CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 5/16

In the matter between:

DEPARTMENT OF TRANSPORT	First Applicant
DIRECTOR-GENERAL: DEPARTMENT OF TRANSPORT	Second Applicant
MINISTER OF TRANSPORT	Third Applicant
WERNER EDUARD KOEKEMOER	Fourth Applicant
ROAD TRAFFIC MANAGEMENT CORPORATION	Fifth Applicant
COLLINS LETSOALO	Sixth Applicant
KEVIN JOSHUA KARA-VALA	Seventh Applicant
MORNE GERBER	Eighth Applicant
GILBERTO MARTINS	Ninth Applicant
CHRIS HLABISA	Tenth Applicant
MAKHOSINI MSIBI	Eleventh Applicant

and

TASIMA (PTY) LIMITED	Respondent

Neutral citation:	*Department of Transport and Others v Tasima (Pty) Limited* [2016] ZACC 39
Coram:	Mogoeng CJ, Bosielo AJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J.

Judgments: The Court: [1]
Jafta J (minority): [2] to [132]
Khampepe J (majority): [133] to [208]
Zondo J (concurring in the minority): [209] to [223]
Froneman J (concurring in the majority): [224] to [232]

Heard on: 24 May 2016

Decided on: 9 November 2016

Summary: unlawful administrative act — reactive challenge — organ of state — maladministration

validity of government contract — contempt of court — rule of law — delay

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ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria)

The following order is made:

1. The application to lead new evidence is refused.
2. Leave to appeal is granted.
3. The appeal is upheld insofar as the counter application succeeds.
4. The order of the Supreme Court of Appeal is set aside and replaced with the following:
    - "i. Within 30 days of this order, Tasima is to hand over the services and the electronic National Traffic Information System to the Road Traffic Management Corporation.
    - ii. Unless an alternative transfer management plan is agreed to by the parties within 10 days of this order, the

hand-over is to be conducted in terms of the Migration Plan set out in schedule 18 of the Turnkey Agreement."

5. The finding of contempt in part 1 of the order made by the Supreme Court of Appeal is upheld for the period before the counter application succeeded, but lapses thereafter.

6. Each party is to pay its own costs.

JUDGMENT

THE COURT:

[1] When the judgment in *Merafong*[1] was handed down, the minority judgment contained a finding that related to this matter (*Tasima*).[2] That finding appears in the first judgment below. This arose due to an agreement between the Justices of this Court that the judgments in *Merafong* and *Tasima* would be handed down together on 24 October 2016. As a result of that understanding, the scribe in the minority judgment in *Merafong*, who is also the scribe in the first judgment in *Tasima*, included a passage that reflected an example of facts similar to those in *Tasima* in the minority judgment in *Merafong*. Two or three days before the envisaged hand-down date, some paragraphs in the first judgment in *Tasima* were deleted at the request of one of the Justices, who pointed out that they were no longer necessary for the narrow finding made in that judgment following the revision process. Regrettably, when the decision to proceed with the delivery of the judgment in *Merafong* was taken, the cross-reference to *Tasima* in that matter was overlooked.

[1] *Merafong City Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35 (*Merafong*).

[2] Id at para 146.

JAFTA J (Mogoeng CJ, Bosielo AJ and Zondo J concurring):

Introduction

[2] This matter concerns constitutional issues of considerable importance. These include the scope of judicial authority exercised by courts. In particular whether a court may decline to decide a counter-application for the review of administrative action where there is a court order directing that the administrative action be implemented.

[3] These issues arise in the context of a decision by the erstwhile Director-General of the Department of Transport (Department) in terms of which a fixed term agreement for provision of services by Tasima (Pty) Limited (Tasima) was extended for five years allegedly in breach of section 217 of the Constitution[3] and section 38 of the Public Finance Management Act (PFMA).[4] Tasima sought and obtained orders from the High Court of South Africa, Gauteng Division, Pretoria (High Court), which enforced that decision. In some of those orders, officials in the Department were held to be in contempt of court for their failure to carry out the enforcement order.

[4] A direct consequence of this was that a contract that had expired due to effluxion of time was kept alive by court orders. These court orders extended the operation of the contract even beyond the extension purportedly made by the

[3] Section 217 of the Constitution provides:

> "(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
>
> (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for–
>
> (a) categories of preference in the allocation of contracts; and
>
> (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
>
> (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented."

[4] 29 of 1999.

Director-General. As a result a contract that carried the price of R355 million ended up costing the Department more than double that amount.

Parties

[5] The applicants are the Department, its current Director-General, the Minister of Transport, the Road Traffic Management Corporation (Corporation) and seven officials of the Department. They cite Tasima as the respondent in this application for leave to appeal against the order of the Supreme Court of Appeal. That Court has overturned an order that was granted by the High Court in favour of the applicants.

Facts

[6] In July 2001 the Department awarded a tender for the provision of services in relation to the electronic National Traffic Information System (eNaTIS). This system linked up the Department with all licensing institutions in the Republic, manufacturers of vehicles and various institutions, including banks and the South African Police Service. The system enables the Department to regulate and administer the licensing of all vehicles in this country, learner drivers and drivers' licenses, vehicle roadworthiness tests as well as the general implementation of the road traffic legislation.

[7] Following the award of the tender, the Department and Tasima concluded a turnkey agreement in terms of which Tasima operated the eNaTIS on behalf of the Department, for a fee of R355 million over a period of five years (Turnkey Agreement). Although the agreement was signed on 3 December 2001, it came into force on 1 June 2002. It was for a fixed period of five years, terminating on 31 May 2007.

[8] The parties agreed that upon termination, Tasima would transfer the operation of the eNaTIS to the Department. The agreement stipulated procedures to be followed in effecting the contemplated transfer. The first step to this end was a written request

from the Department for a transfer management meeting between it and Tasima. This request was to be made within 90 days from the date of termination. At that meeting the parties were to agree on a transfer management plan which had to be completed within 30 days from the date of the request for the meeting.

[9] As usual in complex agreements of this nature, the parties anticipated that disputes would arise during the currency of the agreement. They provided a mechanism for resolving disputes arising from the implementation of the agreement. Disputes of this kind were to be submitted to arbitration by an arbitrator appointed in terms of the agreement. It is apparent that the arbitration envisaged was aimed at resolving disputes relating to enforcing terms of the agreement. A dispute on whether the agreement, having run its course of five years, was validly kept alive did not fall within the arbitrator's competence. This is because the agreement would have terminated and the clause from which the arbitrator derived her power would have fallen away.

[10] Happily for the parties, no dispute arose during the currency of the agreement until it terminated on 31 May 2007. But on the eve of termination Tasima addressed a letter to the erstwhile Director-General, requesting that the agreement be extended for another five years. The request was rejected by Ms Mpumi Mpofu, the Director-General who advised that in accordance with the terms of the agreement, the Department would take over the operation of the eNaTIS. Tasima was informed that a notice would be sent to it on 1 June 2007 which would suggest a date for the transfer management meeting. It was also pointed out that the Department would ask that the parties draw up a transfer management plan within 30 days. In response, Tasima said it would await the Department's notice but in the interim it would continue providing services under the agreement until the transfer management plan was implemented.

[11] Indeed on 31 May 2007, the agreement came to an end by effluxion of time. However notice for the meeting was not given on 1 June 2007 and as a result no meeting was held and no plan was drafted. Instead and in order to avoid a serious

dislocation and disruption in the administration of the eNaTIS, the parties agreed that Tasima would continue providing the services it rendered under the expired contract, on a month-to-month basis. Presumably the aim was that this interim arrangement would run until transfer was effected.

[12] But that was not to be. The month-to-month arrangement continued until April 2010. Meanwhile the employment contract of the Director-General also came to an end in October 2009 and a new Director-General, Mr George Mahlalela, was appointed with effect from February 2010. About a month later, Tasima renewed its request for the extension of the expired agreement.

[13] The request was submitted to Mr Zakhele Thwala, the Deputy Director-General, for consideration and recommendation. He was the official who had been handling the matter and who dealt with Tasima. He was privy to the fact that a concern was raised by Tasima regarding the uncertainty brought about by the interim arrangement, which resulted in skilled employees leaving Tasima's employ, owing to insecurity of their jobs.

[14] In one of the letters addressed to Tasima by the Deputy Director-General, he pointed out that an efficient and properly maintained eNaTIS was vital to the Department's operations. Although the Minister had already approved a phased transfer of the eNaTIS to the Corporation, he assured Tasima that its provision of the services would still continue. This communication took place in May 2009.

[15] Returning to Tasima's request, on 15 April 2010 the Deputy Director-General consulted the Corporation's CEO, Mr Collins Letsoalo, about the request. This triggered a flurry of correspondence between the two of them. The CEO responded by pointing out that the interim arrangement was bad and had attracted criticism from Parliament's Portfolio Committee on Finance which advised that the matter be put to tender. He also pointed out that Tasima's charges were too high and that the

Department could not afford them. He suggested that tender bids be invited so that the interim arrangement could be terminated.

[16] In his response the Deputy Director-General stated:

> "I will take into account your view, and would also like to bring the following to your attention: We cannot advertise a contract which is running. The Company Tasima has recently bought shares from Aivia.kom at cost. Attracting and retaining staff is essential for the service guarantee. A new contractor will only maintain the current system, why advertise. In the best interest of eNaTIS and [the] new shareholders to re-new the current contract is my view and as for SCOPA,[5] I will take responsibility."

[17] To this the CEO responded:

> "I am aware that the contract is running on a month to month. Reason is that it has expired. Change of ownership cannot be used as an excuse to extend a contract. As to SCOPA that is the accounting officer's responsibility, you therefore cannot take responsibility. As head of finance I have to ensure that the procurement processes are complied with. You are therefore advised to refrain from taking any decision on this which would result in irregular expenditure. I am puzzled by your articulation on the interests of the new shareholders in Tasima. Frankly their interest should not worry us. Ours should be the interest of the [D]epartment, the system, eNaTIS and government in general."

[18] Two days later the Deputy Director-General replied:

> "Maybe I need to remind you that we had a discussion on this matter. We agreed on renewal except for the duration. I had proposed 5 years and you said 3 years."

[19] With regard to the shareholders' interest, the Deputy Director-General said the reality which could not be wished away was that they had made an investment and that it was fair to afford them the opportunity to "recoup the investment". He

[5] Parliament's Standing Committee On Public Accounts.

suggested that extending the contract was one of the ways to enable them to recoup their investment.

[20] On 14 May 2010, the Deputy Director-General prepared a memorandum in which he recommended to the new Director-General that the contract be extended for five years with effect from 1 May 2010 to 30 April 2015.

[21] In the memorandum, the Deputy Director-General motivated his recommendation by making reference to constraints that the interim arrangement caused on Tasima's human resources. He also referred to Tasima's then recent release of two software programs to extend the validity of learner drivers' licenses to 24 months. He mentioned the other services which Tasima was planning to launch for use during the FIFA World Cup soccer tournament that was to be held in this country in June-July 2010. These included software on commuter portals, a Geospatial Management System and the Find Your Way 2010 website.

[22] These were new services that were not part of the services covered by the month-to-month arrangement. He asserted that the cost of the contract was anticipated to be consistent throughout its duration. But he did not record the strong opposition from the CEO. Nor did he allude to the disapproval of the interim arrangement by SCOPA and its suggestion that the matter be put to tender. More importantly, the memorandum was silent on reasons why there was to be a deviation from the normal tender system required by section 217 of the Constitution. Treasury Regulation 16.A6.4 read with Treasury Instruction 8 of 2007/2008 permitted a deviation from tendering only in the case of emergency or where there is only one supplier for services to be procured. Even so, the regulation required reasons for the deviation to be recorded in writing and approved by an accounting officer.

[23] None of these requirements was met. There was no emergency and there were other businesses which could supply the services to be procured. Notwithstanding these shortcomings and the unlawfulness of the recommended action which was not

only unconstitutional but was also illegal as it violated section 38 of the PFMA, the Director-General approved and purported to extend the contract for five years. The approval was made on 12 May 2010 with retrospective effect from 1 May 2010.

[24] On 21 May 2010, the CEO, who was also at the level of a Deputy Director-General addressed a letter to Tasima. He advised:

> "Kindly ignore [the Director-General's letter of 12 May 2010] and refrain from using it as a basis for a contract. The contract does not allow for an extension that changes management. The contract that [the Department] needs at this stage is maintenance and enhancement contract. The current contract is a development and only needs enhancement. Furthermore, you are proposing new developments which are not part of the specifications of your contract. You will agree that this will be irregular and therefore unlawful. This matter has been discussed with [the author of the recommendation] and he is in concurrence with the position."

That recommendation had been attached to the letter of 12 May 2010, which informed Tasima about the extension.

[25] Tasima responded by a letter of 24 May 2010 in which it asserted:

> "We take note of your purported rescission of the decision of the Department's Accounting Officer, the Director-General, Mr George Mahlalela.
>
> We place on record that unless and until we receive any communication from either the Director-General, as the Accounting Officer, or the Minister as the Executive Authority, we are going to disregard your letter and proceed on the basis of the DG's letter of 12 May 2010.
>
> To the best of our knowledge and understanding the contract has been extended for five (5) years and we will continue to plan, operate and roll out on those bases."

[26] Evidently this response does not deal with the new and additional services which were not part of the month-to-month arrangement, nor does it offer any

justification for procurement of these services without following the necessary tender process.

[27] It appears that the purportedly extended agreement was implemented. For the provision of the additional services to the Department, the Director-General appointed a close corporation called Mandate Strategy Roadmap and Delivery CC (MSRD). In June 2010 MSRD demanded payment of the sum of R29 771 566. But the Department failed to pay and subsequently MSRD sold its software to Tasima for R12 million. Tasima in turn invoiced and claimed payment of that amount plus VAT from the Department. An amount of R13 680 000 was paid to Tasima even though the sale of the software to Tasima was not part of the eNaTIS contract.

[28] The Auditor-General queried the extension of the contract to Tasima and declared that it was irregular as it was done without following procurement requirements such as tendering. This prompted the Department to seek to terminate the agreement. The Director-General briefed officials in the Department about the Auditor-General's report. This briefing occurred in 2011.

[29] In 2012 the Director-General initiated negotiations with Tasima relating to termination of the extension and transfer of the eNaTIS to the Department. He informed Tasima that the Auditor-General had declared the extension irregular. At the beginning Tasima was willing to negotiate the termination and transfer of the system to the Department. But suddenly Tasima stopped attending the negotiations. The Department addressed an email to Tasima, stating that, since the negotiations had broken down, Tasima should hand over the eNaTIS to it. Around June 2012 the Department stopped all payments relating to the eNaTIS. Tasima turned to the High Court to enforce the purportedly extended contract. Unwittingly the High Court, as it appears below, aided and abetted Tasima in its quest to enforce the agreement.

Litigation background

[30] Tasima instituted an urgent application in the High Court, seeking an interim order directing the Department to effect payment and perform all its obligations under the agreement, pending the finalisation of arbitration proceedings to be instituted by Tasima. On 7 August 2012 the matter came before Teffo J who granted the interim order sought. It is not clear from the papers whether the Department had then been afforded the opportunity to file opposing papers before the order was granted.

[31] What is clear though is the fact that the Department filed an affidavit deposed to by the same Director-General who had purported to extend the contract. He contended that the decision to extend was invalid for failure to follow procurement processes. At the hearing in this Court we were informed that the decision was impugned on the ground that it was not in compliance with section 217 of the Constitution, section 38 of the PFMA and the Treasury Regulations.

[32] On the return day Tasima persisted before Mabuse J in seeking an order declaring that the agreement concluded by the parties on 3 December 2001 was extended to end on 30 April 2015 and that the Department be ordered to perform its obligations under that agreement pending the finalisation of the dispute resolution proceedings to be instituted in terms of clause 24 of schedule 13 of the agreement. Those were the arbitration proceedings which were to be instituted within 25 days from the date of judgment.

[33] Without determining the defence raised by the Department pertaining to the invalidity of the decision to extend which was shown to be inconsistent with section 217 of the Constitution and section 38 of the PFMA. Mabuse J focussed on whether Tasima had met the requirements of an interim relief which would operate until the dispute between the parties was finally determined in the arbitration proceedings.[6]

[6] *Tasima (Pty) Ltd v The Department of Transport*, unreported judgment of the North Gauteng High Court, Pretoria, Case No 44095/2012 (17 October 2012).

