

The Puzzle of Pronouncing on the Validity of Administrative Action on Review

Geo Quinot*
P J H Maree†

I INTRODUCTION

Two cases decided by the Constitutional Court in 2014 highlighted one of the puzzles of administrative law under the constitutional order. The various judgments in *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd*¹ and *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency (No 2)*² raised the question of the relationship between a finding that administrative action is unconstitutional and hence invalid, and the setting aside of that administrative action.

At common law the setting aside of administrative action has always been regarded as a discretionary remedy. This approach has not been seriously interrogated under the democratic constitutional regime. However, the framework within which judicial review of administrative action now takes place under the Constitution of the Republic of South Africa, 1996 differs dramatically from that of the common law. The question thus emerges whether the traditional approach to setting aside administrative action can be reconciled with the new constitutional framework.

In what follows, we grapple with this issue by looking at the remedy of setting aside in administrative law. We thus focus exclusively on an order by the court following a successful application for judicial review of administrative action, to the effect that the impugned administrative action ceases to exist. The central question is how that remedy is to be understood in terms of the Constitution. The exact remedy at issue here carries different labels under the different regimes, which are not always consistently used. At common law it was called setting aside administrative action. Under the constitutional regime it is at times referred to as consequential relief following a declaration of invalidity. We are less concerned about the label attached to the remedy and more with the substance of it. Whatever

* Professor, Department of Public Law, Stellenbosch University.

† Post-doctoral fellow, Department of Public Law, Stellenbosch University.

¹ *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* [2014] ZACC 6, 2014 (3) SA 481 (CC), 2014 (5) BCLR 547 (CC) ('Kirland').

² *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others (No 2)* [2014] ZACC 12, 2014 (4) SA 179 (CC), 2014 (6) BCLR 641 (CC) ('Allpay 2').

it is called, it is the order, which in substance has the result that the impugned administrative action ceases to exist, that we are interested in.

We start by setting out how the common law framed judicial review of administrative action and the remedy of setting aside. We then move on to consider what the Constitution states about judicial review and remedies before turning to the Court's treatment of the issue in *Allpay 2* and *Kirland*.

While the question that we grapple with in this contribution certainly has particular practical implications, as our analysis of the cases will aim to show, we are concerned first and foremost with doctrine. In our view it is essential to develop a coherent doctrinal approach to questions such as what an appropriate, effective remedy should look like in order to achieve the aim of administrative justice under the Constitution.

II THE COMMON LAW

The starting point of the inquiry is the common law, where it has long been the position that the remedy of setting aside following review of administrative action is within the court's discretion to grant or to withhold.³ This is regardless of the court's finding on the reviewability of the impugned administrative action. In other words, whether the administrative action is reviewable, ie whether a ground of review is found to exist, and whether the administrative action should be set aside as a consequence of the finding of reviewability, have long been held to be separate questions. This goes back to one of the foundational judgments for judicial review of administrative action in South African common law, namely that of Innes CJ in *Johannesburg Consolidated Investment Co Ltd v Johannesburg Town Council*, where he stated:

Whenever a public body has a duty imposed upon it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them.⁴

A positive answer to the former question, that is of reviewability, is not decisive of the latter question of setting aside.

The discretionary nature of setting aside follows from the discretionary nature of the entire review procedure. As Corbett J stated in *Harnaker v Minister of the Interior*, 'review under the common law' is 'an inherent jurisdiction exercised by the Court'.⁵ The granting or refusal of an order setting aside an irregular administrative action seems to rest on considerations of both principle and practice. In the context of English law, Wade and Forsyth state that while the rule of law would insist on granting such an order, 'the denial of a remedy sometimes serves the public interest', and they give as examples instances where such a refusal is necessary to avoid administrative chaos or to protect the interests of innocent

³ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48, 2004 (6) SA 222 (SCA) ('*Oudekraal*') at para 36; L Baxter *Administrative Law* (1984) 678, 713.

⁴ 1903 TS 111 at 115 (emphasis added).

⁵ 1965 (1) SA 372 (C) at 380.

third parties.⁶ The authors of *De Smith's Judicial Review* echo the principled position that granting the order must be the default position, but note that fairness and justice may dictate a refusal in a given case.⁷ In relation to South African common law, Baxter observes that '[i]t is not easy to discern a clear set of principles upon which this discretion will be exercised'.⁸

Whatever the exact justification for this remedial discretion may be, at common law the remedy to set aside (*certiorari* to quash) has been discretionary from at least the mid-seventeenth century,⁹ and it is fair to say that the position was well settled in South African common law prior to the adoption of the democratic Constitution. This position was authoritatively stated by the Supreme Court of Appeal in *Oudekraal* in an oft-quoted passage in which the court declared:

[A] court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy. It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimizing injustice when legality and certainty collide.¹⁰

Even though this judgment was handed down in 2004, a decade into the new constitutional era, it was essentially decided in terms of common law. The court relied exclusively on English authority for the above-quoted paragraph, particularly the House of Lords decision in *Wandsworth London Borough Council v Winder*¹¹ and *De Smith*.¹²

III THE CONSTITUTIONAL ERA

While *Oudekraal* was decided with primary reliance on common-law authority and can thus be viewed as a statement of the position at common law, the fact that it was decided well into the constitutional era confirms that the common-law position has been generally accepted up to now. This is borne out by a line of judgments from the Supreme Court of Appeal confirming the discretionary nature of the remedy of setting aside in administrative law. For example, in *Chief Executive Officer, SASSA v Cash Paymaster Services (Pty) Ltd* the court declared that '[c]onsiderations of public interest, pragmatism and practicality should inform the exercise of a judicial discretion whether to set aside administrative action or not',¹³ and in *Judicial Service Commission v Cape Bar Council* the same court held that 'even if an administrative decision is challenged and found wanting, courts

⁶ HWR Wade & CF Forsyth *Administrative Law* (11th Edition, 2014) 597.

