. While the framework for abuse emanated largely from primary legislation enacted by an undemocratic parliament, the day-to-day obscenities of its implementation were perpetrated by an obedient and uncaring administration. All of this has been well documented.[1]

The advent of constitutional democracy was meant to usher in fundamental reform. The Constitution[2] envisaged a new society. It sought to create the framework for a society which rested upon respect for human rights and in which the courts would be their guardian. While part of that vision is in the process of being realised, abuse of power still permeates much of our public and private lives.[3] At least we now have the tools to combat this abuse and an increasing awareness within the judiciary of the need to do so. Courts are by no means the only vehicle for combatting abuse of power. They are, however, essential to the task.

* This chapter draws upon the author's contribution, together with Jason Brickhill, Hugh Corder, and Dennis Davis, to the chapter on the 'Administration of Justice' in 2016 *Annual Survey of South African Law* 2.

1 The literature on the topic is vast. For an overview, see J Dugard *Human rights and the South African legal order* (1978).

2 Constitution of the Republic of South Africa, 1996.

3 The extent of these abuses is disclosed, *inter alia*, in the various reports of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State, chaired by then Deputy Chief Justice Zondo. It is also evidenced in the increasing volume of cases dealing with such issues.

Judicial review is, after all, concerned with the judicial detection and correction of maladministration.[4] This reflects the vision of Nelson Mandela, who said at the inauguration of the Constitutional Court:

> We expect you to stand on guard not only against direct assault on the principles of the Constitution, but against insidious corrosion.[5]

The grounds of review of administrative action, now contained in section 6 of the Promotion of Administrative Justice Act[6] (PAJA) can all be understood as providing a framework for preventing the abuse of power. They constrain the manner in which power is exercised and hence serve to curb its abuse. The justification for the courts to review exercises of public power – whether at common law or now under PAJA – stems from the rule of law itself.[7]

The detection of abuse of power is not always straightforward. Power may be abused in many ways. It may be the product of a good faith error by a well-intentioned but misguided administrator. But all too often, it is the result of deliberate dishonesty and corruption and attempts to cover it up.[8] Whatever form the abuse takes, it is the court's task to detect and correct the problem. In recent years, a new form of abuse has begun to emerge. State officials confronted by contracts or decisions with which they disagreed, or which they found inconvenient, simply contended that the contract or decision was invalid and thus need not be complied

4 *Absa Bank Ltd v Public Protector* [2018] ZAGPPHC 2 at para 60, citing C Hoexter *Administrative Law in South Africa* 2 ed (2012) at 9.

5 Quoted by the Constitutional Court in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* [2021] ZACC 18 at para 1.

6 Act 3 of 2000.

7 See the observations of Judge Plasket in *Mbina-Mthembu v Public Protector* [2019] ZAECBHC 4 para 12 and *Minister of Home Affairs v Public Protector* [2018] ZASCA 15 para 27; also C Forsyth 'Speaking truth unto power: The reform of administrative law' (1994) 111 *South African Law Journal* 408 at 411.

8 In the context of the tort of misfeasance in public office, Lord Millett in *Three Rivers District Council v Bank of England* [2000] 3 All ER 1 at 48-49 draws a distinction between excess of power and abuse of power. He makes the point that the 'core concept' of abuse of power involves concepts such as 'dishonesty, bad faith and improper purpose'. He goes on to state that 'even a deliberate excess of power is not necessarily an abuse of power'. Since 'every power granted to a public official is granted for a public purpose', where the official exercises it 'for his own private purposes, whether out of spite, malice, revenge or merely self-advancement' it is an abuse of power. For the purposes of administrative law, however, it is submitted that the distinction between excess of power and abuse of a power is unimportant. Its relevance may lie only in the appropriate remedy.

with. This stance was adopted without any judicial process to determine the validity of the disputed contract or decision. The potential for corruption in such situations was obvious. Justice Cameron was involved in two landmark decisions which sought to curb it.

Justice Cameron is a person who, in his personal life, carefully picks his battles. When we were both at the Centre for Applied Legal Studies in the 1980s, and after both of us had encountered a number of petty and acrimonious squabbles within Wits University, where the Centre is based, we pledged to each other to adopt a 'no feuds' policy. Fidelity to that policy often proved difficult. While not shying away from a principled confrontation, Cameron always tried to deal with his adversaries in a firm, principled and polite manner. That approach characterises the judgments discussed in this chapter.

2 The *Oudekraal* marker

Oudekraal Estates (Pty) Ltd v City of Cape Town was a critical decision in the fight against abuse of power.[9] The opening paragraph identifies the core question before the court:

> This appeal raises important questions for the rule of law. It raises the question whether, or in what circumstances, an unlawful administrative act might simply be ignored, and on what basis the law might give recognition to such acts.[10]

The Supreme Court of Appeal's judgment (by Howie P and Nugent JA, in which Cameron JA concurred) answers this question against the background of its facts. The case concerned the validity of a decision taken by the Administrator of the Cape Province in 1957 to approve the establishment of a township on the slopes of Table Mountain. When the successor to the township developer wished to act on that approval by seeking consent for the establishment of an engineering services plan for the proposed township, the City of Cape Town called into question the original decision by the Administrator. The evidence disclosed that there were a number of holy burial sites on the land in question. These included two *kramats* – the graves 'of somebody who, among adherents of the Islamic faith, is regarded as having attained, through conspicuous

9 *Oudekraal Estates (Pty) Ltd v City of Cape Town* [2004] ZASCA 48.
10 *Oudekraal* (n 9) para 1.

piety, "an enlightened spiritual situation".[11] The *kramats* and other graves on the land were 'important cultural symbols in the Muslim community of its history in the Western Cape going back to the era of slavery'; many of the graves were those of escaped slaves.[12] The general plan for the proposed township development showed none of the graves, nor did the documentation comprising or accompanying the township application refer to them.[13] It thus seemed clear that all of the officials, and particularly the Administrator, were ignorant of their existence. The SCA held that it did not in fact matter:

> [The] inescapable conclusion must be that he either failed to take account of material information because it was not all before him or if, in the unlikely event that it was before him, that he wrongly left it out of the reckoning when he should have taken it into account. In either situation his decision to lend approval on the terms he granted was invalid.[14]

The problem, however, was that the Administrator's decision had never been challenged. The question was thus whether the City was entitled to disregard the Administrator's approval merely because it believed that it was invalid. The SCA's answer was unequivocal:

> Until the Administrator's approval (and thus also the consequences 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.[15]

The Court then discussed what it described as the 'apparent anomaly' that 'an unlawful act can produce legally effective consequences'.[16] It acknowledged, by reference to academic authority, that this apparent anomaly gives rise to 'terminological and conceptual problems of