[34] The learned Judge proceeded from the premise that for Tasima to succeed it had to show that requirements for a temporary remedy had been established. These, he said, were a clear or prima facie right; a well-grounded fear of irreparable harm if the interim relief was not granted; the balance of convenience and the absence of another satisfactory remedy.

[35] Applying this test to the present case Mabuse J held:

> "It is common cause that on 3 December 2001 the parties entered into an agreement that was to endure for a period of five (5) years. It had been agreed by the parties that, by effluxion of time, the agreement would terminate on 31 May 2007, unless its operation was extended under specific circumstances. It is common cause furthermore that that agreement was extended, from 1 June 2007 to 8 April 2010 on a month to month basis. It is also common cause that between 1 June 2007 and May 2010 the applicant and [the Department of Transport (DOT)] continued performance of the terms of the original agreement. The applicant contends that on 12 May 2010 the parties' agreement was extended for a fixed period of 5 years which will terminate in 2015. The extension of the agreement by the said period created rights for the applicant and obligations for the DOT. That situation has accordingly created, rightly or wrongly, prima facie rights for the applicant.
>
> The applicant contends that the services it renders in accordance with the agreement with DOT are its only source of income and that the business of managing e-Natis is its core business. Accordingly any attempt by the respondents to deny the existence of the agreement or terminate it will doubtlessly cause irreparable harm to the applicant. According to the applicant any termination of the agreement which is contrary to the terms of the parties' agreement will have severe ripples on the employment of its staff and will also result in the applicant having to terminate its obligations to third parties. The email that Mr Jock sent to the applicant on 16 July 2012 in which he threatened not to make any further payments following his position that the agreement had terminated on 31 May 2012 constituted the requisite threat prejudicial to the applicant's rights.
>
> In the honest belief that the contract exists and is valid, the applicant has no choice but to take appropriate measures to protect the rights that it derives from the

> agreement. The measures the applicant adopted are designed to keep it afloat until the principle dispute is determined by another forum."[7]

[36] However, having concluded that Tasima had "made out a good case for interim relief", the learned Judge declined to declare that the agreement had been extended to 30 April 2015. He reasoned that if he did so, he would have usurped the powers of the arbitrator because that touched at the core of the dispute between the parties. The primary objective of an interim order, he continued, is to preserve the status quo pending the final determination of the parties' rights.[8]

[37] What the learned Judge overlooked was the fact that the approach he had adopted was suitable for cases where the resolution of the dispute in the main proceedings depended on a determination of facts. Where, as here, the validity of the source of the right the applicant sought to preserve was also impugned on the basis that it was an illegal source, a court can hardly close its eyes to this and proceed to grant an order preserving an illegally obtained right. Interim relief is not designed to protect an illegal "right".

[38] Here the undisputed facts before the Court were that the extension of the agreement was effected in violation of section 217 of the Constitution, section 38 of the PFMA and the Treasury Regulations. In these circumstances it is difficult to appreciate how the Court was convinced that Tasima had established a right worthy of preservation, even at the level of a prima facie right. Nor is it clear how Tasima established that it would suffer irreparable harm if the interim order were not granted in circumstances where the extension was unconstitutional and unlawful.

[39] Moreover, the Court pointed out rightly that the purpose of an interim order is to preserve rights pending a final determination. Here it was apparent that the arbitrator to whom the Court deferred the matter had no jurisdiction to determine

[7] Id at paras 28-30.

[8] Id at paras 31 and 35.

whether the contract was lawfully extended because her power to arbitrate derived from the impugned contract. Therefore, she could not arrogate to herself the power to arbitrate which was outside the agreement. The question whether the extension was constitutional or not fell outside the arbitrator's mandate. The constitutionality or legality of the extension was an issue pre-eminently within the competence of the Court.

[40] As a result the Court granted an order that was inconsistent not only with the Constitution but also with the PFMA. The order issued was on these terms:

> "1. Pending the finalisation of the dispute resolution proceedings instituted by the applicant in terms of clause 24 and schedule 13 of the agreement between the applicant and the first respondent dated 3 December 2001, as subsequently amended and extended, *the first respondent is hereby directed*:
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> 1.1 *to perform its obligations in terms of the agreement*;
>
> l.2 without limiting the generality of l.l supra, to comply with the payment obligations as defined in paragraph 17 of the applicant's founding affidavit;
>
> 1.3 to pay the costs of this application."

[41] A direct result of implementing this order was that an invalid extension of the agreement was given legal force and effect. As it appears later in this judgment, the extension was not only unconstitutional and unlawful but was also motivated by corruption and fraud.

[42] But I want to stress that on the approach followed by the High Court, even a fraudster whose rights flow from an illegal and fraudulent act would be entitled to an interim order preserving those rights until a final determination of the parties' rights is made. This cannot be right.

[43] Emboldened by the order granted, Tasima maximised its benefit from the order. It did not hesitate to invoke the order whenever the Department failed to make payments. The contempt of court procedure was the stick with which Tasima

whipped the Department's officials to submission. In the process a flurry of orders were issued by various Judges of the Gauteng Division. The genesis of all of them was the order of Mabuse J. In some of them, persons who were not party to the agreement between Tasima and the Department were joined to the proceedings and later were even held to be in contempt of court for their failure to perform contractual obligations emanating from an agreement to which they were not a party.

[44] One of those parties is the Corporation. It was found to have breached the order by its failure to perform the Department's contractual obligations in terms of a contract to which it was a stranger. This was overlooked by the Judge who made the order despite the fact that Mabuse J's order was restricted to the Department only. And it directed the Department to do one thing, namely, "to perform its obligations in terms of the agreement" that was concluded by Tasima and the Department on 3 December 2001.

Current proceedings

[45] Tasima instituted the present application by way of urgency in March 2015. In it Tasima sought a host of orders, including the declaration that the Department's officials and the Corporation were guilty of contempt of court for their failure to comply with the various orders referred to above. It further sought that those officials and members of the Corporation be committed to imprisonment for a period of 30 days. An interdict was also requested to restrain the respondents before the High Court from taking any steps in preparation for the transfer of the eNaTIS to the Department, after the expiry of the extended agreement on 30 April 2015. An order was also sought to ensure that the eNaTIS was not transferred until a transfer management plan envisaged in schedule 15 of the agreement was implemented.

[46] Tasima's application was triggered by an exchange of correspondence between the Department and the Corporation, in late February and early March 2015. The subject of that correspondence was an agreement between them to take over the eNaTIS after 30 April 2015, which was the date on which the extension was to expire.

In preparation for the transfer, the Corporation advertised posts pertaining to operating the eNaTIS.

[47] The High Court defined Tasima's case in these terms:

> "The contemptuous behaviour complained of by applicant was that prior to the expiration of the agreement DoT had already appointed [the Corporation] to take over from 1 May 2015. [The Corporation] had been appointed prior to the stipulated hand over or transfer period being implemented in terms of clause 15 – Change control proceedings and clause 26 – Transfer management upon termination of the agreement. However, DoT contends that it has a right to prepare itself in readiness for when the agreement expires and as such it is not in violation of any contractual rights when it was advertising for staff and the like to step into the applicant's shoes once the agreement came to an end."[9]

[48] The matter was opposed by the Department and the Corporation. The Department also lodged a counter-application for the review and setting aside of the extension. The Department contended that the extension breached section 217 of the Constitution, section 38 of the PFMA and the relevant Treasury Regulations.

[49] The grounds for impugning the extension were formulated in these terms:

> "The impugned extension was in clear contravention of section 217(1) of the Constitution in that it was for the contracting of services without following a system that is fair, equitable, transparent, competitive and cost effective. In extending this contract Mahlalela failed to comply with Treasury Regulation 16.A6.4, read with Treasury Instruction Note 8 of 2007/2008 which provide that in urgent or emergency cases or in case of a sole supplier, other means of procurement may be followed but that the reasons for deviation should be recorded and approved by the accounting officer. The proferred reasons were also lacking in rationality. In terms of section 38(2) of the PMFA an accounting officer may not commit a department, trading entity or constitutional institution to any liability for which money has not

[9] *Tasima (Pty) Ltd v Department of Transport* [2015] ZAGPPHC 421 (Hughes J judgment) at para 25.

> been appropriated. When Mahlalela extended the contract with effect from 1 May 2010, no money had been appropriated by the Department for the extended contract.
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> . . .
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> [A]s a result of this illegal extension the Department has received negative reporting from the Auditor-General.
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> . . .
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> [T]he relevant portion of the Department's annual financial statements for the year ended 31 March 2014 . . . [shows] that the Department is now forced to shift money from some of its programmes in order to fund this contract. This is a direct result of the failure by Mahlalela to comply with section 38(2) of the PFMA."

[50] In addition the Department and the Corporation raised a collateral challenge against the extension. They invoked *Prodiba*,[10] a decision in which the Supreme Court of Appeal had held that another extension granted by the same Director-General in similar circumstances was illegal and was set aside.

[51] The Department and the Corporation disputed that, in taking steps to prepare for the transfer of the eNaTIS after the expiry of the extension, they breached Mabuse J's order and the various other orders. They asserted that they were entitled to take those steps which were not directed at interfering with the extension but were designed purely for them to be ready to take over the system when transfer was effected.

[52] With regard to the Corporation, Hughes J held that since it was not a party to the agreement between Tasima and the Department, it should not have been joined in these proceedings. The learned Judge concluded that as a non-party, the Corporation had no obligation to fulfil arising from that agreement. To the extent that the orders required the Corporation to perform contractual obligations, I agree that apropos the Corporation, they were not competent orders.

[10] *Minister of Transport NO v Prodiba (Pty) Ltd* [2015] ZASCA 38; [2015] 2 All SA 387 (SCA) (*Prodiba*).

[53] Regarding the counter-application, the High Court first considered whether it should entertain the review owing to the delay. The Court proceeded to exercise its discretion and stated:

> "This is in the discretion of the court and in exercising this wide discretion I take into account the fact that the basis of the counter-application is a dispute raised by the applicant already, I also consider the delay in that dispute being adjudicated, I consider that the collateral challenge raised is one that validates or invalidates the relief sought in the applicants main application, I take into account Section 217 of the Constitution and, section 38(1)(a)(iii) of the (PFMA) and I am guided by principle enunciated in *Truter v Degenaar* 1990 (1) SA 206 (T) and the cases mentioned therein.
>
> . . .
>
> In my view to order the enforcements sought by the applicant, in the face of DoT's counter-application, the applicants referral in terms of Schedule 13 and the delay that has already taken place from 2012 together with the factors I have referred to, it would be irresponsible and not in the interests of justice if the counter-application which embodies exceptional circumstances is not considered."[11]

[54] The Court went on to consider the validity of the extension. Drawing from *Prodiba*, Hughes J held:

> "From the aforesaid it is clear to me that Mahlalela did not adhere to section 217(1) of the Constitution in that the extension agreement was not done in a fair, transparent, equitable, and competitive and cost effective manner. With regards to the cost effective aspect it is illustrated by DoT that in the Mahlalela extension period the applicant gained R2,5 billion whilst the initial contract was for R355 million inclusive of VAT. This also went against the grain of section 38(1)(a)(iii) of the PFMA. Clearly, this extension had not been budgeted for as Mpofu had confirmed that the agreement had come to an end and had initiated the transfer management provisions."[12]

[11] Hughes J judgment above n 9 at paras 66-7.

[12] Id at para 96.

[55] The learned Judge concluded that the extension was illegal and declared that as extended the Turnkey Agreement was void *ab initio* (from the outset) and Tasima's application was dismissed.

Supreme Court of Appeal

[56] Tasima appealed to the Supreme Court of Appeal. With regard to Tasima's application for contempt of court and committal to imprisonment that Court differed with the High Court and held that the invalidity of the extension was irrelevant to the question whether the Department's officials and the Corporation were in contempt of the court orders. In a constitutional democracy based on the rule of law, the Supreme Court of Appeal stated, court orders must be complied with by private citizens and the State alike.[13] Having outlined the requirements for civil contempt, the Court held that Tasima had established the charge of contempt against some of those officials, including the Corporation.

[57] Accordingly, the Supreme Court of Appeal held that the current Director-General and Mr Chris Hlabisa, who were second and tenth respondents before it, be committed to imprisonment for a period of 30 days but this order was suspended indefinitely on condition that they did not implement the steps taken in February-March 2015, to transfer the eNaTIS from Tasima to the Corporation. A warrant for the committal to imprisonment was authorised but it was to be issued only if they breached the condition of suspension.

[58] In connection with an interdict sought by Tasima to the effect that the respondents before it be restrained from transferring the eNaTIS, except in terms of schedule 15 of the turnkey agreement, the Supreme Court of Appeal held that there was no link between this part of the order and the Department's challenge directed at the validity of the "extended" contract. The Court reasoned that the interdict was not based on the agreement but on the court orders granted in favour of Tasima. The fact

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

that those court orders were in turn founded on the "extended" contract, concluded the Supreme Court of Appeal, did not detract from this principle because Tasima did not seek to compel performance of the contract but performance of court orders. Hence the illegality of the contract was irrelevant.[14]

[59] Consequently, the Supreme Court of Appeal interdicted the respondents from taking steps to implement transfer of the eNaTIS alluded to in the letters of 24 and 25 February and 4 March 2015.

[60] As regards the counter-application for review, the Supreme Court of Appeal dismissed it mainly on the ground that it was instituted after a delay of five years in circumstances where no case was made out for condonation. The Supreme Court of Appeal held that the High Court did not condone the delay in terms of section 9 of the Promotion of the Administrative Justice Act (PAJA).[15] The Court also held that the Department, as an organ of state, was not entitled to pursue the counter-application for review as a collateral challenge.

Issues

[61] The issues that arise from the judgment of the Supreme Court of Appeal are the following:

(a) Whether the applicants were in breach and in contempt of the various orders;

(b) Whether condonation for the late review of the extension should have been granted;

(c) Whether the applicants could raise a collateral challenge against the extension; and

[14] Id at para 23.

[15] 3 of 2000.

(d) Whether here the Supreme Court of Appeal has correctly relied on *Oudekraal*[16] and *Kirland.*[17]

Leave to appeal

[62] As mentioned this case raises important constitutional issues, including the scope of judicial power. More specifically whether a court may refuse to adjudicate a review application if there is a court order directing that the impugned decision be implemented pending proceedings to be instituted in terms of an underlying agreement. The other issue is whether, in light of the peremptory terms of section 172(1) of the Constitution that requires courts to declare conduct that is inconsistent with the Constitution to be invalid, a court may decline to condone a delay in bringing a review where the impugned decision was clearly unconstitutional and was tainted by corruption.

[63] It is in the interests of justice to grant leave to enable this Court to consider all these issues which until now have not been raised for determination in this Court. Furthermore, there are prospects of success on the merits. The High Court and the Supreme Court of Appeal have reached conflicting outcomes.

[64] The orders issued by the High Court before the launch of the present proceedings and the order granted by the Supreme Court of Appeal, here have enforced and continue to enforce a fixed term contract of five years, more than nine years from the date on which it expired by effluxion of time. The continued operation of that contract costs the Department R50 million per month. And Tasima has to date earned more than R2.5 billion from a contract whose original price was R355 million. As the amount in excess of the original price was not budgeted for, the Department is

[16] *Oudekraal Estates (Pty) Ltd v The City of Cape Town* [2004] ZASCA 48; 2004 (6) SA 222 (SCA) (*Oudekraal*).

[17] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) (*Kirland*).

forced to divert funds from approved projects to finance an allegedly unconstitutional and illegal agreement.

New evidence

[65] After the hearing in the Supreme Court of Appeal and whilst the judgment was pending, the Department attempted to file new evidence. This evidence related to events that occurred after the pleadings were closed and a judgment had been given by the High Court. The evidence pertains to steps taken to pursue criminal charges against certain individuals who were associated with the extension of the Turnkey Agreement. The Supreme Court of Appeal did not admit this evidence into record.