⁷ The Rt Hon the Lord Woolf, Professor Sir Jeffrey Jowell QC, Professor Andrew Le Sueur et al *De Smith's Judicial Review* (7th Edition, 2013) 979.

⁸ Baxter (note 3 above) at 713, and see further at 713–718 where he discusses 'some of the more dominant considerations which influence the courts in the exercise of their discretion'.

⁹ Lord Justice Bingham 'Should Public Law Remedies be Discretionary?' 1991 *Public Law* 64, 65.

¹⁰ *Oudekraal* (note 3 above) at para 36 (footnotes omitted).

¹¹ [1985] AC 461 (HL), [1984] 3 All ER 976 (HL).

¹² SA de Smith, H Woolf & JL Jowell *Judicial Review of Administrative Action* (5th Edition, 1995).

¹³ *Chief Executive Officer, South African Social Security Agency, and Others v Cash Paymaster Services (Pty) Ltd* [2011] ZASCA 13, 2012 (1) SA 216 (SCA) at para 29 (footnotes omitted).

still have a residual discretion to refuse to set that decision aside'.¹⁴ At times the court has, however, sought to circumscribe this discretion by stating, for example in *Eskom Holdings Ltd v New Reclamation Group (Pty) Ltd*, that an applicant who succeeds in showing the existence of a reviewable irregularity '[o]rdinarily . . . would be entitled to call for the [administrative action] to be set aside',¹⁵ thus suggesting that setting aside may be viewed as the default remedy.

When comparing these judgments with the common-law position as set out in the previous section, it becomes evident that that position has largely endured under the Constitution. While setting aside was the default remedy when administrative action was found irregular, the reviewing court could refuse it within its discretion. In *New Reclamation*¹⁶ the court furthermore read the Promotion of Administrative Justice Act 3 of 2000 (PAJA) to confirm the discretionary approach to setting aside as expressed in *Oudekraal*. Section 8 of the PAJA gives the reviewing court the power to grant 'any order that is just and equitable, *including* orders . . . (c) setting aside the administrative action' (emphasis added). This formulation seems indeed to support the view of setting aside as a discretionary remedy.

At this point the reader may justifiably ask: So what is the issue? The constitutional regime seems to align perfectly with the common law on this point, as recognised in both legislation and case law. There may thus be no puzzle here at all. However, in our view the issue emerges when one compares the common-law position with what is set out in s 172(1) of the Constitution, which reads:

- (1) When deciding a constitutional matter within its power, a court—
 - (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
 - (b) may make any order that is just and equitable, including—
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

Unlike Brand JA who, without more, stated in *JSC v Cape Bar Council* that 'this common-law principle . . . is confirmed in effect by s 172(1) of our Constitution',¹⁷ it is not immediately obvious to us that s 172(1) in fact allows for the discretionary nature of setting aside.

The starting point of the puzzle is the recognition that all applications for judicial review of administrative action are now founded on s 33 of the Constitution, regardless of whether the section is in fact expressly raised in the application. That

¹⁴ *Judicial Service Commission and Another v Cape Bar Council and Another* [2012] ZASCA 115, 2013 (1) SA 170 (SCA) (*JSC v Cape Bar Council*) at para 13.

¹⁵ *Eskom Holdings Ltd and Another v New Reclamation Group (Pty) Ltd* [2009] ZASCA 8, 2009 (4) SA 628 (SCA) (*New Reclamation*) at para 11.

¹⁶ *Ibid* at para 9.

¹⁷ *JSC v Cape Bar Council* (note 14 above) at para 13.

much is borne out by the judgments in *Pharmaceutical Manufacturers Association*,¹⁸ *Bato Star*¹⁹ and *New Clicks*.²⁰

In *Pharmaceutical Manufacturers* the Court held that the common law does not continue to provide a basis for judicial review of administrative action separate and parallel to that set out in the Constitution.²¹ The Constitution is now the sole basis for judicial review of administrative action, and the common law has been ‘subsumed’ under it.²² Importantly, the Court held that there is only ‘one system of law . . . shaped by the Constitution, which is the supreme law, and all law . . . derives its force from the Constitution’.²³

In *Bato Star* the Court added the PAJA to this structure of judicial review by holding that the cause of action for judicial review of administrative action will now ordinarily arise from that statute.²⁴ The authority of the PAJA rests in turn on the Constitution, and on s 33 in particular.²⁵ The Court further explained that given this relationship between the PAJA and the Constitution, ‘matters relating to the interpretation and application of PAJA will . . . be constitutional matters’.²⁶

Finally, in *New Clicks* Chaskalson CJ rejected the approach of both the courts below, which had held that there was a basis for judicial review of administrative action under s 33 independent from the PAJA.²⁷ Chaskalson CJ held that the PAJA was intended to and in fact does ‘cover the field’, with the result that a litigant cannot go behind it and rely on s 33 directly when bringing an application for judicial review of administrative action.²⁸ This view was supported by Ngcobo J, who held that it is impermissible either for a litigant to argue or a court to decide a review application directly with reference to s 33 without taking the PAJA into account.²⁹ The PAJA was intended to give effect to s 33, and that is the way in which judicial review of administrative action in terms of the requirements of administrative justice set out in s 33 must be argued. Reliance on the PAJA is thus reliance on s 33 itself.

