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THE UNDERSTATED REVOLUTION: THE DEVELOPMENT OF ADMINISTRATIVE LAW IN THE APPELLATE DIVISION OF THE SUPREME COURT OF SOUTH AFRICA IN THE 1980S AND 1990S

CLIVE PLASKET

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In this article, I discuss four judgments that concern procedural fairness in administrative law. They were delivered before the dawn of democracy in South Africa and the elevation of administrative justice to a set of fundamental rights. I argue that they served as important markers for the development of our post-1994 administrative law and are compatible with our democratic constitutional order.

I INTRODUCTION

When people talk of pre-1994 South African administrative law, they often refer to a speech delivered by Professor Barry Dean, then of the University of Cape Town, to a student gathering at the University of Stellenbosch. It was published in 1986 as the general state of emergency began to bite. Its title was *Our Administrative Law: A Dismal Science?*[1] In it, he explored

[1] WHB Dean 'Our administrative law: A dismal science?' (1986) 2 *South African Journal of Human Rights* 164.

the state of South African administrative law, from the structural and procedural, to the performance of the courts, the generous grants of discretionary power that Parliament made routinely to the executive and the lack of imagination on the part of South African legal practitioners.

In the years of emergency rule that followed, the answer to the question posed by Dean appeared to be obvious: yes, our administrative law was indeed a dismal science. The few hard-fought legal victories against the excesses of emergency rule were overturned, one after the other, by the then highest court in the land, the Appellate Division of the Supreme Court of South Africa (the Appellate Division). And even the victory that *Hurley*[2] represented, when a detention in terms of section 29 of the Internal Security Act 74 of 1982 was set aside, was limited: Parliament and subordinate legislators, such as the state president when making emergency regulations in terms of the Public Safety Act 3 of 1953, learnt that to avoid accountability for the exercise of public power, grants of power had to be made in extremely wide, subjective terms. Not surprisingly, the emergency regulations authorised officials that it clothed with powers to exercise them if they formed the opinion that it was necessary to do so.[3]

In this environment, while life went on as usual in the fields of contract, company law, property law, intellectual property law and so on, in which fields the Appellate Division enjoyed a healthy reputation, it was criticised increasingly fervently for its failures to protect the citizenry from the predations of those imposing emergency rule; and for freeing them from the constraints of legal accountability. It was asserted, for instance, by Fink Haysom and I that the Appellate Division was at war with the law.[4] And we were not alone in our criticism. John Didcott, then a judge of the Natal Provincial Division of the Supreme Court (and later a member of

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[2] *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A).

[3] For the distinction between powers granted in objective terms, such as the power to arrest if an official has 'reason to believe' that a particular state of affairs exists, and subjective formulations, such as the same power if the repository of the power forms the 'opinion' that the state of affairs exists, see *South African Defence and Aid Fund v Minister of Justice* 1967 (1) SA 31 (C) 34H–35D; *Hurley* (note 2 above) 578H–579B; *Minister of Law and Order v Dempsey* 1988 (3) SA 19 (A) 34A–35B. See further C Plasket 'Playing catch-up: The South African Constitution, administrative law and jurisdictional facts' in M Carnelly & SV Hoctor (eds) *Law, Order and Liberty: Essays in Honour of Tony Mathews* (2011) 75.

[4] N Haysom & C Plasket 'The war against law: Judicial activism and the Appellate Division' (1988) 4 *South African Journal of Human Rights* 303. See too D Davis & H Corder 'A long march: Administrative law in the Appellate Division' (1988) 4 *South African Journal of Human Rights* 281.

the Constitutional Court) was perplexed by what emergency jurisprudence was doing to the law. He said:

> *The legislature, not a democratic one in the first place since it does not represent or speak for the large majority of South Africans, has statutorily delegated to the executive the power to make laws by regulation and decree. This the executive has done voraciously, intensifying the evil of imprisonment without trial, restricting wholesale our freedom of speech, assembly, movement and association and the freedom of the press, and often entrusting to its mere underlings decisions with the same consequences. Judicial endeavours have been made to keep the process under some sort of control by the law and to harmonise its workings with the law's requirements, as far as that could be managed. And this has been attempted by no wild unorthodoxy, by no splurge of adventurism, but by invoking and applying tried and trusted rules of administrative law common to our legal system and others, rules developed with the very object of safeguarding the rule of law in such a situation. Sad to say, these efforts have proved to be largely in vain, the Appellate Division in its wisdom having decided in case after case coming before it during the past couple of years that the capacity of the courts to assert and protect the rule of law in that situation is so attenuated as to be, for all practical purposes, insignificant. The cause of all the trouble, of course, has been the enabling legislation passed in the first place which, according to the construction authoritatively placed on it by the Appellate Division, ousts the jurisdiction of the courts from most of these matters and gives the executive virtual carte-blanche.*[5]

Despite this gloomy picture of 'emergency jurisprudence', however, a quiet revolution was taking place under the radar in the Appellate Division. From the mid-1980s to the early 1990s, a series of cases was decided that had a profound impact on South African administrative law and shaped its post-1994 development. This article will examine some of these cases. It will focus on cases dealing with the right to procedurally fair administrative action, although important judgments were also delivered during this period that had an impact on other aspects of administrative law. They included cases dealing with standing,[6] the nature of public power and its

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[5] J Didcott 'Salvaging the law' (1988) 4 *South African Journal of Human Rights* 355 at 358–359.

[6] *Jacobs v Waks* 1992 (1) SA 521 (A).

reviewability,[7] the right to lawful administrative action,[8] and the right to reasonable administrative action.[9] First, however, it is necessary to sketch the historical background.

II THE COURTS IN SOUTH AFRICA: THE APPELLATE DIVISION IN PARTICULAR

Prior to the establishment of the Union of South Africa in 1910, each of the four colonies that made up what is now the Republic of South Africa had their own superior courts.[10] In some cases, a colony had more than one court.[11] Appeals lay from these courts to the Privy Council in London. The South Africa Act of 1909, which created the Union of South Africa

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[7] *Administrator, Transvaal v Zenzile* 1991 (1) SA 21 (A). In this case, the court recognised that the statutory power to dismiss an employee in the public service was, despite its contractual form, a public power subject to review on administrative law grounds. This was particularly important because, at the time, public sector employees were excluded from unfair labour practice protection in terms of the Labour Relations Act 28 of 1956. See too *Administrator, Natal v Sibiya* 1992 (4) SA 532 (A).

[8] See, for instance, *Hira v Booysen* 1992 (4) SA 69 (A) which clarified and developed the ground of review of error of law.

[9] See, for instance, *WC Greyling and Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board* 1984 (4) SA 427 (A) 448G–449A which found decisions to have been grossly unreasonable because there had been no rational connection between the evidence before the tribunals concerned and their findings. See too *Jacobs* (note 6 above) 551D–G in which a decision to ban black people from using parks in 'white' areas of a town was held to be grossly unreasonable, inter alia, because of its disproportionality.

[10] Prior to the Anglo-Boer War (1899–1902), present-day South Africa was made up of two British colonies — the Cape of Good Hope and Natal — and two republics — the Orange Free State and the South African Republic (sometimes referred to as the Transvaal Republic). After the defeat of the republics by Britain, they became the Orange River Colony and the Transvaal Colony.

[11] In the Cape Colony, the Supreme Court of the Cape of Good Hope was established in the 1820s. In 1864, the Eastern Districts Court was established in Grahamstown, now Makhanda, as a local division of that court. In 1871, after the discovery of diamonds and the annexation of Griqualand West by the British, a court was established in Kimberley for that part of the Cape Colony. The Cape Supreme Court retained concurrent jurisdiction with it. See *Swanepoel v De Klerk* 1911 CPD 508. The Transvaal Colony had two superior courts — the Transvaal Supreme Court in Pretoria and the Transvaal High Court in Johannesburg. See *Ogilvie v Bettini and Co* 1905 TS 747.

out of the four colonies and constituted them as provinces, created the Supreme Court of South Africa which was made up of various provincial divisions and, at its apex, a national court, the Appellate Division.[12] Appeals lay from the provincial divisions and from the South West Africa Division to this court. For a while, it also heard appeals from the superior courts of Rhodesia and later, from the superior courts of so-called independent homelands, until they created appeal courts of their own.[13] Even though the Appellate Division was the highest court in the country, an appeal lay from it to the Privy Council.[14] That appeal was abolished by the Privy Council Appeals Act 16 of 1950. From then until the creation of the Constitutional Court by the interim Constitution of 1993, the Appellate Division was the final court of appeal in South Africa.

In that capacity, it played an important and, at times controversial, role in the development of South African law. From its inception, Corder argued, the Appellate Division was the country's most influential court because 'its writs ran nationally, and its decisions bound all other courts through the doctrine of precedent'. It was, even when an appeal to the Privy Council existed, for all practical purposes, 'the final court of appeal for all South African disputes'.[15] Its track record is controversial, as Corder's leading work on its role from 1910 to 1950[16] and Forsyth's equally important study covering the period 1950 to 1980,[17] attest. It could, in truth, be no other way, given the nature of the South Africa Act as a political pact between the major groupings of the white population.

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[12] See generally, C Hoexter 'The structure of the courts' in C Hoexter & M Olivier (eds) *The Judiciary in South Africa* (2014) 1 at 7–8; H Corder 'A century worth celebrating' (2010) 127 *South African Law Journal* 571 at 572–573.

[13] Hoexter (note 12 above) 8–9. For an interesting example of an appeal from a homeland court, see *S v Marwane* 1982 (3) SA 717 (A), in which a panel of 11 judges heard an appeal concerning the constitutional validity of provisions of two South African statutes 'inherited' by Bophuthatswana when it gained 'independence'. They were the Terrorism Act 83 of 1967 and the General Law Amendment Act 76 of 1962 (which created the statutory offence of sabotage). A majority of the court found that provisions of these Acts were invalid because they conflicted with the bill of rights that was part of the constitution of Bophuthatswana.

[14] This right of appeal appears to have been of limited value. The Privy Council appears to have been parsimonious in granting leave to appeal. It only did so ten times from 1910 to 1950. See CF Forsyth *In Danger for their Talents* (1985) 5. One would imagine that pursuing an appeal in London would have been prohibitively expensive.

[15] Corder (note 12 above) 574.

[16] H Corder *Judges at Work* (1984).

[17] Forsyth (note 14 above).

In this context, Corder said of the Appellate Division's legacy in its earlier years that it appeared to have 'succeeded admirably in building a legal system which took the best from both the Roman-Dutch authorities and the English common law and which was suited predominantly to the needs of the emerging hegemonic white ruling class'. Writing of the court in 1950, when his study commenced, Forsyth made a similar point:

> *In 1950 the reputation of the Appellate Division stood high. Its independence from the executive had been clearly established even if, as a recent study suggests, it had not freed itself from the dominant mores and values of the society it served. Notwithstanding criticism of particular decisions, there could be little doubt that the Appellate Division was the pre-eminent tribunal administering Roman-Dutch law in the world.*[18]

The reputation of the Appellate Division was affected for the better during the constitutional crisis of the 1950s. When the National Party government took steps to remove coloured voters in the Cape from the common voters' roll, by passing the Separate Representation of Voters Act 46 of 1951, the Appellate Division struck down this first attempt, in *Harris*.[19] It did so on the basis that Parliament had purported to pass the legislation in the ordinary, bicameral way, whereas the entrenched clauses of the South Africa Act required that legislation of this sort had to be passed by a two-thirds majority of both houses of Parliament sitting together.[20] The government knew that it could not muster the required majority because of the size and composition of the Senate. When the legislature tried again by purporting to give itself the power, sitting as the High Court of Parliament, to review and set aside the Appellate Division's judgment, the court set aside the High Court of Parliament Act 35 of 1952, in *Minister of the Interior.*[21]

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[18] Forsyth (note 14 above) 3.

[19] *Harris v Minister of the Interior* 1952 (2) SA 429 (A).

[20] In the 1936, African voters in the Cape had been removed from the common voters' roll. In a challenge to that legislation, the Representation of Natives Act 12 of 1936, the court held in *Ndlwana v Hofmeyr NO* 1937 AD 229 that a court had no jurisdiction to question even the procedure by which a sovereign legislature passes legislation: 'The answer is that Parliament, composed of its three constituent elements, can adopt any procedure it thinks fit; the procedure express or implied in the South Africa Act is so far as the Courts of Law are concerned at the mercy of Parliament like everything else.' (at 238). *Harris* overruled *Ndlwana*, holding that the procedure provided for in the entrenched clause had to be complied with.

[21] *Minister of the Interior v Harris* 1952 (4) SA 769 (A).

The legislature played its hand a third time. Parliament first passed the Appellate Division Quorum Act 25 of 1955. It provided that when the validity of an Act was in issue, the court's quorum was 11 judges. As there were only six judges of appeal, a further five were appointed in the hope that they would dilute the influence of the old guard.[22] Then the Senate Act 53 of 1955 was passed. It altered the manner in which senators were appointed and increased the size of the senate, conveniently with a significant number of supporters of the National Party. This made a two-thirds majority of both houses sitting together possible. The South Africa Act Amendment Act 9 of 1956 was passed in this way to reinstate the Separate Representation of Voters Act. It was challenged before a panel of 11 judges in *Collins*.[23] This time, the government prevailed, with only Schreiner JA dissenting.

The scene was set for what Baxter refers to as a period of 'unusual judicial restraint' which lasted into the late 1980s.[24] Perhaps its most obvious manifestation was the 'emergency jurisprudence' of the mid to late1980s, which has been discussed. One of the results of what was seen as an overly pro-executive mindset and a hostility to the protection of human rights on the part of the Appellate Division was a sense among the drafters of the interim Constitution that this court could not be trusted with the application of the bill of rights embodied in chapter 3 of that Constitution. In what was soon recognised as an unworkable arrangement, section 101(5) provided that the 'Appellate Division shall have no jurisdiction to adjudicate any matter within the jurisdiction of the Constitutional Court', while section 98(2) provided that the Constitutional Court had jurisdiction 'over all matters relating to the interpretation, protection and enforcement of the provisions of this Constitution'.[25] Section 168(3) of the final Constitution undid the effect of section 101(5) by providing that the newly named Supreme Court of Appeal had the jurisdiction to hear all appeals from high courts or courts of a similar status. Since then,

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[22] Forsyth (note 14 above) 15.

[23] *Collins v Minister of the Interior* 1957 (1) SA 552 (A).

[24] L Baxter *Administrative Law* (1984) 337. See too Haysom & Plasket (note 4 above); Davis & Corder (note 4 above).

[25] The Appellate Division tried, in *Commissioner of Customs and Excise v Container Logistics (Pty) Ltd; Commissioner of Customs and Excise v Rennies Group Ltd t/a Renfreight* 1999 (3) SA 771 (SCA), to make this provision workable by developing the idea of a common-law review jurisdiction running in parallel to a constitutional review jurisdiction. The Constitutional Court overruled that judgment in *Pharmaceutical Manufacturers Association of SA: In re ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) paras 33, 44 and 50.

Corder says, the SCA has 'more than made its mark through its judgments on both constitutional and non-constitutional aspects of South African law'.[26] With this short history, it is now possible to examine the cases that cut against the grain of judicial restraint during the 1980s and early 1990s.

III THE PROCEDURAL FAIRNESS CASES: NORMAL LAW IN AN ABNORMAL SETTING

It is evident that, from the 1960s to the 1980s, South African courts adopted a narrow approach to the right to be heard.[27] That approach was predicated on three things: a contested view of how the right arose in the first place; the classification of functions as a determinant of when a person was entitled to be heard; and the limiting of the types of interests that could activate the right. All three of these aspects were dealt with for the better during the later years of the 1980s and early years of the 1990s, indicative perhaps of an emergence from the long period of judicial restraint.

(*a*) *The basis of the right to be heard*

Two schools of thought emerged concerning the basis of the right to be heard in administrative decision-making. Both relied on *Sachs*[28] to justify their divergent views. In that case, Stratford ACJ had said that the right to a hearing arose as a result of an implied incorporation into the empowering provision. In *Ngwevela*,[29] Centlivres CJ held that Stratford ACJ

> *must have had in mind the numerous judicial decisions in which it has been held that, when a statute empowers a public official to give a decision prejudicially affecting the property or liberty of an individual, that individual has a right to*

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[26] Corder (note 12 above) 577.

[27] Baxter (note 24 above) 543 made the point that because of the flexibility inherent in procedural fairness, scope is created for judicial creativity and this 'renders the application and scope of the principles of natural justice a significant barometer of the prevailing moods of judicial activism or restraint'. With reference to Dean's study, WHB Dean 'Whither the Constitution?' (1976) 39 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 266, Baxter (note 24 above) 337, identified the period from 1960 to 1975 as 'a period of unusual judicial restraint'. That period extended beyond 1975, the time of the publication of Dean's article, into the 1980s, intensifying during the successive states of emergency from 1985 to 1990. See for instance, *Omar v Minister of Law and Order; Fani v Minister of Law and Order; State President v Bill* 1987 (3) SA 859 (A).

[28] *Sachs v Minister of Justice; Diamond v Minister of Justice* 1934 AD 34 at 38.

[29] *R v Ngwevela* 1954 (1) SA 123 (A) 127F.

> *be heard before action is taken against him . . . unless the statute expressly or by necessary implication indicates the contrary.*

The same passage in *Sachs* was relied upon in *South African Defence and Aid Fund*[30] to conclude that the right to be heard was not a substantive, stand-alone right but was sourced in a statutory implication. Botha JA, for the majority, held that a right to be heard only arose if it had been incorporated into a provision that empowered an administrative decision-maker to prejudicially affect the rights, property or liberty of a person. Williamson JA, with Trollip AJA concurring, came to a contrary conclusion — that the right to be heard was a substantive right that applied unless it was excluded by the legislature.[31]

The debate between these two schools of thought took a strange turn when, on the same day, two panels of the Appellate Division delivered conflicting judgments: in *Winter*[32] Ogilvie-Thompson CJ held that 'the initial enquiry must nevertheless always be whether the particular enactment in issue impliedly incorporates the [*audi alteram partem*] maxim'; while in *Administrateur van Suidwes-Afrika*[33] Botha JA, in an about-turn from his judgment in *South African Defence and Aid Fund*, held that where a public body is empowered to take a decision that affects the property, liberty or existing rights of a person, such person has the right to be heard before a decision is taken, unless the empowering provision provides otherwise.

During the 1980s, this conflict came to the fore in cases involving section 30 of the Internal Security Act 74 of 1982, which empowered an Attorney-General to issue a certificate, in respect of a person charged with an offence in terms of the Act, that precluded a court from considering a bail application by that person.[34] The debate was definitively resolved by Corbett CJ's judgment in *Blom*[35] in favour of the substantive right approach. He held:

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[30] *South African Defence and Aid Fund v Minister of Justice* 1967 (1) SA 263 (A) 270C–G. Baxter (note 24 above) described the majority judgment as being 'perhaps one of the most criticised decisions in South African administrative law'.

[31] *South African Defence and Aid Fund* (note 30 above) 276H–277A.

[32] *Winter v Administrator-in-Executive-Committee* 1973 (1) SA 873 (A) 888H–889A.

[33] *Administrateur van Suidwes-Afrika v Pieters* 1973 (1) SA 850 (A) 860G.

[34] See for example, *S v Baleka* 1986 (1) SA 361 (T) and *Buthelezi v Attorney-General, Natal* 1986 (4) SA 377 (D).

[35] *Attorney-General, Eastern Cape v Blom* 1988 (4) SA 645 (A).

> *Logically and in principle, however, I prefer the approach which holds that in the circumstances postulated, viz a statute empowering a public official to give a decision which may prejudicially affect the property or liberty of an individual, there is a right to be heard, unless the statute shows, either expressly or by implication, a clear intention on the part of the Legislature to exclude such a right. The "implied incorporation" formulation appears to contemplate an incorporation of the right by implication, followed by the possibility of the exclusion thereof by implication. It is true that, as I understand the position, the incorporation would be based merely on the circumstances postulated above and the exclusion by implication upon a consideration of the statutory enactment as a whole, but nevertheless I find this formulation logically less satisfactory.*[36]

The default position that everyone affected by an administrative decision was entitled to be heard was thus locked down as the jurisprudentially correct position.

(*b*) *The classification of functions*

For a long time, courts classified administrative functions in order to determine whether a right to be heard existed, even if rights, liberty or property stood to be prejudicially affected. If an administrative function looked court-like, such as the fact-finding function of a tribunal, it would be categorised as 'quasi-judicial'. It followed from this qualification that anyone whose rights, liberty or property stood to be prejudicially affected had a right to be heard before any decision was taken. If, on the other hand, an administrative function was classified as 'administrative' or 'legislative', no right to be heard was recognised.[37] The classification of functions as a means of determining a right to be heard continued into the 1980s in South Africa, despite having been warned against by Schreiner JA in the 1950s in *Pretoria North Town Council*,[38] and being debunked and abandoned by the House of Lords in *Ridge*[39] in the 1960s.

Even after the more flexible and rational fairness doctrine had replaced the classification of functions,[40] one class of administrative action was still subject to it: if an administrative act was general in its effect, it was

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[36] *Attorney-General, Eastern Cape* (note 35 above) 662H–I.

[37] See generally, Baxter (note 24 above) 573–577.

[38] *Pretoria North Town Council v A1 Electric Ice-Cream Factory (Pty) Ltd* 1953 (3) SA 1 (A) 11A–B.

[39] *Ridge v Baldwin* [1964] AC 40 (HL).

[40] *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A) 763H–I in which Corbett CJ held that classifying an administrative action as quasi-judicial 'adds nothing to the process of reasoning' and that a court 'could just as well eliminate

usually regarded as legislative and, from this, it followed that the right to be heard was excluded.[41] The reasons for the exclusion appear to be two-fold: first, the right to be heard was always seen in individual terms, and the process for affording a hearing was an individualised process; and secondly, there was a fear of an unworkable proliferation of hearings when administrative action was general in effect.[42] In *South African Roads Board*,[43] however, the impact of this last remaining remnant of the classification of functions was reduced, and the right to be heard extended. The case concerned the declaration of a toll road that was to be operated by the Roads Board within the area of jurisdiction of the City Council. The proclamation of the toll road was an administrative action of general effect with the consequence, on the authorities, that the City Council had no right to be heard.

In his judgment, Milne JA referred to the difficulty of distinguishing between legislative and other administrative acts and the imprecision of this exercise. He was not convinced of the utility of deciding whether a right to a hearing arose on the basis of this distinction. Instead, he was of the view that a distinction was rather to be drawn between statutory powers that affected everyone equally, on the one hand, and those that, even if they had a wide effect, also caused particular prejudice to an individual or group.[44] He concluded that in the case of the former, 'the public authority is normally guided solely by what it believes to be best for the community as a whole and is not obliged to consider the particular interests of individual members of that community'; while in the case of the latter, irrespective of whether it could be classified as 'administrative', 'legislative', or 'fall into a grey area in between', the administrator should 'normally, and in the absence of a contrary indication in the statute, be obliged to afford the particular party prejudicially affected a hearing before exercising the power'.[45]

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this step and proceed straight to the question as to whether the decision does prejudicially affect the individual concerned'.

41 See for instance, *Pretoria City Council v Modimola* 1966 (3) SA 250 (A) 261H–262A; *S v Moroka* 1969 (2) SA 394 (A) 398D–G.

42 C Hoexter *Administrative Law in South Africa* 2 ed (2012) 407.

43 *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A).

44 *South African Roads Board* (note 43 above) 12E–G.

45 *South African Roads Board* (note 43 above) 12H–13A.

Milne JA concluded:

> *It seems to me that such a departure from formal classification as a criterion not only would be in accordance with modern trends in administrative law, but also would provide a more rational foundation for the application of the rules of natural justice in this area. For the audi principle applies where the authority exercising the power is obliged to consider the particular circumstances of the individual affected. Its application has a two-fold effect. It satisfies the individual's desire to be heard before he is adversely affected; and it provides an opportunity for the repository of the power to acquire information which may be pertinent to the just and proper exercise of the power.*[46]

(*c*) *The legitimate expectation doctrine*

Only certain types of interests were recognised by the courts as important enough to warrant a hearing before administrative action could be taken that adversely affected them. The classic formulation was that a person had a right to be heard if his or her rights, liberty or property stood to be prejudicially affected. For some time, however, the fairness of this threshold had been questioned in South Africa. This was particularly so because, as far back as the late 1960s, it had been extended in English law to include interests falling short of rights, such as legitimate expectations.[47] The extension of the rights, liberty and property threshold was confirmed in South Africa in *Traub*.[48]

The facts of the case made it a perfect test case. It arose as a result of criticism levelled at the management of the Baragwanath Hospital in Soweto by doctors employed there. The criticism, contained in a letter published in a medical journal, was signed by 101 doctors, including the respondents. They were either interns or senior house officers. When interns had completed their internships, they applied to be appointed as senior house officers. When the tenure of senior house officers ended, they applied for the extension of their appointments. As a matter of long-standing practice, if an application for appointment as a senior house officer or for re-appointment as such was accompanied by a favourable recommendation by the head of department concerned, those appointments or re-appointments were made as a matter of course. When the respondents applied for appointment or re-appointment, however, their applications were refused without a hearing, despite all of them having been favourably recommended by their heads

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46 *South African Roads Board* (note 43 above) 13A–C.

47 *Schmidt v Secretary of State for Home Affairs* [1969] 1 All ER 904 (CA).

48 *Traub* (note 40 above).

of department. Their applications were refused because they had signed the letter of complaint.

It was argued on behalf of the Administrator that the respondents had no right to a hearing as they had no right to be appointed to the positions for which they had applied. They accepted this but argued that they had a legitimate expectation of appointment based on the consistent, long-standing practice of appointing and extending the appointments of interns and senior house officers. Corbett CJ identified the main issue to be decided as being whether the right to a hearing was confined to the rights, liberty and property threshold or whether it had a wider application.[49] After a survey of the law in comparable jurisdictions in which the legitimate expectation doctrine had been accepted, Corbett CJ said that the question to be answered was whether South African law should move in a similar direction and recognise a legitimate expectation as an additional factor to activate the right to a hearing, having acknowledged that the 'first steps in this direction have already been taken in certain Provincial Divisions'.[50] He concluded that such a development was, indeed, required in South Africa.