[66] Hence the request for it to be admitted by this Court. Tasima opposes the request. A request of this kind is regulated by rule 31 of the Rules of this Court.[18] In terms of the rule a party is entitled to place before this Court evidence dealing with facts which do not appear on the record provided such facts are common cause or are incontrovertible or are of an official, scientific, technical or statistical nature and capable of easy verification. The new facts which the Department seeks to introduce fall outside those categories. Accordingly the request must be declined. It is now convenient to address the issues and I propose to begin with the main question which is whether the counter-application should have been entertained in view of the delay. For if not, the fact that the applicants should have succeeded on the merits would be immaterial to the outcome.

[18] Rule 31(1) provides:

> "Any party to any proceedings before the Court and an *amicus curiae* properly admitted by the Court in any proceedings shall be entitled, in documents lodged with the Registrar in terms of these rules, to canvass factual material that is relevant to the determination of the issues before the Court and that does not specifically appear on the record: Provided that such facts—
>
> (a) are common cause or otherwise incontrovertible; or
>
> (b) are of an official, scientific, technical or statistical nature capable of easy verification."

Counter-application

[67] The Supreme Court of Appeal declined to entertain the counter-application on a number of reasons. These included the delay in instituting the review and the proposition that a collateral challenge was not available to the state. For a better understanding of the conclusions reached by the Supreme Court of Appeal, it is necessary to remind ourselves of the relief sought by the Department in its counter-application. The Department sought an order:

> "(a) Reviewing and setting aside the decision of the then Director-General of the Department of Transport, Mr George Mahlalela, of 12 May 2010 to approve and extend the eNaTIS project RT1194KA Contract ("the eNaTIS contract or contract") for a fixed period of five years effective from 1 May 2010;
>
> (b) Declaring the extended contract which took effect from 1 May 2010 and expires on 30 April 2015 void *ab initio*; and
>
> (c) Ordering [Tasima] to immediately hand over the eNaTIS system and related services as specified in the eNaTIS contract to the [the Corporation]."

[68] It is plain from this order that in (a), the Department sought a straight review of the extension whereas (b) is aimed at rendering the agreement unenforceable. Typically, this may be taken as a collateral challenge. It would be recalled that in its defence the Corporation raised the invalidity of the agreement only. And in (c) the Department sought an order consequent to either (a) or (b).

[69] As the Supreme Court of Appeal observed, the grounds advanced by the Department for the review were that the impugned decision was taken in violation of section 217 of the Constitution, section 38 of the PFMA and Treasury Regulations. This was not disputed by Tasima. To bolster its case, the Department also relied on *Prodiba*, a decision of the Supreme Court of Appeal in terms of which a decision taken by the same Mr Mahlalela in breach of section 217 of the Constitution and section 38 of the PFMA was declared to be void *ab initio*.

[70] But the Supreme Court of Appeal distinguished the present matter from *Prodiba*. It stated:

> "In *Prodiba* a decision by the same Mr Mahlalela in his capacity as Director-General of the Department to extend another contract for five years, was set aside by this court at the behest of the Department in a counter-application. A cardinal difference between the two cases is, however, introduced by the substantial delay factor in this case, which was absent in *Prodiba*. The impugned decision in this case, as we know, was taken in May 2010. This means that nearly five years had elapsed before the institution of the Department's review application. Since the review application had been brought under s 6 of PAJA it is, at least on the face of it, subject to the time-bar in s 7. In terms of this section proceedings for judicial review in terms of s 6 must be instituted without unreasonable delay and not later than 180 days, unless the court in terms of s 9 allows an extension 'where the interests of justice so requires'."[19]

[71] It is apparent from the judgment of the Supreme Court of Appeal here that in *Prodiba* too there was a delay that was two years less than the present. Having noted that here there was a five year delay, that Court stated:

> "Moreover, Mr Mahlalela's contract as Director-General expired on 28 February 2013. After this date there was therefore no impediment to the institution of review proceedings. What is more, in *Prodiba* the Department brought a counter-application for review in circumstances substantively similar to those of this case. There is therefore no explanation whatsoever for the additional two year delay since 2013 before the counter-application was brought in March 2015."[20]

[72] With regard to allegations of fraud and corruption on which the Department relied for condonation, the Supreme Court of Appeal ruled that for two reasons, the Department could not rely on them. First, the Court stated that those allegations were not put forward as a ground for review. Second, Tasima would be severely prejudiced if the allegations were taken into account because it did not respond to them.

[19] Supreme Court of Appeal judgment above n 13 at para 24.

[20] Id at para 31.

[73] In my respectful view, both these reasons are unconvincing. It will be recalled that serious allegations of corruption were made in the Department's answering papers to which Tasima was afforded an opportunity to reply but out of its own choice decided not to respond to those allegations and confined itself to contesting that Mr Mahlalela was to blame for the Department's inaction.[21] In one of the affidavits filed on the Department's behalf, it was alleged that one Mr Ncube signed a consultancy agreement with Tasima to be paid R2 million per month for no specific services but on condition that the agreement of 3 December 2001 between Tasima and the Department was extended for more than 18 months.

[74] Mr Mahlalela went on to extend that agreement irregularly for a period of five years. Subsequently Mr Mahlalela concluded a lease agreement in terms of which the same Mr Ncube let his house for rent in the sum of R45 000 per month which amount Mr Mahlalela could not afford from his salary and as a result he failed to pay the rent for a period of a year without any action taken by Mr Ncube.

[75] The other allegation was that notwithstanding an irregular agreement signed by Mr Mahlalela and MSRD in January 2010 for the procurement of services on the Geo-Spatial Management System and FindYourWay 2010 website and portal, Mr Mahlalela later authorised payment of R13 million to Tasima for its acquisition of the software from MSRD. The contract with MSRD was also signed in breach of procurement requirements, including section 217 of the Constitution. This was done despite the fact that the services which were to be offered by MSRD were used as motivation for extending Tasima's agreement.

[76] In the absence of an explanation from Tasima and Mr Mahlalela, these allegations on corruption shed light on the motive for breaching the Constitution, the PFMA and Treasury Regulations, at the time the extension was granted.

[21] Id at para 35.

[77] In refusing condonation the Supreme Court of Appeal did not only fail to take the allegations into account but also overlooked the overwhelming evidence on record to the effect that Mr Mahlalela violated section 217 of the Constitution when he extended the agreement. Once that was established, the Supreme Court of Appeal was obliged by section 172(1)(a) of the Constitution to declare the extension to be invalid.[22] Under this section the declaration of invalidity is a mandatory consequence of inconsistency with the Constitution. Section 2 of the Constitution proclaims that the Constitution is supreme and that law or conduct that is inconsistent with it is invalid.

[78] PAJA cannot be invoked as justification for a court not to comply with section 172(1)(a) of the Constitution. This is so because the Constitution, and not PAJA, is the supreme law from which PAJA itself derives its validity. Therefore, here Hughes J in the High Court was right to entertain the counter-application, following her consideration of section 217 of the Constitution.[23]

[79] The approach adopted by the Supreme Court of Appeal did not only deviate from section 172(1)(a) but resulted also in that Court enforcing conduct that was in violation of the Constitution. As guardians of the Constitution, courts are under an obligation to uphold it. A decision that is invalid because of its inconsistency with the Constitution can never have legal force and effect. This is fundamental to the principle of constitutional supremacy.

[80] Consequently the Supreme Court of Appeal erred in holding that:

[22] Section 172(1), in relevant part, provides:

> "When deciding a constitutional matter within its power, a court—
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency."

[23] Hughes J judgment above n 9 at paras 66-7.

> "According to the general principle laid down by this court in *Oudekraal* (para 26) administrative actions must be treated as valid until set aside, even if actually invalid."[24]

And again later:

> "[T]he import of section 7 of PAJA is that after the 180-day period, a court is only empowered to entertain the review application if the interests of justice require an extension under section 9. Absent such extension, the court has no authority to consider the review application at all. Whether or not the decision was in fact unlawful no longer matters. The decision would, as it were, be 'validated' by the delay."[25]

[81] This is in conflict with the rule of law and specifically the principle of legality. These principles require administrative functionaries to exercise only public power conferred on them and nothing more. No amount of delay can turn an unlawful act into a valid administrative action. This is because apart from the rule of law, section 33(1) of the Constitution prescribes that administrative action must be lawful.[26]

Collateral challenge

[82] The Supreme Court of Appeal held that the defence of a collateral challenge is not available to an organ of state. For this proposition, reliance was placed on that Court's decisions in *Kwa Sani Municipality*[27] and *Merafong SCA*.[28] In *Kwa Sani Municipality*, without reference to any authority, the Supreme Court of Appeal said:

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[24] SCA judgment above n 13 at para 25.

[25] Id at para 30.

[26] Section 33(1) provides:

> "Everyone has the right to administrative action that is lawful, reasonable and procedurally fair."

[27] *Kwa Sani Municipality v Underberg/Himeville Community Watch Association* [2015] ZASCA 24; [2015] 2 All SA 657 (SCA) (*Kwa Sani Municipality*).

[28] *Merafong City Local Municipality v AngloGold Ashanti Limited* [2015] ZASCA 85; 2016 (2) SA 176 (SCA) (*Merafong SCA*).

> "In the present matter, it is the municipality which is the public authority, and not the association. The municipality is also not in the position of a subject being coerced by a public authority whose underlying administrative act is invalid. No collateral challenge is raised by way of the application. The application concerned a public authority claiming that its own administrative action was invalid. This submission of the municipality thus falls far wide of the mark."[29]

[83] This conclusion was influenced primarily by the mistaken understanding of the concept of collateral challenge. As the Supreme Court of Appeal remarked here, that concept "has its origins" in *Oudekraal*.[30] In that case the Supreme Court of Appeal adopted the principle of collateral challenge from a decision of the House of Lords in *Boddington*.[31] In this English case Lord Irvine LC stated:

> "It would be a fundamental departure from the rule of law if an individual were liable to conviction for contravention of some rule which itself is liable to be set aside by a court as unlawful. . . . Any system of law under which the individual was convicted and made subject to a criminal penalty for breach of an unlawful bylaw would be inconsistent with the rule of law."

And later he said:

> "However, in approaching the issue of statutory construction the courts proceed from a strong appreciation that ours is a country subject to the rule of law. This means that it is well recognized to be important for the maintenance of the rule of law and the preservation of liberty that individuals affected by legal measures promulgated by executive public bodies should have a fair opportunity to challenge these measures and to vindicate their rights in court proceedings."[32]

[84] In the same case Lord Steyn remarked:

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[29] *Kwa Sani Municipality* above n 27 at para 14.

[30] *Oudekraal* above n 16.

[31] *Boddington v British Transport Police* [1998] UKHL 13; [1999] 2 AC 143 [HL]; [1998] 2 All ER 203; [1998] 2 WLR.

[32] Id at 153H-154A and 161C-D.

> "My Lords, with utmost deference to eminent Judges sitting in the Divisional Court I have to say the consequences of *Bugg*'s case are too austere and indeed too authoritarian to be compatible with the traditions of the common law. In *Eelugbayi; Elekou v Officer Administering the Government of Nigeria* [1931] AC 662 at 670, a habeus corpus case, Lord Atkin observed that 'no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice'. There is no reason why a defendant in a criminal trial should be in a worse position and that seems to reflect the true spirit of the common law."[33]

[85] It is plain from this statement that the principle of collateral challenge which applied to civil matters was extended to criminal trials. It is also apparent that that principle was informed by the rule of law as understood in the English common law. It may well be that in English law an organ of state cannot, unlike in our law, sue another organ of state. And that an organ of state may not, unlike in our system, seek a review of its own decision in a court of law. So care must be exercised in relying on English decisions for the proposition that a collateral challenge is not available to organs of state.

[86] In the view I take of the matter it is not necessary to express a final opinion on this issue. Suffice it to say that in ours, the rule of law as a founding value of our democratic state, does not serve the purpose of preserving individual rights only. It also prohibits the exercise of power that is not validly conferred. In those circumstances I can see nothing in logic or principle that justifies denying an organ of state the right to challenge the validity of administrative action when it is faced with coercive action based on a constitutionally invalid act. Therefore, to the extent that *Kwa Sani Municipality* and *Merafong SCA* suggest otherwise, I doubt that they reflect the correct position in our law. The purpose of a collateral challenge is to prevent an illegal compulsion to do something. Indeed, it would be jurisprudentially intolerable

[33] Id at 173E-G.

for a court to enforce an illegal act solely on the ground that the party against which enforcement is sought is the state which may not raise a collateral challenge.

Oudekraal

[87] The Supreme Court of Appeal's reliance on *Oudekraal* here was mistaken. Nowhere does *Oudekraal* say that an administrative action performed in violation of the Constitution should be treated as valid until set aside. Much worse, that its unlawfulness does not matter as long as it is not set aside and that a delay in challenging it validates the action concerned. As mentioned, this proposition turns the supremacy of the Constitution principle on its head.

[88] On the contrary *Oudekraal* lays down a narrower principle that applies in specific circumstances only. That principle draws its force from the distinction between what exists in law and what exists in fact.[34] An invalid administrative act that does not exist in law cannot itself have legal force and effect. Yet the act may still exist in fact, for example an administrative act performed without legal power. It exists in fact until set aside on review. However, since the act does not exist in law, it can have no binding effect.

[89] This much is clear from *Oudekraal*. There Howie P and Nugent JA said:

> "In our view the apparent anomaly – which has been described as giving rise to 'terminological and conceptual problems of excruciating complexity' – is convincingly explained in a recent illuminating analysis of the problem by Christopher Forsyth. Central to that analysis is the distinction between what exists in law and what exists in fact. Forsyth points out that while a void administrative act is not an act in law, it is, and remains, an act in fact, and its mere factual existence may provide the foundation for the legal validity of later decisions or acts. In other words
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> > '...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

[34] *Oudekraal* above n 16 at para 29.

> of the subsequent act, but that act is valid since the legal existence of the first act is not a precondition for the second.'
>
> It follows that '[t]here 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.'
>
> The author concludes as follows:
>
> '[I]t has been argued that unlawful administrative acts are void in law. But they clearly exist in fact and they often appear to be valid; and those unaware of their invalidity may take decisions and act on the assumption that these acts are valid. When this happens the validity of these later acts depends upon the legal powers of the second actor. The crucial issue to be determined is whether that second actor has legal power to act validly notwithstanding the invalidity of the first act. And it is determined by an analysis of the law against the background of the familiar proposition that an unlawful act is void'."[35]

[90] But what emerges from the above analysis of Forsyth is the fact that an administrative act that is invalid in law may still have legal consequences in exceptional circumstances. The phrase "legal consequences" here does not suggest that the invalid act is suddenly enforceable. Far from it. The legal consequence referred to is that of providing a pre-decision condition. If the performance of a second administrative act required by the empowering provision depends on the mere factual existence of the first administrative act, the mere existence of the first act would lead to a valid second act. The second act cannot be impugned solely on the basis that the first act, although it existed in fact, was legally invalid.

[91] However, if the empowering provision requires that the first act be legally valid, its mere existence in fact will not validate the second act if the first act was invalid in law. In that case the second act may be challenged on the basis that the first act was legally invalid. Thus in *Oudekraal* it was stated:

[35] Id.

> "But just as some consequences might not be dependent for validity upon the mere factual existence of the contested administrative act so there might be consequences that will depend for their legal force upon the substantive validity of the act in question."[36]

[92] Pivotal to the enquiry aimed at determining whether an invalid administrative act has legal consequences in the context contemplated in *Oudekraal*, is the language of the empowering provision.

[93] The ratio of *Oudekraal* is contained in the following statement:

> "Thus the proper enquiry in each case – at least at first – is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court."[37]

Kirland

[94] The Supreme Court of Appeal relied also on *Kirland* for holding that organs of state are excluded from reliance on a collateral challenge.[38] Paragraphs 82-3 of *Kirland* were invoked and the following statement was quoted:

> "PAJA requires that the government respondents should have applied to set aside the approval, by way of formal counter-application. They must do the same even if PAJA does not apply. To demand this of government is not to stymie it by forcing upon it 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

[36] Id at para 32.

[37] Id at para 31.

[38] *Kirland* above n 17.

> procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly. Counsel for the department told this court, as he told the Supreme Court of Appeal, that, if the department had to bring a counter-application under PAJA, it would face the PAJA 180-day rule. Well, precisely. An explanation for the delay is a strong reason for requiring a counter-application."[39]

[95] But the quoted statement did not deal with a collateral challenge at all. In context *Kirland* addresses the question whether public officials should ignore administrative action if they believe it to be invalid. Cameron J was at pains to point out that "the government respondents should have applied to set aside the approval, by way of formal counter-application". They were required to do so, he said, whether PAJA applied or not.

[96] That is exactly what the Department did in this matter. It instituted a counter-application in accordance with what was stated in *Kirland.* In these circumstances the Supreme Court of Appeal should have entertained the Department's counter-application.

Validity of the extension

[97] Now that we have paved the way it is convenient to address the validity of the Director-General's decision to extend the agreement without putting the matter out to tender. The Department advanced three grounds for impugning it. First, it was contended that the decision was in breach of section 217 of the Constitution. Second, it was submitted that he violated section 38 of the PFMA as he committed the Department to financial liability for which no funds had been appropriated. Thirdly, it was asserted that the deviation from the tender process was done in non-compliance with the Treasury Regulation 16.A6.4 read with the Treasury Instruction Note 8 of 2007/2008.

[39] SCA judgment above n 13 at para 27.

[98] The facts show that when Mr Mahlalela extended the contract, there were no funds appropriated for it. As a result money had to be shifted from other projects to finance the extended contract. This led to an investigation by the Auditor-General which culminated in a report that declared the extension to have been irregular. It was only then that Mr Mahlalela changed his view on the extension and sought to have it cancelled. However, Tasima would have none of it after a few meetings between the parties. Tasima adopted this stance despite the fact that it was clear that Mr Mahlalela had violated section 38 of the PFMA. In law conduct or a decision taken in contravention of a statutory prohibition is invalid.[40]

[99] The general principle is that the state procures goods and services through a tender process. Regulation 16.A6.4 read with the treasury instruction note defines an exception to this principle in certain specified circumstances. In a case of an emergency or where there is only one supplier who can provide goods or services, the regulation permits a deviation from inviting competitive bids in terms of a fair, transparent and cost-effective tendering process.[41]

[100] The reasons which the regulation requires to be recorded and approved by the accounting officer must show why it was impossible to ask for competitive bids. Here the reasons advanced did not relate to any impracticality. On the contrary these reasons served the purpose of promoting Tasima's interests at the expense of the Department and the taxpayers who footed the hefty bill from May 2010 to date.

[101] Dealing with a contract extended by the same Mr Mahlalela, the Supreme Court of Appeal stated in *Prodiba*:

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[40] *Master of the High Court Northern Gauteng High Court, Pretoria v Motala NO* [2011] ZASCA 238; 2012 (3) SA 325 (SCA) (*Motala*) at para 14; *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at paras 90-3.

[41] Treasury Regulation 16.A6.4 provides:

> "If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure goods or services by other means, provided the reasons for deviating from inviting competitive bids must be recorded."

> "By not embarking on a competitive bid process, particularly given the nature and scale of the services to be provided, including the cost implications, Mr Mahlalela erred fundamentally. By concluding the agreement without the approval of his employer and political principal and/or of the Cabinet, he acted without authority. By concluding the agreement and incurring a liability for which there had been no appropriation, he not only erred, but acted against mandatory statutory prescripts and against the constitutional principles of transparent and accountable governance. For all these reasons the agreement is liable to be declared void *ab initio*. Consequently the appeal must be upheld."[42]

[102] Finally, in extending the contract Mr Mahlalela violated the provisions of section 217 of the Constitution, our supreme law. This section obliges every organ of state, regardless of the sphere under which it falls, to procure goods or services "in accordance with a system which is fair, equitable, transparent, competitive and cost-effective". Evidently, the purpose of section 217(1) is to eliminate fraud and corruption in a public tender process and to secure goods and services at the best price in the market.[43]

[103] The deleterious impact that corruption has on our society and its democratic institutions was aptly described by this Court in *Glenister*.[44] In their joint judgment Moseneke DCJ and Cameron J stated:

> "There can be no gainsaying that corruption threatens to fell at the knees virtually everything we hold dear and precious in our hard-won constitutional order. It blatantly undermines the democratic ethos, the institutions of democracy, the rule of law and the foundational values of our nascent constitutional project. It fuels maladministration and public fraudulence and imperils the capacity of the state to fulfil its obligations to respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights. When corruption and organised crime flourish, sustainable

[42] *Prodiba* above n 10 at para 40.

[43] *Steenkamp NO v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) at paras 33-5.

[44] *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC).

> development and economic growth are stunted. And in turn, the stability and security of society is put at risk."[45]

[104] Yet earlier in *Heath*,[46] this Court cautioned against the threat posed by corruption to our democracy. There Chaskalson P said:

> "Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state. There can be no quarrel with the purpose sought to be achieved by the Act, or the importance of that purpose. That purpose must, however, be pursued in accordance with the provisions of the Constitution."[47]

[105] What makes corruption to have a devastating impact on our society is the fact that, as a developing country with limited resources; we have not so long ago emerged from the dark past of apartheid which caused enormous inequalities. It has fallen upon the democratic government to address those imbalances in order to transform ours from being one of the most unequal societies in the world into "a society based on democratic values, social justice and fundamental rights" contemplated in our Constitution.

[106] In the sad case of *Soobramoney*,[48] this Court painted a sobering reality in relation to conditions under which the majority of people in our country live. It was stated:

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[45] Id at para 166.

[46] *South African Association of Personal Injury Lawyers v Heath* [2000] ZACC 22; 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC) (*Heath*).

[47] Id at para 4.

[48] *Soobramoney v Minister of Health (KwaZulu-Natal)* [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC).

> "We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring."[49]

[107] There can be no doubt that the financial demands on the government are high. And yet the resources it has at its disposal are limited. To this day many of our country-women and -men still live under the conditions described by this Court in 1997 in *Soobramoney*. To them the aspirations and dreams contained in our Constitution such as improving "the quality of life of all citizens and free the potential of each person" remain to be just that – dreams and aspirations – 22 years after the attainment of democracy in our land.

[108] It is scarce public resources that section 217 seeks to protect from corruption. The facts of this case show that once those charged with the responsibility to procure goods or services on behalf of the state start to operate outside the ambit of the section, corruption thrives. For example here Tasima agreed to pay Brand Partners CC R2 million per month if the relevant contract was extended for a period of more than 18 months. Having concluded an irregular agreement with MSRD, the Department under Mr Mahlalela paid Tasima R13 million for the purchase of software by Tasima from that close corporation.

[109] The unlawful extension of the contract with Tasima by Mr Mahlalela continues to have a huge impact on the Department's reserves, long after Mr Mahlalela had left the Department. It currently costs the Department about R50 million per month to maintain the contract.

[49] Id at para 8.

[110] The violation of the Constitution, the PFMA and the Treasury Regulations, individually and collectively, rendered the extension in question invalid from the outset.

Contempt Proceedings

[111] The Supreme Court of Appeal concluded and declared that the Department of Transport and its Director-General were in contempt of the order of Mabuse J granted on 17 October 2012 and the subsequent orders of 26 March 2013; 27 August 2013 and 21 January 2014. That Court also declared that the Corporation and Mr Makhosini Msibi were in contempt of the order of 27 August 2013 and that Mr Chris Hlabisa was in contempt of the orders of 17 October 2012; 26 March 2014 and 27 August 2013.

[112] In support of the contempt charge Tasima relied on the letters and emails exchanged between the Department and the Corporation which indicated that preparations were undertaken to implement transfer of the eNaTIS to the Corporation upon termination of the extended contract on 30 April 2015. To this end the Corporation had advertised vacancies in newspapers with the aim of enabling it to take over the eNaTIS. 170 of Tasima's employees had applied. The question that arises is whether these facts support a finding that any of the relevant court orders were deliberately or wilfully disobeyed.

[113] The determination of the question requires us to consider each order and compare its terms to these facts. The first order is that of 17 October 2012 granted by Mabuse J.[50] Notably this order was designed to regulate the parties contractual relations pending the finalisation of proceedings which were instituted to resolve the dispute on whether the contract had been validly extended. The order required the Department to perform its obligations under the agreement pending the determination of the dispute. But those proceedings were never finalised until the extension

[50] The entire order is quoted in [40] above.

terminated on 30 April 2015. The steps that Tasima complained about were taken in preparation of what would happen once the extension had run its course.

[114] The contract as extended was going to terminate by effluxion of time on 30 April 2015. The Department and the Corporation had to prepare themselves for the transfer of the eNaTIS from Tasima upon the termination of the contact. What they did could not constitute a breach of Mabuse J's order that required the Department to perform its obligations under the agreement because as on 1 May 2015 that agreement would have terminated.

[115] When this was drawn to the attention of the Supreme Court of Appeal, that Court merely stated that the transfer provisions of schedule 15 continued to exist. The fundamental error in this reasoning is that Mabuse J's order defined the parties' rights and obligations pending the decision on the validity of the agreement. That order was predicated on a contract that continued to exist and was preserved in the interim whilst its validity was under consideration. That order was not designed to govern the parties' obligations after termination of the contract. When the Supreme Court of Appeal heard the appeal on 23 November 2015, the extended contract had long terminated.

[116] But even if Mabuse J's order was to be construed as regulating what should happen after termination, the conduct complained of on the part of the Department and the Corporation did not breach any of the provisions of schedule 15. Bearing in mind that the Department was ordered to continue performing its obligations under the impugned agreement, it is difficult to appreciate how the preparatory steps taken by the Department and the Corporation could be in breach of schedule 15.

[117] In its terms this schedule required Tasima and the Department to meet within 30 days from the date of the Department's written request for a transfer management plan meeting, which should have been made within 90 days from the date of termination. Once the parties have met and agreed a transfer management plan, the

schedule obliged Tasima to implement the plan and the Department to pay costs of implementation. What is clear is that the schedule required the parties to reach an agreement on the transfer of the eNaTIS. The steps undertaken by the Department and the Corporation and on the basis of which they were convicted of contempt, did not impact on the parties' ability to reach an agreement on a transfer management plan. On the contrary, those steps were taken to facilitate implementation of such a plan as and when made. Accordingly, the Supreme Court of Appeal erred in holding that the conduct relied on by Tasima established contempt. There is nothing in schedule 15 which proscribes the steps taken by the Department and the Corporation. These steps did not and could not effect the actual transfer. Nor did they constitute a plan to transfer.

[118] It will be recalled that all that was done by the Department and the Corporation was to agree that upon termination of the extended agreement, the Corporation will accept transfer of the eNaTIS from Tasima. In order to get ready for this obligation, the Corporation advertised posts in newspapers and a number of candidates, including Tasima's employees, applied. These steps did not breach schedule 15 at all. Instead, the order issued here for the transfer of the eNaTIS from Tasima to the Corporation gives effect to this very agreement.

[119] Furthermore, a perusal of subsequent orders which were all based on Mabuse J's order plainly show that none of them regulated the parties conduct after termination of the agreement. Each of the orders of 26 March 2013; 27 August 2013; 5 November 2013; and 21 January 2014 required performance of specified acts which should have been performed during the currency of the agreement. Not one of those orders prohibited the Corporation and the Department from taking steps to be ready for the transfer of the eNaTIS from Tasima.

[120] Therefore, there are no facts on record showing that by taking preparatory steps at the beginning of 2015, the Department and the Corporation were in contempt of the

various orders. There is simply no factual basis for concluding that the conduct complained of established a breach of any of those orders.

[121] I have read the judgment of Zondo J and I agree with it and more particularly that *Economic Freedom Fighters*[51] does not support the proposition that an unconstitutional or unlawful administrative action is binding until set aside in review. The approach adopted by the second judgment draws no distinction between a valid and an invalid administrative action. It disregards the fact that the valid action exists both in law and in fact. Whereas the invalid one does not exist in law but in fact. On that approach both the valid and invalid action are binding and must be complied with until the invalid action is set aside. This is extraordinary.

[122] I have also read the concurring judgment of Froneman J (fourth judgment). I agree with him that judicial precedent obliges this Court to follow its previous decisions and that it may depart from them if convinced that they were clearly wrong. But as Zondo J observes in the third judgment, adherence to precedent must not be inconsistent or selective.

[123] When in *Kirland* the majority pronounced: "having failed to counter-apply during these proceedings, the Department must bring a review application to challenge the approval granted to Kirland, which remains valid until set aside",[52] it departed from many decisions of this Court in cases like *Affordable Medicines Trust*,[53] *New Clicks*[54] and *Pharmaceutical Manufacturers*.[55] These decisions and many others confirmed that administrative action that is inconsistent with the Constitution is

[51] *Economic Freedom Fighters v Speaker of the National Assembly* [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (*Economic Freedom Fighters*).

[52] *Kirland* above n 17 at para 106.

[53] *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC).

[54] *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC).

[55] *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) (*Pharmaceutical Manufacturers*).

invalid. *Kirland* contradicted all of this by holding that conduct inconsistent with the Constitution is valid until set aside. This was done without pronouncing that the previous decisions were clearly wrong.

[124] One administrative action is not capable of being invalid and valid at the same time. The notion of an invalid action remaining valid until set aside is flawed. Invalidity and validity in this context are mutually exclusive. If an invalid action were to be valid until set aside, every performance in compliance with it would be lawful. And once set aside, the invalid action would cease to exist at the level of fact. But its revocation by a court on review would not affect what had already been done in accordance with the invalid action because it would have been valid until the moment of setting it aside.

[125] In support of its novel conclusion, *Kirland* did not cite a single decision of this Court as authority. Instead, reliance was placed on *Oudekraal*, a decision of a lower court. Decisions of the highest court cannot be overruled or contradicted on authority of a lower court. In *Oudekraal,* the Supreme Court of Appeal too did not cite decisions of this Court throughout its judgment but relied solely on the views expressed by an academic commentator on English law and an English case.[56]

[126] Following *Kirland* means that the established body of authority from this Court to the effect that illegal and irrational administrative decisions are invalid is no longer good law. As is the principle that the invalidity of such conduct flow from the Constitution itself and that courts merely confirm invalidity by a declaration.

[127] Moreover, a statement in a judgment which does not form part of a ratio is not binding. Even the lower courts are free to depart from it. As the second judgment rightly observes here: "The majority judgment in *Kirland* held that the Court should not decide the validity of the decision because the government respondents should

[56] *Oudekraal* above n 16 at paras 29-30.

have applied to set aside the approval, by way of formal counter-application."[57] To put this beyond doubt, the majority in *Kirland* said:

> "The Supreme Court of Appeal stated that the approval was, on Dr Diliza's own evidence, tendered by the Department, 'invalid'. This was incautious. The approval was not before the Court. But the Court itself said so. It pointed out that the validity of the approval 'is not the subject of challenge in these proceedings'. So it is wrong to take its statement as a definitive finding"[58]

[128] It is apparent from the judgment in *Kirland* that the majority eschewed adjudicating whether the administrative action was invalid. The majority held that this was not raised for decision in that matter because the respondents had not applied to have the administrative action in question set aside. Therefore, the statement that it remained valid until set aside was obiter.

[129] The fourth judgment also suggests that in this judgment I departed from the precedent set in *Khumalo*. This is not true. *Khumalo* supports the position taken in this judgment and the second judgment with regard to the issue of delay. That case did not address at all the question whether an illegal decision remains valid until set aside. In contrast, the majority in *Khumalo* stressed that a court should not readily accept that a delay prevents it from determining whether public power was lawfully exercised.

[130] Skweyiya J said:

> "In the previous section it was explained that the rule of law is a founding value of the Constitution, and that state functionaries are enjoined to uphold and protect it, inter alia by seeking the redress of their departments' unlawful decisions. Because of these fundamental commitments, a court should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power. But that does not mean that the Constitution has dispensed with the basic

[57] Second judgment [146].

[58] *Kirland* above n 17 at para 81.

> procedural requirement that review proceedings are to be brought without undue delay or with a court's discretion to overlook a delay."[59]

[131] For these reasons I would have declared that the extension with effect from 1 May 2010 to April 2015 was inconsistent with section 217 of the Constitution and section 38 of the Public Finance Management Act and as a result the extension was void *ab initio*. However in the exercise of remedial power on justice and equity, I would have preserved what had already been done in terms of the invalid extension and order Tasima to transfer the eNaTIS systems to the Corporation within 30 calendar days.