A finding of reviewability under the grounds of review in s 6(2) of the PAJA thus amounts to a finding that s 33 has not been complied with. This brings us

¹⁸ *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex parte President of the Republic of South Africa and Others* [2000] ZACC 1, 2000 (2) SA 674 (CC), 2000 (3) BCLR 241 (CC) (‘*Pharmaceutical Manufacturers*’).

¹⁹ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15, 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) (‘*Bato Star*’).

²⁰ *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* [2005] ZACC 14, 2006 (2) SA 311 (CC), 2006 (1) BCLR (1) (CC) (‘*New Clicks*’).

²¹ *Pharmaceutical Manufacturers* (note 18 above) at para 33.

²² *Ibid.*

²³ *Ibid* at para 44.

²⁴ *Bato Star* (note 19 above) at para 25.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *New Clicks* (note 20 above) at para 93, referring to the majority judgment of the High Court in *New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang and Another NNO; Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO* 2005 (2) SA 530 (C), [2005] 1 All SA 196 (C) and to the unanimous judgment of the Supreme Court of Appeal in *Pharmaceutical Society of South Africa and Others v Tshabalala-Msimang and Another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health and Another* [2004] ZASCA 122, 2005 (3) SA 238 (SCA).

²⁸ *New Clicks* (note 20 above) at paras 95–96.

²⁹ *Ibid* at para 437.

back to s 172(1), for success in proving a ground of review under s 6(2) of the PAJA is tantamount to showing that particular ‘conduct . . . is inconsistent with the Constitution’, which triggers s 172(1)(a).

When one looks at s 172(1)(a), one is immediately struck by the mandatory nature of the language. The court entertaining the constitutional matter has no choice but to declare the impugned legislation or conduct invalid. This position of course aligns with the doctrine of objective invalidity flowing from the supremacy clause of the Constitution, as explained in judgments such as *Ferreira v Levin*³⁰ and *Fose*.³¹ In the latter case Kriegler J stated that the supremacy clause ‘makes unconstitutional conduct a nullity, even before Courts have pronounced it so’ and that ‘it is not the declaration itself that renders the conduct unconstitutional. The declaration is merely descriptive of a pre-existing state of affairs.’³² The Court again confirmed this position recently in *Economic Freedom Fighters* when it held that

[d]eclaring law or conduct inconsistent with the Constitution and invalid is plainly an obligatory power vested in this court as borne out by the word ‘must’ [in s 172(1)]. Unlike the discretionary power to make a declaratory order in terms of s 38 of the Constitution, this Court has no choice but to make a declaratory order where s 172(1)(a) applies. Section 172(1)(a) impels this court, to pronounce on the inconsistency and invalidity of, in this case, the President’s conduct and that of the National Assembly. This we do routinely whenever any law or conduct is held to be inconsistent with the Constitution.³³

Within this constitutional framework it is not immediately apparent to us where the inherited common-law discretionary nature of the courts’ power in setting administrative action aside fits in. The core of our argument is that it is not axiomatic that the declaration of invalidity can mean anything but nullifying the administrative action. To say that the declaration of invalidity does not in effect amount to the setting aside of the administrative action seems to fly in the face of the doctrine of objective invalidity, the approach adopted in relation to remedies in judicial review of legislation and, arguably, s 172(1) itself. When one looks at the wording of s 172(1), it seems that para (b) assumes the real effect of the declaration of invalidity under para (a), that is to nullify the legislation or conduct. It is not altogether clear how else one would interpret the reference to ‘the retrospective effect of the declaration of invalidity’ in para (b) other than as suggesting that the declaration under para (a) results in nullifying the legislation or conduct.

Against this background we analyse the Constitutional Court’s approach in *Bengwenyama*,³⁴ *Allpay*²³⁵ and *Kirland*.³⁶ In particular, we question the notion that the effect of nullifying the administrative action following review flows from the just and equitable order under s 172(1)(b) (and of course s 8 of the PAJA) rather

³⁰ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13, 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC).

³¹ *Fose v Minister of Safety and Security* [1997] ZACC 6, 1997 (3) SA 786 (CC), 1997 (7) BCLR 851 (CC) (‘*Fose*’).

³² *Ibid* at para 94.

³³ *Economic Freedom Fighters v Speaker of the National Assembly and Others* [2016] ZACC 11, 2016 (3) SA 580 (CC), 2016 (5) BCLR 618 (CC) at para 103 (footnotes omitted).

³⁴ *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* [2010] ZACC 26, 2011 (4) SA 113 (CC), 2011 (3) BCLR 229 (CC) (‘*Bengwenyama*’).

³⁵ Note 2 above.

³⁶ Note 1 above.

than the declaration of invalidity under s 172(1)(a). After analysing the cases, we return to the broad constitutional considerations outlined above as well as the text of s 172 to interrogate the fit between the discretionary nature of the remedy of setting aside at common law and the constitutional approach to remedies.