> *There are many cases where one can visualise in this sphere – and for reasons which I shall later elaborate I think that the present is one of them – where an adherence to the formula of "liberty, property and existing rights" would fail to provide a legal remedy, when the facts cry out for one; and would result in a decision which appeared to have been arrived at by a procedure which was clearly unfair being immune from review. The law should in such cases be made to reach out and come to the aid of persons prejudicially affected. At the same time, whereas the concepts of liberty, property and existing rights are reasonably well defined, that of legitimate expectation is not. Like public policy, unless carefully handled it could become an unruly horse. And, in working out, incrementally, on the facts of each case, where the doctrine of legitimate expectation applies and where it does not, the Courts will, no doubt, bear in mind the need from time to time to apply the curb. A reasonable balance must be maintained between the need to protect the individual from decisions unfairly arrived at by public authority (and by certain domestic tribunals) and the contrary desirability of avoiding undue judicial interference in their administration.*[51]

Corbett CJ accepted that the long-standing practice of appointing interns to positions as senior house officers and extending the appointments of senior house officers was what gave each of the respondents a legitimate

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49 *Traub* (note 40 above) 748H–I.

50 *Traub* (note 40 above) 760I–J.

51 *Traub* (note 40 above) 761D–G.

expectation that they would be appointed; and that if the decision-maker contemplated departing from the practice, he had to first give the affected respondents a hearing.[52]

(*d*) *The rule against bias*

The right to procedural fairness has two legs. The first is the right to a hearing. The second is the right to an unbiased hearing. This, in turn, consists of two aspects. An administrative decision may be reviewed and set aside if a decision-maker is in fact biased or, in the absence of actual bias, if there is a sufficient appearance of bias. The first issue presents few conceptual problems but the second was the subject of controversy for some time.

Courts had expressed differing views on whether the test for the appearance of bias was the existence of a reasonable suspicion of bias or of a real likelihood of bias. That controversy was put to rest in *BTR Industries*.[53] The matter concerned a long, hard-fought strike. A large number of workers were dismissed and their trade union challenged the fairness of those dismissals in the Industrial Court, an administrative tribunal that was the predecessor of the present Labour Court.[54] During the course of the protracted proceedings, an industrial relations firm that advised BTR Industries organised a seminar entitled 'The New Labour Law — Management Perspectives'. It invited the presiding officer in the Industrial Court, the three advocates representing BTR Industries and their instructing attorney. All five presented papers. When the Industrial Court proceedings went against the union, it took the matter to the Supreme Court. At the centre of its case was an attack on the partiality of the presiding officer in the Industrial Court. The union succeeded in the court of first instance and BTR Industries appealed.

The point relating to the test for perceived bias had been left open in *Council of Review, South African Defence Force*[55] decided ten days before *BTR Industries*. In the court of first instance, in *Mönnig*,[56] however, Conradie J expressed his preference for the reasonable suspicion test. In *BTR Industries*, the Appellate Division clarified the issue. Hoexter JA distinguished

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[52] *Traub* (note 40 above) 762B–D.

[53] *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers Union* 1992 (3) SA 673 (A).

[54] The Labour Court is a court similar in status to a high court.

[55] *Council of Review, South African Defence Force v Mönnig* 1992 (3) SA 482 (A).

[56] *Mönnig v Council of Review, South African Defence Force* 1989 (4) SA 866 (C) 879A–B.

between the two tests for disqualifying bias by holding that whereas a real likelihood connoted significantly more than a 50 per cent probability, a reasonable suspicion demanded a less exacting standard of proof.[57] He held that the reasonable suspicion test was the appropriate test to be applied:

> *It is the right of the public to have their cases decided by persons who are free not only from fear but also from favour. In the end the only guarantee of impartiality on the part of the courts is conspicuous impartiality. To insist upon the appearance of a real likelihood of bias would, I think, cut at the very root of the principle, deeply embedded in our law, that justice must be seen to be done. It would impede rather than advance the due administration of justice. It is a hallowed maxim that if a judicial officer has any interest in the outcome of the matter before him (save an interest so clearly trivial in nature as to be disregarded under the de minimis principle) he is disqualified, no matter how small that interest may be. . . The law does not seek, in such a case to measure the amount of his interest. I venture to suggest that the matter stands no differently with regard to the apprehension of bias by a lay litigant. Provided the suspicion of partiality is one which might reasonably be entertained by a lay litigant a reviewing Court cannot, so I consider, be called upon to measure in a nice balance the precise extent of the apparent risk. If suspicion is reasonably apprehended, then that is an end to the matter.*[58]

Essentially the same test applies when bias in judicial proceedings is alleged.[59]

IV THE SIGNIFICANCE OF THE CASES

What does one make of the cases that I have discussed? Especially when taken together with the other cases that I have mentioned,[60] they cannot simply be written off as aberrations. Instead, they represent a trend, understated perhaps, in the Appellate Division over a substantial period of time to clarify and develop South African administrative law — to move it from the dismal, stagnant science it had become during the period of judicial restraint. They represent a trend towards the harmonisation of our administrative law with the rule of law. In this sense, they laid down markers for the future. For example, the importance of one of those cases — *Hira*[61] — is evident from the fact that the codification

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57 *BTR Industries* (note 53 above) 690E–H.

58 *BTR Industries* (note 53 above) 694G–695B.

59 *BTR Industries* (note 53 above) 694G–695B; Hoexter (note 42 above) 454.

60 See notes 6–9 above.

61 *Hira* (note 8 above).

of the ground of review of error of law is taken directly from Corbett CJ's judgment: section 6(2)(*d*) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) provides that an administrative action may be reviewed and set aside if it 'was materially influenced by an error of law'.

The effect of *Attorney-General, Eastern Cape*[62] was to definitively end the debate about the nature of the right to be heard — whether it was a common-law right that inhered in a person whenever public power was going to be exercised or only came into being if the legislature granted it in a particular instance. The judgment set the scene for the endorsement and recognition of the right to procedural fairness, and its elevation from a common-law right that was vulnerable to legislative override to a fundamental right contained in section 24(*b*) of the interim Constitution and then section 33(1) of the final Constitution. It is now given effect to by section 3(1) of PAJA which provides that—

> *[a]dministrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair'; and section 6(2)(c) which provides that a court may review and set aside administrative action if it 'was procedurally unfair.*

The importance of *South African Roads Board*[63] is two-fold. First, it put the final nail in the coffin of the classification of functions doctrine, a doctrine that had resulted in miserly rationing of procedural fairness by the courts. Secondly, in so doing, Milne JA exposed the weaknesses of the doctrine and confirmed a transition to a more subtle, nuanced, variable and directed application of fairness in the administrative process. That now finds expression in section 3(2) of PAJA which simply states that a 'fair administrative procedure depends on the circumstances of each case'. Milne JA was, however, constrained by the individualistic common-law conception of procedural fairness. He went as far as he could, within this paradigm, by finding a way to afford those especially affected by general administrative action a right to a hearing. In so doing, he departed from the all-or-nothing approach to the right to be heard. In this sense, Hoexter says, the judgment represents a 'compromise between the all and the nothing'.[64] It took legislative intervention to complete the job. Section 4 of PAJA created a new set of procedures to allow for procedural fairness when administrative action has a general effect. Section 4(1) states:

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62 *Attorney-General, Eastern Cape* (note 35 above).

63 *South African Roads Board* (note 43 above).

64 Hoexter (note 42 above) 407.

> *In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether –*
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> *(a) to hold a public inquiry in terms of subsection (2);*
>
> *(b) to follow a notice and comment procedure in terms of subsection (3);*
>
> *(c) to follow the procedures in both subsections (2) and (3);*
>
> *(d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or*
>
> *(e) to follow another appropriate procedure which gives effect to section 3.*

The importance of *Traub*[65] in the development of South African administrative law cannot be underestimated. Forsyth identified three aspects that make it so important. First, Corbett CJ unequivocally rejected the classification of functions, thereby exorcising a cause of many of the more unfair denials by the courts of the right to procedurally fair administrative action.[66] Secondly, the judgment confirmed *Attorney-General, Eastern Cape*.[67] Thirdly, and centrally, Corbett CJ rejected the idea that the right to be heard only applied when liberty, property or existing rights were adversely affected by an administrative decision, extending this threshold to circumstances in which a legitimate expectation would be frustrated.[68] This extension has had a profound, beneficial effect on the fairness of administrative processes. Its importance was recognised in section 24(*b*) of the interim Constitution which gave everyone the right to 'procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened'. Now, section 3(1) of PAJA provides that '[a]dministrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair'.

The Constitutional Court accepted the correctness of *BTR Industries*[69] in *South African Rugby Football Union*,[70] which concerned an application for the recusal of justices of that court. The court added a gloss of a

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[65] *Traub* (note 40 above).

[66] C Forsyth '*Audi alteram partem* since *Administrator, Transvaal v Traub*' in E Kahn (ed) *The Quest for Justice: Essays in Honour of Michael McGregor Corbett, Chief Justice of the Supreme Court of South Africa* (1995) 189 at 191–192.

[67] Forsyth (note 66 above) 192.

[68] Forsyth (note 66 above) 192.

[69] *BTR Industries* (note 53 above).

[70] *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 (CC) paras 35–38. See too *South African Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC).

terminological nature: it preferred the term 'reasonable apprehension' to 'reasonable suspicion' because of what it considered to be inappropriate connotations associated with the word 'suspicion'.[71] But PAJA remained faithful to *BTR Industries.* Section 6(2)*(a)*(iii) provides that administrative action may be reviewed and set aside if the decision-maker was 'biased or reasonably suspected of bias'.

The four cases that I have discussed have shaped our post-1994 administrative law of procedural fairness in important ways. The recognition of the underlying jurisprudence contained in these cases by the interim Constitution, the final Constitution and PAJA, as well as their endorsement by the courts, is a recognition that they are compatible with the founding value of our Constitution of the rule of law.

[71] *South African Rugby Football Union* (note 71 above) para 38.

TRANSFORMATIVE CONSTITUTIONALISM: WHAT DOES IT MEAN IN 2021[*]

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Ever since Karl Klare[1] published what has proved, arguably, to be the most important single article written about the South African constitutional project after 1994, the question has been posed: what exactly is meant by transformative constitutionalism? A most useful analysis of the various meanings of this concept has been set out recently by Heinz Klug,[2] who has argued that there are at least four broad approaches to transformative constitutionalism: a project of constitutional interpretation particularly as undertaken by apex courts; a comparative lens through which to distinguish constitutionalism in the Global North and Global South; a means of distinguishing between preservative and transformative constitutions; and a representation of a specific constitutional vision in which the Constitution serves in a variety of capacities being a symbol, a means, and a commitment to transform society.

Klug considers that there may be an additional fifth approach in terms of which it is possible to conceive of transformative constitutionalism as providing a conceptual framework in which to develop a socio-legal understanding of how a particular constitutional order might emerge. He contends that this approach seeks to understand how a constitutional order is constituted; that is by the institutions, practices and politics which are enabled by a specific constitution and the extent to which the latter frustrates or is incongruent with the constitutional promise.

It is arguably correct that much of the academic energy which focused on transformative constitutionalism subsequent to the publication of Professor Klare's article has focused on the role of the Constitutional Court in interpreting the South African Bill of Rights and, more particularly, the jurisprudence relating to socio-economic rights. In this context, Klare's article raised significant concerns about the conservative nature of the South African legal landscape, peopled by judges and practitioners steeped

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[1] KE Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146

[2] H Klug 'Transformative Constitutionalism as a Model for Africa' in P Dann, M Riegner & M Bonnemann (eds) *The Global South and Comparative Constitutional Law* (2021) ch 6.

in legal positivism and lacking in the kind of sociological imagination which would develop a jurisprudence to ensure the vindication of South Africa's constitutional promises. But to restrict Klare's article's focus to so narrow a position is to miss the fundamental point of his argument, namely, that there is the potential for this new constitutional framework to facilitate a process of peaceful but radical social and economic change from a society steeped in racism and sexism towards the construction of an egalitarian democracy.

It is precisely because much of the focus has been on the interpretive question that a significant amount of the criticism levelled against the concept of transformative constitutionalism has missed its fundamental focus. Take the criticism offered by Sanele Sibanda. He is correct to argue that, instead of judging the progress of constitutionalism from the perspective of the interpretation of rights, including the right to equality or great provision of socio-economic rights, the key question is to determine the relationship of constitutionalism to the eradication of poverty.[3] But this observation concentrates on the core of the concept rather than on penumbral concerns. Hence, it is hardly a critique as opposed to a warning to focus on the key implications of transformative constitutionalism.

Once the idea of transformative constitutionalism is refocused in this direction, the heart of the project is grasped; that in the context of South Africa, the Constitution represents a substantive commitment to the transformation of the social and economic structure of the country through law. To be clear: this conception of transformative constitutionalism should not be taken to suggest that the political process is not crucial to the economic and social restructuring of South Africa. On the contrary, the failure of politics lies at the heart of the failure to vindicate the majestic vision of the Constitution. However, the legal system created by apartheid shaped this inherited economic and social structure. It is for this reason that transformative constitutionalism is linked to the critical legal realist idea that law both constructs a social life and significantly affects distributive outcomes in a range of key transactions and relationships, such as the employer-employee, the owner-neighbour, the landlord-tenant, the seller-consumer, and the husband-wife. Private law rules empower some actors while disempowering and subordinating others. For example, private law establishes ground rules that govern how a person acquires assets, and how they may be used. It focuses attention on how legal endowments work

[3] S Sibanda 'Not Purpose – Made? Transformative Constitutionalism, Post – Independence Constitutionalism and the Struggle to Eradicate Poverty' (2011) 22 *Stellenbosch Law Review* 483.

with others. Thus, the rights of a landowner negatively affect the interests of Q, a malnourished, homeless person, by demanding that Q pay rent to access P's property which would allow Q to produce an edible yield. Though grievous harm or even death may result, P is nevertheless legally privileged to refuse Q's request pursuant to the public policy decisions embodied in the common law of property, namely that the concept of ownership allows owners to exclude strangers and, if 'push comes to shove, to invoke the help of local authorities to use force to uphold owners' privilege to exclude.'[4] A common-law rule can significantly influence patterns of acquisition of property and the distribution of resources.[5] Apartheid was created by legislation and its structures underpinned by, for example, the common law of contract and property. The transformative challenge is to reshape the law so that the legal system promotes the democratic vision of the Constitution.

The challenge posed by this definition of transformative constitutionalism is based on the argument that all law, including private law, is central to the shape of the economic and social structure of society. By introducing a Constitution that applies both vertically and horizontally, the task of those mandated to enforce and develop the law was to integrate the legal system as a whole, particularly private law which is predicated on a laissez-faire conception of economic life with the foundational values of the Constitution. In this way, the legal system may promote rather than retard the journey towards a country based on freedom, dignity, and equality for all who live in it.

This project of legal renovation after the ravages caused by apartheid takes place within a specific economic context. More than a quarter century since the dawn of democracy, the egregious levels of inequality in South Africa have increased. In a recent report, it is suggested that 0.01 per cent of South Africans, meaning 3 500 individuals, hold 65 per cent of household wealth, more than the bottom 90 per cent combined. The top 10 per cent of South Africans earn more than 85 per cent of national wealth. The bottom 50 per cent have an average net wealth of minus R16 000, meaning their liabilities are more than their assets, or they are deeply in debt.[6]

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[4] DM Davis & K Klare *Critical Legal Realism in a Nutshell* in E Christodoulidis, R Dukes & M Goldoni (eds) *Research Handbook on Critical Legal Theory* (2019).

[5] See in general K Pistoor *The Code of Capital* (2019) which compellingly shows how the law shapes the distribution of wealth.

[6] Southern Centre for Inequality Studies *Distribution of Wealth in South Africa from 1993 to 2018* (2021).

The unemployment figures are equally bleak. As at the second quarter of 2021, the unemployment rate had increased to 34.4 per cent, and on the expanded definition this had now reached 44.4 per cent. That figure comprises an unofficial employment rate of 7.8 million, 3.3 million people available to work but who are discouraged work seekers and 0.8 million of those who have other reasons for not searching.[7] As at April 2021, according to Statistics South Africa, the upper-bound poverty line, one of three measures of poverty, was at an income level of R1 335. The middle level, the lower-bound poverty line, was at R890. The lowest level, the food poverty line, was at R624.[8]

These stark figures are a clear reminder of the degrading reality encountered by millions of South Africans who had hoped that the promises of a society based on freedom, equality and dignity for all 60 million who live within South Africa would have been honoured more in the compliance than in the breach. That inequality, unemployment and poverty continue to haunt this country remind us on a daily basis of the egregious damage caused by 350 years of racist and colonial rule. But it also represents a clear warning that a constitutional democracy cannot coexist in parallel with these socio-economic realities. Expressed bluntly, there cannot be a social practice of constitutionalism in a society which is so skewed to the benefit of so few.

Whatever the causes of the July 2021 unrest, and whoever might have instigated the widespread looting and violence that took place, a clear consequence does emerge from these events: failure to radically address the socio-economic realities outlined will result not only in further violence but the ultimate destruction of constitutional governance. In short, populism led by an authoritarian leader will find very fertile ground for growth.

Present economic policy clearly has been profoundly unsuccessful in addressing the economic and social problems described above. The gross domestic product (GDP) is projected to grow by 5.8 per cent in 2021 and 1.8 per cent in 2022.[9] Given the collapse of economic activity in 2020 representing a 7 per cent reduction in GDP, these projections for future growth, if correct, are hopelessly inadequate to address the current levels of poverty and unemployment.

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[7] Quarterly Labour Force Survey (QLFS) Q2: 2021.

[8] Statistics South Africa 'National Poverty Lines' 9 September 2021 http://www.statssa.gov.za/publications/P03101/P031012021.pdf (accessed 1 November 2021).

[9] OECD 'South Africa Economic Snapshot' May 2021 https://www.oecd.org/economy/south-africa-economic-snapshot/ (accessed 12 October 2021).

This bleak picture highlights the imperative to consider a new approach for the South African economy based on the vision of the Constitution. The entry of the Constitution into the economic debate should commence with a careful consideration of the importance during the preparation of the National Budget of the constitutional commitments to the right of access to housing, water, education, food and medical care. A comprehensive discussion is required as to how a national budget is formulated to vindicate these rights. In terms of the Constitution, these rights which form the core of a functioning social democracy, should constitute central considerations in any budgetary process. Thus, the design of the state's economic policy must be to focus on the vindication of these constitutional commitments. Beyond budgetary and legislative initiatives lies the domain of private power. As Justice Madala reminded us more than 20 years ago, with regard to the society constructed under apartheid: 'The extent of the oppressive measures in South Africa was not confined to government / individual relations but equally to individual / individual relations.'[10]

While economic policy has failed millions of South Africans miserably for the better part of the past three decades, the rents extracted by private power continue to be evident in the vast wealth captured by 3 500 individuals. As Karl Klare warned over 20 years ago, the myopic nature of the South African legal culture eschews a comprehensive investigation into the nature of private power and thus fails to hold it accountable to the commitments made to the South African population as set out in the Constitution.

For this reason, beyond economic policy, a transformative jurisprudence needs to deal with the pernicious effects of unaccountable power, both public and private in nature. To be fair, some measures have been taken to address the problem. The 2018 amendments to the Competition Act 89 of 1998[11] were designed to deal more comprehensively with the structures of the South African economy which has consistently been highly concentrated with significant barriers to entry, the exclusion, to a large extent, of small and medium-sized enterprises from participation in the mainstream economy, and the use of market power to extract excessive prices.

An additional focus could be found by way of changes to the Companies Act 71 of 2008 in order to ensure worker representation on boards and thus ensure the appointment of directors who, in turn,

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[10] *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) para 163.

[11] The Competition Amendment Act 18 of 2018.

may ensure that the stakeholders model of corporate law is strengthened within our legal system, thereby ending the dominance of shareholders at the expense of other constituencies which have vested interests in the success of the corporation. The Department of Trade, Industry and Competition has published a Companies Amendment Bill 2021[12] in which a number of amendments have been proposed to require both public and state-owned companies to publish details about the remuneration of directors and prescribed officer as well as the gap between the highest-paid and lowest-paid employees in their annual financial statements and reports. The motivation is that this set of disclosures will provide additional control over excessive remuneration and perceived injustices associated therewith, curtailing a board's desire to provide for excessive remuneration for fear of reputational harm and entrenching good governance principles, particularly insofar as remuneration policy is concerned.

Returning to lawyers, both practicing and academic, there is a continued and tenacious commitment to existing forms of common law. There is nary an attempt to interrogate the role that existing forms of private law play in continuing to reproduce patterns of power and thus inequality. Between the courts and the lawyers who appear before them, there is little understanding of the manner in which the common law can reinforce existing patterns of distribution and thus continue the perpetuation of the economic *status quo*. Lucy Williams has captured the importance of this challenge:

> *Poverty is also caused and sustained by the background institutions, rules and practices responsible for distributing wealth, income and wellbeing in society … Poverty is perpetuated when the political community leaves in place private – law rules property, contract, tort, inheritance, family law and so on that build inequality and poverty into the economic and social status quo.*[13]

This is a critical challenge for South African jurisprudence.[14] All too often, the argument is raised that courts are constrained by the pleadings in a case. This is hardly an excuse for a failure to examine the legal foundations

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[12] Government Notice 586 *GG* 45250 of 1 October 2021.

[13] L Williams 'Beyond the State: Holding International Institutions and Private Entities Accountable for Poverty Alleviation' in MF David, M Kjaerum & A Lyons (eds) *Poverty and Human Rights: A Research Handbook* (2021).

[14] As an illustration, see F Brand 'Equity and Certainty in Contract Law' 2021 *Acta Juridica* 141; D Hutchinson 'From Bona Fides to Ubuntu: The Quest for Fairness in the South African Law of Contract' 2019 *Acta Juridica* 99. It is this myopic view of private law that remains hegemonic in a country where private power holds as pernicious a set of consequences as did public power.

of the case and the imperative to develop the law in the direction of the normative framework of the Constitution.[15]

There have of course been, on fleeting occasions, a recognition of the importance of the perpetuation of poverty and vulnerability through existing legal structures.[16] The most compelling illustration is to be found in *Daniels*[17] where the Court sought to expand the rights of a vulnerable occupier, in this case to effect essential improvement to her dwelling when faced with a landowner who refused to consent to such improvements. In essence, the majority of the Court, through the judgment of Madlanga J, found that the vulnerable occupier had a right to effect these improvements without the consent of the owner, but subject only to a process of 'meaningful engagement' with the farm manager and owners in respect of the implementation of the proposed improvements.

In his judgment, Madlanga J sought to interpret the Extension of Security of Tenure Act 62 of 1997 by way of a careful analysis of the history of land dispossession suffered by the majority of the South African population through 350 years of colonial and apartheid rule. Like the earlier decision in *Modderklip Boerdery*,[18] *Daniels* represents an attempt to alter hitherto entrenched common-law property rights in which the owner had unfettered control of his or her property. In both judgments, the absolute claim on property by an owner was diluted thereby holding the possibility

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[15] In *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 83 the majority judgment accepts that a new law point can be raised on appeal, if sustained by the pleadings. It then dismisses the appeal on an approach to the pleadings that refuses to draw any reasonable inference about an imbalance of power between an individual insured and an insurer: 'There is no admissible evidence that the contract was not freely concluded, that there was unequal bargaining power between the parties or that the clause was not drawn to the applicant's attention. There is nothing to suggest that the contract was not freely concluded between persons with equal bargaining power or that the applicant was not aware of the clause. On the contrary, the indications are that he was aware of the time limitations. The contract required him to submit a written claim with the respondent within thirty days of the accident, but he submitted his written claim within at least eight days of the accident through his insurance broker.' In this way, contrary to the minority judgment of Moseneke J (as he then was), a narrow approach to pleadings results in a failure to embrace the transformative challenge.

[16] This is not to excuse a myopic legal profession that fails consistently to plead a case within the framework indicated by section 8(2) and (3) of the Constitution.

[17] *Daniels v Scribante* 2017 (4) SA 341 (CC).

[18] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA (CC).

of a transformative renovation to the common law of property. *Daniels* and *Modderklip* are only the start of the journey. As illustrated, a challenge remains as to how to reconfigure the elements of ownership so that those who can claim rights to a reconfigured property regime could use the rights so held as security to access capital to finance micro-enterprises. In turn this would allow for the creation of small enterprises that could help reconfigure the economy and give millions living currently on the margins an opportunity to attain a dignified life rather than hoping against hope for a job that may not come given the magnitude of levels of unemployment.

Regrettably, these two judgments are exceptions to a rule that has revealed a disturbing inability to grasp the essential nature of the realist point and with it the Constitution's ambition to curb the excesses of private power as much as it must public power.[19] The Constitutional Court has dallied around the fundamental problem of the exercise of private power in respect of the law of contract. A luminous recent example is to be found the majority judgment in *Beadica*.[20] In its narrow approach to contract law, the majority in *Beadica* failed to develop private law beyond the earlier judgment and confusing approach in *Barkhuizen*.[21] In *Barkhuizen,* the Court inexplicably appears to eschew the idea that the common law of contract was bound by the Bill of Rights. It then went on to find that the manner in which contract law can be developed is through the notion of public policy. The wide berth given to the direct application of the Bill of Rights to the law of contract is regrettably repeated in the various judgments in *Pridwin*;[22] in effect, following the approach that the doctrine of *pacta sunt servanda* is sacrosanct, save where a contractual clause runs contrary to public policy as interpreted through the prism of the spirit and purport of the Constitution.

Admittedly, there was an attempt at the application of section 8 of the Constitution in the majority judgment of Theron J in *Pridwin* but the ultimate finding was essentially to the effect that the validity of the contract does not have to be addressed because the primary challenge was

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[19] Apart from the interpretive guide under section 39 (2) of the Constitution, see the implications of s 8 as discussed in MH Cheadle, DM Davis & NRL Haysom *South African Constitutional Law: The Bill of Rights* (2002) ch 3.