[132] It follows that the appeal must succeed.

KHAMPEPE J (Froneman J, Madlanga J, Mhlantla J and Nkabinde J concurring):

[133] I have read the judgment of my brother Jafta J (first judgment) and gratefully adopt his thorough exposition of the facts. I agree that leave to appeal should be granted, and that the appeal should succeed to the extent that the counter application for review of the extension of the contract should succeed. However, I prefer 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.

[134] I agree that the Department's application to file new evidence should be refused. As the first judgment notes, in terms of rule 31 of this Court's Rules, new evidence can only be admitted if it is common cause, incontrovertible or of an official, scientific, technical or statistical nature that is capable of easy verification. The new evidence which the Department seeks to introduce falls outside of these categories.

[59] *Khumalo v Member of the Executive Council for Education: KwaZulu Natal* [2013] ZACC 49; 2014 (3) BCLR 333 (CC); 2014 (5) SA 579 (CC) (*Khumalo*) at para 45.

[135] What served before the Supreme Court of Appeal was an appeal against the decision of Hughes J in the High Court. The Supreme Court of Appeal found that the High Court had erred and reversed its findings. That decision is now on appeal before us. The Department's defence to the main application is founded on the success of its counter application in the High Court. The counter application consists principally of a reactive challenge to the 12 May 2010 extension of the contract between the Department and Tasima on grounds of illegality.[60] This challenge is composed of a delayed review[61] for which the Department seeks condonation, and a "classical" collateral challenge[62] that the Department argues is not time-barred.[63] The Corporation endorsed the former, and placed no reliance on the latter.

[136] After finding that the Department's reactive challenge should succeed, the first judgment concludes that the orders of contempt made by the Supreme Court of Appeal were, in any case, incorrectly granted.[64] This because there was "no factual basis for concluding that the conduct complained of established a breach of any of [the High Court] orders".[65]

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[60] I use the term "reactive challenge" rather than "collateral challenge" in line with the reasoning of my brother Cameron J in *Merafong* above n 1. These challenges are "reactive" because they are raised in proceedings that are not themselves designed to impeach the validity of the act in question. See *Merafong* at para 26 and *National Industrial Council v Photocircuit* 1993 (2) SA 245 (C) at 253A-B.

[61] The first judgment [48] refers to this specifically as the "counter-application"; terminology I adopt in this judgment. In contrast, I use "counter application" to refer to the counter application filed in the High Court in its entirety.

[62] The first judgment [50] refers to this as the "collateral challenge". I prefer the term "'classical' collateral challenge" in line with the reasoning in *Merafong* above n 1 at paras 69-70.

[63] Classical collateral challenges are geared towards protecting certain core interests (often, but not exclusively, liberty and property) of a person who is being legally coerced into an action without having been afforded sufficient opportunity to challenge the law permitting the coercive administrative act. See *Oudekraal* above n 16 at para 32. Whether a classical collateral challenge is appropriate depends on "the particular statutory context" through which the coercive act operates. See *Boddington* above n 31 at 215. Not all reactive challenges need be made defensively under the threat of coercion. For example, in the current case, the Department's counter-application is raised as a positive attack on the validity of the extension. See further *Attorney-General of Natal v Johnstone & Co Ltd* 1946 AD 256 and also *3M South Africa (Pty) Ltd v Commissioner of the South African Revenue Service* [2010] ZASCA 20; [2010] 3 All SA 361 (SCA).

[64] First judgment [111]-[120].

[65] First judgment [120].

[137] It therefore falls to be determined in the first place whether the reactive challenge should be upheld. If, as the Supreme Court of Appeal found, the applicants were not entitled to raise or rely on a reactive challenge, then that is the end of the case. If they were, then the merits of the reactive challenge, and the impact of any successful challenge on the various court orders, must be considered. It is thus sensible to deal first with whether the applicants, as organs of state, may raise reactive challenges.

Are reactive challenges open to state organs?

[138] In his majority judgment in *Merafong*, Cameron J traces the history of pre-constitutional reactive challenges in the common law.[66] From that analysis, with which I agreed and again endorse here, it emerges that "in South African law, the permissibility of a reactive attack on administrative action has always been approached with a measure of flexibility. And its availability is not limited to those at risk of criminal conviction."[67]

[139] The majority judgment then proceeds to demonstrate that a flexible approach to allowing reactive challenges is buttressed and enhanced by the Constitution.[68] That state functionaries are entitled to challenge exercises of public power, including their own, was recognised by the Supreme Court of Appeal in *Pepcor*,[69] and endorsed by this Court in *Khumalo*.[70] There it was noted that "state functionaries are enjoined to uphold and protect [the Constitution], and that a court should be slow to allow

[66] See *Merafong* above n 1 at paras 26-30.

[67] Id at para 30.

[68] Id at paras 31-8.

[69] In *Pepcor Retirement Fund v Financial Services Board* [2003] (6) SA 38 (SCA); [2003] All SA 21 (SCA) (*Pepcor*) at paras 10-5 the Supreme Court of Appeal found that the public interest "entitled", and in some cases "obligated", the Registrar of Pension Funds to challenge the issuing of certain certificates made by his own office. In *Municipal Manager: Qaukeni v F V General Trading CC* 2010 (1) SA 356 (SCA); 2009 4 All SA 231 (SCA) at paras 23-7 the same Court found that the Municipal Manager of the Qaukeni Local Municipality was permitted to impugn, notably by way of counter application, the validity of a services procurement contract entered into by the Municipality. Again the Court stressed that this prerogative was emergent out of the Municipality being "a body created to serve the citizens of the country".

[70] *Khumalo* above n 59 at para 32.

procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power."[71]

[140] Drawing on this line of reasoning, the majority judgment in *Merafong* held that the Municipality was not disqualified from raising a reactive challenge merely because it is an organ of state.[72] The same must apply here. It is both a logical and pragmatic consequence of the aforementioned developments in our jurisprudence to allow state organs to challenge the lawfulness of exercises of public power by way of reactive challenges in appropriate circumstances.[73] I therefore agree with the first judgment's sentiment that the Supreme Court of Appeal was incorrect to find that the Department was barred from bringing a reactive challenge to the extension of the contract solely because it is a state functionary.[74]

Can an administrative act be ignored?

[141] Having decided that state organs are entitled to bring reactive challenges, the first judgment concludes that the Supreme Court of Appeal erred in holding that PAJA barred it from considering the Department's counter-application.[75] It does so on the basis that, "PAJA cannot be invoked as justification for a court not to comply with section 172(1)(a) of the Constitution."[76] In doing so it takes issue with the Supreme Court of Appeal's finding that the delay in bringing the counter-application was sufficient to validate the extension of the contract. The first judgment finds that this conclusion—

> "is in conflict with the rule of law and specifically the principle of legality. These principles require administrative functionaries to exercise only public power

[71] Id at para 45.

[72] *Merafong* above n 1 at para 82.

[73] Whether an organ of state is entitled to raise a "classical" collateral challenge need not be decided here. It is sufficient to note that the applicants are entitled to rely on the Department's counter-application.

[74] First judgment [86].

[75] Id [80].

[76] Id [78].

> conferred on them and nothing more. No amount of delay can turn an unlawful act into a valid administrative action. This is because apart from the rule of law, section 33 of the Constitution prescribes that administrative action must be lawful."[77]

[142] However, in *Khumalo*, Skweyiya J held that permitting public bodies to challenge administrative decisions does not mean "that the Constitution has dispensed with the basic procedural requirement that review proceedings are to be brought without undue delay or with a court's discretion to overlook a delay."[78] *Khumalo* properly cited section 237 of the Constitution,[79] which demands that "[a]ll constitutional obligations must be performed diligently and without delay". The Court elucidated that this constitutional demand—

> "elevates expeditious and diligent compliance with constitutional duties to an obligation in itself. The principle is thus a requirement of legality.
>
> This requirement is based on sound judicial policy that includes an understanding of the strong public interest in both certainty and finality. People may base their actions on the assumption of the lawfulness of a particular decision and the undoing of the decision threatens a myriad of consequent actions.
>
> In addition, it is important to understand that the passage of a considerable length of time may weaken the ability of a court to assess an instance of unlawfulness on the facts. . . . Thus the very purpose of a court undertaking the review is potentially undermined where, at the cause of a lengthy delay, its ability to evaluate fully an allegation of illegality is impaired."[80]

[143] Except in the unusual case where a "classical" collateral challenge may be open to a state organ, *Khumalo* states the law concerning a government functionary's

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[77] Id [81].

[78] *Khumalo* above n 59 at para 45. The majority judgment in *Khumalo* came to this conclusion on the basis that the review in that matter was not brought in terms of PAJA. The question of whether challenges, reactive or otherwise, to exercises of public power by the state can be initiated through PAJA need not be decided here. It suffices to note that the dictates of section 237 require that any delay in bringing such a challenge be properly justified, irrespective of how the review is classified.

[79] Id at paras 46-8.

[80] Id.

delayed attempt to set aside a decision outside of the usual avenues of judicial review. Simply put, reactive challenges may be brought by state organs, provided that the delay is not unwarrantably "undue".[81]

[144] As I see it, the only arguably new question presented by the first judgment is whether, in instances where the subject of the review implicates a court's section 172(1)(a) obligations, the Court should substitute *Khumalo*'s factual, multi-factor, and context-sensitive framework for a strict rule that delay can never prevent a court from deciding the matter. In my view, the answer is "no". *Khumalo* made it perspicuous that timely performance of constitutional obligations is itself a constitutional concern.[82] Therefore, section 172(1)(a) cannot automatically subordinate section 237.

[145] The first judgment's approach resuscitates an argument advanced by the minority in *Kirland*, and extended by the minority in *Merafong*. After noting that the conduct of a government official was inconsistent with sections 33 and 195 of the Constitution, the minority in *Kirland* argued for the proposition that—

> "[a] decision flowing from [conduct violating sections 33 and 195(1)] must not be allowed to remain in existence on the technical basis that there was no application to have it reviewed and set aside."[83]

And further that—

> "[u]nder our Constitution the courts do not have the power to make valid administrative conduct that is unconstitutional."[84]

[81] Id at para 45.

[82] Id at paras 46-8.

[83] *Kirland* above n 17 at para 43.

[84] Id at para 60.

[146] But these sentiments did not prevail in those cases. The majority judgment in *Kirland* held that the Court should not decide the validity of the decision because "the government respondents should have applied to set aside the approval, by way of formal counter application."[85] In the absence of that challenge – reactive or otherwise – the decision has legal consequences on the basis of its factual existence. One of the central benefits of this approach was said to be that requiring a counter-application would require the state organ to explain why it did not bring a timeous challenge.[86] The same was required of the Municipality in *Merafong*.[87]

[147] This position does not derogate from the principles expounded in cases like *Affordable Medicines Trust* and *Pharmaceutical Manufacturers*.[88] These decisions make patent that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency. This includes the exercise of public power. Moreover, when confronted with unconstitutionality, courts are bound by the Constitution to make a declaration of invalidity. No constitutional principle allows an unlawful administrative decision to "morph into a valid act".[89] However, for the reasons developed through a long string of this Court's judgments, that declaration must be made by a court.[90] It is not open to any other party, public or private, to annex this function. Our Constitution confers on the courts the role of arbiter of legality. Therefore, until a court is appropriately approached and an allegedly

[85] Id at para 82.

[86] Id at para 83.

[87] *Merafong* above n 1 at para 40.

[88] *Affordable Medicines Trust* above n 53 at paras 45-50*; Pharmaceutical Manufacturers* above n 55 at paras 8-9.

[89] *Kirland* above n 17 at para 103.

[90] *Merafong* above n 1 at para 42; *Kirland* above n 17 at paras 101-3; *Camps Bay Ratepayers' Association v Harrison* [2010] ZACC 19; 2011 (4) SA 42 (CC); 2011 (2) BCLR 121 (CC) at para 62; *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) at para 85. For this principle's application in the context of school admission policies, see *MEC for Education, Gauteng Province v Governing Body, Rivonia Primary School* [2013] ZACC 34; 2013 (6) SA 582 (CC); 2013 (12) BCLR 1365 (CC); *Head of Department, Department of Education, Free State Province v Welkom High School; Head of Department, Department of Education, Free State Province v Harmony High School* [2013] ZACC 25; 2014 (2) SA 228 (CC); 2013 (9) BCLR 989 (CC) (*Welkom*); *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC).

unlawful exercise of public power is adjudicated upon, it has binding effect merely because of its factual existence.

[148] This important principle does not undermine the supremacy of the Constitution or the doctrine of objective invalidity.[91] In the interests of certainty and the rule of law, it merely preserves the fascia of legal authority until the decision is set aside by a court: the administrative act remains legally *effective*, despite the fact that it may be objectively invalid.

[149] This approach was endorsed and explained by a unanimous Court in *Economic Freedom Fighters*.[92] There, Mogoeng CJ concluded that our constitutional order hinges on the rule of law:

> "No decision grounded on the Constitution or law may be disregarded without recourse to a court of law. To do otherwise would 'amount to a licence to self-help'. Whether the Public Protector's decisions amount to administrative action or not, the disregard for remedial action by those adversely affected by it, amounts to taking the law into their own hands and is illegal. No binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly. It has legal consequences and must be complied with or acted upon. To achieve the opposite outcome lawfully, an order of court would have to be obtained."[93]

[150] An organ of state, like any other party, must therefore challenge an administrative decision to escape its effects. This it can do reactively, provided its reasons for doing so are sound, and there is no unwarranted delay.

[91] See the discussion of the minority in *Merafong* above n 1 at paras 134-6.

[92] *Economic Freedom Fighters* above n 51.

[93] Id at para 74.

Merits and delay

[151] I agree with the first judgment that, on the merits, the counter-application should be granted.[94] But this is not where the inquiry should start.[95] In light of the substantial delay in instituting the counter-application, it must first be determined whether the applicants are time-barred from bringing their reactive challenge.

[152] In *Khumalo*, this Court endorsed the approach adopted by the Supreme Court of Appeal in *Gqwetha*[96] that a plea of undue delay in bringing a review application by a state organ is assessed by examining: (1) whether, on the facts, the delay is unreasonable or undue; and, if so (2) whether the court should exercise its discretion to overlook the delay and nevertheless entertain the application.[97]

Was the delay unreasonable or undue?

[153] This Court has previously held that, when an applicant seeks condonation for delay, a full explanation that covers the "entire period" must be provided.[98] The first part of the *Khumalo* inquiry must follow these guidelines. On 12 May 2010, Mr Mahlalela communicated his decision to extend the contract between the Department and Tasima. Almost five years later, on 26 March 2015, the Department launched its counter application. The onus is thus on the Department to explain why the delay of some five years was not unreasonable or undue.

[154] Hughes J in the High Court found that although the delay was "very lengthy", "it would be irresponsible and not in the interests of justice" for the Court to avoid considering the counter-application. In respect of the delay itself, it found that Mr

[94] First judgment [131].

[95] *Merafong* above n 1 at para 81.

[96] *Gqwetha v Transkei Development Corporation Ltd* [2005] ZASCA 51; 2006 (2) SA 603 (SCA).

[97] *Khumalo* above n 59 at para 49.

[98] *Van Wyk v Unitas Hospital* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 22.

Mahlalela actively "averted" attempts by members of the Department to bring a review of the extension.[99]

[155] The Supreme Court of Appeal, having held that collateral challenges are not open to state organs, and that the High Court did not purport to exercise its discretion in justifying the delay, nevertheless considered whether the Department had sufficiently justified its dilatory behaviour.

[156] The Supreme Court of Appeal concluded that Mr Mahlalela had not been a sufficient obstacle to the Department bringing a review, and that he had, in any event, vacated his position as Director-General in February 2013, two years before the counter-application was brought. It found further that in the same period, the Department had successfully brought a counter-application in the similar matter of *Prodiba*, which suggested that there were fewer hindrances to bringing a review than the Department had made out.[100] Finally, the Court determined that the Department could not rely on allegations of fraud and corruption to explain the delay, principally because they were not cited as grounds of review in the High Court. For these and other reasons, it concluded that the Department's delay should not be condoned.