IV THE CONSTITUTIONAL COURT

The two 2014 cases of *Allpay 2* and *Kirland* built on the Constitutional Court's earlier pronouncement on this issue in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*.³⁷ Our engagement with the Court's treatment of the discretionary nature of orders setting aside administrative action should thus start with a brief look at *Bengwenyama*.

A *Bengwenyama*

In judicial review proceedings the applicants in *Bengwenyama* challenged the grant of a prospecting right over their land to the first respondent by the Department of Mineral Resources. It was not in dispute that the decision to grant the prospecting right amounted to administrative action and that the PAJA applied to the decision. The review application was thus one brought in terms of the PAJA. The Court found the grant of the prospecting right reviewable on a number of PAJA grounds.

The discretionary nature of the setting-aside remedy was subsequently raised squarely. The respondent relied on a line of Supreme Court of Appeal judgments, *Oudekraal*,³⁸ *JFE Sapela Electronics*³⁹ and *Millennium Waste*,⁴⁰ to support an argument that the Court should not set the action aside despite the reviewable irregularities. The applicant argued in response that these judgments could not stand in light of s 172(1) of the Constitution, which makes a declaration of invalidity mandatory. Thus, the core of our puzzle was raised and very much in the terms outlined above: *Oudekraal* versus s 172(1).

The Court unfortunately does not provide much conceptual clarity on the issue. This is partly owing to some unfortunate formulations in its reasoning. The Court states that 'invalid administrative conduct must be declared unlawful'.⁴¹ Given that lawfulness is one of the constitutional requirements of just administrative action in s 33 and that invalidity is the label attached to conduct that does not comply with constitutional standards under s 172, one would have rather expected this statement to read: 'unlawful administrative conduct must be declared invalid'. The Court continues to refer to a declaration of unlawfulness, ostensibly referring to the declaration under s 172.⁴² The problem with this terminology is that it conflates the finding on the ground of review which, as we

³⁷ Note 34 above.

³⁸ Note 3 above.

³⁹ *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* [2005] ZASCA 90, 2008 (2) SA 638 (SCA).

⁴⁰ *Millennium Waste Management (Pty) Ltd v Chairperson, Tender Board: Limpopo Province and Others* [2007] ZASCA 165, 2008 (2) SA 481 (SCA).

⁴¹ *Bengwenyama* (note 34 above) at paras 82 and 84.

⁴² *Ibid* at paras 82 and 85.

have argued above, amounts to a finding as to whether s 33 has been violated, with the declaration that must subsequently be made under s 172. In our view, a finding of unlawfulness is conceptually something different from a declaration of invalidity. The one expresses a view on whether the relevant conduct complies with the standard set for such conduct by s 33 of the Constitution, while the other pronounces on the result of that finding. In cases involving rights other than those in s 33, the distinction between these two pronouncements is typically made clear by the limitations analysis conducted in terms of s 36 of the Constitution. Keeping these two pronouncements distinct will aid us in identifying where there is judicial discretion in the review of administrative action under the Constitution and where there is none, as we shall argue below.

However, the most significant aspect of *Bengwenyama* is the distinction the Court draws between the declaration of invalidity and an order setting the administrative action aside. The Court holds that the order setting the administrative action aside forms part of ‘a further just and equitable remedy’ following the declaration of invalidity.⁴³ It is only the order setting aside the action, ie the further or consequential remedy, that is discretionary. This is made clear in the Court’s statement that ‘[t]he apparent rigour of declaring conduct in conflict with the Constitution and PAJA unlawful is ameliorated in both the Constitution and PAJA by providing for a just and equitable remedy *in its wake*’.⁴⁴

The Court also expressly rejects the possibility of grounding this approach in s 172(1)(b)(ii), which allows for the suspension of a declaration of invalidity.⁴⁵ The Court thus rejects the conceptualisation of a decision not to set aside the administrative action as a suspension of invalidity. In this respect the Court states that ‘[i]f the administrative action is declared unlawful, but all its consequences are not set aside, the practical effect of the order will be final, not merely a temporary suspension of invalidity’.⁴⁶ This statement is somewhat puzzling in terms of the Court’s own reasoning, in that it suggests an equation of setting aside and invalidity. It is ostensibly only the issue of timing that distinguishes the two positions, namely the declaration of unlawfulness without setting the action aside (fully) and the suspension of invalidity. The former is permanent while the latter is temporary, but the rest is the same.

Instead of relying on the ‘suspension’ conceptualisation in support of its approach, the Court relies on the general reference in s 172(1)(b) to a ‘just and equitable order’ as well as on s 8 of the PAJA, which echoes that provision.

B Allpay 2

Allpay 2 was the second instalment of the botched public tender for the rendering of services to pay social grants to beneficiaries on behalf of the South African Social Security Agency (SASSA). The case followed the familiar pattern in procurement disputes, with a disappointed bidder, Allpay, challenging the decision to award to

⁴³ Ibid at para 84.

⁴⁴ Ibid at para 85 (emphasis added).

⁴⁵ Ibid at para 82.

⁴⁶ Ibid.

the winning tenderer, Cash Paymaster Services (Pty) Ltd. In *Allpay 1*,⁴⁷ the first Constitutional Court judgment in this matter, the Court found the award decision reviewable on a number of PAJA grounds and thus held the decision to award the tender to Cash Paymaster ‘constitutionally invalid’.⁴⁸ However, the Court suspended that order ‘pending determination of a just and equitable remedy’ after further submissions by the parties. *Allpay 2* was the judgment that dealt with these further submissions and that formulated the remedy in this matter.