[20] *Beadica 231 (CC) v The Trustees for the time being of Oregon Trust* 2020 (5) SA 247 (CC). In the interest of full disclosure, the present author wrote the judgment of the court of instance in this case, a judgment that essentially did not find favour with the majority of the Court.

[21] *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

[22] *AB v Pridwin Preparatory School* 2020 (5) SA 327 (CC).

focused on the conduct of the school in making a decision to expel children without a fair procedure and therefore acting contrary to section 28 of the Constitution. In essence, the problem in *Pridwin* was that, once section 8 of the Constitution had been considered, the Court was obliged to examine an approach to horizontal application as set out in section 8(3) which would have shaped the common law of contract in such a fashion that a new rule of contract would have emerged which is congruent with constitutional rights in general and section 28 of the Constitution in particular. That was the aim of section 8 and yet 25 years of constitutional litigation later, the promise of the Constitution remains at root a chimera rather than a reality for those whom it was targeted to help.

The methodology set out in section 8(2) and (3) of the Constitution, designed to engage with private law and its reproduction of existing power relations is rarely employed by counsel. But judges cannot be exonerated by this failure. The majority judgment in *Pridwin* represents a depressing inability to grasp the essential objective of this section. Had section 8 been applied, it would have meant that a new rule of common law based on the applicable constitutional right (section 28) would have been created. Thereafter, a fresh cause of action would not need to rely on the Constitution but exclusively on the newly developed common-law rule.

The Court thus limped towards the impoverished jurisprudence which emerged from the majority judgment in *Beadica*. The essential related issues in this case were whether renewal clauses in a contract of lease were properly enforced and a consideration of the justification offered by the applicants for failure to give the requisite notice before exercising an option to renew the relevant lease agreement. The majority paid but lip service to the development of the law of contract as inherited from the ancient regime and cleaved to the traditional approach which ignored the consequences of exercising unfettered private power. The dispute, which involved inexperienced, financially illiterate litigants, dictated more than a ritual incantation of the relevance of the Constitution to the law of contract. An embrace of the implications of transformative constitutionalism would have pointed in the direction of a different order.

To the argument that the facts constrained the Court, the answer is to be found in the minority judgment of Froneman J. Froneman J, to his great credit in his minority judgment, considered it possible to develop a standard to assess the conduct of various contracting parties in the instant case which would have been grounded in principles of reasonableness, fairness and good faith. In short, the minority judgment grasps the broader point of the manner in which private power influences the contractual outcome and thereby perpetuates systemic disadvantage which is inherent in the *status quo*. But this minority judgment will doubtless be greeted with

obstructive silence by the legal establishment.[23] The minority judgments of both Froneman J and Victor AJ understood that which is regrettably absent from the majority judgment; the dismissal of the appeal resulted in historically disadvantaged appellants losing their businesses and thus their ability to earn income. A preference for *pacta sunt servanda* over any other value resulted in devastating consequences for those whom a democratic society was supposed to benefit.

In conclusion, this paper has argued that the idea of transformative constitutionalism requires two essential moves if its promise is to be vindicated: an initial focus on an enquiry as to the manner in which law reproduces patterns of poverty and inequality to which reference has already been made. Thereafter, the challenge is to reconstruct the law that reproduces these patterns so that the legal system as a coherent whole is brought into alignment with the promises of the Constitution to develop a society based on freedom, dignity, and equality for all.

It has been argued that this challenge has to be met on a number of different fronts. Thus, the political terrain is obviously the most critical if the present depressing economic reality is to be redressed. There is an imperative to create and maintain a capable state that upholds principles of integrity, transparency and accountability to the citizenry of the country. None of these principles is consistently followed. Indeed, they have been sorely ignored for a number of years, most acutely during the so-called decade of state capture. Hence delivery of basic services never reaches many in need.

The political process needs to reconsider a range of legislative reforms, following the design of the recent changes in the realm of company law and competition law in order to address the excessive degree of private power that has reproduced the core of the economic *status quo* inherited from the apartheid regime. But this is no excuse to elide over the importance of legal change through the courts. The courts need to embrace a broader normative vision that would reveal an understanding of the consequences of private power and thus recognise the contribution of private law to the reproduction of inequality and poverty. That jurisprudence has to be both coherent and of general application. At present there is no developed normative framework to guide all courts in the journey to the attainment of transformation. Admittedly there have been pockets of an embrace of this challenge but overall transformative constitutionalism and much of the jurisprudence which emanates from our courts are distant cousins who do not appear to have met for 25 years. In the main, private law is

[23] See note 14 where an example is cited.

taught and litigated in similar fashion to that undertaken 30 years ago. This failure represents an inability to grasp the message of transformative constitutionalism as I have sought to define the term.

Without meeting all of these challenges, the constitutional project is in peril because an island of constitutional democracy cannot exist within a desert of poverty, inequality, and degrading life experiences that are suffered by millions on a daily basis.

FOUR STORIES OF JUDGES, GOVERNMENTS AND THE RULE OF LAW[*]

JOHAN FRONEMAN

Retired Justice of the Constitutional Court of South Africa

> *To assert the right to test laws that can only be changed by the supreme and sovereign authority that enacted them, was to arrogate to oneself the testing right that had been introduced to mankind by the Devil. God instructed Adam and Eve not to eat of the fruit of the tree of the knowledge of good and evil, upon the pain of death… The Devil tested them, by telling them that they will not die, but will become one with God and have no need of him … The testing right is the principle of the Devil…*[1]

I INTRODUCTION

This piece is written at a time of stress and turmoil in South Africa, following upon the committal of ex-president Zuma to jail for contempt of court, as ordered by the Constitutional Court.[2] Large scale looting and mayhem erupted after he was imprisoned,[3] of a kind not experienced since the advent of constitutional democracy in 1994.[4] The article is a personal

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[*] I am indebted to my former law clerk, Helen Taylor, for assisting with the research for this article. She has moved on from those law clerk days, but gladly helped despite her present commitments. The views and faults remain mine, but without her help they would have been the poorer.

[1] President Paul Kruger at his inauguration on 12 May 1898 as the fourth state president of the South African Republic. The quote is from D van der Merwe '*Brown v Leyds* No (1897) 4 or 17: A constitutional drama in four acts. Act Four: Kotzé delivers his judgement, Kruger dismisses him, Milner prepares for war and Brown seeks international redress' (2018) 24 *Fundamina* 120–160.

[2] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma* 2021 (9) BCLR 992 (CC) (handed down on 29 June 2021).

[3] Zuma handed himself over into police custody shortly before midnight on 8 July 2021. In the days that followed, KwaZulu-Natal and Gauteng were worst hit by targeted attacks on infrastructure, the burning of trucks and looting of shopping malls. President Cyril Ramaphosa's statement in response to the unrest provides a summary of key events during this period: South African Government 'President Cyril Ramaphosa: Address on acts of violence and destruction of property' 12 July 2021 https://www.gov.za/node/807706 (accessed 21 September 2021).

[4] The interim Constitution of 1993 came into effect on 27 April 1994, when South Africa held its first democratic elections, and was superseded by the

reflection on constitutional tensions arising from court decisions in four instances, three of them coming from our southern African past and one from the present. Do these hold any lessons for our constitutional future?

The first three 'stories' have been told well and comprehensively by others and I wish to record my gratitude and indebtedness to Professor Derek van der Merwe for his treatment of the first[5] and Justice Edwin Cameron for his treatment of the other two.[6] What follows is largely borrowed from their work.[7]

The first story is the 'constitutional drama' that played out between the judiciary of the then South African Republic, personified by Chief Justice Kotzé, and the executive and legislature, towered over by the imposing figure of President Kruger. We will find strange parallels or coincidences to the present in that story: a young state mired in allegations of corruption, commercial state favouritism of an elite few, and the beginnings of what is now often referred to as white monopoly capitalism. The outcome of that battle for a constitutional democracy that included a 'testing right' by the judiciary was decisive. Chief Justice Kotzé, who espoused the cause of judicial review, lost and was dismissed from his post. It took almost a century for the idea of a constitutional democracy that included judicial review of not only executive action, but also legislation, to find expression in our Constitution.

The second is the constitutional crisis surrounding the attempted removal of the so-called 'coloured vote' by the South African parliament in the 1950s. The initial brave rearguard action of the then Appellate Division

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Constitution of the Republic of South Africa, 1996 which came into effect on 4 February 1997.

[5] Van der Merwe (note 1 above). See also his fuller treatment in D van der Merwe *Brown v Leyds – Who has the Kings Voice? A President scorned, a Chief Justice Dismissed and a Prospector's Accursed Thirst for Gold* (2017).

[6] E Cameron 'Judges, justice, and public power: The Constitution and the rule of law in South Africa' (2018) 18 *Oxford University Commonwealth Law Journal* 73–97.

[7] This is a deliberate choice. The article is a personal reflection on the future resilience of constitutional democracy and the rule of law in South Africa. It does not purport to be a comprehensive academic or scholarly review of the subject. I consider these works to be, respectively, the best treatment of the history and legal implications of the constitutional crisis in the South African Republic, in the case of Professor Van der Merwe's work, and in the case of Justice Cameron, the most lucid and compelling articulation and defence of normative adjudication that I am aware of. Those interested in delving deeper may benefit from the literature referred to in these works.

to withstand the removal of the right to vote eventually succumbed to the enlargement of the Senate and the packing of the court with a more compliant judiciary.

The third concerns the unilateral declaration of independence (UDI) by the then government of Southern Rhodesia in 1965 and the Rhodesian High Court's response to a legal challenge to the validity of the declaration. Although ultimately the government's victory did not endure, the UDI won on the day and encountered little resistance from the Rhodesian judiciary.

The circumstances of each of these instances of potential conflict between the judiciary and the other two branches of government were different. That notwithstanding, all resulted in the eventual defeat or retreat of the judiciary. Is that reason for concern for our current situation?

The fourth story, about the circumstances surrounding the Constitutional Court's contempt of court judgment, is different in the sense that it involved no direct conflict between the judiciary and the other arms of government. But the civil unrest (called by some an insurrection against the state) following the detention of a former president of the country amplified the tension between the judiciary and some in the ruling party that has been in the making for quite some time.[8] This final part of the article will attempt to assess what the future may hold for the resilience of constitutional democracy, judicial review and the rule of law.

II THE BOER PATRIARCH VERSUS THE 'BOY JUDGE'[9]

The constitutional drama surrounding the assertion by the Supreme Court of the then South African Republic (ZAR)[10] of a testing right, or judicial review, of legislation or resolutions of the *Volksraad*[11] arose from the court's decision in *Brown*.[12] The main constitutional actors in this drama, however, were not the litigants themselves but the President of the Republic,

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[8] H Corder & C Hoexter '"Lawfare" in South Africa and its effects on the judiciary' (2017) 10 *African Journal for Legal Studies* 105, 111–116.

[9] Justice JG Kotzé was appointed to the High Court in 1877 at the age of 26 and 'referred to famously as the "boy judge" by Anthony Trollope': C van Onselen *The Cowboy Capitalist* (2017) 23.

[10] The '*Zuid-Afrikaansche Republiek*' in the original Dutch.

[11] The *Volksraad* was the elected legislative arm of the ZAR government.

[12] Brown was an American mining engineer who instituted action in the Supreme Court for a declaration that his pegging of 12 000 gold claims on the proclaimed Witfontein goldfield on the West Rand was valid, despite the suspension of the proclamation by the ZAR executive and *Volksraad*.

Paul Kruger, on the one hand, and the Chief Justice, JG Kotzé, on the other. In turn, they respectively represented or personified the traditionalist and progressive strains of Afrikaner male citizenry of the ZAR at the time.

Some historical context is needed for our purpose:

> *[The] remote origins of the [ZAR] lay in the Cape Colony, as part of a response to Britain's abolition of slavery. In the late 1830s, a substantial number of discontented Boer farmers, who saw their future bound to forms of pastoral agricultural production that were reliant on cheap, if not chattel, black labour, trekked north and settled beyond the Vaal River.*[13]

This terse summary refers to what others called the Great Trek.[14]

The ZAR Boers' first republic ended when the British annexed it in 1877 but in December 1880 the Boers went to war to fight for their independence from Great Britain. The British sued for peace in March 1881 and the peace terms were agreed to in the Pretoria Convention. It provided for the retrocession of the ZAR to the Boers, subject to British suzerainty.[15] The government and the *Volksraad* of the ZAR, however, regarded themselves as factually independent and set about rebuilding and strengthening the pre-1877 republican institutions and creating the conditions for economic independence. One of these was the Supreme Court of which JG Kotzé became Chief Justice in 1881.[16]

Derek van der Merwe has meticulously traced John Kotzé's conversion from upholding *Volksraad* supremacy in *McCorkindale*[17] to the explicit recognition of the judiciary's substantive power of review of *Volksraad* resolutions or legislation in *Brown*.[18] Jurisprudentially the Chief Justice had

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[13] C van Onselen *The Cowboy Capitalist, John Hays Hammond, The American West & The Jameson Raid* (2017) 22.

[14] Another Boer Republic, the Orange Free State, was established south of the Vaal River, its southern border, the Orange (now Gariep) River, adjoining the Cape Colony.

[15] Suzerainty meant that Great Britain controlled foreign affairs, the ZAR's relationships with its African inhabitants and neighbours and also protected the interests of resident British citizens.

[16] Van der Merwe (note 1 above) Act 3, Section 1, Introduction.

[17] *Executors of McCorkindale v Bok NO* (1884) 1 SAR 202.

[18] *Brown v Leyds NO* (1897) 4 OR 17.

been converted from Austinian positivism[19] to *Marbury*-style[20] American constitutional democracy.[21] He concludes that the Chief Justice's desire to promote the cause of an American-style constitutional democracy was misguided because 'he was too ready to attribute to the 1858 *Grondwet* characteristics it simply did not possess'.[22]

It is difficult to disagree with this assessment but for present purposes the interesting questions lie elsewhere. What are the circumstances that made Kotzé CJ change his mind? How could a constitutional democracy of the kind he espoused conceivably have arisen if circumstances were different?

For that kind of re-imagining Charles van Onselen's fascinating revisionist history of the Jameson Raid[23] provides crucial insights. He challenges the prevailing notion that the raid was merely a Boer versus Brit confrontation that can be assessed on the assumption that the ZAR was a fully-developed nation-state with strong institutions of government, rather than as a weak government in an underdeveloped state.[24] His research highlights the important, if not central, role an American capitalist, John Hayes Hammond, played in the conception and planning of the raid together with Leander Starr Jameson and Cecil John Rhodes,[25] combined with the large cosmopolitan and specifically American presence in Johannesburg during this period.[26] Van Onselen characterises the prevailing view as a failure in historical imagination which 'saps the desire to probe for schisms within Afrikaner society and fails to build on our existing understanding of, in the words of CT Gordon, "the growth

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[19] The British legal philosopher John Austin (1790–1859) was an early pioneer of analytical jurisprudence and, more particularly, the view of the law known as legal positivism which asserts that it is both possible and valuable to provide a morally descriptive account of the law. On Austin's brand of legal positivism, laws are the commands of the sovereign and, accordingly, the question of whether or not something is, properly speaking, a law is largely an empirical enquiry about power rather than morality. See generally, B Bix 'John Austin' in EN Zalta (ed) *The Stanford Encyclopedia of Philosophy* (2021).

[20] *Marbury v Madison* 5 US 137 (1803), which established the principle of judicial review in the United States.

[21] Van der Merwe (note 1 above) Act 4, section 3.

[22] Van der Merwe (note 1 above) Act 4, section 3.3.

[23] Van Onselen (note 13 above).

[24] Van Onselen (note 13 above) 530.

[25] Van Onselen (note 13 above) 17–22.

[26] Van Onselen (note 13 above) 531.

of Boer political opposition to Kruger"'. It was a mistake, Van Onselen says, that the Jameson Raiders themselves did not make.[27]

As noted earlier the government and *Volksraad* sought to rebuild the already shaky institutions that they hoped would ensure the ZAR's independence. On the economic front they sought to develop a state based on a dominant agricultural economy that would help feed a secondary industrial base in the urban centres which could provide a commercial outlet for agricultural produce. This developmental model was based on granting first-time producers monopolistic access to markets until a more diversified economy took root in a state where small-scale agricultural producers dominated the economy.[28] This policy of granting concessions in order to privilege a political dominant agricultural sector over secondary industrial development that created its own urban markets became a central tenet of economic policy of the ZAR and predated the discovery of gold.[29] It was a controversial policy that elevated the granting of sole commercial rights without a competitive process to facilitate the industrialisation of the economy and to make it less reliant on expensive international imports. Hugo Nellmapius introduced it to President Kruger.[30]

This policy was introduced to an undeveloped state. The ZAR police and prison administration was inefficient and weak. It was based on dealing with rural crime in country districts, not effective policing in cities. It led to corruption, as evidenced by the fact that in 1891, the Governor of the Pretoria prison and almost his entire staff were dismissed and that in 1894, the Commissioner of Police wrote an open letter to the press acknowledging 'the rottenness of the entire police force, but decline[d] to take to accept the disgrace attached thereto having striven to reorganize the same, but failed through lack of support'.[31]

The concessions policy spawned its own corruption, and court cases flowing from this played an important role in the developing drama between the President and Chief Justice of the ZAR. The *McCorkindale* case[32] dealt with the after-effects of a land concession granted in 1864 by President MW Pretorius.[33]

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[27] Van Onselen (note 13 above) 530.

[28] Van Onselen (note 13 above) 25; cf. Van der Merwe (note 1 above) Act 3, section 1.

[29] Van Onselen (note 13 above) 26.

[30] Van der Merwe (note 1 above).

[31] Quoted in Van Onselen (note 13 above) 24, n 8.

[32] *McCorkindale* (note 17 above).

[33] Van der Merwe (note 1 above) Act 2, section 5.

People close to President Kruger benefitted from these concessions. Nellmapius, the inspiration for the adoption of the policy, was by 1885 'a man of great influence, an owner of many concessions, a facilitator of the purchase and sale of many concessions and esteemed consultant to Paul Kruger and his executive on commercial opportunities in the Republic'.[34] The first concessions (*De Eerste Fabrieken*) were granted to him. In 1882 he ceded his concession to manufacture gunpowder and ammunition to Samual Marks and Isaac Lewis, also influential figures close to Kruger and his executive.[35] This led to what Van der Merwe calls the Nellmapius affair, where he was charged with fraud and found guilty of theft by means of embezzlement and sentenced to 18 months hard labour. Nellmapius first appealed against the finding, then withdrew the appeal and sought a pardon, which was granted. A stand-off between the executive and judiciary ensued, presaging the later final confrontation in *Brown* about the limits of judicial power.[36]

The discovery of gold on the Witwatersrand in 1886 upended not only the primacy of commercial agriculture but also threatened to upset the political foundation of the ZAR. The mining industry became the mainstay of the economy. It competed with the agricultural sector for cheap black labour and the concession policy was extended to goods and services that influenced mining prospects.[37] The seat of political power remained in Pretoria, but the economic power lay in Johannesburg. The lack of a mature, efficient state and other institutions to balance these forces had to be found elsewhere:

> *[T]he classic short-circuiting mechanism was corruption. In developed economies, where wealth is well-entrenched within certain sectors … money is often used to acquire high political office. In underdeveloped or persistently weak economies, where money is harder to come by … it is high office and the selling of favours that is most often used to acquire wealth….Lacking the political clout to effect the economic outcomes they desired, the mining companies and mining owners became vectors of corruption in a state they never ceased to characterize as being as backward and obstructive as it was antiquated and venal.*[38]

Things got worse though.

In Van Onselen's re-telling, the plan for the insurrection now known as the Jameson Raid was originally hatched by an American, an Englishman

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[34] Van der Merwe (note 1 above) Act 3, section 3.

[35] Van der Merwe (note 1 above) Act 3, section 3.

[36] Van der Merwe (note 1 above) Act 3, section 3.

[37] Van Onselen (note 13 above) 26.

[38] Van Onselen (note 13 above) 26–27.

and a Scot on a safari to Matabeleland in August-September 1894. These three men were John Hays Hammond, Cecil John Rhodes and Leander Starr Jameson. In the following months, they revised and refined the plan as circumstances changed.[39] Jameson would invade with his army from Bechuanaland to be joined by a miners' uprising in Johannesburg itself. However, Jameson invaded prematurely, unauthorised by his co-conspirators, and the insurrection ended ignominiously at Doornkop on the West Rand.

Two insights from Van Onselen's revision of that history are relevant here. First, that the history must include

> *the machinations of a small Boer fifth column, composed largely of urban Afrikaner professionals who were already reconciled to the notion of an economy that would no longer be agricultural-industrial but industrial-agricultural, and who were ready to give their backing to the disaffected Vice President of the republic, General Piet Joubert.*[40]

The second is that it was a joint Anglo-American conspiracy in which both the British and American conspirators initially sought the overthrow of the Kruger government and the installation of a mutually agreed more sympathetic provisional government in a still independent republic. Where they differed was in the end-product. The British eventually wanted to see the ZAR formally incorporated into the British Empire, while the American partners sought 'to absorb [the ZAR] into an informal American empire that was on the very threshold of dramatic expansion'.[41]

Chief Justice Kotzé was not a co-conspirator or member of any fifth column, but he was certainly one of the 'progressives' in the ZAR. The Boer Republics were already sympathetic to American constitutional ideas, albeit always in a racist form. The influx and influence of Americans after the discovery of gold might have strengthened and refined progressive Boer thought about American style constitutionalism.

The judgment in *Brown* was handed down on 22 January 1897, 18 months after Brown had instituted action and a year after the failure of the Jameson Raid. As pointed out by Van der Merwe, the legal framework for asserting the right of judicial review of *Volksraad* legislation or resolutions was weak. But Kotzé had also lost the political battle by then. The Boer progressives were on the back foot. The judiciary lacked both

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[39] Van Onselen (note 13 above) 8.

[40] Van Onselen (note 13 above) 471. See also C van der Merwe *Donker Stroom – Eugène Marais en die Anglo-Boereoorlog* (2015).

[41] Van Onselen (note 13 above) 471.

the legal and political legitimacy among those who counted to win the struggle for a testing right. Kotzé was dismissed as Chief Justice and Brown was never paid. Could it have ended differently if the Anglo-American conspiracy had succeeded in setting up a more sympathetic Boer government? Who knows? But even if the empire to which it would be more sympathetic was the informal American version, then in the making, rather than the formal British Empire, the modern industrialised economy would still have been dependent on 'a politically enslaved, economically exploited and socially impoverished African proletariat'.[42]

And so formal, positivist legalism and conservative political power won the day in a young state struggling to cope with the messy business of establishing and consolidating the kind of capitalism that would form the basis of its economy. The orthodoxy of Boer-Brit confrontation and racial discrimination would cast a long shadow over the history of the next century.

III LEGALISM HOLDS SWAY

By the 1950s a racist, industrialised capitalist economy, based largely on mining, was firmly established in South Africa. The Boer-Brit antagonism was, however, still very much alive. After the victory of the National Party in the 1948 election, it set about putting in place its policy of separation of races, *apartheid*. The Appellate Division of the South African Supreme Court attempted to stop part of this policy, the removal of so-called 'coloured' voters from the common voters' roll, in a series of cases starting in 1952. It was a brave effort, but in the end it too failed, some five years later.

The Appellate Division first nullified the Separate Registration of Voters Act 46 of 1951 in *Harris 1*.[43]

Centlivres CJ delivered the unanimous judgment in *Harris 1*. The Court held that the Separate Representation of Voters Act contravened sections 35 and 152 of the South Africa Act 1909 (1909 Act) because it had been passed by a simple majority of the two houses of parliament sitting separately, rather than the required two-thirds majority of a joint sitting of both houses of parliament. 'Parliament', the Court held, meant Parliament as defined in and functioning under the 1909 Act, a statute of the United Kingdom (UK) Parliament that constituted the South African Parliament. So even though Parliament became fully 'sovereign' after the passage of the Statute of Westminster in 1931, and could legislate in

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[42] Van Onselen (note 13 above) 13.

[43] *Harris v Minister of the Interior* 1952 (2) SA 428 (AD).

sovereign capacity to remove 'coloured' voters from the common voters' roll, it could only do so in accordance with the safeguards enacted in the 1909 statute, which required it to sit unicamerally, securing a two-thirds majority, when doing so.

On the same day judgment was handed down in *Harris 1*, Prime Minister DF Malan publicly denounced the Appellate Division's decision as unacceptable. Speaking in the House of Assembly, Malan announced that the government refused to abide by it and would take steps to restore parliamentary sovereignty by eliminating the Appellate Division's 'testing right'. The High Court of Parliament Act 35 of 1952 subsequently established a 'court' constituted by members of Parliament which had the power to review and overturn any decision of the Appellate Division. This too was challenged and unanimously held to be invalid by the Appellate Division in *Harris 2*.[44] The Appellate Division held that the High Court of Parliament Act, which after the decision in *Harris 1* constituted Parliament (consisting of all its Senators and Members) as a court of appeal over decisions of the Appellate Division, was itself invalid because it had not been adopted in accordance with the procedure prescribed by the 1909 Act.

The Appellate Division overruled its own previous decision of just 15 years before, which had decided the contested issues in precisely the opposite way in *Ndlwana*.[45] The *ratio decidendi* of *Ndlwana* was that a court of law has no power to declare that a sovereign parliament cannot validly pronounce its will unless it adopts a certain procedure. Commenting on this case, Edwin Cameron notes:

> *The Court clearly regarded the argument to the contrary as entirely implausible and even somewhat ridiculous: "It is obviously senseless to speak of an Act of a Sovereign law making body as ultra vires. There can be no exceeding of power when that power is limitless".*[46]

But the battle was still far from over. The subsequent reconstitution of the upper house of parliament through the Senate Act 53 of 1955 meant that the Senate was now packed with enough National Party members to ensure that government would secure the two-thirds majority in the joint sitting required to repeal the entrenched provisions protecting the so-called 'coloured vote'. The Appellate Division Quorum Act 27 of 1955 also expanded the Appellate Division bench to 11 judges, thus allowing the government to pack the court itself with judges sympathetic to the Nationalist agenda.