[157] The Department's chief justifications for their delay in bringing review proceeding are as follows: (1) Mr Mahlalela, as the Director-General of the Department, on numerous occasions refused to give the instruction to bring a review against the extension; (2) Mr Letsoalo, the Department's Chief Financial Officer, took numerous steps to challenge the extensions through other mechanisms, including by: opening a criminal case in February 2013, instigating a forensic investigation into the extension,[101] and reporting the extension to the Special Investigation Unit (SIU) in

[99] Hughes J judgment above n 9 at para 97.

[100] *Prodiba* above n 10.

[101] The investigation was finalised on 21 August 2014.

August 2013;[102] and (3) a range of other officials in the Department sought to prevent a review of the extension.

[158] I am unconvinced that these explanations, on their own, warrant a delay of five years. While Mr Mahlalela may have been an obstructive force, he did not prevent Mr Letsoalo from bringing a review, nor was he employed by the Department after February 2013. Even if other employees may have been similarly uncooperative, the Department needed to do more than float unsubstantiated allegations of obstreperous behaviour in order to justify the delay. This is especially true of a state organ, which bears extra constitutional obligations.[103] Moreover, the counter-application brought by the Department in *Prodiba*, a matter in which Mr Mahlalela was again implicated, shows that the Department was not entirely stymied by his influence, especially after his period of office ended. Moreover, when asked during the hearing, counsel for the Department admitted that the period after the departure of Mr Mahlalela was not "adequately" explained away.

[159] In respect of the delay itself, I am therefore persuaded that the approach taken by the Supreme Court of Appeal was correct. The explanation provided by the Department was both porous and lacked the markings of good constitutional citizenship. But this is not the end of the inquiry. The delay cannot be "evaluated in a vacuum".[104] It must now be determined whether there are sound reasons for overlooking the delay.

Should the delay be overlooked?

[160] While a court "should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power", it is equally

[102] The SIU report was finally deposed to on 20 March 2015.

[103] *Khumalo* above n 59 at para 51.

[104] Id at para 52.

a feature of the rule of law that undue delay should not be tolerated.[105] Delay can prejudice the respondent, weaken the ability of a court to consider the merits of a review, and undermine the public interest in bringing certainty and finality to administrative action.[106] A court should therefore exhibit vigilance, consideration and propriety before overlooking a late review, reactive or otherwise.

[161] The High Court found that because Mr Mahlalela's letter extending the contract did not comply with section 217(1) of the Constitution and section 38(1)(a)(iii) of the PFMA, it fundamentally undermined the rule of law. The Court further held that this had significant budgetary and management implications for the Department, which impacted negatively on the public purse, and thus also the public interest. Relying on *Prodiba*, the High Court concluded that this unlawful matrix justified the delay.

[162] The Supreme Court of Appeal rejected the parallels drawn by the High Court to *Prodiba*.[107] It found that as there was no delay in bringing the counter-application in that case, *Prodiba* was not authority for the proposition that delay in bringing a review can be justified by a violation of the law.[108] It further concluded that the mere existence of allegations of fraud and corruption around the extension could not be used to overlook the delay, because neither ground was argued on the papers. Tasima had not been given proper opportunity to respond to these claims, and elevating the allegations to a justification for the delay would therefore be prejudicial.[109] Finally, the Supreme Court of Appeal rejected the contention that precluding the review would allow Tasima to entrench an unlawful contract for a further five years. It concluded

[105] Id at paras 45-6. See also *National Treasury v Opposition to Urban Tolling Alliance* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) at para 26.

[106] *Gqwetha* above n 96 at para 22; *Khumalo* above n 59 at paras 47-8.

[107] See SCA judgment above n 13 at para 24.

[108] Id at paras 24 and 30.

[109] Id at para 35.

that the extension was "validated" by the delay, and that the Department in any case overplayed the possibility of entrenchment.[110]

[163] In *Khumalo*, this Court emphasised that an important consideration in assessing whether a delay should be overlooked is the nature of the decision. This was said to require, "analysing the impugned decision within the legal challenge made against it and considering the merits of that challenge".[111]

[164] The first judgment correctly finds that the extension was in violation of the Constitution and the PFMA. I agree that the flouting of ordinary procurement and tender proceedings was blatant. Mr Mahlalela's decision to override the decision of the previous Director-General is telling. Tasima protests that they were not granted access to necessary documentation to oppose the counter-application. Be that as it may, the extension was not lawful for the reasons already outlined.

[165] On the other hand, the allegations of fraud and corruption were not properly made, and therefore should not be considered. Tasima vehemently denies the veracity of the allegations. These were not properly ventilated before the High Court. I therefore do not think that the allegations can be considered in justifying the delay.

[166] The merits of the challenge are nonetheless compelling. A web of maladministration surrounds the granting of the extension. While "entrenchment" may be too strong a description, for a five-year period, Tasima has been significantly enriched on the basis of an unlawful extension. It would be naïve for this Court to ignore that state of affairs. The effect on state resources should also not be overlooked. Substantial unplanned expenditure has occurred – both by the Department and the Corporation – as a consequence of the extension.

[110] Id at para 38.

[111] *Khumalo* above n 59 at para 57.

[167] In *Merafong*, the Court noted that the Municipality operated in an opaque legal environment.[112] What requirements had to be fulfilled by a state agent in order to bring a reactive challenge, and what subsequent hurdles had to be flown were not yet manifest. The same is true of the Department in this case. While they were not entitled to sit idle and await an enforcement challenge, the ambiguous legal position may have contributed to their reticence. This state of affairs is made apparent by the drastic change of legal strategy adopted by the applicants once they had enlisted new counsel. Ordinarily, this is no excuse. But in the current case, the law was indistinct, and so the approach to be taken was not obvious from the outset.

[168] *Merafong* also holds that whether the failure to challenge the decision timeously was made in good faith may be a reason for overlooking delay. The Department in this case, by its own admission, is plagued by poor management. The Director-General who deposed to the counter application admits that it was brought as a means to get the Department's house in order. Nevertheless, the Department has not acted in bad faith in respect of the administrative decision. Its behaviour has been muddled, but not malicious.

[169] This is borne out by the Department's vigorous attempt to have the extension reviewed before the High Court. Not only is the decision-maker who made the decision now opposed to its enforcement, but this also forms part of a conscious effort by the Department to break with its dilatory past. This is in contrast to the Minister's approach in respect of the month-to-month extensions granted before Mr Mahlalela's letter of 10 May 2010.

[170] But what is the prejudice suffered by Tasima in overlooking the delay?[113] Condoning the delay does not prevent them from enforcing the Court orders that have been granted in their favour. In addition, the contract extension itself has already expired. Setting aside the extension at this point should not, therefore, impact

[112] *Merafong* above n 1 at para 76.

[113] *Khumalo* above n 59 at para 52.

negatively on Tasima going forward. It is also a factor that this Court may rely on its section 172(1)(b) powers to ameliorate the prejudice suffered. It bears repeating that Tasima has, in addition, benefitted greatly from the extension. In my view, the prejudice suffered is minimal, particularly in comparison to the prejudice to be suffered by the Department and the Corporation if the counter-application is not condoned. This is consonant with the dicta in *Khumalo* that, "consequences and potential prejudice . . . ought not in general, to favour the Court non-suiting an applicant in the face of the delay."[114]

[171] For these reasons, and in the unusual context of this case, the Department's undue delay in bringing the counter-application should be overlooked, and the reactive challenge should succeed.

Contempt of court proceedings

[172] The next question is whether upholding the counter-application should have any impact on the main application brought by Tasima. The heart of its case in the High Court was that the applicants were in breach and wilful contempt of various court orders, primarily that of Mabuse J.

[173] The Department was refused leave to appeal the order of Mabuse J granted on 17 October 2012 (Mabuse J order) by both Mabuse J and the Supreme Court of Appeal. This denial of leave to appeal does not, however, justify the Department's failure to have what it viewed as unconstitutional set aside by this Court. An appraisal of what occurred after the Mabuse J order was handed down illustrates the repeated opportunities and incentives the Department had to set the order aside. It also brings to the fore the extent to which the Department flouted this, and subsequent, court orders.

[114] Id at para 56.

[174] On 6 May 2013, the Supreme Court of Appeal denied leave to appeal the Mabuse J order, but the order took effect on 6 December 2012, the day Mabuse J refused leave to appeal. In March 2013, Tasima initiated contempt proceedings in the High Court. As a result, Strijdom J issued an order (Strijdom J order) compelling the Department to perform in accordance with the contract and interdicting it from violating the contract's terms. On 8 April 2013, Tasima again initiated contempt proceedings, after which the Department agreed to Tasima's demands. Then, on 13 June 2013, Tasima again initiated contempt proceedings. These proceedings resulted in Ebersohn AJ declaring the Department to be in contempt of both the Mabuse J order and the Strijdom J order.

[175] In August 2013, another contempt application by Tasima resulted in a further court order. This order, issued by Fabricius J (Fabricius J order), required the Department to comply with the Strijdom J order. Again in October 2013, Tasima initiated contempt proceedings. This resulted in an order by Nkosi J declaring the Department in contempt of the Mabuse J order, the Strijdom J order and the Fabricius J order. And once more, in January 2014, Tasima initiated contempt proceedings, resulting in an order by Rabie J interdicting the Department from prematurely and unilaterally terminating the contract that was at the very heart of the order granted by Mabuse J.[115] Throughout these proceedings, the Department refrained from asking this Court to set aside the Mabuse J order. Instead, it repeatedly defied multiple court orders, and only finally pursued setting the Mabuse J order aside when Tasima sought, before Hughes J, to finalise several of the interdicts it had obtained.

[176] The interim orders requiring compliance with the contract extended by the decision of Mr Mahlalela are of legal effect for the period before the counter-application succeeded. Moreover, the various findings of contempt and suspended committal made prior to the High Court judgment are enforceable. By

[115] I refer to the orders of Mabuse J, Strijdom J, Ebersohn AJ, Fabricius J, Nkosi J and Rabie J as the "High Court Orders".

contrast, the finding of contempt and committal made by the Supreme Court of Appeal and challenged in this Court stands to be set aside. This is because once the High Court orders lapsed as a result of the Department's successful reactive challenge of the extension, the interim interdicts could no longer be enforced.[116] This deduction does not, however, affect the period before the reactive challenge was successfully brought.

Duty to obey

[177] The first judgment holds that it is inappropriate for the courts to enforce an illegal contract.[117] This conclusion is supported by factual findings. It should not be taken to mean that a party is entitled to ignore a court order enforcing a contract that is subsequently found to be unlawful.

[178] The applicants have accepted this standpoint. In its counter application, the Department stated explicitly that it "accept[s] that the respondents must always comply with a court order until it is set aside". They contended further that "the previous contempt of court orders were all complied with". Consequently, in their view, none of the orders made before the proceedings brought by Tasima in front of Hughes J "have a bearing on the current application". The Corporation took a similar view. They stated unequivocally that, "not only does [the Corporation's] conduct not constitute contempt but at no stage have we had any intention to commit such contempt". Neither party claimed that the various orders outlined above can be ignored with impunity, even if the counter-application were to succeed.

[179] That position is also supported by our law. The unique role occupied by the Judiciary since the dawn of our democracy is entrenched in section 165(1) of the Constitution. In addition, section 165(5) states:

[116] Mabuse J granted an interim interdict, "pending the finalisation of the dispute resolution proceedings instituted by [Tasima]". The purpose of these proceedings was to determine the validity of the extension. Now that it has been determined that the extension was invalid, the interim interdict, and the subsequent orders made to enforce it, lapse.

[117] First judgment [37].

> "An order or decision issued by a court binds all persons to whom and organs of state to which it applies."

However, section 2 of the Constitution also makes vivid the venerability of the Constitution:

> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

[180] The equipoise is tipped by section 172(2)(a), which states:

> "The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, *but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court*."

This section culls an exception that implies the general rule. Only an order of constitutional invalidity requires confirmation by the Constitutional Court to take force. The general rule is that orders that *do not* concern constitutional invalidity *do* have force from the moment they are issued. And in light of section 165(5) of the Constitution, the order is binding, irrespective of whether or not it is valid, until set aside.[118]

[181] The common law has long recognised this position. In *Honeyborne*, De Villiers CJ found that if an agent—

> "were to be allowed to defy the authority of the court on the ground of an error of judgment on the part of the court, the question would in every case be whether the magistrate is right in his reading of the law or whether the agent is correct in his, but there would be no tribunal on the spot to decide between them. Undoubtedly it is the

[118] Even though courts do not have the purse or sword to enforce their orders, the effect of their decision is binding in law.

> duty of the agent to bow to the decision of the court and to seek his remedy elsewhere; and it is equally the duty of the court to uphold its own dignity and see that its authority is respected by the practitioners before the court."[119]

[182] This reading of section 165(5) accepts the Judiciary's fallibilities. As explained in the context of administrative decisions, "administrators may err, and even . . . err grossly."[120] Surely the authors of the Constitution viewed Judges as equally human. The creation of a judicial hierarchy that provides for appeals attests to this understanding. Like administrators, Judges are capable of serious error. Nevertheless, judicial orders wrongly issued are not nullities. They exist in fact and may have legal consequences.[121]

[183] So, in the current case, the Mabuse J order, which did not declare any law or conduct constitutionally invalid, was enforceable immediately after it was issued. This finding vindicates the constitutionally-prescribed authority of the courts. The obligation to obey court orders "has at its heart the very effectiveness and legitimacy of the judicial system".[122] Allowing parties to ignore court orders would shake the foundations of the law, and compromise the status and constitutional mandate of the courts. The duty to obey court orders is the stanchion around which a state founded on the supremacy of the Constitution and the rule of law is built.[123]

[184] The Corporation argues that because the extension expired on 30 April 2015, it was entitled to prepare itself for the imminent transfer of the eNaTIS, even if the counter-application brought by the Department failed. This theme is taken up by the

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[119] *In re Honeyborne* (1876) 7 Buch 145 at 150 (*Honeyborne*). See further the discussion in *S v Zungo* 1966 (1) SA 268 (N) at 271B.

[120] *Kirland* above n 17 at para 90.

[121] Id.

[122] *Victoria Park Ratepayers' Association v Greyvenouw CC* [2004] 3 All SA 623 (SE) at para 23.

[123] See *Pheko v Ekurhuleni Metropolitan Municipality (No 2*) [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) (*Pheko II*) at para 1.

first judgment, which finds that the Mabuse J order "was not designed to govern the parties' obligations after termination of the contract".[124] Consequently—

> "[t]he Department and the Corporation had to prepare themselves for the transfer of the eNaTIS from Tasima upon the termination of the contract. What they did could not constitute a breach of Mabuse J's order that required the Department to perform its obligation under the agreement because as on 1 May 2015 that agreement would have terminated."[125]

But this inference is not supported by the facts. Schedule 15 of the Turnkey Agreement makes clear that the content of the transfer management provisions apply "should [the Turnkey Agreement] or any part thereof terminate or expire for any reason whatsoever". At the point that the extension of the contract expired, the Department and the Corporation were therefore obliged to meet with Tasima to forge a transfer management plan. They were not entitled to institute transfer procedures of their own. The effect of the Mabuse J order was to preserve the enforceability of the contract – including schedule 15 which effects the parties' obligations after the expiry of the agreement – pending the finalisation of the dispute resolution process. Until this occurred, the contract continued to run.

[185] The expiry of the extension is thus no justification for ignoring court orders. Not only was the Corporation bound by the orders that did not expressly impose obligations on it,[126] but the Fabricius J order unambiguously interdicted it from "taking steps which have the effect of rerouting any of the work" until the Mabuse J order had run its course. The Corporation was not permitted to assume that once the extension period had expired, it was entitled to take over the running of the system immediately. Until the transfer management procedures have run their course, or the contract is set aside, the High Court orders continued to have effect. I therefore cannot agree with the first judgment's conclusion that "there are no facts on record

[124] First judgment at [115].

[125] Id at [114].

[126] *Pheko II* above n 123 at para 47.

showing that by taking preparatory steps at the beginning of 2015, the Department and the Corporation were in contempt of various orders".[127] For as long as the contract persisted, the High Court orders had to be obeyed.