It is important to note the significance of the decision challenged in the *Allpay* saga, which played a key role in how the Court dealt with the matter and in particular the remedy. This was clearly not just another run-of-the-mill procurement case. Not surprisingly, the Court in *Allpay 1* framed the entire matter by highlighting the importance of the function at stake in this review. The opening paragraph of the judgment reads as follows:

For many people in this country the payment of social grants by the state provides the only hope of ever living in the material conditions that the Constitution’s values of dignity, freedom and equality promise. About 15 million people depend on the payment of these social grants. They are vulnerable people, living at the margins of affluence in our society.⁴⁹

The tender at issue was for the exclusive rendering of grant payment services to all beneficiaries across the country for a period of five years. By the time *Allpay 2* was heard, that service involved nearly 21 million people,⁵⁰ which is about 40 per cent of the total population.⁵¹ The subject matter of the service, social grants, is of course itself also recognised as a fundamental right under s 27 of the Constitution. From a public-function perspective this was accordingly a highly significant tender. From a commercial perspective it was no less significant. The winning bidder submitted that by the time the case was heard, it had already incurred capital expenditure of R1.3 billion under the contract.⁵² It was reported in the media that the tender was worth an estimated R10 billion.⁵³ The tender process itself took close to three years to complete and cost about R6 million.⁵⁴

Against the backdrop of the significance of the decision under review, in *Allpay 1* the Court was not prepared to rule on the appropriate remedy immediately on finding that the award decision was irregular, ie that SASSA had breached s 33 of

⁴⁷ *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* [2013] ZACC 42, 2014 (1) SA 604 (CC), 2014 (1) BCLR 1 (CC) (*Allpay 1*).

⁴⁸ *Ibid* at para 93.

⁴⁹ *Ibid* at para 1.

⁵⁰ *Allpay 2* (note 2 above) at para 14.

⁵¹ The 2011 census reported the total South African population at 51 770 560: Statistics South Africa *Census 2011*, Fact Sheet 1.

⁵² *Allpay 2* (note 2 above) at para 18.

⁵³ S Evans ‘Concourt Asked to “Turn its Back” on Unlawful Grants Tender’ Mail & Guardian (11 February 2014), available at <http://mg.co.za/article/2014-02-11-concourt-asked-to-turn-its-back-on-unlawful-grants-tender>; City Press ‘We Saved Government R3bn Per Year – Cash Paymaster Services’ news24 (11 May 2014), available at <http://www.news24.com/Archives/City-Press/We-saved-government-R3bn-per-year-Cash-Paymaster-Services-20150430>; South African Press Association ‘Social Development Welcomes Grant Ruling’ SABC News (18 April 2014), available at <http://www.sabc.co.za/news/a/b61ca50043ac3b99b5b9f7239b19c088/SocialundefinedDevelopmentundefinedwelcomesundefinedgrantundefinedruling-20141804>.

⁵⁴ *Allpay 2* (note 2 above) at para 12.

the Constitution in awarding the tender to Cash Paymaster. The Court referred to the fact that the system operating under the contract between SASSA and Cash Paymaster was running smoothly and that an abrupt setting aside of the tender award, and hence the contract, would potentially cause significant disruption.⁵⁵ The Court also noted that those likely to be most severely affected by such disruption were vulnerable members of society and in particular, children.⁵⁶ Accordingly, the Court called for additional submissions from the parties on a range of issues that would impact on the formulation of a remedy. These focused closely on what the likely implications might be should the tender award be set aside and how the interruption of the public function at stake here would be managed. In *Allpay 2* the Court dealt with these further submissions.

Already in *Allpay 1* the Court explicitly endorsed the approach in *Bengwenyama*,⁵⁷ stating, again in a somewhat odd formulation, that '[o]nce a ground of review under PAJA has been established there is no room for shying away from it. Section 172(1)(a) of the Constitution requires the decision to be declared unlawful.'⁵⁸ As in *Bengwenyama*, the Court conflated the finding of unlawfulness with the declaration of invalidity in this formulation. However, it held that the consequences of such a 'declaration of unlawfulness' are something distinct from the declaration itself, and must be dealt with in the subsequent just and equitable order. In *Allpay 1* the Court added that this approach, that is the distinction between constitutional invalidity and the remedy, is a constitutional development and not part of our common law.⁵⁹ This is the first indication that here we may not be dealing with the same common-law approach as espoused in *Oudekraal*.⁶⁰

Following this approach, the unanimous Court in *Allpay 2* viewed the matter at hand as what would be a just and equitable remedy *subsequent* to the declaration of invalidity in *Allpay 1*. In other words, the declaration of invalidity was not really at issue in the remedy part of this case, which is *Allpay 2*. This is a very clear indication that the Court views as two separate questions the declaration of invalidity and what the effect of that declaration should be. It is seemingly only in the second part that discretion has a role to play in formulating what the real effect will be of the declaration of invalidity, that is, in the formulation of the subsequent just and equitable remedy.

In *Allpay 2* the Court pointed to the 'corrective principle' governing the formulation of a just and equitable remedy, which flows from s 172 of the Constitution as well as '[l]ogic, general legal principle, the Constitution and the binding authority of this court' and 'the rule of law and principle of legality'.⁶¹ This corrective principle requires 'the consequences of invalidity to be corrected or reversed where they can no longer be prevented', at least as a default position.⁶² However, the Court went on to hold that there may be circumstances in which it

⁵⁵ *Allpay 1* (note 47 above) at para 96.