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44 *Minister of the Interior v Harris* 1952 (4) SA 769 (A).

45 *Ndlwana v Hofmeyr NO* 1937 AD 229.

46 Cameron (note 6 above) 8 n 52.

The reconstitution of the Senate was challenged in *Collins*.[47] At issue was whether Parliament could by ordinary procedure enlarge the Senate for the sole purpose of creating the two-thirds majority the 1909 Act required. Centlivres CJ, for the majority of the enlarged court, held that the purpose for which the legislation was enacted was irrelevant. This was because, once a power exists, 'it becomes irrelevant how, upon what grounds, or for what purpose it is exercised'.[48] The dissenting judgment by Schreiner JA asserted the contrary. While Parliament could in general create any form or type of Senate it wanted using ordinary procedures, when it came to protecting the specially entrenched 'coloured' franchise, the court had to look beyond form alone. It had to scrutinise the substance of the legislative device. Schreiner JA would have struck down the artificial enlargement of the Senate.[49]

By the time these decisions were handed down, South Africa had been a nation state since 1910, albeit still one based on race discrimination. Its political and economic institutions, formal and informal, were not 'backward' anymore and were working efficiently if oppressively. Its security apparatus was to become brutally efficient in the decades to come. But at least in two respects it remained similar to the ZAR. Its dominant legal framework was still formal and legalistic, and political power still lay in the hands of a conservative white minority. The National Party had won power in the 1948 election and the apartheid state was in the making.

IV RHODESIA'S UNILATERAL DECLARATION OF INDEPENDENCE

On 11 November 1965, Ian Smith, the Prime Minister of the white minority government of Southern Rhodesia, unilaterally declared Rhodesia independent of the UK.[50] The trigger was the British

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47 *Collins v Minister of the Interior* 1957 (1) SA 552 (A).

48 *Collins* (note 47 above) 565G.

49 See the discussion of the 'coloured vote' cases in Cameron (note 6 above) 8–10; also DM Scher '"The court of errors" — A study of the high court of parliament crisis of 1952' (1988) 13 *Kronos* 23; E McWhinney 'Court versus legislature in the Union of South Africa: The assertion of a right to review' (1953) *Canadian Bar Review* 52; B Beinart 'The South African Appeal Court and judicial review' (1958) 21 *Modern Law Review* 587.

50 Since the protectorate of Northern Rhodesia ceased to exist when Zambia became independent on 24 October 1964, the white government of Southern Rhodesia took to calling the country Rhodesia, but since the statutory instruments emanating from Crown rule had not been changed, the new name was unofficial, Cameron (note 6 above) 1, n 1.

government's insistence that Smith accepts majority rule. Smith, who refused to compromise the supremacy of Rhodesia's white minority, decided to go it alone.[51] Since the source of his government's power was the Crown and the authority Parliament in Westminster had conferred on it, the UDI was unlawful and an act of rebellion against the Crown. The United Nations Security Council swiftly imposed an oil and arms embargo.[52] In London, Parliament passed legislation declaring the regime illegal and its actions without a lawful warrant.[53] Apart from South Africa and Portugal, no country recognised Rhodesia as 'independent'.

The Smith government had, pre-UDI, locked up one of its opponents, Mr Daniel Nyamayaro Madzimbamuto, without trial. The authority for his initial detention was a pre-UDI statute of the Southern Rhodesian Parliament.[54] The Smith regime sought to prolong Mr Madzimbamuto's detention. It did so under an instrument Mr Smith and his Cabinet themselves purported to issue by proclamation: the 'new' 'Constitution of Rhodesia, 1965'.

A number of legal challenges followed. Their outcomes were contradictory.

In Salisbury (now Harare), the courts upheld the Smith government's powers.[55] In London, the Privy Council did the opposite. It held that the Smith government's enactments had 'no legal validity, force or effect' and that the Rhodesian courts were wrong to have held otherwise.[56]

In the Rhodesian Court, Beadle CJ, purportedly relying on the positivist theory of Hans Kelsen, held that there had been a *de facto* change of government and that the Rhodesian government had effectively usurped governmental powers granted under the 1961 Constitution. This clothed it with effective authority. In consequence it could lawfully do anything its predecessors could lawfully have done under the 1961 Constitution.[57] It followed that the courts should recognise the new government's powers.

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[51] Cameron (note 6 above) 1, n 2: 'The terms of the Declaration were, rather grandiosely, modelled on those the American colonists had employed nearly two centuries before in establishing the United States of America (though the Rhodesians failed to mention that "all men are created equal" or that government existed by the "consent of the governed").'

[52] UNSC Res 216 (12 November 1965); UNSC Res 217 (20 November 1965).

[53] Southern Rhodesia Act 1965.

[54] The Emergency (Maintenance of Law and Order) Regulations of 1965.

[55] *Madzimbamuto v Lardner-Burke* 1968 (2) SA 284 (Appellate Division of Southern Rhodesia (RA)).

[56] *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 (Privy Council (PC)) 731E–F.

[57] *Madzimbamuto* (note 55 above) 352, 359–60.

He denied that in doing so he and the other judges were 'joining the revolution'. Even a judge sympathetic to those seizing power, he said emphatically, 'should declare the law objectively'. 'He must declare the law as it "is", and not as it "was", or as what he thinks it "ought" to be.'[58] He further said that 'in a revolutionary situation the political views of the judge do not play any more significant a part in determining what the law is than they do in normal times.' The judge's disapproval of a statute, no matter how strong, 'cannot affect the validity of the law'. Short of resigning, the judge 'must apply the law as it "is"'.[59]

On appeal to it by Mrs Madzimbamuto the Privy Council concluded that though the Rhodesian judges had been put in a very difficult position, nothing could justify their disregard of the legislation the UK Parliament had adopted. The usurping government could not be regarded as a lawful government.[60] The Rhodesian judges ought to have refused to enforce the Smith regime's legal instruments: they should have resisted the rebellion, instead of aiding it. Lord Reid, who delivered the majority judgment, quoted from an 1872 decision of the United States Supreme Court, which invoked 'the difference between submitting to a force which could not be controlled' and 'voluntarily aiding to create that force'.[61]

Much has been written about this episode, but for current purposes, the last word is Edwin Cameron's:

> *This exposed as a moral sleight of hand the notion of Beadle CJ that the Rhodesian judges were politically neutral agents whose decisions could not contribute to, still less determine, the success or failure of a revolution. For the Rhodesian judges did not sit outside the revolutionary change of power that Ian Smith's declaration of independence brought about. They were not its objective witnesses nor its neutral arbiters, determining from some external Archimedean point whether a change of power had occurred. On the contrary, as the Privy Council's judgment implied, they were themselves deeply implicated in the seizure of power. Their assessment of the efficacy of the revolution was itself an integral factor determining whether the Smith regime's overthrow of British power in Rhodesia would succeed. If the Rhodesian judges had refused to recognise Smith's seizure of power, it would have been crucially and perhaps critically incomplete, and UDI might have failed. Instead, the judgment of Beadle CJ cast over Smith's racist, white-supremacist regime a judicial mantle of legitimating authority. This enabled it to exercise its menacing power for nearly 16 years, as increasing warfare, bloodshed, civilian loss of life, and inflammatory racial animosity engulfed the region.*[62]

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58 *Madzimbamuto* (note 55 above) 327C, 328C.

59 *Madzimbamuto* (note 55 above) 328D–E.

60 *Madzimbamuto* (note 56 above) 725.

61 *Hanauer v Woodruff* 82 US 439, 449.

62 Cameron (note 6 above) 6–7.

In the Rhodesian courts, at least, the same features of a dominant formal and legalistic framework and political control by a conservative white minority existed, as they did in the ZAR and Union of South Africa in our first two examples.

V JUDICIAL REVIEW MAKES A COMEBACK — IS IT RESILIENT ENOUGH?

None of the systems of government in our first three stories survived. All three were white minority governments. In South Africa, of which the ZAR landmass became a part, and Zimbabwe, these minority governments were replaced by majority governments chosen by universal adult suffrage. Does that guarantee continued success?

In South Africa,[63] we have secured a democracy founded on a Constitution that embodies the aspirations of all South Africans. It is rightly hailed as one of the most progressive Constitutions in the world — not just for its comprehensive embrace of fundamental rights and freedoms, but also for its transformative ambitions to realise a society based on freedom, dignity and equality. Important in this regard is the Constitution's commitment to justiciable social and economic rights. While constitutions are often thought of as setting constraints on government to impede change, our Constitution demands change in recognition of our deeply unequal and racist past. It is thus not simply a formal document regulating public power, but 'an objective, normative value system'.[64]

This has significant implications for the judicial role. It means that judges cannot claim adjudication is a value-neutral task of merely 'applying the law' in a legalistic fashion. The Constitution is not value-neutral, and judges are tasked with promoting those values in order to realise its transformative potential. This places a tremendous responsibility on the judiciary because the inclusion of socio-economic rights recognises that the material conditions of life determine the extent to which more abstract rights such as freedom of speech, association, movement and conscience may be exercised — '[i]n short, one's capacity to exercise these rights depends on whether one is hungry or well-fed … If the Constitution fails to render that kind of palpable justice it will rightly be held to have failed'.[65]

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[63] The experience of Zimbabwe after independence may hold lessons for South Africa, but this falls beyond the scope of this article.

[64] *Carmichele v Minister of Safety and Security* 2011 (4) SA 938 (CC) para 54.

[65] Cameron (note 6 above) 13–14.

That responsibility, however, is not only that of the judiciary. It is also, and primarily, the duty of the elected government. The tension between the executive and legislature on the one hand, and the judiciary on the other, arises when courts are called upon, by virtue of the principles of constitutional supremacy and judicial review, to state that the elected government has fallen short in that regard.

This model of constitutional supremacy entrusts the Constitutional Court with a special responsibility to pronounce finally on what the Constitution requires. It follows that where the Court's authority is undermined through wilful non-compliance with court orders, the rule of law and the supremacy of the Constitution may be called into question. And this is where the Zuma contempt case and its aftermath enter the picture, as the final story of this piece.

During the years of the Zuma presidency, there was at times a virulent and sustained attack on the judiciary,[66] and complaints by some within government of 'judicial overreach'.[67] During those same years it has been graphically illustrated to the people of South Africa in the televised hearings before the Zondo Commission[68] that corruption and the undermining of state institutions occurred on a massive scale.

Implicated parties were required to come and explain their alleged conduct in evidence before the Commission. Ex-President Zuma was one of them. He initially complied, but then complained of bias on the part of the Commission and refused to give further evidence before the Commission. This led to a successful application by the Commission for direct access to the Constitutional Court for him to be ordered to comply with directives and summonses issued by the Commission.[69] The ex-President failed to comply with the Commission's directives and summons.Yet again, the Commission approached the Constitutional Court by way of direct access, this time for ex-President Zuma to be committed to prison for contempt of court. He was found guilty of contempt and sentenced to 15 months imprisonment.[70] After initial hesitancy or confusion on the part of the Police as to whether they should arrest him as ordered by the Court, ex-President Zuma handed himself over and started serving his sentence at the Estcourt correctional facility.

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66 Corder & Hoexter (note 8 above).

67 Cameron (note 6 above) 15.

68 *Secretary of the Judicial Commission of Inquiry* (note 2 above).

69 *Secretary of the Judicial Commission of Inquiry* (note 2 above).

70 *Secretary of the Judicial Commission of Inquiry* (note 2 above).

Following upon that, widespread looting and civil unrest ensued in the provinces of Kwa-Zulu Natal and Gauteng, which caused great damage to the economy. The disturbances were eventually brought under control, not only by the security services but also by huge scale involvement of communities in the protection of their own. If this was indeed a planned insurrection by disaffected members of the ruling party with the eventual aim of regaining control of government, it appears that it failed, at least for now.[71]

It is time to take a deep breath and consider what we may learn from these four different stories. The first three tell of a retreat from, or defeat of, moral and substantive judicial reasoning and giving way to formalism, legalism and positivism. Despite the different circumstances of each, they all had this in common: (1) a legal framework or culture incompatible with or unsuited to the assertion of judicial power in the form of judicial review and constitutional supremacy and (2) political power in the hands of a conservative white minority. It is tempting to think that of all three, the ZAR might have had the best chance of establishing at least a racial form of constitutional supremacy and judicial review along American lines. It was a developing state with republican tendencies sympathetic to these ideas, but it was thwarted by its own weak institutions and pervasive corruption, manipulated and used effectively by the economically stronger interests of mining capital. Once the battle for the 'testing right' was lost there, it set the course for the tragic and fateful history of South and Southern Africa for the most part of the twentieth century. By the time of both the 'coloured vote' cases and the UDI, legal formalism and white minority rule were firmly established and seemingly entrenched.

But these three forms of government did not survive in the end. Not primarily because judicial review and constitutional democracy were absent, but because substantive justice was denied to the majority of the populace. Our Constitution sought to address these defects by accepting the principle of constitutional supremacy and judicial review and the

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[71] Cf. J Netshitenzhe 'Beating the counter-revolutionaries: South Africa's people are the ultimate defenders of democracy' 2 August 2021 https://www.dailymaverick.co.za/article/2021-08-02-beating-the-counter-revolutionaries-south-africas-people-are-the-ultimate-defenders-of-democracy/ (accessed 21 September 2021):

> 'One central lesson from this experience is that security interventions, both proactive and reactive, have their limitations. The defence force deployment can only be temporary. The solution lies in mobilising the people into political motion for good. They are the ultimate defenders of democracy that no counter-revolutionary can defeat.'

deracialisation of our laws, but it would be foolish to think that merely that is enough.

The resilience of our Constitution depends not only on these features of the Constitution, but as importantly on the fact that our courts, and in particular the Constitutional Court, have given bold and courageous decisions to 'define and strengthen our democracy at moments when it has trembled'.[72] In turn, the broader impact of constitutional rights lies in the widespread dissemination and internalisation of constitutional values among the broader populace.[73] And that leads to the last and in the end most important aspect of constitutionalism, namely that our people will not easily be bamboozled again. South Africans 'have fought once against tyranny, and prevailed, and the victory has left them salutarily sceptical of power'.[74] This was shown, again, in the recent 'insurrection', when ordinary people did not allow the initial failure of political power by the state or the assertion of political power by would-be insurrectionists to deprive them of their future.

What still remains, however, for all of us, is substantive justice for all, so that we can be certain that all are well-fed and not hungry, in order to enjoy the other rights of freedom, dignity and equality under the Constitution fully. It is a huge task.

For the moment, though, I salute the courage of erstwhile colleagues. The first paragraph of the majority judgment in the Zuma contempt case asserts:

> *It is indeed the lofty and lonely work of the Judiciary, impervious to public commentary and political rhetoric, to uphold, protect and apply the Constitution and the law at any and at all costs. The corollary duty borne by all members of society — lawyers, laypeople and politicians alike — is to respect and abide by the law, and court orders issued in terms of it, because unlike other arms of State, courts rely solely on the trust and confidence of the people to carry out their constitutionally-mandated function. The matter before us has arisen because these important duties have been called into question, and the strength of the Judiciary is being tested.*[75]

It is not only the strength of the judiciary that is being tested, but the strength of our chosen democracy. As Corder and Hoexter rightly observe, 'public confidence [is] the ultimate currency of judicial legitimacy'.[76]

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72 Cameron (note 6 above) 16.

73 Cameron (note 6 above) 19.

74 Cameron (note 6 above) 20.

75 *Secretary of the Judicial Commission of Inquiry* (note 2 above) para 1.

76 Corder & Hoexter (note 8 above) 126.

THE DEPENDENCE OF JUDGES ON ETHICAL CONDUCT BY LEGAL PRACTITIONERS: THE ETHICAL DUTIES OF DISCLOSURE AND NON-DISCLOSURE

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I INTRODUCTION

Judicial ethics and legal professional ethics, as illustrated in the judicial code of conduct and the code of conduct for legal practitioners, prescribe normative obligations which are functionally interrelated. The demand made on judges to conduct efficient and fair hearings is dependent on adherence by legal practitioners to the legal profession's ethical norms. The primary duty of legal practitioners is to the court rather than to the client and thus legal practitioners are obliged to actively support the efficacy of the court process. One aspect of this dependence is illustrated in this article: the duty of legal practitioners to respect and support the process of court by making proper disclosure and not mislead the court. It is argued that the culture of contemporary litigation must be more respectful of this interrelationship between the judge and the legal practitioner to produce efficient and fair litigation.

Judges are recognised as the iconic deliverers of justice. What might constitute substantive justice is something about which reasonable people often differ. However, there are few serious differences of opinion about procedural justice: everyone wants expeditious and fair hearings. Who is responsible for making this happen? The South African Judicial Code of Conduct (JCC)[1] provides that this is the judge's job.

The advent of written judicial codes of conduct came late to the world of law.[2] By contrast, the legal professions, both attorneys and advocates,

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[1] Issued in 2012, pursuant to the Judicial Service Commission Act 9 of 1994, s 12; GN R865 *GG* 35802 of 18 October 2012.

[2] In 2002, the Bangalore Principles were enunciated. See https://undoc.org.crime.judicial_group/Banglore Principles (accessed 1 October 2021). This was a culmination of a movement by several states who were members of the United Nations to produce the global gold standard for judicial ethical conduct. Prior thereto, the American Bar Association Code of Conduct for United States judges, first formulated on 5 April 1973, and continually revised, had been the forerunner.

have had written codes of ethics for generations. Axiomatically, many of the moral premises that underpin the ethics of legal practice have their counterparts in the ethics of the judiciary. The character of the legal system results in symbiotic roles for litigators and adjudicators, both functioning to operate the system optimally.

This paper explores one aspect of this interrelationship between judicial and legal professional ethics: the practices necessary for the conduct of effective hearings, that is, hearings characterised by efficient and fair processes aimed at just outcomes. It is argued that the actualisation of that aspiration is critically dependent on legal practitioners observing the legal profession's ethical norms. Their commitment to the court process, in particular, through proper disclosure practises, is the focus of the paper. The dependence of the judge on adherence by legal practitioners to those ethical norms is demonstrated. [3]

Additionally, it is argued that the demands of modern litigation culture require a significant degree of a common understanding of, and commitment to, the court process by all the professional actors in court proceedings to achieve effective litigation and fair outcomes. This need for such commitment is all the greater because of the pressures on judges derived from burgeoning caseloads, increased complexity of litigation and limited material resources available to the judiciary. Moreover, several *mala fide* practises by legal practitioners who abuse the process of court exacerbate dysfunctionality in proceedings. Failure to observe proper disclosure and non-disclosure is one such abuse.[4]

The United Kingdom Supreme Court published a code in 2009. South Africa participated in the formulation of the Bangalore Principles and our own code reflects the norms encapsulated therein.

[3] The argument in this article is driven by the proposition that the judge is 'dependent' on ethical conduct by a practitioner, rather than merely 'reliant' thereon. In the sense used in this article, 'reliance' is understood to mean that the judge could by independent enquiry become informed of information that a legal practitioner ought to present to the court, if let down by the practitioner. 'Dependence' denotes that in the absence of the legal practitioner behaving appropriately, the judge is impotent to prevent abuse of the court process, albeit *ex post facto*, if abuse occurs and is uncovered, some remedial action may sometimes be possible.

[4] South African courts are bedevilled by several species of misconduct by calculated to frustrate or abuse the process of court. Gamble J in the Western Cape High Court referred a serial latecomer counsel to the LPC for professional misconduct. Nonetheless the trial was delayed. See T Broughton 'Judge scolds 'blatantly dishonest' Cape Town advocate over trial delays, refers to Legal Practice

II THE JUDGE

In the South African *Norms and Standards for the Performance of Judicial Functions*,[5] paragraph 5.1(ii) requires that—

> *Every judicial officer must dispose of his or her cases efficiently, effectively and expeditiously.*

This injunction is echoed in article 10(1)(*c*) of the JCC:

> *[A judge must] dispose of the business of the court promptly and in an efficient and businesslike manner.*

The role of the judge is regulated by several articles in the JCC. These articles are couched in emphatic terms. Article 9 on a 'fair trial' and article 10 on 'diligence' are where most of the significant ethical prescriptions are located.

Article 9 provides:

> *A judge must—*
>
> *(a) resolve disputes by making findings of fact and applying the appropriate law in a fair hearing, which includes the duty to—*
>
> (i) *observe the letter and spirit of the audi alteram partem rule;*

Council' 21 September 2021 https://www.dailymaverick.co.za/article/2021-09-15-judge-lambasts-blatantly-dishonest-cape-town-advocate-over-trial-delays-refers-to-legal-practice-council/ (accessed 1 October 2021). The 'Stalingrad' tactic of delaying the progress of a case by exploiting every opportunity to challenge the opponent, often on ostensibly trivial or specious grounds is rife. Retired Judge Cameron has been vocal in condemning this practice and has called for the legal profession and the judiciary to take a harder line with unscrupulous lawyers who delay matters cynically. See E Cameron, JJ du Toit & A Katsiginis 'Justice postponed: What causes unreasonable delays in criminal trials?' December 2020 https://www.derebus.org.za/wp-content/uploads/2020/12/DR_Journal_December_2020.pdf (accessed 1 October 2021). Also see the comment thereon in Professor Balthazar 'We will always have Stalingrad' 26 July 2021 https://www.dailymaverick.co.za/opinionista/2021-07-26-we-will-always-have-stalingrad/ (accessed 1 October 2021). An attempt by a mining company to silence critics who were challenging it for alleged environmental degradation, by a defamation suit, was dismissed as an abuse of the court by Goliath J, branding it a SLAPP suit (a Strategic Lawsuit Against Public Participation). See J Yeld 'SLAPP in the face for Australian mining company' 10 February 2021 https://www.groundup.org.za/article/slapp-face-australian-mining-company/ (accessed 1 October 2021). These abuses are beyond the scope of this article and warrant discrete attention.

[5] GN R147 *GG* 37390 of 28 February 2014.

(ii) *remain manifestly impartial; and*

(iii) *give adequate reasons for any decision;*

(b) in conducting judicial proceedings—

(i) *maintain order;*

(ii) *act in accordance with commonly accepted decorum; and*

(iii) *remain patient and courteous to legal practitioners, parties and the public, and require them to act likewise;*

(c) manage legal proceedings in such a way as to—

(i) *expedite their conclusion as cost-effectively as possible; and*

(ii) *not shift the responsibility to hear and decide a matter to another judge; and*

(d) not exert undue influence in order to promote a settlement or obtain a concession from any party.

Sub-articles (*a*) and (*d*) describe conduct which the judge can, mostly, perform unilaterally. But (*b*) and (*c*) involve direct interaction with counsel and witnesses. As the following shows, notes in the JCC appended to each article offer guidance:[6]

9 (i): *The duty to grant a fair hearing does not preclude a judge from keeping a firm hand on proceedings. In general—*

(a) reasonable time limits may be laid down for arguments, which may also be cut short when the judge is satisfied that further argument would not be of material assistance;

(b) the examination and cross-examination of witnesses should be curtailed if it exceeds reasonable bounds; and

(c) applications for postponement and the like must be scrutinised for real merit and must be dealt with firmly and fairly.

…

9 (vi): *A judge may in appropriate instances advise parties to consider settlement of a case or put a provisional view in the course of argument. Justice may, however, require that a party be afforded the opportunity to deal with such view.*

These provisions are a mix of enabling and of peremptory rules. In broad terms, the judge has to strike a pragmatic balance between

[6] See too, in the Bangalore Principles, Value 6: Competence and Diligence. Value 6.6 provides: 'A judge shall maintain order and decorum in all proceedings before the court and be patient, dignified and courteous in relation to litigants, jurors, witnesses, lawyers and other with whom the judge deals in an official capacity. The judge shall require similar conduct of legal representatives, court staff and others subject to the judge's influence or control.'

micro-managing the performance of the legal practitioner and allowing space for the strategy being pursued by that legal practitioner to play out. Often, the assumption that counsel has prepared appropriately on either fact or law is not borne out by experience.[7]

The JCC, in article 10 on 'Diligence' provides, inter alia, that the judge must:

> *10(1)(b)*: *investigate the matter at hand thoroughly.*
>
> ....
>
> *10(1)(e)*: *not engage in conduct that is prejudicial to the effective and expeditious administration of justice or the business of the court.*

The relevant notes to article 10 provide a much broader ambit to 'diligence':

> *10(i)*: *Unnecessary postponements, points-taking, undue formality and the like must be avoided.*
>
> *10(v)*: *A pattern of intemperate or intimidating treatment of lawyers and others or of conduct evidencing arbitrariness and abusiveness is prejudicial to the effective administration of justice should be avoided.*

This web of provisions can be understood as prescribing outcomes that the judge must strive towards.[8] To do so, the judge must police legal practitioners' conduct and, axiomatically, can be able to do so if familiar with their code of conduct. The status of legal practitioners as officers of the court underscores their inherent character as being servants of the process. One rationale for the existence of the legal profession is that it is to serve the needs of the courts.[9] How does the legal profession's code of conduct mesh with that of the judiciary?

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[7] The unpreparedness of a legal practitioner is not exclusively a South African phenomenon. See: WW Schwarer 'Dealing with incompetent counsel: The trial judge's role' (1980) 93 *Harvard Law Review* 633 at 669: 'The Judge's role in the adversary process does not include playing back-up counsel for any party. Nor does it require, however, indifference to the fairness with which the process operates. The judge has an inescapable responsibility for the maintenance of professional standards …'

[8] Other notable injunctions regulate recusals and the duty to promote equity. Their ramifications are beyond the scope of this paper.

[9] Historically, this is evidenced by the example in England, where the courts of the King attracted a pool of persons with knowledge of the laws that the citizenry lacked and by so doing facilitated the workflow and evolved into the legal profession, superseding monks as the principal repository of legal knowledge. See M Birks *Gentlemen of the Law* (1960); A Harding *A Social History of English Law* (1966).