[186] This is because the legal consequence that flows from non-compliance with a court order is contempt.[128] The "essence" of contempt "lies in violating the dignity, repute or authority of the court."[129] By disobeying multiple orders issued by the High Court, the Department and the Corporation repeatedly violated that Court's dignity, repute and authority and the dignity, repute and authority of the Judiciary in general. That the underlying order may have been invalid does not erase the injury. Therefore, while a court may, in the correct circumstances, find an underlying court order null and void and set it aside, this finding does not undermine the principle that damage is done to courts and the rule of law when an order is disobeyed. A conclusion that an order is invalid does not prevent a court from redressing the injury wrought by disobeying that order, and deterring future litigants from doing the same, by holding the disobedient party in contempt.

[187] The essence of contempt brings us back to the Constitution. Section 165(4) provides that "[o]rgans of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the court". Fundamentally, these measures must include complying with a court order. As the Supreme Court of Appeal in *Meadow Glen* explained, we are "entitled to expect" that our public bodies "make serious good faith endeavours to comply with [court orders]", including by taking the initiative to challenge decisions with which they disagree.[130] Neither the effectiveness nor the dignity of the Judiciary is protected when an organ of state ignores a court order, let alone several. The Department, an organ of state, had a duty, above and beyond that

[127] First judgment [120].

[128] *Pheko II* at para 28; *S v Beyers* 1968 (3) SA 70 (A).

[129] *Fakie NO v CCII Systems (Pty) Ltd* [2006] ZASCA 50; 2006 (4) SA 326 (SCA) at para 6.

[130] *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality* [2014] ZASCA 209; 2015 (2) SA 413 (SCA) at para 8.

of the average litigant, to comply with the court orders. The integrity of the Constitution demanded this.

[188] The Department nevertheless contends that there has been "no valid basis *ex contractu* [arising from the contract] for the purported extension. Accordingly the orders giving effect to the purported extension could not have been granted." The first judgment similarly finds that "[i]n law conduct or a decision taken in contravention of a statutory prohibition is invalid", and that the court orders therefore had no consequence. I disagree. The Supreme Court of Appeal's decision in *Motala*,[131] cited by the first judgment,[132] should not be relied upon to support this view. The only post-1996 authority on which *Motala* relied for its conclusion on the effect of an invalid court order was *Von Abo II*.[133] In *Von Abo*, the Government was ordered to take steps to remedy the violation of the rights of a South African citizen living in Zimbabwe.[134] After a hearing relating to the Government's compliance with a first court order, a second order was issued concerning damages.[135] It was only then that the Government appealed both orders.[136]

[189] This Court confronted the issue whether the Government's appeal against the first order was perempted by its attempts to comply with that order and its failure to appeal it timeously.[137] *Von Abo* explained that, were the first order wrong in law, the second would be legally untenable.[138] The Government's failure to appeal the first order could not prevent the *court* from reaching a conclusion on the first order.[139]

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[131] *Motala* above n 40.

[132] First judgment at [97].

[133] *Motala* above n 40 at paras 12-5; *Government of the Republic of South Africa v Von Abo* 2011 (5) SA 262 (SCA); 2011 3 All SA 261 (SCA) (*Von Abo II*); *Von Abo v President of the Republic of South Africa* [2009] ZACC 15; 2009 (5) SA 345 (CC); 2009 (10) BCLR 1052 (CC) (*Von Abo*).

[134] *Von Abo* id at paras 7-12.

[135] Id at para 12.

[136] Id at para 13.

[137] Id at paras 14 and 25.

[138] Id at paras 18 and 51-3.

[139] Id.

Von Abo said nothing about the rights of *parties* to ignore a court order. Nor did it take a view on whether a court must ignore the injury to the rule of law suffered when a party ignores a court order. The same is true of the subsequent decision of the Supreme Court of Appeal in *Von Abo II*, in which the first order was set aside by the Court.[140]

[190] Even the pre-1996 cases on which *Motala* relied do not support its conclusion. These ancient decisions' findings on validity occur in the context of a discussion of the binding nature of an invalid order on another court. In *Willis*, the Court stated that the general rule is that a judgment without jurisdiction "is ineffectual and null".[141] But this comment is made in the context of assessing the limits of *res judicata*. Moreover, after writing in Latin that "one who exercises jurisdiction out of his territory is not obeyed with impunity," the Court immediately stated that this does not mean "that an appeal may not generally be necessary to prevent executions being available".[142] The Latin speaks to courts; the clause which follows speaks to parties. Prior to being set aside by a court, an order can still be executed, or, in the parlance of *Oudekraal*, has "legal consequences".[143]

[191] *Lewis and Marks* is also *res judicata* oriented.[144] The Court there states that orders from proceedings with uncited parties are "null and void; *and upon proof of invalidity the decision may be disregarded*".[145] The act of proving something irresistibly implies the presence of a court. It is the *court* that, once invalidity is proven, can overturn the decision. The party does the proving, not the disregarding. Parties cannot usurp the court's role in making legal determinations.

[140] *Von Abo II* above n 133 at para 19.

[141] *Willis v Cauvin* (1883) 4 NLR 97 at 98.

[142] Id at 98-9.

[143] *Oudekraal* above n 16 at para 26.

[144] *Lewis and Marks v Middel* 1904 TS 291.

[145] Id at 303. My emphasis.

[192] *Shifren* is to the same effect.[146] The Court there quoted Voet:

> "If a decision is *ipso jure* void, there is no need of an appeal. Nay the plaintiff can, notwithstanding the judicial decision, set in motion once more the same action, and will by a replication of fraud or of nullity shut out a defence of *res judicata* which has been raised against him by his opponent. Likewise on the other side a defendant who is sued in the action *rei judicatae* on a decision *ipso jure* void will easily evade such action by setting up the nullity."[147]

The focus here was on what effect an invalid order would have on another court. The point is that the ordinary consequences flowing from *res judicata* do not apply where the original decision is "*ipso jure* void". This does not upset the requirement that a court order must be appropriately challenged in order to be set aside.

[193] Other cases cited in *Motala* do make broader statements concerning a party's right to disregard an invalid order. *Sliom*, for example, stated that the order in that case "was a nullity as far as [one of the parties] was concerned".[148] But in reaching this position, the Court relied on *Lewis and Marks*. I have already suggested that *Lewis and Marks* does not support that conclusion. The expansive pronouncement in *Trade Fairs* is similarly unsound.[149] There, the Court stated:

> "It would be incongruous if parties were to be bound by a decision which is a nullity until a Court of an equal number of Judges has to be constituted specially to hear this point and make such a declaration".[150]

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[146] *Suid-Afrikaanse Sentrale Ko-operatiewe Graanmaatskappy Bpk v Shifren and the Taxing Master* [1964] 1 All SA 154 (O) (*Shifren*) at 156.

[147] Id.

[148] *Sliom v Wallach's Printing and Publishing Co., Ltd*. 1925 TPD 650 at 656.

[149] *Trade Fairs and Promotions (Pty) Ltd v Thomson* [1984] 4 All SA 478 (W) (*Trade Fairs*).

[150] Id at 183C.

But *Trade Fairs* relied on *Shifren*, and *Shifren* did not speak to the obligations of parties. Instead, it spoke to the obligations on *courts* where a previous decision is a nullity.

[194] The issue of parties' obligations to obey an order was not an issue in either *Sliom* or *Trade Fairs*, and their dicta on the effect of an invalid order on parties should be read in this light. In fact, the issue of a party's obligations was not before the court in all but one of the cases cited in *Motala*. That one exception, *Mkize*,[151] is inapposite for the determination of the current case. There, a recently convicted defendant was found in contempt; shortly after resisting an order the judge was not authorised to give, while still in court. On review, the Court held that the defendant could not have disobeyed an invalid order. The case is unhelpful because, the finding of contempt coming immediately after the order, the defendant did not have the opportunity to set the invalid order aside.[152] In this it bears some of the hallmarks of a "classical" reactive challenge brought in the administrative law context.[153]

[195] *Motala* also endorsed the slightly different principle that "a thing done contrary to a direct prohibition of the law is void and of no force and effect."[154] The only case cited in support of this proposition, *Schierhout*, considerably predates our Constitution.[155] And the "thing" in that case was not "done" by a court of law.

[196] *Motala*'s final defect is that, in setting aside the order of contempt, it did not even mention section 165(5) of the Constitution: a deficiency shared by *Von Abo*. In the latter case, the absence of section 165(5) is understandable because the binding

[151] *The State v Mkize* [1962] 2 All SA 472 (N).

[152] See similarly *S v Ngcemu* 1964 (3) SA 665 (N), in which the defendant was found to be entitled to refuse a Magistrate's decision that he immediately continue his defence on the grounds that the decision was unlawful.

[153] Our case law does not support a rigid, doctrinal approach to reactive challenges to court orders. There may be a limited set of circumstances where a court order does not need to be set aside. This is especially so where a party has not been given the opportunity to appeal or review the decision. In any event, this is not one of those cases.

[154] *Motala* above n 40 at para 14.

[155] *Schierhout v Minister of Justice* 1926 AD 99.

nature of court orders was not before it. This reinforces the point that the effect of an invalid court order on parties was not at issue in that matter, and therefore could not have formed the basis for the conclusion that invalid court orders can be ignored without more.

[197] In any event, *Motala* dealt with a different issue. There, Kruger AJ, sitting in the High Court, was found to have lacked jurisdiction to appoint judicial managers. The order was treated as a nullity because it purported to exercise power that was specifically assigned to the Master by legislation.[156] In the present matter, Mabuse J clearly had jurisdiction to hear the case. As explained in *Tsoga*, *Motala* is only authority for the proposition that if a court "is able to conclude that what the court [that made the original decision] has ordered cannot be done under the enabling legislation, the order is a nullity and can be disregarded".[157] This is a far cry from the inference that any court order that is subsequently found to be based on an invalid exercise of public power can be ignored.

[198] Whether or not the Mabuse J order is enforceable depends on whether Mabuse J had the authority to make the decision that he did *at the moment that he made it*. Thus, if the extension had been challenged and set aside before Mabuse J made his order, or even during those proceedings by way of counter-application,[158] then the Mabuse J order would be baseless and the implications set out in the first judgment would follow. But, as the extension was successfully challenged only after Mabuse J made his order, the outcome of this review has no bearing on the order's validity. The interdict granted by Mabuse J only falls away once the counter-application is upheld by a court. Until this point, it is binding and enforceable.[159]

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[156] *Motala* correctly holds that where an order is made without jurisdiction, or where there has not been proper citation, another court may refuse to enforce it. Again, it is the *court* that is entitled to act, not the party.

[157] *Provincial Government North West v Tsoga Developers CC* [2016] ZACC 9; 2016 (5) BCLR 687 (CC) (*Tsoga*) at para 50.

[158] While "a whole host of reasons" were advanced before Mabuse J regarding the validity of the extension, he declined to set the extension aside.

[159] In *Clipsal Australia (Pty) Ltd v Gap Distributors* [2009] ZASCA 49; 2010 (2) 289 (SCA) at para 21, the Supreme Court of Appeal explained this position as follows:

[199] The Department and the Corporation were thus obliged to comply with all of the orders premised on the Mabuse J order until their counter-application succeeded in front of Hughes J. The various findings of contempt made by the Supreme Court of Appeal must consequently stand. That said, this is now water under the bridge: the Department and the Corporation are no longer required to comply with the Mabuse J order in light of the success of the counter-application. In the unique circumstances of this case, I am therefore unconvinced that an order of committal is appropriate.[160]

Remedy

[200] To summarise: the Department's counter-application is upheld. From 23 June 2015, the date of Hughes J's order, the extension no longer had legal effect, and the interim interdicts issued by the High Court fell away. Nevertheless, in the period between the granting of the extension and its setting aside, the applicants were constitutionally obliged to comply with the various court orders granted.

[201] What is a just and equitable order in the circumstances? Tasima maintains that, should their application succeed, the transfer management provisions set out in schedule 15 of the original contract should govern the transfer of business to the Corporation. They contend that the default transfer period is five years, and that this period was previously accepted by the Department.

> "[T]he outcome of the review application is irrelevant to the question of whether the respondents were acting in contempt of court . . . That court order is a final order and has to be obeyed even if it is wrong as is alleged by the respondents. Should the review application be successful and the registration of the design be set aside, the interdict would come to an end as there would no longer be a registered design, but until that happens the interdict stands and has to be obeyed."

[160] In *S v Nel* 1991 (1) SA 730 (A) at 733A-E, the Court noted that a person convicted of contempt is not an "ordinary criminal in the everyday meaning of the word and he ought not to be treated as such". The purpose of considering meting out punishment in these cases—

> "is to enforce the court's authority . . . The extent of the punishment stays in the background; in the foreground is the esteem and authority of the court . . . The authority of the court is too precious to attempt to measure it against any punishment for any conduct which harms it. Esteem for the court cannot be achieved by heavier punishments for insults to the court."

[202] The Department and the Corporation argue that Tasima is seeking to entrench its unlawful position. They contend that to construe Tasima's litigation as aimed at compliance with court orders is to see golden intentions where copper coins lie. In their view, it is "private commercial gain" that animates Tasima's application. It was consequently wrong of the Supreme Court of Appeal to conclude that "the illegality or otherwise of the contract is of no consequence". Instead, the effect of the orders should be seen within the context of Tasima's monetary interests. Should their counter application succeed, they therefore ask that the eNaTIS and related services be handed over to the Corporation immediately.

[203] Constitutionally-mandated remedies must be afforded for violations of the Constitution.[161] This means providing effective relief for infringements of constitutional rights.[162] Relief must also spring from breaches of the Constitution generally. There can therefore be no doubt that upholding the High Court orders by enforcing the transfer management provisions of the original contract is open to this Court. Not only has Tasima made commercial decisions on the basis of the High Court orders, but doing so would also vindicate the high esteem the Constitution gives to the orders themselves.

[204] Conversely, the effect of upholding the Department's application is to render the extension prospectively void. Moreover, it cannot be ignored that when Tasima contracted with the Department, it took on an obligation to render public services. As explained in *Allpay II*, at this point—

> "it too became accountable to the people of South Africa in relation to the public power it acquired and the public function it performs. This does not mean that its entire commercial operation suddenly becomes open to public scrutiny. But the

[161] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency (No 2)* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) (*Allpay II*) at para 42.

[162] Id; *Mvumvu v Minister for Transport* [2011] ZACC 1; 2011 (2) SA 473 (CC); 2011 (5) BCLR 488 (CC) at paras 46 and 48; *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 69.

> commercial part dependent on, or derived from, the performance of public functions is subject to public scrutiny, both in its operational and financial aspects."[163]

[205] In crafting an appropriate remedy, even where a range of court orders have been violated, the interests of the public must remain paramount.[164] This extends beyond considerations of the immediate consequences of invalidity. As *Allpay II* expresses, primacy of the public interest in procurement matters "must also be taken into account when the rights, responsibilities, and obligations of all affected persons are assessed. This means that the enquiry cannot be one-dimensional. It must have a broader range."[165]

[206] In the present matter, not only was the extension of the contract between the Department and Tasima unlawful, but it has now expired. It can only be in the best interests of the public that the hand-over of the services and the eNaTIS to the Corporation happens as expeditiously as possible. While I recognise the complexities that this process entails, in light of the success of the counter-application, I am unconvinced that five years is necessary, nor that the unlawfully extended transfer management provisions are inevitably the correct vehicle for bringing the hand-over into fruition.

[207] The Supreme Court of Appeal found that, on the Department's version, a period between four and twelve months is appropriate.[166] The High Court ordered that the hand-over occur within 30 days.[167] This latter period accords with the transfer management plan. I am therefore of the view that hand-over should occur within 30 days of this order. In light of conceivable changes in circumstances, the parties must meet within 10 days to agree on how the transfer is to be facilitated. Should this

[163] *Allpay II* above n 161 at para 59.

[164] Id at para 32: "in the context of public-procurement matters generally, priority should be given to the public good."

[165] Id at para 33.

[166] SCA judgment above n 13 at para 38.

[167] Hughes J judgment above n 9 at para 111.

agreement fail to materialise, the transfer is to take place in accordance with the Migration Plan set out in the Turnkey Agreement.