11 *Oudekraal* (n 9) para 14.
12 *Oudekraal* (n 9) para 15.
13 *Oudekraal* (n 9) para 17.
14 *Oudekraal* (n 9) para 25.
15 *Oudekraal* (n 9) para 26.
16 *Oudekraal* (n 9) para 27.

excruciating complexity'.[17] But it found the anomaly to be 'convincingly explained' by Christopher Forsyth who had expressed the view that

> an invalid administrative act may, notwithstanding its non-existence [in law], serve as the basis for another perfectly valid decision. Its factual existence, rather than its invalidity, is the cause of the subsequent act, but that act is valid since the legal existence of the first act is not a precondition for the second.[18]

Thus, 'there is no need to have any recourse to a concept of voidability or a presumption of effectiveness to explain what has happened [when legal effect is given to an invalid act]. The distinction between fact and law is enough'.[19]

The Court in *Oudekraal* was faced with the practical problem: how to deal with the thousands of administrative decisions that are taken every day which may be objectively invalid but have been acted on and never challenged. The answer furnished was, on the one hand, principled – recognising the importance of the rule of law – and on the other hand, pragmatic – avoiding terminological quibbles about the judicial nature of an invalid act. It asserted the importance of the rule of law by insisting that administrators did not have the power, acting alone, to declare their own conduct invalid.

Accordingly, the core question raised and answered by *Oudekraal* made clear that administrative decisions could not simply be ignored. They continued to have legal effect unless and until set aside by a court of law. It is this principle which is the subject of this chapter. Acceptance of the decision in *Oudekraal* soon became so ubiquitous that courts simply referred to it as 'the *Oudekraal* principle'. It has rightly been pointed out

17 *Oudekraal* (n 9) para 29, quoting SA de Smith, H Woolf & JL Jowell *Judicial review of administrative action* 5 ed (1995) at 5-044. Justice Michael Kirby of the High Court of Australia observed in his dissenting judgment in *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11: 'The debate about the invalidity of administrative decisions, made in breach of statutory requirements (or the rules of natural justice where applicable or where the "decision" is tainted by fraud or misrepresentation) presents one of the most vexing puzzles of public law. Principle seems to pull one way. Practicalities seem to pull in the opposite direction.'

18 C Forsyth '"The metaphysic 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 at 147.

19 *Oudekraal* (n 9) para 29, citing W Wade & C Forsyth *Administrative law* 7 ed (1994) at 342-344.

that this is a misnomer because *Oudekraal* in fact established several principles.[20]

3 *Kirland* endorses *Oudekraal*

Oudekraal soon attracted the approval of the Constitutional Court.[21] But it was not until the Court's decision in *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* that its proper meaning was confronted head-on.[22] There judicial warfare broke out. A majority of seven, led by Cameron J, gave the case and its underlying principles ringing endorsement. There was no avoiding the issue. The Court had been expressly asked to reconsider the correctness of *Oudekraal*.[23] Cameron J analysed *Oudekraal* emphasising that the question before the SCA was 'whether or in what circumstances an unlawful administrative act might simply be ignored, and on what basis the law might give recognition to such acts'.[24] After noting that the Constitutional Court had previously applied *Oudekraal*, Cameron J observed that

> for a public official to ignore irregular administrative action on the basis that it is a nullity amounts to self-help. And it invites a vortex of uncertainty, unpredictability and irrationality. The clarity and certainty of governmental conduct, on which we all rely in organising our lives, would be imperilled if irregular or invalid administrative acts could be ignored because officials consider them invalid.[25]

20 See C Hoexter & G Penfold *Administrative law in South Africa* 3 ed (2021) at 760-776; DM Pretorius '*Oudekraal* after fifteen years: The second act (or, a reassessment of the status and force of defective administrative decisions pending judicial review)' (2020) 31 *Stellenbosch Law Review* 3. Hoexter and Penfold suggest that there are four principles. First, that until an administrative act is set aside by a court, it exists in fact and is capable of having legal effects. Second, that in the case of a series of administrative acts, the proper enquiry is not whether the initial act was valid, but whether its substantive validity was a necessary precondition for the validity of consequent acts. Third, that in order to justify an act of coercion by the state, the rule of law demands that the initial or underlying act be valid. Fourth, that the remedy of setting aside is discretionary and may be withheld in certain circumstances.

21 *Camps Bay Ratepayers and Residents Association v Harrison* [2010] ZACC 19 para 62; *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* [2010] ZACC 26 para 85.

22 *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* [2014] ZACC 6.

23 *Kirland* (n 22) paras 68, 87.

24 *Kirland* (n 22) para 100.

25 *Kirland* (n 22) para 103.

Kirland had applied for approvals to establish hospitals in Port Elizabeth and Jeffreys Bay. After considering Kirland's applications, an advisory committee recommended that they be refused. The superintendent-general, Mr Boya, accepted the recommendation and declined the approval. Before he could sign the letters of rejection, he was involved in a motor accident for which he took six weeks sick leave. During his absence, an acting superintendent-general, Dr Diliza, was appointed. In the meantime, the MEC held a meeting with officials in which she informed them that she was going to meet and discuss Kirland's applications with the provincial chairperson of the African National Congress, the ruling political party in the provincial government. This meeting occurred before the superintendent-general's decision to refuse approval. When the MEC realised that Mr Boya had refused authorisation, the MEC summoned the acting superintendent-general, Dr Diliza, to her office. According to an affidavit filed by Dr Diliza, the MEC told him 'that she was under political pressure to approve the applicant's applications because the refusal to grant the applicant's applications put her in a bad light in the political arena'.[26] She apparently instructed Dr Diliza to approve the applications. Dr Diliza did as he was told. Having received the purported approvals, Kirland sought to increase the capacity of the proposed hospitals and filed applications for further approvals. Mr Boya eventually returned to work. He again declined to approve Kirland's applications. He informed Kirland that the approval by Dr Diliza was withdrawn.