III THE LEGAL PRACTITIONERS

Rule 60 of the *Code of Conduct for All Legal Practitioners et al* (LPCC)[10] stipulates this critical injunction:

> *60.1*: *A Legal practitioner shall not abuse or permit abuse of the process of court or tribunal and shall act in a manner that shall promote and advance efficiency of the legal process.*
>
> *60.2*: *A legal practitioner shall not deliberately protract the duration of a case before a court or tribunal.*[11]

These bland words belie their cardinal significance. Abuse undermines the prospect of effective hearings. These injunctions do not lie adrift. They enjoy support from several other rules in the LPCC. The distinction between appropriate zeal and abuse of the process is at the root of the Great Debate on the ethics of the adversarial system of litigation because of the multiplicity of duties owed by counsel to the other actors: that is, to the client, to the judge and to the opponents.[12] Are these duties all equal? Can they be?

Rule 3.3 of the LPCC addresses this question but does not give an unequivocal answer:

> *[Legal practitioners shall] treat the interests of their clients as paramount, provided that their conduct shall be subject always to—*
>
> 3.3.1 *their duty to the court;*
>
> 3.3.2 *the interests of justice;*
>
> 3.3.3 *observance of the law;*
>
> 3.3.4 *the maintenance of ethical standards prescribed by this code, and any ethical standards recognised by the Profession.*

The term 'paramount', once read in the context of the whole rule, which subordinates the paramountcy of the client's interests to these qualifications, means that the client's interests are not paramount; at least, not when in

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[10] GN 168 *GG* 42364 of 28 March 2019; GN R198 *GG* 42364 of 23 March 2019 pursuant to the Legal Practice Act 28 of 2014, s 36(1).

[11] See the text to note 4 above, in relation to serial late-coming by counsel and a referral to the LPC.

[12] The literature on the theme of lawyers' ethical dilemma when torn between their duty to the court and their duty to the client is vast: See, eg, WB Wendel *Lawyers and Fidelity to Law* (2012); D Markovits *A Modern Legal Ethics* (1969); T Dare *The Counsel of Rogues* (2008); R Sutherland 'A Defence of the Standard Conception of Adversary Advocacy' unpublished MA thesis, University of the Witwatersrand, 2016.

competition with the law, justice or the needs of the court. Nor could a client's interests trump the interests of the court process on any ground without prejudicing the reputation of the court process. By comparison, in the code of conduct regulating English barristers, Rule rC4 reads without equivocation: 'Your duty to act in the best interests of your client is subject to your duty to the court.'[13]

The scope of zeal with which to represent a client is again addressed in rule 25.1 and rule 25.2 of the LPCC:

> *25.1: Counsel shall in the advancement of the client's case resist any conduct calculated to deflect from acting in the best interests of the client and to that end counsel shall be fearless in the conduct of the client's case and shall not be deterred by the threat of or the prospects of adverse consequences to counsel or any other person.*
>
> *25.2: Counsel shall unreservedly assert and defend the rights of the client and, in particular, in order to protect the client's liberty, to the best of counsel's ability and within lawful bounds.*

Because the role of the legal practitioner as champion of the client is qualified by an allusion to 'lawful bounds' the primacy of commitment to the process of court is, nevertheless, made plain.

Another powerful injunction is that in the preamble to Part IV of the LPCC which applies specifically to counsel but not to trust account advocates or attorneys.[14] The pertinent portion provides a conspectus of several relationships inherent in the role of a legal practitioner. The vocational character of the profession of advocacy is emphasised:[15]

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[13] England and Wales Bar Standards Board *Code of Conduct* 9 ed (2018); see too, gc 6.

[14] The title 'counsel' is reserved in the LPCC for members of the referral profession and trust account advocates who are regulated in chapter VI of the LPCC are not so described nor does this rule apply to them.

[15] The text in article 22.3 is derived from the text of the proposal by the General Council of the Bar for inclusion in the LPCC's code. It encapsulates the long-held perspective of the profession of advocacy as primarily a calling rather than a business or mere 'money getting' enterprise. The structure of counsel's role comprises duties towards the court, the client, and the opponent which sometimes are difficult to align, giving rise to ethical dilemmas; see the literature referenced in note 12 above. Also, see the foreword by Mr Justice RPB Davis in AC Cilliers, C Loots & HC Nel *Herbstein and Van Winsen: The Civil Practice of the High Courts & Supreme Court of Appeal of South Africa* 5 ed (2009).

> *22.3: … the fundamental principles that shape, guide and express the essence of the profession of advocacy … [are]—*
>
> *22.3.1: counsel are independent practitioners of advocacy and agents of the rule of law who resist any undue influence from anyone whose specialised services are available to all persons, in particular, indigent people regardless of any disregard in which persons requiring the services of counsel may be held by anyone;*
>
> *22.3.2: counsel understand that the profession of advocacy is primarily vocational and serves the public interest and accordingly acknowledge fiduciary duties towards the courts and to their clients and to all professional colleagues.*

None of these prescriptions contradicts of the substantive law of privilege, emphasised in rules 3.6 and 57. Nor does it compromise the promise to use 'best efforts' to be competent and timeous in terms of rule 3.11, nor, as an independent professional, the duty to give unbiased advice in rule 3.9; an obligation addressed again under the rubric of 'integrity in the performance of professional services', in rules 9.1 and 9.2. Moreover, rule 28 extensively describes several duties by counsel to the client, all functional to achieving a fair hearing.

IV DISCLOSURE AND NON-DISCLOSURE

The duty of full disclosure and duty not to mislead a court on fact or law is pivotal to the relationship between the judge and the legal practitioner. The injunctions in the LPCC, overall, and in particular rule 57, demonstrate the dependence of a judge on the legal practitioner to lead the court through the matter and point out the real issues. The confidence that a judge must have in the integrity of the legal practitioner is unreserved. Competence, diligence, and honesty are to be taken for granted. The premise that any and every assurance given by a legal practitioner need not be second-guessed is the oil that enables the wheels of litigation to move at pace. When these attributes are absent, the system itself falters. These norms are endorsed in the caselaw to which reference is made hereafter.

> *Rule 57.1 requires that—*
>
> > *[a] legal practitioner shall take all reasonable steps to avoid, directly or indirectly, misleading a court … on any matter of fact or question of law. In particular, a legal practitioner shall not mislead a court … in respect of what is in the papers before the court … including any transcript of evidence.*

In *Schoeman,*[16] a provisional order was obtained despite counsel knowing that the respondent was already an unrehabilitated insolvent. That fact was

[16] *Schoeman v Thompson* 1927 WLD 282 at 283.

only disclosed when the respondent raised it on the return day. The Court held the improper non-disclosure was a ground to dismiss the application: 'it is the duty of counsel to inform the court of *any matter which is material* to the granting of an application and *of which counsel is aware*.' (emphasis added)

The implication of the rule is that the judge should not have to listen attentively to what a legal practitioner says in case an impermissible sleight of hand in response to a question by a judge occurs. An example of a *mala fide* evasive answer appears from *Society of Advocates of Natal and the Natal Law Society.*[17] Merret, an attorney, appeared for the plaintiff in divorce proceedings. The defendant had, to Merret's knowledge, said he would defend the action but had not yet entered a notice of intention to defend. The matter was subsequently set down by Merret in the unopposed court. This exchange took place:

> *Merret: After service of the summons the defendant contacted his attorneys who indicated they were going to defend the matter and they were going to make settlement proposals. I intend asking for the appointment of a liquidator. The settlement proposals came to nought. I ask leave to hand in the letter confirming that that was what was intended but there's been no appearance and no settlement has been achieved.*
>
> *Niles-Duner AJ: Yes, do the attorneys who are representing the defendant know the matter is going to proceed today on an unopposed basis?*
>
> *Merret: They know that we are proceeding. They have not filed an appearance.*

In truth, the defendant had not been told the matter was set down and proceeding, that being the crucial fact which the answer obfuscated. The imperative of proper notice being given to an adversary, the obligation on an attorney to ensure notification was given, and the judge's duty to check that notice was effective, are emphasised in *Power NO.*

> *The general principle is plain. No order is to be made on any person unless he has been served. … any departure from this rule … should be amply safeguarded and scrutinised very carefully before being granted …*[18]

In striking Merret's name off the roll of attorneys, the court held that:

> *[T]he respondent is not a fit and proper person to have the right to appear in this court or to remain on the roll of attorneys. Cf. Ex parte Swain 1973 (2) SA 427 (N) in which an application for admission as an advocate failed because of the applicant's "reckless inaccuracy under oath"; his "inability or reluctance to tell the truth even when giving evidence under oath"; and the fact that he "had no sense of responsibility towards the truth".*[19]

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17 *Society of Advocates of Natal v Merret* [1997] 2 All SA 273 (N).

18 *Power NO v Bieber*1955 (1) SA 490 (W) 505H–504A.

19 *Merret* (note 17 above) 282 f–g.

James JP continued:

> *Furthermore, it is of vital importance that when the Court seeks an assurance from an advocate that a certain set of facts exists the Court will be able to rely implicitly on any assurance that may be given. The same standard is required in relations between advocates and between advocates and attorneys. The proper administration of justice could not easily survive if the professions were not scrupulous of the truth in their dealings with each other and with the Court. The applicant has demonstrated that he is unable to measure up to the required standard in this matter. (emphasis added)*

Rule 57.4 provides that:

> *a legal practitioner shall, in any ex parte proceedings, disclose to a court every fact (save those covered by professional privilege or client confidentiality) known to the legal practitioner that might reasonably have a material bearing on the decision the court is required to make.*

The injunction to disclose 'every fact' is the crux. The presentation of facts on affidavit must result in a fair and not a distorted picture of the true position. In *Estate Logie*[20] a provisional sequestration order was obtained. Not disclosed in the application was an agreement of settlement that provided for a withdrawal of the application if payment of a portion of the debt was made by a certain date. Nevertheless, the application was set down for a provisional order on a date before due date for payment. The payment was, in any event, not made. The applicant sought a final order. The Court held that it was proper to seek the final order but inappropriate not to have mentioned the agreement in the initial papers. The Court held this as to principle:

> *[I]t cannot … be too strongly insisted upon that in ex parte applications it is the duty of the applicant to lay all the relevant facts before the court, so that it may have full knowledge of the circumstances of the case before making its order. The fact of a settlement having been arrived at was certainly a relevant and important circumstance in the proceedings and had its terms been set out in the petition, it may well be that the judge before whom it came may in his discretion have refused to make an order or may have directed that the application to stand over till after 1 July when the first instalment fell due.*[21] *(emphasis added)*

What are the limits to disclosure of relevant information? Obviously, privilege trumps relevance and a judge sees only evidence that has been sanitised by the rules of evidence on admissibility. For obvious policy

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[20] *Estate Logie v Priest* 1926 AD 312.

[21] *Estate Logie* (note 20 above) 323.

reasons, the duty does not require the disclosure of previous convictions and if the state fails to prove any, there is no obligation to contradict the prosecution; a position based on sections 89 and 197 of the Criminal Procedure Act 51 of 1977.

Rule 57 regulates extensively the duty of full disclosure and the duty not to disclose privileged or confidential information. Four sub-rules touch on the legitimate scope of non-disclosure.

> 57.2 *A legal practitioner shall scrupulously preserve the personal and confidential information of a client communicated to him or her, unless the information is not privileged, and disclosure is required by law.*
>
> 57.3 *A legal practitioner shall not waive or purport to waive privilege in respect of privileged information; the decision to waive professional privilege is that of the client, not of the legal practitioner.*
>
> 57.6 *A legal practitioner shall, if the interests of justice require the disclosure to a court or tribunal of information covered by professional privilege, seek from the instructing attorney (where one is appointed) and the client permission to make the disclosure, and if permission is withheld, the legal practitioner shall scrupulously avoid any insinuation in any remarks made to a court or tribunal that all information that would serve the interests of justice has been disclosed.*
>
> 57.10 *A legal practitioner shall not make use of any privileged information of the opposing party that has accidentally or unlawfully come into the possession of the legal practitioner and shall at once he or she has knowledge of such circumstances, notify the legal representatives for the opposing party. However, if such information subsequently becomes available to the legal practitioner through lawful means, he or she shall not be prohibited from making use thereof.*

These rules emphasise the importance of scrupulous adherence to laws about privilege. Rule 57.10 is, moreover, aimed at fair play between adversaries but leaves open the prospect to adduce the evidence in due course. Evidence once accidentally revealed is for all practical purposes influential in plotting the way forward.

When a practitioner is ethically obliged to withdraw as a representative, the reasons must not be disclosed. Rule 57.7 provides:

> *A legal practitioner shall not, in the event of being obliged to withdraw from representing a client in any proceedings, offer an explanation that would disclose the client's confidential or privileged information.*

The experienced judge is likely to infer what has happened but is not contaminated by inadmissible privileged evidence or any other information

that might be construed to inappropriately influence any subsequent decisions. The policy premise of the rule is the protection of the judge and of the court process. The legal practitioner who feels constrained to explain why a withdrawal is necessary to an exasperated judge must be resilient and refuse. Both judge and legal practitioner must act with restraint over these mishaps.[22]

Rule 57.8 provides that:

> *A legal practitioner shall, if a draft order is presented to a court that deviates in any respect from standard form orders routinely made in that court, expressly draw such deviations to the attention of the court and offer a justification for such deviations.*

This rule, which is critical to orderly and swift motion proceedings, where many matters of like nature are heard and standard forms are employed, codifies the decision in *Ex parte Satbel*[23] where it was held there that any deviation from the standard form in a draft order must be drawn to the attention of the judge.

Many controversies arise from a failure to observe rule 57.9. It provides that '[a] legal practitioner shall not rely on any statement made in evidence which he or she knows to be incorrect or false'.

The awareness by counsel that the client has uttered a lie must be a certain knowledge of the untruth, not a mere suspicion or personal opinion. In *Van der Berg*,[24] Van der Berg settled an affidavit for one Harksen, who had spent some years as an accused on charges of fraud. To his certain

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[22] The text of the rule is limited to an avoidance of a breach of privilege or confidentiality. In my view, the policy considerations about insulating the judge from possible contamination would support a broader prohibition, ie, absolute non-disclosure. In 2021 the legal representatives for former president Zuma who was arraigned on criminal charges suddenly withdrew shortly before the date of the hearing. See M Wa Afrika 'Jacob Zuma's Defence Team Withdrew on Principle' 2 May 2021 https://www.iol.co.za/sundayindependent/news/jacob-zumas-defence-team-withdrew-on-principle-344ef3fc-1f76-4ba1-976b-d14e069962e9 (accessed 1 October 2021). The attorney addressed a letter to the court withdrawing, without giving reasons. It was reported that the judge called for an explanation. In my view, it was appropriate to say nothing, and it was inappropriate to enquire. This is not a view shared by Mr Justice E Cameron who argues that curbs on abuse should include a requirement that a justification be disclosed. See note 4 above. The policy debate remains open.

[23] *Ex parte Satbel: In Re Meyer v Satbel* 1984 (4) SA 347 (W) 362F–G.

[24] *Van der Berg v General Council of the Bar of South Africa* [2007] 2 All SA 499 (SCA).

knowledge false allegations were made about a foreign trust that would be the source of funding. The court held:

> *The finding by the court below that it was improper for the appellant to settle the affidavit because he suspected that the evidence was false is not correct. Merely to suspect, or even to firmly believe, that evidence is false does not preclude an advocate from permitting his client to place the evidence before a court. On the contrary, it would be improper for an advocate to refuse to do so on those grounds alone. For the same reason, the submission … that an advocate may settle an affidavit only if "the advocate has a reasonable basis for believing that the evidence might be true" is also incorrect. An advocate is not called upon to believe, to any degree, the evidence that he is instructed to place before a court. Even if he believes positively that his client's evidence is false, he is entitled, and indeed obliged, to place it before a court if those are his client's instructions, and there can be no qualification in that regard. (No doubt it would be prudent for an advocate to advise his client that a court is likely to share his belief but that is something else.)*[25]

And:

> *An advocate breaches his duty to the court not only by permitting evidence to be given knowing it to be false but also by failing to speak when he knows that the court is being misled. An example is Meek v Fleming in which counsel knew that the jury was under the impression that a police witness was a Chief Inspector and failed to disclose that the officer had been demoted to the rank of sergeant on account of misconduct.*[26]

The decision in *Incorporated Law Society*[27] illustrates what a legal practitioner may do when the client commits perjury. In this case, the attorney, Bevan, set up a defence on the pleadings that the summons ex facie was against one, Samuel, and because his client's name was Solomon, therefore the summons was bad. Bevan knew that the client was indeed also known as Samuel. The client testified, falsely denying he was known as Samuel. However, in presenting the defence, Bevan stuck to the technical point that the summons was defective against 'Solomon' and did not rely on the perjured evidence. The court held that this conduct, although lacking candour was '… just … within the line'.[28] A distinction was recognised between the position of an attorney, who before the case starts, deliberately sets up a perjured case and that of the attorney, who, during the hearing,

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25 *Van der Berg* (note 24 above) para 15.

26 *Van der Berg* (note 24 above) para 17.

27 *Incorporated Law Society v Bevan* 1908 TS 724.

28 *Incorporated Law Society* (note 27 above) 730.

is caught by the client telling, to his certain knowledge, a lie. As to what to do in the latter circumstance

> *must depend largely on the judgment and sense of honour of the practitioner himself. He owes an important duty to his client as well as a responsibility to the court…He must himself be no party to deceiving the court: and if he feels that he is not warranted in retiring from the case, or throwing up his brief, he must at any rate be careful to make no use of evidence which he knows is not true.*[29] *(emphasis added)*

Bevan escaped striking off, but the Court made its distaste for his conduct clear.

An especially egregious example of misleading the court by deliberately presenting a falsehood is *Hollenbach*.[30] A father and son were each charged with illicit diamond dealing. They were tried separately. The son pleaded guilty and in mitigation claimed his father was the main culprit. The father was then tried, having pleaded not guilty. The son testified in that trial that the father had played no role in the crime. In both cases the same attorney represented each accused. The Court held this was a deliberate and improper misleading of the court by the attorney.[31] Another example of sharp practice is illustrated in *Koni Multinational Brands.*[32] At issue was whether an interdict should be granted against Koni. It was alleged that Koni had passed off its product, a men's grooming cream, as that of Nivea, the trading identity of Beiersdorf. As part of the case presented, an affidavit was filed by a shopper who stated that she had been misled into buying the Koni product in the belief that it was Nivea. The high court inter alia relied on this fact to conclude that Koni be interdicted. On appeal to the Supreme Court of Appeal it was fortuitously revealed that the shopper was an attorney who was a member of the firm representing Beiersdorf. This significant fact had been concealed from the high court and the court of appeal. When confronted with this deception, counsel for Beiersdorf disavowed any reliance on the affidavit. The attorney's unethical conduct was referred to the Legal Practice Council (LPC). The judge is especially vulnerable during the argument stage of proceedings. No judge can be knowledgeable in every branch of law nor does a judge often have the

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29 *Incorporated Law Society* (note 27 above) 731.

30 *S v Hollenbach* 1971 (4) SA 787 (NC).

31 *Hollenbach* (note 30 above) 638.

32 *Koni Multinational Brands (Pty) Ltd v Beiersdorf AG* (553/19) [2021] ZASCA 24 (19 March 2021).

opportunity to personally research a matter before the hearing. In terms of rule 57.5:

> *A legal practitioner shall, in all proceedings, disclose to a court or a tribunal all relevant authorities of which the legal practitioner is aware that might reasonably have a material bearing on the decision the court or tribunal is required to make.*

Several examples of a failure to inform the court of relevant precedent illustrate the vulnerability of a judge to making an order at odds with the law. Moreover, the judge's duty to 'thoroughly investigate' the matter in terms of article 10(1)(*b*) of the JCC is bedevilled by incompetent or mischievous non-disclosure.

Ex parte Hay Management Consultants (Pty) Ltd[33] was a matter before the unopposed motion court. The order sought was against a peregrinus. The issue arose whether an attachment was required to found jurisdiction. Counsel contended that it was, despite the peregrinus having elected a *domicilium* within the jurisdiction. That contention was contradicted by clear authority to the converse. Having been referred to the decision by the judge, counsel retired to prepare argument. She then returned to say she could not locate the case and persisted with her initial stance. The judge knew of that earlier case only because, coincidentally, he had sat in it. At 505B-507A, he held, and I deliberately quote copiously:

> *Had I not known of [the case], counsel's ignorance of its existence and failure to bring it to my attention could have misled me. While counsel and attorneys may not be expected to read the law reports as they are published and recall their contents or effect, if they have to present argument on a matter, the least that is expected of them is to consult the relevant textbooks, the consolidated indexes of and noters-up to the ordinary law reports and the indexes of and noters-up in weekly or monthly reports which have been published after the effective date of the latest consolidated index and noter-up. I do not mention the computer services that are available to retrieve material. If counsel does not possess his or her own copies of the reports, the Bar library or the Court library can be consulted. Regrettably, this is a shortcoming which happens too often. I consider apposite the following words of Brooke LJ in Copeland v Smith [2000] 2 All ER 457 (CA) in an appeal from a judgment which had been delivered on 31 March 1999 by a Judge who had not been told of a relevant decision of the Court of Appeal (reported in [1998] 2 All ER 124 (CA) and [1998] 1 WLR 1540).*

[33] *Ex parte Hay Management Consultants (Pty) Ltd* 2000 (3) SA 501 (W).

> *"It is going to be increasingly important with the regime under the new Civil Procedure Rules that Judges dealing with interlocutory issues are afforded up to date assistance on the law by advocates appearing in front of them…*
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> *In these circumstances it is quite essential for advocates who hold themselves out as competent to practise in a particular field, to bring and keep themselves up to date with recent authority in their field. By 'recent authority' I am not necessarily referring to authority which is only to be found in specialist reports, but authority which has been reported in the general law reports. If a solicitors' firm or barristers' chambers only take one set of the general reports, for instance the Weekly Law Reports as opposed to the All England Law Reports, or the All England Law Reports as opposed to the Weekly Law Reports, they should at any rate have systems in place which enable them to keep themselves up to date with cases which have been considered worthy of reporting in the other series. If this is not done, Judges may be getting the answer wrong through the default of the advocates appearing before them.*
>
> *The English system of justice has always been dependent on the quality of the assistance that advocates give to the Bench. This is one of the reasons why, in contrast to systems of justice in other countries, English Judges are almost invariably in a position to give judgment at the end of a straightforward hearing without having to do their own research and without the State having to incur the cost of legal assistance for Judges because they cannot rely on advocates to show them the law they need to apply."*
>
> (At 462e–463a)

> *The same position should apply in this country where the volume of work, especially in the Motion Court, usually necessitates judgments being given immediately after a hearing. It is not only in contested cases that counsel has a duty to direct the Court's attention to any relevant authority. … The Judge in a Motion Court relies on counsel, especially in ex parte applications and in those cases where there is no appearance for the respondents, to inform the Court of any cases of which the effect may be that they are not entitled to the orders that they seek.*

In Toto,[34] an earlier decision binding on the court disposed of the critical issue. Counsel for the applicant had appeared in that earlier case but did not disclose it. His unconvincing excuse was that he believed it was distinguishable.[35] The Court held that such a conclusion was for the court, and not counsel, to draw. It held:

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[34] *Toto v Special Investigating Unit* 2001 (1) SA 673 (E).

[35] *Toto* (note 34 above) 683G.

> *A legal representative who appears in court is not a mere agent for his client, but has a duty towards the judiciary to ensure the efficient and fair administration of justice … [T]he proper administration of justice could not easily survive if the Professions were not scrupulous of their dealings with the court … [F]or a practitioner to be aware of a judgment adverse to his case and not bring it to the attention of the court amounts … to a gross breach of his duty.*

In a similar case, *Ulde*,[36] the decision dead in point in support of the applicant's case had been overturned by a full court appeal. That reversal was not disclosed by an attorney who had appeared in both cases. His proffered explanation for non-disclosure was that the full court's decision was subject to an application for leave to appeal and thus the judgment was suspended. The Court rejected that as an acceptable belief and remarked:

> *It is true that this particular instance of the suppression of important authority in point and the reliance on an authority that had been expressly disapproved did not occur in an ex parte proceeding; if it had happened under those circumstances, the misconduct would have been simply aggravated. The suppression did take place in the motion court devoted to urgent matters, a court which functions under pressure and on little or token notice to other parties and to the presiding judge. It is a court that, for those reasons, is ever reliant on the integrity of counsel for assistance. It will be rare that a judge is familiar with every branch or topic of law. Counsel really is required to research the law and present an honest account of the law. Counsel is at liberty to try to persuade a court to prefer one decision over another, or to distinguish cases, or to offer novel interpretations, but can never deliberately suppress a reference to an authority that disfavours his case, and even more obviously, counsel can never rely on a dictum in a decision which, to his certain knowledge, has itself been compromised by a superior court's disapproval.*[37]

V CONCLUSION

The examples discussed in this article illustrating the application of the LPCC rules show that the judge is largely impotent to prevent an abuse by legal practitioners and is dependent upon their integrity. Only after the breach of an ethical duty is uncovered can remedial action be taken, if feasible, but seldom without inconvenience and cost. The sanction of punitive costs orders for such breaches is doubtless appropriate but is beside the point.[38]

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[36] *Ulde v Minister of Home Affairs* 2008 (6) SA 483 (W).

[37] *Ulde* (note 36 above) para 40.

[38] See DW Pollak 'Sanctions imposed by courts on attorneys who abuse the judicial process' (1977) *University of Chicago Law Review* 619.

Judges fairly demand that legal practitioners live up to the ideals in the LPCC. Moreover, in a climate of burgeoning caseloads and the unrelenting pressure on courts to deliver on the expectations of the litigating public, it is plain that the dependence of the judge on legal practitioners is acute.[39] The pressures on the judge and on the legal practitioner when busy and, perhaps, overwhelmed, create an environment of fatigue ripe for error, oversight and slackness. The essence of professionalism is being resilient and compliant with ethical duties under such conditions. The ethical responsibilities of the judge and of the legal practitioners are in harmony. The symbiotic relationship between the roles of judge and legal practitioner warrants the respect necessary to produce efficient and fair litigation.

The critical imperative is that legal practitioners act ethically by complying with their duty of diligence in rule 28, their duty of proper disclosure in rule 57, and their duty to advance an effective court process in rule 60.