Order

[208] The following order is made:

1. The application to lead new evidence is refused.
2. Leave to appeal is granted.
3. The appeal is upheld insofar as the counter application succeeds.
4. The order of the Supreme Court of Appeal is set aside and replaced with the following:
    - "i. Within 30 days of this order, Tasima is to hand over the services and the electronic National Traffic Information System to the Road Traffic Management Corporation.
    - ii. Unless an alternative transfer management plan is agreed to by the parties within 10 days of this order, the hand-over is to be conducted in terms of the Migration Plan set out in schedule 18 of the Turnkey Agreement."
5. The finding of contempt in part 1 of the order made by the Supreme Court of Appeal is upheld for the period before the counter application succeeded, but lapses thereafter.
6. Each party is to pay its own costs.

ZONDO J (Mogoeng CJ, Bosielo AJ and Jafta J concurring):

[209] I have had the opportunity of reading the judgment by my Colleague, Jafta J (first judgment) as well as the judgment by my Colleague, Khampepe J (second judgment). I concur in Jafta J's judgment.

[210] In the second judgment it is said that "…until a court is appropriately approached and an allegedly unlawful exercise of public power is adjudicated upon, it

has a binding effect merely because of its factual existence."[168] In the next paragraph it *inter alia* says:

> "In the interests of certainty and the rule of law, it merely preserves the fascia of legal authority until the decision is set aside by a court: the administrative act remains legally effective, despite the fact that it may be objectively invalid."[169]

The second judgment[170] then says that this approach was endorsed by this Court in its unanimous judgment in *Economic Freedom Fighters*.[171] I write to point out that this is not correct.

[211] First of all, in *Economic Freedom Fighters* the validity or lawfulness of the remedial action taken by the Public Protector against the President – which was the administrative action under consideration – was not challenged by the President. The President conceded that the administrative action was valid and binding. This is the context in which what this Court said in *Economic Freedom Fighters* should be understood. It was not called upon to decide what should happen where the person against whom an administrative action has been taken argues that the administrative action is unlawful or invalid. Statements made in *Economic Freedom Fighters* were made in the context of an administrative action that was accepted by all to be valid and lawful.

[212] Furthermore, even the paragraph on which the second judgment relies to support the proposition does not really support the proposition. The paragraph reads:

> "*No decision grounded on the Constitution or law may be disregarded without recourse to a court of law*. To do otherwise would 'amount to a licence to self-help'. Whether the Public Protector's decisions amount to administrative action or not, the disregard for remedial action by those adversely affected by it, amounts to taking the

[168] Second judgment [147].

[169] Second judgment [148].

[170] Second judgment [149].

[171] *Economic Freedom Fighters* above n 51.

> law into their own hands and is illegal. *No binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly*. It has legal consequences and must be complied with or acted upon. To achieve the opposite outcome lawfully, an order of court would have to be obtained."[172]

[213] In this passage, Mogoeng CJ makes it clear that he is referring to a "decision grounded on the Constitution or law." He says that no such decision "may be disregarded without recourse to a court of law". He goes on: "To do otherwise would amount to a licence to self-help." He states: "No binding and constitutionally or statutorily sourced decision may be disregarded willy–nilly." When, towards the end of the passage, he says: "It has legal consequences and must be complied with or acted upon", he is referring to a "decision grounded on the Constitution or law" to which he made reference at the beginning of the passage. When, later on, the Chief Justice says that ". . . remedial action taken against those under investigation cannot be ignored without any legal consequences",[173] he is still talking about remedial action that is "grounded" in the Constitution and the law, as he said in the passage quoted above.

[214] In the paragraph that appears immediately after the passage relied upon by the second judgment, the Chief Justice once again makes a statement that makes it clear that he is referring to a valid or lawful decision in the sense that it is made by a person who has constitutional or legal power to make it. He says: "The rule of law requires that no power be exercised unless it is sanctioned by law and *no decision or step sanctioned by law may be ignored based purely on a contrary view we hold*."[174]

[215] Later on, the Chief Justice said:

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[172] This is part of paragraph 74 of the *Economic Freedom Fighters* judgment above n 51 as quoted in [149] of the second judgment.

[173] See *Economic Freedom Fighters* above n 51 at para 73.

[174] Id at para 75.

> "Neither the President nor the National Assembly was entitled to respond to the binding remedial action taken by the *Public Protector as if it is of no force or effect or has been set aside through a proper judicial process*."[175]

[216] In the light of the above it is not correct to suggest that the decision of this Court in *Economic Freedom Fighters* supports the proposition that an invalid or unlawful decision is binding until set aside.

[217] I also just want to point out that some judgments create the impression that, when a body or functionary has taken an administrative action against someone, if that person neither complies with nor takes the administrative action on review, that would be the end of the administrative action. That is not so. When an administrative action has been taken and the person against whom it has been taken does not comply – whether because he or she thinks it is unlawful or invalid or for any reason – the taker of the administrative action has a right to institute court proceedings to enforce it and the person against whom the administrative action was taken has a chance to put his or her case before the court and the court will decide. Sometimes, the enforcement proceedings may be instituted by the person for whose benefit the administrative action has been taken or made. Under the Labour Relations Act (LRA),[176] if an employee has obtained an arbitration award – which is an administrative action in terms of this Court's decision in *Sidumo*[177] – ordering the employer to reinstate him and the employer fails or refuses to reinstate him and does not take the award on review, the employee brings an application in the Labour Court under section 158(1)(c)[178] of the LRA to make the award an order of the Labour Court. That is a procedure for the enforcement of the award. The employer may oppose the application.

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[175] Id at para 99.

[176] 66 of 1995.

[177] *Sidumo v Rustenburg Platinum Mines Ltd* [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC).

[178] Section 158(1)(c) of the LRA reads: "make any arbitration award or any settlement agreement an order of Court."

[218] Since preparing the earlier draft of this judgment, Froneman J has prepared a judgment (fourth judgment) which I have had the opportunity of reading. Certain aspects of the fourth judgment are dealt with in the first judgment. The purpose of my judgment was to clarify and emphasise that, in reading or interpreting this Court's decision in *Economic Freedom Fighters* or in assessing its effect, we must always bear in mind what the issues before the Court were. In other words, we must read and interpret that decision in its context. In this regard I have pointed out that *Economic Freedom Fighters* was not a case in which the validity or lawfulness of the administrative action was in issue. The fourth judgment seems to have a quarrel with my drawing attention to these features of that case. I fail to see what is perceived to be wrong with pointing these out.

[219] The fourth judgment seems to quarrel with the notion that statements used in *Economic Freedom Fighters* must be understood against the fact that the administrative action that was considered was accepted by all as valid and binding and that that is why in that judgment there are a number of references to "decisions grounded in the Constitution or law" and to "binding and constitutionally or statutorily sourced decision". This is simply factually true. The fourth judgment does not dispute that the validity or lawfulness of the administrative action was not in issue in *Economic Freedom Fighters*. Nor does it say why it would have been necessary for this Court to repeatedly refer to decisions "grounded on the Constitution or law" or to "binding and constitutionally or statutorily sourced decision" if it was not to emphasise that the Court was dealing with an administrative action that was lawful or valid.

[220] At the end of the fourth judgment a question is asked as to how *Economic Freedom Fighters* would have been decided if the President had not conceded that the Public Protector's administrative action was valid and binding. The question is besides the point. The issue here is whether the *Economic Freedom Fighters* decision must or must not be understood in the context that the Public Protector's remedial

action was accepted by all concerned as valid and binding. The answer is: Yes, it must because that is true.

[221] The fourth judgment refers to the importance of following precedent. I agree that following precedent is very important but consistency in adjudication is also very important. In *Maphango*[179] I pointed out in my minority judgment that the majority judgment was granting the applicant relief that it had not asked for.[180] In *Bel Porto*,[181] a decision of this Court, Chaskalson CJ, writing for the majority, had made it clear that it was not permissible to grant a party relief that it had not asked for.[182] I highlighted this in my judgment.[183] The majority went ahead and granted the applicants relief that they had not asked for and, in this way, did not follow *Bel Porto*. Mogoeng CJ and Jafta J concurred in my judgment. The author of the fourth judgment did not on that occasion emphasise the importance of respecting precedent. Instead, he was party to the majority judgment. Although, in addition, he wrote a separate judgment, that judgment did not acknowledge the precedent of *Bel Porto* nor it did say that *Bel Porto* was distinguishable or was not binding. In other words, it did not advance any of the grounds recognised in law as justifying not following a precedent.

[222] In *KwaZulu-Natal Joint Liaison Committee*[184] the majority decided the matter in favour of the applicant on a basis that was not part of the applicant's case as set out in its founding affidavit. They did this despite the fact that, during the hearing, Counsel for the applicant had repeatedly disavowed any reliance on the basis relied upon by the majority judgment to grant the applicant relief. Deciding the matter on a

[179] *Maphango v Aengus Lifestyle Properties (Pty) Ltd* [2012] ZACC 2; 2012 (3) SA 531 (CC); 2012 (5) BCLR 449 (CC). My minority judgment in *Maphango* was the first judgment I wrote as an Acting Justice of this Court.

[180] Id at para 136.

[181] *Bel Porto School Governing Body v Premier, Western Cape* [2002] ZACC 2; 2002 (3) SA 265 (CC); 2002 (9) BCLR 891 (CC) (*Bel Porto*).

[182] Id at para 115.

[183] See *Maphango* above n 179 at para 136.

[184] *KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, KwaZulu-Natal* [2013] ZACC 10; 2013 (4) SA 262 (CC); 2013 (6) BCLR 615 (CC).

basis that fell outside the applicant's founding affidavit went against the rule of practice that in motion proceedings a party stands or falls by its papers. In my minority judgment[185] I highlighted the fact that there were a number of decisions of this Court that had affirmed this rule of practice.[186] Mogoeng CJ and Jafta J concurred in my judgment.

[223] The majority judgment went against those decisions. On that occasion, too, the author of the fourth judgment did not emphasise the importance of precedent. Instead, he was party to the majority judgment. Although, in addition, he wrote a separate judgment, that judgment did not acknowledge the existence of precedent in the form of various decisions of this Court affirming the rule of practice nor did that judgment say that those decisions were distinguishable or were clearly wrong or were not binding. In other words neither the majority judgment nor the separate judgment advanced any of the grounds recognised in law as justifying not following a precedent. There may be more cases to add here but it is not necessary to do so. Both in *Maphango* and *KwaZulu-Natal Joint Laison Committee* the result would have been different if, in the case of *Maphango, Bel Porto* had been followed and, in the case of *KwaZulu-Natal Joint Laison Committee, Bel Porto* and other decisions of this Court had been followed.

FRONEMAN J (Khampepe J, Madlanga J, Mhlantla J and Nkabinde J concurring):

[224] I concur in the judgment of Khampepe J, for the reasons she gives. But I consider it necessary to add some additional reasons of my own.

[185] Id at para 160.

[186] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 39; *Phillips v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC) at paras 39 and 43; *Bel Porto* above n 181 at paras 115-9; *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 31; *Prince v President, Cape Law Society* [2000] ZACC 1; 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC) at para 22.

After the majority judgment in *Doctors for Life,*[187] the precedent it established was applied in *Merafong Demarcation*.[188] The majority judgment in *Merafong Demarcation* was written by one of the dissenters in *Doctors for Life* (Van der Westhuizen J) and concurred in by two of the other earlier dissenters (Yacoob and Skweyiya JJ). The precedents set by the majority judgments in *Kirland* and *Khumalo* have not been so fortunate in their treatment by some of those who did not originally agree with them.

[225] As pointed out in Khampepe J's judgment, this Court has now "through a long string of . . . judgments" endorsed and clarified *Oudekraal*.[189] Yet time and again its treatment of *Oudekraal* and the principles it established has been re-questioned.[190] As she points out "[t]he first judgment's approach resuscitates an argument advanced by the minority in *Kirland*, and extended by the minority in *Merafong*".[191]

[226] It is an individual choice how to react to a majority judgment one originally disagreed with, but as one who agreed with the majority judgments in both *Kirland* and *Khumalo,* my reconsideration of them must be through the lens of this Court's established doctrine. This Court has stated what the approach to overturning precedent should be. The majority judgment in *Turnbull-Jackson* made it clear: the previous decision must not merely be wrong – it must be *clearly* wrong.[192] I do not consider *Kirland* and *Khumalo* to be wrong, and certainly not clearly wrong. They establish an important bulwark for the rule of law, to prevent administrative and executive self-help, and provide a flexible criterion to ensure that state organs correct perceived wrongs timeously.

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[187] *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC).

[188] *Merafong Demarcation Forum v President of the Republic of South Africa* [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC).

[189] And more recently the same has happened in relation to *Khumalo* above n 59: see *Merafong* n 1 at para 42.

[190] *Merafong* above n 1 at para 42; *Kirland* above n 17 at paras 101-3; *Welkom* above n 90 at paras 168-265.

[191] See second judgment [145].

[192] *Turnbull-Jackson v Hibiscus Court Municipality* [2014] ZACC 24; 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310 (CC) at para 57.

[227] One would have hoped that the significance of at least *Kirland*'s contribution to upholding the importance of the rule of law in a principled and pragmatic way would have been settled when it was endorsed in the unanimous judgment of this Court, written by the Chief Justice, in *Economic Freedom Fighters*.[193] But unfortunately that has now been cast in unnecessary doubt.

[228] In the second judgment Khampepe J states the principle that "until a court is appropriately approached and an allegedly unlawful exercise of public power is adjudicated upon, it has binding effect merely because of its factual existence".[194] She then alludes to the fact that "this approach was endorsed and explained by a unanimous Court in *Economic Freedom Fighters*".[195] She quotes part of the judgment in support of this statement.

[229] In his judgment Zondo J feels compelled to write "to point out that this is not correct". But it *is* correct. The paragraph from the *Economic Freedom Fighters* judgment includes a quotation from *Kirland* itself. It is necessary to refute the claim that Khampepe J "is not correct". It is easy to do so. One need merely repeat in full this paragraph in the judgment by Mogoeng CJ in *Economic Freedom Fighters*:

> "This is so, because our constitutional order hinges also on the rule of law. No decision grounded on the Constitution or law may be disregarded without recourse to a court of law. To do otherwise would 'amount to a licence to self-help'. Whether the Public Protector's decisions amount to administrative action or not, the disregard for remedial action by those adversely affected by it, amounts to taking the law into their own hands and is illegal. No binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly. It has legal consequences and must be complied with or acted upon. To achieve the opposite outcome lawfully, an order of

[193] *Economic Freedom Fighters* above n 51.

[194] See second judgment [147].

[195] See second judgment [149].

court would have to be obtained. This was aptly summed up by Cameron J in *Kirland* as follows:

> 'The fundamental notion – that official conduct that is vulnerable to challenge may have legal consequences and may not be ignored until properly set aside – springs deeply from the rule of law. The courts alone, and not public officials, are the arbiters of legality. As Khampepe J stated in *Welkom* . . .'(t)he rule of law obliges an organ of state to use the correct legal process.' 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.'"[196]

[230] Shortly before the hearing in *Economic Freedom Fighters* the President made a concession. He stated on record that he accepted the legal and constitutional validity of the Public Protector's report. That concession is neither the *ratio* nor the logical underpinning of the *ratio* of the *Economic Freedom Fighters* judgment by this Court. Is it seriously intended to state or imply that if the President did not make the concession then this Court's decision would have been different? And that this Court would have concluded that the President was entitled to ignore the Public Protector's report without approaching a court of law to have it set aside? Surely not.

[231] In his judgment Zondo J refers to instances in *Maphango*[197] and *KwaZulu-Natal Joint Liaison Committee*,[198] where he contends my approach to existing precedent was inconsistent with the approach taken in this judgment. In each of those cases, I wrote separate concurring judgments, attempting to explain and justify the approach I took there.[199] Whether these were sufficiently grounded or not, is for posterity to decide. If they were wrong, they nevertheless do not justify making a similar mistake.

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[196] See *Economic Freedom Fighters* above n 51 at para 33.

[197] See *Maphango* above n 179.

[198] See *KwaZulu-Natal Joint Liaison Committee* above n 184.

[199] *Maphango* above n 179 at paras 148-58 and *KwaZulu-Natal Joint Liaison Committee* above n 184 at paras 79-108.

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