⁵⁶ *Ibid.*

⁵⁷ Note 34 above.

⁵⁸ *Allpay 1* (note 47 above) at para 25, and see also para 56.

⁵⁹ *Ibid* at para 26.

⁶⁰ Note 3 above.

⁶¹ *Allpay 2* (note 2 above) at paras 30–32.

⁶² *Ibid* at para 30.

would be just and equitable to deviate from the corrective principle, although it did not find it ‘desirable or even feasible’ to formulate a general statement of what those circumstances might be.⁶³ The Court simply held that it must be accepted ‘that the application of the corrective principle is not uniform’.⁶⁴

In assessing the particular circumstances of the case before it to determine whether there should be a deviation from the default position of the corrective principle, the Court pointed out that ‘a just and equitable remedy will not always lie in a simple choice between ordering correction and maintaining the existing position’.⁶⁵ This statement at least indicates clearly that a decision to maintain the administrative action, that is an order declaring that the administrative action at issue is of full force and effect, may be a just and equitable remedy following a declaration of invalidity.

C Kirland

The unanimity with which the Court dealt with these issues in *Bengwenyama* and *Allpay 2* was somewhat disturbed by the subsequent judgments in *Kirland*.⁶⁶ The facts of the *Kirland* case are rather peculiar and merit close attention.

In July 2006 and May 2007 Kirland applied to the Superintendent-General of Health in the Eastern Cape, Mr Boya, for permission to ‘establish’ two hospitals. Although Mr Boya decided not to approve the application, that decision was not communicated to Kirland because Mr Boya fell ill and an Acting Superintendent-General, Dr Diliza, took over. Dr Diliza subsequently informed Kirland by letter that its application had succeeded.⁶⁷ Kirland acted on the department’s approval in preparing to establish the hospitals. These events comprise all interaction between Kirland and the department until 20 June 2008, more than seven months later.⁶⁸ Thus, as far as Kirland was concerned it could proceed with the establishment of the hospitals.

Kirland’s situation changed upon receipt of a letter, dated 20 June 2008, from the Superintendent-General, Mr Boya, who had returned to work in the meantime. This letter informed Kirland that the approval had been ‘withdrawn’, the reason being that ‘Port Elizabeth [was] over serviced with private health facilities’.⁶⁹ Kirland appealed unsuccessfully to the MEC for Health in the Eastern Cape to have the withdrawal overturned, and subsequently initiated proceedings in the High Court. This was the complete picture as far as Kirland was concerned when the judicial proceedings began.

However, behind the scenes there was far more to the application than Kirland knew. At this stage nothing but the initial approval and subsequent withdrawal of the decision had been communicated to Kirland. In fact, before Mr Boya became ill he had followed an advisory committee’s recommendation to refuse Kirland’s

⁶³ Ibid at para 34.

⁶⁴ Ibid.

⁶⁵ Ibid at para 39.

⁶⁶ Note 1 above.

⁶⁷ *Kirland* (note 1 above) at para 16.

⁶⁸ Ibid at para 16.

⁶⁹ Ibid.

application. His decisions had been reduced to writing by 9 October 2007,⁷⁰ but were left unsigned and were not forwarded to Kirland.

Dr Diliza, the Acting Superintendent-General, was appointed in Mr Boya's absence. Upon learning of Mr Boya's decision to refuse the application, 'the MEC summoned the Acting Superintendent-General to her office on 23 October 2007'.⁷¹ According to Dr Diliza the MEC, claiming political pressure, instructed her to approve the application. Dr Diliza duly approved the application, under the impression that she was obliged to do so. This was denied by both Kirland and the MEC, but Kirland could not secure an affidavit from the MEC.

Even though Mr Boya returned to work in November 2007, it was only on 16 July 2008, seven months after his return, that he contacted Kirland for the first time. The wording of the letter is significant:

I refer to the above matter, more particularly the letter dated 23 October 2007 that the acting superintendent-general of this department addressed to you. In that letter you were informed that your applications for a licence in respect of the above hospitals had been approved. This approval is contrary to our view that the area is over supplied.

I regret to inform you that the Department has *withdrawn* the approval. I point out that on 9 October 2007 and after I had considered all applications, I decided to refuse the application because Port Elizabeth is over serviced with private health facilities.

I advise that you have a right to appeal in writing to the MEC for Health against my decision. That appeal must be lodged with the MEC within 60 days from the date of this letter and must set out the grounds of appeal.⁷²

Mr Boya thus created the impression that the department was entitled to withdraw the approval. (Only after Kirland had initiated judicial proceedings on the basis of the contested withdrawal were the irregularities mentioned for the first time in the state parties' answering affidavits, and this nearly two years after the withdrawal.) The letter set in motion the series of events culminating in the judgment of the Constitutional Court. The withdrawal was the catalyst. It was the decision to which Kirland responded, which Kirland appealed to the MEC and finally brought before the High Court; though that is not to say that the proceedings were limited to the contents of the letter and Kirland's response to it.

Against this background, the Constitutional Court divided mainly on the question whether the validity of Dr Diliza's approval of Kirland's application was an issue before the Court. The two dissenting judgments by Jafta J and Zondo J both held that the validity of that decision was indeed before the Court, whereas the majority judgment of Cameron J held that it was not. On the face of it, the main issue that the judges seemed to disagree on was *when* a court may or ought to entertain a review, which may seem like a question of procedure: can a court review and set aside an administrative action in the absence of a clear application to do so? However, underlying this difference on procedure was a lack of clarity as to exactly what the question of the validity of administrative action really means. It was in this context of a contested interpretation of what exactly was

⁷⁰ Ibid at para 8.