Kirland instituted proceedings in which it sought orders reinstating the approval and setting aside the initial decision of Mr Boya refusing the applications. Cameron J characterised the essence of *Kirland*'s case thus:

> Kirland instituted these proceedings to ensure that an approval communicated to it, and in reliance on which it acted, prevails. In answer the government respondents made no move to set aside the approval. They took the attitude that they could withdraw or ignore it. They branded the approval a 'non-decision'. Their principal deponent resisted Kirland's application on the simple basis that the defective decision did not exist.[27]

26 The relevant passage is set out in *Kirland* (n 22) para 10.
27 *Kirland* (n 22) para 66.

Cameron J considered that the government's approach rested on a 'fundamental error'.[28] The decision – granting approval – 'continues to exist until, in due process, it is properly considered and set aside'.[29]

It would be beguiling to view this case as a refreshing example of a civil servant doing the right thing. Cameron J explained:

> After being indisposed, Mr Boya returned to work in late November 2007. He then discovered that, in conflict with his uncommunicated decision, Dr Diliza had approved Kirland's application. Yet he did nothing for over seven months. Why? His affidavit invokes the political power of the MEC on whose instructions Dr Diliza apparently granted approval. He said that, for so long as she remained in office, 'it was virtually impossible to do anything about the dilemma'. That is an intriguing statement. But what does it mean? Did he have no power? Or was he too scared to exercise it? If the latter, why should Kirland be prejudiced because he stayed his hand for seven months in deference to the seemingly improper conduct of a political superior?[30]

The facts of *Oudekraal* and *Kirland* presented difficult choices. Today the decision to permit the establishment of a township on the slopes of Table Mountain would be unthinkable. Ignoring the existing graves and burial sites, as the Administrator apparently did, was crass and insensitive. But beyond this, Table Mountain forms part of an ecologically sensitive national park and is a major tourist attraction. The temptation simply to ignore the original decision as invalid must have been strong. But to do so would have subordinated principle to expediency. And in *Kirland*, Cameron J was careful not to decide the case on the facts. He observed that

> it does not assist the debate to point out that what happened in this case seems to have been highly unscrupulous and deplorable. This is because, in the next case, the official who seeks to ignore departmental action may not be acting with pure motives.[31]

Cameron J was also alive to the peculiar position in which Kirland had found itself. Kirland was not privy to the decision-making process. It had sought and obtained approval for the establishment of the hospitals in the belief that there was nothing irregular in the process at all. As Cameron J pointed out, Kirland had no inkling that the approval had

28 *Kirland* (n 22) para 66.
29 *Kirland* (n 22) para 66.
30 *Kirland* (n 22) para 71.
31 *Kirland* (n 22) para 104.

been tainted by improper political interference. It merely knew that the Department had withdrawn the approval. The issue which Kirland took to court and the issue it asked the court to adjudicate was 'whether the Department had power to withdraw a valid approval'.[32] It was some 28 months later when Kirland saw the answering affidavit in the litigation that the Department 'proffered the whole unappetising account of political interference leading to the approval', but there was 'never a suggestion that Kirland had a hand in any of the questionable dealings'.[33] Hence, what Kirland took to court 'was a baffling withdrawal ... of a seemingly valid approval'.[34]

The factual context in which the issue presently under consideration arose in *Oudekraal* and *Kirland* was different. In *Oudekraal*, it arose in the context of successive acts, of which the Administrator's unlawful approval for the establishment of a township was but one. In *Kirland*, the issue essentially turned on the single unlawful decision of the acting superintendent-general. These factual differences are of no moment for present purposes.[35] At root, *Oudekraal* and *Kirland* asserts that an administrative decision which is objectively invalid cannot simply be ignored and treated as non-existent. A party who wishes to treat such a decision as invalid requires judicial sanction to do so. I refer to this as 'the *Oudekraal-Kirland* principle'. In this context, Cameron J laid down another fundamental principle which has since enjoyed widespread approval. He said that insisting on the MEC to formally apply for the setting aside of the approval in question, by way of a counter-application, did not entail a senseless formality:

> It is to insist on due process, from which there is no reason to exempt government. On the contrary, there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly.[36]

32 *Kirland* (n 22) para 75.
33 *Kirland* (n 22) para 76.
34 *Kirland* (n 22) para 80.
35 Hoexter & Penfold (n 20) 761 accept that *Kirland* reaffirmed the *Oudekraal* principle presently under discussion, but suggest that in the process 'the principle was extended beyond its original context'. The original context related to the first act in a series of acts.
36 *Kirland* (n 22) para 82.

Given the long pedigree of *Oudekraal* and its acceptance by the Constitutional Court, it was surprising that there should be any disagreement with its central propositions at all. But Jafta J (Madlanga and Zondo JJ concurring) dissented in *Kirland*. Jafta J identified his difference with Cameron J thus:

> At the heart of our difference lies the simple fact of court process. Because the state parties failed to institute an application for review, he concludes that a decision which, on the face of uncontroverted evidence on record, was fraudulent must be left intact for as long as there is no review application to set it aside. The motivation for this approach is that Kirland has acted on the decision to its financial prejudice and that it enjoys a procedural protection under the Constitution to defend the unlawful decision.[37]

So the principle which is the focus of this chapter – that an invalid administrative act has effect unless and until set aside by a court of law – was the very issue on which the Court divided.

Unlike Cameron J, Jafta J was profoundly influenced by the facts. He labelled the MEC's conduct as being 'a complete disregard for the relevant legal prescripts, and an abuse of public authority, to facilitate a desired outcome'.[38] Such conduct was 'incompatible with the principles and values enshrined in the Constitution'.[39] Hence, 'a decision flowing from such conduct must not be allowed to remain in existence on the technical basis that there was no application to have it reviewed and set aside'.[40] For Jafta J, therefore, insistence on a formal application to have the decision set aside was a mere technicality. Indeed, Jafta J saw the facts as being clear examples of corruption and maladministration.[41] He also disagreed with Cameron J that the issue of prejudice to Kirland had to be properly explored before the approval was set aside. He blamed Kirland for failing to bring to the attention of the court facts illustrating the prejudice it would suffer if the approval were to be set aside.[42]

37 *Kirland* (n 22) para 44.
38 *Kirland* (n 22) para 43.
39 *Kirland* (n 22) para 43.
40 *Kirland* (n 22) para 43.
41 *Kirland* (n 22) paras 46-47.
42 *Kirland* (n 22) para 58.

4 Justice Jafta's rearguard action: *Merafong* and *Tasima*

Had the underlying issue been left with *Kirland*, one may have concluded that the differences between Cameron J and Jafta J turned on their respective interpretation of the facts and matters of procedure. But the matter did not end there. It is remarkable and disquieting that the *Oudekraal* principle was entirely re-argued in two subsequent Constitutional Court cases.

The first case was *Merafong City Local Municipality v AngloGold Ashanti Limited*.[43] In *Merafong* the issue turned on the validity of a decision by a Minister overruling a surcharge on water usage imposed by the Merafong City Council. The City considered that the Minister's decision was void in law. AngloGold instituted proceedings to compel the City to comply with the Minister's ruling. The City, in turn, brought a counter-application attacking the validity of the Minister's ruling. There were two issues: first, whether *Oudekraal* applied to the Minister's ruling and second, whether an organ of state was entitled to bring a collateral or reactive challenge to an administrative decision.