[39] The intrusion into the realm of case preparation by way of case-flow management pursuant to rule 37A promulgated in July 2019, could address some of the potential for abuse from which our litigation model suffers as a principally practitioner-driven system. A habit of cooperation between judge and practitioner could be cultivated in the practises evolving there. This is a theme beyond the scope of this article.

REVIEWABLE MISTAKES OF LAW AND FACT

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I INTRODUCTION

Theoretically, the distinction between appeal and review lies at the heart of South Africa's system of administrative law. An appeal concerns the merits or the outcome of a decision whereas a review entails whether a decision was reached in an acceptable, regular and legal manner. Ordinarily, a party aggrieved by an administrative decision may challenge it in court by way of review, not on appeal. That means the party can impugn the manner in which the decision was arrived at and its legality — not the outcome of the decision itself. The basic distinction reflects our fundamental political commitments to democracy, the separation of powers,[1] and to being governed by an administration accountable both to elected representatives (on policy outcomes) and to the courts (on process and legality).[2] It also highlights the limits of adjudication. Courts are often not best-placed, both prescriptively and descriptively, to make decisions that require a choice among many legitimate policy options or the use of specialised knowledge and skills.[3] At the same time, administrators cannot have free reign in decision-making. That would be the rule of bureaucracy, not the rule of law. For the rule of law to mean anything, we must be governed by laws and not by people.

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* The arguments developed in this article were first presented in LLM seminars I facilitated at UCT in 2019 and 2020. My thanks to the students for interesting questions and discussions. Thanks are also due to Lauren Kohn for inviting me to facilitate the seminars and for debating many of my arguments.

1 See *Bo-Kaap Civic and Ratepayers Association v City of Cape Town* [2020] 2 All SA 330 (SCA) paras 70–79.

2 A commitment across many jurisdictions: see *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent)* [2019] UKSC 41 para 33 (United Kingdom Supreme Court reiterates that the Prime Minister is accountable both to Parliament, for matters of policy, and to the courts, regarding the lawfulness of what she or he does).

3 LL Fuller 'The forms and limits of Adjudication' (1978) 92 *Harvard Law Review* 353.

The distinction between appeal and review has always been difficult to maintain in practice.[4] And over the course of the last 25 years of law under the Constitution, it has become increasingly blurry. The courts no longer need to justify their interference with administrative decisions on the basis of the *ultra vires* doctrine coupled with finding the intention of a supreme legislator in respect of an empowering statute, but rather on the basis of explicit authority that flows from a justiciable constitutional right to administrative justice,[5] and more broadly on a thick conception of the rule of law.[6] Even so, the Constitution does not obliterate this distinction. Far from it. Courts should not substitute their view of what is correct for the administrator's, unless they are empowered to do so by the law.[7] For that would amount to the rule of judges. Those exercising the judicial power too must justify their decisions.[8] The Constitution also contemplates an efficient administration,[9] something which an overzealous judiciary could undermine. Judges must still show some deference to or respect for the legitimate decisions of administrators.[10]

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[4] C Hoexter 'The future of judicial review in South African administrative law' (2000) 117 *South African Law Journal* 484 at 487.

[5] Section 33 of the Constitution.

[6] The rule of law is a founding value of the Constitution (see section 1(*c*)). The Constitutional Court has developed a substantive and thick understanding of the Constitution's commitment to the rule of law: see D Dyzenhaus 'The pasts and future of the rule of law in South Africa' (2007) 124 *South African Law Journal* 734 and A Price 'The evolution of the rule of law' (2013) 130 *South African Law Journal* 649. Yet in political theory, the rule of law is contested terrain. Some like Raz contend that the rule of law should be understood in a formal sense only and is one of many virtues by which a legal system should be judged, so that the extent to which substantive justice, democracy and human rights, are respected by the system are independent considerations (see J Raz *The Authority of Law* (1979) 211). Others advocate for a more substantive conception that embraces human rights and substantive fairness as important components of the rule of law (see T Bingham *The Rule of Law* (2010) 67). I take no view on this debate here.

[7] For example, if a statute creates an internal appeal.

[8] E Mureinik 'A bridge to where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal of Human Rights* 31.

[9] Sections 33(3)(*c*) and 195(1)(*b*) of the Constitution. See also *Premier, Province of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 (2) SA 91 (CC) para 41; *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) para 62.

[10] Hoexter (note 4 above) 501–502 and D Dyzenhaus 'The politics of deference: Judicial review and democracy' in M Taggart (ed) *The Province of Administrative Law* (1997) 279. Hoexter's views have not gone unchallenged in the

In this article I explore the constitutional development of what the late Etienne Mureinik once called 'a much less glamorous branch of administrative law': the judicial review of mistakes of law and fact.[11] Grounds of review that seek to establish whether the administrator got the law or facts right appear on their face to be grounds of appeal.

Nevertheless, the courts of the apartheid era were often overly deferential towards decision-makers. In an effort to maintain the distinction between appeal and review, they took a categorical approach and held that not all mistakes of law were reviewable. Only mistakes of law of a certain kind were so-called 'jurisdictional errors'.[12] The courts would also generally not second-guess the factual findings of decision-makers unless they were errors that affected the decision-maker's jurisdiction. Where mistakes did not affect the administrator's jurisdiction, the only other time the courts would intervene is when the mistake caused a consequential irregularity.

Today the category of the error is not so important, rather its nature is. Any administrative decision is reviewable if it was 'materially influenced' by a mistake of law[13] or fact.[14] Another significant development is that non-jurisdictional mistakes of fact are also reviewable, according to the Supreme Court of Appeal, but only where the fact in issue falls into the category of being 'uncontentious and objectively verifiable'.[15]

My argument proceeds as follows. I discuss the evolution of each of these grounds of review from the approach in the old legal order, to the Interim and final Constitutions' impact after 1994. I consider the requirement of materiality and why it is important in South Africa's constitutional public law system. I also explain why the Supreme Court of Appeal's categorical approach to reviewable non-jurisdictional mistakes of facts is of limited assistance in determining whether a decision should be reviewable and make suggestions for what I believe is a better approach. Finally, I make some concluding observations about the nature of judicial review.

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academic writing — two judges of the SCA have called the concept of deference into question, see M Wallis 'Do we need deference?' (2018) 1 *South African Judicial Education Journal* 97 and C Plasket 'Judicial review, administrative power and deference: A view from the bench' (2018) 135 *South African Law Journal* 502. I return to this issue in my conclusion.

[11] E Mureinik 'Administrative law in South Africa' (1986) 103 *South African Law Journal* 615 at 626.

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

[13] Section 6(2)(*d*) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[14] *Dumani v Nair* 2013 (2) SA 274 (SCA) para 29.

[15] See the cases discussed in part IV(*b*) below.

II MISTAKES THEN

In the first South African textbook written on administrative law, Rose Innes (later Rose Innes J) explained that a 'mistake of law or a wrong conclusion of fact, duly arrived at, is not an irregularity such as may justify a review.'[16] If, however, the mistakes caused a consequential irregularity — 'if as a consequence of a mistake of law or fact an irregularity [was] committed' — the decision could be set aside.[17]

(*a*) *Mistakes of law in the past*

As for mistakes of law, the courts were steadfast in categorising various types of mistakes, some of which were reviewable and others not. Stratford JA held in *Union Steel* that only where a mistake precluded the administrator from appreciating the nature of their powers or otherwise prevented the proper exercise of their discretion, could the courts review the decision.[18] Yet as Cora Hoexter explains,[19] the problem with this *dictum* is that any error of law could be said to 'prevent administrators from appreciating the nature of their powers or from exercising their discretion "properly"'[20] — especially with some lawyers' ingenuity.[21]

To delineate the difference between reviewable and non-reviewable errors, the courts retreated into drawing a formalistic distinction between

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[16] LA Rose Innes *Judicial Review of Administrative Tribunals in South Africa* (1963) 201, citing *Doyle v Shenker* 1915 AD 233; *Ellis v Morgan* 1909 TS 576 at 581, and *Chesterfield House* (note 12 above).

[17] Rose Innes (note 16 above) 201.

[18] *Union Government (Minister of Mines and Industries) v Union Steel Corporation (South Africa) Ltd* 1928 AD 220 at 234.

[19] C Hoexter *Administrative Law in South Africa* 2 ed (2012).

[20] Hoexter (note 19) 283.

[21] Cf. L Baxter *Administrative Law* (1984) 470. The various grounds of review overlap in significant ways. With a little imaginative lawyering, an irregularity in a decision that might fit better into one ground of review can be shoe-horned into another. Strategically this is important, because courts are more likely to interfere with decisions impugned by some irregularities rather than others. For example, see *Corruption Watch v The Arms Procurement Commission* 2020 (2) SA 165 (GP), where in setting aside the Arms Deal Commission's Report, the Court did not find that the Commission made factual errors, but rather that its failure to admit relevant evidence, to interrogate critical persons allegedly involved in corruption and to interrogate critical witnesses, all amounted to failure to carry out the investigation required by its terms of reference and the Commission therefore acted irrationality and breached the principle of legality.

'jurisdictional' and 'non-jurisdictional' mistakes. The former were mistakes where administrators misunderstood the extent of their jurisdiction or lawful powers, either by asserting authority over matters in respect of which they had no authority or abdicating powers that ought to have been exercised. So, a road traffic officer who purports to fine the captain of a boat docked in the wrong place would obviously act unlawfully for exceeding his authority in law. These types of mistakes had to be reviewable because the administrator would clearly be acting unlawfully or *ultra vires*, then the main justification for judicial review.

The latter were mistakes of law made by an administrator when exercising their jurisdiction over a matter — mistakes not *of* jurisdiction, but *in* jurisdiction. If our road traffic officer interprets their city's traffic by-law as prohibiting parking on a busy road over weekends and fines the owner of a car parked there, their decision would be insulated from review even if the court would have interpreted the by-law differently. In *Doyle*, Innes CJ held that a 'mere mistake' committed by an administrator in a matter they had jurisdiction over, in the case a magistrate, was not an irregularity in the proceedings, and was not reviewable. His reasoning?

> *Otherwise a review would lie in every case in which the decision depends upon a legal issue, and the distinction between procedure by appeal and procedure by review, so carefully drawn by statute and observed in practice, would largely disappear.*[22]

The spectre of administrative law's central distinction was thus the driving factor in the divide. Innes CJ seemed to overlook that it is primarily the province of the courts to decide what the law says,[23] not the executive or its administration. And he also seemed to brush aside the fact that a non-jurisdictional error of law could be much worse than just a 'mere error'. But the upshot was that the courts effectively shared the interpretative exercise with administrators when the latter had jurisdiction. South African courts kept up the jurisdictional/non-jurisdictional dividing line for many years.[24] But it made for a very unsatisfactory approach.

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[22] *Doyle* (note 16 above) 236.

[23] A remark made by an equally important Chief Justice of the United States of America in *Marbury v Madison* (1803) 5 US 137 at 177.

[24] See, for example, *Chesterfield House* (note 12 above); *Local Road Transportation Board v Durban City Council* 1965 (1) SA 586 (A); *Reynolds Brothers Ltd v Chairman, Local Road Transportation Board, Johannesburg* 1985 (2) SA 790 (A).

By the end of the 1980s, this rigid approach was finally discarded by Corbett CJ in *Hira*.[25] The Chief Justice candidly explained that any error of law — including those made within a functionary's jurisdiction or authority — has the potential to cause them to misconstrue their powers or prevent the correct exercise of their discretion.[26] His solution to distinguishing between reviewable and non-reviewable errors was for the courts to determine whether or not Parliament had intended for the administrator to have exclusive authority on deciding the issue of law, something to be gleaned from its empowering statute.[27] If it did, the court should not interfere. In any other instance, it had a free hand to decide whether the administrator got it right.

Before 1994 then, the courts sought to justify why some mistakes of law were reviewable and others were not. Initially, the jurisdictional/non-jurisdictional partition played that role, but later it came down to whether Parliament had excluded the judiciary's authority to decide on the issue of law in question.

(*b*) *Mistakes of fact in the past*

The jurisdictional/non-jurisdictional distinction also played an important role when courts were asked to interfere with decisions premised on factual errors. Where Parliament had empowered administrators to make certain factual findings, and those administrators got them wrong but were acting within their jurisdiction, the courts would not review them. That would be too close to an appeal.[28]

But erroneous findings of jurisdictional facts were certainly reviewable. After all, if the legislature required the existence of a certain factual situation before a power could be exercised lawfully, and the administrator wrongly thought it existed, they would be acting beyond their powers;[29] this is as a matter of principle the terrain of administrative law review.

Some jurisdictional facts specified procedural requirements and would be reviewable only if they were mandatory and not merely directory.[30] Non-compliance with the former would typically lead to invalidity,

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[25] *Hira v Booysen* 1992 (4) SA 69 (A).

[26] *Hira* (note 25 above) 90F. In England, the House of Lords had done the same thing 20 years earlier in *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208 (HL).

[27] *Hira* (note 25 above) 93C.

[28] Hoexter (note 19 above) 302–303.

[29] *SA Defence and Aid Fund v Minister of Justice* 1967 (1) SA 31 (C).

[30] Hoexter (note 19 above) 291–300.

but not necessarily for the latter. It was, however, often difficult to determine whether a procedural fact was mandatory or 'merely directory'.[31]

Others were substantive, being a necessary precondition for the exercise of the power. A big wrinkle was that sometimes (actually, more often than not) empowering provisions were subjectively phrased: the administrator could exercise the power if they '[were] satisfied that' or 'if, in [their] opinion', a factual situation existed.[32] Baxter explained that the courts 'vacillated' between two approaches: the literal approach, where all that had to be shown was that the administrator indeed subjectively believed that the facts existed, and the objective approach, where the courts would require objective evidence of the facts.[33] Some phrases seemed to require a more objective assessment; sometimes an administrator needed 'reason to believe' a factual situation existed. It usually came down to a matter of interpretation.

In 'security, detention and arrest cases' in particular, some judges tended towards the literal approach. In the notorious *Liversidge* case,[34] the speeches of a majority of the House of Lords contorted a 'reason to believe' provision to be subjective. Mr Liversidge had been detained under war-time regulations which allowed the Secretary of State to order a person detained who he had reasonable cause to believe was of hostile origin. The majority of the Law Lords found, for various legal and political reasons leaning heavily towards the executive over the subject,[35] that despite the objective phrasing, the Secretary of State only needed to show that he had a subjective belief that the person to be detained had hostile origins. The upshot was that this type of clause acted as a limited ouster-clause of the court's jurisdiction to review a detention under the regulation.

Lord Atkin produced a rigorous dissent, pointing out that the words used in the provision were not subjectively phrased, and similar phrasing in other statutes had a settled meaning that required an objective factual basis for the exercise of the power. After evoking the judiciary's tradition

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[31] Although Mureinik pointed out in his classes at Wits, that where a provision already contained a sanction other than invalidity, that may have indicated that legislature's intention that invalidity ought not to have been the outcome of not complying with it — see J Klaaren 'Teaching procedural jurisdictional facts' (1998) 14 *South African Journal of Human Rights* 60.

[32] Baxter (note 21 above) 462.

[33] Baxter (note 21 above) 463.

[34] *Liversidge v Anderson* [1942] AC 206.

[35] D Dyzenhaus *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (2010) 77–82 gives a stirring account of the majority's reasoning.

of protecting individual liberty against executive excesses — and with the support of Lewis Carroll[36] — Lord Atkin concluded:

> *[T]he question is whether the words "If a man has" can mean "If a man thinks he has." I am of opinion that they cannot, and that the case should be decided accordingly.*[37]

Liversidge cast a long shadow over South Africa's common law. In *R v Sachs*,[38] Centlivres CJ cited the majority's decision in support of interpreting a 'reason to believe' clause to be subjective. The statutory provision in question allowed the Minister of Justice to prohibit a person from attending a gathering if the Minister had reason to believe that the 'achievement of any of the objects of communism would be furthered' by the person's attendance. In the absence of raising another ground of review, Centlivres CJ held that the Minister's opinion could not be interfered with.[39] *Liversidge* was relied on explicitly in reaching this conclusion. (Centlivres CJ noted that the decision could still be reviewed on other grounds, such as *mala fides*, failure to apply the mind, abuse of discretion, or a breach of natural justice.)

Some voices went against the tide.[40] In *United Democratic Front*,[41] Rose Innes J declined to follow *Liversidge* on the basis that, 'on most eminent authority' in England,[42] it was wrong. His reasoning which imposed an objective standard on the jurisdictional fact, closely tracked that of Lord Atkin:

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[36] *Liversidge* (note 34 above) 245:' I know of only one authority which might justify the suggested method of construction: "'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master — that's all.'" ("Through the Looking Glass," c. vi.).'

[37] *Liversidge* (note 34 above) 245.

[38] *R v Sachs* 1953 (1) SA 392 (A).

[39] *R v Sachs* (note 38 above) 405.

[40] Cf. C Hoexter 'Judicial Policy in South Africa' (1986) 103 *South African Law Journal* 436 at 446.

[41] *United Democratic Front (Western Cape Region) v Theron NO* 1984 (1) SA 315 (C) 323E.

[42] *Nakkuda Ali v Jayaratne* 1951 AC 66 (PC); *Ridge v Baldwin* [1963] 2 All ER 66 (PC); *Secretary of State for Education and Science v Metropolitan Borough of Tameside* [1976] 3 All ER 665 (CA).

> *The words "whenever a magistrate has reason to apprehend [that the public peace would be seriously endangered by a gathering]" do not mean "whenever in his opinion a magistrate has reason to apprehend", nor do they mean "whenever a magistrate states that he has reason to apprehend", nor do they mean "whenever to the satisfaction of a magistrate there is reason to apprehend". They mean that there must be reason for apprehension and, if the magistrate does not have reason to apprehend, he cannot exercise the powers [to prohibit public gathering] … To have reason to apprehend means also that the apprehension must be a reasonable one.*[43]

(*c*) *Mistakes gone by*

To sum up, the courts initially took a categorical or conceptual approach to determine whether a mistake of law or error of fact was reviewable. The courts were also ungenerous in providing administrative justice.[44] For mistakes of law, in the beginning only those which affected an administrator's jurisdiction or authority were reviewable. At the end of the apartheid legal order, this distinction was abandoned, in favour of an approach that sought to determine whether the court or the administrator was to determine what the law meant. For mistakes of fact, non-jurisdictional issues were out of bounds for the courts. And even though jurisdictional errors were reviewable, often the courts would not require that facts be proved objectively by the decision-maker.

III MISTAKES OF LAW NOW

The Constitution had a revolutionary effect on administrative law in South Africa.[45] 'Everyone' today, we are told by section 33(1), 'has the right to administrative action that is lawful, reasonable and procedurally

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[43] *United Democratic Front (Western Cape Region)* (note 41 above) 323G–324A. Rose-Innes J ruled the same in the Transkei: *Sigaba v Minister of Defence and Police* 1980 (3) SA 535 (Tk).

[44] Or as Hoexter says, 'parsimony' featured heavily in administrative law, by which she means 'the pervasive sense, apparently shared by all three branches of the state, that administrative justice was something to be carefully hoarded and doled out only grudgingly. This tendency seems to have been informed mainly by fears of overburdening the administration' (C Hoexter 'The principle of legality in South African administrative law' (2004) 4 *Macquarie Law Journal* 165 at 168).

[45] M De Beer 'A new role for the principle of legality in administrative law: *State Information Technology Agency Soc Ltd v Gijima Holdings (Pty) Ltd*' (2018) 135 *South African Law Journal* 611 at 617.

fair.'[46] All errors of law are now in principle reviewable, no matter the category they fall into. But does this then mean that any administrator's decision influenced by a mistake of law, or of fact for that matter, is automatically liable to be set aside on review? I would suggest that the answer must be no.

First, as has already been alluded to, the Constitution explicitly contemplates that the administration must be efficient.[47] Efficiency is an important aspirational value, without which a developmental and human rights state (or welfare state) will flounder. As O'Regan J put it in *Premier, Mpumalanga*: 'As a young democracy facing immense challenges of transformation, we cannot deny the importance of the need to ensure the ability of the executive to act efficiently and promptly.'[48] When the final Constitution's administrative justice rights were being drafted, the burden of rights on the administration, and the potential threat of review for every error of law or fact, was a concern in the minds of the negotiators.[49] This eventually culminated in the Constitution granting Parliament a role to pass legislation that gives effect to the rights, provides a framework for judicial review, and also promotes an efficient administration — which is PAJA.[50] The statute contains many provisions that limit the scope of review: the definition of administrative action, bounded time periods in which reasons may be sought and reviews must be brought, a strict duty to exhaust internal remedies.[51]

Secondly, even though during apartheid liberal lawyers utilised and advocated for expansive powers of judicial review to ameliorate the insidious consequences of the National Party's policies and law, in the new constitutional era, expansive judicial review powers are not necessarily the most progressive starting point.[52] In the United States of America, for example, with its welfare state history, it is the political right that takes a dim view of judicial deference towards the administration.[53] While judicial

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46 Constitution section 33(1).

47 Constitution sections 33(3)(*c*) and 195(1)(*b*).

48 *Premier, Mpumalanga* (note 9 above) para 41.

49 De Beer (note 45 above) 618.

50 As above.

51 This is not to say that PAJA could be challenged on the basis that it unduly limits the section 33 administrative justice rights or that limiting provisions should not be interpreted in a manner that best promotes those rights.

52 See A Cockrell 'Can you paradigm — Another perspective on the public law/private law divide' 1993 *Acta Juridica* 227 at 246–247.

53 C Sunstein 'Chevron as law' (2019) 107 *Georgetown Law Journal* 1613 at 1664; G Metzger '1930s Redux: The administrative state under siege' (2017) 131 *Harvard Law Review* 1.

review at times provided some protection against apartheid excesses, and state power was justifiably viewed negatively, in South Africa's constitutional order we should have a positive view of state power, that can and should be used for the benefit of all.[54] The courts ought to give due respect to an administrator's view of the law and facts — which may be closely tied up to progressive or transformative policy being pursued by them.[55]

The third and final reason is that while the rights in Chapter 2 of the Constitution have special priority in our constitutional state, they are not automatic trumps over any other consideration which cannot be overridden.[56] Sometimes a right may need to give way to another right or to some other special consideration justified by the state. The Constitutional Court's rights limitation analysis, first adopted in *S v Makwanyane*,[57] and instantiated by section 36 of the Constitution, incorporates a doctrine of proportionality into South African public law to mediate this. The state may justify the limitation of any right — in the context of this discussion, of not acting lawfully, reasonably, or procedurally fairly when making administrative decisions — due to other *special* considerations.[58] In reaching a conclusion, the court will determine whether the limitation is proportional and thus justified. And even if a right is breached and the limitation found to be disproportionate, the courts still have wide remedial jurisdiction to decide what to do about it, and at the end of the day whether the decision should be set aside.[59]

Thus, a mistake of law does not always result in the decision being set aside. In what follows, I engage in more detail with how constitutional proportionality has impacted judicial review of mistakes of law.[60]

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[54] M Wiechers 'Administrative Law and the Benefactor State' 1993 *Acta Juridica* 248.

[55] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) paras 45–46.

[56] R Dworkin *Taking Rights Seriously* (1977) xi and 191–192.

[57] *S v Makwanyane* 1995 (3) SA 391 (CC) para 105 adopting the Canadian Supreme Court's approach to proportionality in *R v Oakes* (1986) 19 CRR 308.

[58] R Stacey 'A service conception of the Constitution: The concept of (the rule of) law in South Africa's limitations jurisprudence' (2019) IX *Constitutional Court Review* 219.

[59] Constitution section 172(1)(*b*).

[60] Proportionality has also been recognised by the courts as forming part of review for reasonableness, see *Medirite (Pty) Limited v South African Pharmacy Council and Another* (197/2014) [2015] ZASCA 27 (20 March 2015) para 20.

(*a*) *Materiality as context*

Quinot and Maree have argued that section 36 of the Constitution, and the proportionality inquiry, have played 'virtually no role' in judicial review of an administrative decision since 1994.[61] They explain:

> *The most obvious reason is undoubtedly the s 36 requirement of a "law of general application" for the limitation of rights. … [T]here is arguably room for the view that administrative action properly taken under an empowering provision that qualifies as a "law of general application" will satisfy the requirements of s 36. In such a case a court could thus find that a ground of review exists, meaning that the impugned administrative action infringes s 33 of the Constitution, but that the infringement amounts to a justifiable limitation under s 36 and is thus not constitutionally invalid.*[62]

To me, it seems that constitutional proportionality may actually have slipped into South African administrative law, unnoticed, under the guise of 'materiality'.

From a conceptual perspective, the lawfulness of any conduct often lends itself to categorical identification. Law as a system of norms tags legal meaning onto conduct manifested in the world: according to the law some act is either objectively lawful or unlawful.[63] For example, an administrative decision may either have been premised on the correct understanding of the law or not, or a certain act, say littering, may have been criminal or it may not have been. One or the other, never both nor neither. Another way of saying this is that there is no internal variability in the concept of lawfulness.[64]

In contrast, procedural fairness, reasonableness, and reason-giving — the other ingredients of the administrative justice right — do not operate in such an all-or-nothing fashion. Context is everything and their content can be variable depending on the circumstances.[65]

Hoexter has long argued for South African courts to adopt a 'concept of variability' in administrative law which 'allows the courts to be more generous about the application of administrative justice and to vary its

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[61] See G Quinot & PJH Maree 'The puzzle of pronouncing on the validity of administrative action on review' (2015) 7 *Constitutional Court Review* 27 at 42.

[62] As above.

[63] I draw on H Kelsen *Pure Theory of Law* 2 ed (1967, trans M Knight) 3–4. See also Plasket (note 10 above) 511.

[64] Hoexter (note 19 above) 223, does point out that there may be some variability on how courts determine whether procedural requirements have been complied with, which is usually understood as a question of lawfulness.

[65] Hoexter (note 19 above) 222–223.

precise content according to the circumstances.'[66] Variability here can be understood as an obverse of constitutional proportionality or of the intensity at which the court will review the mistake.[67]

The problem with lawfulness, however, is that because of its traditionally rigid nature a conceptual justification or home for its variability from one case to the next is difficult to find. The requirement of materiality, which is context specific, can and should serve that role.