⁷¹ Ibid at para 9.

⁷² Ibid at para 16 as reproduced in the judgment of Jafta J (emphasis added).

before the Court, specifically relating to the validity question, that the first cracks seemed to appear in the unanimity of the Court as to how invalid administrative action should be dealt with under the Constitution.

Jafta J formulated the issue as ‘what should be the response from a court where serious maladministration and abuse of public power is established but there is no request for the review of the offending administrative action’.⁷³ He stated that this issue ‘goes to the heart of the role played by our courts in ensuring that public power is properly exercised within the bounds of the Constitution’.⁷⁴ Jafta J held that the validity of the approval was squarely before the Court and that the Court had to pronounce on it. He further found the approval to be invalid. In criticising the Supreme Court of Appeal’s handling of this matter, Jafta J stated:

It is apparent from the record that the Supreme Court of Appeal adopted an unduly narrow approach to the matter. In doing so, it left intact an administrative decision which that Court had found to be invalid – a decision which was made under circumstances described by that court as ‘a sorry tale of mishap, maladministration and at least two failures of moral courage’.⁷⁵

Although these statements may be read at least to question whether irregular administrative action of the type at issue here could be left intact, ie whether there is any discretion to uphold that action following the finding of invalidity, Jafta J steps back from such a position by confirming later in his judgment that a court has discretion to order a just and equitable remedy ‘[i]f the coming into effect of an order invalidating an administrative action would result in an injustice’.⁷⁶ He thus largely kept to the *Bengwenyama* approach, although with less fervour than the Court expressed in that matter or in *Allpay 1* and *Allpay 2*.

Jafta J placed much emphasis on the fact that the discretion does not apply to the declaration of invalidity,⁷⁷ and interestingly noted that the choice of a just and equitable remedy subsequent to the declaration of invalidity ‘does not include the reversal of what was done during the first stage’.⁷⁸

Zondo J broke ranks with the *Bengwenyama* orthodoxy much more explicitly in his dissenting judgment, where he stated:

The view that the applicants did not ask the high court to set aside the Acting S-G’s decision raises the question of what the difference is between asking a court to decide that a certain administrative decision is invalid and of no force and effect, and asking it to set such an administrative decision aside. In my view there is no difference in law. If a court decides that a certain administrative decision is invalid and of no force and effect, the position is as if that administrative decision was never taken in the first place. The same applies if a court sets aside an administrative decision. Therefore, where a litigant has asked a court to set aside an administrative decision or where he or she has asked a court to find the administrative decision to be invalid and of no force and effect, the result would be the same whichever of the two the court adopted.⁷⁹

⁷³ Ibid at para 28.

⁷⁴ Ibid.

⁷⁵ Ibid at para 38.

⁷⁶ Ibid at para 52.

⁷⁷ Ibid at paras 56 and 59–60.

⁷⁸ Ibid at para 61.

⁷⁹ Ibid at para 129.

In his majority judgment, however, Cameron J kept to the *Bengwenyama* approach and even explicitly confirmed *Oudekraal*. He held that where a party wishes to invalidate an administrative action effectively, that party should formally approach a court on review for an order declaring the administrative action invalid and setting it aside. Without a proper hearing on both issues, a court lacks jurisdiction to decide whether the particular action is effective. Following the approach in *Oudekraal*, the administrative action would stand.⁸⁰ One reason for this finding was in fact that the court should first consider the consequences of effective invalidity,⁸¹ that is of setting the administrative action aside, before it grants that order, very much as was done in *Allpay 1* and *Allpay 2*. It follows that those consequences must be properly placed before the court by all parties concerned before the court exercises its discretion whether to grant a remedy that may correct the administrative failure, or to sustain the action or follow some other route.

While following the *Bengwenyama* and *Allpay* approach to the issue of validity of administrative action, the majority in *Kirland* made at least two important contributions to the debate. First, the Court adopted terminology that is less confusing than that employed in the earlier judgments, as pointed out above.⁸² Cameron J used the terms ‘unjust administrative action’ or ‘irregular administrative action’ to refer to administrative action that has been found noncompliant with the Constitution, in particular s 33, via a ground of review.⁸³ This terminology is to be preferred for it avoids the confusion, at this stage of the inquiry, of using ‘lawful’, which refers to only one aspect of administrative justice, or ‘valid’ and ‘invalid’, which refers to the subsequent declaration. It thus avoids potentially conflating the finding of an infringement of a right and the subsequent declaration and remedy.

Secondly, Cameron J made the important point, albeit in a footnote, that ‘[t]here is no right to a perfect administration’.⁸⁴ This statement may provide a useful basis for exploring possible solutions to the puzzle at issue in this contribution. One could, for example, expand on this statement by arguing that the right to administrative justice does not equate to a right to administrative perfection. Consequently, even when administrative justice is being enforced, it may be that imperfect administrative action continues to be binding at times.

V CONCLUSION

The main difficulty with the Constitutional Court’s approach to the issue of validity of administrative action as expressed in *Bengwenyama*, *Allpay 2* and the majority judgment in *Kirland* is that the distinction made between the declaration of invalidity under s 172(1)(a) and the effect of nullifying the administrative action thus declared invalid in a *subsequent* order of setting aside is not wholly persuasive. As we have argued above, in terms of the constitutional framework it is not

⁸⁰ Ibid at para 106.