In the SCA, the court had explicitly invoked *Kirland* in finding against the Minister on the first point, and held that a collateral or reactive challenge by one organ of state to a decision made by another was incompetent.[44] Whether an organ of state may raise a collateral or reactive challenge to the validity of an administrative act was not an issue previously decided by the Constitutional Court and was a legitimate matter for final determination. All the justices answered this question in the affirmative and this is not the subject of the present chapter. In *Merafong*, the majority judgment was penned by Cameron J with the support of six other justices. As in *Kirland*, the dissent was led by Jafta J, with Zondo J and Bosielo AJ concurring. Madlanga J, who had concurred with Jafta J in *Kirland*, now followed the *Kirland* precedent in supporting the majority.

Jafta J considered that the case presented the court 'with an opportunity of defining the reach of the principles of *Oudekraal* and *Kirland*'.[45] He acknowledged that *Kirland* had established that invalid

43 *Merafong City Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35.
44 *Merafong City Local Municipality v AngloGold Ashanti Limited* [2015] ZASCA 85, especially paras 15-17.
45 *Merafong* (n 43) para 88.

administrative action may not simply be ignored but may be valid and effectual and may continue to have legal consequences until set aside by proper process.[46] Surprisingly, however, he considered that this was 'not part of the *ratio*' of *Kirland*.[47] The true position, according to Jafta J, was more blunt:

> An illegal administrative act is inconsistent with the Constitution and the rule of law. The inconsistency renders it invalid, regardless of the fact that it is not set aside, because in our constitutional order the Constitution is supreme. In our law an unlawful act is void *ab initio* and thus it can have no legal force and effect.[48]

In support of this contention, Jafta J invoked the argument that the principle in *Kirland* is at odds with the rule of objective invalidity. He stated that 'conduct that is inconsistent with the Constitution is invalid from the moment the decision is taken and remains invalid regardless of whether it is set aside or not'.[49] But this is wrong. The principle of objective invalidity derives from *Ferreira v Levin NO; Vryenhoek v Powell NO.*[50] Jafta J in fact quotes the relevant passage.[51] *Ferreira* makes absolutely clear that, while laws inconsistent with the Constitution are objectively invalid, it is the court's order that declares it to be so.[52] There is no free-floating concept of extra-judicial invalidity. What this plainly means is that objectively unconstitutional laws continue to have effect and must be obeyed until set aside after due process. To distort the principle of objective invalidity, as Jafta J does, is dangerous to a constitutional democracy. The doctrine does not mean that the state, or anyone else, may pick and choose which laws they choose to consider invalid and may thus disobey at whim. This would, adapting the words of Cameron

46 *Merafong* (n 43) para 128.
47 *Merafong* (n 43) para 129.
48 *Merafong* (n 43) para 130.
49 *Merafong* (n 43) para 134.
50 *Ferreira v Levin NO; Vryenhoek v Powell NO* [1995] ZACC 13 at para 27.
51 *Merafong* (n 43) para 136.
52 See eg *Ferreira* (n 50) para 27: 'It is very seldom patent, and in most cases is disputed, that pre-constitutional laws are inconsistent with the provisions of the Constitution. It is one of this Court's functions to determine and pronounce on the invalidity of laws, including Acts of parliament.' Ackermann J's reason for adopting the objective approach was that, once the Court issues its declaration, fairness requires that the declaration be construed to apply to *all* persons and disputes, whenever they arose, and not only to the dispute before the Court: see para 26. This rationale does not suggest in any way that the law can be disregarded even without any judicial declaration.

J in *Kirland*, also invite a 'vortex of uncertainty, unpredictability and irrationality'.[53]

Jafta J suggested that what he termed the '*Kirland* principle' has the effect of creating 'space for corrupt public officials to abuse public power for their selfish interests'.[54] He gives the example of a corrupt head of department who illegally extends a procurement contract for 10 years at massive expense and then 'ensures that for five years the extension is not set aside because the power to institute legal proceedings by the department vests in him'.[55] Applying *Kirland*, says Jafta J, would mean that 'the unconstitutional and illegal extension of the corrupt functionary becomes valid and binding for so long as it is not set aside'.[56] On this argument, 'the service provider in whose favour the decision was made may enforce it with impunity for the duration of the extension' because, the extension would 'have become valid and effectual'.[57]

Apart from Jafta J's incorrect articulation of the underlying principle – by equating the effect of an unlawful administrative act with its validity – it is difficult to see how the approach of Cameron J would somehow create space for corrupt officials to abuse public power. The spectre of abuse is always present. This has nothing to do with the *Oudekraal-Kirland* principle that an unlawful administrative act is capable of having legal effect until it is set aside by a court of law. Of course, the possibility of an unlawful act being set aside requires that the right person seeks the right remedy in the right proceedings and at the right time.[58] So, in the example cited by Jafta J, the illegality would effectively continue until properly challenged – which may be done by any person who is adversely affected by the decision. If no one does challenge the decision, the corrupt official may get away with it. But that is true in all cases. It might be that the illegality is never challenged or that it is only challenged long after the event, in which case the delay rule would have to be overcome. It is not clear how the approach of Jafta J would yield a different result or stem the abuse of power.

53 See again n 25 above.
54 *Merafong* (n 43) para 145.
55 *Merafong* (n 43) para 146.
56 *Merafong* (n 43) para 146.
57 *Merafong* (n 43) para 146.
58 *Oudekraal* (n 9) para 35, said in the context of a collateral challenge and relying on *Metal and Electrical Workers Union of South Africa v National Panasonic Co (Parow Factory)* 1991 (2) SA 527 (C) at 530.

Jafta J (and Zondo J) were not silenced by having been outvoted in both *Kirland* and *Merafong*. They perpetuated their dissent two weeks later in *Department of Transport v Tasima (Pty) Ltd*.[59] The case concerned a tender granted to Tasima, resulting in a fixed term contract, which had been extended without following tender processes. Tasima had attempted to enforce the extension in various contempt applications. In the result, a possibly irregular contract that had expired was kept alive by these court orders. In response to an application by Tasima to compel the Department to perform its obligations under the extended contract, the Department counter-applied to set aside the extensions.

Four judgments were generated. First, the majority judgment by Khampepe J. Second, a separate concurring majority judgment by Froneman J with which the majority judges all agreed. Third, a dissenting judgment by Jafta J, in which Mogoeng CJ (who had not sat in either *Kirland* or *Merafong*), Bosielo AJ, and Zondo J concurred. Fourth, a separate dissenting judgment by Zondo J, in which the minority judges concurred. Once again, the point of difference was whether an invalid administrative act has effect unless set aside by a court of law. There was no attempt to disguise the fact that at issue was the binding nature of precedent.