Materiality comes up in a few places in PAJA. Administrative decisions which materially affect the rights or legitimate expectations of any person must be procedurally fair (section 3(1)), and reasons must be given for them (section 5(1)). In addition, if a decision materially affects the rights of the public, the administrator concerned must take certain steps to give effect to the right to procedural fairness (section 4(1)). Materiality comes up explicitly in two grounds of review: section 6(2) of PAJA empowers the courts to judicially review administrative decisions if they were '*materially* influenced by an error of law' (para (*d*)), and where 'a mandatory and *material* procedure or condition prescribed by an empowering provision was not complied with' (para (*b*)).

(*b*) *Materiality and mistakes of law*

Only a handful of judgments have grappled with what materiality means in the context of mistakes of law. One thing is clear: an error that affects the outcome of a decision will be material for the purposes of the provision.[68] In *Gauteng Development Tribunal*, Jafta J held that '[a]n error of law is not material if it does not affect the outcome of the decision. This occurs if, on the facts, the decision-maker would have reached the same decision, despite the error of law.'[69] In *Tantoush*, Murphy J held that even though the decision-maker in the case, the Refugee Appeal Board, had made a mistake of law in thinking it was empowered to approach a matter before it on appeal *de novo*, there had been no failure to exercise a discretion or power and thus the mistake was neither material nor reviewable.[70] Lauren Kohn and Hugh Corder explain:[71]

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[66] Hoexter (note 19 above) 222–223.

[67] See *Joseph* (note 9 above) para 58.

[68] *Genesis Medical Scheme v Registrar of Medical Schemes* 2017 (6) SA 1 (CC) para 21.

[69] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC) para 91.

[70] *Tantoush v Refugee Appeal Board* 2008 (1) SA 232 (T) para 93.

[71] L Kohn & H Corder 'Administrative Justice in South Africa: An overview of our curious hybrid' in H Corder & J Mavedzenge *Pursuing Good Governance: Administrative Justice in Common Law Africa* (2019) 131.

> *Materiality rightly features as the touchstone in the enquiry and can be explained with reference to the 'but for' test: but for the error, the particular decision would not have been made thereby rendering the error material. Put differently, where the same outcome would have been reached, "even on a correct interpretation of the statutory criterion", the error of law could not have been material and so would not be reviewable on this basis.*

Therefore, the jurisprudence tells us that materiality mostly concerns outcomes — a court will ask 'what does administrative justice require' in this case.[72] If the mistake of law or the procedural non-compliance does not have a causal effect on the outcome of the decision, then it is not reviewable. The upshot is that one decision may be 'lawful' even if it is premised on an incorrect understanding of the law if that mistake was not material to the decision. The same mistake may vitiate another decision, where it was material.

Unfortunately, the jurisprudence is not entirely coherent. In various judgments,[73] the Constitutional Court and Supreme Court of Appeal have held that where an administrator exercises a power and explicitly relies on a provision that did not authorise the exercise of the power but another provision did, the decision remains invalid. This is a classic mistake of law: I thought I could do something under one provision when actually I could do it under another. From one perspective, the mistake would not be material because the power existed anyway — would it really affect the outcome?[74] Similarly, the jurisprudence is tending towards a position that an administrator is bound by the reasons they gave for a decision when they made it, and that new reasons raised later — often in review proceedings and formulated by legal representatives — cannot save a bad decision if they amount to an *ex post facto* rationalisation.[75] That is, even

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[72] C Hoexter 'Administrative action in the courts' 2006 *Acta Juridica* 303 at 309.

[73] *Minister of Education v Harris* 2001 (4) SA 1297 (CC) paras 17–18; *Liebenberg NO v Bergrivier Municipality* 2013 (5) SA 246 (CC) para 93 (minority judgment of Jafta J); and *Zuma v Democratic Alliance; Acting National Director of Public Prosecutions v Democratic Alliance* 2018 (1) SA 200 (SCA) para 58.

[74] In earlier cases, like *Latib v Administrator, Transvaal* 1969 (3) SA 186 (T), courts would not set aside a decision where there was an inadvertent reliance on an incorrect provision where the power existed elsewhere. For a full discussion, see L Olivier 'Acting in reliance upon the wrong empowering provision: Reconsidering the principle in *Harris*' (2021) XII *Constitutional Court Review* — forthcoming.

[75] *National Lotteries Board v South African Education and Environment Project* 2012 (4) SA 504 (SCA) para 27 (Cachalia JA notes strict English authority for the proposition that an administrator is bound to contemporaneous reasons without deciding finally whether it applies in South Africa); *Zuma* (note 73 above)

if when the decision was made, the administrator had good and lawful reasons for doing so, even if they were not aware of them. Perhaps it is the *deliberate* reliance[76] on the wrong provision that makes the decision liable to being set aside for the former, and that decisions made for bad reasons should not be saved if the administrator may have good reasons for it.

I suggest that these complaints go more to the rationality or reasonableness of the decision — separate grounds of review — rather than its lawfulness. Doctrinally, it may be better for the courts to recognise this in future.

IV MISTAKES OF FACT NOW

Constitutionalism has also had an impact on the reviewability of mistakes of fact. The Constitutional Court has affirmed that jurisdictional facts are to be judged solely on an objective basis, and the Supreme Court of Appeal has developed a review over non-jurisdictional mistakes.

(*a*) *Jurisdictional mistakes of fact*

Regarding substantive jurisdictional facts, Jafta J explained in *Walele* that in 'the past … [the administrator's] *ipse dixit* could have been adequate'.[77] He continued to explain that the administrator's subjective decision would need to be based on 'reasonable grounds'.[78]

And in *AllPay*, Froneman J explained how courts are to determine whether a procedural jurisdictional fact was mandatory, linking it to materiality:

> *The proper approach is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a review ground under PAJA has been established.*[79]

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para 24 (Navsa ADP holds that the reasons given by the Acting National Director of Public Prosecutions at the time for withdrawing corruption charges are the only reasons against which the legality of the decision could be tested); and *National Energy Regulator of South Africa v PG Group (Pty) Limited* 2020 (1) SA 450 (CC) para 39 (Khampepe J confirms that reasons formulated after a decision cannot be relied on as an *ex post facto* justification, but distinguishes the expert reports relied on in the matter which explained the rationale of the reasons).

[76] See *Zuma* (note 73 above) para 93.

[77] *Walele v City of Cape Town* 2008 (6) SA 129 (CC) para 60.

[78] *Walele* (note 77 above).

[79] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agent* 2014 (1) SA 604 (CC) para 28.

For both, the Constitutional Court moved away from the rigid categorical approach of the past. The High Court has recognised that deference could play a role, nonetheless.[80]

(*b*) *Non-jurisdictional mistakes of fact*

Perhaps the biggest development is that non-jurisdictional mistakes of fact can now be reviewed — the 'final frontier'.[81] There is a problem though. By opening the door to this ground of review, the Supreme Court of Appeal has retreated into a new category-driven approach to determine whether a non-jurisdictional factual error can be reviewable.

The first case which introduced the review ground in South African law was *Pepcor*.[82] Cloete JA held that where legislation grants power to an administrator to make a decision, it should be based on correct material facts. Where a decision 'has been made in ignorance of facts material to the decision and which therefore should have been before the functionary' it is reviewable.[83] However, in opening the door, Cloete JA cautioned that the ground of review must 'not be permitted to be misused in such a way as to blur, far less eliminate, the fundamental distinction in our law between two distinct forms of relief: appeal and review.'[84] He stated that where an administrator is vested with the statutory powers to determine the relevant facts and/or whether they exist, a judge could not review the facts simply on the basis that she or he has a different view as to their relevance and/or existence[85] (this echoed how *Hira* developed the reviewability of non-jurisdictional mistakes of law). He also emphasised that the public interest

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[80] *Wingate-Pearse v Commissioner, South African Revenue Service* 2019 (6) SA 196 (GJ) paras 58–60.

[81] Cf. C Forsyth & E Dring 'The final frontier: The emergence of material error of fact as a ground for judicial review' in C Forsyth et al (eds) *Effective Judicial Review: A Cornerstone of Good Governance* (2010) 245.

[82] *Pepcor Retirement Fund v Financial Services Board* 2003 (6) SA 38 (SCA).

[83] *Pepcor* (note 82 above) para 47.

[84] *Pepcor* (note 82 above) para 48. The facts in *Pepcor* occurred before PAJA came into effect, and so PAJA was not applicable. Later the Supreme Court of Appeal held that the ground of review, while not being explicitly set out in PAJA, fits into the statute somewhere: *Chairperson's Association v Minister of Arts and Culture* 2007 (5) SA 236 (SCA) para 48, section 6(2)(*e*)(iii) (irrelevant/relevant considerations were/were not taken into account); or *Chairman State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman State Tender Board v Sneller Digital (Pty) Ltd* 2012 (2) SA 16 (SCA) para 34, section 6(2)(i) (the decision was otherwise unconstitutional or unlawful).

[85] *Pepcor* (note 82 above) para 48.

and the interests of any affected individual should be balanced in deciding whether to review the decision.[86]

Around a decade later, Cloete JA revisited the ground of review in a concurring judgment in *Dumani v Nair*.[87] After reviewing the development of this ground of review post-*Pepcor*, he cited Christopher Forsyth and Emma Dring's[88] discussion of similar developments across other commonwealth jurisdictions, who argued that the ground of review does not 'destroy' the distinction between appeal and review:

> *An administrative decision-maker may need to make various findings of law (which he must get right) and he may also need to make findings of fact (which it is submitted he must also get right), but then the decision-maker has to exercise his judgment*.[89]

In exercising that judgement, the administrator makes their decision. If the process and legality are satisfactory, the court must not interfere. It is here where Cloete JA — adopting Forsyth and Dring's reliance on English authority which came after *Pepcor*[90] — introduced the categorical requirement that a non-jurisdictional error of fact must be 'uncontentious and objectively verifiable' before a court may intervene.[91] Again the requirement was explicitly introduced in seeking to maintain the difference between appeal and review. The Supreme Court of Appeal has recently held that if the mistake is not within this 'narrow band' it is not reviewable.[92]

I have doubts about the value of this approach and the new requirement of 'uncontentious and objectively verifiable'.

First, in addition to adding a new requirement, the *Dumani* approach differs in another respect from *Pepcor*. In some sense, *Dumani* enlarges the scope of review. That is because the Court's jurisdiction to determine the existence or relevance of facts is *not* ousted where the administrator is empowered exclusively by the statute to determine the facts if the new requirement can be established. In *Airports Company South Africa*,

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86 *Pepcor* (note 82 above) para 49.

87 *Dumani* (note 14 above).

88 *Dumani* (note 14 above) para 31.

89 Forsyth & Dring (note 81 above) 258.

90 *E v Secretary of State for the Home Department* [2004] EWCA Civ 49 para 66.

91 Forsyth & Dring (note 81 above) 258.

92 *Mgijima v Premier of the Eastern Cape Province* (949/2018) [2020] ZASCA 139 (30 October 2020) para 30 citing *De Freitas v Somerset West Municipality* 1997 (3) SA 1080 (C) 1084E–H. See also Plasket (note 10 above) 512–513.

Unterhalter J made this observation.[93] He synthesised the two approaches as follows:

> *[A]n error as to material facts that are not objectively contestable is a reviewable error. The exercise of judgment by the functionary in considering the facts, such as the assessment of contested evidence or the weighing of evidence, is not reviewable, even if the court would have reached a different view on these matters were it vested with original competence to find the facts.*[94]

Secondly, the manner in which the new requirement is formulated, gives rise to a problem: how can a party satisfy it? In *Granor Passi*,[95] Wallis JA had the opportunity to explain what the requirement means:

> *Uncontentious in this context does not restrict the enquiry to instances where the decision maker has overlooked something and exclude cases where the decision maker's view of the facts is erroneous. It must be understood in conjunction with the requirement that the facts be objectively verifiable. If, on objective verification, there is no room for debate or argument about the correct facts, they will be uncontentious.*[96]

With respect to Wallis JA, this explanation does not take the issue much further. Verifying the objective truth of what happened in a dispute can be a difficult task.[97] This is particularly the case in judicial review proceedings, usually brought in applications that are not best suited to resolve disputes of fact.[98] And it also makes things difficult for an applicant,

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[93] *Airports Company South Africa v Tswelokgotso Trading Enterprises CC* 2019 (1) SA 204 (GJ) para 11.

[94] *Airports Company South Africa* (note 93 above) para 12, referred to with approval in *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs: KwaZulu-Natal Provincial Government* 2020 (4) SA 453 (SCA) para 23.

[95] *Polokwane Local Municipality v Granor Passi (Pty) Ltd* [2019] 2 All SA 307 (SCA).

[96] *Polokwane Local Municipality* (note 95 above) para 14.

[97] PJ Schwikkard 'Does cross-examination enhance accurate fact-finding?' (2019) 136 *South African Law Journal* 27 at 29.

[98] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T). Trials are, in theory, designed for factual disputes to be decided, because evidence can be tested through cross-examination, cf. Schwikkard (note 97 above). It is unsettled whether judicial review proceedings may be brought in an action if a factual dispute is anticipated, compare: *Nelson Mandela Bay Metropolitan Municipality v Erastyle (Pty) Ltd* 2019 (3) SA 559 (ECP) (It is permissible to bring judicial review proceedings by way of action where the affected party anticipates a dispute of fact); with *Deputy Minister of Tribal Authorities v Kekana* 1983 (3) SA 492 (B)

normally a private party, who must lead evidence to rebut the evidential presumption of validity — *maxim omnia praesumuntur rite esse acta*.[99] Only once the presumption is displaced will the decision-maker be required to defend the validity of the decision.[100]

Thirdly, it is worth considering the English case that Cloete JA relied on to adopt the new requirement, *E v Secretary of State*.[101] There, the Court of Appeal held that 'the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge', but, importantly, it set out *four* requirements an applicant would have to satisfy, namely:

(i) 'there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter';

(ii) 'the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable';

(iii) the applicant 'must not have been responsible for the mistake'; and

(iv) 'the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning.'[102]

Neither *Dumani v Nair*, nor the cases following it, have mentioned or grappled with these other requirements. Requirement (iii) that an applicant not be 'responsible for the mistake' is potent and could curtail review under this ground if it had been incorporated into South African law.

Finally, some judges have also stated that review for mistake of non-jurisdictional fact is akin to review for irrationality or unreasonableness. Unterhalter J said so in *Tswelokgotso Trading*.[103] Justice Clive Plasket, writing off the bench, similarly suggests that the ground of review is 'closely aligned to irrationality'.[104] While all of the grounds of review certainly overlap,[105]

(Judicial review by way of action and not application is an irregular procedural step liable to be set aside).

[99] Baxter (note 21 above) 355; Hoexter (note 19 above) 544.

[100] Both Hoexter and Plasket have noted, however, that this procedural approach might need to be revised in the constitutional era due to the supreme law's requirement that the exercise of any public power be justified by those exercising the power — Hoexter (note 19 above) 544–545; C Plasket *The Fundamental Right to Just Administrative Action: Judicial Review of Administrative Action in the Democratic South Africa* (unpublished PhD thesis, Rhodes University, 2002) 516–517.

[101] *E v Secretary of State for the Home Department* (note 90 above) para 63.

[102] *E v Secretary of State for the Home Department* (note 90 above) para 66.

[103] *Airports Company South Africa* (note 93 above) paras 13–14.

[104] Plasket (note 10 above) 512–513.

[105] See Hoexter (note 19 above) 253–245.

getting the facts wrong and acting irrationally, or unreasonably, speak to different issues. In *Pepcor*, Cloete JA cited a number of English authorities which emphasise that is not enough for an administrator to show that the decision was reasonably decided on the material before him or her: 'The court may *also* intervene where a body has reached a decision which is based on a material misunderstanding or error of fact' (my emphasis).[106]

The point is this: an administrator could make a rational decision, based on what she believes are the correct facts before her (for example if she has been misled[107]). If the fact is shown to be wrong, the decision may also be irrational; but that is a *consequence* of the factual mistake. The issue of rationality, or any other ground of review, should not need to be proved independently of the factual mistake in order for the decision to be reviewable — otherwise, the law would be the same as it was when Rose Innes wrote his textbook in 1963.[108] For this reason, the English courts have emphasised that the ground of review is distinct, and should not be conflated with review for breach of natural justice or 'unfairness' as *E v Secretary of State for the Home Department* seemed to infer.[109]

So, the new categorical approach adopted by the Supreme Court of Appeal is open to criticism. A better approach would be to accept that the door for reviewing non-jurisdictional facts has been opened, legitimately so, and that errors of fact are in principle reviewable. But that does not mean that every factual mistake will vitiate a decision for it is important to constrain the Court's powers in this context — rules and principles guide the Court's review powers.

First, there is a place for deference. Where an administrator exercises what are primarily fact-finding powers, a court is not well-placed to interfere with such exercise, unless a party can show a glaring mistake. *Dumani*, for example, concerned factual findings of a disciplinary tribunal. A review court should not interfere with those types of factual decisions, just as an appeal court will defer to a lower court's factual findings in the absence of material irregularity.[110] Contrast *Pepcor*: there, a decision-maker was materially misled by a report in making a serious decision, and this

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[106] *Pepcor* (note 82 above) para 39, citing *Halsbury's Laws of England* 4 ed (2001) vol 1(1) para 76.

[107] As happened in *Pepcor*.

[108] Rose Innes (note 16 above) 201.

[109] *Chalfont v Chiltern District Council* [2014] EWCA Civ 1393 para 100 and see *E v Secretary of State for the Home Department* (note 90 above) para 63.

[110] Plasket (note 10 above) 520; *R v Dhlumayo* 1948 (2) SA 677 (A) 705–706.

factual mistake resulted in the decision being vitiated. This distinction may harden into a rule in future cases.

Secondly, mistakes must be material for the decision to be reviewable. Administrative justice does not require decisions to be set aside merely because an administrator got a fact wrong, where that does not materially impact the outcome of the decision.

Thirdly, *Pepcor*'s approach of balancing various interests and factors makes good sense. Cloete JA explained it thus:

> *Whether a review should succeed in a matter such as the present will depend on a consideration of the public interest in having the decision corrected and other factors, and in particular, the interests of the person in whose favour a decision has been made. Ultimately, a value judgment, balancing all the relevant factors, will be required.*[111]

This approach brings the mistakes of non-jurisdictional fact back into the realm of uncontroversial review. The court is policing the exercise of public power. It is not substituting its own decision for that of the administrator. It is making sure that the power was exercised in accordance with the requirements of legality and, where necessary, the correct facts. This ultimately requires a value judgement concerning various interests.

V CONCLUSION

This article has covered much ground. I wish to make some concluding observations about the nature of judicial review in light of my arguments.

The first is that I have taken time to explain the different rules and principles that apply to the review of different kinds of mistakes of law or fact. The reader will notice that I continue to use the terminology of jurisdictional/non-jurisdictional errors. I do so for good reason.[112] While in hard cases — at the penumbra of uncertainty — it may be difficult to draw a sharp line between whether an error went to jurisdiction or not, in principle the scope of courts' review powers must be attuned to whether an administrator is acting within or outside their powers. The outer bounds of an administrator's powers are pre-eminently issues for the judiciary to decide: what powers have a statute conferred upon this

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111 *Pepcor* (note 82 above) para 49.

112 Cf. G Quinot & A Anthony 'Lawfulness' in G Quinot (ed) *Administrative Justice in South Africa: An Introduction* 2 ed (2020) 162–169, who contend that such terminology is 'no longer accurate' with reference to *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) para 98. My thanks to Lauren Kohn for bringing this to my attention.

administrator? Have they acted beyond those powers in law or believed that factual pre-conditions existed in exercising that power? Where they acted within their jurisdiction or authority, whether they erred as to the law, or the facts is a different issue.

Secondly, by advocating for an approach that continues to use the terminology, I do not seek to resuscitate what Justice Dennis Davis calls the judicial 'slot machine' of the old era, which ostensibly told courts whether a decision was reviewable or not.[113] Instead, the distinction serves to assist courts in determining when and how they should defer to or respect an administrator's decision. In certain instances, deference operates more as a set of general principles, in others it has concretised into discreet rules.[114]

In the case of non-jurisdictional facts, deference manifests as a set of more rigid rules which guide the court's powers of review, and which circumscribe the instances where a mistake will vitiate a decision. And that is how it should be. Judicial review should not be an avenue in which any and all administrative decisions can be challenged or set aside. The administration must have some scope to get on with its mandate.

For other errors, while the courts have held they are now always reviewable — if material — deference should still play a role. Depending on the nature of the decision, the identity of the administrator, and the nature of the legal or factual question in issue (for instance how closely it is related to questions of policy which the administrator is tasked with pursuing), there may be greater scope for judicial deference or respect[115] towards the administrator's interpretation of the law or evaluation of the facts.[116] These principles should apply with greater intensity when deciding a non-jurisdictional question of law — even if the final arbiter of the law is the judiciary.[117]

My final observation is that the distinction between jurisdictional and non-jurisdictional errors, and the instantiation of the principle of

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[113] DM Davis 'To defer and then when? Administrative law and constitutional democracy' 2006 *Acta Juridica* 23 at 34.

[114] See L Kohn 'The burgeoning constitutional requirement of rationality and the separation of powers: Has rationality review gone too far?' (2013) 130 *South African Law Journal* 810 at 822–824 and the authorities discussed there.

[115] H Corder 'Without deference, with respect: A response to Justice O'Regan' (2004) 121 *South African Law Journal* 438 at 443–444.

[116] See the remarks of Hoexter (note 19 above) 302 in respect of subjective jurisdictional facts in the constitutional era and of O'Regan J in *Bato Star* (note 55 above) para 45 in respect of reasonableness.

[117] See *Marshall v Commission for the South Africa Revenue Service* 2019 (6) SA 246 (CC) paras 6–10.

deference in this context, supports the difference between appeal and review. However, that distinction should not be maintained for its own sake, but rather because it supports important constitutional values, including the separation of powers, accountability and administrative efficiency. The distinction should also be reinterpreted and made the best it can be in light of the best principles and practices of South Africa's constitutional order.[118] Constitutionalised judicial review — especially of questions of law and fact — necessarily requires substantive consideration of the merits of the decision, to determine whether it is lawful, reasonable and procedurally fair.[119] Yet, as eminent administrative lawyers have cautioned, in doing so judges should take care not simply to replace the administrator's decision, with their own view of what is right.[120]

[118] R Dworkin *Law's Empire* (1986) 226–227.

[119] See Corder (note 115 above) 443–444; *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA) para 31.

[120] Hoexter (note 19 above) 352; see also Froneman DJP's remarks in *Carephone (Pty) Ltd v Marcus NO* 1999 (3) SA 304 (LAC) at para 36.

Honoré's South African Law of Trusts
by Edwin Cameron, Tony Honoré, M J de Waal and Peter Solomon.
Sixth edition. Juta. 2018
816 pages. Price: R1 795.00 (hard cover)

Honoré's South African Law of Trusts,[1] now in its sixth edition, first appeared more than 40 years ago, then under the sole authorship of the late Professor Tony Honoré. Gauntlett relates that it 'was welcomed as the only comprehensive analysis of trusts in South African law' and accepted as 'the standard authority' on the subject.[2] Honoré relinquished sole authorship of the book in 1992,[3] and since 2002 a team of authors has revised it, initially with Cameron as lead author.[4] In the current edition, De Waal has undertaken the lion's share of the work,[5] although Cameron remains significantly involved.[6] The current edition is essentially a revision of the previous book, not a rewrite. It is nevertheless a substantial revision.[7]

The focus of the book is on what the authors term a trust in the strict sense. Such a trust is one in which

> *the … founder of the trust has handed over or is bound to hand over to another the control of property which is, or the proceeds of which are, to be administered or disposed of by the other (the trustee …) for the benefit of some person other than the trustee as beneficiary, or for some impersonal object.*[8]

[1] E Cameron, M de Waal & P Solomon *Honorés South African Law of Trusts* (2018) (hereinafter referred to as the 'sixth edition' or the 'current edition').

[2] J Gauntlett 'The South African Law of Trusts (Second edition) by AM Honoré' (1976) 9 *The Comparative and International Law Journal of Southern Africa* 437 at 437.

[3] T Honoré & E Cameron *Honoré's South African Law of Trusts* (1992).

[4] E Cameron, M de Waal, B Wunsh, P Solomon & E Kahn *Honoré's South African Law of Trusts* 5 ed (2002) (hereinafter referred to as the 'fifth edition').

[5] Cameron et al (note 1 above) vi second and third paras.

[6] For a more precise breakdown of the workload see Cameron et al (note 1 above) vi second and third paras.

[7] I estimate that the text has been expanded by almost 120 pages, being the number by which the sixth edition exceeds the fifth edition, plus the pages that replaced chapter 14 of the fifth edition since that chapter was not carried into the sixth edition.

[8] See Cameron et al (note 1 above) 5 third para.

This is to be distinguished from a trust in the wide sense that would include, for example, a court-appointed curator.[9] The book comprises 13 chapters and runs to 816 pages. Apart from the removal of one chapter and the repositioning of another — discussed more fully below — the structure of the book is almost identical to the previous edition. It would be tedious to list all the chapter headings,[10] suffice it to say that it constitutes an exhaustive discussion of the law relating to trusts,[11] thoroughly supported by references to case law and other local and foreign authorities.

Apart from updating citations, there are three broad themes to the revision of the sixth edition, namely: an emphasis on the reality that the trust form can lend itself to abuse and on remedies the courts may develop to combat this,[12] the role of the Constitution[13] in the future development of trust law in South Africa,[14] and a general modernisation of the language used.[15]

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[9] See Cameron et al (note 1 above) 4 second para.

[10] Those without the book will find them at http://juta.co.za/pdf/24873/ accessed on 23 May 2021.

[11] And includes in chapter 2 a careful differentiation of the trust in the strict sense from 'other legal forms and institutions' (Cameron et al (note 1 above) 41 first para).