⁸¹ Ibid at para 86.

⁸² See text to note 41 above.

⁸³ *Kirland* (note 1 above) at paras 93, 96, 97.

⁸⁴ Ibid at para 88 fn 54.

axiomatic that the declaration of invalidity can mean anything but nullifying the administrative action.

It also does not seem to us to be an adequate answer to this puzzle to point to the familiar distinction between the common-law remedy of a declaratory order (later given a statutory foundation in the Supreme Court Act 59 of 1959) and an order setting aside administrative action. As the Court has itself noted, the declaration of invalidity under s 172 is ‘a unique remedy created by the Constitution’.⁸⁵

To be sure, while we are not convinced of the Constitutional Court’s reasoning regarding the proper conceptualisation of the discretionary nature of the setting-aside remedy under the Constitution, it does seem highly desirable to have flexibility in managing the effects of invalidating administrative action on review. Many of the problems we experience in judicial review of administrative action can arguably be ascribed to a blunt approach to remedies, mostly the knee-jerk setting aside of reviewable administrative action.⁸⁶

What we are questioning is not the desirability of the discretionary nature of remedies in judicial review of administrative action, in particular relating to the invalidation of such action, but rather how that discretion ought to be accommodated within our constitutional setting. It seems to us that the common-law position as expressed for instance in *Oudekraal* cannot continue, but that the two-stage approach of the Constitutional Court as expressed in *Bengwenyama*, *Allpay* and *Kirland* is not ideal either. Perhaps a better approach would be to focus on the stage of constitutional adjudication preceding the application of s 172. At least the possibility should be explored of incorporating the desired discretion into the assessment of the impugned conduct against s 33 or of developing a limitation clause analysis in administrative-law review. Exploring each of these options in any detail goes beyond the scope and goal of this contribution and would require in-depth analysis of administrative-law review within the approach to and structure of fundamental rights adjudication that has developed under the Constitution. We accordingly offer only brief remarks on these options.

Hoexter has long argued persuasively for variability in the application of administrative-justice standards.⁸⁷ She argues that variability ‘allows the courts to be more generous about the application of administrative justice and to vary its precise content according to the circumstances’.⁸⁸ The court can thus adjust the content of what administrative justice entails in a given context depending on the circumstances. The basic notion of flexibility in the content of particular administrative justice standards has also long been recognised in the context of procedural fairness and has been explicitly recognised in the constitutional era,

⁸⁵ *Islamic Unity Convention v Independent Broadcasting Authority and Others* [2002] ZACC 3, 2002 (4) SA 294 (CC), 2002 (5) BCLR 433 (CC) at para 10.

⁸⁶ See G Quinot ‘Towards Effective Judicial Review of State Commercial Activity’ 2009 *Journal of South African Law* 436; G Quinot ‘Worse than Losing a Government Tender: Winning It’ (2008) 19 *Stellenbosch Law Review* 101.

⁸⁷ C Hoexter ‘The Future of Judicial Review in South African Administrative Law’ (2000) 117 *South African Law Journal* 484, 502–505; C Hoexter *Administrative Law in South Africa* (2nd Edition, 2012) 222–223.

⁸⁸ Hoexter 2012 (note 87 above) at 222.

both statutorily⁸⁹ and judicially.⁹⁰ It seems to us that part of the considerations informing a variable application of administrative justice standards could be the need to maintain the relevant administrative action. The type of substantive reasoning applied by the Constitutional Court in *Joseph* in respect of the content of procedural fairness under the PAJA is arguably an example of such an approach.⁹¹ The court reasoned that s 3(2)(a) of the PAJA must be read ‘as an empowering provision that allows courts to exercise a discretion in enforcing the minimum procedural fairness requirements under s 3(2)(b)’.⁹² One finds in this reasoning the type of discretion in the application of administrative justice standards that could, in suitable circumstances, serve the same purpose as the common-law remedial discretion in respect of setting aside administrative action.

The second option would be to develop a limitations analysis approach to the adjudication of breaches of administrative-justice rights in line with the adjudication of all other fundamental rights. Up to now s 36 of the Constitution has played virtually no role in judicial review of administrative action in terms of the Constitution. The most obvious reason is undoubtedly the s 36 requirement of a ‘law of general application’ for the limitation of rights. Without delving here into a detailed analysis of this requirement and how it has been interpreted to date, there 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. Section 172(1) is accordingly not triggered. On this approach there would still be a weighing up of the competing interests that are typically taken into account when a court decides whether to exercise its remedial discretion to set aside irregular administrative action – but the weighing would effectively be done in terms of the structured proportionality analysis of s 36.

Developing these approaches to judicial review of administrative action further would bring administrative-law review much closer to judicial review generally under the Constitution. In this development the distinction drawn by Cameron J between perfect administrative action and just administrative action may be a particularly useful conceptual tool.

⁸⁹ Section 3(2)(a) of the PAJA states that ‘[a] fair administrative procedure depends on the circumstances of each case’.

⁹⁰ See, eg, *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30, 2010 (4) SA 55 (CC), 2010 (3) BCLR 212 (CC) (*‘Joseph’*) at para 58.

⁹¹ *Ibid.*

⁹² *Ibid* at para 59.