Khampepe J captured the differences by stating in the opening paragraph of her judgment that while she agreed that the appeal should succeed, she preferred 'to arrive at that outcome on the basis of existing precedents of this court and the application of the logic of that approach to new circumstances'.[60] The purpose of the separate concurring judgment by Froneman J was to confront the question of precedent. He observed:

> As pointed out in Khampepe J's judgment, this Court has now 'through a long string of ... judgments' endorsed and clarified *Oudekraal*. Yet time and again its treatment of *Oudekraal* and the principles it established has been re-questioned.[61]

He acknowledged that it is 'an individual choice how to react to a majority judgment one originally disagreed with', but contended that any reconsideration 'must be through the lens of this Court's established doctrine'.[62] That approach required that in overturning precedent 'the

59 *Department of Transport v Tasima (Pty) Ltd* [2016] ZACC 39.
60 *Tasima* (n 59) para 133.
61 *Tasima* (n 59) para 225.
62 *Tasima* (n 59) para 225.

previous decision must not merely be wrong – it must be clearly wrong'.[63] Yet, Jafta J and Zondo J perpetuated their dissents in both *Merafong* and *Tasima*, and in the latter case were joined by Mogoeng CJ.

5 Justice Jafta persists: *Magnificent Mile*

Perhaps because of the noise generated by these dissents, Cameron J took the opportunity to clarify the legal position in *Aquila Steel (Pty) Ltd v Minister of Mineral Resources*.[64] He explained the position thus:

> *Kirland*, and *Oudekraal*, which it confirmed, do not make invalid administrative action legally valid. Nor do they invest them retrospectively with power to thwart rightful and lawful processes from prevailing at the time they took place. *Kirland* and *Oudekraal* are concerned with constraining misuse of the bureaucracy's power. They recognise that administrative action, even though invalid, may give rise to consequences that must be held lawful. As explained in *Merafong*, the import of these decisions was that government cannot simply ignore its own seemingly binding decisions on the basis that they are invalid. The validity or invalidity of a decision has to be tested in appropriate proceedings. And the sole power to pronounce that decision defective, and therefore invalid, lies with the courts. The lodestar principle is that the courts' role in determining legality is pre-eminent and exclusive. Government officials may not usurp that role by themselves pronouncing on whether decisions are unlawful, and then ignoring them. And, unless set aside, a decision erroneously taken may well continue to have lawful consequences.[65]

Cameron J contextualised the principle by locating its application at the remedial stage:

> Properly seen, *Kirland* and *Oudekraal* in their practical effect are about remedy. They assert the power of the courts to constrain bureaucratic self-help. The fact that administrative action exists, albeit invalid, may on fitting facts be the basis for withholding a remedy of invalidity.[66]

One might have thought that the Constitutional Court decisions in *Kirland*, *Merafong*, and *Tasima* and the exposition in *Aquila Steel* would have ended the debate on the *Oudekraal* principle. Indeed, there was a clear indication that Jafta J now respected the majority position.

63 *Tasima* (n 59) para 226.
64 *Aquila Steel (South Africa) (Pty) Ltd v Minister of Mineral Resources* [2019] ZACC 5.
65 *Aquila Steel* (n 64) para 94.
66 *Aquila Steel* (n 64) para 97.

The occasion arose in *Genesis Medical Aid Scheme v Registrar, Medical Schemes*.[67] At issue was whether the Registrar of Medical Schemes had committed an error of law. He had issued various circulars under the Medical Schemes Act[68] with which, he contended, Genesis had failed to comply. These circulars were based upon a High Court decision. On review, the reviewing court held that the High Court decision relied upon by the Registrar had been wrongly decided. Hence, the question arose whether the circulars perpetuated an error of law. Once again, the court divided, with Cameron J in the majority and Jafta J dissenting. But on this occasion, Jafta J's dissent was of an all together different character. Now he asserted not simply the binding nature of precedents, but the binding nature of the very precedents in *Kirland, Merafong* and *Tasima* in which he had so stridently dissented. In *Genesis,* and in relation to the approach adopted by the majority, he stated:

> This argument, together with decisions like *Tasima*, *Merafong* and *Kirland*, creates an insurmountable obstacle in the way of setting aside the impugned decision. The principle of judicial precedent obliges us to take the circulars in question as binding even if they are invalid. For as long as they are not set aside by a competent court on review they are binding on all medical schemes.[69]

Given Jafta J's previous dissents, this seemingly new approach to precedent by him was refreshing. And in subsequent cases, to which he was a party, the authority of *Kirland* and *Merafong* was reaffirmed.[70]

But the reprieve was short-lived. Jafta J once again reopened the entire debate on the binding authority of *Oudekraal* and *Kirland* in *Magnificent Mile Trading 30 (Pty) Ltd v Celliers NO*.[71] The facts of *Magnificent Mile* are somewhat complicated but the details are unimportant for present purposes. In simplified form, the case concerned a botched process concerning the purported award of prospecting rights. In one instance, the Department of Mineral Resources awarded a prospecting right to an applicant for which he had not applied. It also purported to award a prospecting right to another party in relation to the same property. The

67 *Genesis Medical Aid Scheme v Registrar, Medical Schemes* [2017] ZACC 16.
68 Act 131 of 1998.
69 *Genesis* (n 67) para 109.
70 See eg *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Ltd* [2018] ZACC 41 para 103 fn 89 and *Salem Party Club v Salem Community* [2017] ZACC 46 para 134 fn 155.
71 *Magnificent Mile Trading 30 (Pty) Ltd v Celliers NO* [2019] ZACC 36.

Department attempted to unravel the mess it had caused by clarifying the respective grants. The matter eventually found its way to court when one of the parties sought an order setting aside one of the Department's decisions. The main judgment on appeal to the Constitutional Court was delivered by Madlanga J (in which Cameron J concurred). There was a separate judgment by Jafta J. Although he concurred in Madlanga J's outcome, it was a full-blooded dissent in relation to the applicability of the principle in *Oudekraal* and *Kirland*.