[12] See, for example, the expanded discussion in Cameron et al (note 1 above) §5, and §7 last para; the discussion at 42–43 of the treatment of trusts in divorce proceedings; the reference at 72, third para to improper protection from creditors or a spouse; and the suggestion at 113, last para that provisions akin to those designed to combat the gross abuse of the juristic personality of a close corporation may be needed in respect of a business trust.

[13] Constitution of the Republic of South Africa, 1996, which is supported by the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('PEPUDA').

[14] See, for example, Cameron et al (note 1 above) 30 last para, 43 first para, 53 last para, 72 third para, 111 last para, 176 last para and note 239, and 187 first para. At 176 note 239 and 187 note 296 the authors refer to the judgments in the Western Cape High Court in *Harper v Crawford NO* 2018 (1) SA 589 (WCC) and *King NO v De Jager* 2017 (6) SA 527 (WCC), which upheld discrimination in the private sphere against, respectively, adopted descendants and female descendants. They presciently comment there that both judgments 'may be vulnerable'. In the event both judgments have been overturned on appeal to the Constitutional Court — see, respectively, *Wilkinson v Crawford NO* 2021 JDR 0703 (CC) and *King NO v De Jager* 2021 (4) SA 1 (CC).

[15] Thus, for example, in Cameron et al (note 1 above) 150 third para 'personal claims' replaces the expression 'remedies in personam' used in Cameron et al 5 ed (note 4 above) 130 first para.

I shall not attempt to list all the changes that have been made, but the following are some of the more significant ones:

- The discussion of 'General Principles of Trust Administration'[16] has been expanded to include sections specifically concerning 'Abuse of the trust and corrective measures'[17] and 'The possibility of going beyond the trust form'.[18] These discuss, inter alia, attributing the assets of the trust to a beneficiary when valuing the beneficiary's estate in divorce proceedings,[19] and permitting a creditor to claim against the trustees personally for an obligation of the trust.[20]
- There has been a volte-face on the question whether the English concept of joint tenancy has been received in South Africa — the fifth edition asserted categorically that '[t]he rule of joint tenancy forms no part of the law of South Africa'[21] whereas the sixth edition states that '[i]t appears that "joint tenancy" as a form of co-ownership among co-trustees … [has] been received in South Africa'.[22]
- There is an expanded theoretical explanation of the way in which trusts are treated in a deed of transfer of immovable property.[23]
- The discussion of contracts for a company to be formed — and in particular the significance of whether the promoter acts as agent or trustee (in the wide sense of the term) — has been updated in light of the enactment of the Companies Act 71 of 2008.[24]
- The discussion of the stipulation contained in section 6(1) of the Trust Property Control Act 57 of 1988[25] that no person shall act in the capacity of trustee until authorised to do so by the Master has been substantially revised, and extended, to deal, inter alia, with the impact of the judgment of the Supreme Court of Appeal in *Lupacchini NO v Minister of Safety and Security*.[26]

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16 See Cameron et al (note 1 above) §160.
17 Cameron et al (note 1 above) 308–309.
18 Cameron et al (note 1 above) 309–314.
19 See Cameron et al (note 1 above) 312–313.
20 See Cameron et al (note 1 above) 313 second para.
21 Cameron et al 5 ed (note 4 above) 27 second para.
22 Cameron et al (note 1 above) 33 second para.
23 Cameron et al (note 1 above) 33 second para.
24 For the discussion see Cameron et al (note 1 above) §44–§50.
25 For the discussion see Cameron et al (note 1 above) 249–259.
26 (2010) 6 SA 457 (SCA), discussed in Cameron et al (note 1 above) 254–256.

- The discussion of whether, and how, a trustee can resign is extended to deal with the issue whether the resignation provisions of the Trust Property Control Act[27] apply even when the trust instrument itself provides for resignation, or whether they only apply if the trust instrument is silent about the resignation of a trustee.[28]
- The discussion of legal standing to apply for the removal of a trustee has been extended. It now discusses whether standing extends beyond beneficiaries and contingent beneficiaries to include other sufficiently interested persons, such as a co-trustee who is not a beneficiary.[29]
- A new section has been added to discuss whether the *Turquand* rule of company law can properly be applied to trusts.[30]
- The discussion of variation of the trust instrument by agreement between the founder and the trustee[31] has been expanded to discuss whether a contingent beneficiary's acceptance of the benefits of the trust impacts their power of variation.[32]
- The section on the court's powers under section 13 of the Trust Property Control Act[33] to amend the terms of a trust deed has been expanded to include an extended discussion[34] of *Curators, Emma Smith Educational Fund v University of KwaZulu-Natal*[35] and *In re Heydenrych Testamentary Trust*.[36]
- To the discussion of the courts' powers to amend a trust deed has been added a new section dedicated to the 'Public Policy and Constitutional Considerations' applicable to the common law powers of the courts.[37]

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27 Cameron et al (note 1 above).

28 See the discussion in Cameron et al (note 1 above) 264–265.

29 Cameron et al (note 1 above) 269–270.

30 See Cameron et al (note 1 above) 384–387.

31 Cameron et al (note 1 above) §257 and Cameron et al 5 ed (note 4 above) §304.

32 See the discussion in Cameron et al (note 1 above) 495–496 of *Potgieter v Potgieter NO* 2012 (1) SA 637 (SCA).

33 For the discussion see Cameron et al (note 1 above) 249–259.

34 Cameron et al (note 1 above) 523–526.

35 2010 (6) SA 518 (SCA).

36 2012 (4) SA 103 (WCC).

37 This is Cameron et al (note 1 above) §272(*e*) at 540–544. The former topics (*d*) and (*e*) of Cameron et al 5 ed (note 4 above) have been combined and comprise §272(*d*) in the sixth edition.

- The chapter on unit trusts[38] has been rewritten to refer to the new governing legislation, namely the Collective Investment Schemes Control Act 45 of 2002, which replaced the Unit Trusts Control Act 54 of 1981. The authors state that the new chapter 'merely provides a brief overview of certain general aspects of collective investment schemes, with special emphasis on some of the institution's trust-like features'.[39]
- The chapter on 'Jurisdiction and Conflict of Laws'[40] has been scrapped because, says Cameron, the chapter 'seems to have had diminishing practical significance'.[41] Librarians would be wise to retain the fifth edition when they acquire the sixth to preserve historic information that will otherwise be lost.
- The chapter on taxation of trusts has been updated and moved to a more sensible position at the end of the book.[42]

The discussion of the requirement that the trust object must be lawful[43] has seen surprisingly little development. The relevance of the Constitution and PEPUDA[44] to the legality of the trust object was already mentioned in general terms in the fifth edition. In the intervening years, there have been a number of cases in which trust conditions relating to the award of bursaries have been set aside because they were unfairly discriminatory but the discussion of these is relegated to a footnote in the sixth edition.[45] Whether a trust object falls foul of the prohibitions against unfair discrimination in PEPUDA[46] will not always be a straightforward matter. A fuller discussion of the impact of PEPUDA would, therefore, have been useful. Possibly the difficulty was that the relevant case law is not yet sufficiently developed.

The changes outlined above, together with multitudes of smaller changes and additions to citations throughout the sixth edition, have improved it and brought it up to date. The authors have not indicated a

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38 Chapter 13 of the fifth edition, now chapter 12 of the sixth edition.

39 At 640 third para.

40 Chapter 14 in the fifth edition.

41 Preface to Cameron et al (note 1 above) vi second para.

42 Now chapter 13.

43 Cameron et al (note 1 above) §107.

44 See note 13 above.

45 See Cameron et al (note 1 above) 197 note 371.

46 See PEPUDA (note 13 above) sections 6-9, read with section 1(1) sv 'discrimination' and 'prohibited grounds', and section 14.

precise cut-off date up to which new cases were included, but the updates include at least one 2018 case.[47]

I detected some minor errors in the editing of the book — a gremlin that stalks even the most careful authors.[48]

For more than 50 years *Honorés* book, in its various editions, has been regarded as the leading text on trusts in South Africa and has been cited frequently in the judgments of our courts. The sixth edition deserves to be held in the same high regard.

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[47] *Harper v Crawford NO* (note 14 above).

[48] For example, Cameron et al (note 1 above) 35 second-last line 'sue the trustee personally capacity' (sic), and at 96 second para 'docs not' (sic) for 'does not'.

The Survivor's Guide for Candidate Attorneys
by *Bhauna Hansjee, Fahreen Kader and Clement Marumoagae*.
Third edition. Juta. 2021

304 pages. Price: R575.00 (soft cover)

The world of legal practice for legal practitioners can be a daunting and complex one, especially for new and aspiring members to the profession. *The Survivor's Guide for Candidate Attorneys* is aimed at soon-to-graduate law students, LLB graduates and particularly those who have secured practical vocational training contracts to become attorneys (that is, candidate attorneys (CAs)).

This book is written by highly experienced and competent legal practitioners with a wealth of knowledge in dealing with CAs. The book contains 135 pages on the practical elements largely relating to being a CA. The remaining 169 pages simply provide a directory of contact details for courts, quasi-judicial bodies and sheriffs. In essence, the book therefore has two very distinct parts. In so far as it provides original information and ideas, the first portion forms the crux of this review.

The book[1] is written in an understandable format and a very practical fashion which suits its stated aims and readership. It provides a step-by-step guide from securing a practical vocational training contract (PVT) all the way to admission as an attorney / legal practitioner. This edition appropriately introduces from its second edition significant changes to the landscape of the legal profession brought about by the Legal Practice Act 28 of 2014 (LPA).[2]

The key parts of the book — which has 15 chapters — contain:

- An introductory chapter setting out the challenges of securing a PVT and, even more so, obtaining work as an admitted legal practitioner after the training.
- Initial chapters provide hints on one's first few days in the office and then how CAs and admitted legal practitioners sell and record their time. In chapter 3, proper file maintenance is stressed as is diarising

[1] When this review refers to 'the book', unless otherwise indicated, what is being referred to is the 'content' of the book referred to above in the first 135 pages.

[2] The LPA includes both advocates and attorneys under the umbrella of 'legal practitioner'. Nonetheless, the LPA also makes provision for the terms 'pupil advocate' and 'candidate attorney', 'advocate' and 'attorney', albeit again for certain purposes grouped together as 'candidate legal practitioners' and 'legal practitioners'. This book focuses on CAs and not pupil advocates.

and drafting correspondence and making formal telephone calls. A very useful precedent of a formal 'lawyer's letter' is provided and discussed. This chapter also deals with the importance of how one interacts with one's colleagues in and outside a CAs firm.

- The CA's relationship with their principal is discussed in chapter 4, both from the perspective of good relations to the principal's duties under the LPA and expectations of the CA.
- The registration and cession of a CA's PVT are to be found in chapter 5. This section is as practical as listing each document that must be submitted to the Legal Practice Council upon registration of one's contract. This chapter also sets out court appearance certificates and the sticky issue of prior criminal convictions. The section on cession of articles is clear, but the authors could have given some guidance on how to avoid it. As with many parts of this book, examples of agreements and applications are provided which is a very valuable, easy to access tool for CAs. An example of this is a PVT contract precedent.
- Client relations such as taking instructions are covered in chapter 6. As the centre-pin around which one's practice operates, it is somewhat surprising that more detail was not contained in this chapter.
- How advocates work and their relationship with CAs and admitted attorneys are to be found in chapter 7.
- The nuts and bolts of issuing, serving and filing court documents are given appropriately detailed attention in the next chapter.
- Chapter 9 on applications and actions could be said to be somewhat of a civil procedure and law of evidence exposé on those types of proceedings. Its content is well written and in far greater detail than most other parts of the book.
- Chapter 10 deals with something very often encountered by CAs — indexing and paginating court files.
- The applicable prescripts on CA appearance in different courts are discussed in chapter 11, as are practical issues such as how the presiding officer is to be addressed.
- Issues post-judgment such as rescission of judgments and taxation of costs are to be found in chapter 12.
- Legal ethics, professional conduct, including etiquette and administrative issues, are covered in the next chapter.

- The triumphant culmination of one's PVT in admission to the profession is tackled in chapter 14, together with aspects such as writing the admission exams and bringing one's application to court for admission.
- The main body of the book ends with a to-do checklist for CAs, and dates of when to do what is listed.

Well over half of the book is thereafter dedicated to directories of courts, quasi-judicial bodies and sheriffs of the courts in terms of how to contact these. The book's unequal balance between discussion and meaningful content (in the first 135 pages) versus the directory section (of 169 pages) is concerning. It is a fine line to tread, but the publication overly focuses on this directory section. Much, if not all, of this directory information is readily available online to a CA. Therefore, more space could have been spared to allow for, first, more discussion of the present content and, second, the addition of more topics.

Some additional topics or supplementation of current chapters may be useful for a new edition and could include:

- The chapter on client relations could be expanded.
- More could be said on labour rights of CAs, such as religious, maternity and family responsibility leave, and the reasonable accommodation of CAs living with disabilities.
- There is a need to discuss psycho-social support resources available for CAs who face one of the most stressful occupations around.
- Beyond what is contained in chapter 1, the discussion on how CAs can best go about searching for work after their PVT is completed could be augmented.
- It would have been useful to note that CAs may not, without Legal Practice Council permission, perform other remunerative work whilst their PVT is underway.
- The 'second route' towards (attorney) admission, being the School for Legal Practice and one year of PVT, could be significantly expanded on.
- The book could engage in a discussion of the difference between performing one's PVT at a private law firm versus at a legal aid entity such as a university law clinic, a legal non-governmental organisation (like the Legal Resources Centre) or Legal Aid South Africa.

The book could have broadened its appeal to pupil advocates (the other category of candidate legal practitioners under the LPA) — both those with and without trust accounts — by having some discussion on admission and the like into that branch of the profession. However, the authors have rightly ensured that aspects like the difference between advocates with and without trust accounts are mentioned. As stated above, the book does discuss well the nature of the relationship between counsel and CAs and legal practitioners.

Ultimately the question needs to be asked whether this book would be a valuable resource to particularly CAs. The answer to this is an unequivocal 'yes'. I would definitely recommend this book to CAs, law graduates and even senior law students planning their move into the working world. Even principals would gain from a brief reading of parts of the publication to remind themselves what should be brought to the attention of CAs mainly upon commencing their PVT. There are not many publications on the South African market that cover the type of practical issues discussed in this book, let alone any dedicated to CAs. This therefore makes it an attractive book to purchase.

It is well laid out with appropriate and amusing illustrations and humour which are suited to a book of this nature. The book is well-edited and would be most valuable to any CA's library.

DR DAVE HOLNESS
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Understanding National Health Insurance in South Africa: A Legal Perspective
by M Labuschaigne and M Slabbert. Juta 2020
172 pages. Price: R235 (soft cover)

The importance of the right to adequate healthcare has perhaps never been more apparent than now, amid the Covid-19 pandemic. The book *Understanding National Health Insurance in South Africa: A Legal Perspective* provides an essential and timeous analysis of the role of the National Health Insurance (NHI) in achieving universal healthcare in South Africa. The book's analysis is premised on the many opportunities and challenges arising from South Africa's NHI Bill. The book's preface correctly notes that the NHI underpins a single South African healthcare system based on the values of justice, equity, and fairness.

The book is arranged into four chapters. Chapter 1 introduces the NHI Bill and its purpose. The chapter also contains valuable commentary to assist non-lawyers in understanding various concepts, such as the difference between a Bill and an Act. In the comments section, at the end of the chapter, the book also reflects on various important challenges presented by the NHI Bill's scope of application. It contains a comprehensive discussion on the exclusion of various different groups of foreign nationals, including the problematic exclusion of asylum seekers.

Chapter 2 sets out the structure of the proposed NHI. It includes a valuable discussion on the functions of the various officials and statutory bodies within the healthcare sector. The chapter also critically engages with important concerns surrounding the governance of the NHI and the broad discretionary powers conferred upon the Minister of Health. It then proceeds to analyse the valid concerns arising from the exclusion of fund transactions from the jurisdiction of the Competition Commission. The chapter warns that this could have an adverse impact on small, medium, and micro enterprises if the fund were to set the prices at a meagre rate and such enterprises cannot obtain relief from the Competition Commission). It further considers the impact of the NHI on the sustainability of the pharmaceutical industry. It provides a comprehensive explanation of the methods envisaged for the reimbursement of service providers. The chapter concludes by clarifying that the benefits under the NHI should not be conflated with the Prescribed Minimum Benefits under private medical health cover.

Chapter 3 provides an overview of the impact and effect of the NHI on various stakeholders and sectors. The chapter offers practical examples of how the implementation of the NHI will impact ordinary citizens. These case scenarios are particularly valuable to gain insights into what the various provisions of the NHI Bill practically mean for persons seeking

medical care. The chapter also contains a comprehensive discussion of the current uncertainty on the future of private medical schemes under the NHI. It also considers the high emigration patterns among South African medical professionals and the challenges this presents for the NHI before turning to the reclassification of hospitals under the NHI. The chapter ends with an invaluable set of tables explaining how each stakeholder will benefit from the NHI and how stakeholders will bear the cost of the NHI.

Chapter 4 sets out the implementation plan for the NHI and provides concluding remarks. The chapter reflects on the various financial implications of the NHI, including its funding and the payment of healthcare providers. It then briefly discusses transitional arrangements and legislation that need to be amended to give effect to the NHI. The concluding remarks again reflect critically upon the opportunities and challenges presented by the NHI Bill in its current form.

Generally, the book *Understanding National Health Insurance in South Africa: A Legal Perspective* gives a balanced account of the opportunities and challenges presented by the NHI. The book uses easily accessible language and simplifies legal jargon. This accessible language should make the book an invaluable resource for both lawyers and non-lawyers alike. Academics and all stakeholders impacted by the NHI would be well-served by adding this book to their collection.

LOUIS KOEN
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The Rental Housing Act Amendments, Annotations and Commentary
by Philip Stoop. Juta. 2020

98 pages. Price: R155.00 (soft cover)

Dr Philip Stoop has published this short (90 pages) accessible guide to the Rental Housing Act 50 of 1999, presumably in anticipation of the long-awaited proclamation of the 2014 Amendment to this Act.

The book employs a simple, yet very useful, technique. The wording of the original (and still current) Act is placed in the left column and it is aligned with the wording of the Amendment Act in the right column. Insertions and deletions are then clearly noted through the use of coloured text and striking through. The reader can, at a glance, identify what, if anything, has been added to or deleted from the current provisions of the Act.

In addition, the author has provided comments, clearly indicated in greyed-out boxes, to both the current and the Amendment Act. These comments are often in the form of simple explanations or cross-references to other parts of the Act, or even other Acts, that might have a bearing on the understanding of the section being referred to.

This book will be invaluable to legal practitioners as well as other professionals who deal with the Rental Housing Act, as it provides information as to whether a section has been changed or not and if so, clearly what the changes are. It will also be helpful to academics as Stoop has done the work necessary to effectively teach what is new in this Act.

The book will, unfortunately, have a short shelf-life as, within a few months, or perhaps a year, of the Amendment Act being proclaimed, I imagine that those who work with the Rental Housing Act regularly will be quite comfortable with the amendments and will no longer need to reference this book. In the meantime, though, it is an excellent resource that clearly highlights the changes the Amendment Act will bring to rental housing.

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Workplace Law
J Grogan. Thirteenth edition, Juta. 2020
508 pages. Price: R931.00 (soft cover)

Workplace Law, the classic general textbook covering just about the entire scope of employment law, is now in its thirteenth edition. It was originally published in 1996. The thirteenth edition covers the law as at March 2020, just as South Africa entered the Covid-19 hard lockdown. Sadly then, although the book explains new legislation and judgments until March 2020, it does not touch on the dramatic impact on employment law caused by responses to the Covid-19 pandemic. Nevertheless, as the author hopes, this edition does provide a solid framework for assessing the scope of that impact and giving meaning to the host of Covid-19-related employment cases that are emerging from this period in our history.

The author of the book, the highly acclaimed Dr John Grogan, is a former professor, a practicing advocate and arbitrator and has been an acting judge. He is a senior commissioner at the CCMA. He brings his wealth of practical, professional, and academic experience to this book to make it a primary resource for those interested in employment law. All aspects of employment law are covered in some depth, and the author uses footnotes to provide legal authority for his statements and to reference his examples, which are in the main drawn from case law. The use of footnotes assists in making the book highly readable — it is also written in clear easy-to-understand language. For those who require more detail than *Workplace Law* provides, there are four fellow volumes to assist: *Dismissal* (Juta 2017), *Employment Rights* (Juta 2019), *Collective Labour Law* (Juta 2019) and *Labour Litigation and Dispute Resolution* (Juta 2019). These four texts are in their third editions and are also by Dr John Grogan.

Part A of *Workplace Law* is entitled 'Sources' and explains how employment law came to look as it does. A small suggestion is that South Africa's colonial past should also be explored in this section. Lindiwe Maqutu in her University of Kwa-Zulu Natal Doctor of Philosophy thesis entitled 'The Postcoloniality of Labour Law: A South African Perspective' makes a strong argument that the vestiges of our past are still evident in modern-day South African employment law.

Part B deals with the 'Individual Employment Relationship' and starts off by discussing the parties to the employment contract, the employment contract itself, and basic conditions of employment. Part C deals with unfair labour practices and employment equity. In respect of the latter, there is a chapter on unfair discrimination and one on affirmative action.

Part D is about discipline and dismissal. The section starts off by discussing workplace discipline generally, talking about management's disciplinary prerogative, the role of discipline and disciplinary procedures. The different forms of dismissal are then canvassed, followed by a discussion of discipline in terms of the Labour Relations Act 66 of 1995 (LRA), where the onus, as well as the role of the code of good practice, are discussed. Automatically unfair dismissals get their own chapter, and section 187 of the LRA is thoroughly dissected in it. Dismissals for misconduct are split into two chapters, one dealing with substantive fairness and the other dealing with procedural fairness. Specific types of misconduct are discussed in the former chapter. Dismissals for poor work performance, incompatibility and incapacity are dealt with in one chapter, as are dismissals for operational requirements. The remedies available to persons who have been unfairly dismissed are dealt with in their own chapter, and the section closes with a chapter on closures, mergers, and sales of businesses.

Part E of *Workplace Law* deals with collective labour law, where there is an introduction followed by a discussion of bargaining agents, bargaining forums, the bargaining process, and collective agreements. Part F is industrial action. It comprises three chapters: strikes and protest action, the dismissal of unprotected strikers and lockouts. The final part of the book is entitled 'Forums and Procedures' and the various dispute resolution entities are discussed here, from the CCMA to labour inspectors, private dispute resolution, and the Constitutional Court.

All in all, the thirteenth edition does not disappoint. The author and publisher have not deviated from their winning formula, and they continue to set out the law until March 2020 in an accessible and reasonably detailed manner. The book is a pleasure to read, and a useful addition to one's bookshelf. The book is also available in electronic format where new developments will be tracked in quarterly updates by the author.

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Law of Persons
by Trynie Boezaart. Seventh edition. Juta. 2020
239 pages. Price: R599.00 (soft cover)

The evolutionary nature of law is undeniable and blatantly evident in the law of persons which typically includes the identification, classification and differentiation between persons from birth to death. The evolutionary, progressive and transformative nature of the law of persons generates substantial interest and litigation in this area of law.

Trynie Boezaart (previously writing under the name CJ Davel), professor emeritus at the University of Pretoria, has authored this work from the first edition, which was published in 1995 just after South Africa's first democratic elections. She is an advocate of the High Court of South Africa, founder and director of the Centre for Child Law at the University of Pretoria until 2008 and has served as an acting judge of the High Court. She enjoys international recognition for research in child law and the law of persons, has lectured extensively in the law of persons for more than three decades, and has published widely on numerous aspects of the law of persons and related fields.

Law of Persons is now in its seventh edition and is a recommended text on the South African law of persons. The book constitutes a general and fully referenced source on the law of persons and reflects the evolution and transformation of this area of law in line with the values entrenched in the Constitution with specific reference to the Bill of Rights.

As South Africa matures in understanding the Bill of Rights, the values entrenched in it begin to permeate all areas of the law including the law of persons to bring about equality. The seventh edition of the book provides a focus on the courts' role in the evolutionary process of the law of persons. In particular, the recent cases of *KOS v Minister of Home Affairs* 2017 (6) SA 588 (WCC) and *GPCM v Minister of Home Affairs* 2020 (3) SA 434 (GP) are discussed and reveal the improper implementation of the Alteration of Sex Description and Sex Status Act 49 of 2003 which aimed at achieving equal treatment for individuals by providing for the alteration of sex descriptions in certain circumstances. The cases also revealed the inappropriate application of the Marriage Act 25 of 1961 or Civil Union Act 17 of 2006 and the shortcomings in the record-keeping regulatory mechanisms that negatively affected the rights of transgendered individuals.

The ambiguous areas of our law have led to litigation and calls for greater clarity and interpretation. This was seen in respect of the rights and responsibilities of unmarried fathers in respect of their minor children as well as the requirements to conclude a valid surrogacy agreement and whether the services rendered by surrogacy coordinators or facilitators are lawful.

As the evolutionary process continues, more areas of inequality are unearthed. The book highlights this by dealing with the recent case of *Centre for Child Law v Director-General, Department of Home Affairs* 2020 (6) SA 199 (ECG). In that case the Full Court of the High Court of South Africa, Eastern Cape Division, Grahamstown declared section 10 of the Births and Deaths Registration Act 51 of 1992 constitutionally invalid 'to the extent that it does not allow unmarried fathers to give notice of the births of their children under the father's surname in the absence of the mothers of such children' (paragraph 2.1 of the order). This ensured that more children are able to obtain birth registration and thereby access education, social assistance, and healthcare. This case was taken up to the Constitutional Court for confirmation of the declaration of invalidity. On 22 September 2021, the Constitutional Court confirmed the declaration of invalidity and consequently severed section 10 from the Act (*Centre for Child Law v Director General: Department of Home Affairs* (CCT 101/20) [2021] ZACC 31 (22 September 2021).

The book encapsulates the evolutionary nature of the law of persons and incorporates the latest case law and updates in this area of law. The book is systematic, succinct, logical in approach and easy to read with excellent signposting and strategically placed subheadings throughout which together with its comprehensive overview makes it suitable as a textbook in that it makes the subject area accessible to students from entry to exit of academia.

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