Madlanga J articulated the principle in *Oudekraal* and *Kirland* as being a rule that 'an unlawful administrative act exists in fact and may give rise to legal consequences for as long as it has not been set aside'.[72] In elaboration of this rule, Madlanga J went back to the authorities referred to in *Oudekraal*, one of which was the House of Lords decision in *Smith v East Elloe Rural District Council*.[73] That case concerned an action for damages arising from the execution of a compulsory purchase order that had allegedly been procured, issued, and confirmed in bad faith. The lower court had summarily dismissed the action, on the basis that the relevant legislation did not say that such orders to be challenged on grounds of bad faith, but only on a closed list of other grounds. On appeal, the claimant sought to circumvent this by pointing out that any governmental decision made in bad faith 'was in law a nullity', and could be recognised as such by the court, independently of the legislation.[74] Madlanga J quoted from the speech of Lord Radcliffe where he said:

> [T]his argument is in reality a play on the meaning of the word nullity. An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.[75]

Madlanga J then applied this principle to the facts in *Oudekraal*. He reasoned that *Oudekraal* was, in the first instance, 'about the continued existence of an unlawful administrative act for as long as it has not been set aside by a court'.[76] He made clear that the *Oudekraal* principle 'applies

72 *Magnificent Mile* (n 71) para 1.
73 *Smith v East Elloe Rural District Council* [1956] AC 736.
74 *Smith* (n 73) 769.
75 *Smith* (n 73) 769-770, quoted in *Magnificent Mile* (n 71) para 35.
76 *Magnificent Mile* (n 71) para 40.

to any situation where – for whatever reason – an extant administrative act is being disregarded without first being set aside'.[77]

Jafta J would have none of this. He now contended, despite his repeated apparent acceptance of *Oudekraal* and *Kirland*, that *Kirland* was 'not an accurate reflection of what was stated in *Oudekraal*'.[78] He explained:

> The inaccuracy in *Kirland*'s statement is to the effect that an invalid administrative action 'may be valid and effectual'. To say an invalid action may have legal consequences does not mean that the action itself has suddenly become valid. It remains invalid but since it continues to exist at the level of fact, the invalid action may give rise to legal consequences in circumstances like those identified in *Oudekraal*. In that event it is the consequences that become legal and valid, not the administrative action which is the source of those consequences. Indeed to say an invalid action remains valid defies logic.[79]

Given the explanation advanced by Madlanga J, and particularly his reference to the speech of Lord Radcliffe, it is difficult to avoid the conclusion that Jafta J was now simply playing with words. Jafta J interpreted *Kirland* as

> affirming the presumption that an administrative action is taken to be valid until set aside. This does not mean where, as in *Oudekraal* ..., the unlawfulness of the administrative action in question has been established to the satisfaction of the court, the presumption continues to operate in favour of validity. Proof of invalidity terminates the force of the presumption.[80]

This was a new tack by Jafta J. He now sought to recharacterize the *Oudekraal* principle as resting on a presumption of validity. On this approach, the presumption was rebuttable. And if the evidence rebutted the presumption, then there would be no impediment to treating the administrative act in question as invalid without any need for a formal application to set the decision aside.

But this simply ignores the underpinning of *Oudekraal* and *Kirland*. In *Oudekraal*, the court gave specific attention, as mentioned, to the 'apparent anomaly' that an unlawful act can produce legally effective consequences.[81] It noted that this is sometimes 'attributed to the effect

77 *Magnificent Mile* (n 71) para 45.
78 *Magnificent Mile* (n 71) para 88.
79 *Magnificent Mile* (n 71) para 89.
80 *Magnificent Mile* (n 71) para 91.
81 See n 16 above.

of a presumption that administrative acts are valid'.[82] The court also considered that the apparent anomaly has, at other times, 'been explained on little more than pragmatic grounds'.[83] In this regard, it referred to *Harnaker v Minister of the Interior*, where Corbett J had pointed out that where a court declines to set aside an invalid act on the grounds of delay, that would, in a sense, 'validate' a nullity.[84] Having considered these approaches, the SCA nevertheless found that the apparent anomaly was 'convincingly explained' by Christopher Forsyth, in the manner described above.[85] Hence, it was incorrect and misleading for Jafta J to characterise the *Oudekraal* principle as flowing from a mere evidential presumption that administrative acts are valid.

It is not entirely clear whether Jafta J's concerns were purely semantic or principled. Nevertheless, Madlanga J took great pains, once again, to address them. Jafta J, as he had contended in other cases, took the implacable view in *Magnificent Mile* that an administrative decision taken contrary to statutory prescripts was inconsistent with the principle of legality, an incident of the rule of law.[86] Madlanga J answered him thus:

> Crucially though, the *Oudekraal* rule itself is informed by the rule of law. Imagine the spectre of organs of state and private persons ignoring or giving heed to administrative action based on their view of its validity. The administrative and legal chaos that would ensue from that state of affairs is unthinkable. Indeed, chaos and not law would rule.[87]

He went on:

> The *Oudekraal* rule averts the chaos by saying an unlawful administrative act exists in fact and may give rise to legal consequences for as long as it has not been set aside. The operative words are that it exists 'in fact'. This does not seek to confer

82 *Oudekraal* (n 9) para 27, relying on L Baxter *Administrative law* (1984) at 355, where it was stated: 'There exists an evidential presumption of validity expressed by the maxim *omnia praesumuntur rite esse acta*; and until the act in question is found to be unlawful by a court, there is no certainty that it is. Hence it is sometimes argued that unlawful administrative acts are "voidable" because they have to be annulled.'

83 *Oudekraal* (n 9) para 27.

84 *Harnaker v Minister of the Interior* 1965 (1) SA 372 (C) at 381C, quoted in *Oudekraal* (n 9) para 27.

85 *Oudekraal* (n 9) para 29.

86 *Magnificent Mile* (n 71) paras 80-82.

87 *Magnificent Mile* (n 71) para 50.

> legal validity on the unlawful administrative act. Rather, it prevents self-help and guarantees orderly governance and administration.[88]

Madlanga J also dealt with Jafta J's new argument that the presumption of validity may be factually rebutted. Importantly, however, Jafta J would have it that this could all be done without any court process. Madlanga J answered as follows:

> My immediate practical, if not legal, difficulties are manifold. Who rebuts the presumption? Who – outside of a court process – determines that the invalidity of the administrative action has been proven and that, therefore, the presumption has been rebutted; and how do they do that? What if there is disagreement on whether the illegality has been proven? The approach of the concurring judgment has the potential of taking us to the very realm of uncertainty from which the *Oudekraal* rule removes us. It takes us to the real possibility of a free-for-all.[89]

6 The impact of *Gijima*

My central argument has been that *Kirland*'s insistence that administrative acts thought to be unlawful cannot simply be ignored, is critical to combatting abuse of power. Some might query whether the Constitutional Court's decision in *State Information Technology SOC Ltd v Gijima Holdings (Pty) Ltd*[90] has diluted this principle.[91] I think not.

Gijima establishes two propositions. First, an organ of state seeking a self-review cannot do so under the PAJA. It can only do so by way of a legality review.[92] Second, where confronted with unlawful administrative action, and notwithstanding insufficiently explained delay, a court was enjoined to declare such action to be invalid.[93] Both of these propositions have attracted strident criticism.[94] It had previously been held that an

88 *Magnificent Mile* (n 71) para 51.
89 *Magnificent Mile* (n 71) para 55.
90 *State Information Technology SOC Ltd v Gijima Holdings (Pty) Ltd* [2017] ZACC 40.
91 This suggestion is made, for example, in L Boonzaier 'A decision to undo' (2018) 135 *South African Law Journal* 642 at 658-663.
92 *Gijima* (n 90) paras 37-38.
93 *Gijima* (n 90) para 52.
94 See eg Hoexter & Penfold (n 20) 739-743. A particularly acerbic critique is by Boonzaier (n 91). His criticisms were acknowledged by Cameron J in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15 para 112 fn 109 in which it was insinuated that the remarks concerning the quality of the Court's membership were neither apposite nor warranted.

unreasonable delay in instituting a review – whether under PAJA or legality – could non-suit an applicant in the absence of condonation. The concern now was that state applicants seeking a self-review would not automatically be hit by the delay rule and moreover, would obtain a mandatory declaration of invalidity.

This development notwithstanding, the *Kirland* principle continues to stand firm for two reasons. First, and fundamentally, state litigants are still not at liberty to simply ignore administrative decisions with which they disagree. They are obliged to seek a self-review. Second, the courts have been vigilant in ensuring that the state cannot evade the consequences of its own wrongdoing. This is achieved through the courts' wide remedial discretion. *Gijima* itself is a good example. In that case, not only had the organ of state delayed unduly before instituting a self-review, but it had falsely assured the recipient of the state contract that it had acted lawfully and that a proper procurement process had been followed. Hence, the court held that justice and equity required that *Gijima* not be divested of its contractual rights notwithstanding the declaration of invalidity.[95] Similar remedial options have been followed in several cases.[96]

One inevitable consequence of the *Oudekraal-Kirland* principle is that those seeking to escape the consequence of an allegedly unlawful administrative act must approach a court in order to do so. Organs of state are now increasingly approaching courts by way of self-review. So much so, that the Supreme Court of Appeal has lamented the

> ever growing, and frankly disturbing, long line of cases where municipalities and organs of state seek to have their own decisions, upon which contracts with service providers are predicated, reviewed and overturned, for want of legality, more often than not after the contracts have run their course and services have been rendered thereunder.[97]

Moreover, this was sometimes done by organs of state 'falsely' seeking 'to claim the moral high ground'.[98]

95 *Gijima* (n 90) paras 53-54.
96 See for example *Central Energy Fund SOC Ltd v Venus Rays Trade (Pty) Ltd* [2022] ZASCA 54, in which leave to appeal to the Constitutional Court was denied.
97 *Govan Mbeki Municipality v New Integrated Credit Solutions (Pty) Ltd* [2021] ZASCA 34 para 1.
98 *Govan Mbeki Municipality* (n 97) para 1.

The disquiet expressed by the Supreme Court of Appeal is perfectly understandable, but it is not the consequence of the *Oudekraal-Kirland* principle. That principle says no more than a party seeking to escape the consequences of an unlawful administrative decision cannot take the law into their own hands: they must approach a court to have it set aside. The principle says nothing about the manner in which this is to be done. An organ of state seeking a self-review essentially approaches a court with an acknowledgement that its officials have behaved unlawfully. Courts are rightly not impressed with platitudes from organs of state about their duty to undo illegality and combat wrongdoing when there is no adequate explanation of the steps taken to bring wrongdoers to book and no proper explanation for delay in doing so. This is the source of their disquiet.[99]

7 Precedent and dissent

Early in its jurisprudence, the Constitutional Court accepted the importance of sticking to its own precedents. There was, said the court, a 'sound jurisprudential basis for the policy that a court should adhere to its previous decisions unless they are shown to be clearly wrong'.[100] The Constitutional Court as an institution adopted this principle. However, individual judges who had once dissented also accepted that they were bound by precedents, even by those with which they did not agree. Thus, in *Bernstein v Bester* Ackermann J accepted that he was bound by the majority decision in a previous case even though he had dissented from it.[101] In later cases, the Constitutional Court elaborated on the rationale for this principle. It was 'a core component of the rule of law', deviation from which was 'to invite legal chaos'.[102] In that case, the court adopted the formulation of Cameron J from *True Motives 84 (Pty) Ltd v Mahdi*:

99 Compare *Govan Mbeki Municipality* (n 97) para 47.

100 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 24 at para 8.

101 *Bernstein v Bester* [1996] ZACC 2 para 13, discussing *Ferreira* (n 50), in which Ackermann J had taken a different view from the majority on the basis for the legislative provision's unconstitutionality. See also *Tasima* (n 59) para 224, where Froneman J makes a similar point in relation to the precedent set by the majority in *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11, which was later accepted even by those who had dissented from it.

102 *Turnbull-Jackson v Hibiscus Coast Municipality* [2014] ZACC 24 para 54.

> Without precedent there would be no certainty, no predictability and no coherence. The courts would operate in a tangle of unknowable considerations, which all too soon would become vulnerable to whim and fancy. Law would not rule.[103]

By accepting the principle of adherence to precedent, the Constitutional Court has aligned itself in ways similar to cognate courts in the Commonwealth. Like most legal principles, the rules of precedent are not absolute. Moseneke J in his minority judgment in *Daniels v Campbell NO* recognised exceptions to the rule 'where the court is satisfied that the previous decision was wrong or where the point was not argued or where the issue is in some legitimate manner distinguishable'.[104] Of course, if the rules of precedent were immutable, the law would never change. But the debates about binding precedent go further than the examples recognised by Moseneke J. They include disputes about whether particular decisions establish a precedent at all and about the ambit of a particular precedent and whether what was decided was *ratio decidendi* or *obiter dictum*.

These issues played out in the struggle for the acceptance of *Kirland* and *Oudekraal*. A plain reading of several decisions of the Constitutional Court shows that the authority of *Oudekraal* and its endorsement in *Kirland* ought to have been incontestable. But contested it was, with Jafta J leading the charge.

No judge in South Africa has ever doubted the importance of precedent. It is the issue which confronts every judge and every advocate in every case. In the vast majority of cases, the law is settled and thus determined by precedent. But advocates are adept at avoiding inconvenient precedent by arguing that the facts are distinguishable – the oldest trick in the book – or that the critical passage is *obiter* and not *ratio* or that the particular point in issue was not pertinently previously considered.

But these tricks of arguments are for cause-pleaders. Judges should not resort to them if precedent is to be taken seriously. This does not mean that the law should be fossilised. Decisions of the highest court can be overturned if they are clearly wrong. Overturning a previous precedent calls for a frontal attack, recognising the decision's precedential value and discarding it if there is a clear basis to do so.

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103 *True Motives 84 (Pty) Ltd v Mahdi* [2009] ZASCA 4 para 1.
104 *Daniels v Campbell NO* [2004] ZACC 14 para 95.

This is not what Jafta J did in relation to the precedent that *Kirland* set. He did not recognise *Kirland* as laying down a binding precedent at all. Instead he quibbled about what it decided and how other precedents were ostensibly ignored. That approach is not only unconvincing. It is disquieting. It suggests a reluctance to deal rigorously with the issues.

The attempts to distinguish *Kirland* were transparently thin. Having been knocked back in both *Kirland* and *Merafong*, it was never explained why Jafta J and Zondo J penned dissenting judgments some two weeks later in *Tasima*. Jafta J, as we saw, repeated the same arguments he had advanced in his dissent in *Merafong*. Zondo J in his separate judgment devoted a considerable amount of time to criticising Froneman J on the basis of the latter's alleged inconsistency when it comes to following precedent: while acknowledging the importance of following precedent, he contended that 'consistency in adjudication is also very important',[105] and then points to various decisions in which he implies that the approach of Froneman had been inconsistent.[106] This has the ring of arguments that belong to politicians, not judges. Accusing one's opponent of inconsistency with a previous position is simply not an answer to the substance of the argument advanced. Even if Froneman J had previously been inconsistent – which seems frankly doubtful – that does not meet the force of reasoning nor the power of precedent.

The argument based on consistency is, in any event, a dangerous one. Zondo J had obviously forgotten the unanimous decision (penned by 'The Court') to which he was a party in *President of the Republic of South Africa v South African Dental Association*.[107] That this case escaped his notice is perhaps forgivable, for none of the other judges, minority or majority, appear to have noticed its significance either. In that case, the court dealt with a proclamation that had been issued in error. It unanimously asserted – as uncontroversial doctrine – that it remains in force and has legal effect. This was 'an inevitable consequence

105 *Tasima* (n 59) para 221.

106 *Tasima* (n 59) paras 221-223, discussing Froneman J's willingness to decide issues not raised by the parties in *Maphango v Aengus Lifestyle Properties (Pty) Ltd* [2012] ZACC 2 and *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, KwaZulu-Natal* [2013] ZACC 10, despite the Court's judgment in *Bel Porto School Governing Body v Premier, Western Cape* [2002] ZACC 2.

107 *President of the Republic of South Africa v South African Dental Association* [2015] ZACC 2.

of the rule of law'.[108] It meant, the court added for good effect, that the proclamation 'may not be ignored until it is set aside'.[109] As authority for these propositions the court – obviously – referred to both *Kirland* and *Oudekraal*.[110] Bosielo AJ was a party also to this decision, which he too presumably had forgotten.

This is not to score a cheap point. It is to underscore how elementary – rightly elementary – the *Oudekraal-Kirland* doctrine had become. For *South African Dental Association* was yet another decision by the Constitutional Court recognising their binding authority.[111] Usually a judgment given by 'The Court' indicates either that the matter is one of such high controversy and importance that the judges align themselves with indisputable institutional solidity; or that the matter at issue, though requiring an adjudicative determination, is so bread-and-butter, so uncontroversial, that no oral hearing and no individually credited judgment is necessary.

As noted above, Jafta J purported to accept the binding precedent of *Oudekraal* and *Kirland* in *Genesis*. That he chose to reopen the issue in *Magnificent Mile* suggest that precedent counted for little with him. The shift in position evidenced by Madlanga J stands in contrast to that of Jafta J. Madlanga J had joined Jafta J in the dissent in *Kirland*. When the authority of *Kirland* (and *Oudekraal*) was questioned in *Merafong* and *Tasima*, however, Madlanga J joined the majority in both cases. He obviously accepted the binding force of *Kirland* in which he had dissented, and indeed he penned the majority decision in *Magnificent Mile*.

The precedents in *Oudekraal* and *Kirland* presented an important practical problem of how to deal with the many objectively unlawful administrative acts that occur every day. Froneman J addressed this in *Bengwenyama Minerals*, observing that

108 *South African Dental Association* (n 107) para 12.
109 *South African Dental Association* (n 107) para 12.
110 *South African Dental Association* (n 107) para 12 fns 16-17.
111 A similar point can be made about *Economic Freedom Fighters v Speaker of the National Assembly* [2016] ZACC 11, which at para 74 quoted from *Kirland*. See *Tasima* (n 59) paras 227-230.

> the apparent anomaly that an unlawful act can produce legally effective consequences is not one that admits easy and consistently logical solutions. But then the law often is a pragmatic blend of logic and experience.[112]

Froneman J seems to have been echoing the famous statement by Oliver Wendell Holmes in the introduction to his lectures on the common law that 'the life of the common law has not been logic: it has been experience'.[113] An intriguing linguistic debate is possible about whether something that is void can have legal consequences. This was the constant refrain of Jafta J. And certainly, at the level of language, there is something in what he says. But he never comes to grips with the problem of how best to deal with objectively invalid administrative acts (and laws). Nor does he provide answers to the chaos that would flow if administrative decisions could be ignored because the presumption of validity (on which he relies in *Magnificent Mile*) has been rebutted.

The problem is never squarely confronted by the dissenters in *Merafong* and *Tasima*. Taken to their logical conclusion, however, it seems that the dissenters must accept the unpalatable consequence that individuals are free to pick and choose which administrative acts (and laws) they will obey and which they will not. We are never told how the law would deal with the chaos that would then ensue.

8 Conclusion

Perhaps now that Justice Jafta has retired, this controversy will be laid to rest. To be sure, *Oudekraal* and *Kirland* raise other interesting issues and possibly unresolved questions.[114] But the core principle – that an objectively invalid administrative act has effect unless and until set aside by a court of law – establishes a critical principle central to curbing the abuse of power. The judicial debate between Jafta J and Cameron J about that principle was protracted and baffling. It was baffling because it is difficult to discern a clear doctrinal issue which separated the two judges. The 'excruciating complexity' regarding the effect of an objectively invalid administrative act was decidedly not a nettle which Jafta J grasped.

112 *Bengwenyama Minerals* (n 21) para 85.
113 OW Holmes *The common law* (1881) at 1-2, which has been quoted by South African courts in *AB Ventures Ltd v Siemens Ltd* [2011] ZASCA 58 para 9; *Daniels v Daniels* 1958 (1) SA 513 (A) at 522.
114 See again Pretorius (n 20).

Instead, the debate seemed to assume an element of stubbornness on the part of Jafta J, often turning on semantic quibbles rather than doctrine and without offering sensible alternatives. For his part, Justice Cameron also dug in. For him, however, there were important doctrinal principles at stake which have a bearing on the use and abuse of power. He knows that the Constitution's 'lofty language' and 'vaulting aspirations' will not see the country through its many problems.[115] But he also knows that 'the Constitution continues to prove itself a viable framework for the practical play of power needed to secure our future beyond our current problems'.[116]

115 E Cameron *Justice: A personal account* (2014) at 276.
116 Cameron *Justice* (n 115) 276.